

(1951) 11 BOM CK 0003

In the Bombay High Court

Case No : Civil Revision Application No. 951 of 1951

Duleraï and Co.

APPELLANT

Vs

Pokerdas Mengraj

RESPONDENT

Date of Decision : 29-11-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 47, Order 21 Rule 50, Order 30 Rule 1, Order 30 Rule 1(1), 85

Citation : AIR 1952 Bom 335 : (1952) 54 BOMLR 313

Hon'ble Judges : Chagla, C.J

Bench : Single Bench

Advocate : Jamshedji Kanga and P.N. Bhagwati, for the Appellant; P.P. Khambata, C.C. Vaidya and S.M. Benjamin, for the Respondent

Judgement

(1) The plaintiffs filed a suit against the firm of Duleraï & Co. Appearance for the firm was filed under protest and the protest was directed to this that one of the partners of the defendant firm was the Maharaja of prchha who could not be sued in the City Civil Court. The plaintiffs took out a summons for striking out the protest. The learned Principal Judge first held following Gaekwar Baroda State Railway Vs. Sheik Habib Ullah , that a suit against a firm in, which a Maharaja is a partner is not a suit against the Maharaja u/s 86 of the Civil P. C. Then the attention of the learned Principal Judge was drawn to the decision of the Privy Council in "GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ", 65 Ind App 182. Thereupon the learned Principal Judge took the view that if the suit was against a firm in the name of the firm and not against the partners in their individual names, Section 86 would not apply.

(2) Now, Section 86 of the Civil P. C. has been amended after our Constitution came into force, and Section 86 runs at present thus:

"No Ruler of a foreign State may be sued in any Court otherwise competent to try a suit, except with the consent of the Central Government certified in writing by a Secretary to that Government."

We are not concerned with the proviso to that, section. Therefore, judging by the language used by the Legislature, the immunity conferred upon the Ruler is absolute and it is not limited to any particular class of suits or in respect of his public dealings. That view was taken by the Privy Council in "GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ", 65 Ind App 182, where the Privy Council pointed out that Section 86 represented an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. The first contention urged by Mr. Khambata is that inasmuch as he has sued the firm under Order XXX and not the Maharaja, no question, of the application of Section 86 arises. It is well known that a firm is not a legal entity. The word "firm" is merely a compendious way of describing the various persons who carry on a business in partnership, and Order XXX, Rule 1, confers a special convenience upon litigants to sue persons carrying on a business in partnership in the name of the partnership business. Therefore, when a suit is filed under Order XXX, it is a suit filed against the persons who constitute the partnership, but it is permitted to be filed in the name of the firm. In bringing a firm before the Court the plaintiff is bringing or attempting to bring every partner of the defendant firm. Order XXX affords him the facility of using the partnership name in order to sue all the partners of that firm. Therefore, if the Maharaja of Orchha is a partner in the defendant firm, by bringing the defendant firm before the Court and suing the defendant firm the plaintiffs are undoubtedly suing the Maharaja, and in suing the Maharaja they are contravening the mandatory provisions of Section 86.

Mr. Khambata draws my attention to Order XXI, Rule 47 and Rule 50. Those rules deal with execution of decrees passed against a firm against partners, and the provisions (Contained in those rules prevent execution being taken out against the personal property of a partner who has not been served or who has not entered his appearance. But we are not concerned with those provisions in this application. We have not reached the stage when the plaintiffs are attempting to execute the decree against the property of the Maharaja. We are now at a stage when a suit is instituted against the defendant firm, one of the partners of which is alleged to be the Maharaja of Orchha. Therefore, in my opinion, the learned Principal Judge was not right when he took the view that merely because the Maharaja of Orchha was not sued by name but because the suit was against the partnership firm in which he was a partner, Section 86 had no application.

(3) The other contention urged by Mr. Khambata is that this is a case where the Maharaja of Orchha is being sued in respect of a private transaction. He has joined a partnership, he is doing business, and he should not be allowed to claim any personal privilege as far as the liability to be sued is concerned. I entirely sympathise with Mr. Khambata. It does seem rather strange that in these democratic republican days Maharajas should still continue to have privileges which were given to them in those palmy days of old under the Civil P. C., when Maharajas had States to govern. But how unstateable Mr. Khambata's contention is is clear from the fact that even after our Constitution came into force, even

after Rulers ceased to have any public duties or public functions the privilege conferred upon them under the old Civil P. C. has still continued.

