Supreme Court of India
Harbhajan Singh Dhalla vs Union Of India on 5 November, 1986
Equivalent citations: 1987 AIR, 9 1987 SCR (1) 114
Author: S Mukharji
Bench: Mukharji, Sabyasachi (J)

PETITIONER:
HARBHAJAN SINGH DHALLA

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT05/11/1986

BENCH:
MUKHARJI, SABYASACHI (J)
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MUKHARJI, SABYASACHI (J)
SINGH, K.N. (J)

CITATION:
1987 AIR 9 1987 SCR (1) 114
1986 SCC (4) 678 JT 1986 765
1986 SCALE (2)728
CITATOR INFO :
F 1991 SC 814 (2)

ACT:
Suit against an ambassador of a foreign state--Doctrine of immunity and the maxim Par in Parem N-on habet jurisdictionem-Central Government refusing to grant permission to sue the Embassy "on political grounds"---Propriety of the order--Code of Civil Procedure, 1908, Sections 86 and 87 scope and nature of--Administrative orders and Principle of Natural Justice, following of--Right of a citizen to carry on the work of maintenance and repairs and Court's duty to safeguard his right.

HEADNOTE:
The appellant, an Indian national who had undertaken general maintenance work and repairs at the Embassy of Algeria and at the residence of the then ambassador in New Delhi in the year 1976, in order to recover certain alleged payments due from the Embassy sought the consent of the Central Government under section 86(4)(aa) of the Code of Civil Procedure which was refused on "political grounds". Hence the writ petition by the aggrieved citizen.
Allowing the petition, the Court,

HELD: 1.1 Immunity of foreign States to he sued in the domestic forum of another State was and still is part of the general international law and international order. In India where the rule of law prevails, the foreign State ought to he entitled to such immunities but to no more as are enjoyed by the domestic state before its own Tribunal. [119E, 120H]

Mirza Ali Akbar Kashani v. United Arab Republic and Anr., [1966] 1 SCR 319, followed.

Cristina 1938 A.C. 485 at 498; and Rahimtoola v. Nizam of Hyderabad and Anr., 1958 Appeal Cases 379 at 418, quoted with approval.

Mirza Ali Akbar Kashani v. United Arab Republic and Anr., AIR 960 Calcutta 768, approved.

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1.2 Indian Constitution guarantees the right of a citizen to carry on his business and carry on trade freely subject to certain limitations as contained in the relevant provisions of the Constitution. In the instant case, the petitioner had the right to be paid his reasonable remmuneration or dues in accordance with the law subject to the bargain between the parties and subject further to any reasonable prohibitions or restrictions under the law of the country. The disputes that has arisen have to he resolved both under the principles of Lex Loci Contractus and lex Situs. Since the disputes have not been judicially determined nor the claim held frivolous, a foreign State in this country if it fulfills the conditions stipulated in subsection (2) of section 86 of the Code of Civil Procedure would he liable to he sued. That would be in conformity with the Principles of international law as recognised as part of our domestic law and in accordance with the Indian Constitution and human rights. [118G-119B, 122G]

1.3 It is true that the provisions both of sections 86 and 87 of the Code of Civil Procedure are intended to save the foreign states from harassment which would he caused by the institution of a suit but except in cases where the claim appears to he frivulous 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 he exercised in accordance with the principles of natural justice and in consonance with the principle that reasons must appear from the order. [123H-124C]

Maharaj Kumar Tokendra Bir Singh v. Secretary, to the Government of India, Ministry of Home Affairs and Anr., AIR 1964 SC 1663, followed.

