

State of Karnataka Vs. Eastern Medicals

State of Karnataka Vs. Eastern Medicals

SooperKanoon Citation : sooperkanoon.com/378610

Court : Karnataka

Decided On : Apr-23-1993

Reported in : ILR1993KAR1401; 1992(2)KarLJ164

Judge : K.A. Swami, Ag. C.J. and ;L. Sreenivasa Reddy, J.

Acts : [Evidence Act, 1872](#) - Sections 114; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 80 - Order 27, Rule 5A

Appeal No. : R.F.A. No. 85 of 1991

Appellant : State of Karnataka

Respondent : Eastern Medicals

Advocate for Def. : P. Shivanna, Adv.

Advocate for Pet/Ap. : Sunder Kumar and ;N.K. Gupta, Govt. Adv.

Disposition : Appeal allowed

Judgement :

L. Sreenivasa Reddy, J.

1. This Appeal is preferred against the judgment and decree dated 20.10.89 passed in O.S.2801/86 by the XIV Additional City Civil Judge, Bangalore City.

2. The appellants were the defendants in the said suit and the respondent was the plaintiff. Therefore, in this judgment, the parties will be referred to as the defendants and the plaintiff.

3. The plaintiff filed the said suit on 28th February 1986 against the defendants for recovery of a sum of Rs. 27,23,628-81; claiming Rs. 17,85,920-81 towards the value of the drugs supplied, Rs. 9,37,608-00 towards interest at 18% per annum and Rs. 100/- towards the notice charges.

4. The facts of the case as pleaded by the plaintiff may be shortly stated thus: The plaintiff is a registered partnership firm doing business in drugs at Bangalore. By a memo dated 1.10.1980 the second defendant authorised the third defendant to purchase specialist drugs from the plaintiff and two others mentioned therein subject to other conditions of purchase. Pursuant to the said memo, the third defendant was placing indents with the plaintiff for supply of drugs on credit basis. Accordingly, the plaintiff was supplying the same to ESIS Dispensary, Rajajinagar, Bangalore and used to obtain acknowledgments from the third defendant whenever drugs were supplied. During the course of the said transactions, the plaintiff supplied drugs worth several lakhs to the third defendant. However, in this case we are concerned only with the supply of drugs from 1.1.1983 to 26.3.83 aggregating to Rs. 17,85,920-81. Despite repeated demands the defendants were irregular in making payments and the plaintiff had to stop further supplies with effect from 28.3.1983. The plaintiff also sought for intervention of the Chief Minister, Labour Minister and Transport Minister for the settlement of its bills by submitting several representations. According to the plaintiff only 30% of the claim was settled by defendants 2 and 3 on account of the intervention of either the Labour Minister or the Transport Minister and it could not recover the balance amount inspite of its best efforts. Therefore, the plaintiff had to cause a legal notice dated 4.12.85 under Section 80 of C.P.C. to the second defendant demanding payment of a sum of Rs. 17,85,920-81 together with interest at 18% per annum. However, the second defendant did not comply with the demand made in the said notice. Left with no other option, the plaintiff had to bring a law suit against the defendants for recovery of the aforesaid amount with interest and costs.

5. The defendants have filed a bald written statement wherein they have denied the suit claim and contended that the two documents on which the suit claim was based were not genuine and that the Lokayukta was investigating into the fraudulent acts committed by the plaintiff in connection with the said supplies.

6. On the basis of the pleadings of the parties, the trial Court framed the following issues;

1. Does plaintiff prove that he supplied drugs to the defendants 2 and 3 and that the sum of Rs. 17,85,920-81 is due by the defendants?

2. Whether the Court-fee paid is sufficient?

3. Whether plaintiff is entitled to interest claimed?

4. To what decree?

7. On behalf of the plaintiff, Sri. Subhaschandra, one of its partners gave evidence as P.W.1 and produced seventy(70) documents which have been marked as Exs.P.1 to P.20.

8. On behalf of the defendants, the Director of ES IS (Services) Dr. Honnabovi was examined as D.W.1 and no document was produced by them.

9. The trial Court on appreciation of the evidence on record answered issue No. 1 in the affirmative, and issue No. 3 in the negative and found it unnecessary to answer issue No. 2 on the ground that it did not arise for consideration since the plaintiff had prosecuted the suit information pauperis. Consequently, the trial Court decreed the plaintiff's suit for Rs. 17,85,920-81, with interest at 6 per cent per annum from the date of the suit till realisation with proportionate costs. A direction was also given to recover the balance Court-fee payable on the plaint by creating a charge on the decretal amount.

