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

Date of order: 11th July, 2011

+ **LETTERS PATENT APPEAL NO. 489/2010**

UNION OF INDIA Appellant
Through Mr. Akshay Chandra, Advocate
for Mr. Neeraj Chaudhari, CGSC for UOI.

versus

SYED ASHRAF HASNAIN RIZVI Respondent
Through Mr. S.N. Mehrotra, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not ? | Yes. |
| 3. Whether the judgment should be reported in the Digest ? | Yes. |

DIPAK MISRA, CJ.:

In this intra-Court appeal preferred under Clause X of the Letters Patent, the legal pregnability of the order dated 5th April, 2010 passed by the learned single Judge in Writ Petition (Civil) No. 3625/2008 is called in question.

2. The facts which are essential to be adumbrated for adjudication of this appeal are that the respondent was employed in the Science and Education Section of the Embassy of Islamic Republic of Iran. He worked in the embassy from 1st October, 1989 till 14th May, 2002, when his services were

terminated by the said embassy.

3. After the order of termination came to be passed, he filed an application under Section 86(1) of the Code of Civil Procedure, 1908 (for short, 'CPC') before the Ministry of External Affairs (MoEA) for grant of consent to sue the competent authority of the embassy. The competent authority of MoEA, by communication dated 23rd January, 2004, had granted permission under Section 86(1) for initiation of the legal proceedings. The said communication is as follows:

“Now, therefore, government of India, the Ministry of External Affairs, hereby accord and certify their consent under Section 86 Code of Civil Procedure, 1908 for institution of legal suit against the Embassy of the Islamic Republic of Iran, New Delhi in a court of competent jurisdiction for getting the retirement benefits.”

4. On the basis of the aforesaid consent, the respondent instituted Civil Suit No. 59/2004 in the trial court against the embassy, the third respondent herein. In the suit the respondent had prayed for recovery of retiral dues, retirement benefits and compensation for belated payment. The learned Additional District Judge decreed the suit for a sum of Rs.7,89,600/- with 10% per year increase on the wages drawn from the last seven years with proportionate cost and pendente lite and future

interest @ 9% till the date of payment along with the cost of the suit.

5. After the decree was passed by the learned trial Judge, the respondent sought consent from the MoEA as required under Section 86(3) of the CPC for execution of the decree but the said consent was not accorded to vide communication dated 4th April, 2008.

6. Being dissatisfied with the aforesaid refusal, the respondent invoked the inherent jurisdiction of this Court under Article 226 of the Constitution of India for issue of a writ of certiorari for quashment of the order dated 4th April, 2008 and also for issue of a mandamus to command the respondent No. 1 to grant permission to proceed with the execution.

7. The learned single Judge referred to the material brought on record, scanned the anatomy of Section 86 of the CPC and referred to the decision in ***Harbhajan Singh Dhalla versus Union of India***, AIR 1987 SC 9 and came to hold that denial of permission under Section 86(3) of the CPC to execute the decree was not justified and accordingly directed the respondent-Union of India to issue a letter/sanction as envisaged under Section 86(3) of CPC.

8. Questioning the legal propriety of the aforesaid order, Mr.

Akshay Chandra, learned counsel for the appellant has raised the following contentions:

- (a) The order passed by the learned single Judge is absolutely flawed inasmuch as he has not appositely appreciated the partial consent granted by the MoEA under Section 86(1) and further reliance placed on the decision in ***Harbhajan Singh Dhalla*** (supra) is inappropriate.
- (b) The order passed by the learned single Judge is faulted as he had misconstrued the consent was only to sue for retiral dues and that would not include a prayer for grant of compensation.
- (c) Assuming the determination by the learned single Judge in respect of the aforesaid aspects is correct, yet it was incumbent on the part of the learned single Judge to remit the matter to the Central Government to reconsider the matter in accordance with law.

9. Mr. S.N. Mehrotra, learned counsel appearing for the respondent in appugnation of aforesaid submissions, has canvassed as follows:

- (i) The order passed by the learned single Judge that the respondent was entitled to institute a suit for grant of

retiral benefits including compensation is impeccable and hence, does not warrant interference in exercise of the intra-Court appellate jurisdiction.

