



A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. No.127 of 1995

(In the matter of an appeal under Section 100 of the Code of Civil Procedure, 1908)

State of Orissa and another *Appellants*

-versus-

M/s. B. Engineers and Builders *Respondent*
Private Limited

Appeared in this case:-

For Appellants : *Mr. G. Mohanty, learned Standing Counsel*

For Respondent : *None*

CORAM:
JUSTICE A.C. BEHERA

JUDGMENT

Date of hearing : 22.11.2024 / date of judgment :03.12.2024

A.C. Behera, J. This 2nd appeal has been preferred against the confirming judgment.

2. The appellants(State and Executive Engineer) in this 2nd appeal were the defendants before the trial court in the suit vide T.S. No.04 of



1992 and appellants before the 1st appellate court in the 1st appeal vide T.A. No.04 of 1993.

The respondent in this 2nd appeal, i.e., company was the sole plaintiff before the trial court in the suit vide T.S. No.04 of 1992 and respondent before the 1st appellate court in the 1st appeal vide T.A. No.04 of 1993.

3. The suit of the plaintiff-company vide T.S. No.04 of 1992 before the trial court against the defendants was a suit for declaration.

The case of the plaintiff-company before the trial court in nutshell against the defendants was that, the plaintiff being a registered construction company had entered into an agreement with the defendants vide Agreement No.56/G2/C.E.C. (Roads) L.S.84-85 for construction of a H.L. Bridge over river Vansadhara river near Gunupur in the district of Rayagada in order to complete such construction works within 36 calendar months starting from 25.01.1985 by furnishing Bank guarantees for Rs.8,85,000/- as security of such work, but due to non-completion of construction works within the above stipulated period for some unforeseen natural obstacles beyond control, the time period of completion was extended by the defendants in two phases up to 30.06.1992 on the application of the plaintiff-company.



Out of all the running bills of such construction works submitted by the plaintiff, only forty two numbers of running bills were passed in favour of the plaintiff by the defendants, but, the defendants did not clear the 44th, 45th and 46 numbers of running bills of the plaintiff. During that time, the cost of construction materials and wages of the labourers were increased. For which, the plaintiff incurred extra expenditures for the construction of works with the knowledge of the defendants. Therefore, the plaintiff submitted bills for his extra expenditures due to increase of the rates of construction materials and wages of the laourers, but, the said bills were also not cleared by the defendants. Instead of clearing the pending bills, surprisingly, as per letters dated 27.01.1992 and 29.01.1992 respectively, the defendants unilaterally cancelled the agreement of the plaintiff and intimated the plaintiff that, they(defendants) shall adjust the security deposit of the plaintiff towards part of their losses for the delay in construction works by the plaintiff, i.e., for non-completion of the same in due time.

4. For which, without getting any way, the plaintiff approached the civil court by filing the suit vide T.S. No.04 of 1992 against the defendants praying for a declaration that, the rescission/cancellation of its contract through Letter Nos.1165 dated 27.01.1992 and letter No.1312 dated 29.01.1992 respectively issued by the plaintiff are illegal, invalid,



inoperative and non-existent in the eye of law and to declare that, the plaintiff is entitled to get refund of his security deposit, i.e., Rs.8,85,000/.

5. The defendants contested the suit of the plaintiff-company by filing their joint written statement denying the averments made by the plaintiff in the plaint taking their stands inter alia therein that, the works programme for each month for each item relating to construction was planned by the defendants and the defendants had given such plan to the plaintiff, to which, the plaintiff agreed to follow, but later, the plaintiff did follow the same. For which, the defendant no.2 issued instructions to the plaintiff time and again through several letters for the progress of the works in month wise and item wise, but, without progressing the works according to their instructions, the plaintiff submitted baseless explanations. In fact, there was no flood on 08.05.1990 in river Vansadhara. After knowing about the expected rain as well as usual flood in river Vansadhara, the plaintiff had signed the agreement. The time schedule for completion of the construction works was fixed considering all the above possible future happenings. The rain in the year 1990 had not made any hindrance to the plaintiff in his works.

In the month of October, 1991, 44th running bill of the plaintiff was paid, but, the 45th running bill of the plaintiff was not paid, on the ground of non-progress of work. As the plaintiff had no interest for the progress



of the works, for which, huge quantity of materials of the defendants for such works were lying unused remaining under the custody of the plaintiff those were ultimately washed away due to careless activities of the plaintiff-company. So, considering the above facts, the defendants rescinded/cancelled the works contract of the plaintiff and took steps for part adjustment of their losses from the security deposit of the plaintiff issuing notice to the plaintiff on 05.02.1992 for final measurement of the works done by it and the plaintiff also accepted the final measurement. For which, rescission/cancellation of contract of the plaintiff by the defendants is legal. As per final measurement, the plaintiff is to pay Rs.34,26,094 to the defendants after adjustment of security deposit amount. So, the plaintiff has no prima facie case and balance of convenience in its favour. Therefore, the suit of the plaintiff is liable to be dismissed against the defendants, because, the same is not maintainable for the reasons assigned above.

