

RFA 11/2009

BEFORE

THE HON'BLE MR JUSTICE N. CHAUDHURY

JUDGMENT AND ORDER (Oral)

In this First Appeal, appellants, the Commissioner and Special Secretary to the Government of Assam, P.W.D and others have challenged the judgment and decree dated 23.05.2008 passed by the learned Civil Judge, Darrang, Mangaldai in Money Suit No. 3 of 2007, whereby the suit of the plaintiff, Md. Chand Ali was decreed by the learned trial court for Rs.4,63,935/- along with interest @ 6% per annum from the date of institution of the suit till its realisation.

[2] The plaintiff Md. Chand Ali instituted Money Suit No.3 of 2007 in the Court of learned Civil Judge, Darrang, Mangaldai stating that he is a class I(C) category contractor under the defendant No.5 and was awarded with a contract mentioned in Paragraph-3 of the plaint. He performed the contract works but even after completion of works the defendant did not clear the bills amounting to Rs.4,63,935/- for which legal notice was served on 19.01.2007 but even thereafter the authority did not make any payment to him for which suit for recovery of Rs.6,12,745.90 has been instituted along with interest @ 12% per annum. In the Schedule to the plaint particulars of the contractual amount against the respective work orders has been mentioned. The plaint was subsequently amended for impleading Executive Engineer, P.W.D. Mangaldai as the defendant No.6.

[3] On being summoned the defendant No.4 submitted written statement on behalf of himself and the respondents No.1 to 5 and contested the suit, inter alia, on the grounds of lack of cause of action, bad for non-joinder of necessary parties, lack of notice under Section 80 of the Code of Civil Procedure Etc. On merit it was stated in the written statement that the Government of Assam not having been sanctioned money, payment could not be made to the plaintiff.

[4] Upon such rival contentions of the parties, the learned trial court framed as many as 5 issues which are quoted below:

(1) Whether there is any cause of action for the suit?

(2) Whether the suit is bad for non-joinder and mis-joinder of necessary parties?

(3) Whether the suit is liable to be dismissed for want of proper notice under Section 80 of the Code of Civil Procedure?

(4) Whether the plaintiff is entitled for a decree for realisation of Rs.6,12,745.90 being the contractual amount and interest thereof as prayed for from the defendants with interest?

(5) To what other relief/s the parties are entitled to?

[5] The plaintiff examined himself as P.W.1 and exhibited some documents while defendants exhibited 1 document. Bharat Chandra Hazarika an Accounts Officer in the Office of the Defendant No.6 was examined as sole witness and he also exhibited some documents. After consideration of the materials placed on record, the learned trial court held that the plaintiff has cause of action, that the suit is not bad for non-joinder of the parties, that the suit is not liable to be dismissed for the want of notice under Section 80 of the Code of Civil Procedure and that the plaintiff is entitled to an amount of Rs.4,63,935/-. Accordingly suit was decreed for Rs.4,63,935/- along with interest @ 6% per annum from the date of institution of the suit till realisation. This judgment was passed on 23.05.2008 and the defendants have preferred this appeal against that judgment.

[6] I have heard Mr. G. Rahul, learned Standing Counsel, P.W.D. (Roads). None appears on behalf of the sole respondent/plaintiff although names of the learned counsel have been shown in the cause-list.

[7] Upon consideration of the judgment passed by the learned trial

ial court and the pleadings of the parties along with their respective evidence the point for determination in this appeal shall be as follows:

Whether the judgment of the learned trial court is sustainable?

[8] Mr. G. Rahul, learned counsel for the appellant would argue that the suit of the plaintiff is not maintainable for non-compliance of Section 79 & 80 of the Code of Civil Procedure. The plaintiff has really claimed money from the P.W.D. which on turn is to be provided by the State of Assam. But the State of Assam has not been made a party though statutorily required under Section 79 of the Code of Civil Procedure. The defendants took a specific stand in the written statement that the suit is bad for non service of notice under Section 80 of the Code of Civil Procedure but yet the plaintiff did not prove service of any notice under Section 80 of the Code of Civil Procedure in course of trial. Under such circumstances, the suit of the plaintiff ought to have been dismissed in limine. He further argues that the learned trial court has not discussed as to how the plaintiff is entitled to a decree of Rs.4,63,935/-. In Paragraph-9 of the judgment the learned trial court has merely stated that after going through 'both sides exhibited documents' it found that the plaintiff is entitled for total amount of Rs.4,63,935/- but in so doing he did not discuss the exhibited documents basing on which said finding was arrived at. This finding of the learned trial court, therefore, is vitiated as it is not based on materials available on record. With these submissions the learned Standing Counsel prayed that the appeal be allowed and impugned judgment and decree be set aside by dismissing the suit of the plaintiff.

