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**(1955) 03 BOM CK 0002**

**In the Bombay High Court**

**Case No :** O.C.J. Appeal No. 114 of 1954

Indrajitsinghji Vijaysinghji — APPELLANT

Vs

Rajendrasinghji Vijaysinghji — RESPONDENT

**Date of Decision :** 17-03-1955

**Acts Referred:**
Bombay High Court Rules — Rule 665, 689, 690, 692
Civil Procedure Code, 1908 (CPC) — Section 26, 85, 86, 86(1), 86(3)
Companies Act, 1956 — Section 184, 186, 187
Succession Act, 1925 — Section 235, 268, 295

**Citation :** AIR 1956 Bom 45 : (1955) 57 BOMLR 962 : (1955) ILR (Bom) 912

**Hon'ble Judges :** Chagla, C.J;Tendolkar, J

**Bench :** Division Bench

**Advocate :** Murzban J. Mistree and M.M. Javeri, for the Appellant; K.T. Desai and M.R. Mody, for the Respondent

## Judgement

Chagla, C.J.—A very interesting question as to the rights of an ex-ruler arises in this appeal. The appellant is the third son of the late Maharaja of Rajpipla and the respondent is his eldest son. The appellant filed a petition for letters of administration to the state of the late Maharaja of Rajpipla with the will annexed. Citations were served amongst others upon the respondent.

The respondent filed a caveat and filed an affidavit in support of that caveat and under the rules of the High Court, to which we shall presently refer, the petition was converted into a suit and a summons in the suit was served upon the respondent, and when the suit came on for hearing before Desai J., the respondent raised a contention that the suit was not maintainable in the absence of a consent of the Central Government by reason of the provisions of Section 87B of the Civil Procedure Code. The learned Judge upheld that contention and dismissed the suit and the petitioner has come in appeal.

2. Now, Section 86 gave certain immunity to Rulers of a Foreign State and that immunity was that he could not be sued in any Court otherwise competent to try

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the suit except with the consent of the Central Government certified in Writing by the Secretary to that Government. This section applied to Rulers of all Foreign States and before 1947 it also applied naturally to Rulers of Indian States which were looked upon as foreign States. After 1947 when the Indian States merged with the Union of India a special section was enacted to preserve certain rights which Rulers of Indian States had enjoyed, & the section that was enacted was Section 87B which was in the following terms:

"The provisions of Section 85 and of Sub-sections (1) and (3) of Section 86 shall apply in relation to the Rulers of any former Indian State as they apply in relation to the Ruler of a foreign State "

Therefore, the immunity which a Ruler of a Foreign State enjoyed u/s 86(1) is still enjoyed by a Ruler of a former Indian State, and it is not disputed that the respondent is the Ruler of a former. Indian State as defined in Section 87B, and therefore what we have to consider is what is the immunity which the CPC confers upon the Ruler of a Foreign State u/s 86(1).

3. It win be best to construe Section 86(1) in the first instance, apart from authorities. It confers a substantive right upon the Ruler of a Foreign state & it also imposes a disability upon a litigant who wants to sue the Ruler of a Foreign State.'' The Legislature has used the expression "may be sued" and it has further made that expression clear by stating "in any Court otherwise competent to try the suit." Therefore, it is clear that, apart from any other considerations, Section 86(1) strictly construed only applies to a case where a suit is filed in a civil Court against the Ruler of a Foreign State.

It is true that the expression "may be sued" in its plain ordinary meaning may have wider connotation. It may mean to claim a civil right in a Court of law by any legal process by which that civil right can be established. But, in our opinion, this expression must be construed in the context of the Civil Procedure Code. It must be borne in mind that the Legislature has used this expression in a law which deals with procedure-and it has used that expression in a Code where the expression "suit" is used and understood in a strictly technical sense.

As far as the CPC is concerned, "a suit" means a legal proceeding instituted by means of the filing of a plaint as specifically provided for by Section 26 which deals with "institution of suits," and the Civil Procedure-Code draws a sharp distinction between "suits" and "legal proceedings". This is clear if one-looks at the provisions of Section 141. The Legislature, realising that in a civil Court not only suits would be filed but legal proceedings instituted, had to make provisions also with regard to legal proceedings, and therefore it enacted Section 141 which is to the following effect:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

Now the Privy Council in construing Section 141 has held that the expression

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"proceedings" used in this section means independent proceedings in the nature of probate or guardianship proceed ings. Apart from those two proceedings mentioned by the" Privy Council there may be proceedings under the Companies Act, there may be proceedings under the Charitable Trust Act and various other proceedings which may be instituted in a civil Court. All these proceedings, al though they may claim rights, would not be "suits" as understood by the CPC be cause they are not instituted by the filing of a plaint.