10. Counsel on both sides addressed elaborate arguments in support of their contentions. It was vehemently contended by Sri. N.K. Gupta, learned High Court Government Advocate, appearing for the appellants that the plaintiff had miserably failed to prove the suit claim; the plaintiff's claim was barred by time; the suit was

not maintainable for want of statutory notice as required under Section 80 C.P.C; the indents placed exceeded the purchase limit; actually there was no supply of drugs by the plaintiff to ESIS; the medical officer concerned has acted in collusion with the plaintiff and got up the suit documents; and the judgment and decree of the trial Court are liable to be set aside.

11. On the other hand, Sri. P. Shivanna, learned Counsel for the respondent sought to support the judgment and decree of the trial Court by contending that he had placed all the available material before the trial Court in proof of his claim; the defendants by their contract have waived the notice under Section 80 of C.P.C., in as much as no objection was taken at the earliest opportunity regarding want of notice as required under Section 80 C.P.C., the suit was well in time; the plaintiff made all possible efforts to secure the account books, bill books etc., which had been seized by the COD but he could not succeed, in spite of an I.A. being filed before the trial Court to direct the appellants to produce certain documents no documents were produced by them. In this Appeal the plaintiff has filed two Applications - I.As. VII and VIII, which will also be considered.

12. Counsel on both sides also relied on various Decisions in support of their contentions and we will advert to them at the appropriate stage.

12.1. Having regard to the several contentions urged before us on both the sides, the following Points arise for Consideration in this Appeal:

1. Whether the plaintiff has satisfactorily proved the suit claim against the defendants?
2. Whether the plaintiff's claim was barred by limitation and, if so, to what extent?
3. Whether the suit was not maintainable against the first defendant for want of notice under Section 80 C.P.C.?
4. Whether the first defendant by its conduct can be held to have waived the privilege of notice under Section 80 C.P.C.?

5. Whether the second defendant by implication can be held to have ratified the excess purchases made by the third defendant?
6. Whether I.As.VII and VIII filed in this appeal by the plaintiff have to be allowed?
7. In the facts and circumstances of the case, whether the suit requires to be remitted to the trial Court for fresh disposal?

13. POINT NO. 1: The suit was instituted on 28.2.86 against the defendants for recovery of a sum of Rs. 27,23,678-81. In support of the suit claim P.W.1 Subhaschandra, a partner of the plaintiff-firm has been examined and Exs.P.1 to P.70 have been marked. Ex.P.1 is the memo dated 1.10.80 issued by the second defendant authorising the third defendant to purchase specialist drugs from the plaintiff and two other druggists mentioned therein. Exs.P.2 to P.24 are claimed to be the indents issued by the third defendant Ex.P.25 to P.52 are claimed to be the acknowledgments issued by the third defendant towards the receipt of the supplies from the plaintiff. Exs.P.53 to P.55, Ex.P.59 and Ex.P.60 are the representations given by the plaintiff in connection with the non-payment of the amount due to them by defendants 2 and 3. Ex.P.56 is the letter dated 28.3.83 issued by the third defendant to the plaintiff to continue the supplies Ex.P.57 is the copy of the reply given by the plaintiff to the third defendant. Ex.P.58 is another representation dated 29.11.84 to the Chief Minister, Government of Karnataka requesting immediate settlement of all the plaintiff's bills. Ex.P.61 is the account extract showing the supplies made and the payment received from 1.1.83 to 16.3.83. Ex.P.62 is the copy of the lawyer's notice dated 4.12.1985 issued to the second defendant under Section 80 C.P.C. Ex.P.63,64 and P.66 are the show cause notices issued to the plaintiff by the Commercial Tax Department. Ex.P.67 is the plaintiff's letter dated 13.3.88 to the second defendant requesting to issue an endorsement to the effect that no drugs were supplied by them to ESIS for the financial year 1983-84 in connection with their sales tax assessment. Ex.P.68 is the reply to Ex.P.67. Ex.P.67 is the xerox copy of the assessment order dated 4.7.88 passed by the Assistant Commissioner of Commercial taxes. Ex.P.70 is a copy of the memo dated 1.5.82 issued by the Insurance Medical Officer, ESIS.

14. The second defendant, authorised the third defendant to purchase certain specialist drugs from the plaintiff and two others as per Ex.P.1 admits of no controversy. But, the real lis between the parties is with regard to the supply of medicines worth Rs. 17,85,920-81 to defendants 2 and 3 within a short period of three months i.e., from 1.1.83 to 16.3.83.

