

(1968) 11 CAL CK 0005
In the Calcutta High Court
Case No : Suit No. 138 of 1945

Bengal River Service Company Limited	APPELLANT
Vs	
Governor-General in Council (The Islamic Republic of Pakistan)	RESPONDENT

Date of Decision : 12-11-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 4, 83, 84, 84, 85, 85
Government of India Act, 1935 — Section 175(3), 175(3)

Citation : 73 CWN 125

Hon'ble Judges : S.C. Deb, J

Bench : Single Bench

Advocate : N.N. Dutt, for the Appellant; Shankar Ghose for Pakistan, for the Respondent

Judgement

S.C. Deb, J.—This suit was instituted on the 25th January 1945 against the then Governor-General in Council of undivided India for recovery of a sum of Rs. 1,21,656-9-3. In the plaint it is alleged that between Oct. 1942 and April 1943 the then Governor-General in Council employed the plaintiff to carry stone ballast from Chhatak to Bhairab, from Chhatak to Ghorashal, from Luba-mouth to Bhairab and from Luba-mouth to Ghorashal. The rates upon which the Governor-General in Council agreed to pay for carrying the said materials are also set out in the plaint. In paragraph 3 of the plaint it is alleged that the terms of employment were agreed orally and by means of correspondence. According to the plaint the said goods were carried by the plaintiff to the destinations above mentioned and from October 25, 1942 to 25th May, 1943 the plaintiff submitted detailed statements in respect of particulars of the said materials supplied to the then Governor-General in Council and a sum of Rs. 1,21,656-9-3 became due and payable by the Governor-General in Council to the plaintiff.

2. On 9th April 1947 the written statement was filed on behalf of the Governor-General in Council admitting the contract in suit and stating that the said agreement was subsequently embodied in an instrument in writing executed by

both the parties. After further admitting that diverse quantities of the said materials were supplied by the plaintiff to the Governor-General in Council, in the written statement the Governor-General in Council denied the claim of the plaintiff and expressly pleaded that the plaintiff had committed a breach of the said agreement for which the Governor-General in Council had suffered loss and damages and claimed a sum of Rs. 26,536-1-0 by way of set off or such other sum by way of set off as the Court might award for such loss and damages.

3. During the pendency of the suit India was divided and the Dominion of Pakistan was substituted in place of the Governor-General in Council and the plaint was amended. Further substitution was made later on bringing the Islamic Republic of Pakistan in place of Dominion of Pakistan and the plaint was further amended accordingly. Warrants of Attorney were filed on behalf of the Dominion of Pakistan and the Islamic Republic of Pakistan but no additional written statements were filed at any point of time dealing with the amended portion of the plaint.

4. It is to be noted that all the territories above mentioned now form part of Western Pakistan. One Satyaranjan Chatterjee who was an officer of the plaintiff give evidence in this suit and proved Ex. F. which is a copy of the original contract relied on by the Governor-General in Council in the written statement. The original of Ex. F. was in possession of the then Governor-General in Council and was disclosed as document No. 7 in the affidavit of documents affirmed by Mohitosh Shaw on behalf of the Governor-General in Council and was filed by Mr. S.K. Mondal, solicitor to the Central Government at Calcutta. Notice was served by the plaintiff's solicitor to produce the original contract but the same was not produced. This Ex. F. shows that the original agreement was signed on the 25th October 1943 by the Superintending Engineer, Eastern Aviation Circle, Central P. W. D., who accepted the tender on behalf of the Governor-General of India in Council.

5. The plaintiff's said witness also proved the goods in suit were delivered to the representative of the Governor-General in Council in the places mentioned in the plaint which are now situate in East Pakistan. Challan-Registers (Exts. G-1 and G-2) of the plaintiff for the year 1942-43 proved by the plaintiff's witness show that the total quantities of materials as alleged in the plaint were delivered by the plaintiff to the representative of the Governor-General in Council. Apart from the oral testimony of the plaintiff's witness Ex. F. proves the rates of the said materials supplied by the plaintiff. The plaintiff's said witness has also proved that the total amount payable by the then Governor-General in India was Rs. 2,71,475-9-3 out of which a total sum of Rs. 1,49,800 was paid. According to the plaintiff's witness the balance sum of Rs. 1,21,656 -9-3 remained due and unpaid at the time of institution of this suit.

6. I am satisfied on the evidence and documents before me that the balance sum of Rs. 1,21,656-9-3 was not paid by the Governor-General in Council to the plaintiff.

