

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.639 of 2017**

Ku. Urmal Munjwani D/o Shri Sukhdev Munjwani, Aged About 29 Years R/o Motor Stand Ward Dhamtari, Tahsil & District Dhamtari, Chhattisgarh, Through Her Power Of Attorney Holder (Brother) Surendra Munjwani, S/o Sukhdev Munjwani, Age 33 Year, R/o Motor Stand Ward Dhamtari, Tahsil & District Dhamtari, Chhattisgarh

-----Petitioner

Versus

1. State Of Chhattisgarh Through Collector, Dhamtari, District Dhamtari, Chhattisgarh.
2. Municipal Corporation, Dhamtari, Through Its Commissioner, Municipal Corporation Dhamtari, District Dhamtari, Chhattisgarh.
3. Deputy Collector, Shri Rajeev Pandey, Office Of Collector, Dhamtari, District Dhamtari, Chhattisgarh.

----- Respondents

For Petitioner	:	Mr.Adil Minhaz, Advocate
For Respondent No.1	:	Mr.Arvind Dubey, Panel Lawyer

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

5/9/2017

1. Calling in question the legality, validity and correctness of order dated 8.8.2017 passed by the trial Court rejecting the application filed by the petitioner herein under sub-section (2) of Section 80 of the Code of Civil Procedure, this writ petition under Article 227 of the Constitution of India has been filed.
2. The petitioner filed an application under sub-section (2) of Section 80 of the CPC seeking leave to institute a suit stating inter-alia that on 25.7.2017 the defendant-Municipal Corporation, Dhamtari has dismantled his boundary wall/barbed wire and gate without prior notice to him and therefore, the petitioner/plaintiff be permitted to institute a

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suit for declaration of title and permanent injunction restraining the respondent-Municipal Corporation for further demolishing barbed wire and further relief of restraining the respondent-Municipal Corporation for construction of road on the suit land and therefore, he is entitled for urgent or immediate relief of temporary injunction against the government. The trial Court by its impugned order finding no merit in the petitioner's application rejected the said application, which has been called in question in the instant writ petition.

- 3.** Mr. Adil Minhaz, learned counsel for the petitioner, would submit that barbed wire and attached gate have been dismantled by respondent-Municipal Corporation, Dhamtari and road is likely to be constructed which goes to show that the petitioner is required to obtain an urgent or immediate relief against the Government and governmental authorities, therefore, the impugned order is liable to be set aside and the petitioner/plaintiff be permitted to file a suit without waiting for service period of two months as notice has already been issued on 29.7.2017 which has been served to the respondent-Municipal Corporation on 31.7.2017.
- 4.** On the other hand, learned State Counsel would support the impugned order.
- 5.** I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also

gone through the record with utmost circumspection.

- 6.** In order to decide the dispute, it would be appropriate to notice Section 80 (1) & (2) of the CPC which reads as under:-

“80. Notice.- (1) Save as otherwise provided in sub-section (2), 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—

(a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district; and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the court, without serving any notice as required by sub-section (1); but the court shall not grant relief in the suit, whether interim or otherwise, except after giving to the government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the court shall, if it is satisfied, after hearing the parties, that no urgent or immediate

relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1)."

7. Section 80 (2) of the CPC is in the nature of an exception to Section 80 (1). It has been introduced with a view to entertain suits where urgent or immediate relief is required to be obtained. Sub-section (2) of Section 80 of the CPC is mandatory in nature and it cannot be bypassed. It is a condition precedent even in the suit for injunction.

8. In the matter of **State of A.P. Vs. Pioneer Builders, A.P.**¹ the Supreme Court while considering the provisions contained in Section 80(2) of the CPC has held that leave of the Court is condition precedent. It was observed as under:-

