VEB DEUTRFRACHT SEEREEDEREI ROSTOCK (D.S.R. LINES) A
A DEPARTMENT OF THE GERMAN DEMOCRATIC REPUBLIC

v.

NEW CENTRAL JUTE MILLS CO. LTD. AND ANR.

NOVEMBER 5, 1993. B

[M.M. PUNCHHI AND N.P. SINGH, JJ.]

Code of Civil Procedure, 1908—Section 86—Scope of—Indian company purchasing spare parts and accessories from foreign company—Goods found damaged—Suit filed by Indian Company—Foreign Company, a State Department claiming immunity as instrumentality of State—Necessary prior consent of Central Government not obtained—Suit—Maintainability of. C

The Respondent-Company filed a suit before the High Court against the appellant-a foreign company, for decree of a sum of Rs. 2,40,000 alleging that it purchased diverse spare parts and accessories from the appellant, which were found to be damaged. The appellant opposed the suit on the ground that it was an instrumentality of the State and as such the suit could not be entertained without the prior consent of the Central Government as required by S.86 of the Code of Civil Procedure 1908. A Single Judge allowed the objection and dismissed the suit. D E

On appeal, the Division Bench set aside the order of the Trial Judge and directed that the objection taken by the appellant-defendant be considered during the trial of the suit. Against this decision, the defendant preferred the present appeal. F

The appeal was contested by the Respondent-Company stating that the dispute had arisen in connection with a commercial contract and so S.86 CPC. was not applicable, as sovereign immunity could not be extended to commercial contracts.

Allowing the appeal, this Court G

HELD : 1.1. In view of Article 12 of the Constitution of the German Democratic Republic, and the certificate granted by the Counsel General of the German Democratic Republic, the appellant shall be deemed to be a department of the Government of German Democratic Republic. [666-C] H

A 1.2. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a limit, so that a foreign company and corporation trading within the local limits of the Jurisdiction of the Court concerned, may take a plea of Section 86 of the Code of Civil Procedure, 1908 although *prima facie* it appears that such company or corporation is liable to be sued for any act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of Section 86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss and injury to the plaintiff. But, if it appears to the Central Government that, any attempt on the part of the plaintiff, to sue a foreign State, including any company or Corporation, is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent, because such motivated action on the part of the plaintiff, may strain the relations of this country with the foreign State. [666-G-H & 667-A-B]

D

1.3. In the instant case, the appellant being a foreign State within the meaning of Section 86 C.P.C. and the plaintiff-respondent not having obtained the consent of the Central Government as required by Section 86 C.P.C the suit filed on its behalf was rightly not entertained by the Trial Court. The question whether a suit should be entertained, cannot be deferred, till the stage of the final disposal of the suit, because that will serve neither the interest of the plaintiff nor of the defendant. The object of Section 86 is to save foreign States from being harassed by defending suits in which there are hardly any merits. If the foreign State is required to file written statement and to contest the said suit and only at the stage of final disposal, a verdict is given whether in the facts and circumstances of the particular case, such foreign State is entitled to the protection of Section 86 of the Code, the very object and purpose of the section shall be frustrated. The bar of Section 86 can be taken at the earliest opportunity and the Court concerned is expected to examine the same. [667-C-E]

G

Mirza Ali Akbar Kashani v. *United Arab Republic,* [1966] 1 SCR 319, *Baccus S.R.L.* v. *Servicio Nacional Del Trigo,* [1957] 1 Q.B. 438, *Karjina* v. *The Tass Agency,* [1949] 2 All England Law Reports 274 & *Royal Nepal Airline Corporation* v. *Monorama Mehar Singh Legha,* AIR (1966) Cal. 319 H referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4208 of 1983. A

From the Judgment and Order dated 21.1.83 of the Calcutta High Court in Appeal No. 94 of 1982.

Dr. Shankar Ghose, Parijat Sinha and B.D. Ahmed for the Appellant. B

P.R. Seetharaman for the Respondents.