It is precisely because of these that Section 141 was enacted so that the procedure provided in the Code with regard to suits should also be followed with regard to these proceedings.

4. We can understand the argument, and Mr. Desai has also advanced that argument and we shall presently deal with it, that probate proceedings being independent proceedings by reason of Section 141, Section 86 has been made applicable to those proceedings; but it is difficult to understand the contention that Section 86, independently of Section 141, applies not only to suits but also to proceedings. in terms it only applies to suits and there is no reason why an extensive meaning should be given to the expression "suits" in Section 86 which is not justified by the scheme of the Civil Procedure Code.

It is pointed put, and rightly, that Section 86 is a statutory recognition of the International Law that a Foreign Ruler should not be subjected to the jurisdiction of a Municipal Court. It is pointed out that Dicey in his Conflict of Laws, 6th edn., at p. 131, broadly lays down the proposition that the Court has no jurisdiction to entertain an action or other proceeding against any foreign Sovereign, and this rule is subject to certain exceptions which are not material for the purposes of this discussion; and it is pointed out that no distinction is made with regard to the immunity of the Foreign Sovereign between "action" or "other proceeding."

The rule of International law is perhaps slightly differently stated by Lord Atkin in --''Compania Naviera Vasoongado v. S.S. Cristina'' (1938) AC 485 (A), He deals with two propositions of International law which according to him are engrafted into the domestic law of England and which seem to the learned Law Lord to be well established and beyond dispute. The first with which we are Concerned is that the Courts of a country will not implead a Foreign Sovereign, i.e., make him against his will" a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

These observations seem to imply that the legal proceeding must be such as to involve a process against the person of the Foreign Sovereign or it must seek to recover from him specific property or damages. But whatever the principle of International law may be, we are concerned with the statutory form that it has taken in our country. In the very forefront we notice that there is an important departure from the rule of International law because in India a Ruler of a Foreign State can be sued with the consent of the Central Government. Further in

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England a Foreign Ruler can waive the privilege of being sued.

The Privy Council has held that the consent required u/s 86 cannot be waived and therefore it would not be treading on safe ground to inquire what is the principle of International law and to construe Section 86 the light of that principle. If the language of Section 86 permitted such a construction, perhaps it would not be objectionable to consider rules of International law because our country also is in the comity of Nations, and there is no reason why we should not as much as other countries give effect to well settled principles of International law.

But if the language of the section is clear and is capable of only one construction in the context in which that language is used, then in our opinion it would be an unjustifiable attempt on the part of the Court to engraft upon the statutory provision a principle of International law which the Legislature itself did not think it proper to do.

5. The same view of the law has been taken in -- Madan Lal Jhunjhunwalla Vs. H.H. the Nawab Sayed Reza Ali Khan Bahadur Mustaid Jung, . In that case a debtor presented a petition for being adjudicated an insolvent and the petition was opposed by a Ruling Chief who was a creditor, and Nasim Ali J. and Narsing Rau J., held that Section 86 of the CPC applied in terms only to suits. Tendolkar J., in an unreported Judgment in -- ''His Highness Vir Sing Dev alias V.S. Deo v. Gangavishandas Lachman- das'', Insolvency No. 89 of 1951, D/- 3-10-1951 (Bom) (C), where an application was presented to adjudicate the ex-Ruler of Orchha, has also taken the view that Section 86 by its very words is limited to a suit and does not extend to any other proceedings.

With respect, we are in agreement with the views expressed in both these judgments.

6. If then Section 86 deals only with "suits", the next question is whether by reason of Section 141 the provisions of Section 86 have been made applicable to probate proceedings. Now, it is possible to take two views of the ambit of Section 141. One is that every section in the Code relating to suits has-been made applicable to other proceedings, and the other view is that only those provisions of the Code which deal with procedure and not with substantive rights are made applicable to independent proceedings initiated in a Court.

In our opinion the language used by Section 141 itself rules out the first view. It is only the procedure provided in the Code in regard to suits which has been made applicable to other proceedings. But if in the Code there are provisions which deal with substantive rights, those provisions are not made applicable by Section 141. Take this very case of probate proceedings. The question of substantive rights and the question of imposing disabilities can only be dealt with in the Succession Act which deals with these proceedings.

But when these proceedings come to a Court of law, the Court has to consider

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what procedure it should apply to those proceedings, and Section 141 lays down that the procedure that should be applied is the procedure that the Court would apply if it was trying a suit. Therefore, if S- 86 deals with the substantive rights, as we have held it does, then by reason of Section 141, Section 86 cannot be made applicable to probate proceedings.