1.4 There is no provision of any appeal from the order

of the Central Government in either granting or refusing to grant sanction under section 86 of the Code. This sanction or lack of sanction may, however, be questioned in the appropriate proceedings in court but inasmuch as there is no provision of appeal, it is necessary that there should he on objective evaluation and examination by the appropriate authority of relevant and material factors in exercising its jurisdiction under section 86 by the Central Government. There is an implicit re-
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quirement of observance of the Principles of natural justice and-also the implicit requirement that decision must be expressed in such a manner that reasons can be spelled out from such decision. [124H-I25B]

1.5 Though this is an administrative order, in a case of this nature, there should be reasons. If the administrative authorities are enjoined to decide the rights of the par-ties, it is essential that such administrative authority should accord fair and proper bearing to the person to be affected by the order and give sufficiently clear and ex-plicit reasons. Such reasons must be on relevant material factors objectively considered. There is no claim of any privilege that disclosure of reasons would undermine the political or national interest of the country. [125C]

1.6 The expression 'political ground' covers a wide range and connotes without further particulars vague and fanciful attitude. The refusal by the Central Government to accord its sanction to sue the foreign ambassador, in this case, is not in accordance with law.[124F, 125C]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition No. 67 of 1985 (Under Article 32 of the Constitution of India) Dr. Gaurl Shanker (Amicus Curiae) for the Petitioner. Madhu Sudan Rao, Mrs. Kittu Kumarmangalam and C.V. Subba Rao for the Respondent.

The Judgment of the Court was delivered by SABYASACHI MUKHARJI, J. Harbhajan Singh Dhalla, the petitioner herein asserts that he is going from piller to post to collect Rs.27,000 which according to him is due from the Algerian Embassy, he further asserts that this is a case where a little man's small claim is attempted to be thwarted by technical device. He is an Indian National. He had under- taken general maintenance work at the Embassy of Algeria in India and at the residence of the then Ambassador of Algeria in New Delhi in the year 1976. He claims that his rightful dues in respect of the said work runs into more than Rs.28,500. He says that he has been deprived of the same. He states that he is in search of a remedy but the remedy alludes him and his claim remains uninvestigated and unde- cided.

The petitioner narrates his story that he had written to fail and sundry to extend some help in obtaining his dues but nothing tangible has resulted so far. The petitioner had approached the

Ministry of External Affairs for granting permission to sue the Algerian Embassy for recovering his dues. After numerous letters and passage of number of years in the processing of his request,, he received a letter from the Ministry of External Affairs dated 26th November, 1983 which is Annexure 'A' to the petition. It states, inter alia. "After due consideration the Government of India regrets that permission to sue the State of Algeria cannot be given on political grounds".

It may be mentioned that according to the petitioner he had done the jobs of building maintenance, reconditioning and renovation work at the Embassy of Algeria and at the residence of the then Ambassador of Algeria in the year 1976. He completed the work assigned to him and submitted the bills for Rs.29,000 which were not settled in toto and he claimed that even the sum of Rs.11,380 had not-been. settled by the Embassy. The balance, according to the peti- tioner, accumulated to Rs.27,000 at the rate of 18% inter- est. A representation was made to the Ministry of External Affairs.' The Ministry delayed action and then allegedly took up the matter with the Algerian Embassy who in turn intimated the Ministry that according to the accounts main- tained by the Embassy all bills pertaining to work done by the petitioner had been settled by the Embassy. The Embassy further claimed to have issued a cheque beating cheque No. 245273 amounting tO Rs.17,500 in favour of the petitioner on 17th June, 1976 which, according to the Embassy, was en- cashed by the petitioner the same day. This fact was sought to be corroborated by the State Bank of India with whom enquiries were made by the Ministry of External Affairs. The petitioner, however, claimed that though he received payment against this cheque, he had handed over the amount to the Financial Attache of the Embassy who paid him only Rs.3,330. The petitioner alleged further that when he went to get the remaining amount, the financial attache had pointed a re- volver at-him and threatened him with dire consequences. (See Annexure 'A' to .the affidavit of the petitioner af- firmed on 17th March, 1986--p.31 of the Paper-Book). The petitioner mentioned hereinafter that he had requested the Ministry of External Affairs to grant permission to sue the State of Algeria under section 86 of the Code of Civil Procedure for realisation of the claim with interest. The petitioner was given a hearing as required under section 86 of the Code, according to the respondent, on 2nd November, 1983, which is, however, denied by the petitioner.

