PRIVY COUNCIL

Gaekwar Baroda State Railway

Vs.

Hafiz Habib-ul-Haq

P.C.A.No.67 of 1936
(Lord Wright, Lord Romer, CJ. Sir Lancelot Sanderson, Sir Shadi Lal and Sir George Rankin JJ.)

18.03.1938

JUDGMENT

SIR LANCELOT SANDERSONJ.

1.This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated 22nd December 1933, which varied but in the main confirmed a judgment and decree of the Subordinate Judge of Agra dated 3rd July 1929. The suit was brought by Mohammad Habib-ullah, who died after the judgment of the trial Court was given and during the pendency of the appeal to the High Court. The respondents to this appeal were brought on the record as his heirs and personal representatives. . The defendant in the suit was described as "The Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief" of the said Railway. The plaintiff was a timber merchant, and in April 1923, he entered into four contracts for the supply of sleepers for the said railway in Baroda which are the subject matters of this appeal. A fifth contract for the supply of shisham wood was also comprised in the suit. The contracts were made in Baroda between the plaintiff and a Mr. Martin who signed the contracts as "Manager and Engineer-in-Chief, Baroda State Railway". No sleepers were delivered in respect of two contracts. The other two contracts were partly performed by the delivery of sleepers. It was alleged on behalf of the defendant that the sleepers which were delivered were not in accordance with the contracts and for this and other reasons which need not now be specified all the contracts were cancelled by a letter dated 3rd May 1924, from Mr. A.T. Houldcroft who was then the manager and engineer-in-chief of the railway, which was said to have been received by the plaintiff on 7th May 1924. The plaintiff filed his suit on 7th May 1927, in the Court of the Subordinate Judge of Agra, claiming Rs. 38,185-12-0 for the balance of

the price of the sleepers supplied plus retrenchment money, and Rs. 1,16,720-14-0 damages for failure to take delivery of the remainder of the sleepers and wood.

2. The written statement, which was filed on 10th December 1927, was signed by Mr. C. Allan Cooke, who was then the manager and engineer-in-chief of the said railway. It contained many defenses including pleas that the Agra Court had no jurisdiction to try the suit, and that the suit was barred by limitation, bat the main question which their Lordships have to consider in this appeal arises in respect of the following plea:

> 24. The suit not having been filed against the proper party is not maintainable; the defendant railway is owned by H.H. the Maharaja Gaekwar of Baroda, a Sovereign Prince, and is managed by His Highness' Government, the claim against the Manager and Engineer-in-Chief of the defendant railway who is only a paid servant of the State is bad in law.

3. Many issues were settled and tried by the Subordinate Judge, and the issue in connection with the above- mentioned plea was as follows: Is the Maharaja Gaekwar of Baroda a necessary party to the suit ? Is the suit as framed maintainable ?

4. This raises an important question, for it was alleged on behalf of the defendant that the suit was in reality, though not in form, a suit against H. H. the Gaekwar of Baroda, that it had been framed in the above- mentioned manner because of the difficulty in the plaintiff's way caused by the provisions of Sections 86 and 87, Civil Procedure Code of 1908, to which further reference will presently be made, and that it was an attempt to fix H.H. the Gaekwar with liability in this indirect manner. The Subordinate Judge made a decree in favour of the plaintiff for the price of material supplied including retrenchment money Rs. 37,065, interest on the said amount Rs. 14,430, damages Rs. 50,054 minus Rs. 112 for shisham log wood which he held was barred by time, balance Rupees 49,942, total Rs. 1,01,437, with further directions as to interest and costs. The defendant appealed to the High Court, which ordered and decreed that the appeal should be allowed in part, and that the Subordinate Judge's decree should be modified to the extent that the amount decreed thereunder should be reduced by Rupees 7797-9-0 and that in other respects the aforesaid decree should be confirmed and the appeal dismissed.