The Judgment of the Court was delivered by

N.P. SINGH, J. The defendant is the appellant in this appeal. The C suit in question was filed by the respondent, for a decree for Rs. 2,40,000 alleging that the respondent had purchased diverse spare-parts and accessories from the appellant, which were found to be damaged. The appellant is a Company incorporated under the appropriate laws of the West Germany and is carrying on its business in West Germany as also at Calcutta. D

An objection was taken at the initial stage on behalf of the appellant that it was a department and/or agent and/or instrumentality of the Government of German Democratic Republic, which is recognised as a sovereign foreign State and as such the suit in question cannot be entertained against the appellant without prior consent of the Central Government as required E by Section 86 of the Code of Civil Procedure (hereinafter referred to as "the Code"). The same plea was taken even no behalf of the carrier, which also belongs to and is owned by the German Democratic Republic. In support of the stand and in order to attract the bar of Section 86 of the Code, the appellant produced the certificate dated 18.9.1981 granted by the Counsul General of the German Democratic Republic at Bombay F saying :

> VEB Deutfracht, Seereederei Rostock, abbreviated as 'D.S.R. commonly known as D.S.R. Lines constitutes a department of the Government of the German Democratic Republic exercising the G rights of a legal entity."

The Constitution of the German Democratic Republic was also produced. Reference was made to Article 12 of the said Constitution which says :

> "Mineral resources, mines, power stations, barrages and large H

A bodies of water, the natural resources of the continental shelf, the larger industrial enterprises, banks and insurance companies nationally-owned farms, traffic routes, the means of transport of the railways, ocean shipping and civil aviation, post and telecommunication installations, are nationally-owned property, private ownership thereof is inadmissible."

B

In respect of the carrier also, the Counsul General of the German Democratic Republic at Bombay granted the certificate saying that the said vessel "is owned by the people of the German Democratic Republic and, hence, owned by the State."

C

A learned Judge of the Calcutta High Court by order dated 3.2.1982 allowed the objection taken on behalf of the appellant and rejected the plaint saying that in absence of written consent by the Central Government, as required by Section 86 of the Code, the suit filed on behalf of the D respondent could not be entertained. On appeal filed on behalf of the respondent, the Division Bench set aside the order of the Trial Judge and directed that whether the suit cannot be entertained in absence of consent of the Central Government, should be considered during the trial of the suit.

E

One of the principles of International Law is that every State sovereign State respects the independence of every other foreign State. This absolute independence and the international comity underlines, the relationship between sovereign States. The object of Section 86 of the Code is to give effect to the principles of International Law. But, in India it is F only a qualified privilege because a suit can be brought with the consent of the Central Government in certain circumstances. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued so can it provide rights and liabilities of foreign States to sue and be sued in its Courts. It can be said that effect of Section 86 thus is to modify the extent of doctrine of immunity recog- G nised by the International Law. If a suit is filed in Indian Courts with the consent of the Central Government as required by Section 86, it shall not be open to any foreign State to rely on the doctrine of immunity. Sub-section(1) of Section 86 says in clear and unambiguous terms that no foreign State may be sued in any court, except with the consent of the Central H Government certified in writing by the Secretary to that Government.

Sub-section (2) prescribes that such consent shall not be given unless it appears to the Central Government that the case falls within any of the clauses (a) to (d) of sub-section (2) of Section 86. Sub-section (6) enjoins that where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity of being heard. On a plain reading of different sub-sections of Section 86, it is apparent that no foreign State may be sued in any Court in India, except with the consent of the Central Government which has to be certified in writing by the Secretary to that Government. In view of the provisions aforesaid, before any action is launched or a suit is filed against a foreign State, person concerned has to make a request to the Central Government for grant of the necessary consent as required by sub-section (1) of Section 86 and the Central Government has to accede to the said request or refuse the same after taking into consideration all the facts and circumstances of the case. In a sense it amounts to a bar on the power of Court itself which is entitled to try all suits of civil nature in view of Section 9 of the Code. But, Section 9 itself recognises the limitation on such Courts to try any suit the cognizance whereof is either expressly or impliedly barred. As such whenever a relief is sought against a foreign State, the Court before which such claim is lodged has to examine whether the person concerned has got the consent of the Central Government in terms of Section 86 of the Code.