7. At this stage it is necessary to record here that when the suit was called on for hearing no one appeared for the Islamic Republic of Pakistan which is hereinafter referred to as Pakistan and after the evidence adduced on behalf of the plaintiff was concluded and I was about to deliver my judgment the learned counsel Mr. Shankar Ghosh sought my leave to appear for Pakistan and expressly told me that he would not cross-examine plaintiff's witness nor he would lead any evidence on behalf of Pakistan and would only argue on the following two points as pure questions of law for which no formal issues need be raised:

(1) The suit is not maintainable on the ground that the plaintiff did not take any consent in writing of the Central Government u/s 86(1) of the CPC to continue with the suit against Pakistan, and

(2) this Court has no jurisdiction to try this suit on the ground that Pakistan is immuned from being sued in the Municipal Courts of India in accordance with the doctrine of International Law.

8. I asked the learned counsel Mr. Nripendra Nath Dutt, appearing for the plaintiff, whether he wanted an adjournment to enable the plaintiff to obtain consent of the Central Government but he expressly told me that no adjournment was required as according to him consent of the Central Government was not necessary in view of the Articles 8(1) and 12(1) of the Indian Independence (Rights, Property and Liabilities) Order, 1947. Mr. Dutt further told me that as these two points sought to be urged by Mr. Ghosh were of some importance I should decide them. Under the circumstances, instead of delivering my judgment I allowed both of them to place their respective points of view.

9. During the pendency of this suit the British Government divided India as from the 15th August, 1947 into two independent Dominions known respectively as India and Pakistan by the Indian Independence Act, 1947. By section 7 of the said Act the para-mountcy of the British Crown lapsed over the then Indian States and excepting few Indian States most of them integrated with India with effect from the 15th August, 1947.

10. In order to carry out the object of the and in exercise of the powers conferred by section 9 of the Act the then Governor General of the undivided India promulgated Indian Independence (Rights, Property and Liabilities) Order of 1947 to provide for the initial distribution of rights, property and liabilities between the two Dominions and Articles 8(1) and 12(1) of the said Order relied on by Mr. Dutt are set out hereunder:

Article 8 (1) - Any contract made on behalf of the Governor-General in Council before the appointed day shall, from that day, -

(a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and

(b) in any other case, be deemed to have been made on behalf of the Dominion

of India instead of the Governor-General in Council;

and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India, as the case may be.

Article 12 (1) - Where immediately before the appointed day the Governor-General in Council is a party to any legal proceedings with respect to any property, rights or liabilities transferred by this Order, the Dominion which succeeds to the property, rights or liabilities in accordance with the provisions of this Order shall be deemed to be substituted for the Governor-General in Council as a party to those proceedings, and the proceedings may continue accordingly.

11. Leaving aside the words which are not necessary for consideration in this suit, Article 8(1) of the Order expressly provides that the contracts which were entered into before the 15th August, 1947 by the Governor-General in Council of the undivided India for the purposes which were exclusively for Pakistan they should, from the 15th August, 1947 be deemed to be the contracts made on behalf of Pakistan and all liabilities of the Governor-General in Council which had already accrued under such contracts should be the liabilities of Pakistan from the 15th August 1947 and Article 12(1) of the Order provides that if the said liabilities of the Governor-General in Council were the subject-matter of any legal proceedings, Pakistan should be substituted in place of Governor-General in Council in those legal proceedings and the said proceedings might be continued accordingly.

12. In order to get out of the provisions of Article 8(1) of the Order Mr. Ghosh at first sought to urge that the contract in suit was invalid due to non-compliance with the provisions of section 175(3) of the Government of India Act, 1935 in view of the pleadings in paragraph 3 of the plaint but he did not press this point ultimately as I drew his attention to the words "the above tender is hereby accepted by me on behalf of the Governor-General in Council" in Ex. F. signed by the Superintending Engineer and indicated my view that they substantially complied with the provisions of section 175 (3) of the Government of India Act, 1935 and satisfied the test laid down by the Supreme Court in Union of India (UOI) Vs. A.L. Rallia Ram, and as I expressly told him that I would not allow him to agitate this plea unless he could satisfy me on the following points:

(1) Whether this plea was at all open to him as it was not taken in the written statement filed on behalf of the Governor-General in Council and as the same plea was not allowed to be taken under similar circumstances by the Supreme Court in Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another, ?

