Before : V. K. Jhanji, J.

BALJIT SINGH AND OTHERS,—*Petitioners.*

versus

ANITA RANI (SMT.) AND OTHERS,—*Respondents.*

Civil Revision No. 2913 *of* 1990.

15th April, 1991.

Police Act, (V of 1861)—*S.* 42—*Suit for damages brought under the Fatal Accidents Act against policemen for having caused death by firing—Trial Court rejecting plaint for want of notice under S.* 42—Held, *notice under S.* 42 *is not necessary—Rejection of plaint is illegal.*

Held, that the present suit has not been brought for anything done or intended to be done under the provisions of Police Act or under the general police powers. Section 42 of the Police Act cannot and does not relate to suit or action brought in regard to act done in the exercise of powers granted by other Acts to the Police Officers. It is only with respect to actions and prosecutions falling within the mischief of Section 42 that the service of notice can be said to be necessary but not in the case of actions and prosecutions against the police officers arising otherwise.

(Paras 9 & 10)

Petition under Section 115 *C.P.C. for revision of the order of the* Court of Shri J. S. Korey, PCS, Senior Sub-Judge, Patiala, dated 9th *June*, 1990, *dismissing the application of the defendants/applicants for rejection of plaint.*

Claim : Suit for damages.

Application on behalf of defendants No. 2 to 9 rejection of plaint.

Claim in Revision : For reversal of the order of the Lower Court.

J. C. Nagpal, Advocate, *for the Petitioner.*

Puran Chand, Advocate, *for Respondent No.* 1.

Rajiv Rana, AAG Punjab, *for the Respondent Nos.* 2 & 3.

Baljit Singh and others *v.* Anita Rani (Smt.) and others
(V. K. Jhanji, J.)

JUDGMENT

V. K. Jhanji.

(1) This revision petition has been filed by applicant-defendants No. 2 to 9 against the order of Senior Sub-Judge, Patiala, dated 9th June, 1990. It was prayed in the application that the plaint is liable to be rejected as no notice under Section 42 of the Police Act (hereinafter referred to as the Act) was given before filing the suit.

(2) Briefly, the facts are that on 2nd May, 1983 curfew was imposed in Patiala. Ashok Kumar was standing in the Chaubara of his residential house along with the members of his family. It is alleged that Swaran Singh, defendant No. 5 shot dead Ashok Kumar from the roof of the temple opposite his house while he was looking from behind the glass-panes of the window of the Chaubara. It was further alleged that the murder was committed at the instance of defendants No. 2, 4, 6 to 10. The plaintiffs are the widow and sons of the deceased and they claimed Rs. 10 lacs as damages for the alleged murder.

(3) Initially the suit was filed in *forma pauperis*. The defendants filed an application stating that the plaint was not in accordance with Section 3 of Fatal Accidents Act as it did not contain full particulars of the persons for whose benefit the suit had been instituted. It was further stated that the suit filed by the plaintiffs did not satisfy the requirement of Order XXXII Rule 2 of Civil Procedure Code read with Section 3 of Fatal Accidents Act and thus it was liable to be rejected. The learned trial Court rejected the plaint after finding that the provisions of Fatal Accidents Act were applicable and as the said suit did not comply with the provisions of Section 3 of the Act. Plaintiffs filed appeal, F.A.O. No. 455 of 1986 in this Court which was allowed by R. N. Mittal, J. (as his lordship then was) on 8th September, 1987 and the trial Court was directed to decide the application filed by the plaintiffs to sue it as indigent persons on merits.

(4) Since the matter regarding the decision of the application to sue as indigent persons was being delayed, plaintiffs paid court fee of Rs. 12.104 and the plaint was thus registered. After several adjournments respondents No. 1 and 1-A filed written statements. In the written statement, defendants No. 1 and 1-A admitted the service of notice under Section 80 of Civil Procedure Code. However, defendants No. 2 to 9 did not file any written statement but instead filed

an application under Section 42 of the Act alleging that the plaint is liable to be rejected as the plaintiffs did not serve any notice as required under Section 42 of the Act. The application was contested by the plaintiffs and the learned trial Court,—*vide* impugned order dismissed the application. Trial Court held that no separate notice under Section 42 of the Act was required to be given when notice under Section 80 of Civil Procedure Code had been given by the plaintiffs before institution of the suit.

