Supreme Court of India
Mirza Ali Akbar Kashani vs United Arab Republic And Anr on 5 August, 1965
Equivalent citations: 1966 AIR 230, 1966 SCR (1) 319
Author: P Gajendragadkar
Bench: Gajendragadkar, P.B. (Cj), Wanchoo, K.N., Hidayatullah, M., Shah, J.C., Sikri, S.M.

PETITIONER:
MIRZA ALI AKBAR KASHANI

Vs.

RESPONDENT:
UNITED ARAB REPUBLIC AND ANR.

DATE OF JUDGMENT:
05/08/1965

BENCH:
GAJENDRAGADKAR, P.B. (CJ)
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GAJENDRAGADKAR, P.B. (CJ)
WANCHOO, K.N.
HIDAYATULLAH, M.
SHAH, J.C.
SIKRI, S.M.

CITATION:
1966 AIR 230 1966 SCR (1) 319
CITATOR INFO :
R 1972 SC 202 (8)
D 1987 SC 9 (17)
F 1991 SC 814 (2)

ACT:
Code of Civil Procedure, 1908, s. 86(1)-Suit against foreign State Consent of Central Government whether necessary -'Ruler of a foreign State' whether distinguishable from foreign State for the purpose of the section.

HEADNOTE:
The appellant filed a suit for breach of contract against the respondents on the Original Side of the Calcutta High Court. The first respondent was the United Arab Republic while the second respondent was one of its departments. The suit was filed without obtaining the consent of the Central Government under s. 86(1) of the Code of Civil Procedure, but the High Court granted leave to the appellant under cl. 12 of the Letters Patent. The respondents entered appearance but claimed that leave under cl. 12 of the Letters Patent be cancelled and the plaint be rejected.

Their contention was that the suit was incompetent inasmuch as the suit was in substance against the Ruler of the United Arab Republic and consent of the Central Government under s. 86(1) was necessary before it was filed. They also urged that respondent no. 1 was a sovereign State and as such it enjoyed absolute immunity from being sued under the Rules of International Law adopted and applied by the municipal law of India. The trial court did not accept either of these contentions and passed a decree in favour of the appellant. The respondents appealed under the Letters Patent to the Division Bench of the High Court. The Division Bench agreed with the trial court that s. 86(1) wag not applicable to the appellant's suit because the said section referred to the Ruler of a foreign State and not to a foreign State as such. In This connection the High Court observed that only in the case of a monarchical State could the Ruler be taken to be identical with the State. However, on the alternative plea of the respondent based on immunity under International Law, the Division Bench differed from the trial court and decided in favour of the respondents. Consequently the appellant's plaint stood rejected. With certificate from 'the High Court the appellant came to this Court.

HELD : (i) As a matter of procedure it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler. This is apparent from the fact that s. 87 provides that even when a Ruler of a State sues or is sued, the suit must be in the name of the State. It is also remarkable that though the heading of ss. 84-87B does not in terms refer to foreign States at all, s. 84 in terms empowers a foreign State to bring a suit in a competent court; obviously the Legislature did not think that the case of a foreign State would not be included under 'he heading of this group of sections. [328 A-D]

(ii)Section 86 is a counterpart to s. 84. Whereas s. 84 confers a right on a foreign State to sue, s. 86(1) in substance imposes a liability on foreign States to be sued. The foreign State can sue, as laid down in the proviso to s. 84 to enforce a private right vested in the Ruler of such State

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or in any officer of such State in his public capacity. By 'private right' in this context is meant rights which can be enforced in the municipal courts of a foreign State as distinguished from a political or territorial rights which must be settled under International Law by agreement between States. As a counterpart, s. 86(1) proceeds to prescribe a limited liability against foreign States. The first limitation is that such a suit cannot be instituted except with the consent of the Central Government. The second limitation is that the Central Government shall not give consent unless it appears that the case falls under one or the other cls. (a) to (d) of s. 86(2). Having provided for

this limited liability to be sued the Legislature has taken care to save Ruler of a foreign State from arrest, except with the consent of the Central Government and has directed that no decree shall be executed against the property of any such Ruler; that is the effect of s. 86(3). What is exempted here is the separate property of the Ruler himself and not the property of the Ruler as head of the State. [332 B-H]

HajonManick v. Bur Sing, II Cal. 17, referred to.

