

A M/S. BAJAJ HINDUSTAN SUGAR & INDUSTRIES LIMITED
v.
BALRAMPUR CHINI MILLS LTD. AND ORS.

MARCH 19, 2007

B [DR. AR. LAKSHMANAN AND ALTMAS KABIR, JJ.]

Code of Civil Procedure, 1908; Section 80(1) & (2):

C *Setting up of a sugar factory by a company within prohibited distance limit from the proposed Unit of appellant-company—Appellant-company filing a suit/application under Section 80(2) C.P.C. against respondent-company and Union of India—No notice u/s 80(1) issued prior to filing of such application—Trial Court directing appellant-company to ensure compliance of Section 80(1) CPC—Revision Petition—High Court directing trial Court to reconsider the matter—On appeal, Held: High Court merely remitted the matter to trial Court to re-decide the entire matter as order passed by it earlier was non reasoned and non-speaking—Defendants in the suit were not served with notice u/s 80(1) of the Code—Suit against them could not be instituted without complying with the provisions of Section 80(2) and without leave of the Court—Since leave was refused, the question of institution of the suit does not arise—Under such circumstances, it is open to the superior Courts to grant such leave—However, High Court has not granted such leave but directed the trial Court to re-consider the matter—Trial Court is bound to re-consider the question of grant of leave in terms of the directions of High Court—Hence, no reason is found to interfere with the order passed by the High Court.*

F **Appellant is a registered company engaged in the manufacture of sugar and has various industrial undertakings at different sites in Uttar Pradesh. Union of India issued a directive making it compulsory to obtain Licence before establishing new Sugar factories and also made it mandatory for such sugar factories to maintain a minimum distance of 15 Kms. from the existing sugar mill. Respondent No. 5 proposed to set up a sugar mill at Itai Maida, which was within 15 Kms. from the proposed unit of the appellant-company at Kalu Bankat. The appellant filed a suit in the Court of Civil Judge against the Union of India and its authorities and Respondent No.5 *inter alia* for granting a**

decreed against respondent No.5 by not allowing it to establish the factory within the prohibited distance limit. Since the suit was filed against the Union of India, an application was also made under Section 80 (2) of the Code of Civil Procedure for grant of leave to proceed against the Government and its authorities. However, no notice in terms of Section 80 (1) of the Code was served upon them/him. The Court did not grant the relief observing that there was no urgency in the matter, which warranted immediate relief and the appellant was directed to ensure compliance of Section 80 (1) of the Code. Aggrieved, the appellants filed Revision Petition in the High Court. While admitting the revision petition, the High Court directed Respondent Nos. 5 and 6 to maintain *status quo* and they were restrained from continuing with any developmental or construction activities at the proposed site. Respondent Nos. 5 and 6 filed an application for vacation of the interim order. Both the revision petition as well as the application for vacating the interim order, were taken up for hearing together for final disposal by the High Court. Disposing of the Revision Petition, High Court directed the trial Court to reconsider the matter and the parties were directed to make all the submissions before the competent Court of law and the same may be appreciated and considered by the Court. Hence the present appeal.

Appellants contended that after the order passed by the High Court directing the trial Court to hear his application for interim relief, the trial Court without doing so had in fact directed that the appellant's application under Section 80 (2) of the Code be re-heard; that the trial Court should have decided the application for interim relief without re-opening the question of grant of leave under Section 80 (2) of the Code; that by directing the Trial Court to hear the appellant's application for interim relief, it had dispensed with the requirement of Section 80 (2) of the Code or had impliedly allowed the appellant's application for leave. It was, therefore, no longer open to the Trial Court to direct re-hearing of the application under Section 80 (2) of the Code instead of deciding the application for interim relief on its merits; that even if the suit could not be registered as far as the Union of India and its authorities were concerned, the same could have been registered against the private respondents instead of the plaint being returned to the plaintiff; that since the appellants had filed an Industrial Entrepreneurship Memorandum (IEM) for Kalu Bankat as well, the project of the respondent No. 5 to set up a sugar mill at the proposed site was in contravention of the rules relating to maintenance of a minimum distance of 15 Kms. between two units; that on such score also, the respondent Nos. 5 and 6 were not entitled to continue with the proposed construction work; that the High Court erred in vacating