"14. From a bare reading of sub-section (1) of Section 80, it is plain that subject to what is provided in sub-section (2) thereof, no suit can be filed against the Government or a public officer unless requisite notice under the said provision has been served on such Government or public officer, as the case may be. It is well-settled that before the amendment of Section 80 the provisions of unamended Section 80 admitted of no implications and exceptions whatsoever and are express, explicit and mandatory. The Section imposes a statutory and unqualified obligation upon the Court and in the absence of compliance with Section 80, the suit is not maintainable. (See: Bhagchand Dagdusa Gujrathi & Ors. Vs. Secretary of State for India in Council² ; Sawai Singhai Nirmal Chand Vs. Union of India³ and Bihari Chowdhary Vs. State of Bihar⁴). The service of notice under Section 80 is, thus, a condition precedent for the institution of a suit against the Government or a public officer. The legislative intent of the Section is to give the Government sufficient notice of the suit, which is proposed to be filed against it so that it may reconsider the decision and

1 (2006) 12 SCC 119

2 AIR 1927 PC 176

3 (1966) 1 SCR 986

4 (1984) 2 SCC 627

decide for itself whether the claim made could be accepted or not. As observed in *Bihari Chowdhary* (supra), the object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.

17. Thus, from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice under sub-section (1) is imperative except where urgent and immediate relief is to be granted by the Court, in which case a suit against the Government or a public officer may be instituted, but with the leave of the Court. Leave of the Court is a condition precedent. Such leave must precede the institution of a suit without serving notice. Even though Section 80 (2) does not specify how the leave is to be sought for or given yet the order granting leave must indicate the ground(s) pleaded and application of mind thereon. A restriction on the exercise of power by the Court has been imposed, namely, the Court cannot grant relief, whether interim or otherwise, except after giving the Government or a public officer a reasonable opportunity of showing cause in respect of relief prayed for in the suit."

9. Thereafter, in the matter of **Bajaj Hindustan Sugar & Industries Ltd. Vs. Balrampur Chini Mills Ltd. and others**⁵ the Supreme Court has again considered and held as under:-

"31. From the above, it would be evident that a suit may be filed against the Government or a public officer without serving notice as required by sub-section (1) with the leave of the court. When such leave is refused, the question of institution of the suit does not arise and accordingly, no interim relief could also be granted at this stage.

34. The law, in our view, has been succinctly expressed in the aforesaid judgment. The language of Section 80(2) of the Code leads us to hold that if leave is refused by the original court, it is open to the superior courts to grant such leave as otherwise in an emergent situation a litigant may be left without remedy once such leave is refused and he is required to wait out the statutory period of two months after

⁵ (2007) 9 SCC 43

giving notice.”

10. In the matter of **State of Kerala Vs. Sudhir Kumar Sharma & others**⁶ the Supreme Court has delineated the manner in which application under Section 80(2) has to be dealt with and held as under:-

“19.....In our opinion, a suit filed without compliance with Section 80(1) cannot be regularised simply by filing an application under Section 80(2) CPC. Upon filing an application under Section 80(2) CPC, the court is supposed to consider the facts and look at the circumstances in which the leave was sought for filing the suit without issuance of notice under Section 80(1) to the government authorities concerned. For the purpose of determining whether such an application should be granted, the court is supposed to give hearing to both the sides and consider the nature of the suit and urgency of the matter before taking a final decision. By mere filing of an application, by no stretch of imagination can it be presumed that the application is granted. If such presumption is accepted, it would mean that the court has not to take action in pursuance of such an application and if the court has not to take any action, then we failed to understand as to why such an application should be filed.

20. It is an admitted fact that no order had been passed on the application filed under Section 80(2) CPC. Till a final order is passed granting the said application, in our opinion, the irregularity in filing of the suit continues. If ultimately the application is rejected, the plaint is to be returned and in that event the application filed on behalf of the appellants under Order 7 Rule 11 CPC is to be granted. If the application filed under Section 80(2) is ultimately granted, the objection with regard to non-issuance of notice under Section 80(1) CPC cannot be raised and in that event the suit would not fail on account of non-issuance of notice under Section 80(1) CPC.

21. We reiterate that till the application filed under Section 80(2) CPC is finally heard and decided, it cannot be known whether the suit filed without issuance of notice under Section 80(1) CPC was justifiable. According to the provisions of Section

80(2) CPC, the court has to be satisfied after hearing the parties that there was some grave urgency which required some urgent relief and therefore, the plaintiff was constrained to file a suit without issuance of notice under Section 80(1) CPC. Till arguments are advanced on behalf of the plaintiff with regard to urgency in the matter and till the trial court is satisfied with regard to the urgency or requirement of immediate relief in the suit, the court normally would not grant an application under Section 80(2) CPC. We, therefore, come to the conclusion that mere filing of an application under Section 80(2) CPC would not mean that the said application was granted by the trial Court.”

