

REPORTABLE

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO(OS) NO. 412 OF 2006

% Date of Decision : February 6, 2008.

ROYAL NEPAL AIRLINES CORPORATION Appellant.
Through None.

VERSUS

ARUN JAIN Respondent.
Through Mr. K.K. Bhatia & Mr. Y.R. Sharma,
Advocates.

CORAM:

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers 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 ?

SANJIV KHANNA, J:

1. Royal Nepal Airlines Corporation, now known as Nepal Airlines Corporation, has filed the present appeal impugning order dated 19th

April, 2006 by which application filed by the appellant under Section 86 read with Order I Rule 10 (2) of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) was dismissed. The suit filed by the respondent herein for recovery of damages amounting to Rs. 25,00,000/- was held to be maintainable and it was further held that no prior consent of the Central Government under Section 86 of the Code is required for instituting the said suit.

2. Section 86 of the Code stipulates that no “foreign State” can be sued in India without consent of the Central Government. The only issue which is required to be examined by us is whether the appellant-corporation is a “foreign State” and, therefore, entitled to protection under Section 86 of the Code. It may be noted here that Calcutta High Court in the case of **Royal Nepal Airlines Corporation and Another versus Monorama Meher Singh Legha and Others**, reported in AIR 1966 Calcutta 319 has held that the said corporation is a “foreign State” and, therefore, entitled to privilege under Section 86 of the Code. The said judgment was cited before the learned Single Judge but was distinguished on the ground that

the appellant is a Government corporation having its own legal entity and not a department of the State. It was held that the earlier decision of the Division Bench of the Calcutta High Court was based on the provisions of Royal Nepal Airlines Corporation Act, 2014 but, thereafter amendments were made. Royal Nepal Airlines Corporation Act (With Amendments) 2019 (1963), which came into force in 1963 therefore, the entire issue was required to be examined de novo and de hors the said judgement.

3. The expression "foreign State" for the purpose of Section 86 of the Code has been considered and examined by the Supreme Court in **Mirza Ali Akbar Kashani versus The United Arab Republic and Another**, reported in 1966 (1) SCR 319, **Harbhajan Singh Dhalla versus Union of India**, reported in (1986) 4 SCC 678 and **Veb Deutfrachet Seereederei Rostock (D.S.R.I. Lines) A Department of the German Democratic Republic versus New Central Jute Mills Company Limited and Another**, reported in (1994) 1 SCC 282. In these decisions it has been held that a corporation, which has a juristic personality of its own, may yet fall within the meaning of

a “foreign State”. Mere fact that a body corporate has a juristic personality of its own, is not the determining factor for deciding whether immunity is granted under Section 86 of the Code. To decide whether a corporate body is a foreign State what is required to be examined and considered is whether the said corporate body is a part of the Government machinery of the foreign State even if it is an incorporated body. The question is answered by examining whether the identity being sued is an alter-ego or an organ of a foreign Government. The legislation under which the body corporate has been incorporated has to be examined to decide whether the foreign Government has given up its claim to immunity generally or only for limited and definite purposes under the legislation. If the foreign government does not intend to give up its immunity then regardless of the activities of the corporation, Section 86 of the Code will apply and protection under the said Section will be available to the incorporated body. The activities of the corporation is not the determining factor as far as Section 86 of the Code is concerned. As far as Section 86 is concerned, public and private acts are treated

alike. Section 86 of the Code does not make any distinction between “commercial transactions” - “*Jure Gestionis*” and what can be called pure State functions - “*Jure Imperii*”. For Section 86 of the Code it is the identity of the “party” and not the quality or nature of the transaction which matters unless the plaintiff is a tenant of a foreign State in which case no consent is required. Section 86 of the Code is a part of the municipal law of India. Therefore the question is not to be answered by relying upon the doctrine of immunity under the International Law. If immunity is granted under Section 86 of the Code, consent of the Central Government will be required. Immunity under Section 86 of the Code is not absolute. A plaintiff is required to seek permission and obtain consent from the Central Government. Reference may also be made to the decision of the Bombay High Court in the case of **Kenya Airways versus Jinibhai** Reported in AIR 1998 Bom 287 (DB). The High Court approved of the views expressed in the cases of ***Baccus S.R.L. versus Servicio Nacional Del Trigo***. reported in (1956)3 All ER 715 and ***Krajina versus The Tass Agency*** reported in (1949) 2 All ER 274, 280. In

both cases observation of the Court was that, before arriving at a conclusion and decision, one must look at the relevant legislation and related facts to decide whether the foreign State has intended to give up its immunity generally or only for limited and defined purposes. However, it may be noted that doctrine of Immunity has undergone a change in England since 1975.