6. Basing upon the aforesaid pleadings and matters in controversies between the parties, altogether three numbers of issues were framed by the trial court in the suit vide T.S. No.04 of 1992 and the said issues are:-

ISSUES

- (i) Whether the defendants can invoke the three Bank Guarantees given by the Branch Manager, S.B.I., Industrial Estate Branch, Bhubaneswar till the



accounts are finally settled and paid to the plaintiff by the defendants in respect of the construction of H.L. Bridge on river Vansadhara?

- (ii) Whether the court has jurisdiction to try the suit?
- (iii) To what relief, if any, the plaintiff is entitled?

7. In order to substantiate the aforesaid relief sought for by the plaintiff-company against the defendants, the plaintiff-company examined one witness on its behalf as P.W.1 and relied upon the document vide Ext.1 to 19.

On the contrary, in order to nullify / defeat the suit of the plaintiff, the defendants also examined one witness from their side as D.W.1 and exhibited series of documents on their behalf vide Exts.A to N/3.

8 After conclusion of hearing and on perusal of the materials, documents and evidence available in the record, the trial court answered all the issues in favour of the plaintiff-company and against the defendants and basing upon the findings and observations made by the trial court in all the issues in favour of the plaintiff-company and against the defendants, the trial court decreed the suit of the plaintiff-company vide T.S. No.04 of 1992 on contest against the defendants, as per its judgment and decree dated 09.09.1993 and 17.10.1993 respectively and declared that, letter of rescission of contract issued by the defendant no.2



vide letter No.1165 dated 27.01.1992 and letter No.1312 dated 29.01.1992 respectively are illegal and inoperative and the defendants are permanently restrained from invoking/encashing the Bank guarantees covered under this suit till the final settlement of the accounts are made, assigning the reasons that, the defendants have cancelled the works contract with the plaintiff unilaterally without the knowledge of the plaintiff before the extended period of completion of construction works, i.e., before 30.06.1992, for which, the said rescission / cancellation of contract made by the defendants are illegal and contrary to the law. Therefore, the defendants cannot encash the Bank guarantees of the plaintiff, as the plaintiff has no fault in the progress of the works, but, the contract for works has been rescinded / cancelled illegally by the defendants. For which, the plaintiff is entitled for the relief as prayed for by him against the defendants.

9. On being dissatisfied with the aforesaid judgment and decree dated 09.09.1993 and 17.10.1993 respectively passed by the trial court in T.S. No.04 of 1992 in favour of the plaintiff-company and against the defendants, the defendants challenged the same by preferring the 1st appeal vide T.A. No.04 of 1993 being the appellants against the plaintiff arraying the plaintiff-company as respondent.



After hearing from both the sides, the 1st appellate court dismissed that 1st appeal vide T.A. No.04 of 1993 of the defendants as per its judgment and decree dated 14.02.1995 and 22.02.1995 respectively confirming the judgment and decree passed by the trial court in T.S. No.04 of 1992 in favour of the plaintiff.

10. On being aggrieved with the aforesaid judgment and decree of the dismissal of the 1st appeal vide T.A. No.04 of 1993 of the defendants passed on dated 14.02.1995 and 22.02.1995 respectively, they(defendants) challenged the same by preferring this 2nd appeal being the appellants against the plaintiff-company arraying the plaintiff-company as respondent.

11. This 2nd appeal was admitted on formulation of the following substantial questions of law:-

(I) Whether in absence of any pleading in the plaint that, notice under Section 80 of the C.P.C. was sent or served on the defendants(appellants), the suit is/was maintainable?

(II) Whether in the facts and circumstances of the present case, it can be said that, there is/was waiver regarding the notice under Section 80 of the C.P.C.?

12. I have already heard from the learned Standing Counsel for the appellants(defendants) only, as none participated in the hearing of this 2nd appeal from the side of the respondent(plaintiff-company).



13. During the course of hearing of this 2nd appeal, the learned Standing Counsel for the appellants(defendants) relied upon the ratio of the following decisions contending that, the suit of the plaintiff-company was not maintainable under law against the State and Executive Engineer(defendants) due non-service of statutory notice under Section 80 of the C.P.C. prior to the filing of the suit and the said decisions are:-

(i) W.P.(C) No.15161 of 2008 : Abhimanyu Nayak and others vrs. Basanta Mohanty and others.

(ii) Civil Appeal No.1732 (N) of 1966 decided on 23.10.1970 : Gangappa Gurupadapa Gugwad Gulbarga vrs. Rachawwa and others.

