

FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice,
Mr. Justice Thom and Mr. Justice Iqbal Ahmad*

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April, 29

OFFICIAL LIQUIDATORS, DEHRA DUN-MUSSOORIE
ELECTRIC TRAMWAY CO. (PETITIONERS) *v.* PRESI-
DENT, COUNCIL OF REGENCY, NABHA STATE
(OPPOSITE PARTY).*

Companies Act (VII of 1913), sections 184, 186, 187—Civil Procedure Code, section 86—Jurisdiction—Putting a Sovereign Prince or Ruling Chief in the list of contributories—Making calls on and ordering payment by a contributory who is a Sovereign Prince or Ruling Chief—Civil Procedure Code, section 141—Proceedings in court in winding up of company.

Section 86 of the Civil Procedure Code does not apply to proceedings under section 184 of the Companies Act for settling the list of contributories, but it does apply to all proceedings under sections 186 and 187 of the Companies Act for ordering payments to be made by the contributories.

Section 184 of the Companies Act imposes a statutory duty upon the court to settle the list of contributories, and the matter is not optional or discretionary. Accordingly, if a Sovereign Prince or Ruling Chief is a contributory, he must be placed in the list of contributories; and for this purpose no previous consent of the Governor-General in Council is required under section 86 of the Civil Procedure Code, for it can not be said that when such a list of contributories is to be settled the court is starting any proceeding analogous to that of a suit brought by a private person against a Sovereign Prince or Ruling Chief.

On the other hand, the court's action under section 186 or 187 of the Companies Act is discretionary, and an order will be made under those sections if the case is a fit case. An order for payment by a contributory can be made under those sections only in cases where a suit to recover the amount would be maintainable, and no such order will be made under those sections if by such procedure the opposite party would be deprived of some defence or answer which would be open to him in a suit for the money. Section 86 of the Civil Procedure Code confers a special privilege on Sovereign Princes and

*Miscellaneous Case No. 96 of 1926.

Ruling Chiefs which entitles them to defend a suit on the mere ground that the previous consent of the Governor-General in Council has not been obtained. The court, therefore, under sections 186 and 187 of the Companies Act can not have jurisdiction to override the provisions of section 86 of the Civil Procedure Code and make an order for payment against a Sovereign Prince or Ruling Chief in the absence of the previous consent of the Governor-General in Council. No jurisdiction exists in a British Indian court to enforce any personal liability against a Sovereign Prince or Ruling Chief, unless the case can be brought within the scope of section 86 of the Civil Procedure Code ; and inasmuch as in the present case none of the conditions mentioned in clauses (a), (b) and (c) of sub-section (2) of section 86 existed, no consent of the Governor-General in Council could be obtained, and therefore no order under section 186 or 187 of the Companies Act could be passed at all.

Proceedings under section 186 or 187 of the Companies Act are proceedings in a court of civil jurisdiction to which section 141 of the Civil Procedure Code is applicable, and therefore section 86 is also applicable.

Dr. N. P. Asthana and Mr. Bhagwati Shankar, for the applicants.

Messrs. B. E. O'Connor and Ram Nama Prasad, for the opposite party.

SULAIMAN, C.J.:—The question referred to the Full Bench is: “Does section 86 of the Code of Civil Procedure apply to proceedings under sections 184 and 186 and 187 of the Indian Companies Act?”

The Dehra Dun-Mussoorie Electric Tramway Co., Ltd., has been in liquidation and has been wound up. The former Maharaja of Nabha had purchased a large number of shares and paid in a large sum of money in cash, but a sum of about Rs.20,000 was outstanding as the unpaid balance on account of those shares. After some correspondence, the then Managing Agent accepted a Rolls Royce car as payment on account of the outstanding balance. The car was shown as part of the properties of the company and the shares were shown as having been paid up. There was, however,

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some dispute on account of the transfer of that car by the Managing Agent and an interpleader suit was filed in the Calcutta High Court in respect of that car. It was on account of the pendency of that interpleader suit that the Company Judge ordered that the question of the liability of the Maharaja of Nabha should be postponed till after the decision of the suit. The Rolls Royce car was sold at a low price and the sale proceeds have already been credited in the account to the Nabha Darbar and the claim is for the balance only. On the question having been raised, and no settlement having been arrived at by an amicable arrangement, the liquidator filed the application, out of which this reference has arisen, on the 1st of September, 1933, in which he prayed (a) that the matter (the settlement of the list of contributories) be heard and decided at an early date, and (b) the Nabha Darbar be called upon to pay the Official Liquidator the sum of Rs.19,240-15-3 together with interest. The matter came up before a Bench of this Court and objection was raised on behalf of the Nabha Darbar that without the previous consent of the Governor-General in Council as required by section 86 of the Code of Civil Procedure no proceedings could be taken against the Darbar.

