

(1912) 04 CAL CK 0002

Calcutta High Court

Case No: None

B.E.M. Rodricks

APPELLANT

Vs

The Secretary of State for India
in Council

RESPONDENT

Date of Decision: April 2, 1912

Acts Referred:

- Letters Patent Act, 1865 - Clause 12

Citation: 15 Ind. Cas. 955

Hon'ble Judges: Chaudhuri, J

Bench: Single Bench

Judgement

Chaudhuri, J.

The plaintiff in this suit seeks to recover the sum of Rs, 10,000 by way of damages for a false and malicious prosecution, said to have been conducted against him in the District of Rungpur, in which he says he was falsely accused of criminal breach of trust in respect of certain articles belonging to the Eastern Bengal State Railway, when he was employed as a servant of the Railway. He states that the criminal proceedings terminated in his acquittal, that such proceedings were taken maliciously and without reasonable or probable cause, and claims to be entitled to judgment against the Secretary of State for India in Council, for damages. It has not been argued before me, whether or not such a suit is maintainable against the Secretary of State for India in Council, the only point urged being that this Court has no jurisdiction under the Charter to entertain it. The argument on both sides has also proceeded upon the basis that the whole of the cause of action in this suit arose outside the local jurisdiction of this Court. I find, however, from the 9th paragraph of the plaint that the plaintiff asked for leave under Clause 12 of the Letters Patent "to safeguard himself against any contention" that part of the cause of action arose outside Calcutta. I find also from an endorsement on the plaint that such leave was granted by a learned Judge of this Court then sitting on the Original

Side. I do not, however, find anything in the plaint upon which such leave could have been granted. It may be, there are facts which have not been fully set out in the plaint, upon which the plaintiff could have legitimately asked for such leave, but, as the matter now stands, I must hold that leave under Clause 12 was not rightly granted and the Secretary of State for India in Council cannot be bound by the leave so given. The order was made in his absence, and he can, undoubtedly, question it. As I have said before, the argument has proceeded on the basis that no part, of the cause of action in this suit arose within the local limits of our jurisdiction. The learned Advocate-General contends that this Court has no jurisdiction to try an action of this character against the Secretary of State for India in Council, the cause of action having arisen wholly outside our local jurisdiction. He says that unless it can be shown in cases like this, that the Secretary of State for India in Council is a person who dwells, or carries on business, or personally works for gain within the local limits of Calcutta, this Court cannot try a suit instituted against him, and relies upon *Doya Narain Tewary v. The Secretary of State for India in Council* 14 C. 256. That case was decided by two Judges sitting on the Original Side of this Court composing a Bench constituted by the then Chief Justice on the 10th August 1886. There were three other similar cases which were referred to the same Bench for disposal, in all of which the Secretary of State for India in Council was defendant. The Bench was so constituted, I take it, upon a reference by one of the Judges, who was then sitting on the Original Side of this Court under Rule 54 (Original Side), although I have not been able to find the order of reference. There is no doubt that the case of *Doya Narain, Tewary v. The Secretary of State* 14 C. 256 is direct authority for the proposition that no such suit is maintainable. The learned Judges there hold that the Secretary of State for India in Council does not dwell within the local jurisdiction of this Court, or carry on business, or personally work for gain. In so deciding, the learned Judges discussed the decision of Mr. Justice Pigot in *Bipro Doss Dey v. The Secretary of State for India in Council* 14 C. 262n. Pigot, J., had taken a directly" opposite view. He held that such a suit was maintainable. He held farther that if the Secretary of State for India in Council in this country was a legal person in any sense, he could not possibly hold that he did not carry on business in Calcutta. So far as I am concerned, I am bound by the decision of the two learned Judges, Mitter and Trevelyan, JJ., who constituted the Bench to whom the matter was referred, but as I am not convinced in my mind that the decision is correct, I state my reasons. However differently the word "business" may have been construed at different times, I do not think there is any question whatever that a carrier's business is business" within the meaning of Section 12 of the Letters Patent, nor is there any doubt that a Railway Company, or other Corporate Body, or even a body of individuals, whether incorporated or not, is a "person" within the meaning of that section. See the definition of the word "person" in the General Clauses Act, 1897. It cannot also be doubted that a Railroad Company, apart from the fact of having " a Registered Office, carries on business" at its principal office where the Directors meet and the general business of the Company is transacted. Jessel, M. R., in

Erichsen v. Last (1881) 51 L.J.Q.B. 86 : 8 Q.B.D. 414 : 45 L.T. 703 : 30 W.R. 301 : 46 J.P. 357, said that where the "Brain Power" is, there a trade or business is carried on. The question, therefore, is as to whether the Secretary of State for India in Council, is a "person" within the meaning of Section 12 of the Letters Patent, and if so does that "person" carry on business in Calcutta, which at the time of the institution of this suit was the capital of the Government of India.

