

(2018) 03 GAU CK 0016
In the Gauhati High Court
Case No : RFA 12 of 2017

UNION OF INDIA

APPELLANT

Vs

DAMODAR ROPEWAY AND INFRA LIMITED

RESPONDENT

Date of Decision : 06-03-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 77, 79, 80, 80(1), 80(2), 80(1)(2), 96, 151
Indian Railways Act, 1890 — Section 2(32), 3(6), 4(1), 4(2)
Code of Civil Procedure, 1908 — Order 41 Rule 1, Order 41 Rule 2, Order 1 Rule 10(1), Order 1 Rule 9, Order 1 Rule 3

Citation : (2018) 03 GAU CK 0016

Hon'ble Judges : ARUP KUMAR GOSWAMI

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Heard Ms U. Chakraborty, learned Special Senior counsel, NF Railway, appearing for the appellants. Also heard Mr. S. Banerjee, learned counsel

for the respondent.

2. On 5.2.2018, the learned counsel for the parties had submitted that having regard to the issues involved in the appeal, instead of formally admitting

the appeal, the appeal can be disposed of at the admission stage itself and it was also contended that the records need not be called for.

3. It is in the light of the above order, the appeal was heard at the admission stage and is being disposed of by this order today.

4. In IA(C) No. 1433/2017, this Court had passed the following order on 5.3.2018:-

â?? Heard Ms U Chakraborty, learned Special Senior counsel, NF Railways appearing for the applicants. Also heard Mr. S. Banerjee, learned

counsel, appearing for the respondent. This is an application under Section 151

CPC praying for grant of leave to prefer appeal under Section 96 read with Order 41 Rule 1 and 2 CPC against the ex parte judgment and order dated 12.8.2016 passed by the learned Civil Judge No. 2, Kamrup(M) in MS No. 372/2015. The applicant is the Union of India, represented by the General Manager (Construction), NF Railways and in the appeal filed it is already arrayed as appellant No. 1. The appellant No. 2 in the appeal is the Union of India represented by the General Manager, NF Railways, Maligaon. The applicant had filed a civil revision petition numbered as CRP No. 379/2015 against the order dated 17.5.2016 passed by the Civil Judge, No. 2, Kamrup (M) whereby the petition filed under the provision of Order 1 Rule 10(1) CPC for adding it as a party in MS No. 372/2015 was rejected. The above civil revision petition was dismissed as infructuous by order dated 11.11.2016 but at the same time liberty was granted to the applicant to challenge the judgment and decree passed in MS No. 372/2015. In view of the above order dated 11.11.2016 passed in CRP No. 379/2016, leave is granted to the applicant to prefer appeal. The application is allowed and disposed of.â??

5. Though in the appeal a number of grounds are taken to assail the ex parte judgment and decree dated 12.8.2016 passed by the learned Civil Judge

No. 2, Kamrup(M) in MS No. 372/2015, Ms Chakraborty has submitted that she will be addressing the Court only on the ground that the ex parte

decree dated 12.8.2016 is liable to be interfered with as the General Manager (Construction), who is a necessary party, was not arrayed as a

defendant in the suit and that the application filed on 8.3.2016 for impleading the General Manager (Construction), NF Railway was also erroneously

rejected by the order dated 17.5.2016.

6. With the above preface, it will be appropriate to briefly take note of the case of the respondent in the trial court.

7. The respondent, who is the plaintiff, is engaged in the business of construction of ropeway, bridges and other civil and mechanical construction

works and deals with government as well as non-governmental private organizations on contractual basis. A letter of intent was issued in favour of the

plaintiff on 29.11.2011 for construction of three bridges on three rivers: Sankosh, Tipkai and Gadadhar in Assam. A formal agreement was entered

into on 29.8.2012. A letter dated 13.6.2013 was issued directing the plaintiff to

stop the execution of the works due to shortage of funds till further orders/instruction. The plaintiff was informed that it would be at liberty to opt for closure of the said contract, if it so desired without any financial liabilities or claim on either side. The plaintiff opted for closure of the agreement by letter dated 1.7.2013, recording there in that such closure of the contract could not be without any financial liability/claim and relying upon Clause 61 of the General Conditions of Contract, demanded the price for value of approved materials at site, the price of construction work done by the plaintiff till the date of such closure and other miscellaneous expenses incurred by it at site and also sought for deployment of suitable officers for necessary inspection at site for joint measurement.