15. The plaintiff mainly relied on the indents claimed to have been issued by the third defendant and the acknowledgments obtained from defendants 2 and 3 towards the supply of medicines and the account extract. According to the plaintiff it had all the account books, vouchers, invoices etc., pertaining to the supply of drugs to defendants 2 and 3 and it could not produce the same as they were seized by the COD, Bangalore sometime prior to the institution of the suit. However, D.W.1, the then Director of ESI Services in his deposition has not admitted in clear and unequivocal terms that the alleged indents and acknowledgments are genuine. As already stated above, the plaintiff has not produced the account books relating to the suit transaction. They have only produced the indents, acknowledgments, account extract and representations to some of the Ministers. The plaintiff is admittedly a registered partnership firm assessed to Income tax and sales tax. Therefore, it would be reasonable to expect the plaintiff to maintain regular accounts not only in respect of the suit transaction but also in respect of the supplies made to its customers. It is note-worthy that the plaintiff has not stated anywhere in the plaint that its account books, vouchers and bills were seized by the COD. Even assuming it to be true, the plaintiff did not take any effective steps to summon those documents from the COD during the trial. Undoubtedly the burden of proving issue No. 1 was upon the plaintiff and the plaintiff ought to have proved it satisfactorily. In view of the serious allegations as to collusion between the then Medical Officer and the plaintiff, and the heavy spurt of indents for supply of drugs between January 1983 to March 1983 in utter disregard to the Departmental Circulars, the trial Court, in our opinion, has committed gross illegality in answering Issue No. 1 in the affirmative with scanty evidence. If the COD had seized the account books, bills and vouchers, etc., relating to the suit transaction from the plaintiff, we are unable to understand why the indents and acknowledgments were not seized by the COD for purpose of enquiry. If the COD had really seized all the books of accounts from the plaintiff

then on what basis EEx.P-61 the extract of account came to be prepared by the plaintiff is un understandable.

16. We are constrained to observe that before the trial Court the case was conducted on behalf of the defendants in a most callous and irresponsible manner in spite of the fact that a very heavy claim was involved in the suit. The written statement of the defendants and the evidence of D.W.1, the then Director of ESIS demonstrate this callousness. We are of the view that necessary action on the administrative side is called for against the concerned officers. We are also very sorry to observe that the learned Counsel appearing for the defendants had failed to discharge his functions properly and diligently, D.W.1 Dr. Honna Bovi appears to have entered the witness box in a casual manner. In fact, his evidence, in our view, was more helpful to the plaintiff rather than to the defendants. Therefore, in our view, the trial Court was not at all justified in decreeing the plaintiff's suit merely on the basis of the indents alleged to have been issued by defendants 2 and 3, the acknowledgments alleged to have been issued towards the alleged supplies and the part payment of the amount towards the alleged supplies. It is only now the plaintiff has filed I.A.VII and I.A.VIII. I.A.VII is to receive the documents mentioned therein to show that 30% payment of the amount due has been paid by the defendants and also to show that notice under Section 80 C.P.C. was also sent to the first defendant. I.A.VIII is under Order 11 Rule 15 C.P.C. to direct the defendants to produce the documents mentioned therein on the ground that inspite of the direction of the trial Court to produce the documents mentioned therein, the defendants had failed to produce the same. Though the suit claim was very heavy the case of the defendants was conducted in a most callous, cavalier and irresponsible manner. This is clear from the written statement of the defendants as well as the evidence of D.W.1.

17. Admittedly, the plaintiff-firm was a retail dealer and even according to P.W.1 the firm had to purchase the drugs from several persons for giving supplies to defendants 2 and 3. If that was the case, the plaintiff should have produced some documents relating to the purchases made by him from other drug manufacturers or concerns and such purchases would have been reflected in the account books, vouchers, income tax and sales tax returns. Therefore, the contention of the

plaintiff is that in the absence of any specific averments in the written statement as to the plaintiff's averments they did not take suitable steps to call for necessary documents either from the COD or defendants 2 and 3 to prove the suit claim cannot be accepted.

18. Sri. N.K. Gupta, learned High Court Government Advocate, contended that the plaintiff's suit being a suit based on accounts, the plaintiff ought to have proved each and every entry by placing cogent and reliable evidence. We are not prepared to accept this argument of Sri. Gupta. In our view, this is not a suit on accounts in the strict sense. At best it is a suit on accounts stated. This is a suit based on the supply of drugs made by the plaintiff to defendants 2 and 3 pursuant to Ex.P.1 memo dated 1.10.80 issued by the Director, ESIS.