- A the interim order at the time of final hearing and also in directing the trial Court to reconsider the matter; that it was not only the High Court which committed an error in remitting the matter to the trial Court for a fresh decision on the self-same matter, but even the trial Court misunderstood the scope of the order passed by the High Court; that both the orders of the High Court as well as that of the trial Court are liable to be set aside with a further direction to hear the application for interim orders; that when the original court where the suit was to be filed had refused leave under Section 80 (2) of the Code and the plaint was returned, the plaintiff was entitled to invoke the revisional jurisdiction of the High Court under Section 115 of the Code; that when the trial Court had refused to grant leave, it was always open to the revisional court to grant such leave provided it was satisfied that such a case had been made out; that the leave could also be said to have been granted by implication when no express language was used in that behalf; that when the High Court remitted the matter to the trial court for a decision on the interim relief as well, it could be presumed that leave to file the suit under Section 80 (2) of the Code had impliedly been granted; and that when leave had been refused by the trial court under Section 80 (2) of the Code it was always open to the High Court to grant such leave under its revisional jurisdiction.

E Respondent submitted that since the appellants had ultimately decided as would be evident from their letter dated 9th August, 2005, not to proceed with the proposal to set up a separate sugar unit at Kalu Bankat, which was within the prohibited limit of 15 Kms. from their establishment at Datauli, the High Court had not committed any jurisdictional error which warranted interference of this Court.

Dismissing the appeal, the Court

- F HELD: 1.1. It cannot be said that the High Court had acted without jurisdiction or in excess of jurisdiction in vacating the interim order and directing the trial Court to reconsider the matter. The High Court merely remitted the matter to the trial Court to re-decide the entire matter on the concession that the impugned order passed by the trial court on 18th January, 2007, was a non-reasoned and non-speaking order. The said concession was obviously with regard to the rejection of the plaintiff's prayer for grant of leave under Section 80 (2) CPC. [Para 29] [142-B, C]

H 1.2. Without serving notice under Section 80 (1) of the Code, the suit could not have been instituted against the defendants-Union of India and its authorities without compliance with the provisions of Section 80 (2) CPC.

The appellants were fully aware of the said provision and accordingly, an application was made under Section 80 (2) CPC for grant of such leave, which was refused. [Para 30] [142-D, E, F]

1.3. 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 that stage. The trial Court does not also appear to have committed any illegality in taking up the petitioners' application for grant of leave once again.

[Para 31 and 32] [143-B, C]

1.4. The language of Section 80 (2) CPC leads this Court 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 giving notice. In the instant case, the High Court has not granted such leave while disposing of the revision petition filed by the appellant-company and the trial Court was bound to reconsider the question of grant of leave in the light of the observations made by the High Court. In such circumstances, no reason is found to interfere with the order passed by the High Court. Trial Court is directed to dispose of the plaintiff's application for grant of leave under Section 80 (2) CPC.

[Paras 34, 35, 36 and 37] [143-G-H; 144-A-B-C]

State of A.P. & Ors. v. M/s. Pioneer Builders, A.P., (2006) 9 Scale page 52, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1451 of 2007.

From the Final Judgment and Order dated 25.01.2001 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Civil Revision No. 16 of 2007.

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Civil Appeal No. 1452 of 2007.

Mukul Rohtagi, Rajeev Dutta, Gaurab Banerjee, Bhargava V. Desai, Uday Kumar, Sanjeev Kumar Singh, Gaurav Bhatia, Sayeda Hina Rizvi and Syed Shahid Hussain Rizvi for the Appellant.

A Shanti Bhushan, R.N. Trivedi, Jayant Bhushan, Mahesh Agarwal, Gaurav Goel, Akhilesh Kalra, Ankur Chawala, Sanjeev Kumar and Vikram Bajaj (for M/s. Khaitan & Co.) for the Respondents.

The Judgment of the Court was delivered by

B **ALTAMAS KABIR, J.** 1. Leave granted in both the special leave petitions.

C 2. These two civil appeals have been taken up one after the other since both arise out of the same proceedings. While Civil Appeal arising out of SLP (C) No. 1983 of 2007 was directed against the interim order passed in the proceedings, the Civil Appeal arising out of SLP (C) No. 3855 of 2007 was filed against the final order. The interim order from which the first appeal was filed has since merged with the final order and has therefore been rendered infructuous.

D 3. Civil Appeal arising out of SLP (C) No. 1983 of 2007 is therefore dismissed as infructuous.

E 4. Civil Appeal arising out of SLP (C) No. 3855 of 2007 has been filed by M/s. Balrampur Chini Mills Ltd. against the order passed by the High Court of Uttar Pradesh, Lucknow Bench, in Civil Revision Petition No. 16 of 2007, allowing the revision and granting final relief in favour of the revisioner petitioner in the High Court.

5. In order to appreciate the order passed by the High Court, it is necessary to set out some of the facts leading to the filing of the said revision petition.

