

Murari Lal and anr. Vs. E.V. David and anr.

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Court : Allahabad

Decided On : Nov-03-1924

Reported in : AIR1925All241a; 84Ind.Cas.739

Appellant : Murari Lal and anr.

Respondent : E.V. David and anr.

Judgement :

1. The question for consideration in this appeal is whether the suit brought by the plaintiffs-appellants for a declaration of their title to a two-thirds share of the house in dispute was maintainable against the receiver without any notice under Section 80 of the Code of Civil Procedure.
2. The plaintiffs are the brothers of one Behari Lal, who was adjudicated an insolvent. The defendant was appointed an Official Receiver under Section 57 of the Provincial Insolvency Act, V of 1920, and in that capacity he took charge of the estate of the insolvent, including the house in dispute whereof a two-third share is now claimed by the plaintiffs.
3. On the date fixed for the first hearing the receiver appeared and filed his defence; but no plea was raised by him regarding the omission of the plaintiffs to send him a notice of the kind above referred to, but on the date fixed for final hearing, he filed an application urging that the suit was not maintainable without such notice; and he asked the Court to take cognizance of that objection and add

another issue to those which had been previously framed. The Court below amended the issues and after hearing arguments gave effect to that objection and dismissed the claim.

4. Section 80 of the Code of Civil Procedure requires that no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been given to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims. It further requires that the plaint shall contain a statement that such notice had been delivered. A public officer is defined by Section 2(17) of the Code of Civil Procedure, and the definition includes every officer of a Court of justice who3a duty it is, as such officer, to take charge of or dispose of any property and every person specially authorized by a Court of justice to perform such a duty. Section 28 of the Provincial Insolvency Act lays down that on the making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver; and Section 59 declares the duties and powers of the receiver when so appointed, and among those duties and powers he has been given the power to realise the property of the debtor and to sell that property or any part thereof and to give receipts for any money received by him. His official duties, therefore, fall within the purview of Section 2(17) of the Code of Civil Procedure; and outside the Insolvency Court which appointed him, he is entitled to the protection afforded by Section 80 of the Code. No suit can, therefore, be instituted against him in respect of any act done by him in his capacity as such a public officer without a previous notice of the kind prescribed by that section. In *Anna Laticia De Silva v. Gobind* (1920) 44 Bom. 895. It was held that as soon as a receiver was appointed under the Provincial Insolvency Act, he became a public officer within the meaning of Section 2, Sub-section 17 of the Code of Civil Procedure and he was protected by Section 80 of the Code against any plaintiff who filed a suit against him with regard to any act done by him as such receiver without giving the requisite notice. The person against whom the suit in that case was filed was a receiver appointed for particular case to take charge of the property of the insolvent. An Official Receiver stands on a higher footing and the Court below, therefore, rightly held that no suit was maintainable against him without the requisite notice.

5. It is urged on behalf of the plaintiffs-appellants that the suit had been filed after obtaining the sanction of the Insolvency Court and that that sanction should be taken as tantamount to a notice to the receiver or as an effective substitute for such a notice, but the proceedings taken by the Insolvency Court show that the order granting the sanction was an ex parte order granted evidently without any notice to the receiver and in no circumstance can such a sanction be taken as an adequate compliance with the requirements of Section 80 of the Code of Civil Procedure.

6. It is further urged that the receiver had waived the notice inasmuch as no such objection was taken by him in his written statement. But it is open to a defendant if the Court permits to apply to amend his written statement or to apply to urge an additional plea before the commencement of the trial and this is what was done in this case by the receiver the explanation of the receiver is that certain observations in the decision in *Mt. Maharana Kunwar v. E.V. David* A.I.R. 1924 All. 40 brought to his attention his right to claim such a notice, of which he was till then not cognizant. His failure to raise such an objection in the written statement cannot per se be regarded as a waiver, even if a waiver were otherwise admissible, because the objection was raised practically before the trial had commenced and before any prejudice could have been caused to the plaintiffs by the lateness of the stage at which the objection was raised.

7. Our attention has been drawn to the decision in *Manindra Chandra Nandi v. The Secretary of State* (1907) 34 Cal. 257 and *Bhola Nath Roy v. Secretary of State* (1912) 40 Cal. 503. In the first of these cases the objection was raised at a very late stage of the case after the original written statement and some further written statements had been filed and the case of the plaintiff had been completely closed; while in the latter case the objection was not taken at all by the party concerned but was raised for the first time at a late stage by another party who had no right to raise the objection. The decision of the Court; below must, therefore, be sustained and this appeal must therefore fail and it is hereby dismissed with costs.