19. The learned Counsel for the respondents, on the other hand, contended that the trial Court was justified in answering issue No. 1 in the affirmative on the basis of the indents placed by defendants 2 and 3 and the acknowledgments issued towards the supply of drugs. He also contended that since the plaintiff has proved his case by cogent and reliable evidence no adverse inference can be drawn against it for non-production of books of accounts etc. According to the plaintiff, since the COD had seized all the account books and other documents relating to the suit transaction it was not in possession of the account books and other documents relating to the suit transaction and as such it could not produce them before the Court. In this context the learned Counsel for the plaintiff/respondent relied on a Decision reported in A. KANDASWAMI PILLAI v. P.M. THEAGARAJA PATTAR, : AIR1968 Mad203 and contended that Section 114 of the Evidence Act is only a rule of guidance and the presumption arising therein being only a permissive presumption it is not obligatory that the Court should draw such presumption in every case where account books are not produced and when other evidence which is equivalent to or which can be characterised as substitute for account books is available. In our view, mere extract of account books, indents and acknowledgments produced on behalf of the plaintiff are no substitute to the account books maintained in regular course of business. Therefore, this Decision has no application. As such it cannot be applied to the facts of the instant case.

20. The trial Court while dealing with the lapses on the part of the defendants as regards the alleged collusion between the concerned Medical Officers and the plaintiff and the non-examination of Dr. Radha Nagaraj, who had placed indents, appears to have lost sight of the fact that the burden of proving issue No. 1 was heavily on the plaintiff. Further, the trial Court appears to have been influenced by the payment of 30% of the amount due towards the said supplies to the ESIS. The alleged part payment by itself was not sufficient to prove the supply of medicines worth Rs. 17,85,920-81 by the plaintiff to defendants 2 and 3 during the relevant period. No doubt, there was no reply by the 2nd defendant to the legal notice dated 4.12.1985 issued by the plaintiff demanding payment of the amount. But, no adverse inference could be drawn on that ground. In the light of the allegations of collusion between the Medical Officers of the ESI Dispensary and the bulk indents placed between January and March 1983, contrary to the circulars issued by the second defendant restricting the extent of indents to be placed to only Rs.5,000/- and the non-production of account books, vouchers, bills and stock registers etc., there was no justification for the trial Court to answer issue No. 1 in the affirmative. At this stage, we do not express any opinion as to the alleged collusion between the concerned Medical officers of the ESI Dispensary and the plaintiff in connection with the alleged supplies. All that we wish to say in this Appeal is that no satisfactory evidence has been placed by the plaintiff with regard to issue No. 1. Therefore, we answer Point No. 1 in the negative.

21. POINT NO.2: This Point relates to limitation. As already stated above, the suit was filed on 28.2.86 for recovery of a sum of Rs. 27,23,628-81 inclusive of principal, interest and notice charges. Ex.P.61 is the statement of pending bills. According to Ex.P.61 the plaintiff claims that it supplied medicines to defendants 2 and 3 from 1.1.83 to 16.3.83 amounting to Rs. 17,85,920-81. Sri. N.K. Gupta, learned High Court Government Advocate, contended that the trial Court ought not to have decreed the entire suit claim and items commencing from SI.Nos. 1 to 34 aggregating to Rs. 6,33,085-00 found in the statement of account extract- Ex.P.61 were clearly barred by limitation. It may be relevant to notice that the plea as to limitation was not at all raised by the defendants before the trial Court and no issue was framed to that effect. However, in the instant case, the question as to the limitation is a pure question of law, as such, it can be urged at any stage.

Article 14 of the Limitation Act, 1963 prescribes a period of three years from the date of delivery for claiming the price of goods sold and delivered where no fixed period of credit is agreed upon. In the instant case, no fixed period of credit had been agreed upon nor was there a condition that the price of goods sold and delivered would be paid after the expiry of the fixed period of credit. Therefore, in our view, Article 14 of the Limitation Act, 1963 is the proper Article that applies to the case on hand. It is clear from Ex.P.61 that the plaintiff is said to have supplied drugs worth Rs. 6,33,085-00 from 1.1.1983 to 26.2.1983. Both the Counsel were unanimous in their submission that Article 14 was applicable to the suit transaction. As already stated above, the suit was filed on 28.2.1986. in respect of the medicine supplied from 1.1.1983 to 26.2.1983 i.e., items 1 to 34 in Ex.P.61, the plaintiff ought to have filed the suit on or before 1.1.1986 in order to save the limitation for the medicine supplied on 1.1.86.

