

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.353 of 1992**

Narayan Singh (since dead), through: the Lrs:-

1. Smt. Trilochan Kour widow of late Narayan Singh (since dead)
2. Indrajeet Singh son of late Narayan Singh (since dead), Through Legal Heirs:-

2(a) Chandra Kour, aged about 55 years, widow of late Indrajeet Singh

2(b) Lakki Singh, aged about 30 years, son of late Indrajeet Singh

2(c) Harmit Singh, aged about 27 years, son of late Indrajeet Singh

3. Manjeet Singh, son of Narayan Singh, aged about 66 years
4. Amrik Singh, son of Late Narayan Singh, aged about 62 years,
5. Paramjeet Singh, son of late Narayan Singh, aged about 50 years,
6. Harbhajan Kour, wife of late Ranjeet Singh, aged about 65 years,
7. Harminder Singh son of late Narayan Singh, aged about 50 years,

No.1 to 7 are R/o Police Station Road, Raigarh, Tahsil and District Raigarh (CG)

8. Jasbir Kour, aged about 52 years, D/o late Narayan Singh, R/o Plot No.159, Guru Nanak Pura, Nagpur (M.H.)-17
9. Harbhajan Kour, aged about 55 years, D/o Late Narayan Singh, R/o C/o. Harjinder Singh, Arka Chhetrapara, Kondagaon, Jagdalpur (CG)
10. Surender Kour, aged about 50 years, D/o Late Narayan Singh, R/o Qtr. No.3, New Lay Out, Sitaram Dera, Post Agnilo, Jamshadpur (Jharkhand)

---- Appellants

Versus

State of M.P. through the Collector, Raigarh

---- Respondent

For Appellants	:	Ms Hamida Siddiqui, Advocate
For Respondent	:	Mr.Arun Sao, Dy.A.G.

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

10/09/2018

1. The substantial questions of law involved, formulated and to be answered by this Court in this plaintiff's second appeal are as under:-

“ (1) Whether in view of the notice Ex.P/22, the finding of the Courts below holding the suit filed by the plaintiff to be bad for want of a fresh notice after the order of remand, is contrary to law ?”

(2) Whether the cause of action, having arisen to the plaintiff on account of encroachment proceedings having been initiated against him, can be said to have been wiped out by the order of remand ?”

2. With the consent of learned counsel for the parties, the above-stated questions of law are re-framed as under:-

“Whether the suit as framed and filed was maintainable for want of notice under Section 80 of the Code of Civil Procedure”

3. The imperative facts required for determination of above-stated substantial question of law are as under:-

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court]

(3.1) The plaintiff filed a suit for declaration that he is eligible for renewal of temporary lease in the suit plot and the State be restrained from dispossessing him from the suit land. Suit was filed after service of notice under Section 80 of the CPC dated 14.2.83.

(3.2) The defendant filed its written statement denying the plaintiff allegation and pleaded that provision contained in Section 80 of the CPC has not been complied with and with regard to other averments, the defendant denied those averments.

4. The trial Court after appreciating oral and documentary evidence available on record decreed the suit finding inter-alia that the suit land was given to the plaintiff on temporary lease and he is entitled for decree of declaration and permanent injunction.

5. On an appeal being preferred by the defendant/State before the First Appellate Court, the First Appellate Court rejected the plaintiff under Order 7 Rule 11 (a) of the CPC holding that the plaintiff does not disclose triable cause of action and notice under Section 80 of the CPC was not served prior to institution of suit.

6. Assailing legality, validity and correctness of the judgment and decree passed by the First Appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been framed by this Court, which has been set-out in the opening paragraph of this judgment.

7. Ms Hamida Siddiqui, learned counsel for the appellants/plaintiff, would submit that there is no plea in the written statement filed by the defendant that plaintiff does not disclose any triable cause of action. In fact, suit was filed after service of notice Ex.P/22 dated 14.2.1983 and the trial Court has clearly struck the issue and recorded a finding in

para 10 holding notice under Section 80 of the CPC was duly served before filing suit, as such, the First Appellate Court could not have rejected the plaint under Order 7 Rule 11 (a) of the CPC as it is not case of the defendant that plaint does not disclose the triable cause of action.

8. On the other hand, Mr.Arun Sao, learned Deputy Advocate General appearing for the respondent/defendant, would submit that the First Appellate Court is absolutely justified in rejecting the plaint under Order 7 Rule 11(a) of the CPC as Section 80 of the CPC was not complied with while filing suit. Therefore, the second appeal deserves to be dismissed.