7. Mr. Desai says that a contrary view has been taken by a Full Bench of the Allahabad High Court in -- Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co., Ltd. Vs. President, Council of Regency, The Allahabad High Court was considering whether Section 86 of the CPC applied to proceedings under Sections 134, 186 and 187 of the Indian Companies Act, and the Full Bench came to the conclusion that it did apply to proceedings u/s 186 or Section 187 and not to proceedings u/s 184. With regard to Sections 186 and 187 they undoubtedly took the view that Section 86 was applicable because of Section 141.

But, with respect, the Allahabad High Court did not consider the question that we have been considering whether Section 141 applies to all provisions of the Code or only to provisions dealing with procedure and not dealing with substantive rights. There was also another reason why the Allahabad High Court came to this conclusion with regard-to proceedings under Sections 186 and 187.

With regard to Section 186 the view taken was that as it furnished a summary remedy it was not right for the Court to order payment against a Ruler by a summary remedy when if a suit was filed the Ruler could have taken a defence u/ s 86, and with regard to Section 187 in a sense also it was exercising the summary jurisdiction of the Court, because after ordering a call it is open to the Court u/s 187 to order payment instead of asking the Liquidator to resort to a suit.

But, with respect to the Allahabad High Court, it is difficult to understand how a distinction can be made between proceedings u/s 184 and proceedings under Sections 186 and 187. The only reason given by the Allahabad High Court is that u/s 184 it is incumbent upon the Court to make an order whereas it is discretionary with the Court whether to make an order u/s 186 or 187 or not. But whether it is incumbent upon the Court to make an order u/s 186 or Section 187 or not, it is a proceeding in Court.

If the view of the Allahabad High Court was right that Section 141 applied all provisions of the Code to proceedings in Court, then there seems to be no reason in principle why a distinction should have been made between proceedings u/s 184 and proceedings u/s 186 or Section 187. But this view of the Allahabad High Court with regard to the applicability of Section 141 is clearly in conflict with the decisions of several other High Courts.

It has been held that the provisions with regard to appeals which are to be found in the CPC do not apply to proceedings by virtue of Section 141, and the reason for this decision is that the right of appeal is a substantive right and Section 141 does not deal with substantive rights.

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If the provisions with regard to appeals do not fall within the ambit of Section 141 because they deal with and confer substantive rights, then, in our opinion, by parity of reason, Section 86 also cannot fall within the ambit of Section 141 because it deals with substantive rights and confers substantive rights upon Rulers of Foreign States.

8. The next contention of Mr. Desai is that even assuming Section 86 only applied to suits, what we have before us is a suit and, therefore, Section 86 applies, and as no consent has been taken, the respondent was right in contending that the appellant''s suit must fail on that ground. Now, in order to appreciate this contention, we must understand the nature of probate proceedings. A petition for letters of administration with the will annexed or a petition for a probate is not directed against any party. It seeks from the Court only this relief that the petitioner should be clothed with authority to represent the estate of the deceased and that he should exercise various powers as representing that estate.

It is true that the petitioner does not get this relief ''ex parte''. Both the Succession Act and the High Court Rules provide that notice must be given to the next of kin, and when notice to given " it is open to any next of kin to file what is known as a caveat and also to file, an affidavit in support of a caveat." It is at that stage that the proceedings become what is known as contentious, and when they become contentious they are treated as a suit, they are numbered as a suit and the petitioner is decribed as the plaintiff and the ca-veator is described as the defendant.

We are concerned here with the High Court Rules, and Rule 689 deals with a caveat. Rule 690 with the filing of an affidavit, and Rule 692 which Js the relevant rule, provides chat:

"Upon the affidavit in support of the caveat being filed, the petitioner for probate or letters of administration shall be called upon by notice to take out a summons, and the proceedings shall be numbered as a suit in which the petitioner shall be "the plaintiff and the caveator shall be the defendant. The procedure in such a suit shall, as nearly as may be, be according to the provisions of the Code of Civil Procedure".

A reference may also be made to Rule 665 which makes notice to the next of kin obligatory. The corresponding section of the Succession Act is, first. Section 235 which also makes the issue of citation to the next of kin obligatory before the issue of Setters of administration with the will annexed, and Section 268 which provides that the proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as thereinafter otherwise provide ed, be regulated, so far as the circumstances of the case permit, by the Code of Civil Procedure, 1908. And Section 295 provides that:

"In any ease before the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908, in which the petitioner for

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probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant",

9. Now, from these provisions it is sought to be argued that whatever the nature of the proceedings may be when they were first instituted, at a certain stage they become a suit, and Section 86 applies, and if there is no consent taken of the Central Government, the suit cannot be maintained against the defendant if he is a Ruler of a former Indian State. It is very difficult to accept the view that these proceedings are a suit as contemplated by Section 86. If we are right in the view that we take that a suit can only be instituted as required by Section 26 by the presentation of a plaint, then obviously a petition for letters of administration with the will annexed is not a plaint and at no stage becomes a plaint as understood in Section 26 of the Civil Procedure Code.