(iii)When s. 86(i) refers to a Ruler of a foreign State, it refers to the Rulerin relation to the said State, and means the person who is for the time being recognised by the Central Government to be the head of that State. In view of the definition of 'Ruler' in s. 87 (1) (b) it is difficult to accept the argument that the expression 'the Ruler of a foreign State under s. 86(1) can take in cases only of Rulers of foreign States which are governed by a monarchical form of Government. In view of the definition, when s. 86(1) refers to Rulers of foreign State, it refers to Rulers of all foreign States whatever be their form of Government whether monarchical or republican. [330 H-331 A]

Besides, on principle, there is no reason why it should be assumed that the Code of Civil Procedure always made a distinction between Rulers of foreign States governed by monarchical form of Government and those which were governed by Republican form of Government. The Legislature which framed the relevant provisions of the Code was aware that there were several States in which the monarchical form of Government did not prevail. It could not have been the intention of the framers of the Code of Civil Procedure that monarchical States should be liable to be sued under s. 86(1) subject to the consent of the Central Government in the municipal courts of India, whereas foreign States not so governed should fall outside s. 86(1) and thus be able to claim immunity under International Law. When s. 87(1) (b) was introduced in 1951 it must have been intended that the definition of 'Ruler' therein should include all heads of foreign States whatever their form of Government. [331 E-F]

(iv)The effect of the provisions of s. 86(1) appears to be that it makes astatutory provision covering a field which would otherwise be coveredby the doctrine of immunity under International Law. Every sovereign State is competent to make its own laws in relation to the rights and liabilities of a foreign State to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal courts. That being so it would be legitimate to hold that the effect of s. 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal courts of India with the consent of the

Central Government and when such consent is granted as required by s. 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law because the municipal courts in India would be
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bound by the statutory provisions, such as those contained in the Code of Civil Procedure. [333 B-E]
Chandulal Khushalji v. Awad Bin Umar Sultan Nawaz Jung Bahadur, I.L.R. 21 Dom. 351 referred to.
(v)Section 86(1) thus applies to cases where suits are brought against Rulers of foreign States and foreign States fall within its scope whatever be their form of Government. The Section applied to the present suit, and the consent of the Central Government not having been obtained before it was filed, the suit was barred. [334 B-C]
[in view of the decision that s. 86(1) barred the suit, the Court did not find it necessary to deal with the question whether the respondents were justified in claiming absolute immunity under International Law.] [334 C]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 220 of 1964. Appeal from the judgment and order dated April 17, 1961 of the Calcutta High Court in Appeal from Original Order No. 11 5 of 1960.

R.Chowdhury, S. Mukherjee and S. N. Mukherjee, for the appellant.

B.Sen, V. A. Seyid Muhammad, P. K. Das and P. K. Bose for the respondents.

The Judgment of the Court was delivered by Gajendragadkar, C.J. This appeal arises out of a suit filed by the appellant, Mirza Ali Akbar Kashani, against the two respondents, the United Arab Republic, and the Ministry of Economy, Supplies, Importation Department of the Republic of Egypt at Cairo, on the Original Side of the Calcutta High Court. By his plaint, the appellant claimed to recover from the respondents damages assessed at Rs. 6,07,346 for breach of contract. According to the appellant, the contract in question was made between the parties on March 27, 1958. Respondent No. 2 which was a party to the contract had agreed to buy tea from the appellant upon certain terms and conditions; one of these was that respondent No. 2 would not place any further orders in India for purchase of tea with anyone else during the tenure of the contract and that it would, in every case, give the appellant the benefit of the first refusal for respondent No. 2's additional requirements. The appellant alleged that during the tenure of the contract, the respondents had wrongfully placed an order for the supply of tea with a third party without giving the appellant a chance to comply with the said requirement. That is how the respondents had committed a breach of a material term of the contract.

