CIVIL REVISION

Before Mr. M. C. Chagla, Chief Justice.

DULERAI & CO. (ORIGINAL DEFENDANTS) APPLICANTS *v.* POKERDAS MEGHRAJ (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1952 *Nov.* 29

Civil Procedure Code (Act V of 1908), ss. 86, 87B, O. XXX—Suit against a firm—One of the partners is a Maharaja—Suit in effect is also against the Maharaja—Suit not maintainable by virtue of s. 86 of the Code.

A firm is not a legal entity and so when a suit is filed against a firm under O. XXX of the Code, it is in effect a suit against all the partners constituting the firm.

Held, therefore if a suit is filed against a firm in the firm name in which one of the partners is a ruler entitled to the personal privilege conferred by s. 86 or s. 87B of the Code of Civil Procedure, 1908, the suit against the firm is not maintainable unless the previous consent of the Central Government is obtained.

It is however open to the plaintiff to sue the other partners by name.

Gaekwar Baroda State Railway v. *Hafiz Habib-Ul-Haq*[1] and *Madanlal Jhunjhunwalla* v. *Reza Ali Khan,*[2] referred to.

The applicant firm Dulerai & Co. consisted of four partners one of whom was the Maharaja of Orchha, a ruler of the former Indian State of Orchha.

The respondents, Pokerdas Meghraj, filed a suit in the City Civil Court Bombay, against the firm in the firm name of Dulerai & Co., to recover a sum of Rs. 5,000. The defendants filed their appearance under protest and informed the plaintiffs that as the Maharaja of Orchha was one of the partners and as the consent of the Central Government required under s. 87B of the Code to file the suit against him had not been obtained the suit was not maintainable.

The plaintiffs thereupon took out a chamber summons on August 6, 1951, asking that the appearance under protest be removed.

The chamber summons was heard by the Principal Judge, Bombay City Civil Court, who held that as the suit was filed against the firm in the firm name and not against the partners in their individual names, s. 86 of the Code did not apply. The Judge therefore made the summons absolute.

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* Civ. Rev. Appln. No. 951 of 1951.

[1] (1938) L. R. 65 I. A. 182. [2] [1940] 1 Cal. 344.

1952

DULERAI AND CO. v. POKERDAS MEGHRAJ

Chagla C. J.

The defendants applied to the High Court in revision.

Sir Jamshedji Kanga with *P. N. Bhagwati and Kanga & Co.* appeared for the petitioners.

P. P. Khambatta with *C. C. Vaidya* and *S. M. Benjamin* for the respondents.

CHAGLA C. J. The plaintiffs filed a suit against the firm of Dulerai & Co. Appearance for the firm was filed under protest and the protest was directed to this that one of the partners of the defendant firm was the Maharaja of Orchha who could not be sued in the City Civil Court. The plaintiffs took out a summons for striking out the protest. The learned Principal Judge first held, following *Baroda State Railway* v. *Habib Ullah,*[1] that a suit against a firm in which a Maharaja is a partner is not a suit against the Maharaja under s. 86 of the Civil Procedure Code. Then the attention of the learned Principal Judge was drawn to the decision of the Privy Council in *Gaekwar Baroda State Railway* v. *Hafiz Habib-Ul-Haq*[2]. Thereupon the learned Principal Judge took the view that if the suit was against a firm in the name of the firm and not against the partners in their individual names, s. 86 would not apply.

Now, s. 86, of the Civil Procedure Code has been amended after our Constitution came into force, and, s. 86 runs at present thus:

> "No Ruler of a foreign State may be sued in any Court otherwise competent to try a suit, except with the consent of the Central Government certified in writing by a Secretary to that Government."

We are not concerned with the proviso to that section. Therefore, judging by the language used by the Legislature, the immunity conferred upon the Ruler is absolute and it is not limited to any particular class of suits or in respect of his public dealings. That view was taken by the Privy Council in *Gaekwar Baroda State Railway* v. *Hafiz Habib-Ul-Haq,*[2] where the Privy Council pointed out that s. 86 represented an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. The first contention urged by Mr. Khambata is that inasmuch as he has sued the firm under O. XXX and not the Maharaja, no question of the application of s. 86 arises. It is well known that a firm is not a legal entity. The word "firm" is merely a compendious way of describing the

[1] [1934] A. I. R. All. 740.

[2] (1938) L. R. 65 I. A. 182, s. c. 40 Bom. L. R. 811.

various persons who carry on a business in partnership, and O. XXX, r. 1, confers a special convenience upon litigants to sue persons carrying on a business in partnership in the name of the partnership business. Therefore, when a suit is filed under O. XXX, it is a suit filed against the persons who constitute the partnership, but it is permitted to be filed in the name of the firm. In bringing a firm before the Court the plaintiff is bringing or attempting to bring every partner of the defendant firm. Order XXX affords him the facility of using the partnership name in order to sue all the partners of that firm. Therefore, if the Maharaja of Orchha is a partner in the defendant firm, by bringing the defendant firm before the Court and suing the defendant firm the plaintiffs are undoubtedly suing the Maharaja, and in suing the Maharaja they are contravening the mandatory provisions of s. 86. Mr. Khambata draws my attention to O. XXI, r. 47 and r. 50. Those rules deal with execution of decrees passed against a firm or against partners, and the provisions contained in those rules prevent execution being taken out against the personal property of a partner who has not been served or who has not entered his appearance. But we are not concerned with those provisions in this application. We have not reached the stage when the plaintiffs are attempting to execute the decree against the property of the Maharaja. We are now at a stage when a suit is instituted against the defendant firm, one of the partners of which is alleged to be the Maharaja of Orchha. Therefore, in my opinion the learned Principal Judge was not right when he took the view that merely because the Maharaja of Orchha was not sued by name but because the suit was against the partnership firm in which he was a partner, s. 86 had no application.