22. The learned Counsel for the respondent submitted that he had filed W.P.Nos. 18620, 18621 and 18622 of 1985 on 26.11.1985 before this Court for a Writ of Mandamus against the defendants and the same were rejected on 2.12.1985 and, as such, the suit was well in time. This contention cannot be accepted because where limitation has once begun to run, it will continue to run and it can be suspended only under the circumstances specifically provided in the Limitation Act and not otherwise. In this regard, the observations made in RAMACHARAN SAHU v. GOGA : AIR1927 All446 may carefully be referred to:

'The Indian Limitation Act is undoubtedly an exhaustive code governing the law of Limitation in India. The cases in which the running of limitation can be suspended are contained in the Sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Limitation Act, under which limitation can be suspended. Such a conclusion would be quite contrary to the intention of the Legislature...'

Therefore, in our view, the contention of the plaintiff that filing of the aforesaid Writ Petitions enures to its benefit and saves the limitation, cannot be accepted. Filing of the Writ Petition or pendency of it did not disable or prevent the plaintiff from filing the suit. At any rate, it is not pointed out that filing or pendency of the Writ

Petition fell in one or the other circumstances as provided in Section 14 or 15 of the Limitation Act, and as a result thereof, the period of limitation was either extended or the operation of it was suspended or the period of pendency of the Writ Petition was required to be excluded in computing the period of limitation for the suit.

23. Nextly it was contended on behalf of the respondent that before instituting the suit, the plaintiff had caused legal notice dated 4.12.1985 as per Ex.P62, which was issued to Defendant No. 2 and as such, the period of two months had to be excluded. It is not known when Ex.P.62 was received by Defendant No. 2. However, a postal acknowledgment dated 9.12.1985 was produced to show that Ex.P62 was served on 9.12.1985. It is relevant to notice that the case of the plaintiff was that the notice was received by defendant-2. Defendant-2 is the Director of E.S.I.S. and not the State Government. It is not the case of the plaintiff that the notice was issued to the first defendant. It is submitted that the period of notice issued under Section 80 C.P.C., is required to be excluded in computing the period of limitation. There is no doubt that Section 15(2) of the Limitation Act, does provide for it and the Supreme Court, in SAWAI SINGHAI NIRMAL CHAND v. THE UNION OF INDIA, : [1966]1SCR988 on excluding the statutory period of notice under Section 80 CPC, has held that the suit concerned therein was in time. The Decision in M/s KHEDUT OIL CAKE INDUSTRIES & ANR. v. UNION OF INDIA, : AIR1988 Delhi88 is also to the same effect. However, in the instant case, it is relevant to notice that the claim is against the State. Therefore, the State ought to have been served with a notice under Section 80 CPC. Even whenever there is a claim made against a public officer for damages or other relief, in respect of any act alleged to have been done by him in his official capacity, as per Rule 5A of Order 27 C.P.C., the Government shall have to be joined as a party to the suit. If the Government has to be joined as a party to the suit notice has to be served as per Section 80 C.P.C. In the instant suit, as already pointed out, the suit is for recovery of the money from the State Government and its officers in respect of the medicine alleged to have been supplied to the State Government Hospitals. Therefore, the notice ought to have been served on the State Government. In the absence of service of notice on the State Government and by a mere service of notice on its officers under Section 80 C.P.C., it would not be legally permissible

for the plaintiff-respondent to claim exclusion of the period of notice issued under Section 80 C.P.C. However, this Point cannot be answered in one way or the other without recording a finding on the question whether a notice under Section, 80 CPC, is served upon the 1st defendant. This question will have to be considered under Point Nos. 3 and 4. After recording findings on Point Nos.3 and 4, this Point will be answered.

24. POINT NOS. 3 & 4: These two Points are inter-connected. Therefore, they are to be considered together. Learned Counsel for the appellants contended that the suit against the first defendant was not maintainable for want of notice under Section 80 C.P.C. No doubt, this point is raised for the first time before us. No such plea was taken up by the first defendant in the trial Court. As already pointed out, in fact, the defendants have filed a very bald written statement.