According to the affidavit of the respondent, which is the Union of India, after giving due consideration, the Ministry was of the opinion that no prima facie case had been made out and it was decided not to grant permission to the petitioner.

After receipt of the official communication from the Ministry as noted above, the petitioner got an appointment with Late Smt. Indira Gandhi, the then Prime Minister of India and requested her for compensation from Prime Minis- ter's relief fund or some loan from any Nationalised Bank. He further alleged that Late Shrimati Gandhi helped the petitioner to get a letter which was addressed to the Minis- try of Finance but the appropriate authorities failed to acknowledge the grievances and demands of the petitioner. In those circumstances the petitioner has approached this Court for issue of an appropriate writ.

A rule Nisi having been issued on this application, an affidavit on behalf of the respondent was filed. In the counter-affidavit on behalf of the Union of India, the facts as mentioned hereinbefore have been reiterated and it was stated in the submission that the petition for recovery of the

compensation as claimed was not maintainable. It in- volved the disputed questions of facts and there was no cause of action against the Union of India. The petitioner filed an affidavit in reply. There are certain annexures indicating as to what happened. For the purpose of disposing of the present application, it is not necessary to refer to the same.

We have heard the parties. We requested Dr. V. Gauri Shankar, Senior Advocate of this Court, to help us as amicus curie since the petitioner was appearing in person. He has rendered valuable assistance and we record our appreciation and gratitude for the same.

In this case two aspects require to be emphasized. First is the right of a citizen to carry on his business and carry on trade freely subject to limitation under the law. Our Constitution guarantees that right subject to certain limi- tations as contained in the relevant articles of the Consti- tution. That right of the petitioner in this case was sub- ject to the provisions of law controlling, restricting or inhibiting that right. The petitioner states that he had performed the general maintenance work at the 'Embassy of Algeria and at the residence of the then Ambassador of Algeria. He had therefore the right to be paid his reasona- ble remuneration or dues in accordance with the law subject to the bargain between the parties and subject further to any reasonable prohibitions or restrictions under the law of the country. There are disputes in this case as we have noticed as to what is the amount due, if any, and further whether any amount was paid as asserted by the Algerian Embassy and as denied by the petitioner. These disputes have to be resolved in accordance with the law of this country, both under the principles of Lex Loci contractus as well as lex situs. The Union of India has indubitably the jurisdiction and obliga- tion in the appropriate case to give sanction but the Union cannot in any arbitrary manner or administratively adjudi- cate those disputes or determine the claim. The petitioner wants to have the disputes adjudicated as he alleges that he has failed to realise the amount which, according to him, is reasonably and lawfully due to him. The communication to the petitioner which is impugned in this application dated 26th November, 1983 states that "permission to sue the State of Algeria cannot be given on political grounds". But in the affidavit filed on behalf of the Union of India in these proceedings, it is stated that "The Ministry was of the opinion that no prima facie case was made out and the facts of the case were not superiorily covered under section 86 of Code of Civil Procedure. It is submitted that under section 86, paras 86(1) and (2), the Central Government has discre- tion to refuse consent as required under that section." In this application, the court is not concerned with the cor- rectness or genuineness or otherwise of his claim or asser- tion, except perhaps prima facie maintainability. What concerns this Court is whether the. grievances of the citi- zen of this country have been properly and legally dealt with.

