

Unreportable
* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ FAO (OS) No. 403 of 2002

% *Reserved on : July 07, 2008*
Pronounced on : July 25, 2008

M/s. International Devlp. Research Centre . . . Appellant

through : Ms. Sona Khan, Advocate

VERSUS

Ramesh Mehta & Anr. . . . Respondents

through : Mr. Lokesh Bhole, Advocate

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI
THE HON'BLE MR. JUSTICE MANMOHAN SINGH

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The respondent No.1 (hereinafter referred to as the 'plaintiff') filed Suit No. 100/1996 on the Original Side of this Court. In the said suit, the plaintiff has prayed for a decree of mandatory injunction directing the appellant herein (hereafter referred as the 'defendant Nos. 1 & 2') to pay to the defendant No.3/Land & Development Officer (L&DO) misuse charges as imposed by L&DO in respect of the suit premises 11, Jorbagh Road, New Delhi. Further direction to the effect that L&DO be directed to take a final decision in the matter of imposition and/or waiver of misuse charges be taken by it is also sought.

2. It may be pointed out that the plaintiff had let out the suit premises to the defendant Nos. 1 & 2. As per the L&DO, letting out of these premises was in violation of the terms of the lease and, therefore, it proposed to levy the penalty for misuse charges. This led the plaintiff to file the aforesaid suit for mandatory injunction, inter alia, praying that if any such misuse charges are payable, those should be paid by the defendant Nos. 1 & 2.

3. We may also note at this stage that in another case between the defendants and the landlady the tenancy was terminated with effect from 1.4.1997 and the defendants called upon the defendant Nos. 1 & 2 to surrender the possession of the tenanted premises to the plaintiff. When this request of the said landlady was not acceded to, she instituted Suit No. 1231/1997 for possession as well as mesne profits with *pendente lite* and future interest. The defendant Nos. 1 & 2 put in appearance in the said suit and challenged the maintainability thereof on the ground that these defendants were the '*foreign state*' within the meaning of Section 86 of the Civil Procedure Code, 1908 (for short, the 'Code') and, therefore, no such suit was maintainable without seeking prior consent of the Central Government, as required under Section 86 of the Code. This issue was considered by a learned Single Judge of this Court in the said suit and plea of the defendant Nos. 1 & 2 was rejected holding that it could not be treated as an agency of the Government of Canada and, therefore, provisions of Section 86 of the Code were not

applicable. The said judgment is reported as *Durgeshwari Devi v. International Development Research Centre*, 79 (1999) DLT 750. Appeal against that judgment was preferred before the Division Bench of this Court, which was registered as FAO (OS) No. 33/1999 and was admitted to hearing.

4. In the suit in question, instituted by the plaintiff, out of which the present appeal arises, the defendant Nos. 1 & 2 took the same objection predicated on Section 86 of the Code. The learned Single Judge, vide his impugned order dated 28.8.2002, has rejected this objection following the aforesaid judgment in *Durgeshwari Devi* (supra). Having regard to the fact that appeal against the order passed in FAO (OS) No. 33/1999 had been admitted, this appeal was also admitted to hearing vide orders dated 25.2.2003.
5. During the pendency of this appeal the aforesaid FAO (OS) No. 33/1999 came up for final hearing and the Division Bench vide its judgment dated 25.1.2007 dismissed the said appeal thereby confirming the order of the learned Single Judge. Thus, it is categorically held by the Division Bench of this Court that the defendant Nos. 1 & 2 cannot be considered as '*foreign state*' or an agency of the Government of Canada. Normally, in view of the aforesaid judgment of this Court, determining the status of the appellant herein with reference to Section 86 of the Code, which is of a Coordinate Bench, no arguments were required to be advanced in this appeal.

6. Notwithstanding the aforesaid decision, learned counsel for the appellant submitted that Special Leave Petition (C) No. 11996/2007 was filed against the aforesaid judgment of the Division Bench before the Supreme Court and the Apex Court passed order dated 30.7.2007 in the said case leaving the question of law open. As per the said order, though the SLP of the appellant herein was dismissed, it was because of the reason that the contractual obligations between the parties had been worked out and thus, no grievance in relation thereto was left. Learned counsel for the appellant contended that insofar as the question whether the appellant is a '*foreign state*' within the meaning of Section 86 of the Code or not, was left open and therefore, she has a right to address the arguments on this issue afresh.
7. In view of the aforesaid submission, it would be appropriate to reproduce the order dated 30.7.2007 passed by the Supreme Court, which reads as under :-