25. We have perused Ex.P-62 - a copy of legal notice dated 4.12.85 issued under Section 80 C.P.C. It has been addressed to the second defendant only. In the plaint also it has been specifically stated that the plaintiff got issued a legal notice dated 4.12.85 to the second defendant demanding payment. There is no documentary proof on record to show that the plaintiff had issued such a notice to the first defendant. It was contended by learned Counsel for the Respondent that the plaintiff had sent a copy of Ex.P-62 to the Secretary, Labour Department as per the postal acknowledgment dated 9.12.1985 and it is available in the Court records. Since the said acknowledgment has not been marked as an exhibit, it is not possible to look into it. No doubt, P.W-1 Subhaschandra in his deposition has stated that he had sent notices to the defendants and that there was no reply to those notices. We see that there was no cross-examination on this point But nevertheless, in view of the specific averment in the plaint that the said legal notice was sent only to the second defendant, it becomes difficult to accept the testimony of P.W-1 which in our view appears to be an after thought. Further, if such notice had been sent, it would be a matter of record, such as postal receipt for having sent the notice through registered post and the postal acknowledgment. Nothing is produced.

26. It was also contended on behalf of the plaintiff that notice sent under Section 80 C.P.C. to the second defendant who is a public officer should be construed as notice to the first defendant as such, the suit was maintainable. We are unable to accept this contention. The Supreme Court in *STATE OF MAHARASTRA v. CHANDER KANT*, : [1977]1SCR993 , has clearly held 'that the language Section 80 of the Code of Civil Procedure is that a notice is to be given against not only the Government but also against the Public Officer in respect of any act purporting to be done in his official capacity'. In our opinion, notice under Section 80 C.P.C. was also necessary to the first defendant in order to maintain the suit. In the absence of any satisfactory proof as to the issuance of notice to the first defendant before the institution of the suit, the plaintiff could not have maintained the suit as against the first defendant.

27. However, it was the contention of the plaintiff that the 1st defendant must be held to have waived its defence or given up the objection as to service of notice under Section 80 of the Civil Procedure Code. The learned Counsel for the plaintiff very vehemently contended that by conduct and implication the first defendant must be held to have waived its right to have notice under Section 80 C.P.C. inasmuch as the plea of want of notice was not taken at the earliest opportunity i.e., at the time of filing the written statement. Therefore, it was not open for the first defendant to raise any plea as to want of notice for the first time in appeal. He also contended that since no issue was framed by the trial Court as to the maintainability of the suit for want of notice under Section 80 C.P.C., it must be held that the first defendant-State waived its right to such a notice. The respondent's Counsel in support of his contentions placed reliance on several Decisions to which we will now advert. *PURNA CHANDRA SARKAR v. RADHA RANI DASSYA*, AIR 1931 Calcutta 175. In this Decision it has been held that the plea of want of notice under Section 80 C.P.C. which is a clear bar to institution of proceedings against public officer must be taken at the earliest possible opportunity and must be specifically pleaded. It has also been held that where such a plea is taken by the defendant at a very last stage of the suit and at a time when the plaintiff would be precluded by the law of limitation from bringing a further suit against the defendants the defendant must be deemed to have waived the privilege of notice.

28. A Full Bench Decision of the Rajasthan High Court in the case of STATE OF RAJASTHAN v. GIRDHARLAL CHUMILAL MODI, AIR 1959 Rajasthan, has held that it is not open to the State to raise the plea of want of notice for the first time in appeal and it must be deemed to have been waived.

29. In GAJA AND ORS. v. DASA KOERI AND ORS., : AIR1964 All471 , it has been held that if the State Government could be said to have waived its objection regarding want of notice by not taking a plea to that effect in the written statement filed by it, and it can be said with equal reason that the State Government waived it by filing the written statement at all.

30. Lastly, learned Counsel for the plaintiff placed reliance on the Decision in LALCHAND v. UNION OF INDIA, : AIR1960 Cal270 wherein it has been held that if the provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon a footing of a waiver.

31. It is not possible to agree with the views expressed in the aforesaid Decisions. No amount of waiver or silence or acquiescence will make the suit maintainable, nor it will confer jurisdiction upon the Court to entertain the suit; because no suit against the Government or against the public officer attracting Section 80 of the C.P.C. can be instituted and maintained without serving a notice and until the expiration of two months next after the notice in writing has been delivered to or left at the office. It is a pre-requisite for service of notice as contemplated under Section 80 C.P.C. Service of notice is a pre-requisite for instituting and maintaining a suit. In fact in GANGAPPA GURUPADAPPA GUGWAD v. RACHAWWA AND ORS., : [1971]2SCR691 , it has been held that in such a case plaint has to be rejected. The following passage from the said Decision may usefully be referred to:

'No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 of the Code of Civil Procedure claiming relief was served in terms of the said Section it would be the duty of the

Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action'.