(2) Pakistan not having filed any written statement denying the validity of the said contract and no prayer being made by Mr. Ghosh for filing any additional written statement to raise such a defence whether such a plea can at all be taken at this stage without applying for amendment of the written statement in view of

the said judgment of the Supreme Court?

(3) Whether such a plea can at all be taken at this stage as in the written statement filed on behalf of the Governor-General in Council, the formation of the contract in suit was not only expressly admitted but also a sum of Rs. 26,536/- was claimed by the Governor-General in Council from the plaintiff by way of set off on the allegation that the Governor-General in Council had suffered loss and damages in the said sum due to the breach of contract in suit on the part of the plaintiff and relevant terms and conditions of the said contract on which the claim for set off was based were set out in the written statement?

13. As hereinbefore stated without pressing this plea any further and without endeavouring to satisfy me on the points raised above Mr. Ghosh in his usual fairness proceeded on the basis that the contract in suit was exclusively for the purpose of the Dominion of Pakistan and in terms of Article 8(1) of the said Order the liability of the Governor-General in Council under the said contract became the liability of the Dominion of Pakistan from the appointed day as it satisfied the tests laid down by the Supreme Court in Union of India (UOI) Vs. Chaman Lal Loona, .

14. Coming now to the question of maintainability of the suit it is necessary to set out sections 86(1), 86(2) and 87B of the Code of Civil Procedure:

86(1) - No Ruler of a foreign State may be sued in any court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government.

86(2) - Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the court in which the Ruler may be sued, but it shall not be given, unless it appears to the Central Government that the Ruler -

(a) has instituted a suit in the court against the person desiring to sue him, or

(b) by himself or another, trades within the local limits of the jurisdiction of the court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon, or

(d) has expressly or impliedly waived the privilege accorded to him by this section.

87B(1) - The provisions of section 85 and of such-sections (1) and (3) of section 86 shall apply in relation to the Rulers of any former Indian States as they apply in relation to the Ruler of a foreign State.

15. Section 86 of the Code expressly provides that no foreign Ruler can be sued without the consent in writing of the Central Government and such consent

cannot be given by the Central Government unless the conditions laid down in section 86(2) are fulfilled. u/s 87B of the Code no former Rulers of Indian States can similarly be sued without the consent of the Central Government.

16. In *Mirza Ali Akbar Kashani v. The United Arab Republic and another*, reported in (1965) 2 SCA 590, the Supreme Court held that in the absence of the consent in writing of the Central Government no suit is maintainable against any foreign sovereign State u/s 86(1) of the Code and in interpreting the word "sued" in section 86(1) of the Code the Supreme Court in *Mohanlal Jain Vs. His Highness Maharaja Shri Sawai Man Singhji*, at page 76 held "The word "sued" means not only the filing of a suit or a civil proceeding but also their pursuit through Courts. A person is sued not only when the plaint is filed, but is sued also when the suit remains pending against him. The word "sued" covers the entire proceeding in an action, and the person proceeded against is sued throughout the duration of the action. It follows that consent is necessary not only for the filing of the suit against the ex-Ruler but also for its continuation from the time consent is required."

17. On the other hand Article 12(1) of the Order expressly provides for continuation of the suit against Pakistan but it does not impose any condition for obtaining such consent from the Central Government. In view of this apparent inconsistency between the provisions of section 86(1) of the Code and Article 12(1) of the Order Mr. Ghosh has firstly contended that Article 12(1) of the Order which is a prior legislation is impliedly repealed by section 86(1) of the Code which is a subsequent legislation so far as continuation of suit against Pakistan is concerned.

18. There is no dispute that Pakistan became an independent foreign Dominion with effect from 15th August 1947. The relevant provisions of the Code on that day relating to the suits against foreign rulers and Indian Princes were as follows:

85(1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorise or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