(iii) Civil Appeal No.2522 of 1992 decided on 07.12.2000 : Bishandayal and sons vrs. State of Orissa and others.

As both the aforesaid formulated substantial questions of law, are interlinked having ample nexus with each other, for which, both the above formulated substantial questions of law have been taken up together analogously for their discussions hereunder:-

Undisputedly, the plaintiff(respondent in this 2nd appeal) is a private construction company, whereas, the defendants are the State and its officer, i.e., Executive Engineer.

As per the pleadings of the parties and judgments and decrees of the trial court and 1st appellate court, no notice under Section 80(1) of the C.P.C., 1908 has been served upon the defendants by the plaintiff



before filing of the suit vide T.S. No.04 of 1992 and there is also no averments in the plaint regarding the cause of non-service of the statutory notice under Section 80(1) of the C.P.C. on the defendants before the institution of the suit.

14. In the pleadings of the appellants/defendants, they(State and its officer) have not raised any objection challenging the maintainability of the suit of the plaintiff against the defendants on the ground of non-service of notice under Section 80(1) of the C.P.C., 1908, on the defendants prior to the filing of the suit.

As such, no pleading or evidence or argument was raised on behalf of the defendants during trial of the suit before the trial court challenging / objecting the maintainability of the suit of the plaintiff on the ground of non-service of notice under Section 80(1) of the C.P.C., 1908 prior to the institution of the suit.

The main object/purpose of issuance of notice under Section 80(1) of the C.P.C., 1908 by the plaintiff to the State/Government and its officer prior to the institution of suit is only to give the concerned Government or officer an opportunity to reconsider the legal position and to settle the claim raised by the plaintiff, if so advised, without moving for the litigation in order to enable the State and its officer to be



responsive to the notice of the plaintiff for the avoidance of a fight in the suit or litigation with the plaintiff or plaintiffs.

15. It is settled propositions of law that, though, the provision of issuance of notice under Section 80(1) of the C.P.C. is mandatory, but, the same can be waived by the defendant or defendants and if once, the defendant or defendants waived the requirement of the notice under Section 80(1) of the C.P.C. without raising any objection about the same in their written statement, in that case, the plaintiff cannot be non-suited on the ground of non-service of statutory notice on the defendant or defendants prior to the institution of suit.

So, if the issuance of notice under Section 80(1) of the C.P.C. before filing of the suit is waived by the defendant or defendants without raising any objection about the same in the written statement, then in that case, there is no impediment for the court to entertain the suit of the plaintiff without notice under Section 80(1) of the C.P.C., 1908.

16. On this aspect, the propositions of law has already been clarified by the Hon'ble Courts and the Apex Court in the ratio of the following decisions:-

(i) ***AIR 1969(S.C.)-674 : Raghunath Das vrs. Union of India and another—C.P.C., 1908—Section 80***—Object of notice contemplated by Section 80 of the C.P.C. is to give to the concerned Governments and public officers opportunity to reconsider the legal position and make



amends or settle the claim, if so advised without litigation.(Para-8)

(ii) ***AIR 1978(S.C.)-1608 : State of Punjab vrs. M/s. Geeta Iron & Brass Works Ltd.—CPC, 1908—Section 80—Object of notice***—State should be responsive to noticed and avoid a fight.

C.P.C., 1908—Section 80—Object of notice to give opportunity to reconsider, whether plaintiffs claim would be accepted or not.

(iii) ***2007 (I) CJD(S.C.)-40 : State of A.P. and others vrs. M/s. Pioneer Builders, A.P.—C.P.C., 1908—Section 80***—The object of notice is to give opportunity to reconsider whether the claim made could be accepted or not for the advancement of justice and the securing of public good by avoidance of unnecessary litigation.

(iv) ***2012(9) Law Digital.in-450(Karnataka) : Karishma Anand vrs. Union of India and another—C.P.C., 1908—Section 80—Object***—The object of issuance of notice under Section 80, C.P.C. is to provide an opportunity to the Government to consider the legal position to settle the claim without compelling parties to go for litigation and also to afford an opportunity to the Officer of the Government to scrutinize and settle the matter, if possible with a minimum action, so that, unnecessary litigation is avoided.

(v) ***2023(2) Civil Court Cases-44(M.P.)(decided on 02.02.2023) : Managing Director Corporation Lamta Project Balaghat vrs. Bhajanlal and others—C.P.C., 1908—Section 80***—Provision of Section 80 of the C.P.C. is mandatory, but, it can be waived by the defendants.

(vi) ***AIR 1958(S.C.)-274 : Dhian Singh Sobha Singh and Ors. vrs. The Union of India (decided on 29.10.1957 in Civil Appeal No.5 of 1954)—C.P.C., 1908—Section 80(1)***—No objection about notice—***No issue***—Notice is waived.