2. I shall, therefore, first consider the position of the Secretary of State for India in Council as a defendant in suits. In order to understand the position of the Government in this country, it is necessary to refer to certain old Acts. At the time that 21 Geo. III, C. 70, and 37 Geo. III, C. 142 were enacted, the Governor-General, the Governors of Bombay and Madras and their Councillors were servants of the East India Company, and it was necessary to protect them by special enactments from suits on account of things done by them in the exercise of their quasi-political functions. By Statute 3 and 4 Wm. IV. C. 85, the trading capacity of the Company was abolished except as to such trade as was necessary for purposes of the State. By 21 and 22 Vic, C. 106, the Government was transferred from the East India Company to the Crown. Section. 65 of that Statute provides as follows: "The Secretary of State in Council shall and may sue, and be sued as well in India, as in England by the name of the Secretary of State in Council as a Body Corporate; and all persons and Body politic shall and may have and take the same suits, remedies and proceedings, legal and equitable against the Secretary of State in Council of India as they could have done against the said Company; and the property and effects hereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes, shall be subject and liable to the same judgments and executions as they would while vested in the said Company have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company." By the words of the Statute, a clear right of suit is given against the Secretary of State for India in Council as a Body Corporate. Mitter and Trevelyan, JJ., however, hold that this section does not constitute the Secretary of State for India in Council a Body Corporate. Perhaps not so for all purposes, but it is quite clear that they were constituted a Body Corporate for purposes of suits, and as such represent the Government of India in such suits as may be maintained against the Government. Sir Richard Garth in *Judah v. The Secretary of State for India in Council* 12 C. 445 at p. 450 says--"It seems to me that since the Statute 21 and 22 C. 106, the Secretary of State for Indian in Council represents the Government here to all intents and purposes. He is the officer of the Crown authorized to sue and be sued in respect of all Crown debts and contracts." On page 452, he says: "Section 1 of that Act deals only with the manner in which suits are to be brought and has nothing to do with substantive rights. The latter part of the section says nothing as to what rights may be acquired either by the Secretary of State or by the Crown through the Secretary of State, nor as to the nature or character of rights so acquired. It leaves that to be governed by the ordinary principles of law. But. with regard to liabilities which may

be enforced against the Secretary of State there are express words."

3. The East India Company was in its origin a Trading Company, which became vested with sovereign powers. There is no question that the Company was liable to suits in respect of acts done in their trading capacity.

4. In *Gibson v. The East India Co.* (1839) Bing (N.S.) 262 at p. 273 : 7 Scott 74 : 1 Arn. 493 : 8 L.J.C.V. 193 : 3 Jur. 56, Chief Justice Tindal distinctly points out that the power of the East India Company was of a two-fold nature--one political and the other commercial. By 21 and 22 Vict. G. 106, such right of suits, as individuals had against the East India Company, was continued as against the Secretary of State. This was an exceptional enactment. Colonial Governments have been held not to be liable to such suits. They are not subject to any similar provision. See *Sloman v. The Government of New Zealand* (1876) 1 C.P.D. 563 : 46 L.J.Q.B. 185 : 35 L.T. 454 : 25 W.R. 86,

5. The East India Company at the time, that the Government was transferred from them, had power to carry on trade for purposes of the State. After the transfer, such trade has been carried on by the Government of India in this country, and, as pointed out by Pigot, J., in the case of *Bipro Boss Dey v. The Secretary of State for India in Council* 14 C. 262n, the Government is a frequent litigant in the Indian Courts in respect of matters arising out of such trade.

6. The Secretary of State for India in Council cannot in this country claim on behalf of the Crown the prerogative of immunity from suits. As is pointed out in *The Secretary of State for India in Council v. Hari Bhanji* 5 M. 273, two principles regulate the maintenance of proceedings at law by a subject against the Sovereign--the one, having a relation to the personal status of the defendant--the other, to the character of that in respect of which relief is sought. In England the form of procedure permitted to a subject who considers himself aggrieved by an act of the Crown, is by petition of rights. In this country the Crown has consented to submit some of its acts to the jurisdiction of the Municipal Courts. It is not necessary in this case to discuss the nature of the acts for which Government can be sued in our Courts. The defendant concedes for the present, that such a suit as this is maintainable against the Government. I am, therefore, of opinion that for purposes of such a suit, the Secretary of State for India in Council is a Body Corporate and a person within the meaning of Clause 12 of the Letters Patent.