86(1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or envoy -

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

19. The old sections of the Code enact that in the absence of consent of the Governor-General in Council certified by the signature of Secretary to the Central Government no suit could be filed against any foreign ruler and the meaning ascribed to the word "sued" by the Supreme Court in Mohan Lal's case to the corresponding new section of the Code is equally applicable to the meaning of the word "sued" in old section with the result no suit could be continued against the foreign rulers under the old section in the absence of such consent of the Governor-General in Council. As Pakistan became an independent foreign Dominion with effect from 15th August 1947 and if I uphold the contention of Mr. Ghosh hereinbefore indicated these old sections would have barred any suit being continued against Pakistan without the consent of the Governor-General in Council as these old sections would have applied in the case of Pakistan like any other foreign State. These old sections of the Code are similarly inconsistent with Article 12(1) of the Order so far as continuation of suit against Pakistan is concerned and these two inconsistent provisions cannot be harmonised at all. If I am to accept the contention of Mr. Ghosh that the new section 86(1) of the Code had impliedly repealed Article 12(1) of the Order to the extent of continuation of suit against Pakistan I shall have to hold that the old corresponding section of the Code was impliedly repealed by Article 12(1) of the Order and again our Parliament impliedly repealed Article 12(1) of the Order by enacting new section 86 (1) of the Code. In my opinion, this sort of inconsistent motive and fickle-mindedness cannot be attributed to the wisdom of Parliament and the question of implied repeal cannot be answered in the affirmative solely on the ground of inconsistencies between the two provisions.

20. In order to determine this question inter alia the following principles have to be borne in mind as laid down by the Supreme Court in the leading case of Municipal Council Palai Vs. T.J. Joseph and Others, :

(a) "Whether the two statutes relate to the same subject-matter and have the same purpose" before the Court can hold that due to the inconsistency between them the legislature has repealed the earlier statute by implication and "in order to ascertain whether there is repugnancy or not" the Court will have to consider:

-

1. Whether there is direct contact between the two provisions;
2. Whether the legislature intended to lay down an exhaustive code in respect of the subject-matter replacing the earlier law;
3. Whether the two laws occupy the same field" (vide *Deepchand v. The State of Uttar Pradesh*, 1959 Supp. 2 SCR 8 at p. 43).

(b) "Whether the new statute purports to replace the existing statute" and "where it is doubtful whether the special statute was intended to be repealed by the general statute the Court should try to give effect to both the enactments as far as possible.

21. As these principle laid down by the Supreme Court may overlap with each other while discussing there problem before me I propose to deal with them together and see whether they are satisfied in the instant case.

22. The CPC does not provide for substitution of any foreign State in place of another Sovereign State. Pakistan was not in existence prior to 15th August 1947 and naturally the Code could not provide for substitution of Pakistan in a pending legal proceeding in place of Governor-General in Council. One of the items for consideration of the Governor-General was how to save the pending legal proceedings in which Governor-General in Council was a party and on whom the rights and liabilities in such legal proceedings would ultimately devolve. There was no provision of law for continuation of such pending legal proceedings or substitution of either Pakistan or India in such legal proceedings and they would have automatically abated. Rights and liabilities of the Governor-General in Council of Undivided India were undivided rights and obligations and there was no provision of law for apportioning such rights or liabilities under the Municipal Law. The Governor-General in Council had also to consider the rights and obligations of the citizens of undivided India in pending legal proceedings in which the Governor-General in Council was a party and similarly, there was no Municipal Law to solve the said difficulties. Under these circumstances, the Governor-General by Article 12 (i) of the said Order resolved the said difficulties and saved and protected the rights and liabilities of India and Pakistan and the citizens of India and Pakistan in pending legal proceedings. In the *State of Tripura v. Province of East Bengal*, (1951) SCA 113 Patanjali Sastri J. (as he then was) at page 118 delivering the majority judgment of the Supreme Court expressly approved the judgment of the Division Bench of this Court to the effect that by this order the Province of East Bengal was substituted in that suit for the Province of Bengal by operation of law and Mukherjee J. (as he then was) at page 38 expressly held that such substitution was only possible under this Order

as "there is no provision of any Municipal Law which contemplates or authorises substitution of one Sovereign State for another in a pending suit".

23. Leaving aside the words which are not necessary for consideration for the time being, Article 12(1) of the Order expressly provides for the automatic substitution of the Dominion of Pakistan in place of Governor-General in Council in pending legal proceedings and further provides that after such substitution such legal proceedings may be continued against Pakistan. The combined effect of Articles 8(i) and 12 (i) of the Order, in my opinion, is that the liability of the Governor-General in Council in a pending legal proceedings was automatically shifted on to Pakistan when such liability of the Governor-General in Council accrued under a contract which was exclusively for the purpose of Dominion of Pakistan. The new sections of the Code do not provide for any substitution of any foreign state in place of another foreign State. The provision contained in Order 22 of the CPC was not amended to meet the new situation at the time of introducing sections 83 to 87B of the Code in place of the old sections. In my opinion, the question of "replacing" Article 12 (i) of the Order by the new sections of the Code does not and cannot arise as "the scope and the object" of the said two enactments are quite different from each other. The question of "repugnancy" between these two enactments also cannot arise because there is no "direct contact between the two provisions of the two enactments," and in my opinion, the Parliament never intended to alter or affect the provision contained in Article 12 (i) of the Order so far as the pending legal proceedings against Pakistan were concerned by re-enacting the new sections 83 to 87B of the Code in place of the old section of the Code as no substantial or material changes were introduced.

