

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION NO. 1063 OF 2018

Ashish S/o Subhashchandra Gupta,
Aged about 30 years, Occ. Business,
R/o Plot No.5, Perna Nagar, Near
Afzal Bakery, Friends Colony, Katol
Road, Nagpur

...Petitioner

// VERSUS //

1. The State of Maharashtra, Department of Forest, through Collector, Civil Lines, Nagpur
2. Chief Conservator of Forest (Territorial) Nagpur, near Government Printing Press, Civil Lines, Nagpur 440 001
3. Public Works Department of Government of Maharashtra, Nagpur Region, Nagpur, through its Chief Engineer, Bandhkam Sankul, B.No. 39/1, Civil Lines, Nagpur

... Respondents

Shri N.A.Lalwani, Advocate for the petitioner.
Ms. H.N.Jaipurkar, AGP for the respondent nos. 1 to 3.

CORAM : ANIL S. KILOR, J.

DATED : 1st MARCH, 2023.

ORAL JUDGMENT :

Heard. Rule. Rule made returnable forthwith heard finally by consent of the parties.

2. In this writ petition, the challenge is raised to the order below exhibit 5 dated 16th February, 2018, rejecting the application Exhibit 5

and order below exhibit 1 dated 16th February, 2018, returning the complaint for compliance of Section 80(2) of the Code of Civil Procedure, 1908 (in short referred as “CPC”).

3. In this writ petition while issuing notice on 23rd February, 2018 interim relief was granted in terms of prayer clauses (c) and (d) which read thus:

(c) stay the impugned order dated 16th February, 2018, passed by the learned 8th Joint Civil Judge, Senior Division, Nagpur in Regular Civil Suit No. 142 of 2018 below Exhibit 1 i.e. Annexure-J during the pendency of present writ petition.

(d) by way of interim relief restrain the respondent nos. 1 and 2 from obstructing the petitioner to use the road towards the eastern side to approach his building at Plot No.88 and 89 at Khasra No. 149, 164/3, Mouza Zingabai Takli during the pendency of the present writ petition.

4. Thus, it is clear that from last five years, the interim relief is in operation and the only issue involved in this case is whether waiver of requirement of Section 80(1) of CPC, was rightly refused by the trial Court.

5. From the record, it is evident that prior to filing of suit in the writ petition filed before the Division Bench, defendants were party and they had knowledge about the dispute.

6. In the reply filed by the respondent except the pleading that no notice under Section 80 was served, no pleadings made denying urgent hearing of the matter by waiving the requirement of Section 80 of CPC.

7. The Hon'ble Supreme Court of India in the case of *State of Andhra Pradesh and others Vs. M/s Pioneer Builders, A.P.*¹ had an occasion to examine the intention of the legislature to provide Section 80 of CPC. The Hon'ble Apex Court has held thus:

“15. 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 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. 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).

16. Thus from a conjoint reading of sub-sections (1) and (2) of Section 80, the legislative intent is clear, namely, service of notice

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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.

17. Having regard to the legislative intent noticed above, it needs little emphasis that the power conferred in the Court under sub-section (2) is to avoid genuine hardship and is, therefore, coupled with a duty to grant leave to institute a suit without complying with the requirements of sub-section (1) thereof, bearing in mind only the urgency of the relief prayed for and not the merits of the case. Moreso, when want of notice under sub-section (1) is also made good by providing that even in urgent matters relief under this provision shall not be granted without giving a reasonable opportunity to the Government or a public officer to show cause in respect of the relief prayed for. The provision also mandates that if the Court is of the opinion that no urgent or immediate relief deserves to be granted it should return the plaint for presentation after complying with the requirements contemplated in sub-section (1)."

8. Thus, considering the above referred observations, I am of the opinion that the learned trial Court has committed error in refusing to waive the requirement of Section 80, particularly in the light of the urgency pointed out by the petitioner and considering the rights of the petitioner to have a approach way, in view of the fact that NIT had acquired the part of the land of the petitioner for constructing the road.

9. In the above referred facts and circumstances of the case, I am of the opinion that the requirement of Section 80(1) of the CPC needs to be waived with the directions to decide the application exhibit 5 afresh after hearing both the parties. Accordingly, I pass the following order.

- i. The writ petition is allowed.
- ii. Order below exhibit 5 dated 16th February, 2018 and order below exhibit 1 dated 16th February, 2018 are hereby quashed and set aside. The requirement of Section 80(1) of CPC is hereby waived;
- iii. The trial Court is directed to decide the application exhibit 5 for temporary injunction afresh without influence by the observations made in the order dated 16th February, 2018 passed below exhibit 5.
- iv. The parties shall appear before the trial Court on **15th March, 2023.**
- v. In the meantime, interim relief granted by this Court on 23rd February, 2018, shall continue till the decision of application exhibit 5.

[ANIL S. KILOR, J.]

SACHINDANAND
K NAIR

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