4. Keeping in mind the judicial precedents referred to above one can peruse the provisions of the Nepal Airlines Corporation Act. If on reading the provisions of the Act, it is observed that the appellant corporation is an instrumentality of a foreign State over which the sovereign control has not been given up, then the appellant Corporation cannot be sued without adhering to the provisions of Section 86 of the Code. The relevant provisions of "The 2019 Act" read as under:-

“3. Establishment of the Corporation:-

(1) x x x

(2)The Corporation shall be a corporate and autonomous body having perpetual succession. It shall have a seal of its own for the purpose of its entire function. Subject to the provisions of this Act it may acquire, use, hold and transfer movable and immovable property. It may sue and be sued by its name.

(3)The head office of the Corporation shall be situated in Kathmandu or at such place prescribed by His Majesty's Government. And the Corporation may establish its branches within or outside of the Kingdom of Nepal.

4. Tenure of the Board and Directors:-

Amended by Royal Nepal Airlines Corporation (Third Amendment) Act, 2034.

1. His majesty's Government, to conduct the Corporation's business, shall constitute a seven

member Board of Directors including the General Manager in case he has already been appointed. His Majesty's Government, if deems necessary, may also appoint the private individuals, well-known in the field of commerce, finance and accounting or experienced in civil aviation and tourism.

2. XXXXXXXX
3. Notwithstanding anything contained in sub-section (2), His Majesty's Government may remove any Director before expiry of his tenure.
4. His Majesty's Government may appoint Chairman and Deputy Chairman of the Board from among the Directors. The terms of their office in the capacity of Chairman and Deputy Chairman shall be as desired by His Majesty's Government.
5. His Majesty's Government may appoint the Chairman, Deputy Chairman, or any member of the Board as an Execution-Chairman, Executive Deputy Chairman or Executive Director with the functions and duties of General

Manager according to this Act. The remuneration and other conditions of service of the Executive Director, appointed in this way, shall be as fixed by His Majesty's Government.

6. XXXXXXXXX

7. Concerned ministry will propose the name of the persons to be appointed as Directors of the Board to His Majesty's Government, six months prior to the expiry of the term according to sub-section (2).

5. Authorised Capital of the Corporation:-

The authorised capital of the Corporation shall be Fifty million rupees and it may be increased from time to time by His Majesty's Government on the recommendation of the Board by notification published in the Nepal Gazette.

6. Appointment of General Manager:-

(1) His Majesty's Government shall appoint General Manager in case the Executive Chairman. Executive Deputy Chairman or Executive Director of the

corporation has not been appointed. His remuneration and other conditions of service shall be as fixed by His Majesty's Government.

7. Management:-

1. His Majesty's Government may, with the advice of the Corporation, and keeping in view the national interest, issue such directives from time to time to the Corporation as it may deem necessary. It shall be the duty of the Corporation to Carry out all such directives.
2. XXXXXXXXXX
3. XXXXXXXXXX
4. In case the functions, duties and rights of Directors are regulated according to sub-section (3), the Chairman will evaluate the works of Directors and send every year a report to His Majesty's Government. His Majesty's Government may shorten or extend the tenure of any Director on the ground of such evaluation reports.
8. XXXXX

9. Conditions when General Manager or Director may be

removed from office:-

His Majesty's Government may remove the General Manager or any Director from his office in the following circumstances:-

(a) In case he suffers from any of the disqualifications mentioned in Section 8, or

(b) In case he remains absent for three consecutive meetings of the Board without its approval, and the reasons given for such absence are not satisfactory in the opinion of His Majesty's Government, or

© In case he violates the provision of Section 21, or he has been punished for offence under Section 25, or

(d) If a breach of Section 22 has been proved. (Amended by Royal Nepal Airlines Corporation (Third Amendment) Act, 2034.

13. Functions, Duties and Powers of the Corporation:-

(1) Subject to the provisions of this Act and the rules framed under this Act, it shall be the duty of the Corporation to operate the concerned air transport services within or outside the Kingdom of Nepal in a safe, efficient, well managed, economical and proper

manner. The Corporation may exercise its powers for developing air transport services so as to ensure maximum gain and make available such services as cheap fares as far as possible.