“The question as to whether the petitioner is a sovereign State within the meaning of Section 86 of the Code of Civil Procedure is the subject matter of this special leave petition which arises out of a judgment and order dated 25.1.2007 passed by a Division Bench of the Delhi High Court. Learned counsel appearing on behalf of the petitioner very fairly states that the contractual obligations have been met and the petitioner does not have any grievance in relation thereto. It is however contended that having regard to the fact that the petitioner was created by a statute of Canadian Parliament for the purpose of initiating, encouraging, supporting and conducting research into the problems of the developing regions of the world and furthermore having regard to the fact that an agreement had been entered into in that behalf by and between the petitioner and the Government of India, it should have been considered to be a State. As the mutual contractual obligations of the parties hereto are said to have been worked out, we are of the opinion that the said question need not be

determined in this petition. The special leave petition is dismissed. We, however, leave the question of law open.”

8. No doubt, the Hon’ble Supreme Court has left the question of law open. At the same time, it is also to be borne in mind that decision of the Division Bench of this Court in FAO (OS) No. 33/1999 is not interfered with. Once the question of law is left open by the Supreme Court, implication thereof would be that insofar as the Supreme Court is concerned, it has not, so far, put its seal of approval or disapproval on the view taken by this Court in the said judgment. However, as far as the judgment of the Division Bench is concerned, that would still hold the field in so far as this Court is concerned. That judgment of the Division Bench of this Court determines the character of the appellant herein conclusively. That is the judgment of a Co-ordinate Bench. Such a situation may lead to adopting three alternatives, namely, (i) to follow the law laid down by the earlier Division Bench in its order dated 25.1.2007 being a precedent on the issue which had arisen; or (ii) if a dissenting view is to be taken from the view taken by the Division Bench earlier, then refer the question for decision by a larger Bench (Full Bench); or (iii) to hold that the order dated 25.1.2007 passed by the Division Bench of this Court is *per incuriam* and proceed to discuss the issue afresh. It is not the case of the defendants that the judgment of the Division Bench is *per incuriam*.

9. Thus, we had heard the learned counsel for the appellant at length in order to determine which of the first two alternatives we should adopt.
10. The question is as to whether the appellant is an agency of the Government of Canada within the meaning of Section 86 of the Code and is entitled to the special immunity in India of the nature provided under the said Section. Section 86 of the Code, *inter alia*, provides that 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. The appellant claims special status on the ground that it is the creation of a statute passed by the Parliament of Canada and its activities are approved by the duly elected Parliament of Canada. It was also pleaded that it was a Crown owned corporation and was not present in India to conduct commercial or profit-making activities and, thus, entitled to protection under Section 86 of the Code and the present suit was not maintainable against them. The suit was instituted without permission of the Ministry of External Affairs, which has to accord such permission to any person to institute a legal action against a foreign entity, which is a representative of a foreign government and it alone can determine the status and dimensions of the activities of such foreign entity, of its function in India and whether such entity was entitled to diplomatic protections, as such the suit could not have proceeded in law.

It was also sought to urge that for establishing its office in India, the Indian Government had given specific permission and vide letter dated 25.6.1990 the Ministry of Finance certified the recognition of the appellant by the Government of India, being an instrumentality of the Government of Canada. It was argued that funding of research projects in India takes place with the approval of the Department of Economic Affairs, Ministry of Finance, Government of India. The appellant has also narrated detailed account of its activities in India of which this country has benefitted as several projects have been undertaken by the appellant in India. Therefore, contention of the appellant is that its presence in India is a channel for cooperation between Canada, India and other South Asian countries and South Asian research institutions. It is for this reason, contended the learned counsel, the Ministry of External Affairs, through its letter dated 7.11.1988, granted special status to the appellant in India inasmuch as all the personnel of the appellant are granted exemption from AIDS testing, consistent with the exemption granted to the representatives of international organizations and foreign diplomats. It was argued that the nature and character of the activities of such an organization, as recognized by the Indian Government, are to be seen and even when the statutory body like the appellant is not a 'State' in its own country, viz. Canada, it can be a '*foreign state*' in other country like India for the purpose of immunity granted under Section 86 of the Code.