F 6. The appellant before us is a registered company engaged in the manufacture of sugar and has various industrial undertakings at different sites in Uttar Pradesh. On 31.08.1998, a press note was issued by the Industries' Ministry requiring compulsory licensing and it was also provided that new sugar factories, when established, would have to maintain a minimum distance of 15 Kms. from an existing sugar mill.

G 7. Alleging that M/s. Bajaj Hindustan Sugar & Industries Limited (formerly known as the Pratappur Sugar & Industries Limited), the respondent No. 5 in this proceeding, was setting up a sugar mill at Itai Maida, which was within 15 Kms. of the proposed unit of the appellant-company at Kalu Bankat, the appellant filed a suit in the Court of Civil Judge (Senior Division) Balrampur,

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being No. 2 of 2006, against the Union of India and its authorities and M/s. Bajaj Hindustan Sugar & Industries Limited *inter alia* for a decree declaring that on filing of the Performance Bank Guarantee, the Kalu Bankat unit of the appellant-company had become a new sugar factory, as such, no proposed factory could be permitted within 15 Kms. of the proposed unit of the appellant-company at Kalu Bankat.

8. Since the suit was filed against the Union of India, an application was also made under Section 80 (2) of the Code of Civil Procedure (hereinafter referred to as 'the Code', for short) for grant of leave to proceed against the Government and its authorities without service of notice under Section 80 (1) of the said Code. It was prayed that compliance as envisaged under Section 80 (2) of the Code, be dispensed with on account of the urgency involved. The said application was taken up for consideration by the learned Civil Judge on 18.01.2007. Holding that on a perusal of the plaint, there was no urgency in the matter, which warranted immediate relief, the leave prayed for by the appellant was not granted and the appellant was directed to ensure compliance of Section 80 (1) of the Code and thereafter to place the suit. The plaint was accordingly returned to the appellant (plaintiff) as per law.

9. Aggrieved by the said order of the learned Civil Judge, the appellants herein filed Civil Revision No. 16 of 2007 in the Allahabad High Court, Lucknow Bench. In the revision, apart from praying for the order dated 18.01.2007 of the learned Civil Judge to be set aside, the appellants also prayed for a direction from the learned Civil Judge to *register the case* (emphasis added) and to hear the application filed by the appellants on merits and till the said application was decided, the respondents be required not to take any steps which could permit the respondent Nos. 5 and 6 to set up their industrial undertaking at Itai Maida and also to restrain the others from continuing their developmental activities from their site at the said location.

10. Initially, while admitting the revision petition, the High Court directed the respondent Nos. 5 and 6 to maintain *status quo* and they were restrained from continuing with any developmental or construction activities at Itai Maida. As indicated hereinbefore, the first civil appeal was directed against the said interim order.

11. After the revision petition had been admitted and the interim order had been passed, the respondent Nos. 5 and 6 filed an application for vacation of the interim order passed on 25.01.2007. *Inasmuch* as, a counter affidavit had also been filed by the said respondents in the main revision petition, both

A the revision petition as well as the application for vacating the interim order, were taken up for hearing together for final disposal on 20.01.2007 with the consent of the counsel for both the parties. After a contested hearing, the High Court decided not to enter into the merits of the case and passed the following order.

B “The trial court, the Civil Judge (Senior Division), Balrampur is directed to reconsider the matter. The revisionists may present the application seeking interim relief before the competent court of law and put forth their respective versions and place the legal precedents. Since the actions of the State Government and the Government of India are also involved in this civil revision, let their version may also be taken into account. It may be open for the parties to make all these submissions before the trial court, competent court and the same may be appreciated and considered by the competent court. It is expected from the competent court to pass a reasoned and speaking order or orders after judicially scrutinizing the matter in accordance with law. However, in the interest of justice, it is made clear that the civil court shall adjudicate the matter with an open and independent mind. It shall be free to pass any order in accordance with law following relevant provisions of C.P.C., Evidence Act and other laws without being influenced by this order or the last interim order passed by this Court on 25.01.2007.

E With the above observations and directions, the civil revision is finally disposed of. The interim order granted by this Court on 25.01.2005 is vacated.”

F 12. It is against the said order of the High Court by which the interim order was vacated and the Civil Revision was finally disposed of that the second civil appeal has been filed.