Immunity of foreign States to be sued in the domestic forum of another State was and perhaps still is part of the general international law and international order and it is not necessary for the present purpose to consider its ori- gin, development and the trends in different countries. As Professor H. Lauterpacht writes in "The British Yearbook of International Law 1951" (Volume 28) on "The Problem of Jurisdictional Immunities of Foreign States" at page 230 the assumption of jurisdiction over foreign states by the domes- tic court was considered at one point of time to be contrary to the dignity of the foreign states and as such inconsist- ent with the international courtesy and the amity of inter- national relations. This has been in the past a persistent theme of judicial decisions. It may be noted that in so far as the doctrine of immunity owed its acceptance to the decisions of the courts

of the United States it is explained to some extent by the fact that it was by reference to dignity of the states of the Union that their immunity from suit was urged insistently and repetitiously. During the debates preceding the adoption of the Virginian Convention in 1978, John Marshall stressed the element of indignity inflicted upon a state by making it a defendant in an action. (Elliot, Debates--2nd Ed. 1836, page 555). It may be of historical amusement specially in the context of Indian Constitution and the growth and the history of the Indian Constitution to note that in the leading case of Chisholm v. Georgia, Dall, Page 419, 425(US) 1793, the main argument for the defendant state was that it was a 'degradation of sovereignty in the states to submit to the supreme judiciary of the United States'. The courts of the United States have gone to the length of relying on the argument of dignity in the matter of immunity of foreign states from taxation. In England, 'dignity', coupled or identified with 'independence', played an important part as an explanation of the doctrine of immunity of foreign states.

Esher L.J. in The Parlement Beige (1880) L.R. 5P.D. 197,207 had observed: "From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with his regal dignity--that is to say, with his absolute independence of every superior authority." In the said case, Lord Justice Brett at pages 2 14, 220 of the report referred variously to 'independence and dignity' and to 'equality and independence' as the basis of immunity. To the same effect are the observations of Lord Macmillan in Cristina, [1938] A.C. 485 at 498. According to Professor Lauterpacht these strained emanations of the notion of dignity were an archaic survival and therefore these could not and should not continue as a rational basis of immunity.

The legal development of this aspect has been discussed by Sompong Sucharitkul in "State Immunities and Trading Activities in International Law". Professor H. Lauterpacht has also discussed this aspect in the said article "The Problem of Jurisdictional Immunities of Foreign States" in "The British Year Book of International Law 1951 ..

The problem was also discussed by several High Courts and this Court. These have been noted in the Bench decision of the Calcutta High Court in United Arab Republic and another v. Mirza Ali Akbar Kashani, AIR 1962 Calcutta 387. In India where rule of law prevails, the foreign State ought to be entitled to such immunities but to no more as are enjoyed by the I domestic State before its own Tribu- nal. This was observed by Ray, J.

sitting singly, as the Chief Justice of India then was, in Mirza Ali Akbar Kashani v. United Arab Republic and another, AIR 1960 Calcutta 768.

Lord Denning in Rahimtoola v. Nizam of Hyderabad and Another, [1958] Appeal Cases 379 at 418 observed in the context of English courts: "There is no reason why we should grant to the departments or agencies of foreign Governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them". Lord Denning noted in the said decision as early as 1957 that among the decisions of the English courts, one would not find consistency on this aspect. Lord Denning was of

the view that there was no uniform practice or uniform rule. It may incidentally be noted that this was the opinion of Lord Denning expressed in the House of Lords. Viscount Simonds in his opinion observed that he should not be taken to have assented to the views of Lord Denning upon a number of questions and authorities in regard to which the House of Lords had not the benefit of the arguments of counsel or the judgments of the courts below.

It is instructive to note what Lord Denning had to say on matters on which he had expressed views without the help of counsel of the parties. Lord Denning concluded at pages 423-424 of the report as follows:

> "My Lords, I acknowledge that, in the course of this opinion, I have considered some ques- tions and authorities which were not mentioned by counsel. I am sure they gave all the help they could and I have only gone into it fur- ther because the law on this subject is of great consequence and, as applied at present, it is held by many to be unsatisfactory. I venture to think that if there is one place where it should be reconsidered on principle--without being tied to particular precedents of a period that is past--it is here in this House: and if there is one time for it to be done, it is now, when the oppor- tunity offers, before the law gets any more enmeshed in its own net. This I have tried to do. Whatever the outcome, I hope I may say, as Holt C.J. once did after he had done much research on his own: "I have stirred "these points, which wiser heads in time may settle." (Emphasis supplied).
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> With the observations of Lord Denning on the question of immunity of the foreign states, the other Law Lords disassociated themselves. Mr. Justice Bachawat, speaking for the Division Bench of the Calcutta High Court, rejected the contention urged by counsel in United Arab Republic and another v. Mirza Ali Akbar Kashani (supra) . that the foreign State enjoyed the same immunity as a domestic state enjoyed and no more. This decision came up in appeal before this Court in Mirza Ali Akbar Kashani v. United Arab Republic and Anr,, [1966] 1 SCR 3 19 and this Court upheld the Bench decision of the Calcutta High Court and held that section 86(1) of the Code of Civil Procedure as it stood at the relevant time was the statutory provision coveting a field which would otherwise be covered by the doctrine of immunity under International Law and save and except in accordance with the procedure indi- cated in section 86 of the Code a suit against a foreign State would not lie.
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> Section 86 at the material time controlled the suits against foreign States and provided that no foreign state might be sued in any Court otherwise competent to try the suit except with the consent of the Central Govern- ment certified in writing by a Secretary to that Government save and except, certain specified type of suits, with which we are not concerned in this appeal. Sub-section (2) of section 86 of the Code stipulates inter alia, that no such sanction shall be given, unless the foreign State is in possession of immova- ble property situate within those limits and is to be sued with reference to such property or for money charged thereon or by itself or another trade within the local limits of the jurisdiction of the courts in India. In this case the

petitioner had a right to carry on the work of maintenance and repairs in this country. This right is granted to him under the Constitution and he trades within the local limits of the courts in India and the foreign State which he wants to sue has immovable property situate within the limits of this country. There is dispute about the petitioner's claim. That dispute has not been judicially determined. It has not been held that the claim of the petitioner is frivolous. In that view of the matter, it appears to us that a foreign State in this country if it fulfils the conditions stipulated in sub- section (2) of section 86 of the Code would be liable to be sued in this country. That would be in conformity with the principles of inter- national law as recognised as part of our domestic law and in accordance with our Con- stitution and human fights. the power given to the Central Government must not be exercised arbitrarily or on whimsical grounds but upon proper reasons and grounds. The order merely states that the Government could not grant the permission to sue the State of Algeria on political grounds. In respect of a building where a masonary work was supervised by a contractor or an archi- tect, how the dignity of a foreign. state or relationship between the two countries would be jeopardised or undermined or endangered, it is difficult to comprehend or understand from this reason nor are the reasons explained or demonstrated in the counter-affidavit filed on behalf of the respondent-Government. The reasons given in the counter-affidavit on the other hand are different namely (a) the gov- ernment found no prima facie ground and (b) the claim was outside the provisions of sec- tion 86 of the Code of Civil Procedure. The second ground now stated is patently erroneous and contradictory to the ground mentioned in the letter dated 26th November, 1983. One should have thought that the political rela- tionship between the two countries would be better served and the image of a foreign State be better established if citizens' grievances are judicially investigated. This would also be in consonance with human rights. Sub-section (6) of section 86 enjoins that opportunity being given before passing of the order. There is dispute in this application as to whether such reasonable opportunity was given. The respondent-Union of India asserts that such opportunity was given. No satisfac- tory evidence of such opportunity being given was produced before us.

The law on this aspect of sovereign immu- nity in England is regulated by the State Immunity Act, 1978 which introduced or con- ferred a number of exceptions to the basic rule of immunity. Although the Act .was de- signed in part to implement the European Convention of State Immunity, it goes consid- erably further than the Convention in re- stricting immunities- See in this connection Diecy & Morris 'The Conflict of Laws,' 10th Edition page 157 (Volume 1).