Formerly, the Republic of Egypt and the Republic of Syria were two independent sovereign States. They, however, merged and formed a new Sovereign State on February 22, 1958. This new sovereign State is known as the United Arab Republic and is referred as respondent No. 1 in the present appeal. This new State has been recognised by the Government of India. Respondent No. 2 has been working as a department of respondent No. 1 and is a part and parcel thereof. The present suit was instituted on August 10, 1959. It is common ground that the appellant did not obtain the consent of the Central Government to the institution of the suit under s. 86 of the Code of Civil Procedure. The appellant, however, applied for leave under Clause 12 of the Letters Patent in view of the fact that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court. This leave was granted to the appellant by the learned trial Judge.

On December 3, 1959, the respondents entered appearance in the suit; and on December 17, 1959, they applied for an order that the leave granted under Clause 12 of the Letters Patent should be revoked, the plaint should be rejected and further proceedings in the suit should be stayed. According to the respondents, the trial Court had no jurisdiction to entertain the suit inasmuch as the President of the United Arab Republic was its Ruler and the suit was, in reality, and in substance, a suit against him and as such, it was barred under S. 86 of the Code. It was further averred on their behalf that no part of the alleged cause of action had arisen within the jurisdiction of the Court; and so, leave could not be granted under Clause 12. At the hearing of this petition, the respondents were allowed to urge an additional ground in support of their plea that the leave should be revoked; they urged that respondent No. 1 was a foreign sovereign State and as such it enjoyed absolute immunity from being sued in the trial Court under the Rules of International Law as adopted and applied by the municipal law of India.

These pleas were controverted by the appellant, It was urged that S. 86 of the Code was not a bar to the present suit, as the said section created a bar only against a Ruler of a foreign State and the present suit clearly did not fall in that category. According to the appellant, the immunity from being sued without the sanction of the Central Government to which s. 86 of the Code referred could not be invoked by a foreign State such as respondent No. 1. The appellant also urged that in view of the fact that the transaction which has given rise to the present suit has nothing to do with the governmental functions of respondent No. 1, no immunity could be claimed by the respondents under the doctrine of International Law. The appellant further contended that by appearing in the present proceedings and by filing pleas thereafter, the respondents had submitted to the jurisdiction of the Court and had waived their objection to its jurisdiction.

The learned trial Judge held that s. 86 did not bar the present suit. He accepted the contention of the appellant that that bar could be invoked only against the Ruler of a foreign State and not against respondent No. 1 which was an independent sovereign State. On the question of the plea raised by the respondents under International Law, the trial Judge held that having regard to the nature of the transaction which has given rise to the present suit, the plea of immunity raised by the respondents cannot be sustained. He also found against the respondents on the question of waiver. In the result, the application made by the respondents for revoking leave was dismissed by the trial Judge.

The respondents then took the matter before the Court of' Appeal of the Calcutta High Court under the Letters Patent. Both the learned Judges who constituted the Court of Appeal have upheld the finding of the trial Judge that s. 86 of the Code does not create a bar against the present suit. They have, however, reversed the trial Judge's conclusions on the question of immunity claimed by the respondents under International Law as well as on the question of waiver. They have held that it was not shown that the application made by the respondents challenging the jurisdiction of the trial Judge to entertain the suit could be reasonably construed as submission to the jurisdiction of the Court by them; and they have come to the conclusion that the doctrine of International Law which recognises the absolute immunity of sovereign independent States from being sued in foreign courts created a bar against the present suit. In the result, the appeal preferred by the respondents has been allowed, the order passed by the trial Judge has been set aside, and the plaint filed by the appellant has been rejected under prayer (b) of the Master's Summons. The appellant has applied for and obtained a certificate from the Court of Appeal and it is with the said certificate that he has come to this Court in appeal.

