

(2010) 01 MAD CK 0146

Madras High Court

Case No: Writ Petition No. 1416 of 2010 and M.P. No. I of 2010

Lt. Col. M.J. Reddy

APPELLANT

Vs

The Deputy High Commissioner,
British Deputy High Commission
and Others

RESPONDENT

Date of Decision: Jan. 28, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 80, 80(2), 86, 86(1), 86(2)
- Constitution of India, 1950 - Article 12, 226

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: N. Umapathy, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

The writ petition is filed by the Petitioner seeking for a direction to the 5th Respondent -Union of India to give suitable directions to Respondents 1 to 4 to strictly implement the proceedings dated 25.04.2006 so as to settle the dues to the extent of Rs. 2,99,454/- together with difference in the overtime payable to the Petitioner.

2. It is the case of the Petitioner that he was a Army Officer retired from Indian Army. He had secured appointment as a Security Manager with the first Respondent British Deputy High Commission, Chennai. It is unnecessary to traverse the other averments except to state that the Petitioner's contract with the High Commission came to an end on 31.12.2008. It is the claim of the Petitioner that as per the terms of the contract and also the circular of the Ministry of External Affairs, Government of India, he is entitled to get certain amounts. The Petitioner had sent a

representation to the British High Commission.

3. The Deputy Head of Mission informed the Petitioner that the British High Commission has a fair and well-established framework of conditions and policies of service for locally engaged staff and the model contract given by the Ministry of External Affairs, Government of India is only recommendatory and not binding on any Diplomatic Mission bound by the Vienna Convention. The Petitioner through his counsel had issued a notice to the High Commission and thereafter came forward to file the present writ petition.

4. Initially, the Registry of this Court raised its objection regarding the maintainability of the writ petition. The matter was directed to be posted before this Court to hear the arguments of the counsel for the Petitioner.

5. Mr. N. Umapathy, Learned Counsel for the Petitioner submitted that the Vienna Convention is binding on all foreign diplomatic missions. The United Kingdom is also a party to the Vienna Convention and as per the circular issued by Ministry of External Affairs, the Petitioner is entitled to get his amounts. Since the High Commission had refused to pay the amount, the writ petition is maintainable. This Court is unable to entertain such a contention.

6. Under Article 226 of the Constitution of India, this Court has power, throughout the territories in relation to which it exercises jurisdiction, to issue any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs for the enforcement of any of the rights conferred by Part III and for any other purpose.

7. The word "any person" only means that apart from the State within the meaning of Article 12, the power to issue writ is available against any person who is amenable to the writ jurisdiction of the Court. But in such circumstances, it must be seen whether the person referred to in Article 226 has a duty enjoined under a statute. In the absence of the body being a "State" within the meaning of Article 12 or if it is not an any instrumentality of the State, the person against whom a writ can be issued must have a statutory obligation. Otherwise, the Court cannot issue any writ. It must also be noted that all the Foreign Missions including their Consular officer are amenable to the writ jurisdiction of this Court unless they were imposed with any statutory duty in India.

8. In this Context, it is necessary to refer to the decision of the Supreme Court in G. Basi Reddy Vs. International Crops Research Instt. and Another. In paragraphs 27 and 28 it was observed as follows:

27. It is true that a writ under Article 226 also lies against a "person" for "any other purpose". The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to the well-established principles, a writ lay. That a writ may issue to an appropriate person

for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose for which any of the writs mentioned would, according to well-established principles issue.

28. A writ under Article 226 can lie against a "person" if it is a statutory body or performs a public function or discharges a public or statutory duty (Praga Tools Corporation v. C.A. Imanal, Shri Anadi Mukta Sadguru Trust v. V.R. Rudani SCC at p.698 and VST Industries Ltd. v. Workers" Union). ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities. In Praga Tools Corp. v. C. V. Imanal this Court construed Article 226 to hold that the High Court could issue a writ of mandamus "to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest". The Court also held that: (SCC p.589, para 6)

[A]n application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (See Sohan Lal v. Union of India.)

9. The Foreign Missions including the Respondent will have to be treated as a private person having certain privileges under the Indian laws and only subject to those terms and conditions a writ can be issued. In the present case, the claim of the Petitioner is purely contractual and therefore, even for enforcing any contractual obligation, the power under Article 226 cannot be invoked. It is not as if the Petitioner has no remedy under law. The Petitioner can always avail remedy of a civil suit subject to the restriction imposed under the Code of Civil Procedure. The power of the civil court to order payment of certain contractual amounts are always available subject only to Section 86 of the CPC .

10. Section 86 of the CPC may be usefully extracted below:

86. Suits against foreign Rulers, Ambassadors and Envoys- (1) No 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:

Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid a foreign State from whom he holds or claims to hold the property.