(5) Present revision petition has been filed by defendants No. 2 to 9 praying for setting aside of the order dated 9th June, 1990 whereby their application for rejection of the plaint for want of notice under Section 42 of the Act was rejected.

(6) Learned counsel for the petitioner has contended that the order of the learned trial Court is erroneous in law inasmuch as no suit could be filed by the plaintiffs before serving a notice under Section 42 of the Act. In support of this, he has placed reliance on *Manasarovar Agencies* v. *Governor-General in Council* (1).

(7) On the other hand, learned counsel for the plaintiffs has contended that no notice under Section 42 of the Act was required to be given as the suit had been filed under the provisions of Fatal Accidents Act.

(8) After hearing the learned counsel for the parties at length, I find that there is no merit in the revision petition. The present suit for damages has been brought against the defendants for acts done in the exercise of powers granted to them by the Criminal Procedure Code. Allegation contained in the plaint does not show that what was alleged to have been done by the defendants was done under the provisions of the Act or General Police Powers given under the Act.

(9) Section 23 of the Act lays down that it is the duty of every police officer, among other things,

> "to apprehend all persons whom he is legally authorised to apprehend, and for whose apprehension sufficient ground exists."

(1) A.I.R. 1955 Mysore 123.

Section 24 of the Act simply says that—

> "it shall be lawful for any police officer to lay any information before a Magistrate, and to apply for a summons, warrant, search warrant or such other legal process as may by law issue against any person committing an offence."

In the present case the acts on the basis of which the present suit has been filed are not contemplated by Section 24 of the Act. In my view no notice under Section 42 of the Act was necessary. The material portion of Section 42 of the Act reads as under :—

> "All actions and prosecution against any person, which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police powers hereby given, shall be commenced within three months after the act complained of shall have been committed, and not otherwise; and notice in writing of such action and of the cause thereof shall be given to the defendant, or to the District Superintendent or an Assistant District Superintendent of the District in which the act was committed, one month at least before the commencement of the action."

The important words to notice in Section 42 of the Act are :—

> "All actions and prosecutions.....for anything done or intended to be done under the provisions of this Act or under the general police powers hereby given."

It is only with respect to actions and prosecutions falling within the mischief of aforesaid expression that the service of notice can be said to be necessary but not in the case of actions and prosecutions against the police officer arising otherwise.

(10) The present suit has not been brought for anything done or intended to be done under the provisions of this Act or under the general police powers. Section 42 of the Act cannot and does not relate to suits or actions brought in regard to acts done in the exercise of powers granted by other Acts to the Police Officers. *Manasarovar Agencies'* case (supra) is clearly distinguishable on the facts of the present case and is of no help to the counsel for the petitioner.

(11) The decision of the suit is being delayed by the defendants for one reason or the other. Defendants No. 2 to 9 have yet to file written statements. Suit was filed as far back as in July, 1984 and even after seven years the suit is at the initial stage.

(12) The learned trial Court is, therefore, directed to give only one opportunity to defendants No. 2 to 9 for filing written statement and in case they fail to file the written statement, trial Court shall proceed to decide the suit in accordance with law.

(13) Consequently, the revision petition is dismissed. Costs are quantified at Rs. 2,000.

R.N.R.

Before : H. S. Rai & A. P. Chowdhri, JJ.

SHYAM LAL,—*Petitioner.*

versus

STATE OF HARYANA AND OTHERS,—*Respondents.*

Criminal Misc. No. 237-M of 1989.

22nd August, 1990.

Code of Criminal Procedure, 1973 (II of 1974)—Ss. 216 & 482—Prevention of Food Adulteration Act, 1954—S. 16(a), 16(1) Second proviso—Trial of accused according to procedure of warrant case—Charge framed under S. 15(1)(c)—Opinion that accused deserves greater sentence and ought to be tried in accordance with the Cr. P.C. not recorded by Magistrate—Magistrate thereafter curing defect by recording requisite opinion and fixing case for pre-charge evidence—Thereafter fresh charge framed—Correction of error of procedure permissible—Second proviso to S. 16(a) authorises the Magistrate to switch over from summary procedure to warrant procedure—Such switching over does not vitiate trial—No automatic discharge or acquittal by merely framing charge again by way of rectification of procedural mistake—Accused has no vested right to trial by particular procedure.

Held, that it is axiomatic that summary procedure is less favourable to the accused than procedure for the trial of a warrant