Mr. R. Chaudhry for the appellant has contended that the view taken by the Court of Appeal about the scope and effect of the doctrine of immunity on which the respondents relied is erroneous in law. In support of his argument, he has urged that the trend of recent decisions and the tendency of the development of Inter-

national Law in recent times indicate that the doctrine of immunity in question can no longer be regarded as an absolute and unqualified doctrine. He suggests that in modem times, States enter into commercial transactions and it would be inappropriate to allow such commercial transactions the protection of the doctrine of immunity of sovereign States from being sued in foreign countries. In support of his argument, Mr. Chaudhry has very strongly relied on the observations made by H. Lauterpacht who has ,edited the eighth edition of Oppenheim's International Law. Says Editor Lauterpacht, "The grant of immunity from suit amounts in -effect to a denial of a legal remedy in respect of what may be .a valid legal claim; as such, immunity is open to objection. The latter circumstance provides some explanation of the challenge to -which it has been increasingly exposed-in addition to the circumstance that the vast expansion of activities of the modem State in the economic sphere has tended to render unworkable a rule which grants to the State operating as a trader a privileged position as compared with private traders. Most States, including the United States, have now abandoned or are in the process of abandoning the rule of absolute immunity of foreign States with regard to what is usually described as acts of a private law nature. The position in this respect in Great Britain must be regarded as fluid" (p. 273). Even Dicey in his Conflict of Laws while enunciating, Rule 17 in relation to such immunity in unqualified form, has made some comment to which Mr. Chaudhry has invited our attention. It is true that Rule 17 says, inter alia, that the Court has no jurisdiction to entertain an action or other proceeding against any foreign State, or the head of government or any ,department of the government of any foreign State. Commenting on this rule, the learned author observes that "the immunity is derived ultimately from the rules of Public International Law and from the maxim of that law, par in parem non habet imperium. The relevant rule of Public International Law has become part of English law. It is not impossible, however, that English law goes further than the international legal system demands in this regard". Then the learned author subjects the English decisions to a close analysis and

concludes that it may well be that the system of international law as a whole is moving towards a "functional" concept of jurisdictional immunities which would confine their scope to matters within the field of activity conceived as belonging essentially to a person of that system of whatsoever category(1).

(1)Dicey's Conflict of Laws, 7th Ed. pp. 132-33.

Mr. Chaudhry naturally lays emphasis on these observations of Dicey. He has conceded that the general consensus of opinion as disclosed in the English decisions bearing on the point is not in his favour, though the voice of dissent raised by Lord Denning in Rahimtolia v. Nizam of Hyderabad(1) distinctly supports Mr. Chaudhry's plea. That, in substance, is how Mr. Chaudhry has attempted to present his case on the interesting question about the immunity of sovereign States under International Law. Whilst we were hearing Mr. Chaudhry on this point, we enquired from him whether be supported the finding of the courts below that the present suit was not barred under s. 86 of the Code, and he contended that his case was that that finding was clearly right and the present appeal would have to be dealt with on the footing that s. 86 created no difficulty against the appellant. Mr. Chaudhry did not dispute the correctness of the finding recorded by the Court of Appeal on the question of waiver.

Mr. B. Sen who appeared for the respondents, however, urged that he wanted to challenge the correctness of the finding recorded by the Calcutta High Court as to the applicability of s. 86 of the Code. He conceded that the trial Judge as well as the two learned Judges who heard the Letters Patent Appeal had agreed in holding that s. 86 was not a bar against the present suit; but Mr. Sen's argument was that the said finding was plainly inconsistent with the true scope and effect of s. 86. He also urged that the view taken by the Court of Appeal as to the applicability of the doctrine of immunity under International Law was right. During the course of the hearing of this appeal, it thus became clear that two questions fall to be considered by us; the first is in relation to the application of s. 86 of the Code; and the second in regard to the scope and effect of the doctrine of immunity under International Law. Logically, the effect of s. 86 has to be considered first, because it is common ground that if we were to hold that s. 86 was a bar to the present suit, then the interesting point about immunity under International Law may not have to be considered. The appeal would, in that view, be liable to be dismissed on the ground that the suit was barred by s. 86. After hearing both Mir. Chaudhry and Mr. Sen, we have come to the conclusion that the learned Judges of the Calcutta High Court were, with respect, in error in holding that s. 86 does not create a bar against the present suit. That being our view, we do not propose to consider whether the Court of Appeal was right in (1) [1959] A.C. 379.

upholding the respondents' plea of absolute immunity under International Law. Let us, therefore, deal with the problem raised under s. 86 of the Code.