(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 foreign State may be sued, but it shall not be given, unless it appears to the Central Government that the foreign State-

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

(b) by itself 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 charge thereon, or

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

(3) Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.

(4) The preceding provisions of this section shall apply in relation to-

(a) any Ruler of a foreign State;

(aa) any Ambassador or Envoy of a foreign State;

b) any High Commissioner of a Commonwealth country; and

(c) any such member of the staff of the foreign State or the staff or retinue of the Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country as the Central Government may, by general or special order, specify in this behalf, as they apply in relation to a foreign State.

(5) The following persons shall not be arrested under this Code, namely:

(a) any Ruler of a foreign State;

(b) any Ambassador or Envoy of a foreign State;

(c) any High Commissioner of a Commonwealth country;

(d) any such member of the staff of the foreign State or the staff or retinue of the Ruler, Ambassador or Envoy of a foreign State or of the High Commissioner of a Commonwealth country, as the Central Government may, by general or special order, specify in this behalf.

(6) 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.

11. Therefore, before filing the civil suit, the Petitioner will have to necessarily get the consent of the Central Government certified in writing by the Secretary to the Government. When such request is made for consent and if the Central Government wants to refuse to give consent, such person who made a request will also be given a reasonable opportunity of being heard. The said provision has been incorporated in the CPC with a view to check frivolous or unsubstantiated claims made against Foreign Missions and also with a view to maintain cordial relationship with such countries.

12. Mr. N. Umapathy Learned Counsel for the Petitioner states that he had not approached the Central Government with any such request for consent of the Central Government to sue the Respondents and he had also not filed any suit. He was not sure whether he will get any such permission from the Central Government and that it was a time consuming process.

13. A constitution bench of the Supreme Court in [H.H. The Maharana Sahib Shri Bhagwat Singh Bahadur of Udaipur Vs. The State of Rajasthan and Others](#), held that the term "sue" found in Section 86 of CPC will not include proceedings under the Industrial Disputes Act as the Industrial Tribunal is not a Court within the meaning of Section 86 CPC . In the present case, this Court is not considering a claim under the I.D. Act.

14. Subsequently, the Supreme Court in [Mirza Ali Akbar Kashani Vs. United Arab Republic and Another](#), held that a suit for damages for breach of contract instituted in the Original Side of the Calcutta High Court against the United Arab Republic is governed by Section 86 of CPC and in the absence of the consent of the Central Government, the suit is not maintainable.

15. Once again the scope of Section 86 CPC came to be considered elaborately by the Supreme Court in [Harbhajan Singh Dhalla Vs. Union of India \(UOI\)](#) . In that case, which is similar to that of the present case, an Indian National who performed general maintenance work in the Embassy of Algeria and at the residence of the Ambassador of Algeria in New Delhi claimed certain dues. In order to sue the Foreign Mission, he sought for permission of the Central Government which was refused, The refusal of the Central Government to give consent came to be challenged before the Supreme Court. The Supreme Court in paragraphs 9 and 18 held as follows:

9. Immunity of foreign States to be sued in the domestic forum of another State was and perhaps still is part of the general international law and international order and it is not necessary for the present purpose to consider its origin, development and

the trends in different countries. As Professor H. Lauterpacht writes in The British Yearbook of 1951 IL 28 on "The Problem of Jurisdictional Immunities of Foreign States" at p. 230 that the assumption of jurisdiction over foreign states by the domestic court was considered at one point of time to be contrary to the dignity of the foreign States and as such inconsistent with the international courtesy and the amity of international relations. This has been in the past a persistent theme of judicial decisions. It may be noted that insofar as; the doctrine of immunity owed its acceptance to the decisions of the courts of the United States it is explained to some extent by the fact that it was by reference to dignity of the States of the Union that their immunity from suit was urged insistently and repetitiously. During the debates preceding the adoption of the Virginian Convention in 1778, John Marshall stressed the element of indignity inflicted upon a State by making it a Defendant in an action. (Elliot, Debates - 2nd Edn. 1836, p. 555). It may be of historical amusement specially in the context of Indian Constitution and the growth and the history of the Indian Constitution to note that in the leading case of *Chisholm v. Georgia* the main argument for the Defendant State was that it was a "degradation of sovereignty in the States to submit to the supreme judiciary of the United States". The courts of the United States have gone to the length of relying on the argument of dignity in the matter of immunity of foreign states from taxation. In England, "dignity", coupled or identified with "independence", played an important part as an explanation of the doctrine of immunity of foreign States.

