PRIVY COUNCIL

GAEKWAR BARODA STATE RAILWAY *v.* HAFIZ HABIB-UL-HAQ AND OTHERS

J. C.*
1938
March, 18

[On appeal from the High Court at Allahabad]

Civil Procedure Code, sections 86, 87; *order* XXX, *rule* 10—*Railway owned by Sovereign Prince—Suit against Railway—Summons addressed to Manager of Railway—Appearance entered by Manager—Objection to maintainability of suit raised in written statement—Suit defended on merits—Privilege, whether waived—Maintainability of suit.*

A timber merchant entered into contracts for the supply of sleepers to the Baroda State Railway, a Railway owned by H. H. the Maharaja Gaekwar, a Sovereign Prince. The contracts were signed by the Manager and Engineer-in-Chief of the Railway as such. The merchant instituted a suit in respect of a claim under the contracts in Agra, where delivery was to be made under one of the contracts, against "The Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief." The summons was served on the Manager and Engineer-in-Chief and he entered appearance and in his written statement pleaded, *inter alia*, "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's Government; the claim against the Manager and Engineer-in-Chief who is only a paid servant is bad in law." He also defended the suit on its merits.

The plaintiff admitted that the Railway was "owned and managed by H. H. the Maharaja Gaekwar through his own men" but contended that the railway was established as a corporation and could be sued as such, and (2) the privilege under sections 86 and 87 of the Code of Civil Procedure had been waived.

Held, on the facts, that there was no evidence that the Railway had been established as a corporation.

(2) No one having purported to appear in the suit on behalf of His Highness, there was no ground on which it could be said he waived his privilege.

(3) The provisions of sections 86 and 87 of the Code of Civil Procedure are imperative and cannot be evaded by bring-

*PRESENT: Lord WRIGHT, Lord ROMER, Sir LANCELOT SANDERSON, Sir SHADI LAL and Sir GEORGE RANKIN.

1938

GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ

ing a suit which is in reality one against a Sovereign Prince against him under another name on the ground that he was carrying on business under that name.

Banque Internationale de Commerce de Petrograd v. *Goukassow* (1) and *Lazard Brothers & Co.* v. *Midland Bank* (2), referred to.

Appeal (No. 67 of 1936) from a decree of the High Court (December 22, 1933) confirming in the main a decree of the Subordinate Judge of Agra (July 3, 1929).

The material facts are stated in the judgment of the Judicial Committee.

1938 *February*, 21. *Sir William Jowitt, K. C. and Sir Thomas Strangman, for the appellant*: The action was brought in the form in which it was in order to avoid the provisions of section 86 of the Code of Civil Procedure. The plaintiff admitted that His Highness the Maharaja Gaekwar was the owner of the railway. Permission to sue was not only not given but, it is submitted, it is clear could not have been given for this suit under section 86. The plaintiff succeeded in the lower court on the hypothesis that this railway was a corporation. There is no evidence that it was established as a corporation. The Notification relied on relates to suits in the Baroda Courts. It has nothing whatever to do with suits in courts in British India. The statute of 1879, 42 and 43 Vict. c. 41, merely grants to 6 railway companies power to work railways either in or outside British India. It does not say they are corporations and it is confined to those railways which are mentioned in the schedule. The Indian Railways Act (IX of 1890) does not apply to Baroda. The Government of India derives its legislative powers from statutes. It cannot legislate for Native States. Reference was made to the Government of India Acts of 1833, 1861, 1865, 1869 and 1915. This is the only material on which it is sought to establish that the railway is a corporation. If it were a corporation,

(1) (1923) 2 K.B. 682. (2) [1933] A.C. 289.

section 86 would have nothing to do with the case. If it were a corporation one would have expected it to have derived its corporate existence from His Highness in Baroda. There is no evidence of that and the questions would be what were its functions and when and how it became a corporation. *Ram Narain* v. *Gwalior Light Railway* (1) does not throw much light on the matter. It simply says that the argument that the suit there was incompetent is futile. On the question of waiver reliance was placed on order XXX, rule 10 of the Code of Civil Procedure. Section 87 is a complete answer to that. If there is any inconsistency in the provisions, those in the body of the Code must prevail. The general rules of procedure of the courts cannot override particular provisions of the legislature. Futher it is submitted that order XXX, rule 10 is not intended to refer to any one but partners carrying on business in British India. It is suggested that there is some kind of estoppel, a waiver by His Highness. But he was not there. It is difficult to see how one who is not a party to a suit can waive anything.