The relevant provisions are to be found in sections 83-87B of the Code. The heading of these provisions is "Suits by aliens and by or against foreign Rulers, Ambassadors and Envoys". The present sections have been introduced by s. 12 of the Code of Civil Procedure (Amendment) Act, 1951 (No. 11 of 1951). Prior to the amendment, the relevant sections were 83-87. As a result of the

amendment, cases of the Rulers of former Indian States are now dealt with by s. 87B, and the remaining provisions deal with foreign States and Rulers of foreign States. It is a matter of history that the Rulers of Indian States who could claim the benefit of the provisions contained in sections 84 and 86 under the Code of 1908 have ceased to be Rulers and are now entitled to be described as Rulers of former Indian States. That is why a specific and separate provision has been made in regard to Rulers of former Indian States by s. 87B. That, broadly stated, is the main distinction between the schemes of earlier sections 83-87 and the present sections 83-87B. The learned Judges of the Calcutta High Court who have repelled the respondents' contention that the present suit is barred under s. 86 of the Code, appear to have taken the view that s. 86(1)refers to Ruler of a foreign State and not to a foreign State assuch. We will presently cite the relevant sections and construe them; but, for the present, we are indicating the main ground on which the decision of the learned Judges is founded. Section 86(1) says that no Ruler may be sued except with the consent of the Central Government; and the learned Judges thought that a Ruler must be distinguished as from a State and s. 86(1) cannot be extended to a case of the State. The reference to a Ruler made by s. 86(1) was contrasted with the reference to a foreign State made by s. 84; and this contrast was pressed into service in support of the conclusion that s. 86 cannot be invoked against a foreign State. Similarly, s. 86(3) grants exemption to a Ruler from arrest except with the consent of the Central Government. A similar argument is based on this provision to take the case of a foreign State outside the purview of s. 86. Likewise, s. 85 refers to a Ruler while authorising the Central Government to appoint any person to act on behalf of such Ruler, and it is said that this provision also brings out the fact that the Ruler of a foreign State is treated as apart from the State itself.

It appears from the judgments of the learned Judges that they were prepared to concede that in regard to a State which is governed by a monarchical form of Government, it would not be permissible to make a distinction between the State as such and its Ruler; and so, it was thought that in regard to a monarchical State, s. 86 may conceivably apply, though the words used in s. 86(1) do not, in terms, refer to a State. On this view, the court of Appeal naturally considered the question about the immunity of the respondents under the provisions of International Law. The point which arises for our decision thus lies within a narrow compass; was the Calcutta High Court right in holding that the ?resent suit does not fall under the purview of s. 86(1)? It is clear that if the answer to this question is in the negative, the suit would be bad because it has been filed without the consent of the Central Government. The decision of this question depends primarily on the construction of s. 86(1) itself; but before construing the said section, it is necessary to examine s. 84. The present s. 84 reads thus:-

> "A foreign State may sue in any competent court : Provided that the object of the suit is to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity".

The predecessor of this section in the Code of 1882 was s. 431 it read thus :-

> "A foreign State may sue in the Courts of British India, provided that-
>
> (a) it has been recognised by Her Majesty or the Governor-General in Council, and

(b) the object of the suit is to enforce the private rights of the head or of the subjects of the foreign State.

The Court shall take judicial notice of the fact that foreign State has not been recognised by Her Majesty or by the Governor- General in Council."

1908, s. 84(1) took the place of s. 431. In enacting this section, an amendment was made in the structure of the section and two provisos were added to it. We will presently refer to the purpose which was intended to be served by the second proviso.