G 13. Appearing in support of the appeal, Mr. Harish Salve, Senior Advocate, and Mr. Rohinton Nariman, Senior Advocate, submitted that after the order passed by the High Court directing the learned trial Judge to hear out the appellant’s application for interim relief, the learned Civil Judge without doing so had in fact by his order dated 23.02.2007 directed that the appellant’s application under Section 80 (2) of the Code be re-heard. Mr. Salve submitted that the learned Civil Judge should have decided the appellant’s application for interim relief without re-opening the question of grant of leave under H Section 80 (2) of the Code. According to Mr. Salve, by directing the learned

Trial Judge to hear out the appellant's application for interim relief, it had dispensed with the requirement of Section 80 (2) of the Code or had impliedly allowed the appellant's application for leave. It was, therefore, no longer open to the learned Trial Judge to direct re-hearing of the appellant's application under Section 80 (2) of the Code instead of deciding the application for interim relief on its merits.

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14. Mr. Salve urged that even if the suit could not be registered as far as the Union of India and its authorities were concerned, the same could have been registered against the private respondents instead of the plaint being returned to the plaintiff.

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15. On merits, Mr. Salve, contended that since the appellants had filed an Industrial Entrepreneurship Memorandum (IEM) for Kalu Bankat as well, the project of the respondent No. 5 to set up a sugar mill at Itai Maida was in contravention of the rules relating to maintenance of a minimum distance of 15 Kms. between two units. Mr. Salve submitted that on such score also, the respondent Nos. 5 and 6 were not entitled to continue with the construction work at Itai Maida.

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16. Mr. Salve urged that having granted an interim order on a detailed discussion of the facts at the time of admission of the revision, the High Court erred in vacating such order at the time of final hearing and to direct the trial court to reconsider the matter. However, according to Mr. Salve, it was not only the High Court which committed an error in remitting the matter to the trial Judge for a fresh decision on the self-same matter, but even the trial Judge misunderstood the scope of the order passed by the High Court in reconsidering not the application for interim order but the application for grant of leave under Section 80 (2) of the Code. Mr. Salve urged that both the orders of the High Court as well as that of the trial Judge were liable to be set aside with a further direction to hear out the application for interim orders.

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17. Mr. Venugopal and Mr. Mukul Rohtagi along with Mr. Rajiv Dutta, Senior Advocates, strongly opposed Mr. Salve's submissions and urged that neither the High Court nor the learned trial Judge had committed any error and/or illegality which required any correction in the instant special leave petition. Mr. Venugopal submitted that upon a reconsideration of the matter, the High Court, at the time of final hearing of the revision petition and the application for vacating the interim order, concluded that the trial Judge

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A should consider the grant of interim order in the suit and accordingly directed the trial Judge to reconsider the matter.

B 18. Reference was made to the order of the High Court impugned in the appeal where it had been recorded that the learned counsel of both parties had agreed that the order of the trial court dated 18th January, 2007, was a non-reasoned and non-speaking order and in that factual matrix the High Court had remitted the matter to the trial court for reconsidering the matter. In the process, the revisionists were given the liberty to also place their application for interim relief. It was urged that the matter relating to grant of leave had been left to be decided by the trial court.

C 19. On the merits, as argued by Mr. Salve, Mr. Venugopal submitted that, in any event, the case made out by the appellants had no foundation, inasmuch as, the appellants had ultimately decided as would be evident from their letter dated 9th August, 2005, not to proceed with the proposal to set up a separate sugar unit at Kalu Bankat, which was within 15 Kms. of their establishment at Datauli. Mr. Venugopal urged that the High Court had not committed any jurisdictional error which warranted the interference of this Court in this Appeal.

D 20. Mr. Shanti Bhushan, learned senior advocate, who appeared for the appellant at a later stage of the proceedings, urged that when the original court where the suit was to be filed had refused leave under Section 80 (2) of the Code and the plaint was returned, the plaintiff was entitled to invoke the revisional jurisdiction of the High Court under Section 115 of the Code of Civil Procedure, as amended in its application to Uttar Pradesh.

E 21. He then urged that when the trial court had refused to grant leave, it was always open to the revisional court to grant such leave provided it was satisfied that such a case had been made out. According to him, the language of Section 80 (2) of the Code did not restrict its application to the court of original jurisdiction alone.

F 22. Mr. Shanti Bhushan also urged that leave could also be said to have been granted by implication when no express language was used in that behalf. In support of his contention, Mr. Shanti Bhushan relied on a decision of the Calcutta High Court in *Smt. Janak Rani Devi v. Chandrabati Devi & Anr.*, reported in A.I.R. (2002), Calcutta, page 11, wherein it was observed, *inter alia* as follows:-

“.....However, my reading of sub-section (2) of Section 80 of the Code of Civil Procedure is that no separate application and an express order are the essential requisites; such leave could be presumed; the leave need not be granted by passing a formal order. The leave under sub-section (2) of Section 80 could be implied and could be granted from what the Court does.”