- (ii) The consent granted by the MoEA under Section 86(1) cannot be narrowly construed to affect the rights of the respondent to institute a suit and the decree passed by the court should not be allowed to be nullified in an arbitrary manner by the competent authority.
- (iii) The learned single Judge is absolutely correct in issuing a writ of mandamus when he has conclusively held that the consent sought was in accordance with law and no further exercise is required to be carried out by the respondent.
- (iv) The refusal of permission by the Union of India to execute the decree cannot be held to be defensible as it is not covered by the United Nations Convention on Jurisdictional Immunities of States and their Property 2004, which reflects the international practice as to the immunity from the jurisdiction of local courts.

10. To appreciate the aforesaid submission raised at the bar, it is apt to refer to Section 86 of the CPC, which reads as follows:

“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 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 charged 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 proceeding 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. On an x-ray of the aforesaid provisions, it is luculent that before a suit is instituted, consent of the Central Government certified in writing by the Secretary is imperative. The respondent had sought permission by letter dated 20th April, 2003 on following terms:

“It is, therefore, once again prayed that Ministry of External Affairs, Government of India be pleased to take appropriate action against the Embassy of the Islamic Republic of Iran and direct them to settle the matter amicably with me, which I am very keen to do. However, should the Embassy be unwilling to do so within a period of 15 days, I earnestly pray to the Ministry of External Affairs to grant me consent under Section 86 of the Code of Civil Procedure, 1908 to move the competent court for redressal of my grievances and recovery of the compensation and other amounts due to me on account of the illegal termination of my service.”

12. The learned single Judge has opined that the application made by the writ petitioner and the communication dated 23rd January, 2004 are to be read in a conjoint and harmonious

manner. On a reading of the communication pertaining to consent, we do not see any stipulation to grant permission to file a suit in a limited manner. What is stipulated in the letter of consent is to institute a suit in a court of competent jurisdiction for getting the retirement benefits. The concept of retirement benefits cannot be restricted to a narrow compartment of what was exactly payable as retiral dues. If there has been belated payment or an intentional non-payment, the consequential reliefs can be sought. True it is, in the case at hand the respondent filed a suit challenging the illegal termination. Rightly or wrongly the learned trial court had treated the termination to be illegal and granted compensation. We may hasten to clarify that we are not on the validity of the decree as that is not the lis before us. In the case of **Harbhajan Singh Dhalla** (supra), a two-Judge Bench of the Apex Court emphasized on the role of the Central Government. In paragraph 22 of the said decision their Lordships referred to the decision in **Maharaj Kumar Tokendra Bir Singh versus Secretary, to the Government of India, Ministry of Home Affairs**, AIR 1964 SC 1663 and stated thus:

“22. The Court noted that the power conferred on the Central Government to refuse to accord consent to the proposed

suit shall be carefully exercised. These principles would be applicable to the facts of this case. It is true that these provisions both of Ss. 86 and 87 are intended to save the foreign States from harassment which would be caused by the institution of a suit but except in cases where the claim appears to be frivolous patently, the Central Government should normally accord consent or give sanction against foreign States unless there are cogent political and other reasons. Normally, however, it is not the function of the Central Government to attempt to adjudicate upon the merits of the case intended to be made by the litigants in their proposed suits. It is the function of the courts of competent jurisdiction and the Central Government cannot under section 86 of the Code usurp that function. The power given to the Central Government must be exercised in accordance with the principles of natural justice and in consonance with the principle that reasons must appear from the order. We may note that in the counter-affidavit we do not find any such cogent reasons or due consideration.”