8. A letter dated 30.6.2014 was issued by the NF Railway admitting and accepting the statements made by the plaintiff that there had been delay in making payment but at the same time calling upon the plaintiff to return certain materials and tactfully asking it to take up the work again on the same terms and conditions. Subsequently, a letter dated 5.7.2014 was issued by the NF Railway calling upon the plaintiff to extend the bank guarantee dated 25.11.2013 which expired on 24.4.2014 for a further period of six months plus 60 days from the date of expiry up to 24.1.2015 and to resubmit the same for necessary action. While the plaintiff was called for joint measurement work at site, the letter also demanded "No Claim Certificate" from the plaintiff. By a letter dated 10.7.2014 the plaintiff clarified that question of resumption of work under the same agreement could only arise if the defendant agreed to new rates and prices on the basis of mutual discussion and on payment of outstanding dues. In response to letter dated 5.7.2014 issued by the NF Railway, plaintiff by letter dated 17.7.2014, informed that all materials had been returned back to NF Railway and that no fruitful purpose would be served by joint measurement at that distance of time. It was also clarified that question of issuance of "No Claim Certificate" could not arise till such time the plaintiff's dues are paid. It is pleaded that in respect of the work executed by the plaintiff under the agreement, the defendant made payment of an amount of Rs.45,54,099/- and a sum of Rs.62,64,075/- remained due and payable. The plaintiff, apart from the aforesaid amount, pleaded that a sum of Rs. 6,39,870/- is to be paid by the plaintiff to the owners of machineries and equipments. For

miscellaneous and incidental expenses an amount of Rs. 8,60,793/- is due and payable. Further an amount of Rs. 29,70,789/- against the construction

of labour camp, earnest money of Rs. 3,45,020/-, security deposit of Rs. 4,55,410/-, cost of transportation for mobilization, etc to the tune of Rs.

1,12,000/- are also due and payable. The plaintiff had served a notice dated 18.6.2015 under Section 80(1) CPC upon the defendant claiming an

amount of Rs. 1,23,89,609/-. Subsequently, the suit was filed for the aforesaid amount along with pendente lite interest and interest upon judgment at

the rate of 18% per annum and cost of the suit. The said suit was registered as Money Suit No. 372/2015 in the Court of the learned Civil Judge, No.

1 Kamrup (M), Guwahati.

9. In the suit, the defendant was arrayed as follows:

Union of India, Service through the General Manager, NF Railway having its office at Maligaon, Guwahati-781011.

10. On 8.3.2016, the learned counsel for the General Manager (Construction), NF Railway filed an application stating that the General Manager, NF

Railway and the General Manager (Construction), NF Railway are two different entities and the plaintiff wrongly impleaded the General Manager, NF

Railway upon whom summons had been served instead of General Manager (Construction). It is stated that the General Manager, NF Railway is not

a necessary party in the suit as all dealings were made by the General Manager (Construction), NF Railway. It is further stated that the General

Manager, NF Railway had forwarded the information of the institution of the suit to the General Manager (Construction), NF Railway, who in turn

forwarded the information to the Deputy Chief Engineer (Construction), NF Railway, who had engaged him to appear in the case. Accordingly, a

prayer was made to implead the General Manager (Construction), NF Railway as defendant and to issue summons to the General Manager

(Construction) to enable him to file written statement.

11. In the objection that was filed to the said application, it is stated that the defendant had received summons on 7.12.2015 and as the defendant failed

to appear on 20.1.2016, the suit had proceeded ex parte against the defendant and 8.3.2016 was fixed for evidence of the plaintiff. In the said

objection it is pleaded that Clause 1.1 of the Additional Special Condition of Contract, which is a part of the tender and part of the plaint, provides that

General Manager shall mean and include General Manager (Construction), NF Railway and therefore, no case is made out for impleading the General

Manager (Construction), NF Railway. It is pleaded that the General Manager (Construction), NF Railway could have filed written statement.

12. By the order dated 17.5.2016, the learned trial court rejected the application for impleading the General Manager (Construction), NF Railway as party defendant.

13. As noticed in the earlier part of this order, the said order dated 17.5.2016 was put to assailment in CRP No. 379/2016 and the petition was dismissed on 11.11.2016 as being rendered infructuous.