24. New sections 83 to 87B of the Code replace the old corresponding sections of the Code and to that extent it is an "exhaustive Code" but the "subject matter" of the new sections being completely different from the "subject matter" of the said Order, question of "replacing Article 12 (i) of the said Order by the new sections of the Code can never arise.

25. The Indian Independence Act was passed to divide India into two Independent States and in order to carry out the object of the said Act, the Governor-General promulgated the said order. The "object" of the said order was to divide rights, properties and liabilities as between the two Dominions and in order to give full effect to the said object, the rights, properties and liabilities involved in the legal proceedings which were pending on the appointed day were also taken into account. The "subject-matter" and the "purposes" of the said Act and the Order were to distribute and adjust the respective rights, properties and liabilities of the two countries. On the other hand the CPC is a procedural law and although the sections under consideration provide inter alia for institution and continuation of the suits against foreign Rulers and foreign independent States still the "subject-matter" and the "purposes" of the said sections of the Code are quite different from the "subject-matter" and the "purpose" of the Indian

Independence Act and the said Order.

26. In *Edinburgh Street Tramways v. Torbain* (1877) 2 A.C. 58 Lord Blackburn at page 68 observed as follows:

I quite agree that in construing an act of Parliament we are to see what is the intention which the legislature has expressed by the words, but then the words again are to be understood by looking at the subject-matter they are speaking of and the object of the legislature, and the words used with reference to that may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced.

Applying the principles quoted above, in my opinion, the "subject-matter" of the Order being to divide the rights, properties and liabilities as between the two countries the words "proceedings may continue accordingly in Art. 12(1) of the said Order" were used in a context which is quite different from the word "sued" used under new s. 86(1) of the Code or in the corresponding section of the Code. Under the old section of the Code no suit could be instituted without the consent of the Governor-General against the foreign Rulers and the Rulers of the Indian States. After India became independent, the said provisions of the old Code could not have applied to the Ex-Rulers of Indian States as they ceased to be the Rulers of those States and those Indian States ceased to exist as they were integrated with India. To bring the old sections of the Code in conformity with the changed circumstances due to such integration of Indian States and in order to implement the guarantees and assurances given to the then Rulers of the Indian States at the time of their integration and in conformity with the provisions of our Constitution the Parliament in the year 1951 amended the CPC by introducing the new sections in place of the old sections and the effect of such changes was that the Ex-Rulers of the Indian States who could be sued without the consent of the Central Government before the amendment could not be sued after the amendment without the consent in writing of the Central Government.

27. The wordings of the old and the new sections of the Code relating to the suits against foreign Rulers remain practically the same and the word "sued" as interpreted by the Supreme Court in *Mohanlal* case under the new section 86 (i) was equally applicable to the old corresponding sections of the Code. Mere comparison of the old sections with the new sections of the Code of Civil Pro. clearly shows that no substantial or material change was at all introduced by the new sections relating to the suits against the foreign Rulers. The Parliament knew the old provisions of the Code and also knew the provisions contained in the Indian Independence Act and the Orders passed thereunder including the Indian Independence (Rights, Property and Liabilities) Order 1947. The Parliament also knew that the Governor-General did not make any provision for obtaining consent in writing of the Central Government to continue with the suits against Pakistan which were pending on the 15th August, 1947 and still but no change was introduced by the new sections by substituting the old sections of

the Code. At the time of introducing the new sees, in place of the old sections, the Parliament, in my opinion, did not intend to affect Article 12 (i) of the said Order in any way and never intended to repeal the said provisions by introducing the new sections of the Code.

28. Neither the old sections of the Code nor the new section could at all deal or dealt with the rights, properties and liabilities of undivided India. The legal proceedings in which such rights, properties and liabilities were involved and were pending on the appointed day could not be nor were dealt with by the Code. This order deals with such rights, properties and liabilities and it covers completely a different "field" from the CPC and there is no nexus between the Code and the said Order.

29. This Order is a special provision dealing with the rights, properties and liabilities of the undivided India including rights, properties and liabilities in legal proceedings which were pending on the appointed day. The old and the new sections of the Code, on the other hand, are general provisions relating to the suits against foreign rulers.

