

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

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WRIT PETITION NO.4937 OF 2018

Mr. Mehboob Noorali Ukani

..Petitioner

Versus

Mr. Kundan Jadhav and Ors.

..Respondents

Mr. Digambar Mishr a/w Suraj Vishwakarma & Khushboo Dilloud i/
by SRV Legal LLP, for the Petitioner.

Ms. Manisha A. Devkar, for the Respondent No.1.

Smt. V. S. Nimbalkar, AGP for Respondent Nos.2 & 3.

CORAM : NITIN W. SAMBRE, J.

DATE : 15th FEBRUARY, 2022

PC.

1. This petition is by the plaintiff to Special Civil Suit No.190 of 2015 wherein the 8th Joint Civil Judge Senior Division, Thane vide impugned order dated 11th August, 2017 having noticed that the defendant Nos.1 to 3 who are public servants were not issued notice in accordance with the provisions of Section 80 of the CPC and directed their deletion. The petitioner feeling aggrieved preferred appeal before the learned District Judge which was held to be returnable vide impugned order dated 16th November, 2017.

2. So as to substantiate the contention that the appeal is maintainable, reliance is placed on the judgment of the Rajasthan High Court in the matter of *Mt. Phool Sundri Vs. Gurbans Singh and*

Ors. reported in **(1957) AIR (Raj) 97**. According to learned counsel, order of deletion of defendants virtually amounts to deciding the suit finally against the said defendants and that being so, appeal is very much maintainable. Next contentions are even if suit is instituted before the expiry of statutory period provided under Section 80 of the CPC, however, the maintainability of the suit ought not to have been gone into by the Trial Court at the belated stage particularly when defendant Nos.1 to 3 had already placed their written statement on record. He would further claim that there is waiver of the statutory notice period. He would place reliance on the judgment in the matter of ***Chandrashekhar Purshottam Rathi Vs. State of Maharashtra and Ors.*** reported in **(2001) 3 All MR 573**, so as to substantiate aforesaid contention.

3. Counsel for the respondents would oppose the claim.

4. Considered submissions.

5. The fact remains that the impugned order passed by the Trial Court on 11th August, 2017 thereby holding that the suit is not maintainable against defendant Nos.1 to 3 for want of compliance of Section 80(2) of the CPC is admitted fact that before expiry of notice period of 90 days, proceedings can be initiated.

6. In the aforesaid background, remedy which was available to the petitioner/plaintiff was ask for return of plaint and

after expiry of statutory period re-initiate the proceedings or otherwise seek dispensation of the notice period. Admittedly, both these remedies are not availed of by the petitioner. That being so, the Court below, in my opinion, was justified in holding that the suit against defendant Nos.1 to 3 is not maintainable.

7. Apart from above, the Appellate Court has rightly recorded finding that the appeal is not maintainable particularly when there is no final decree of adjudication against defendant Nos.1 to 3. The support drawn from these judgments by the petitioner so as to substantiate his contentions is wholly misplaced as in the judgment of *Chandrashekhar Purushottam Rathi (supra)* Court was of the view that the parties since have not raised objection on the non-compliance of Section 80(2) of the CPC, the said objection was waived, whereas in the case in hand, deletion of defendant Nos.1 to 3, who are public servants may be at belated stage. Apart from above, the issue of maintainability of appeal is concerned, the judgment of the Rajasthan High Court in *Mt. Phool Sundri (supra)* is based on the order of the Trial Court whereby plaint was rejected under Order VII Rule 11 of the CPC whereas in the case in hand, deletion of defendants is ordered based on non-compliance of Section 80(2) of the CPC.

8. In the aforesaid background, I hardly see any reason which warrants interference in the extraordinary jurisdiction of this Court.

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9. The petition as such fails, dismissed.

10. However, this will not preclude the petitioner from taking corrective measures in accordance with law.

[NITIN W. SAMBRE, J.]