So far as the question of the settlement of the list of contributories is concerned, the matter appears to be simple. Section 184 of the Indian Companies Act provides that as soon as may be after making a winding up order the court *shall* settle a list of contributories, etc. The section is, therefore, imperative and imposes a duty upon the court to settle the list of contributories. It is not necessary that any application should be made by the liquidator to the court for settling such a list. The rules, which were made by this Court by virtue of the power vested in it under the Act and which are admittedly applicable to the present case, were the old rules 54 and 55 under which the Official Liquidator had to file a list in court and obtain an appointment

for the court to settle the same and it was the Official Liquidator who was to give notice of such appointment to the persons included in the list. There was to be no application made to the court and the court did not issue any notice direct to the opposite party to show cause. But a date was fixed on which it was open to the contributories mentioned in the list prepared by the Official Liquidator to appear and take any objection. There being a statutory duty on the court to settle the list, it follows necessarily that there is no option but to settle such a list. It cannot be said that when such a list is to be settled the court is starting any proceeding analogous to that of a suit brought by a private person against a Sovereign Prince or a Ruling Chief, for which the previous consent of the Governor-General in Council is required under section 86 of the Code of Civil Procedure. It is, therefore, impossible to accept the contention that before even the list is settled, the consent of the Governor-General in Council should be obtained.

The proceeding under section 186, however, stands on a different footing. Under that section "The court may, at any time after making a winding up order, make an order on any contributory for the time being settled on the list of contributories to pay . . . any money due from him . . . to the company exclusive of any money payable by him . . . by virtue of any call." Now the section is discretionary and the court is not bound to make an order but may make such an order in a fit case. It is also necessary that when the order is passed, there should be money due from a contributory exclusive of any money payable by him by virtue of a call. The interpretation of section 186 of this Act has been set at rest by the recent pronouncement of their Lordships of the Privy Council in the case of *Hansraj Gupta v. Official Liquidators of Dehra Dun, etc. Company* (1). At page 1078 their Lordships laid down that

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(1) (1932) I.L.R., 54 All., 1067.

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the meaning and effect of section 186 was identical with the corresponding section in England. The three features of the section were emphasised: “(1) It is concerned only with moneys due from a *contributory*, other than money payable by virtue of a call in pursuance of the Act. A debtor who is not a contributory is untouched by it. Moneys due from him are recoverable only by suit in the company’s name. (2) It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights. (3) The power of the court to order payment is discretionary. It may refuse to act under the section, leaving the liquidator to sue in the name of the company, and it will readily take that course in any case in which it is made apparent that the respondent under this procedure, if continued, would be deprived of some defence or answer open to him in a suit for the same moneys.” At page 1079 their Lordships again emphasised that the provisions must be confined to “money due and recoverable in a suit by the company, and they do not include any moneys which at the date of the application under the section could not have been so recovered.”

This case was, of course, followed by the later Full Bench case of this Court in *Shiam Lal Diwan v. Official Liquidator, U. P. Oil Mills Co.* (1), in which one of the members of the Bench at page 936 also emphasised that the analogous section 235 also did not create new rights and the procedure under the section would not be adopted where it would deprive the opposite party of some defence or answer open to him in a regular suit.

It follows, therefore, that where there was any case of an order to be made under section 186 for payment of money due from a person, the order can be made by the court only in cases where a suit to recover the

(1) (1933) I.L.R., 55 All., 912.

amount would be maintainable. If the remedy by suit is for some reason or other barred, then the court would not make an order under section 186, for it would be depriving the opposite party of the defence which is open to him.

Now section 86 of the Code of Civil Procedure confers a special privilege on Sovereign Princes and Ruling Chiefs which presumably existed under treaties before even the earlier Code was enacted, and entitled them to defend a suit on the mere ground that the previous consent of the Governor-General in Council has not been obtained. It seems to me that it could not have been the intention of the legislature that the proceedings under section 186 should deprive them of this defence. Indeed, it follows from the observations of their Lordships of the Privy Council that no new rights and no new liabilities are created by section 186, but that it only provides a speedy procedure for recovering the amount due, that the Princes cannot be made liable when a suit against them would not be maintainable. The court under section 186 merely enforces an existing liability which can be enforced without any obstacle or impediment, and cannot, therefore, override the provisions of section 86 of the Code of Civil Procedure by making an order under section 186 of the Companies Act.

But in the present case the liability of the Nabha Darbar is said to be on account of the unpaid call money with which section 186 of the Companies Act does not deal. It expressly refers to moneys due exclusive of any payable by virtue of any call. Section 156 of the Companies Act fixes the statutory liability of the present and past members of a company and lays down the extent to which each is liable. Their Lordships in *Hansraj Gupta's* case (1) made it clear at pages 1078 and 1079 that section 186 would not be applicable to cases relating to money due on shares in the company

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which was in liquidation, the liability for which on a winding up became a statutory liability under section 156 of the Companies Act. It is, therefore, open to the company Judge to declare in an *ex parte* proceeding that a Sovereign Prince or a Ruling Chief has the statutory liability to pay a certain amount, but such a declaration is of no avail unless the order is made under section 187 making calls on and ordering payment thereof by such a contributory. The question that falls for consideration is whether the order under section 187 can be made against a Sovereign Prince or a Ruling Chief without the consent of the Governor-General in Council.