30. For all these reasons I am unable to accept the contention of Mr. Ghose that Article 12(1) of the Order so far as it relates to the continuation of the suit against Pakistan is concerned was repealed by implication by the new section 86(1) of the Code.

31. Relying on the judgment of the Supreme Court in Mohanlal's case next contention of Mr. Ghose was that full effect had to be given to section 86 (i) of the Code and although no consent of the Governor-General in Council was necessary to continue with this suit still the consent of the Central Government became necessary after Pakistan became an independent Sovereign State from Independent Foreign Dominion.

32. In the *The State of Tripura Vs. The Province of East Bengal*, , delivering the majority judgment of the Supreme Court, Patanjali Sastri, J. (as he then was) at page 25 held that this Order is binding on India and Pakistan and the Governor-General of British India by this Order "provided for the initial distribution of the rights, property and liabilities as between the two Dominions" and "a wide and liberal construction, as far as the language would admit should be placed upon the terms of the Order, so as to leave no gap or lacuna in relation to the matters sought to be provided for".

33. Mukherjea, J. as he then was, concurring with the majority decision at page 37 held that the Orders made under the Indian Independence Act "are fully binding on India as well as the Dominion of Pakistan" and at page

As the avowed object of the Rights, Property and Liabilities Order is to distribute and adjust as far as possible the rights, properties and liabilities between the two Dominions which were to come into being under the Indian Independence Act, the language of the Order should be construed as liberally as possible, and there

is no warrant for putting an interpretation upon the words used more restricted than they would bear in English law.

34. In *Henrietta Muir Edwards & others v. Attorney-General of Canada and others*, 1930 AC 121, delivering the judgment of their Lordships of the Judicial Committee Lord Chancellor Viscount Sankey clearly laid down that the constitutional provisions of a country should not be narrowly or technically construed but should be construed most liberally so as to give full effect to all its provisions and the relevant portions of the judgment at pages 136 and 137 are quoted hereunder:

Their Lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation * * * * The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British colony:

See Clement's Canadian Constitution, 3rd Edition, page 347 :

***** It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under sections 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government. Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act, which creates a Constitution for a new country.

35. Again, Lord Chancellor Viscount Sankey delivering the opinion of the Judicial Committee of the Privy Council in *British Coal Corporation and others v. The King*, 1935 AC 500 at pages 518 and 519 before expressly approving and adopting the passages quoted above from Clement's Canadian Constitution relied on by the Judicial Committee in *Henrietta's* case held-

Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards v. Attorney-General of Canada*.

36. In *J.K. Gas Plant Manufacturing Co. Ltd. and others v. Governor-General in Council*, reported in AIR 1947 FC 38 Chief Justice Spens at page 41 rejecting the contention that the provisions of the Government of India Act should be strictly construed held -

We are, however, by no means satisfied that this criterion must be strictly

applied to an Act passed to establish the Government of a Dominion or in this case India. From 1935 AC 124 at p. 136 and 1935 AC 500 at pp. 518-519, it appears that no narrow construction such as might be applicable to the affairs of an English parish is to be applied to an Act passed to ensure the peace, order and good government of a British Colony. Still less, in our opinion, should any such narrow construction be put upon any provisions of the old or present Constitution Act of India. Such Acts must be given a large and liberal construction.

37. It is to be borne in mind that Indian Independence Act was the Constitutional Law of India and Pakistan and it was the basic law of these two Dominions. In the historical and political background it is also to be borne in mind that this Act is also essentially and basically a political instrument dividing India into two Dominions and by this instrument Pakistan was brought into existence. This Order is still the Constitutional provision of this country and is the basic and fundamental law governing the rights, properties and liabilities as between the two countries. This Order confers right upon the citizens of its country to continue with the legal proceedings against Pakistan. This right to continue with the pending suit is a constitutional and accrued right and no condition restricting such right ought to be inferred by the Court unless the clear language of the Order itself enjoins and in my opinion, this Order promulgated by the Governor-General in Council under the Indian Independence Act should be interpreted most liberally in order to give full effect to all the provisions in their widest amplitude and should not be restricted to its narrow grammatical meaning.

38. If full effect of the grammatical meaning of the old and the new sections of the Code had to be given to a pending legal proceeding which is covered by the said order, as contended by Mr. Ghosh, it would nullify the very purpose and object of the said order and will not only upset the existing arrangements and understanding between the two countries as to their respective rights, properties and liabilities but also many existing disputes regarding the rights, properties and liabilities of these two countries which have not yet been settled will be clouded with confusion and will further deteriorate the already strained relationship between the two countries.