It is plain that s. 84 empowers a foreign State to sue. In other words, it confers a right on the foreign State to bring a suit, whereas s. 86 imposes a liability or obligation on the Ruler of a foreign State to be sued with consent of the Central Government, It is remarkable that though the heading of these sections does not in terms refer to foreign States at all, s. 84 in terms empowers a foreign State to bring a suit in a competent Court. It is true that too much emphasis cannot be placed on the significance of the heading of the sections; but, on the other hand, its relevance cannot be disputed; and so, it seems to us that the Legislature did not think that the case of a foreign State would not be included under the heading of this group of sections. In this connection, it is necessary to bear in mind that ever when the Ruler of a State sues or is sued, the suit has to be in the name of the State; that is the effect of the provision of S. 87, so that it may be legitimate to infer that the effect of reading sections 84, 86 and 87 together is that a suit would be in the name of the State, whether it is a suit filed by a foreign State under s. 84, or is a suit against the Ruler of a foreign State under s. 86 As a matter of procedure, it would not be permissible to draw a sharp distinction between the Ruler of a foreign State and a foreign State of which he is the Ruler. For the purpose of procedure, in every case the suit has to be in the name of a State. That is another factor which cannot be ignored. Then in regard to the scope of the suit which may be filed by a foreign State under s. 84, the proviso makes it clear that the suit which can be filed by a foreign State must be to enforce a private right vested in the Ruler of such State or in any office. -of such State in his public capacity. It will be recalled that s. 431(b) of the Code of 1882 had provided that the object of the suit which could be filed under s. 431 should be to enforce the private rights of the head or of the subjects of the foreign State. It appears that this clause gave rise to some doubt as to whether a suit could be brought by a foreign State in respect of the private rights of the subjects of that State; and in order to remove the said doubt, the Code of 1908 inserted the second proviso to s. 84(1) which took the place of s. 431 of the Code of 1882. This proviso made it clear that the object of litigation by a foreign State cannot be to enforce the right vesting in subject as such as a private subject; it must be the enforcement of a private right vested in the head of a State or in any office of such State in his public capacity. In other words, the suit which can be filed under s. 84 and which could have been filch under s. 431 of the Code of 1882, must relate to a private right. vested in the head of the State or of the subjects meaning some public officers of the said State. The private right properly so called of an individual as distinguished from the private right of the State, was never intended to be the subject-matter of a suit. by a foreign State under the Code of Civil Procedure at any stage.

That takes us to the question as to what is the true meaning of the words "private rights". In interpreting the words "private rights", it is necessary to bear in mind the fact that the suit is by a

foreign State; and the private rights of the State must, in the context, be distinguished from political rights. The contrast is not between private rights or individual rights as opposed to those of the body politic : the contrast is between private rights of the State as distinguished from its political or territorial rights. It is plain that all rights claimed by a foreign State which are political and teritorial in character can be settled under International Law by agreement between one State and another. They cannot be the; subject-matter of a suit in the municipal courts of a foreign State. Thus, the private right to which the proviso refers is, on them ultimate analysis, the right vesting in the State; it may vest in the Ruler of a State or in any officer of such State in his public capacity; but it is a right which really and in substance vests in, the State. It is in respect of such a right that a foreign State is authorised to bring a suit under s. 84.

In Hajon Manick v. Bur Sing(1) a Division Bench of the Calcutta High Court had occasion to consider the denotation of the words "private rights" spoken of in s. 431, clause

(b) of the Code of Civil Procedure, 1882, and it was held that the said words do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of Justice, as distinguished from its political or territorial rights, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity.

That takes us to s. 86. Section 86(1) with which we are directly concerned reads thus :-

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

(1)11 Cal. 17.