(2) Without prejudice to the generality of the power conferred by sub-section (1), the Corporation may exercise the following powers in particular:-

(a) To operate any air transport services or any flight by aircraft for a commercial or other purpose, and to carry out all forms of aerial works.

(b) To provide for the instruction and training in matters connected with aircraft or flight by aircraft to persons desirous of being appointed in the Corporation, or to any other person.

(c.) To obtain the corporation and services of any aviation agency of a foreign country, if necessary, with the prior approval of His Majesty's Government to perform any function pertaining to flight by aircraft, which it is entitled to carry on under this Act.

(d) To acquire, use, hold,

sell or transfer movable or immovable property and to perform any other function pertaining to air transport.

(e) To manufacture, repair or produce the aircraft, vehicles or other spare parts, belonging to itself to any other person.

(f) To conclude and execute all such contracts as may be helpful in the exercise of its powers and the performance of its duties under this Act.

(g) To act as an agent or contractor in matters pertaining to air transport services operated by any other person.

(h) To enter into agreement with any person engaged in air transport services for enabling him to operate such services on behalf of or in co-operation with the Corporation.

(i) To collect fares and other prescribed charges from passengers transported through air transport services operated by it, with the prior approval of His Majesty's Government.

(j) To determine freight rates for cargo transported through air transport services operated by it, with the prior approval of His

Majesty's Government.

(k) To adopt such measures as are necessary for improving the various types of aircraft to be used in the development of feeder services and air transport services and for improving the air transport services operated by the Corporation within or outside the Kingdom of Nepal.

(l) To undertake any work in the interest of the Corporation or to do necessary works to refrom(sic) and to provide services and facilities such as food rest-houses, hotels, godowns and the land and water transport services related with the airways services regulated by the corporation, and;

(m) To perform all such functions as are necessary and convenient for the discharge of its duties and the exercise of its powers under this Act.

Chapter-3

15. Monopoly to operate Scheduled Air Transport Services:-

(1) No person other than the Corporation or its associated(sic) shall be entitled to operate any scheduled air transport services

from or to the Kingdom of Nepal or from one part of the Kingdom of Nepal to another part from such date as may be prescribed by His Majesty's Government by a notification published in the Nepal Gazette.

16. Fund of the Corporation:-

(1) The Corporation shall have a separate fund of its own. All incomes of the Corporation shall be deposited in this fund and all expenditures shall be made from the same fund.

(2) The Corporation shall deposit its fund with the Nepal Rastra Bank and where a branch of the Nepal Rastra Bank is not established, with a Bank as prescribed by the Board. For the purpose of its business, if the Corporation has to maintain funds in foreign countries as well, it shall deposit its fund with a Bank recommended by the Nepal Rastra Bank after obtaining the approval of His Majesty's Government.

18. Profit and Loss

At the end of every fiscal year, the Corporation after providing, on its discretion for reserve fund, depreciation and similar other amounts from the profit earned during that year, shall deposit the balance with His Majesty's Government. In case the Corporation incurs any loss, such loss shall be met

by His Majesty's Government.”

CHAPTER – 5

20.HisMajesty's Government's right to suspend Directors:-

If deemed necessary, His Majesty's Government may suspend for investigation any Director, facing charges under this Act and until the end of such investigation, may appoint another person as Director in his place.

22.Oath of Secrecy and Loyalty:-

Before assuming the office, every Director, General Manager, official and other employee of the Corporation shall take an oath accordance to the schedule as prescribed hereunder.

24.Dissolution:-

The Corporation shall not be dissolved without an order from His Majesty's Government. The dissolution of the Corporation shall be effected as according to the decision given by His Majesty's Government in this regard.

26.Annual Report:-

General Manager of the Corporation shall submit annual report to the Board within two months after

receiving the report of audit of account of the corporation according to section 17. The Board shall also submit its specific recommendation to His Majesty's Government within one month from the date the final report.

27. Power to make Rules:-

His Majesty's Government may make rules to implement the objectives of this Act.