[9] I have perused the plaint in entirety. In the plaint the plaintiff has claimed that he performed contract work under the defendants and that he had completed the works but even thereafter his bills were not cleared for a sum of Rs.4,65,935/- for which he issued legal notice to the defendants on 19.01.2007. But even thereafter the same has not been cleared. He, therefore, claimed interest @ 12% per annum thereon and thus a decree for Rs.6,12,745.90 has been prayed with further interest @ 12% per annum till realisation.

[10] The defendants in their written statement stated that the State of Assam did not provide the fund and therefore, the unpaid bills of the plaintiff could not be cleared. Thus it is clear that ultimately the paying authority is the State of Assam which has not been made a party in the suit. Under Article 300 of the Constitution of India, a State can sue or be sued in its own name. Article 300 of the Constitution is quoted below:

300. Suits and proceedings - (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relation to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding Indian States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution-

(a) any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings; and

(b) any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

[11] Same is the provision under Section 79 of the Code of Civil Procedure which requires that in a suit by/ or against the Government's authority to be named as plaintiff or defendant shall be State Government of the concerned State in case the suit is filed by/or against the State Government and the Union of India in case the case is filed by/ or against the Central Government. This is required because ultimately the Central Government or the State Government, as th

e case may be, shall be the ultimate authority to make payment. In the case of State of Tripura and Others Vs. Manabendra Das Chowdhury AIR 2001 GAU 178 this Court held that it is not necessary to implead the specific department of the Government as necessary party in a suit filed against the Central Government or the State Government under the principle of respondent superior. In the case of State of Kerala vs. General Manager, Southern Railway reported in AIR 1976 SC 2538, the Government of Kerala filed a suit against the General Manager of Southern Railway stating that it booked 2000 tons of rice in 21,310 bags from Barrelli Railway Station for being transported to Trivandrum Central Railway Station but there was short delivery by 79,378 lbs. Besides rice in 327 bags was found to be damaged. The State of Kerala, therefore, claimed Rs.28,208.70 as damages from the General Manager, Southern Railway. Respondent resisted the claim, inter alia, on the ground that the Union of India which is the owner of the Railways was not made a party to the suit and once the Union of India would have been made a party suit would have been barred under Section 131 of the Constitution of India and/or relief would have been available only from the Supreme Court. The suit was dismissed on these grounds and a first appeal preferred by the State of Kerala which was also dismissed by the Hon'ble High Court. Under such circumstances, State of Kerala preferred appeal before the Supreme Court wherein the Hon'ble Supreme Court considered the provision of Section 79 of the Code of Civil Procedure and held that the Union of India was a necessary party. In so doing the Hon'ble Supreme Court considered that there is a distinction between the owner of the Railway and the authority which actually runs the Railway to whom duties have been assigned. The Manager of the Railway under the Railway's Act is the authority to run the Railway but when the liability is sought to be fastened on the Railway Administration and the suit is brought against it on that account, the suit has to be brought against the Union of India because it is the Union who owns the Railway and who would have the funds to satisfy the claim in case a decree is passed in the suit. After making such observation in Paragraphs-6 & 7 of this judgment, the appeal preferred by the State of Kerala was dismissed by the Hon'ble Supreme Court.