What Section 86 requires is a suit instituted in the manner laid down in the Civil Procedure Code, not a proceeding which is treated as a suit by reason of the provisions of some other law. It is also difficult to understand how a petition for letters of administration can be a suit when no relief is sought by the petitioner against the caveator. It is true that the caveator appears on the scene to oppose the grant of the letters of administration to the petitioner. But it is all the same true that ''quae'' the defendant the plaintiff is seeking no relief, and the very essence of a suit is, and must be, that the parties are so arrayed that one party seeks relief from the other which the other is denying.

Section 86 also contemplates that the consent required must be taken before the institution of the suit, and Mr. Desai concedes that no consent is necessary before the petition, is presented, because, at that stage the petition is not a suit and it may never become a suit if no caveat is filed by the Ruler. But Mr. Desai says that once the citation is served and in answer to the citation a caveat is filed, the petitioner has the ''locus penetentlae'' to get the consent of the Central Government before an affidavit is filed and before the proceedings are converted into a suit.

Section 86 surely does not contemplate the obtaining of the consent at any other stage except at the institution. It would indeed be a curious application of Section 86 if a party was compelled to obtain the consent of the Central Government when a proceeding is converted into a suit not by his action but by the action of the other side, and when at the time when he filed the proceeding he had no knowledge that the proceeding would ever become a suit, nor had he knowledge when it would become a suit.

Therefore, in our opinion, it is very difficult to accept the alternative contention put forward by Mr. Desai that the probate proceedings in this case become a suit when the defendant filed his affidavit in support of his caveat and Section 86 came into operation.

10. Mr. Desai has also sought to argue, that, apart from Section 141, by reason of Section 268 the proceedings must be regulated by the CPC and, therefore,

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Section 86 would apply to these proceedings. Our answer to this contention is the same that we gave with regard to the arguments advanced with reference to Section 141. Regulating proceedings does not include conferring rights and imposing disabilities, and what Section 268 does is nothing more than Section 141. It only makes applicable the procedural provisions of the Civil . Procedure Code to the proceedings instituted in a Civil Court under the Succession Act in relation to the granting of probate arid letters of administration.

11. The question that we have to consider may be posed in a different way When the Court is exercising its ordinary civil'' jurisdiction to try suits that jurisdiction has been made subject to the provisions of Section 86, and the Courts are prevented from entertaining suits against Foreign Rulers without the consent of the Central Government as provided by Section 86. Can it be said that when the Court is exercising its testamentary jurisdiction, as it is doing in this case, that jurisdiction is also made subject to the provisions of Section 86?

In our opinion if the intention of the Legislature was to put that -limitation upon the jurisdiction of the Court, the Legislature would have so provided by some substantive provision either in the Succession Act or in any other law. But it would be erroneous to import from the language used in Section 86 limitation upon the testamentary jurisdiction of the Court when such a limitation has not been imposed in clear language by the Legislature.

12. With regard to the view taken by the learned Judge, with respect, the learned Judge, has relied on a decision of this Court in -- ''P. Rao v. Khushaldas S. Advani'' AIR 1949 Bom 277 (E). There also we had to construe the expression "to sue", but we were construing that expression as used in Section 176, Government of India Act, and we gave to that expression its plain natural meaning. But as we have pointed out that expression has a -very different meaning and a very different connotation when used in the context of the Civil Procedure Code. In our opinion, therefore, with respect, the learned Judge was in error when I he took the view that the defendant was protected by Section 86 and in the absence of the consent of the Central Government the proceedings taken by the appellant could not be maintained.

13. An issue was also raised before the learned Judge as to whether the petition presented by the appellant was bona fide. The learned Judge tentatively took the view that the petition was bona fide, but when he came to answer the issue he rightly refused to answer that issue Inasmuch as he had come to the conclusion that the petition was not maintainable. We see no reason why we should express any opinion as to the bona fides or otherwise of the appellant''s petition. When the matter goes back to the learned Judge it would be for him to go into the question on merits and decide as to whether he should exercise his discretion in favour of the petitioner and grant him letters of administration.

14. The result is that the appeal must succeed, the order of the learned Judge be set aside and the suit will be remanded to the learned Judge for disposal

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according to law. The respondent to pay the costs of the appeal. The appellant wilt also be entitled to the costs of the hearing in the lower Court.

15. Appeal allowed.

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