5. Section 4 of the Royal Nepal Airlines Corporation Act (With Amendments) 2019 (1963 AD) states that the Government of Nepal to conduct the corporation's business shall constitute a seven member Board of Directors who shall hold office for four years period. However, the Government has power to remove any Director before expiry of his tenure. Similarly, the Government has power to appoint Chairman and Deputy Chairman from among the members of the Board. Remuneration and other conditions of service of Chairman, Deputy Chairman or Executive Chairman are fixed by the Government. Civil Aviation Ministry of the Government of Nepal is required to propose the name of the persons to be appointed as Directors. The authorized share capital can be increased by the Government by publication in the Official Gazette.

6. Similarly, General Manager is appointed by the Nepal

Government and his remuneration and other conditions of service are fixed by the said Government. With regard to management, the Nepal Government has power to issue advice and directives to the Corporation keeping in view the national interest. It is the duty of the Corporation to carry out the directions issued by the Government. The Chairman is to evaluate the work of the Directors and send a report to the Government, who may then shorten or extend tenure of the Director. To obtain services of any aviation agency of a foreign country, approval of the Government is required. Similarly, to collect fares and other prescribed charges from passengers transported through air transport services or to determine freight rates, prior approval of the Government is required. Under Section 15 of the said Act, it is specifically provided that no other person other than the Corporation will be entitled to operate any scheduled air transport services to Nepal or from one part of Nepal to another, except as may be prescribed by the Government in a notification published in the Nepal Gazette. The appellant-corporation is entitled to have a separate fund for meeting the expenses and income earned by the

Corporation. Receipts are to be deposited in the said fund with Nepal Rastra Bank or in a prescribed bank and if the said bank is not established at a particular place, with any bank but with approval of the Government. The accounts are liable to be audited as per existing law and any surplus after meeting depreciation and other similar amounts are to be deposited in the Government account. In case of losses, such losses have to be met by the Government. The appellant-corporation cannot be dissolved except by an order of the Government and the decision by the Government in this regard will be conclusive. Section 25 of the Act provides for various penalties, which can be imposed in case there is violation of certain provisions of the Act relating to accounts, furnishing false information etc. In these cases, prior sanction of the Government is required to be taken for any offence, which is punishable by a court of law. The Government has power to make rules, to implement the provisions of the Act. Certain types of regulations formulated by the Corporation also require approval of the Government prior to their enforcement.

7. Keeping in view the nature of the governmental control in the

present case, it is apparent that on all important matters including appointment of agents, prior approval of the Government of Nepal is required. The appellant-corporation is virtually required to function under substantial and overall control and supervision of the Government. Some minor functional autonomy is given, but the control of the Government is complete and all pervasive. It may be relevant to state here that the decision of the Calcutta High Court in the case of **Monorama Meher Singh** (supra) holding that the appellant was a foreign State was approved by the Supreme Court in **Veb Deutfrachet Seereederei Rostock** (supra). We may also refer here to the judgments in cases relating to foreign airlines wherein after examining the relevant enactments, said airlines were granted protection under Section 86 of the Code. Reference can be made to **Deepak Wadhwa versus Aerofloat**, reported in 1983 (24)DLT (Delhi) 1 and **Mansoor Mumtaz & Others versus Saudi Arabian Airlines Corporation**, reported in 2001 VII AD (Delhi) 502. Similarly, Bombay High Court in the case of **Kenya Airways versus Jinibai B. Kheshwala**, (Supra) has held that if entire shareholding is possessed

by the foreign Government, then and the said corporation is a foreign State within the meaning of Section 86 of the Code. The appellant in the present case has filed letter dated 6th August, 2007 that the appellant-Corporation is fully owned by the Government of Nepal. We may refer here to a Division Bench decision of this Court in ***International Development Research Centre versus Smt. Durgeshwari Sahi*** reported in 2007 III AD (Delhi) 10. In the said case, the research center was incorporated and established by the Government of Canada under an enactment but looking into the nature of activities being performed i.e. cultural activities or to maintain and operate information data center facilities and nature of State control and supervision, it was held that the research center is not a “foreign State”. It was observed that the center was not functioning as an agent or department of the Canadian Government and the officers were not public servants. We may also notice here that the case related to a suit for possession and damages, which was filed by the landlord against the said research center.

8. In view of the facts stated above and the legal principles

discussed, the appeal is allowed. The impugned order is set aside.

It is held that Section 86 of the Code is applicable to the facts of the present case. No Costs.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

FEBRUARY 6, 2008

VKR/P