5. The defendant applied to the High Court for leave to appeal to His Majesty in Council and the grounds of his application admittedly included substantial questions of law. The learned Judges of the High Court allowed the application and certified that;

6. As regards the value and nature of the case it fulfils the requirements of Section 110 of Act 5 of 1908.

7. A preliminary objection was taken by learned counsel on behalf of the plaintiff-respondents that the appeal was incompetent for non-compliance with the provisions of the Civil Procedure Code, Sections 109 and 110. In support of this contention reference was made to the judgment of the learned Judges of the High Court who granted the above- mentioned certificate. In that judgment it was stated that :

> The valuation of the suit in the Court below being above Rs. 10,000 and the valuation of the proposed appeal to His Majesty in Council being also above Rs. 10,000 and the Courts in India having differed, the case satisfies the requirements of law under Section 110, Civil Procedure Code, and we certify accordingly.

8. The point which was taken by the learned counsel was that the learned Judges were wrong in holding that the Courts in India had differed, inasmuch as the decree of the Subordinate Judge was confirmed by the High Court in all respects, except that the amount decreed by the Subordinate Judge in the plaintiff's favour was reduced by Rs. 7797-9-0.

9. It was argued that the decree of the High Court really affirmed the decree of the Court immediately below, and therefore that the ground relied on by the learned Judges for granting the certificate was wrong. Several cases relating to this question were cited to their Lordships and it appears that the decisions therein are not altogether consistent, but their Lordships do not propose on this occasion to consider them in detail or to give any decision upon the point. The reason for their Lordships' conclusion in this respect, is that even if the decree of the High Court did affirm the decree of the Subordinate Judge (which their Lordships do not decide), it is obvious that the appeal involves substantial questions of law and as the value of the subject-matter of the suit and of the appeal was above Rupees 10,000, the learned Judges were right in granting the certificate. Indeed the learned counsel for the plaintiff-respondents frankly admitted that this was a case in which their Lordships, if it were necessary, would properly grant special leave to appeal by reason of the important questions of law involved.

10. The Subordinate Judge in his judgment recorded the admission made on behalf of the plaintiff in the trial Court that the above- mentioned railway is neither a State railway nor a company railway but is owned and managed by His Highness the

Maharaja of Baroda through his own men, and it is to be noted that in the course of some interlocutory proceedings before the trial the plaintiff declined to make His Highness the Gaekwar a defendant in the suit. The Subordinate Judge however found it possible to make a decree, as already stated, in the plaintiff's favour, holding that the railway was a corporation within the meaning of the Civil Procedure Code, and that it possessed a locus standi of its own before the law Courts and could be sued in its own name through the head of the railway department. This conclusion was based largely upon the construction which the Subordinate Judge placed upon the provisions of 42 and 43 Vict., c. 41 and the Railways Act (Act 9 of 1890), which the learned Judge considered were applicable to the Gaekwar Baroda State Railway. The High Court came to the same conclusion and held that the defendant railway is a corporation, of which H. H. the Gaekwar is the owner.

11. One of the learned Judges in the High Court noted in his judgment that the plaintiff was not suing a Ruling Prince, and that he was not trying to execute his decree against such a Prince, but stated that "what he wants is a decree against the defendant railway which is the property of a Ruling Prince." He held further that it was open in India to the plaintiff to obtain his object so long as he did not contravene the express provisions of the Code of Civil Procedure, and expressed the opinion that the position was that the owner of the corporation carries on business under an assumed name and the suit therefore can be instituted against that assumed name without in any manner infringing the provisions of Section 86 Civil Procedure Code.

12. The other learned Judge agreed with the conclusions arrived at by his learned brother and added that in his opinion the case was governed by Order 30, Rule 10, Civil P. C. With all respect to the learned Judges, their Lordships are unable to assent to the propositions and conclusions contained in their judgments. The provisions of Sections 86 and 87, Civil Procedure Code, 1908, are as follows :

> 86.-(1) Any such Prince or Chief and any ambassador or envoy of a foreign State, may, with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.
> (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 Prince, Chief, ambassador or envoy may be sued: but it shall not be given unless it appears to the Government that the Prince, Chief, ambassador or

envoy-

(a)has instituted a suit in the Court against the person desiring to sue him, or (b) by himself or another trades within the local limits of the jurisdiction of the Court, or (c) is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor-General in Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) The Governor-General in Council may, by notification in the Gazette of India, authorise a Local Government and any secretary to that Government to exercise, with respect to any prince, chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor-General in Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immovable property sue, without such consent as is mentioned in this section, a prince, chief, ambassador or envoy from whom he holds or claims to hold the property.