Now in the first place, the consent of the Governor-General for making calls and ordering payment thereof is not of any use unless the case is one of the three classes mentioned in sub-section (2) of section 86 of the Code of Civil Procedure. *Prima facie* the order making calls does not fall in either of the three categories. It follows, therefore, that either no order can be made at all under section 187 or it can be made without such consent.

Section 141 of the Code of Civil Procedure lays down that the procedure provided in this Code in regard to suits *shall* be followed, as far as it *can* be made applicable, in all proceedings in any court of civil jurisdiction. The Code, of course, contains section 86 also. It has been held by their Lordships of the Privy Council that this section applies to all original matters that are initiated in a court of civil jurisdiction, although they are not really suits. The point for consideration then is whether proceedings under section 187 in which the court can make call on and order payment thereof by a contributory can be regarded as proceedings in a court of civil jurisdiction to which section 141 and therefore section 86 is also applicable.

It is true that unlike section 186, there is no provision in the Companies Act for a separate suit being filed

in respect of these calls and the only court which can make the order under section 187 is the winding up court. But it does not follow that the court can bring under its jurisdiction persons who are declared to be outside the jurisdiction of British courts, subject to certain reservations. The order making calls or ordering payment thereof is of a necessity an enforcement of the personal liability of the contributory on account of the outstanding balance due from him. No order can be passed unless the court has jurisdiction to enforce the personal liability of the Sovereign Prince or the Ruling Chief. It seems to me that no such jurisdiction exists in a British court, unless the case can be brought within the scope of section 86 of the Code of Civil Procedure.

Before the matter came into the court, the company had no remedy against the Prince or the Chief in respect of the money due from him, excepting, of course, the forfeiture of shares or withholding payment of money due to him. Section 187 in my opinion does not confer any higher jurisdiction on the court to enforce the remedy which was not open to the company before the liquidation proceedings, against a person who is not amenable to the court's jurisdiction. I am, therefore, of the opinion that no order under section 187 can be made against the Sovereign Prince or the Ruling Chief at all, and no question of any consent of the Governor-General in Council can arise, because such a case does not fall in any of the three classes mentioned in sub-section (2) of that section. Apparently the legislature has intended that Sovereign Princes and Ruling Chiefs are altogether exempt from all personal liability and cannot be sued against in a British court except in respect of matters within fixed limits, and there, too, after the previous consent of the Governor-General in Council has been obtained. Persons or companies dealing with Sovereign Princes and Ruling Chiefs enter into transactions with open eyes and have

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no grounds for complaint if it turns out later on that they have no remedy to enforce their personal liability. It is for companies to make sure that they do not sell shares to such persons unless they are fully paid up. The position of the companies is, to my mind, exactly the same as that of other sellers of articles, who have no remedy left in case the balance of the price is not paid.

I would, therefore, answer the question referred to this Bench by saying that section 86 of the Code of Civil Procedure does not apply to the proceedings under section 184, but that it does apply to all the proceedings under sections 186 and 187 of the Companies Act.

THOM, J.:—I concur. So far as section 184 is concerned it charges the court with a statutory duty in the winding up proceedings of companies. In exercising its powers under section 184 the court does not exercise any jurisdiction over a Native Prince or over an Independent State. If the court makes an order under section 184 and places the name of a Native Prince or a Regent of an Independent State upon the list of contributories, it does not thereby enforce a jurisdiction against that Native Prince or against the Regent or President of the Independent State. So far as sections 186 and 187 are concerned, however, different considerations arise. There is no doubt that the present application under sections 186 and 187 is a proceeding in a civil court within the meaning of section 141 of the Code of Civil Procedure. Section 86 therefore is applicable. Section 86 states in clear and specific terms that Independent States and Native Princes are not liable to the jurisdiction of the British courts in India. They may be sued, however, in certain instances if permission of the Governor-General in Council is granted.

It has been contended, however, that sections 186 and 187 of the Companies Act impose certain liabilities

upon Independent States and Native Princes as shareholders in companies which have gone into liquidation. That may be so, but I am clearly of the opinion that it never was the intention of the legislature by these sections to extend the jurisdiction of the British courts in India. If the contention of the Official Liquidator that under sections 186 and 187 the court may issue an order calling upon Independent States to pay a certain sum of money as contributories be accepted, then a very wide and sweeping alteration in the existing law would be implied. Under the existing law Independent States and Native Princes are not subject to the jurisdiction of the courts in India. This is enacted in specific terms by section 86 of the Code of Civil Procedure, and in my judgment an alteration of the law of jurisdiction which is embodied in specific statutory enactment may not be effected by implication in a statute which has nothing whatever to do with jurisdiction. In these circumstances I am of opinion that it is not open to the Official Liquidator to present an application asking the court to issue an order against the Nabha State under sections 186 and 187 of the Indian Companies Act. In the result I agree that the questions submitted to this Bench should be answered as the learned CHIEF JUSTICE suggests.

IQBAL AHMAD, J.:—I agree with the judgment that has been delivered by the CHIEF JUSTICE and have nothing to add.

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