(Emphasis supplied)

13. In this context, we may profitably reproduce a passage from ***Mirza Ali Akbar Kashani versus United Arab Republic***, AIR 1966 SC 230:

“ The limitation of the liability of foreign States to be sued is two-fold. The first limitation is that such a suit cannot be instituted except with the consent of the Central Government certified in writing by a Secretary to that Government. This requirement shows the anxiety of the Legislature to save foreign States from

frivolous or unjustified claims. The second limitation is that the Central Government shall not give consent unless it appears to the Central Government that the case falls under one or the other of Cls. (a) to (d) of S. 86(2). In other words, the Legislature has given sufficient guidance to the Central Government to enable the said Government to decide the question as to when consent should be given to a suit being filed against the Ruler of a foreign State.”

14. A three-Judge Bench in ***Shanti Prasad Agarwalla and Others versus Union of India and Others***, AIR 1991 SC 814 referred to the decision in ***Mirza Ali Akbar Kashani*** (supra) and opined as follows:

“5. ...The Central Government while considering the application under S. 86 of the Code must decide the application in accordance with the provisions of the section itself and state clearly and intelligible its reasons for rejecting the application...”

15. In view of the aforesaid, we are of the considered opinion that the purpose of the provision is to do justice between the parties following the principles of natural justice. When the respondent had sought permission to sue for his grievances on account of illegal termination and the permission had been granted for restitution of a legal suit for getting the retirement benefits, the illegal termination was required to be questioned. If the termination is not held to be illegal, the question of retiral

benefit would not arise. As an ancillary relief, the prayer for compensation for termination was made. The said prayer is inextricably connected with the consent accorded. In view of the aforesaid, the denial of permission under Section 86(3) is untenable.

16. At this juncture, we may refer to Article 11 of the United Nations Convention, 2004, which is as follows:

“1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:

a. The employee has been recruited to perform particular functions in the exercise of government authority;

b. the employee is:

(i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) A member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference or

(iii) any other person enjoying diplomatic

immunity;

c. the subject matter of the proceeding is the recruitment, renewal or reinstatement of an individual;

d. the subject matter of the proceeding is the dismissal or termination of employment of an individual.....”

17. Article 11(b) enables the aggrieved person to challenge his dismissal or termination after obtaining permission and paragraph 1 of the Article 11 does not apply. There is no prohibition that an additional prayer for compensation cannot be added to the issue of illegal termination. The permission sought and the sanction accorded would clearly make out that there was no denial in that regard.

18. The other issue that emerges for consideration is whether the learned Single Judge is justified in issuing a mandamus in the manner he has done. Learned counsel for the appellant has commended us to the decision in ***Union of India and Another versus Bilash Chand Jain and Another***, (2009) 16 SCC 601, wherein their Lordships have opined thus:

“A perusal of the judgment of the learned single Judge shows that the learned Single Judge has, while allowing the writ petition, directed the Ministry of External Affairs, Union of India to give consent under Section 86(3) CPC for executing the decree. That judgment has been upheld by the Division Bench of the High Court. We are of the considered opinion that even if the High Court was of the view

that the order of the Central Government dated 23-3-1992 refusing to give consent to execute the decree was arbitrary or illegal, at most what the High Court could have done was that it could have remanded the matter to the Ministry of External Affairs, Union of India to reconsider the matter in accordance with law instead of itself directing the Central Government to give consent under Section 86(3) CPC.”

19. In view of the aforesaid pronouncement of law, the issue of writ of mandamus by the learned single Judge commanding the competent authority to accord permission is not justified. The matter should have been remitted to the Central Government to reconsider the matter. Therefore, we remit the matter to the Union of India to reconsider the matter in accordance with law after following the principles of natural justice. We may note with profit that the embassy has already paid Rs.84,000/- to the respondent. We have noted so as the learned counsel for the respondent has apprised us that the embassy was going to pay the entire amount but did not pay as there was interdiction by the appellant.

20. Resultantly, the appeal is allowed in part and the direction issued by the learned single Judge to pass an order of consent is set aside and the matter is remitted to the Union of India to reconsider the same. The Union of India shall take appropriate

decision within a period of three months from today. There shall be no order as to costs.

CHIEF JUSTICE

SANJIV KHANNA, J.

**JULY 11, 2011
VKR**