Rewcastle, K. C., Majid and Foote, for the respondents (called on to reply on the question as to whether the railway was a corporation): The question whether the railway is a corporation is a question of fact to be determined by the law of Baroda: *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (2) and *Lazard Brothers & Co.* v. *Midland Bank* (3). It is submitted that the Notification is evidence that His Highness was there for the purpose of suits, putting his own railway on the same footing as the B. B. and C. I Railway. It was an act of sovereignty. Incorporation may be implied from this Notification. If the railway was not a corporation, one would expect to find it said that it was not. Reference was made to Aitcheson's Treaties, Vol. VI, p. 297. The Court could conclude

(1) (1931) 134 Indian Cases, 300. (2) (1923) 2 K.B. 682.
(3) (1933) A.C. 289.

1938

GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ

that for the purposes of suits the railway was a corporation in Baroda carrying on business in British India. Code of Civil Procedure order XIX, rule 1, was referred to.

[It was also contended that the appeal to the Privy Council was incompetent.]

Majid, following, submitted that sections 86 and 87 did not apply. A person carrying on business may be sued in the name of the business. Here H. H. the Gaekwar was carrying on business in the name of the railway.

The judgment of the Judicial Committee was delivered by Sir LANCELOT SANDERSON: This is an appeal from a judgment and decree of the High Court of Judicature at Allahabad dated the 22nd of December, 1933, which varied but in the main confirmed a judgment and decree of the Subordinate Judge of Agra dated the 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 the 3rd of 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 the 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.

The written statement, which was filed on the 10th of 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 defences including pleas that the Agra court had no jurisdiction to try the suit, and that the suit was barred by limitation, but 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."

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?". 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 of the Civil Procedure Code of 1908, to which further reference will presently be made, and that it was an attempt to fix

1938

GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ

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 Rs.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 Rs.7,797-9-0 and that in other respects the aforesaid decree should be confirmed and the appeal dismissed.

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 "As regards the value and nature of the case it fulfils the requirements of section 110 of Act No. V of 1908". A preliminary objection was taken by learned counsel on behalf of the plaintiffs 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, C.P.C., and we certify accordingly". 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.7,797-9-0.

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 Rs.10,000, the learned Judges were right in granting the certificate.

Indeed the learned counsel for the plaintiffs 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.

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

1938

GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ

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 & 43 Vict. c. 41 and the Indian Railways Act (Act IX 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.

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 of the Civil Procedure Code".

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 XXX, rule 10 of the Civil Procedure Code.

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 of the Civil Procedure Code, 1908, are as follows: [The sections were here quoted.]

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 plaintiffs 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". Their Lordships cannot find any evidence in the record to justify the above-mentioned finding and indeed the learned counsel who appeared for the plaintiffs 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., *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (1) and *Lazard Brothers & Co.* v. *Midland Bank* (2) and especially on the following passage in Lord

(1) (1923) 2 K.B. 682. (2) (1933) A.C. 289.

1938

GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ

WRIGHT'S opinion at page 297: "English Courts have long since recognized as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law." 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 the 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.

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

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

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 on 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 Prant Niyayadhishi (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, not 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.

It was contended on behalf of the plaintiffs 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 connection 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.

Reference was made to a further notification No. 92 of 1921-22, dated the 17th June, 1922. This related to the civil and criminal jurisdiction over the Okhamandal Railway and amongst other matters it provided that the Indian Railways Act of 1890 and the rules relating thereto had been made applicable. It was argued that

1938

GAEKWAR BARODA STATE RAILWAY v. HAFIZ HABIB-UL-HAQ

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 Indian 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".

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 and 87 of the Civil Procedure Code.

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 of the Code of Civil Procedure 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 plaintiffs respondents contended that the above-mentioned finding was correct.

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 of the Code of Civil Procedure, 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.

Solicitors for the appellant: Gregory, Rowcliffe & Co.

Solicitors for the respondents: Douglas Grant and Dold.