7. Just before the Letters Patent of 1862, the first CPC (Act VIII of 1859) had come into operation so far as the Mofussil Courts were concerned. Section 5 of that Act dealt with the jurisdiction of those Courts. In that Act there was no provision as to how the Government might sue or be sued. The CPC of 1877, Chapter 27, Section 416, introduced the provision which we now find in Section 79 of our present Code. It laid down that suits against the Government were to be instituted in the name of the Secretary of State for India in Council. The Secretary of State for India in Council,

therefore, is more than a mere name." He is, for purposes of suits, to be treated as a "person," and represents the Government. The learned Advocate General referred me to Ilbert's Government of India (2nd edition), pages 176-177, which does help to decide the point. I notice that on page 146, the learned author says this: "the office of the Secretary of State is constitutionally a unit, though there are five officers." Reference was made by the learned Judges in Doya Narain Tewary's case 14 C. 256 to Kinloch v. The Secretary of State for India in Council (1880) 15 Ch. D. 1 at p. 8 : 49 L.J. Ch. 571 : 42 L.T. 667 : 28 W.R. 619, in which the plaintiff sued for an account and distribution of "booty of war" come to the hands of the Secretary of State under a Royal Warrant. It was argued that the defendant thus became "trustee" and the "booty" was "trust fund." James, L.J., held it was not a trust, and that the Secretary of State for India in Council (the name by which the Government can be sued) was not a person capable of being trustee, because according to that learned Judge, the Government of India was not capable of being the trustee of such a fund. The property in that case had vested in the Crown, and was to be distributed by the servants of the Crown according to the Crown's directions, and that, therefore, no Municipal Court had jurisdiction to entertain the suit. The observations made in the course of the judgment refer to the matter which was before the Court of appeal and cannot be considered of general application. To hold that where suits are actually maintainable against the Secretary of State for India in Council, he is a "mere name," I consider erroneous. He is a "Body Corporate" in such a suit according to the express words of the Statute. If, however, the Secretary of State for India in Council is a mere name", it is quite clear that a name can never be said to "dwell" anywhere or carry on business." It is also clear that a mere name" can do nothing. The name cannot sue or be sued, nor can there ever be a cause of action against a mere name, but as I hold it is not, I shall consider whether the Secretary of State for India in Council, who is "legal person" in such suits, can be said to dwell in Calcutta, or carry on business there. It seems to me difficult to say that the Government does not dwell in its own capital, and that a Government engaged in trade, though it may be for purpose of the State, does not carry on business," if Sir George Jessel is right that where the Brain Power" is, there a trade or business is carried on. That the Brain Power of the Government of India is at its seat of Government, is not an unjustifiable assumption. I would have had, therefore, no hesitation in holding that the Secretary of State for India in Council, namely, the Government, dwells at its capital and carries on business there, and is thus amenable to the jurisdiction of this Court, in cases where a suit can be maintained against the Government.

8. I have gone through the cases referred to by Mr. Justice Pigot in his judgment, and I may say I generally agree with the view expressed by him. In the case of The Peninsular & Oriental Steam Navigation Co. v. The Secretary of State for India in Council 1 Bourke Pt. VII 166 : 5 B.H.C.R. App. 1, the question has been elaborately discussed." The learned Judge points out that there are several cases decided in our

Courts against the Secretary of State in spite of the ruling in *Bundle v. The Secretary of State for India in Council* (1862) 1 Hyde 37. The observations in that case were made for the guidance of the profession and are obiter. About the same time, the Madras Court, in the case of *Subbaraya Mudali v. The Government* 1 M.H.C.R. 286 took a different view, after which came the cases of *Brito v. The Secretary of State for India* 6 B. 251 in which the question of jurisdiction does not appear to have been raised *Hari Bhanji v. The Secretary of State* 4 M. 344 and *Secretary of State for India v. Hari Bhanji* 5 M. 273.; *Bundle v. The Secretary of State for India in Council* (1862) 1 Hyde 37 was cited during argument but was not commented upon in the judgment. It appears that in spite of the decision in *Bundle v. Secretary of State for India in Council* (1862) 1 Hyde 37 the other High Courts continued to exercise jurisdiction over the Secretary of State. This Court also did the same in the case of *Boss Johnson v. The Secretary of State* (1864) 2 Hyde 153 : Cor. 71, although how it came to do so, in direct conflict of the decision in *Bundle v. The Secretary of State for India in Council* (1862) 1 Hyde 37, is not clear. See also *Hukumchand's Civil Procedure Code*, page 319, where the references are collected. I may also refer to *Doss v. The Secretary of State for India in Council* (1875) 19 Eq. 509 : 32 L.T. 294 : 22 W.R. 773, see page 535, in which Sir R. Malins, V. C, allowed the demurrer, one of the grounds being that the plaintiff was a resident of India and the Secretary of State was also in India". Reference was made, during the argument in that case, to *Holmes, in re* (1861) 2 J. and H. 527 : 31 L.J. Ch. 58 : 8 Jur. (n.s.) 76 : 5 L.T. 548 : 10 W.R. 39 in which a demurrer was allowed on the ground that the Queen was as much "resident" in Canada as in England.

9. Having regard to what I have said before, and with great respect to the learned Judges who decided the case of *Doya Narain Tewary v. The Secretary of State for India in Council* 14 C. 256, I venture to dissent from the views therein expressed, but as I hold that I am bound by the decision of a Bench so constituted, I must hold that this Court has no jurisdiction. The suit will accordingly be dismissed with costs, unless the defendant will consent to waive costs.

10. Advocate-General.--I am not in a position to consent.

11. Then the costs must be paid by the plaintiff.