There is a proviso to this section with which we are not concerned in the present appeal. Section 86(2) deals with the question of consent which the Central Government is authorised to give, and it lays down how the consent can be given and also provides for cases in which such consent shall not be given. Section 86(3) refers to the question of arrest and provides that no Ruler of a foreign State shall be arrested except with the consent of the Central Government and no decree shall be executed against the property of any such Ruler. Section 86(4) extends the preceding provisions of s. 86 to the three categories of Officers specified in clauses (a), (b) and (c). Section 86(1) as it stood prior to the amendment of 195 1, read thus :-

> "Any such Prince or Chief, and any Ambassador or Envoy of a foreign State, may, with the consent of the Central Government, certified by the signature of a Secretary to that Government but not without such consent, be sued in any competent Court."

So far as the other provisions are concerned, there does not appear to be any material change made by the Amending Act. The form of the section and its structure have however been altered.

Then follows s. 87 to which we have already referred. This section provides that the Ruler of a foreign State may sue, and shall be sued, in the name of his State. This provision of the present section is substantially the same as in s. 87 which occurred in the Code of 1908. The said section provided that a Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State. This provision naturally conforms to s. 86(1) as it then stood. Section 87A(1) which has been added for the first time by the Amending Act of 1951, prescribes the definitions of "foreign State" and "Ruler". Section 87A(1)(a) provides that in this Part "foreign State" means any State outside India which has been recognised by the Central Government; and (b) "Ruler", in relation to a foreign State, means the person who is for the time being recognised by the Central Government to be the head of that State.

Reverting then to S. 86, there can be no difficulty in holding that when s. 86(1) refers to a Ruler of a foreign State, it refers to the Ruler in relation to the said State, and means the person who is for the time being recognised by the Central Government to be 3 31 the head of that State. In view of the definition prescribed by s. 8 7A (1) (b), it seems difficult to accept the argument that the expression "the Ruler of a foreign State" under s. 86(1) can take in cases only of Rulers of foreign States which are governed by a monarchical form of Government. In view of the definition of a foreign Ruler, it is plain that when s. 86(1) refers to Rulers of foreign States, it refers to Rulers of all foreign States whatever be their form of Government. If the form of Government pre- vailing in a foreign State is Republican, then the Ruler of the said State would be the person who is recognised for the time being by the Central Government to be the head of that State. In other words, the definition of a Ruler clearly and unambiguously shows that whoever is recognised as the head of a foreign State would fall within the description of Ruler of a foreign State under s. 86. That being so, we do not think in reading s. 86(1), it would be permissible, to import any terms of limitation; and unless some terms of limitation are imported in construing s. 86(1), the argument that the head of a Republican State is not a Ruler of that State cannot be upheld.

Besides, on principle, it is not easy to understand why it should be assumed that the Code of Civil Procedure always made a distinction between Rulers of foreign States governed by monarchical form of Government and those which were governed by Republican form of Government. Both forms of Government have been in existence for many years past, and the Legislature which framed the relevant provisions of the Code was aware that there are several States in which monarchical form of Government does not prevail. Could it have been the intention of the framers of the Code of Civil Procedure that monarchical States should be liable to be sued under s. 86(1), subject to the consent of the Central Government, in the municipal courts of India, whereas foreign States not so governed should fall outside s. 86(1) and thus be able to claim the immunity under International Law ? In our opinion, no valid ground has been suggested why this question should be answered in the affirmative. There is one more circumstance to which we may refer in this connection. We have already noticed that while amending the provisions, the Amending Act of 1951 has dealt with the question of Rulers of former Indian States separately under s. 87B, and having made some formal and some substantial changes in the rest of the provisions, the Legislature has introduced s' 87A

which is a definition section. At the time when s. 87A(1)(b) defined "Ruler", it must have been plain to the Legislature that this definition would take in all heads of foreign States whatever the form of government prevailing in them may be; and so, it would not be unreasonable to hold that the object of the definition was to make it clear that Rulers of foreign States to which s. 86(1) applied would cover Rulers of all foreign States, provided they satisfied the requirements of the definition of s. 87A(1)(b). Incidentally, the construction which we are inclined to place on s. 86(1) is harmonious with the scheme of the Code on this point. Section 84 authorises a foreign State to sue in respect of the rights to which its proviso refers. Having conferred the said right on foreign States, s. 86(1) proceeds to prescribe a limited liability against foreign States. The limitation on the liability of foreign States to be sued is twofold. 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 clauses (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. Having provided for this limited liability to be sued, the Legislature has taken care to save the Ruler of a foreign State from arrest, except with the consent of the Central Government similarly certified and has directed that no decree shall be executed against the property of any such Ruler; that is the effect of s. 86(3).