The stand of the respondent is that as the dispute has arisen in connection with a commercial contract, Section 86 shall not be applicable. According to the respondent, the framers of the Code, while reconising the sovereignty and the immunity of the foreign States on principles recognised by the International Law, never purported to give immunity to the breach and contravention of the terms of the contract entered on behalf of the foreign State, which has nothing to do directly or indirectly with the sovereignty of the one State or the other but relates to commercial trade between the two States. There cannot be any conceivable object to keep such contracts within the scope of Section 86. As a first impression, this looks attractive. But, from bare reference to sub-section (2) (b) of Section 86, it shall appear that it requires such consent of the Central Government even in respect of agreements relating to commercial or trading contracts, because it say that such consent "shall not be given, unless it appears to the Central Government that the foreign State ..... by itself or another,

A trades within the local limits of the jurisdiction of the Court". If sub-section 2(b) of Section 86 itself prescribes that the consent to sue shall not be given unless it appears to the Central Government that the foreign State which is being sued, by itself or by any other authority, trades within the local limits of the jurisdiction of the Court, how it can be held that such consent is not required in connection with commercial contracts. If for granting consent the Central Government is required to be satisfied as to whether such foreign State, by itself or by any other authority, trades within the local limits of the jurisdiction of the Court concerned, then can it be urged that commercial contracts relating to trade and business having been entered on behalf of a foreign State are beyond the purview of Section 86 of the Code?

This Court in the case of *Mirza Ali Akbar Kashani* v. *United Arab Republic,* [1966] 1 SCR 319, pointed out in respect of section 86 :–

> ".....s.86 (1) proceeds to prescribe a limited liability against foreign States. The limitation on the liability of foreign States to be sued is twofold. The first limitation is that such a suit cannot be instituted except with the consent of the Central Government certified in writing by a Secretary to that Government. This requirement shows the anxiety of the Legislature to save foreign States from frivolous or unjustified claims. The second limitation is that the Central Government shall not give consent unless it appears to the Central Government that the case falls under one or the other of clauses (a) to (d) of s.86 (2). "

It is true that Government Corporations have been incorporated to undertake the activities, which at one time were directly part of the activities of the foreign State. A question may arise whether the immunity provided by Section 86 of the Code can be extended to even such Government Undertakings which have their own legal entity. At one time, in view of their corporate and juristic personality, such Government Corporations were held not to be part of a State having their own independent existence. But, this aspect was re-examined by the English Court as well as this court. In the case of *Baccus S.R.L.* v. *Servicio Nacional Del Trigo,* [1957] 1 Q.B. 438, it was said :

> "Are we then to hold that the State of Spain is deprived of sovereign immunity with respect to this activity of importing and

exporting grain by reason of the fact that the defendants are a corporate body? In my view that would be plainly wrong. In these days the Government of a Sovereign State is not as a rule reposed in one personal sovereign: it is necessarily carried out through a complicated organization which ordinarily consists of many different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me to be purely a matter of governmental machinery."

Again, in *Karjina* v. *The Tass Agency,* [1949] 2 All England Law Reports 274, it was pointed out :

"The history of the legislation in this country as regards the departments of State seems to me to show that it is quite possible that a State may for certain purposes under its own legislation give some department of State the status and the rights of a juridical entity without depriving the department of its general immunity from suit, and it seems to me that it would be impossible to say - no doubt, our government would not wish to say - that the Crown had thereby deprived itself of the right to rely on that immunity if an attempt were made to sue it in a foreign country. One must look in every case at the facts to reach a conclusion whether the Crown has intended to give up its immunity generally or only for limited and defined purposes."