9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

10. Notice under Section 80 of the CPC was served to the defendant/State on 14.2.83 and thereafter, suit was filed on 4.9.84 stating inter-alia that cause of action arose on 26.8.84. The trial Court has answered Issue No.4 holding that the plaintiff has served a notice to the Collector under Section 80 of the CPC. That has neither been questioned nor it has not been challenged by the defendant/State as the trial Court has returned a finding that notice under Section 80 (1) of the CPC was duly served to the defendant. In an appeal filed by the State, the First Appellate Court has held that since notice under Section

80 of the CPC was served to the Collector on 14.2.83 with respect to suit land vide Ex.P/22 and thereafter the order of the Commissioner was passed on 14.7.1983, therefore, fresh notice ought to have been issued under Section 80 of the CPC before filing suit on 4.9.84 as cause of action arose on 26.8.84.

11. A careful perusal of the written statement would show that no such plea of want of second notice under Section 80 of the CPC was taken by the defendant before the trial Court. Even no cross-examination of the plaintiff with regard to notice under Section 80 of the CPC Ex.P/22 on behalf of the defendant/State.

12. It is well settled that service of notice under Section 80 CPC is a condition precedent for institution of suit against the Government or a public officer. It imposes a statutory and unqualified obligation and in absence thereof, suit is not maintainable, except where S. 80(2) applies.

13. In the matter of **State of A.P. and others v. Pioneer Builders, A.P.**¹ Their Lordships of the Supreme Court have clearly held as under:-

“16. Thus, in conformity therewith, by the Code of Civil Procedure (Amendment) Act, 1976 the existing Section 80 was renumbered as Section 80(1) and sub-sections (2) and (3) were inserted with effect from 1-2-1977. Sub-section (2) carved out an exception to the mandatory rule that no suit can be filed against the Government or a public officer unless two months' notice has been served on such Government or public

¹ (2006) 12 SCC 119

officer. The provision mitigates the rigours of sub-section (1) and empowers the court to allow a person to institute a suit without serving any notice under sub-section (1) in case it finds that the suit is for the purpose of obtaining an urgent and immediate relief against the Government or a public officer. But, the court cannot grant relief under the sub-section unless a reasonable opportunity is given to the Government or public officer to show cause in respect of the relief prayed for. The proviso to the said sub-section enjoins that in case the court is of the opinion that no urgent and immediate relief should be granted, it shall return the plaint for presentation to it after complying with the requirements of sub-section (1). Sub-section (3), though not relevant for the present case, seeks to bring in the rule of substantial compliance and tends to relax the rigour of sub-section (1).

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.”

14. The above-stated principle of law laid-down in **Pioneer Builders** (supra) has been followed with approval by the Supreme Court in the matter of **State of Kerala and others v. Sudhir Kumar Sharma and others**².

15. In the instant case, though notice under Section 80 of the CPC

² (2013) 10 SCC 178

was served to the Collector by notice dated 14.2.83 and thereafter suit was filed on 4.9.84, but the State did not raise any issue regarding non-service of fresh/second notice under Section 80 of the CPC while filing written statement before the trial Court. In fact, the defendant/State is deemed to have waived the objection, if any, with regard to want of fresh/second notice under Section 80 of the CPC.

16. The Supreme Court in the matter of **Pioneer Builders** (supra) has held that plea as to want of notice under Section 80 of the CPC can be waived off by the State. It was held as under:-

“19.....Accordingly, we decline to interfere with the finding recorded by the High Court on this aspect of the matter. The High Court has held 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 High Court has also observed that knowing fully well about non-issue of notice under Section 80 CPC 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. It goes without saying that the question whether in fact, there is waiver or not necessarily depends on facts of each case and is liable to be tried by the Court, if raised, which, as noted above, is not the case here.”

17. In view of the aforesaid principle of law laid-down by the Supreme Court in **Pioneer Builders** (supra), it was not open to the State to raise new plea of want of fresh/second notice under Section 80 of the CPC before the First Appellate Court as it is deemed to have waived such objection and the First Appellate Court ought not to have rejected the plaint on new ground invented by the State of alleged want of

fresh/second notice under Section 80 of the CPC in the fresh appeal.

18. Accordingly, the judgment and decree passed by the First Appellate Court is hereby set aside. The matter is remitted to the First Appellate Court for hearing and disposal of first appeal on merits in accordance with law. The parties shall appear before the First Appellate Court on **3rd October, 2018**. No fresh notice need to be issued. The First Appellate Court shall dispose of the appeal within three months from the said date as suit itself was instituted way back on 4.9.84.

19. The second appeal is allowed to the extent indicated hereinabove. A decree be drawn up accordingly. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-