[12] Even in the case in hand the P.W.D. is only a department under the State of Assam and P.W.D does not have its own machinery to generate finance. It is the State of Assam which funds the activities of the P.W.D and a specific statement was taken by the defendants in the written statement that payment was not made to the plaintiff because the state of Government had not sanctioned the amount to the department. The learned trial court while deciding the case noticed that the funds were sanctioned from the State of Assam for the purpose of paying the bills of the contractor. When such findings have been arrived at, there cannot be any doubt to the effect that the ultimate authority to make the payment is the State of Assam. Even after the decree is passed, if it is put into execution, the State of Assam have to provide the fund for satisfying the decree and so there cannot be any doubt to the effect that State of Assam is a necessary party. Apart from that the Code of Civil Procedure has laid down Section 79 for the purpose of suing by/ or against the Government. Section 79 of the Code of Civil Procedure provides that in such a suit by/ or any State Government the plaintiff or defendant, as the case may be, shall be the State Government of the respective State. The suit filed by the plaintiff against the various officers of the P.W.D., therefore, is vitiated for non-compliance of the provision of Section 79 of the Code of Civil Procedure. Once it is held that the State Government is a necessary party, an appellate Court under Section 99 of the Code of Civil Procedure is entitled to reverse or modify the decree passed by the learned trial court. The plaintiff not having sued the State of Assam no executable decree can be passed. The suit, therefore, is bad for non-joinder of necessary party i.e. the State Government.

[13] In course of evidence the plaintiff exhibited a postal receipt as Exhibit-7. According to the plaintiff by that postal receipt notice under Section 80 of the Code of Civil Procedure was served on the defendant No.1. It is to

be noticed that in the written statement defendant took a specific stand that no such notice was served on the State of Assam under Section 80 (1) of the Code of Civil procedure and the suit is liable to be dismissed on that ground. Since the defendant denied to have received notice under Section 80 of the Code of Civil Procedure, the plaintiff was duty bound to prove that such a notice was at all served. In Examination-in-chief it is stated that Exhibit-7 is notice under Section 80 of the Code of Civil procedure. I have perused the records. Exhibit-7 is a postal receipt whereby some material was sent to the Secretary to the Chief Engineer and Executive Engineer of Assam. But what was the content of the notice has not been proved. The Examination-in-chief does not show that the plaintiff asked for production of the office copy of the notice from the defendants in the manner provided under Section 66 of the Evidence Act and that the defendants did not produce the same thereafter. That not being the position even production of the notice by the plaintiff was not possible. Here in this case, the plaintiff did not make any attempt to prove even by secondary evidence that a notice under Section 80 of the Code of Civil Procedure was served on the defendants. The learned trial court observed that a photocopy of the notice was available on the record but he did not qualify as to whether it was included into evidence by any known means. Had the photocopy been admitted into record by the plaintiff and the same was exhibited without objection in that event the Appellate Court would not have been in a position to question the manner in which the same was exhibited. The plaintiff did not exhibit even a photocopy of the notice under Section 80 of the Code of Civil Procedure to prove that such a notice was issued or served on the State. The finding of the learned trial court, therefore, that Section 80 of the Code of Civil procedure has been served cannot be upheld. This finding is accordingly reversed and consequently, it is held that the suit of the plaintiff is bad for non service of notice under Section 80 of the Code of Civil procedure. Coming to the merit of the case the learned trial court made the following observation in paragraph-F while deciding the issue No.4:

Issue No.4.- Whether the plaintiff is entitled for a decree for realization of Rs.6,12,745.90 being the contractual amount with interest thereof as prayed for from the defendant with interest?

Admittedly the plaintiff claimed money has been lying with the defendant's authority as outstanding amount. But the actual fact is that as the Government of Assam has not released the fund so the defendant could not pay the outstanding bill amount to the plaintiff.

D.W.1- the Account Officer, P.W.D. Rural Road Division at Mangaldai in his cross-examination deposed that the plaintiff had contractual work under the Mangaldai Road Division of the State of Assam and so in my opinion whether the plaintiff had work order to their Department or to the State Road Division, Mangaldai it is not a matter of consideration because admittedly the defendant's authority issued the work completion certificate vide Exhibit-4. I have gone through the both sides' exhibited documents and found that the plaintiff is entitled for total amount of Rs.4,63,935/-.

[14] It would appear that the learned trial court has not discussed the evidence on record to come to a finding that the plaintiff is entitled to an amount of Rs.4,63,935/-. He merely stated that he has gone through the exhibited document of both sides and found that the plaintiff is entitled to total of Rs.4,63,935/-. Such finding without there being any discussion on specific evidence cannot be sustained. Consequently, it is to be held that the suit of the plaintiff is neither maintainable nor has the plaintiff succeeded to prove the claim against the Government in accordance with law. Accordingly, the appeal stands allowed. Impugned judgment and decree is set aside. Send down the records to the learned trial court after framing of decree.

[15] No order as to costs.