It is true that this provision exempts the property of any such Ruler from execution of any decree that may be passed against a Ruler, and apparently, the High Court thought that this tends to show that the Ruler of a foreign State within the contemplation of s. 86(1) must be the Ruler himself and not the State. In our opinion, this view is not well- founded. The provision that a decree passed against the Ruler of a foreign State shall not be executed against the property of such Ruler, rather tends to show that what is exempted is the separate property of the Ruler himself and no*, the property of the Ruler as head of the State. A distinction is made between the property belonging to the State of which the Ruler is recognised to be the head, and the property belonging to the Ruler individually. We are, therefore, satisfied that s. 86(1) applies to cases where suits are brought against Rulers of foreign States and that foreign States fall within its scope whatever be their form of Government. We have already indicated that whenever a suit is intended to be brought by or against the Ruler of a foreign State, it has to be in the name of the State, and that is how the present suit has, in fact, been filed.

The effect of the provisions of s. 86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under International Law. it is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal courts. That being so, it would be legitimate to hold that the effect of s. 86(1) is to modify to a certain extent the doctrine of immunity recognised by International Law. This section provides that foreign States can be sued within the municipal of India with the consent of the Central Government and when such

consent is granted as required by s. 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. In substance, s. 86(1) is not merely procedural; it is in a sense a counter- part of s. 84. Whereas s. 84 confers a right on a foreign State to sue, s. 86(1) in substance imposes a liability on foreign States to be sued, though this liability is circumscribed and safeguarded by the limitations prescribed by it. That is the effect of s. 8 6 (1 ).

In Chandulal Khushalji v. Awed Ritz Umar Sultan Nawaz Jung Bahadur(1), Strachey, J., had occasion to consider this aspect of the matter in relation to the provisions of s. 433 of the Code of 1882. What s. 433 does, said the learned Judge, "is to create a personal privilege for sovereign princes and ruling chiefs and their ambassadors and envoy,,. It is a modified form of the absolute privilege enjoyed by independent sovereigns and their ambassadors in the Courts in England, in accordance with the principles of international law. The difference is that while in England the privilege is unconditional, dependent only on the will of the sovereign or his representative, in India it is dependent upon the consent of the Governor General in Council, which can (1) I.L.R.21 Bom. 351 at pp. 371-2-

sup.CI/65---7 be given only under specified conditions. This modified or conditional privilege is, however, based upon essentially the same principle as the absolute privilege, the dignity and independence of the ruler, which would be endangered by allowing any person to sue him at pleasure, and the political inconveniences and complications which would be result'. We are inclined to think that this view correctly represents the result of the provisions of S. 433 as much as of those contained in s. 86(1).

In view of. our conclusion that s. 86(1) applies to the present ,suit, it follows that in the absence of the consent of the Central Government as prescribed by it, the suit cannot be entertained. ,On that view of the matter, it is not necessary to deal with the other question as to whether the respondents were justified in claiming absolute immunity under International Law. It is common ground that if there is a specific statutory provision such as is contained in s. 86(1) which allows a suit to be filed against a foreign State subject to certain conditions, it is the said statutory provision that will govern the decision of the question as to whether the suit has been properly filed or not. In dealing with such a question, it is unnecessary to travel beyond the provisions of the statute, because the statute determines the competence of the suit. The result is, the appeal fails and is dismissed. In view of the fact that we are affirming the decision of the Court of Appeal on ,a ground which did not succeed before that Court, we direct that parties should bear their own costs throughout.

Appeal dismissed.