39. This Order is the fundamental law of this country and in promulgating this law, the Governor-General has not only not limited either in express terms or by necessary implication the rights of the citizen to continue with the pending suits against Pakistan but also expressly safeguarded the said right of the citizens of this country and the Court should not construe this Order in such a way the effect of which would be to cut down or nullify or limit the very spirit, intent and object of this Order.

40. At the time of passing of the Indian Independence Act, 1947, the British Parliament knew the then existing specific provisions contained in the CPC relating to the suits by and against the foreign Rulers. Similarly, at the time of promulgation of the said Order, the Governor-General knew those existing

specific provisions under the Code but neither in the Act nor in the said Order any express provision was made for obtaining any consent in writing from the Central Government for the purpose of continuing with the pending suit in which Pakistan was to be automatically substituted. No limitation nor any bar was imposed relating to the continuance of such pending legal proceedings and it is to be noted that this order expressly provides that the pending legal proceedings may be continued after such substitution.

41. So far as the old sections of the Code were concerned they could not have possibly been applied with any stretch of imagination to Pakistan at the time of institution of the suit as there was no existence of Pakistan at all. Even after the promulgation of the said order, no provision was made for obtaining consent in writing of the Central Government to continue with the suit against Pakistan when the Code was amended and adapted by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. The combined effect of the said two Orders and Act so far as the pending legal proceedings in which Pakistan was to be automatically substituted in place of the Governor-General in Council, in my opinion, was not to put Pakistan at par with other foreign Rulers as such question could not possibly have arisen so far as other foreign Rulers were concerned. But so far as the institution of the fresh suits in the Municipal Courts of this country against Pakistan for enforcing the liabilities which might devolve ultimately on Pakistan or which might accrue later on under the said Order were concerned, no specific provision was at all necessary as there were existing provisions in the old relevant sections of the Code to meet such situation. By including new sections of the Code the Parliament never intended to place Pakistan in the same position with that of either the Ex-Rulers of the Indian States or other foreign Rulers regarding the legal proceedings which were pending on August 15, 1947 in which the Governor-General in Council was a party and in which Pakistan with effect from the said "appointed day" became automatically substituted in place of the Governor-General in Council. The existing provisions in the old section of the Code, in my opinion, were made inapplicable by the Governor-General in Council with effect from August 15, 1947 so far as the continuation of the pending suits against Pakistan was concerned by Article 12(1) of the said Order and similarly, no substantial change being introduced by the new sections of the Code the provisions contained in Article 12(1) of the said Order remain unaffected. In my opinion, full effect has to be given to the provisions of Article 12(1) of the said Order and this Order being special and paramount must prevail over the CPC and the Code must yield to the provisions of this Order. For all these reasons I am unable to accept the contention of Mr. Ghosh that new section 86(1) of the Code applies to this suit and/or its full effect has to be given in this suit which is covered by the provisions of Article 12(1) of the Order and for the same reasons I am unable to accept the contention of Mr. Ghosh that the consent in writing of the Central Government is required to continue with the suit after Pakistan became independent Sovereign State.

42. Coming now to the question of immunity claimed by Pakistan, it is true that their Lordships of the Supreme Court did not, in *Mirza Ali Akbar v. United Arab Republic*, (supra), decide whether United Arab Republic could claim immunity under the International Law from being sued in the Municipal Courts of India, in view of their Lordships' decision u/s 86(1) of the Code, still their Lordships' judgment in connection with that section, in my opinion, is also pertinent to the question of immunity and the relevant portion of which at pages 236 and 237 is set out hereunder :

The effect of the provisions of section 86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own Municipal Courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its Municipal Courts. That being so, it would be legitimate to hold that the effect of section 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the Municipal Courts of India with the consent of the Central Government and when such consent is granted as required by section 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the Municipal Courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, section 86(1) is not merely procedural; it is in a sense a counter-part of section 84. Whereas section 84 confers a right on a foreign State to sue, section 86(1) in substance imposes a liability on foreign State to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. That is the effect of section 86(1).

43. Their Lordships of the Supreme Court, in my opinion, laid down as follows:

- (a) The doctrine of immunity recognised by the International Law is to a certain extent modified by section 86(1) of the Code;.
- (b) A foreign State cannot rely on the doctrine of immunity when the Central Government grants "consent" to institute suit against such foreign State;
- (c) The Municipal Courts of India are bound to give effect to the provisions of the law which modifies the doctrine of immunity under the International Law.