11. We may point out that all these submissions were considered by the Division Bench in the aforesaid judgment at length, but the same did not find favour with the Division Bench. The Bench was of the opinion that the aforesaid aspects highlighted by the appellant would not give it the character of '*sovereign state*' or agency of a sovereign state in India. In the process, the Division Bench noted and discussed the judgment of the Supreme Court in the case of *Veb Deautfracht Seereederei Rostock (D.S.P. Lines) a Department of the German Democratic Republic v. New Central Jute Mills Co. Ltd. & Anr.*, AIR 1994 SC 516, which is the judgment cited by the appellant before us as well. The Court also took into consideration various other judgments and considered their implication, some of which are as follows :-

- (i) *Mirza Ali Akbar Kashani v. The United Arab Republic & Anr* AIR 1996 SC 230
- (ii) *M/s. B.L. Gupta Constrn. Co. v. Sri Lanka High Commission in India & Anr.*, (Arb.P. No. 295/2004 decided on 29.9.2005).
- (iii) *Uttam Singh Duggal & Co. P. Ltd. v. United States of America, Agency of International Development*, ILR (1982) II Del 273.

It was of the view that two conditions precedent for entertaining of a suit under Section 86 of the Code are: (a) the competence of the Court to try such suits; and (b) certificate issued by the Central Government. The certificate of the Central Government was necessary only if the body/person sued satisfies the conditions of being a '*foreign state*'. The Court noted that the expression '*foreign state*' is explained in Section 87-A of the Code. It

also took into consideration provisions of Article 367(3) of the Constitution of India. There is a detailed discussion on the legal principle and it is not necessary to burden this judgment by reproducing the same. However, we feel it proper to reproduce paras 15 and 16 of the judgment wherein the contentions of the appellant, which are advanced before us as well, were specifically dealt with :-

“15. Having concluded as above, the objection taken by the appellant was rejected and decree was passed in regard to possession. The learned counsel for the appellant while relying upon the various clauses of the Act, establishing the International Development Research Centre and the copy of the letter of the Ministry dated 2.6.1983 contended that the object of the Centre was to establish, maintain and operate information data Centre facilities for research and other allied activities. This was created by an act of Parliament, was controlled by the Government and as such the Centre was entitled to all the protection that a Foreign State would be entitled to in terms of Section 86 and that its status as a foreign governmental agency was accepted by the Central Government and, therefore, it was entitled to the protection of these provisions.

16. Firstly, development of cultural activity or facilitation of information data Centres cannot be strictly construed as a function of a foreign state in discharge of its sovereign obligations on a foreign land. Secondly, under Clause 18(1) of the Act, this Centre was said to be not an agent of Her Majesty and the Governor and Officers were not part of the public service. Furthermore, the copy of the letter dated 2.6.1983 describes the status of the appellant and nowhere in the letter it is stated that the said Centre has been treated as a foreign state by the Central Government of India in accordance with the provisions of Section 86 of the Act. No documents have been placed on record to show that the functions of the centre read in conjunction with their constitution would entitle them to be an instrumentality or corporation of a foreign State entitled to the protection of Section 86. Even in the case of *Veb Deutfracht Seereederei Rostock (D.S.R.) A Dept. of the German Democratic Republic vs. New Central Jute Mills Col. Ltd.* and another (1994) 1 Supreme Court Cases 282, the Supreme Court has categorically stated that a Corporation/undertaking of a foreign State can claim protection of Section 86 of the Act only if they were directly part of the activities of the foreign State. In other words, the constitution of such a body itself would not be the

determinative factor in answering such an argument. The findings recorded by the learned Single Judge in relation to non-availability of the protection under the provisions of sub-section of Section 86 of the Code to the appellant really do not call for any interference. The documents placed by the appellant on record do not reflect that it is a foreign State or an instrumentality or corporation of a foreign State engaged in the functions of the State. The purpose of the provisions is certainly not to protect every private activity of a foreign corporation squarely falling in the domain of private rights. These kind of cases would not fall in the category where a person would be debarred from bringing a suit against a foreign corporation without consent of the Central Government. Thus, on this issue we have no hesitation in affirming the findings recorded in the judgment under appeal.”

12. After reading this judgment in its entirety, we are not inclined to take a different view. It being the judgment of the Coordinate Bench, we are inclined to follow that judgment. We have already mentioned that for the sake of brevity we have not reproduced the legal reasoning or discussion contained in the said judgment in detail. The result would be, following the aforesaid Division Bench judgment dated 25.1.2007, to hold that the appellant is not entitled to immunity as provided under Section 86 of the Code.
13. We, therefore, do not find any infirmity in the judgment passed by the learned Single Judge and dismiss this appeal.

(A.K. SIKRI)
JUDGE

(MANMOHAN SINGH)
JUDGE

July 25, 2008
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