87. A Sovereign Prince or Ruling Chief may sue and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section the Governor-General in Council or the Local Government, as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

13. The sections relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. H.H. the Gaekwar is a Sovereign Prince within the meaning of these sections, and it was admitted by counsel, on behalf of the plaintiff-respondents that no certificate had been obtained as provided by Section 86, and further that no such certificate could have been obtained as none of the conditions contained in Section 86(2) (a), (b) and (c) were applicable to this case. With regard to the above- mentioned statement as to the position, it is obvious that a suit cannot be brought against "an assumed name". There must be some juristic entity capable of being sued which is using or is known by the assumed name. It was however held by the learned Judges of the High Court that the defendant railway came into existence under a grant from the Sovereign power and it is therefore a Corporation though its owner is one person (His Highness the Maharaja of Baroda)

and not several persons.

14. Their Lordships cannot find any evidence in the record to justify the above-mentioned finding and indeed the learned counsel who appeared for the plaintiff respondents admitted, and in their Lordships' opinion rightly admitted, that he was not able to support the judgment of the High Court on this or any of the grounds mentioned therein. The learned counsel however contended that the conclusion at which the Courts in India arrived, viz. that the railway was a corporation capable of being sued, was correct, and that he could support the High Court's decision on a ground not considered by the Courts in India. He argued that the question whether the railway was a corporation was a question of fact and must be determined in accordance with the law of the State of Baroda. For this proposition he relied upon two cases, viz. *BanqueInternationale de Commerce de Petrograd v. Gaukassow,* and *Lazard Brothers and Co. v. Midland Bank,* and especially on the following passage in Lord Wright's opinion at p. 297 :

> English Courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law.

15. It was contended that by analogy the Courts in British India should recognize the railway as a juristic person, inasmuch as it could be shown from the materials in the record of this case that the railway had been established in the State of Baroda as a corporation. The evidence which was mainly relied upon to establish the above contention was a notification which was under the heading "Supreme Court" No. 77 of 1921-22, dated 16th April 1922. The translation is in the following terms :

SUBJECT :

> In regard to suits arising out of the dealings relating to the State railway not being deemed as suits against the State (but) to be regarded like other suits.

16. Suits relating to the State railway not to be deemed as suits against the State but to be considered as other suits.

17. The management of the State railway and the work of keeping supervision over it was entrusted in the first instance to the B.B. and C.I. Ry. Co.

18. During that time all suits relating to the Railway Administration, like other suits, were filed in any Court having jurisdiction but recently for some time past the management of that Railway has been taken over by the Government of His Highness

the Gaekwar in its own hands and its management is carried by the Railway Department of the State. For this reason in order to make it clear whether suits relating to the working of the Railway being taken as ordinary suits, should be filed as before in any Court having proper jurisdiction, or suits of that nature, being regarded as suits against the State should, in the first instance be filed in the PrantNiyayadhishi (District Court). (In order to make that clear) a note herefrom, No. 114, dated 18th February 1922, was issued, relating to Civil Order No 162/82, dated 7th April 1922 as passed, consequently it is decided that suits arising out of the business of the Railway of this State, cannot be regarded as suits against the State, and being considered like other suits, means should be adopted by all concerned to file them as before in any Courts of proper jurisdiction.