In AMAR NATH DOGRA v. UNION OF INDIA, : [1963]1SCR657 , the suit instituted without complying with Section 80 CPC was held to be not maintainable. The relevant portion is as follows:

'4. It would be seen from the above narration that what may be termed the merits of the appellant's claim for damages could arise for consideration only if the suit was maintainable. As we were clearly of the opinion, that the appeal must fail principally on the point that the suit was not maintainable because of the non-compliance of the terms of Section 80 of the Civil Procedure Code, we did not hear learned Counsel about the merits of the appellant's complaint regarding breach of contract on the part of the State and the relief to which the appellant would be entitled on that basis.

XXX XXX XXX

'14..... In view of these circumstances we have no hesitation in holding that even on a very narrow and strict view of Section 80 there was no compliance with its terms.

15. The result therefore is that the entire claim in the suit must fail for the reasons we have indicated earlier. The appeal, therefore, fails and is dismissed.....'

Following the aforesaid Decision, a Division Bench of this Court in K.P. ARVIND v. GOVERNMENT OF KARNATAKA, : ILR 1992 KAR307 , has held thus:

'7. As already pointed out, the plaint did not contain any averment that the notice in writing as required by Section 64 of the Act and Section 80 of the C.P.C., had been served upon the B.D.A. and the State Government respectively. Therefore, on the face of it, the plaint was barred by Section 64 of the Act and Section 80 of the C.P.C. Hence, the trial Court ought to have rejected the plaint under Order 7 Rule 11 (d) of the C.P.Code. In that event, it would have been open to the plaintiffs

to file a fresh suit on the same cause of action on complying with Section 64 of the Act and Section 80 of the C.P.C. Whereas the trial Court has dismissed the suit which is not permissible in law. Hence, the point raised for determination is answered in the negative'.

From the aforesaid Decisions it follows that without giving a notice of two months under Section 80 of the C.P.C. no suit against the Government or the public officers can be instituted or maintained. As such, it was incumbent upon the plaintiff to prove that the notice under Section 80 of the C.P.C. was served upon the State Government. In the absence of any such proof, the fact that no such contention is raised in the written statement or an issue is framed in the trial Court, would make the suit maintainable. However, the plaintiff has sought for adducing additional evidence to prove that such a notice has been issued to the State Government. Therefore, it is just and appropriate to give an opportunity to prove the same.

32. For the reasons stated above, Points 2 to 4 are answered as follows:

i) Point No. 2: Part of the suit claim as indicated while discussing the above point would be barred by time if it is not proved that notice under Section 80 of the C.P.C. has been served upon the 1st Defendant;

ii) Point No. 3: The suit would not be maintainable without the proof of the fact that notice under Section 80 of the C.P.C. was served upon the 1st Defendant. Service of notice under Section 80 of the C.P.C. on Defendants 2 and 3 would not make the suit maintainable, because the claim is against the Government of Karnataka. Even otherwise, whenever there is a claim against the Public Officer of the State Government in respect of the acts done by him in his official capacity, notice shall have to be issued to the State Government and the State Government has to be made a party;

iii) Point No. 4: This point is answered in the negative.

33. POINT NO. 5: The learned Counsel for the appellants contended that the Memo dated 12.1.1983 issued by the office of the Director, E.S.I.S. (Med.)