14. While the aforesaid CRP was pending consideration, the suit was proceeded with and finally on 12.8.2016, an ex parte judgment was passed. Mr.

Banerjee has submitted that though the civil revision petition was filed, the same was not even moved till 5.10.2016.

15. Ms Chakraborty has submitted, with reference to the agreement entered into by the plaintiff with the President of India, that the General Manager,

NF Railway was not in the picture at all and for NF Railway, the signatory was the Deputy Chief Engineer (Construction)/Tender, and therefore, the

General Manager (Construction), NF Railway is a necessary party, in absence of whom an effective decree cannot be passed.

16. By placing reliance on the additional affidavit filed, it is submitted by her that the Government of India in the year 1979 decided to lay one new line

each in six North-Eastern States, namely, Assam, Tripura, Meghalaya, Manipur, Arunachal Pradesh and Mizoram and construction was entrusted to

Railways as a deposit work. Railways, in view of such a big thrust in railway construction projects in North-East areas, created a separate

construction organization headed by General Manager, (Construction), NF Railway, to manage and control new and other ongoing works including BG

lines projects. She submits that the plaintiff being aware of the same had demanded appointment of an arbitrator by a letter dated 2.8.2014 addressed

to the Deputy Chief Engineer (Construction)/G-2 and yet when the suit was filed, General Manager (Construction), NF Railway was not made a party

defendant as a result of which the Railways has suffered great prejudice. She has further submitted that the court can, at any stage of the proceeding,

direct impleadment of any person as party, who ought to be have been joined as

defendant, for effective and complete adjudication of the issues

involved in the suit. In support of her submission, the learned counsel places reliance on the judgment in the case of Abdul Rasak and ors. vs. Kerala

Water Authority and ors., reported in (2002) 3 SCC 228 and Vidur Impex & Traders (P) Ltd. vs. Tosh Apartments (P) Ltd., reported in (2012) 8 SCC

384.

17. Mr. Banerjee has submitted that the plaintiff had prayed for relief from the Union of India, and therefore, Union of India was made a party

defendant represented by the General Manager, NF Railway. He has submitted that in terms of Section 80(2) CPC, notice was given to the General

Manager, NF Railway. It is submitted by him that when Union of India is made a party defendant, individual departments are not required to be made

party defendants separately as the liability is sought to be fastened only upon Union of India. Mr. Banerjee has also drawn the attention of the Court to

the supplementary affidavit filed on behalf of the respondent enclosing thereto the Additional Special Condition of Contract containing definition and

interpretation section as well as The Regulation for Tenders and Contract for Engineering Works. He submits that the definition of General Manager

is an inclusive definition encompassing General Manager (Construction) in the definition of General Manager, NF Railway and therefore, there was no

necessity whatsoever to implead the General Manager (Construction). He contends that under no circumstances it can be construed that the General

Manager (Construction) was a necessary party. He has submitted that appropriate steps were not taken by the defendant whom the plaintiff rightly

arrayed as the defendant and no written statement was filed. No prayer was also made by the defendant praying for time to file written statement

and, on the contrary, a petition was filed on 8.3.2016 contending that General Manager, NF Railway is not a necessary party. He has relied upon the

judgment rendered in the case of State of Tripura and ors. vs. Kaushik Roy, reported in (2001) 3 GLR 312 and State of Kerala vs. General Manager,

Southern Railways, reported in (1976) 4 SCC 265.

18. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

19. Order 1 Rule 9 CPC provides that no suit shall be defective by reasons of mis-joinder or non-joinder of parties and the court may in every suit deal

with the matter in controversy so far as regards the right and interest of the parties actually before it. Proviso to Rule 9, however, makes it clear that nothing in Rule 9 shall apply to non-joinder of a necessary party. The principle enshrined in proviso to Order 1 Rule 9 CPC is that impleadment of a necessary party is mandatory and in case of non-joinder of necessary party, the plaintiff will not be entitled to the relief sought by him and the suit will be defeated by reason of non-joinder of necessary party. The plaintiff has to ensure that the necessary party is before the court as otherwise the proceeding will fail.

20. Since the entire controversy is revolving around non impleadment of the General Manager (Construction), NF Railways, at the outset, it will be appropriate to have an understanding of who is a necessary party.