As a matter of fact, Section 87B, which is a new section, provides that the provisions of Section 85 and Sub-sections (1) and (3) of Section 86 shall apply in relation to the Rulers of any former Indian State as they apply to the Rulers of a foreign State. So that the amended CPC contemplates Rulers of former Indian States--Rulers who can only have a private life and engage in private activities, and even with regard to them the privilege continues. Therefore, it is clear that Section 86 confers a personal privilege upon the Rulers of foreign States or Rulers of any former Indian States. Strictly it is not Section 86 which applies to the Maharaja of Orchha who is not a Ruler of a foreign State. It is Section 87B which deals with Rulers of a former Indian State which makes Section 86 applicable to him. And a Ruler in relation to a former Indian State u/s 87B(b) is defined as a person who for the time being is recognised by the President as the Ruler of that State for the purpose of the Constitution, and it is not disputed that the Maharaja of Orchha is recognized by the President.

(4) Mr. Khambata has relied on a decision Of the Calcutta High Court in "MADAN LAL JHUNJHUNWALLA v. REZA ALI KHAN" ILR (1940) Cal 344. In that case the Question arose whether an insolvency petition could be presented to the Court against a debtor when one of the creditors of the debtor was a Ruler. It was this narrow question that the Calcutta High Court was considering, and it came to the conclusion that Section 86 was no bar to presenting such a petition. It is difficult to deduce from this decision the principle for which Mr. Khambata is contending that Section 86 only applies when a suit is filed against the property of the Maharaja which property is public property belonging to the State or when the Maharaja is acting in a public capacity. As a matter of fact in the Privy Council case to which I have referred, the suit was against a railway company owned by the Maharaja of Baroda, the profits of which went to the Maharaja, and the Privy Council said that attempting to sue the railway company was circumventing Section 86 because the Maharaja was the owner and in substance what the plaintiff was doing was suing the Maharaja and not any other legal entity. As I said before, I realise the force of Mr. Khambata's argument and I have every sympathy for that argument, but I see no way how I can escape the consequences of Section 88, which is mandatory in its character and which confers a personal privilege upon every Ruler of a former Indian State. In my opinion, therefore, the Maharaja is entitled to the privilege conferred upon him u/s 86 although this is a suit relating to a private transaction of the Maharaja.

(5) Mr. Khambata does not admit the allegation of the defendant firm that the Maharaja of Orchha is a partner in the firm. In order to decide it an issue will have to be tried. It is further urged by Mr. Khambata that technically the defendant firm was not right in filing an appearance under protest. It is perfectly true that normally when a suit is filed under Order XXX, appearance is filed in protest by a person who is served as a partner and who disputes his partnership.

But this is rather a novel case to which the ordinary rules of procedure cannot apply. If the defendant firm had filed its appearance without protest, it may have been urged that the Maharaja had waived his privilege, and as the firm consisted of four partners, one of whom was the Maharaja, the solicitors of the firm took the precaution of filing the appearance under protest.

(6) Mr. Khambata then points out the difficulties with which his clients would be faced if it is held that the firm could not be sued if the Maharaja of Orchha is a partner. I do not really see what the difficulties are. It is certainly open to the plaintiffs to have the title of the plaint amended and to substitute in place of the defendant firm the names of the other three partners who do not enjoy the privilege which the Maharaja of Orchha enjoys of not being sued in any civil Court.

(7) I would, therefore, set aside the order passed by the learned Principal Judge, send the matter back to him, and ask him to try the issue as to whether the Maharaja of Orchha is a partner in the defendant firm. If he comes to the conclusion that the Maharaja of Orchha is a partner in the defendant firm, then he will hold that the suit as filed has not been properly instituted. If the plaintiffs so desire he will give them liberty to amend the title of the plaint by bringing the other partners on the record. If, on the other hand, he comes to the conclusion that the Maharaja of Orchha is not a partner in the defendant firm, then the order that he has made will stand. The result is that the application must succeed. Rule absolute with costs.

(8) Rule made absolute.