The other contention urged by Mr. Khambata is that this is a case where the Maharaja of Orchha is being sued in respect of a private transaction. He has joined a partnership, he is doing business, and he should not be allowed to claim any personal privilege as far as the liability to be sued is concerned. I entirely sympathise with Mr. Khambata. It does seem rather strange that in these democratic republican days Maharajas should still continue to have privileges which were given to them in those palmy days of old under the Civil Procedure Code, when Maharajas had States to govern. But how unstateable Mr. Khambata's contention is is clear from the fact that even after our Constitution came

1952

DULERAI AND CO. v. POKERDAS MEGHRAJ

Chagla C. J.

into force, even after Rulers ceased to have any public duties or public functions, the privilege conferred upon them under the old Civil Procedure Code has still continued. As a matter of fact, s. 87B, which is a new Section, provides that the provisions of s. 85 and sub-ss. (*1*) and (*3*) of s. 86 shall apply in relation to the Rulers of any former Indian State as they apply to the Rulers of a foreign State. So that the amended Civil Procedure Code contemplates Rulers of former Indian States—Rulers who can only have a private life and engage in private activities, and even with regard to them the privilege continues. Therefore, it is clear that s. 86 confers a personal privilege upon the Rulers of foreign States or Rulers of any former Indian States. Strictly it is not s. 86 which applies to the Maharaja of Orchha who is not a Ruler of a foreign State. It is s. 87B which deals with Rulers of a former Indian State which makes s. 86 applicable to him. And a Ruler in relation to a former Indian State under s. 87B (*b*) is defined as a person who for the time being is recognised by the President as the Ruler of that State for the purpose of the Constitution, and it is not disputed that the Maharaja of Orchha is recognised by the President.

Mr. Khambata has relied on a decision of the Calcutta High Court in *Madan Lal Jhun Jhun Walla* v. *Reza Ali Khan.*[1] In that case the question arose whether an insolvency petition could be presented to the Court against a debtor when one of the creditors of the debtor was a Ruler. It was this narrow question that the Calcutta High Court was considering, and it came to the conclusion that s. 86 was no bar to presenting such a petition. It is difficult to deduce from this decision the principle for which Mr. Khambata is contending that s. 86 only applies when a suit is filed against the property of the Maharaja which property is public property belonging to the State or when the Maharaja is acting in a public capacity. As a matter of fact in the Privy Council case to which I have referred, the suit was against a railway company owned by the Maharaja of Baroda, the profits of which went to the Maharaja, and the Privy Council said that attempting to sue the railway company was circumventing s. 86 because the Maharaja was the owner and in substance what the plaintiff was doing was suing the Maharaja and not any other legal entity. As I said before, I realise the force of Mr. Khambata's argument and I have every sympathy for that argument, but

[1] [1940] 1 Cal. 344.

I see no way how I can escape the consequences of s. 86, which is mandatory in its character and which confers a personal privilege upon every Ruler of a former Indian State. In my opinion, therefore, the Maharaja is entitled to the privilege conferred upon him under s. 86 although this is a suit relating to a private transaction of the Maharaja.

Mr. Khambata does not admit the allegation of the defendant firm that the Maharaja of Orchha is a partner in the firm. In order to decide it an issue will have to be tried. It is further urged by Mr. Khambata that technically the defendant firm was not right in filing an appearance under protest. It is perfectly true that normally when a suit is filed under O. XXX, appearance is filed in protest by a person who is served as a partner and who disputes his partnership. But this is rather a novel case to which the ordinary rules of procedure cannot apply. If the defendant firm had filed its appearance without protest, it may have been urged that the Maharaja had waived his privilege, and as the firm consisted of four partners, one of whom was the Maharaja, the solicitors of the firm took the precaution of filing the appearance under protest.

Mr. Khambata then points out the difficulties with which his clients would be faced if it is held that the firm could not be sued if the Maharaja of Orchha is a partner. I do not really see what the difficulties are. It is certainly open to the plaintiffs to have the title of the plaint amended and to substitute in place of the defendant firm the names of the other three partners who do not enjoy the privilege which the Maharaja of Orchha enjoys of not being sued in any civil Court.

I would, therefore, set aside the order passed by the learned Principal Judge, send the matter back to him, and ask him to try the issue as to whether the Maharaja of Orchha is a partner in the defendant firm. If he comes to the conclusion that the Maharaja of Orchha is a partner in the defendant firm, then he will hold that the suit as filed has not been properly instituted. If the plaintiffs so desire he will give them liberty to amend the title of the plaint by bringing the other partners on the record. If, on the other hand, he comes to the conclusion that the Maharaja of Orchha is not a partner in the defendant firm, then the order that he has made will stand. The result is that the application must succeed.

Rule absolute with costs.

Rule made absolute.

A. J. P.