19. It was contended on behalf of the plaintiff-respondents that by this notification H.H. the Gaekwar of Baroda intended to place the Gaekwar Baroda State Railway in the same position as the Bombay Baroda and Central India Railway Company, which apparently had managed the said railway until H.H. the Gaekwar took the management thereof into his own hands and that he thereby intended to establish the railway administration as a corporation. Their Lordships are not able to accept that contention : to place such a construction upon the terms of the notification would be unreasonable and contrary to the ordinary meaning of its terms, which in their Lordships' opinion are quite plain. The notification is no more than a direction regulating the procedure as to suits relating to the railway administration and the working of the State Railway in Baroda. It provided that such suits in Baroda were not to be regarded as suits against the State but were to be considered as other suits and it gave directions as to the Courts in Baroda in which the said suits might be instituted. The notification related to the State of Baroda only and was merely a piece of internal administration with respect to the Courts in Baroda in which the suits therein referred to were to be instituted and the procedure to be adopted in connexion therewith. The notification, in their Lordships' opinion, affords no evidence whatever that H. H. the Gaekwar intended to make the railway administration a legal entity or to establish it as a Corporation.

20. Reference was made to a further notification No. 92 of 1921-22, dated 17th June 1922. This related to the civil and criminal jurisdiction over the Okhamandal Railway and amongst other matters it provided that the Railways Act of 1890 and the rules relating thereto had been made applicable. It was argued that this notification was of some materiality for the purpose of showing the status of the railway therein referred

to. It was however admitted by learned counsel for the plaintiff respondents that the Railways Act of 1890 has no application to Baroda and in their Lordships' opinion the above- mentioned notification affords no assistance to the plaintiff-respondents' case. When asked to state how the alleged corporation was constituted, the learned counsel for the plaintiff respondents contended that the corporation, as established by H. H. the Gaekwar, consisted of the members of the railway administration from time to time. In their Lordships' opinion there is no evidence on the record to support such a contention and it is directly contrary to the admission already mentioned which was made on behalf of the plaintiff at the trial of the suit, viz. that the railway is neither a State railway nor a company railway but is owned and managed by His Highness the Maharaja of Baroda through his own men.

21. Their Lordships are of opinion that the suit was in reality, though not in form, a suit against H.H. the Gaekwar of Baroda and if the judgments of the Courts in India were allowed to stand they would have far-reaching results and might have the effect of nullifying the provisions of Sections 86 land 87, Civil P. C.

22. It was further held by the High Court that, even if it be assumed that the suit was in reality against H.H. the Gaekwar of Baroda, the provisions of section 86 Civil Procedure Code could not be relied upon because H. H. the Gaekwar had waived his privilege by allowing the defendant railway to defend the suit on its merits and to produce evidence and take the chance of getting a judgment in his favour. Learned counsel for the plaintiff-respondents contended that the above- mentioned finding was connect. Their Lordships cannot accept that contention. In the first place, it appears that the summons was addressed to and served upon the manager of the State railway. He filed a written statement, containing the plea which has already been set out in full, whereby he alleged that the suit was not filed against the proper party and was not maintainable. He applied without success that this issue should be tried as a preliminary issue. No one purported to appear in the suit on behalf of H. H. the Gaekwar of Baroda and there is no ground for saying that he waived his privilege. Further, as already pointed out, the provisions relating to this matter are statutory. They are contained in Sections 86 and 87, Civil Procedure Code, they are imperative, and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court. Their Lordships therefore are of opinion that the suit was not maintainable. In view of this conclusion, it is not necessary to consider the other issues which were raised in the Courts in India. For the above- mentioned reasons, their Lordships are of opinion that

the appeal should be allowed, the decrees of the High Court and of the Subordinate Judge set aside, and the suit should be dismissed. The plaintiffs-respondents must pay the costs of the defendant appellant in this appeal, and in both the Courts in India. They will humbly advise His Majesty accordingly.

Appeal allowed.

Cases Referred.

(1923) 2 KB 682=92 LJ KB 1079=129 LT 725=68 SJ 38=39 TLR 574

(1933) AC 289=102 LJ KB 191=148 LT 242=76 SJ 888=49 TLR 94=44 LL Rep 159