11. The Madhya Pradesh High Court in the matter of **M.P.**

Oil Extraction Pvt. Ltd. Vs. State of Madhya Pradesh &

Ors.⁷ while dealing with Section 80(2) CPC held as under:-

“8.....In this context a bare reading of proviso to sub-section (2) of section 80, Civil Procedure Code makes the whole position clear. Permission to file a suit as contemplated under sub-section (2) of section 80, Civil Procedure Code is subject to the proviso. The intention of the Legislature while making this sub-section (2) of section 80, Civil Procedure Code is that only in urgent and immediate matters where relief in favour of the plaintiff becomes expedient, permission can be granted without complying the terms of 60 days' notice, but the Court is to be satisfied for the 'urgent or immediate' relief showing as to what was that urgency which required the plaintiff to take leave of the Court without complying the 60 days' statutory period of notice and if ultimately after hearing the opposite party as contemplated under sub-section (2) of section 80, Civil Procedure Code, the Court reaches the conclusion that there was no urgency in filing such a suit after taking leave of the Court, then in such circumstances proviso to sub-section (2) of section 80, Civil Procedure Code has to be acted upon, thereby returning the plaint for presentation to it after complying with the requirements of sub-section (1) of section 80, Civil Procedure Code by giving statutory notice of 60 days.

Granting leave to file the suit without complying with the requirement of giving 60 days' notice depends

upon the satisfaction of the Court as to the urgency of the relief sought and therefore, in the instant case, while considering the injunction application, the Court below reached the conclusion that no case for grant of injunction was made out as there was no urgency in the matter requiring immediate relief in favour of the plaintiff, hence, it has rightly passed the order impugned under the proviso to sub-section (2) of section 80, Civil Procedure Code.

9. Further by reading section 80, Civil Procedure Code as a whole particularly sub-section (2), it can safely be inferred that this sub-section (2) is subordinate to its proviso which contemplates that in the event of failure to establish a prima facie case in an interlocutory application, the plaint is to be returned for its presentation after complying the requirement of sub-section (1) of section 80, Civil Procedure Code and this harmonises the provisions of sub-section (2) and its proviso. This being so, sub-section (2) of section 80, Civil Procedure Code does not contemplate two orders i.e., first, to grant leave to file suit without complying with the provisions of section 80(1) and secondly, to hear the interlocutory application. Thus, to grant leave depends upon allowing the prayer claimed in interlocutory application after hearing the opposite party.”

12. Thus, in order to obtain an urgent or immediate relief against the Government or any public officer in respect of any act purporting to be done by such public officer in his official capacity, a suit may be instituted with the leave of the Court without serving any notice as required by sub-section (1) of Section 80 of the CPC.

13. In the instant case, it is admitted position on record that the petitioner's boundary wall which he had fenced by barbed wire and attached gate have been dismantled by the Municipal Corporation, Dhamtari and thereafter the petitioner has served a notice even on 29.7.2017 and instituted a suit

on 4.8.2017 seeking leave of the Court to institute a suit. Dismantle of such a boundary wall/fencing barbed wire is sufficient to infer that there is urgency in the matter to the plaintiff, therefore, leave under Section 80 (2) of the CPC ought to have been granted by the trial Court, otherwise, the plaintiff would be deprived of his right to protect his property as right to protect the property is constitutional right under Article 300-A of the Constitution of India, therefore, the trial Court has committed legal error in rejecting the application.

14. As a fallout and consequence of the aforesaid discussion, the impugned order is set aside. Leave under Section 80(2) of the CPC is granted and the petitioner is permitted to file a suit for declaration of title and permanent injunction before the trial Court along with an application for temporary injunction without serving notice as mandated by Section 80(2) of the CPC. If an application for temporary injunction, if any, is filed, that would be considered by the trial Court strictly in accordance with law.

15. The writ petition is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K. Agrawal)

Judge