In the case of *Royal Nepal Airline Corporation* v. *Monorama Mehar Singh Legha,* AIR (1966) Cal. 319, a Division Bench of the Calcutta High Court held that Nepal Airlines Corporation having its office at Calcutta shall be deemed to be department of the Government of Nepal on the basis of the documents produced before the Court and as such was entitled to claim immunity from the process of the Indian Court to exercise its jurisdiction in respect of the claim for damages which had been brought by the plaintiff of the said suit. But, at the same time, it must be impressed that any plea of immunity raised by a corporate undertaking of a foreign State, has to be examined on the basis of materials produced on behalf of such undertaking or corporation. The initial onus of establishing that such corporation or undertaking had right to immunity, must be discharged. If it satisfies the court that because of any constitutional provision, although

A such corporation has its separate legal entity, still it shall be deemed to be a department of the State for purpose of immunity, then only the onus will shift to the plaintiff to disprove any such claim.

In the present case, the appellant had produced the Constitution of the German Democratic Republic, Article 12 whereof has been B reproduced above, which provides that larger industrial enterprises, banks, insurance companies, nationally-owned farms, means of transport of the railways, ocean shipping and civil aviation, post and telecommunication installations, are nationally-owned property, private ownership thereof is inadmissible. In view of the aforesaid Article 12 of the Constitution and C the certificate granted by the Counsul General of the German Democratic Republic, the appellant shall be deemed to be a department of the Government of German Democratic Republic.

Sub-section (2) of Section 86 of the Code says that such consent shall D not be given unless it appears to the Central Government that the suit in question has been filed under the conditions mentioned in clauses (a) to (d) of sub-section (2) of Section 86. Clause (b) of sub-section (2) provides that consent shall be given, in respect of a suit, which has been filed against a foreign State, if such foreign State 'by itself or another, trades within the local limits of the jurisdiction of the Court'. When sub-section (2) provides E that such consent shall be given by the Central Government in respect of cases covered by clause (b) of sub-section (2), then a person who is to sue in any court of competent jurisdiction, against any such foreign State or any company or corporation which can be held to be a foreign State in respect of any breach of contract, is entitled to apply for consent of the F Central Government and the Central Government is expected to consider the said request taking into consideration the facts and circumstances of that particular case. While considering the question of grant or refusal of such consent, the Central Government is expected to examine that question objectively. Once the Central Government is satisfied that a cause of action has accrued to the applicant against any foreign company or corporation, G which shall be deemed to be a foreign State, such consent should be given. The immunity and protection extended to the foreign State on the basis of International Law should not be stretched to a limit, so that a foreign company and corporation, trading, within the local limits of the jurisdiction of the Court concerned, may take a plea of Section 86 although *prima facie* H it appears that such company or corporation is liable to be sued for any

act or omission on their part or for any breach of the terms of the contract entered on their behalf. It is neither the purpose nor the scope of Section 86 to protect such foreign traders, who have committed breach of the terms of the contract, causing loss and injury to the plaintiff. But, if it appears to the Central Government that, any attempt on the part of the plaintiff, to sue a foreign State, including any company or corporation, is just to harass or to drag them in a frivolous litigation, then certainly the Central Government shall be justified in rejecting any such application for consent, because such motivated action on the part of the plaintiff, may strain the relations of this country with the foreign State.

In the present case, the appellant having been held to be a foreign State within the meaning of Section 86 and the plaintiff- respondent not having obtained the consent of the Central Government, as required by Section 86, the suit filed on its behalf was not rightly entertained by the Trial Court. The question whether a suit should be entertained, cannot be deferred, till the stage of the final disposal of the suit, because that will serve neither the interest of plaintiff nor of the defendant. The object of Section 86 is to save foreign States from being harassed by defending suits in which there are hardly any merit. If the foreign State is required to file written statement and to contest the said suit and only at the stage of final disposal, a verdict is given whether in the facts and circumstances of the particular case, such foreign State is entitled to the protection of Section 86 of the Code, the very object and purpose of Section 86 shall be frustrated. The bar of section 86 can be taken at the earliest opportunity and the Court concerned is expected to examine the same.

Accordingly, the appeal is allowed. The order of the Division Bench is set aside and the of the Trial Court is restored. In the facts and circumstances of the case, there shall be no order as to costs.

G.N. Appeal allowed.