23. Mr. Shanti Bhushan also referred to two other decisions of the Delhi High Court and Kerala High Court reported in 111 (2004) Delhi Law Times, page 33 and AIR 1989 (Kerala) page 276, where similar views have been expressed.

24. Mr. Shanti Bhushan submitted that when the High Court remitted the matter to the trial court for a decision on the interim relief as well, it could be presumed that leave to file the suit under Section 80 (2) of the Code had impliedly been granted.

25. Mr. Shanti Bhushan lastly submitted that the superior courts were always within their jurisdiction to vary or reverse the order passed by the lower courts in exercise of the powers vested in them in revision or in appeal. According to learned counsel, when leave had been refused by the trial court under Section 80 (2) of the Code it was always open to the High Court to grant such leave under its revisional jurisdiction.

26. A few decisions in this regard with reference to Order XXXIII Rule 5 of the Code was relied upon by Mr. Shanti Bhushan wherein the High Court in revisional jurisdiction granted leave to the plaintiff to file his suit as *forma pauperis* even though such prayer had been refused by the trial court. The same are as follows:-

1. AIR (1952) Allahabad page 582 *S.E. Orde v. Mrs. T.C. Deacon & Anr.*
2. AIR 1955 Patna, page 257 *Raghuraj Singh & Anr. v. Mst. Sitapati Kuer & Ors.* and
3. AIR 1975 Gujarat, page 94 *Rambhai Punjabhai Vinchiya v. The Gujarat State Road Transport Corporation, Ahmedabad & Anr.*

27. Mr. Shanti Bhushan submitted that by the same principle it must be held that the High Court had the jurisdiction to grant leave under Section 80 (2) of the Code, once such leave was refused by the court of original jurisdiction.

A 28. Although, the order passed by the learned trial Judge, upon the matter being remitted by the High Court, is not the subject matter of the special leave petition, it has been brought to the notice of this Court that the matter was directed to be re-heard by the trial Judge on the question of grant of leave under Section 80 (2) of the Code and the said application was fixed by the learned trial Judge for filing of objections and disposal.

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29. We have carefully considered the submissions made on behalf of the respective parties and we fail to see how it can be contended that the High Court had acted without jurisdiction or in excess of jurisdiction in vacating the interim order and directing the learned trial Judge to reconsider the matter. The High Court merely remitted the matter to the learned trial Judge to re-decide the entire matter on the concession that the impugned order passed by the trial court on 18th January, 2007, was a non-reasoned and non-speaking order. The said concession was obviously with regard to the rejection of the plaintiff's prayer for grant of leave under Section 80 (2) of the Code.

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30. There can be no dispute that once the plaint was returned, there was no suit pending before the trial Judge. Without the suit being registered the question of considering the application for interim orders also did not arise. The provisions of Section 80 (1) of the Code make it very clear that except in the manner provided in sub-Section (2), no suit can be instituted against the Government and its authorities in respect of any act purported to have been done by such authority in its official capacity until the expiration of two months after notice in writing has been delivered to or left at the office of the authorities named therein. Admittedly, the defendant Nos. 1-4 in the suit, were the Union of India and its authorities and without notice under Section 80 (1) of the Code, the suit could not have been instituted against them without compliance with the provisions of Section 80 (2) of the Code. The appellants were fully aware of the said provision and accordingly, an application was made under Section 80 (2) of the Code for grant of such leave, which was refused. Section 80(2) provides as follows:-

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“(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

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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).”

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 that stage.

32. The learned trial Judge does not also appear to have committed any illegality in taking up the petitioners’ application for grant of leave once again.

33. The decisions cited by Mr. Shanti Bhushan on the question of implied leave was countered by Mr. Mukul Rohatgi with the decision of this Court in *State of A.P. & Ors. v. M/s. Pioneer Builders, A.P.*, reported in (2006) 9 Scale page 520, wherein in paragraph 16 it has been observed as follows:-

“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.”

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

A without remedy once such leave is refused and he is required to wait out the statutory period of two months after giving notice.

B 35. However, in the instant case, the High Court has not granted such leave while disposing of the revision filed by the appellant-company and the trial court was bound to reconsider the question of grant of leave in the light of the observations made by the High Court.

36. In such circumstances, we see no reason to interfere with the order passed by the High Court, impugned in this appeal and the same is accordingly dismissed.

C 37. The learned trial court is directed to dispose of the plaintiff's application for grant of leave under Section 80 (2) of the Code within ten days from the date of the receipt of this order.

38. There will be no order as to costs.

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Appeal dismissed.