21. Law on the subject is well settled and it has crystallized that a necessary party is one without whom, no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. In determining whether one is a necessary party or not, the question that is to be posed is as to whether there is curtailment or extinction of a legal right of the person who is not impleaded.

22. Section 79 CPC lays down that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, shall be — (a) in the case of a suit by or against the Central Government, the Union of India, and (b) in the case of a suit by or against a State Government, the State.

23. Section 80(1) CPC provides that save as otherwise provided in sub-section (2) thereof, no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of — (a) in the case of a suit against the Central Government, except where it relates to a railway, a Secretary to that Government; (b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway; (bb) in the case of a suit against the Government of the State of Jammu & Kashmir, the Chief Secretary to Government or any other officer authorized by that Government in that behalf; (c) in the case of a suit

against any other State Government, a Secretary to that Government or the Collector of the district and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a statement that such notice had been so delivered or left.

24. The aforesaid provision makes it clear that before institution of a suit against the Central Government, where it relates to a railway, a notice has to be given to the General Manager of that railway. The requirement of Clause (b) to Section 80 CPC is that notice in the case of a suit against the Central Government, where it relates to a railway must go to the General Manager of the concerned railway or railways is because of the fact that it is primarily the liability of the railway administration of the said railway or railways to satisfy the claim of the suitor in accordance with Section 80 CPC.

25. In State of Kerala (supra), the suit was filed claiming damages from the General Manager, Southern Railways, Madras on the ground of short supply as well as damages caused in transit. The suit was filed by the State of Kerala and in the suit, Union of India was not made a party defendant.

26. In Paragraphs 6, 7, 8 and 9 of State of Kerala (supra), it was held as follows:

â??6. Section 80 of the Code of Civil Procedure provides inter alia that no suit shall be instituted against the Government until the expiration of two months next after the notice in writing has been delivered to or left at the office of, in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway. The above provision clearly contemplates institution of a suit against the Central Government even though it relates to a railway. A suit against the Central Government in terms of section 79 of the Code would necessarily have to be brought against the Union of India.

7. The Act no doubt makes provision for the liability of the railway administration, but from that it does not follow that the railway administration is a separate legal entity having a juristic personality capable of being sued as such. The definition of "railway administration" in section 3(6) of the Act

that it would mean the Manager of the railway does not warrant the inference that a suit against the railway administration can be brought against the

Manager of that railway. We have to bear in mind the distinction between the owner of the railway, namely, the Union of India, and the authority which actually runs the railway and to whom duties have been assigned for this purpose by the Act. The manager of the railway under the Act is such authority. When, however, liability is sought to be fastened on the railway administration and a suit is brought against it on that account, the suit, in our opinion, would have to be brought against the Union of India because it is the Union who owns the railway and who would have the funds to satisfy the claim in case decree is awarded in such suit.

8. The scheme of the Act, even though there are now hardly any company-owned railways in India, is to treat different railway administrations as different units, although all of them may be owned by the Union of India. Neither the definition of the "railway administration" in section 3(6) of the Act nor the language of sections 72 to 80 of the Act lends support for the view that the railway administrations are to be treated as separate personalities, entities or separate juridical persons as seems to have been observed in the case of *Dominion India v. Firm Museram Kishunprasad*. Yet the treatment of the different railway administrations as different units for the purpose of fastening liability on the Union of India has got significance and relevance. Viewed in that light, it would follow that the definition of the "railway administration" given in section 3(6) of the Act does not make the railway administration or its General Manager a legal entity or a corporate body or a juridical person to represent the railway administration as such in suits. The claim in a suit for recovery of money under the Act against the different railway administrations owned by the Central Government in accordance with the general principle of law contained in Order 1 Rule 3 of the Code of Civil Procedure has got to be made against the person against whom the right to relief is alleged to exist.

9. The significance of creating the various railway administrations as separate units, even though they may be State-owned, is to be found in section 80 of the Act, and section 80 of the Code of Civil Procedure. For claiming a decree against the Union of India under the Act the plaintiff has got to specify the railway administration or administrations on account of which liability is sought to be fastened upon the Union of India, as contemplated by section 80 of the Act. The institution of the suit has to be preceded by service of

notice under section 77 of the Act and section 80 of the Code to the appropriate authority which is the General Manager of the railway concerned. The requirement of clause (b) of section 80 of the Code that a notice in the case of a suit against the Central Government where it relates to a railway must go to the General Manager of the concerned railway or railways is also based upon the assumption that it is primarily the liability of the railway administration of the said railway or railways to satisfy the claim of the suitor in accordance with section 80 of the Act. The demarcation of the different State-owned railways as distinct units for administrative and fiscal purposes cannot have the effect of conferring the status of juridical person upon the respective railway administrations or their General Managers for the purpose of civil suits.