44. There cannot be any doubt that from August 15, 1947 Pakistan as an independent foreign State is entitled to claim immunity under International Law from being sued in the Municipal Courts of India if suits are instituted on or after August 15, 1947. It is also clear that the Indian Independence Act and the said Order are binding on India and Pakistan as held by the Supreme Court in *The State of Tripura v. Province of East Bengal* (supra).

45. This Order expressly granted a right to Pakistan to continue with the suit in which rights and properties stood automatically transferred to Pakistan. Similarly, this Order expressly Provides that pending suits may be continued against Pakistan in which the liabilities of the Governor-General in Council representing the undivided India stood automatically transferred on Pakistan. In other words this Order imposes a liability on Pakistan to be continued to be sued in such pending legal proceedings. Section 86(1) of the Code puts a limitation on the rights of the citizens of this country to commence and/or to continue with the suit against foreign States but so far as this Order is concerned no such limitation is imposed for continuation of pending legal proceedings against Pakistan.

46. There cannot be any doubt that Pakistan as an independent State could annul all existing foreign laws which may affect Pakistan as contended by Mr. Ghosh but India as a Sovereign Democratic Republic is not bound by the laws of Pakistan when such laws of Pakistan in any way conflict with the laws of India and the Municipal Courts of India are bound to give effect to the provisions of law of this country and this Order is one of such laws which is still in force and this Courts is bound to give effect to it.

47. Pakistan owes its very existence to the Indian Independence Act and owns properties by virtue of the said Order and for the first time has come forward with the plea of immunity under the International Law in a legal proceedings which is being continued under the said Order with a view to nullify the very object and effect of the said Order and the Act. In order to appreciate the true effect of the words "the proceedings may continue accordingly", in the said Article, it is necessary to bear in mind the principles of interpretation of statutes laid down by Lord Wright in *James v. Commonwealth of Australia and State of New South Wales and others*, (1936) 2 All ER 1449 at page 1464:

The words used are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning.

48. It is to be remembered that many suits were pending on the 15th August 1947 against the Governor-General in Council representing the undivided India and in those suits the Governor-General could not invoke the doctrine of immunity under the International Law to defeat the claim made against him. This suit is one of such suits which was pending on the appointed day against the Governor-General in Council of undivided India and similarly the Governor-General in Council could not, claim any immunity from being sued in this Court. The doctrine of International Law as modified by the old section of the Code could not, with any stretch of imagination, be applied to this suit at the time of its institution. Similarly, the doctrine of immunity under the International Law as modified by the new section of the Code cannot be imported into this suit, as

such principle of International Law was initially lacking in and was foreign to this suit. In my opinion by the words "proceedings may continue accordingly" in this Article of this Order the Governor-General of undivided India precluded Pakistan to take shelter under the doctrine of immunity under the International Law so far as the continuation of the pending legal proceedings were concerned and Pakistan being successor of liability of the Governor-General in Council cannot claim any immunity from being sued in the Municipal Courts of India under the International Law in the legal proceedings which were pending on the 15th August 1947 and in which Pakistan is automatically substituted under the Order. This Court had jurisdiction to try this suit at the time it was instituted and due to the subsequent change of events arising out of the Indian Independence Act such jurisdiction to hear and determine this suit in my opinion, has not been affected in any way. Moreover, Article 13 (2) (a) of High Court (Bengal) Order, 1947, promulgated by the Governor-General in Council under the Indian Independence Act, expressly preserved the jurisdiction of this Court to try all suits. For all these reasons I am unable to accept the contention of Mr. Ghosh and in my opinion Pakistan in this suit cannot claim immunity from being sued under the doctrine of International Law and this Court has jurisdiction to try this suit.

49. It is not necessary to decide the further questions viz., whether Pakistan is at all entitled to invoke the doctrine of immunity from being sued under the International Law by filing warrants of Attorney in this suit and whether section 86(1) of the Code is inapplicable in view of section 4 of the Code as contended by Mr. Dutt. As no other point was agitated before me by Mr. Ghosh and as I am satisfied about the plaintiff's claim there will be a decree in favour of the plaintiff for Rs. 1,21,656-9-3 p. against the defendant. The plaintiff will be entitled to the costs of this suit. The decretal amount will carry interest @ 6% per annum.

Certified for two Counsel.