Dr. Gauri Shankar had drawn our attention to Maharaj Kumar Tokendra Bir Singh v. Secre- tary, to the Government of India, Ministry of Home Affairs and another, A.I.R. 1964 S.C. 1663 which deals with the conditions under which sanction under section 87B of the Code are obtained and observed that in granting the consent, the Central Government was not to adjudicate upon the correctness of the claim. The Court noted that the power conferred on the Central Government to refuse to accord consent to

the proposed suit shall be careful- ly exercised. These principles would be ap- plicable to the facts of this case. It is true that these provisions both of sections 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 frivu- lous patently, the Central Government should normally accord consent or give sanction against foreign states unless there are cogent political and other reasons. Normally, howev- er, 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 jurisdic- tion 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-affida- vit we do not find any such cogent reasons or due consideration.

It is well to bear in mind the two princi- ples on which sovereign immunity rest. So far as the principle expressed in maxim par in parem non habet jurisdictionem is concerned with the status of equality. The other princi- ple on which immunity is based is that of non-intervention in the internal affairs of other states. See in this connection Brownlie "Principles of Public International Law" Third Edition 322-325. Much has happened in differ- ent States since Marshall, C.J. of the United States in The Schooner Exchange v. Mc Faddon, [1812] 7 Cranch 116; Green, p. 237 Briggs, p. 413; Bishop, p. 659 explained the principle and said that a state within its own territory as being "necessarily exclusive and absolute". In the days of international trade and com- merce, international interdependence and international opening of embassies, in grant- ing sanction the growth of a national law in this aspect has to be borne in mind. The interpretation of the provisions of Code of Civil Procedure must be in consonance with the basic principles of the Indian Constitution. The expression 'political ground' used in the communication of the Government noted before covers a wide range as explained in Aiyar's Law Lexicon page 986. It connotes without further particulars vague and fanciful attitude.

Corpus Juris Secundum Vol. 48 page 28 at pages 30 to 35 deals with the various kinds of remedies by a citizen against foreign state. In granting of sanction or refusing sanction under section 86, the Central Government must bear these factors in mind.

In this case there is no provision of any appeal from the order of the Central Govern- ment in either granting or refusing to grant sanc-

tion under section 86 of the Code. This sanc- tion or lack of sanction may, however, be questioned in the appropriate proceedings in court but inasmuch as there is no provision of appeal, it is necessary that there should be an objective evaluation and examination by the appropriate authority of relevant and material factors in

exercising its jurisdiction under section 86 by the Central Government. There is an implicit requirement of observance of the principles of natural justice and also the implicit requirement that decision must be expressed in such a manner that reasons can be spelled out from such decision. Though this is an administrative order in a case of this nature, there should be reasons. If the admin- istrative authorities are enjoined to decide the rights of the parties, it is essential that such administrative authority should accord fair and proper hearing to the person to be affected by the order and give suffi- ciently clear and explicit reasons. Such reasons must be on relevant material factors objectively considered- There is no claim of any privilege that disclosure of reasons would undermine the political or national interest of the country.

In the aforesaid view of the matter we order as follows:

1. Order dated 26th November, 1983 at Annexure 4 to this Petition' tion is set aside;

2. Union of India is directed to reconsider the matter;

3. The Central Government should also explore the possibilities with Algerian au- thority of mutual settlement either by arbi- tration or by other accepted legal norms;

4. The Union of India should pass rea- soned order in accordance with the principle of natural justice and keeping in view' the trend and the development of the international law as noted hereinbefore-

We further direct that the Central Gov- ernment in considering the question of accord of sanction should ignore the limitation of time that may have lapsed in view of the action taken in obtaining the consent in accordance with the principles of the Limita- tion Act, 1963. As the petitioner is appearing in person the Union of India should ensure in considering the case of the petitioner giving him proper legal assistance- The writ petition is disposed of in the aforesaid manner. In the facts and circumstances of the case, the petitioner is entitled to the costs of this application including the order for costs by the order dated 5th February, 1986 passed in this matter-