18. Section 86 at the material time controlled the suits against foreign States and provided that no foreign State might 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 save and except, certa in specified type of suits, with which we are not concerned in this appeal. Sub-section (2) of Section 86 of the Code stipulates inter alia, that no such sanction shall be given, unless the foreign State 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 by itself or another trades within the local limits of the jurisdiction of the courts in India.

16. With reference to the refusal by the Central Government, the Supreme Court held that such a refusal can be a subject matter of judicial review. In paragraph 19 of the same judgment, the Supreme Court had observed as follows:

19. In this case the Petitioner had a right to carry on the work of maintenance and repairs in this country. This right is granted to him under the Constitution and he trades within the local limits of the courts in India and the foreign State which he wants to sue has immovable property situate within the limits of this country. There is dispute about the Petitioner's claim. That dispute has not been judicially determined. It has not been held that the claim of the Petitioner is frivolous. In that view of the matter, it appears to us that a foreign State in this country if it fulfills the conditions stipulated in Sub-section (2) of Section 86 of the Code would be liable to

be sued in this country. That would be in conformity with the principles of international law as recognised as part of our domestic law and in accordance with our Constitution and human rights. The power given to the Central Government must not be exercised arbitrarily or on whimsical grounds but upon proper reasons and grounds. The order merely states that the Government could not grant the permission to sue the State of Algeria on political grounds. In respect of a building where a masonry work was supervised by a contractor or an architect, how the dignity of a foreign State or relationship between the two countries would be jeopardised or undermined or endangered, it is difficult to comprehend or understand from this reason nor are the reasons explained or demonstrated in the counter-affidavit filed on behalf of the Respondent Government. The reasons given in the counter-affidavit on the other hand are different, namely:

- (a) the Government found no *prima facie* ground and
- (b) the claim was outside the provisions of Section 86 of the Code of Civil Procedure.

The second ground now stated is patently erroneous and contradictory to the ground mentioned in the letter dated November 26, 1983. One should have thought that the political relationship between the two countries would be better served and the image of a foreign State be better established if citizens' grievances are judicially investigated. This would also be in consonance with human rights.

17. The power of the Central Government to refuse by a non-speaking order also came to be considered subsequently in Shanti Prasad Agarwalla and others Vs. Union of India and others. In that case, the Central Government refused the consent on political grounds. In assailing the said order and following Harbhajan Singh Dhalla's case (cited *supra*), in paragraph 6, it was held as follows:

6. In the present case also, it is difficult to comprehend what is meant by the expression "political grounds" used in the impugned order. It is not clear what political considerations necessitated the rejection of the application. The Central Government while considering the application u/s 86 of the Code must decide the application in accordance with the provisions of the section itself and state clearly and intelligibly its reasons for rejecting the application. In the instant case, we are unable to appreciate what political considerations weighed with the Central Government for rejecting the application. We, therefore, have no alternative but to quash the impugned Order No. 10245-EE/82 dated February 1, 1984 and remit the matter to the Central Government for taking a fresh decision in accordance with law after giving an opportunity to the Petitioners of being heard.

18. Subsequently, the Supreme Court in dealing with the scope of Section 86 in Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic Vs. New Central Jute Mills Co. Ltd. and another, after referring to the previous cases in paragraphs 11 and 12 observed as follows:

11. Sub-section (2) of Section 86 of the Code says that such consent shall 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 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 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, 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* 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.

12. 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 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 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.

19. The Supreme Court vide its judgment in [Prem Lala Nahata and Another Vs. Chandi Prasad Sikaria](#), dealt with the scope of Order VII Rule 11(d) of CPC vis a vis Sections 80 and 86 of the Code of Civil Procedure. In paragraph 16, it was observed as follows:

... On the scheme of the Code of Civil Procedure, it cannot therefore be held that a suit barred for misjoinder of parties or of causes of action is barred by a law, here the Code. This may be contrasted with the failure to comply with Section 80 of the Code. In a case not covered by Sub-section (2) of Section 80, it is provided in Sub-section (1) of Section 80 that "no suit shall be instituted". This is therefore a bar to the institution of the suit and that is why courts have taken the view that in a case where notice u/s 80 of the Code is mandatory, if the averments in the plaint indicate the absence of a notice, the plaint is liable to be rejected. For, in that case, the entertaining of the suit would be barred by Section 80 of the Code. The same would be the position when a suit hit by Section 86 of the Code is filed without pleading the obtaining of consent of the Central Government if the suit is not for rent from a tenant....

(Emphasis added)

20. In the light of the above, the prayer made by the Petitioner cannot be countenanced and no relief can be given against the Deputy High Commissioner, Chennai. He has to seek remedy before the appropriate forum and certainly writ jurisdiction is not available to the Petitioner. Hence, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.