(vii) ***AIR 1980(Patna)-212 : State of Bihar and another. Vrs. Panchratna Devi and another.(decided on 20.09.1979 in A.F.O.D. No.67 of 1967)—C.P.C., 1908—Section 80—Objection of notice***—No objection about notice under Section 80(1) of the C.P.C. raised at the trial, right waived.



(viii) 2007(2) CCC-323(M.P.) : *Laxmichand (dead) through L.Rs. Kanta Bai and Ors vrs. Murty Shri Laxminarayan & Ors.—C.P.C., 1908—Section 80(1)*—No objection raised about maintainability of suit for want of statutory notice— If no such objection raised at the trial stage, same cannot be raised at appellate stage.

(ix) 25(1959) CLT-335: *Basudeb Biswal and others vrs. Padmanav Choudhury and others—C.P.C., 1908—Section 80—Waiver of the right to notice*—Plea as to want of notice must be deemed to have been waived, when such plea is taken for the first time in the appeal. In that case, the appellate court is not entitled to dismiss the suit on the ground of absence of notice under Section 80, C.P.C.

(x) AIR 1981(Bombay)-394 (Full Bench) : *Vasant Ambadas Pandit vrs. Bombay Municipal Corporation and others—C.P.C., 1908—Section 80*—If objection as to non-service of statutory notice is waived, court can entertain a suit.

(xi) AIR 1971 (Orissa)-227 : *State of Orissa and another vrs. Bamadeb Panigrahi and another—C.P.C., 1908—Section 80*—Plea as to absence of notice under Section 80 though raised in written statement cannot be permitted to be argued for the first time in second appeal if no issue for the same in the courts below—Plea will be deemed to have been waived.

Once the defendants have waived the requirements of the notice under Section 80 of the C.P.C. by not raising any objection about the same in written statement, the plaintiff cannot be non-suited on that ground.”

17. In view of the propositions of law settled in the ratio of the above decisions of the Hon’ble Courts and the Apex Court, the main object/purpose of issuance of notice under Section 80(1) of the C.P.C. by the plaintiff to the defendant or defendants before institution of suit is only to give the defendant or defendants an opportunity to reconsider the plaintiff’s claim, i.e., whether the same can be accepted or not and to reconsider the legal position and to make amends or settle the claim of



the plaintiff, if so advised, without moving for the litigation with the plaintiff, for no other reason, but, only, in order to avoid the fight with the plaintiff and if the defendants do not raise any objection about the same in their written statement challenging the maintainability of the suit of the plaintiff on the ground of non-issuance of notice under Section 80(1) of the C.P.C., 1908 and if no issue is framed on the said point, then, it will be deemed as per law that, defendant or defendants have waived their right on such point.

Here, in the suit/appeal at hand, when the defendants, i.e., State and its officer have neither raised any objection in their written statement challenging the maintainability of the suit of the plaintiff-company on the ground of non-issuance of notice under Section 80(1) of the C.P.C., 1908 prior to the institution of the suit nor any issue has been framed on that point by the trial court during trial of the suit, then at this juncture, by applying the principles of law enunciated in the ratio of the decisions of the Hon'ble Courts and Apex Court referred to (supra) in para no.16 to this appeal/suit at hand, it is held that, the defendants have waived the requirements of notice under Section 80(1) of the C.P.C.

For which, it cannot be held that, the suit of the plaintiff-company against the defendants was not maintainable on the ground of non-sending of notices under Section 80(1) of the C.P.C., 1908 to the



defendants. So, the decisions relied upon by the learned Standing Counsel on behalf of the appellants(defendants) indicated in Para No.13 of this judgment have become inapplicable to this appeal/suit at hand on facts.

18. Therefore, there is no justification under law for making any interference with the concurrent findings and observations made by the trial court and 1st appellate court against the appellants/defendants and in favour of the respondent/plaintiff in T.S. No.04 of 1992 and T.A, No.04 of 1993 respectively through this 2nd appeal filed by the defendants/appellants.

19. As such, there is no merit in the appeal of the appellants(defendants). The same must fail.

20. In result, the 2nd appeal filed by the appellants (defendants) is dismissed on merit, but without cost.

The judgments and decrees passed by the trial court and 1st appellate court in T.S. No.04 of 1992 and T.A. No.04 of 1993 respectively are confirmed.

(A.C. Behera)
Judge

Signature Not Verified
Digitally Signed
Signed by: JAGABANDHU BEHERA
Designation: Personal Assistant
Reason: Authentication
Location: OHC, CUTTACK
Date: 04-Dec-2024 14:21:00
The 3rd Dec 2024/ Jagabandhu, P.A.