Services, Rajajinagar, Bangalore-10 permitted purchase of specialist drugs not available in the stores in accordance with the purchase rules on credit basis upto the tune of Rs.5,000/- (maximum) per month and as such any excess purchases made by the third defendant have to be considered as unauthorised purchases in contravention of the above said memo dated 12.1.1983. A perusal of the account extracts Ex.P-61, the contents of which are yet to be proved, shows that the third defendant appears to have made purchase of drugs from the plaintiff in utter disregard to the rules of purchase and the memo referred to above. For example, on 1.1.1983 itself under invoices Nos. 667 and 676 drugs worth Rs. 19,173-61 and Rs. 17,575-32 appear to have been purchased. This is sufficient to demonstrate how recklessly the drugs appear to have been purchased by the third defendant by totally ignoring the Department instructions as to the purchase of drugs. But, we cannot blame the plaintiff for these acts of misconduct or dereliction of duty on the part of defendants Nos. 2 and 3. As could be seen from Ex.P-61, drugs worth Rs. 17,85,990-77 appear to have been purchased by defendants 2 and 3 between 1.1.1983 and 16.3.1983. These startling purchases appear to have gone on unnoticed, and nobody had raised his little finger to prevent this. Defendants 1 and 2 also appear to have passed some of the bills presented by the plaintiff. Even after the stoppage of supplies by the plaintiff it is claimed that the defendants had paid 30% of the total bill amount due to the plaintiff, it is noteworthy that even in the written statement, the defendants have not taken any specific plea as to the excess purchases alleged to have been made by them in contravention of the purchase conditions. D.W.1 Dr. Honna Bovi except stating, in his evidence, that in the normal course they were not placing orders for supply of medicines worth Rs. 17 lakhs within a period of 3 months, has not stated that the alleged purchases were in contravention of the purchase conditions. Under Section 197 of the Indian Contract Act, ratification may be either express or implied depending upon the conduct of the parties. Section 199 of the Contract Act deals with the effect of ratifying unauthorised act forming part of a transaction. In this Appeal, in our view, whether the alleged unauthorised act, i.e., excess purchases alleged to have been made by the third defendant were impliedly ratified by the second defendant need not be decided in the light of the finding recorded on Point No. 1 in the negative. In the event the plaintiff proves that it has supplied the drugs as claimed by it, this

point has to be decided. Point No.5 is answered accordingly.

33. POINT NO.6: We have already referred to I.As. VII and VIII filed by the respondent in this appeal. I.A. VII is under Order 41 Rule 27 read with Section 151 C.P.C. to receive the documents mentioned therein and I.A. VIII is under Order 11 Rule 15 read with Section 151 C.P.C. calling upon the defendants to produce certain documents.

34. The reasons given for filing these I.As. are that the defendants while filing their written statement have not taken any specific plea; now by way of additional grounds in the appeal they have urged several grounds. Therefore, in order to effectively meet those grounds it would be necessary to allow I.As. VII and VIII in the interest of justice. It is also necessary to allow the applications in order to decide the case properly. Thus, it is necessary for proper decision in the case.

35. In the peculiar facts and circumstances of the case we are not in a position to say at this stage and without further evidence being recorded that the entire transaction between the plaintiff and the defendants was the outcome of fraud and collusion. All that we wish to say in this Appeal is that the plaintiff should adduce better evidence in proof of his claim. Since I.A.No. VII is intended for that purpose, we consider it proper to allow I.A.No. VII and permit the plaintiff to produce the documents mentioned therein by way of additional evidence. So also it would be necessary in the ends of justice to allow I.A.No. VIII directing the appellants to produce the documents mentioned therein if they are in possession and custody of those documents. The suit claim being very heavy, the plaintiff should not be denied an opportunity to prove his claim in accordance with law. Therefore, we answer Point No.6 in the affirmative. Additional evidence as prayed for is allowed to be produced.

36. Point No.7: .This point should not detain us long. We have already held that both the parties have not placed satisfactory evidence with regard to their claims. No doubt, the plaintiff's case is that it could not place better evidence in view of the fact that the COD Bangalore had seized all its account books, bill books, stock registers etc., and though it filed I.A.No. 11 before the trial Court calling upon the defendants to produce the said books, the same were not produced. No effective

steps were taken by the plaintiff to summon the documents seized by the COD. The plaintiff is also required to prove that it had served notice on the 1st defendant as per Section 80 of the Civil Procedure Code. On behalf of the defendants Dr. Radha Nagaraj should have been examined besides other witnesses in the Accounts Department of the ESIS (Medicine). All this can be effectively done only if the suit is remitted back to the trial Court for fresh disposal in accordance with law. In the interest of justice the remand is necessary. Therefore, we answer Point No.7 in the affirmative. As the case is remanded, the finding on Point No. 1 shall not be treated as final and conclusive.

37. For the reasons stated above, the Appeal is allowed, the Judgment and Decree of the trial Court are set aside. The suit is remitted to the trial Court for fresh disposal in accordance with law and in the light of the findings recorded on points 1 to 7. The trial Court shall frame necessary issues in the light of the findings recorded herein on Points 1 to 7, try and decide the same in accordance with law. The evidence on record shall also form part of the record in the case.

38. The parties are directed appear before the trial Court, i.e., Principal Judge, City Civil Court, Bangalore, on 10.6.1993 and the trial Court shall decide the suit within six months from 10.6.1993.

In the facts and circumstances of the case, we direct both the parties to bear their own costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com