27. Thus it is clear that Section 80 CPC expressly contemplates institution of a suit against the Central Government even though it relates to a railway and a suit against the Central Government, in terms of Section 79 CPC, would necessarily have to be brought against the Union of India. Taking note of the definition of "railway administration" under Section 3(6) of the Indian Railways Act, 1890, it was held that the same does not make the railway administration or its General Manager a legal entity or corporate body or a juridical person for the purpose of civil suits. It was held that when liability is sought to be fastened on the railway administration and a suit is brought against it on that account, the suit would have to be brought against the Union of India because it is the Union who owns the railways and who would have the fund to satisfy the claim in case decree is passed in such suit.

28. In the Indian Railways Act, 1890, in Section 3(6) "railway administration" or administration in the case of a railway administered by the Government, means the Manager of the Railways and includes the Government, and, in the case of a railway administered by railway company, means the railway company. In the Railways Act, 1989, the definition of "railway administration" in Section 2 (32) reads as follows: "railways administration", in relation to (a) a Government railway, means the General Manager of a Zonal Railway; and (b) a non-Government railway, means the person who is the owner or lessee of the railway or the person working the railway under an agreement". In substance, there is

no fundamental difference in the definitions and therefore, having regard to the pronouncement of the Supreme Court in the State of Kerala (*supra*),

there is no escape from the conclusion that demarcation of the different State-owned railways as distinct units for administrative and fiscal purposes

cannot have the effect of conferring the status of juridical person upon the respective railway administrations or their General Managers for the

purpose of civil suit.

29. In the State of Tripura and *ors.*, (*supra*), it was observed that State or Union Government is liable for the act committed by any officer or official

of any department if it comes within the fold of liabilities to be shouldered by the Union of India or respective States under law and that in such

circumstances it was not necessary that the Forest Department should be impleaded as party though it might have been proper to implead the official

connected with the cause of action in the suit as proper party only.

30. Section 4(1) of the Railways Act, 1989 provides that the Central Government shall, by notification, appoint a person to be the General Manager of

a Zonal Railway and Section 4(2) provides that the general superintendence and control of the Zonal Railway shall vest in the General Manager.

31. In the suit, the Union of India was made a defendant through the General Manager, NF Railway. In the light of the pronouncement of the

Supreme Court, General Manager (Construction) is not a legal entity to represent the railway administration in suits and therefore, it is apparent that

there could not have been any curtailment or extinction of a legal right of the General Manager (Construction), NF Railway. Viewed in that context, it

cannot be construed that because General Manager (Construction), NF Railway was a necessary party and as he was not arrayed as a defendant, the

suit is liable to be dismissed. The decision cited by Ms Chakraborty in the case of Abdul Rasak (*supra*) is not applicable to the facts and

circumstances of this case. In the said case, a local authority for whose benefit land was sought to be acquired was held to be proper party in a land

acquisition proceeding.

32. Further, in the Additional Special Conditions of Contract issued by the NF Railway (Construction) at Clause 1.1, General Manager is defined and

the same reads as follows:

â??1.1 'General Manager' shall be the officer in Administrative charge of the

whole of Northeast Frontier Railway and shall mean and include the General Manager of the Successor Railway and General Manager (Construction) of Northeast Frontier Railway.â? In the Regulations for Tenders and Contracts for the Guidance of the Engineers and Contractors for engineering works, in the definition section at Clause 1.2(b) 'General Manager' is defined as follows: â??General Manager shall mean the Officer in charge of the general Superintendence and control of the Railway and shall also include the General Manager (Construction) and shall mean and include their successors of the successor Railway.â??

33. Going by these definitions of General Manager, NF Railway, it is crystal clear that such definition embraces within its fold General Manager (Construction) and therefore, from this stand point also General Manager (Construction), NF Railway is not a necessary party.

34. In view of the above discussion, I find no merit in this appeal and consequently, the appeal is dismissed.

35. No cost.