

AD-08
Ct No.16
13.02.2025
TN

FAT 14 of 2018

Om Prakash Prasad
Vs.
West Bengal State Council of Technical Education
and others

Mr. Supratick Shyamal,
Ms. Tanusree Das

....for the plaintiff/appellant

1. The present appeal has been preferred by the plaintiff in a suit for compensation and ancillary reliefs as well as for re-employment of the plaintiff in his service.
2. Learned counsel appearing for the appellant submits that the learned Trial Judge dismissed the suit on the sole ground of non-compliance of Section 80 of the Code of Civil Procedure. It is argued that a previous writ petition moved by the appellant in this Court culminated in a leave being granted by the appellate court, which sat in appeal against an order passed by the writ court, for the present appellant to file a civil suit for grant of compensation. Since the suit was filed pursuant to such leave, which was granted in a proceeding where the defendants, including the authorities, were parties, it was well within the knowledge of the defendants that the suit would be filed. As such, the technical objection as to

non-compliance of Section 80 of the Code of Civil Procedure is not attracted at all.

3. Secondly, the defendants, particularly the defendant authorities, filed their respective written statements and contested the suit. While doing so, the defendants have never raised the objection of violation of Section 80 of the Code of Civil Procedure, as such waiving such bar.
4. In view of such palpable waiver, evident on the face of the defence taken by the defendants, it was beyond the jurisdiction of the learned Trial Judge to make out a third case and dismiss the suit on the ground of non-compliance of Section 80 of the Code of Civil Procedure.
5. On a larger perspective, it is argued by the appellant that the principle embodied in Section 80 of the Code is a rule of procedure and a hyper-technical approach ought not to be adopted by the court. It is submitted that the purpose and intent behind Section 80 is to put the Government or other authorities-defendants on notice of filing of the suit.
6. The said purpose having been amply served in the present case by way of the order granting leave to file the suit as well as the said point having been waived by the defendants, the learned Trial Judge ought not to have adopted a hyper-technical approach in dismissing the suit.

7. It is also argued that the learned Trial Judge did not frame any issue as to whether the suit was barred under Section 80 of the Code of Civil Procedure and, as such, the non-compliance of the said provision could not be a ground of dismissal of the suit.
8. Learned counsel also cites *State of A.P. & Ors. Vs. M/s. Pioneer Builders, A.P.*, reported at AIR 2007 SC 113, where the Hon'ble Supreme Court, while affirming an order passed by the High Court, had noted with approval the said order where the High Court had recorded that having participated in the original proceedings, it was not now open to the State to raise a fresh issue as to the maintainability of the suit in view of waiving the defect at the earliest point of time. The Supreme Court also recorded the observation of the High Court that knowing fully well about the non-issuance of notice under Section 80 of the Code of Civil Procedure, the State had not raised such a plea in the written statement or additional written statement filed in the suit and therefore deemed to have waived the objection.
9. Since the Supreme Court approved of such position of law, the said observation of the High Court in the cited case, it is argued, ought to be adopted as a dictum laid down by the Supreme Court itself.
10. However, we are unable to convince ourselves of the legal tenability of the appellant's arguments despite

excellent arguments having been advanced by learned counsel for the appellant.

11. Even in the cited judgment of *M/s Pioneer Builders (supra)*, in paragraph nos.16 and 17, the Supreme Court consistently stood by the well-settled position of law that the bar under Section 80(1) of the Code of Civil Procedure is imperative except where urgent and immediate relief is to be granted by the court, that too with the leave of the court. In the present case, no such leave was sought or granted by the court of first instance, as such, taking the matter beyond the domain of the discretion of the court.
12. The Supreme Court held in the cited judgment of *State of A.P. Vs. M/s. Pioneer Builders (supra)* that from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent of the service of notice under Section 80(1) being imperative was evident.
13. Also, from a careful perusal of the language of Section 80, we find that the bar has been couched in a negative language. Section 80(1) provides that no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or 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

delivered to or left at the office of the persons as mentioned in the said provision.

14. In view of such negative language, no discretion is left to the civil court to grant liberty to the plaintiff to file a suit without prior service of two months' notice under Section 80 of the Code, unless leave is granted under sub-section (2) thereof, that too only upon urgency and immediacy having been made out.
15. Sub-section (2) of Section 80 clearly provides the sole exception where the rigour of the bar under Section 80(1) can be mitigated that is, where the suit is instituted with prior leave of the court on the court being satisfied of the urgency or immediacy of the relief sought against the defendants.
16. In the case at hand, the plaintiff/appellant did not even pray for any leave under sub-section (2) of Section 80, nor plead or establish any urgency or immediacy for the grant of any relief. In the absence of any such mitigating circumstance, the learned Trial Judge was justified in holding that the suit was barred by Section 80 of the Code of Civil Procedure. That apart, the bar, as per sub-section (1) of Section 80, operates not at the stage of entertaining or decreeing the suit, in which case it might have been considered whether such bar can be waived subsequently by the defendants. The bar, as per the said sub-section, operates at the point of institution

of the suit and, as such, the suit becomes incurably defective for non-compliance of Section 80(1) at the very point of institution of the same, which cannot, thus, be subsequently waived. An incurable defect at the inception, it is well-settled, cannot be cured by any subsequent action either on the part of the defendants or the plaintiff and the court does not have any discretion to permit the curing of such defect subsequently.

17. Hence, the bar under Section 80 (1) of the Code of Civil Procedure is an imperative and absolute legal bar which is non-waivable at the instance of the defendants. Thus, the appellant's argument as to waiver, due to such objection not being raised by the defendant-authorities in their written statements or otherwise, is not tenable in the eye of law.
18. Thus, we are of the opinion that the learned Trial Judge was justified on such count as well.
19. The other argument made by learned counsel for the appellant is that no specific issue was framed by the learned trial Judge on non-compliance of Section 80 of the Code of Civil Procedure.
20. However, we are not impressed by such contention as well.
21. Issue no.2 in the suit, as reflected in the impugned judgment itself, is whether the suit is maintainable as framed. As such, the point of non-maintainability

due to non-compliance of Section 80 comes within the broad purview of issue no.2 in the suit.

22. We also find that arguments were advanced by both parties during hearing of the suit on the said issue of Section 80 of the Code of Civil Procedure. It is by now well-settled and trite law that even if an issue is not specifically framed in particular terms, if both parties were aware at the time of going to trial that the said issue would be germane for the adjudication of the suit and such issue was addressed by both sides extensively in their arguments, the non-framing of a specific issue on the said point cannot vitiate the judgment. As such, non-framing of a specific issue on Section 80 is not a relevant consideration in the present case, since the parties understood the significance of the said issue while going to trial and addressed the same substantially in their arguments, which is reflected from the impugned judgment itself.
23. In such view of the matter, we are of the opinion that there is no illegality in the impugned judgment and decree dismissing the suit of the plaintiff/appellant on the ground of non-compliance of Section 80 of the Code of Civil Procedure.
24. However, we make it clear that in view of pendency of the appeal for so long before this court, it is evident that the appellant was labouring under the misconception that relief could be obtained by the

appellant in the appeal. As such, it must be said that the appellant has been proceeding *bona fide* with the present appeal before this court, which mitigates the bar of limitation, if any, if a fresh suit is instituted upon compliance of Section 80 of the Code of Civil Procedure on the self-same cause of action at this juncture, taking into consideration the scope of Section 14 of the Limitation Act, 1963.

25. In the light of the above observations, FAT 14 of 2018 is dismissed without any order as to costs, thereby affirming the judgment and decree dated August 21, 2017 passed by the learned Civil Judge (Senior Division) at Durgapur, District: Paschim Bardhaman in Title Suit No. 21 of 2008.
26. A formal decree be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)