

\* **HIGH COURT OF DELHI : NEW DELHI**

+ **RFA (OS) No. 20/2002**

% Reserved on : 31<sup>st</sup> July, 2008  
Decided on : 8<sup>th</sup> August, 2008

MANSOOR MUMTAZ & ORS. ...Appellants  
Through : Mr. S.D. Ansari, Adv.

Versus

SAUDI ARABIAN AIRLINES CORPORATION  
DCM BUILDING, BARAKHAMBHA ROAD,  
NEW DELHI-1100 01 ....Respondents  
Through : Mr. Mudit Sharma, Adv.  
with Mr. Moazzam Khan,  
Adv.

Coram:

**HON'BLE MR. JUSTICE A.K. SIKRI**  
**HON'BLE MR. JUSTICE MANMOHAN SINGH**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

**MANMOHAN SINGH, J.**

1. This Appeal has been filed against the impugned order dated 23<sup>rd</sup> July 2001 passed by the learned Single Judge of this Court in I.A. No. 2467 and 2468 of 2000 in Suit No. 2480/98 whereby the application of the Defendant under Order 7 Rule 11 read with Section 151 CPC was allowed and the plaint as such was rejected mainly on the ground that the

suit is barred by strict provisions and rigours of sub-section (1) of Section 86 of the Code of Civil Procedure and the suit is not maintainable under Order 7 Rule 11 (d) of Code of Civil Procedure.

2. In the nutshell, brief facts for deciding the appeal are that on 12<sup>th</sup> November, 1996, there was a mid air collision of Saudi Arabian Airlines Boeing 747 ( flight SV 763) with Kazakistan Airlines near Charkhi Dadri, Haryana. One Ms. Farah Mumtaz was a passenger on board of Saudi Arabian Airlines. She died as a result of the said collision. The plaintiffs are the legal heirs of deceased Farah Mumtaz and claim compensation and damages from the Defendant Saudi Arabian Airlines Corporation. This suit is filed claiming a decree for 2,60,000 Francs equivalent to 17,030 gms of gold of millesimal fineness nine hundred converted into Indian rupees according to the price of gold in Indian rupees on the date of the judgment (less an amount of Rs. 7,40,896/- already paid by the Defendant to the plaintiff). The said amount claimed is tentatively valued at Rs. 5,10,000/-.
3. The Defendant filed the written statement dated 26<sup>th</sup> July 1999. However, it is a matter of fact that the Defendant did not take the plea of non-compliance of Section 86 of the Code of Civil Procedure. After filing of the replication by the plaintiff the Defendant filed a separate application dated 14<sup>th</sup> March 2000 under Order 7 Rule 11 CPC wherein the Defendant specifically raised the plea that “the Defendant is a Corporation which is wholly owned by the Kingdom of Saudi Arabia and is, therefore, a foreign State within the meaning of Section 86 of Code of Civil Procedure, 1908 and enjoys immunities and privileges and no suit

is maintainable under Section 86 CPC as against a foreign State unless the consent of the Central Government is obtained.” In support of the application the Defendant has also placed copy of the bye-laws.

4. The argument of the learned counsel for the Plaintiff are mainly on two grounds, namely, that the Defendant has not taken the defence in the written statement, therefore, the Defendant cannot raise this plea in the application filed by the Defendant as the Defendant has waived its right to plead the same. Secondly, by virtue of Section 7 of the Carriage by Air Act, 1972 the provisions of Section 86 of CPC are impliedly superseded. As regards the first argument of the learned counsel for the Plaintiff is concerned, we may state that no doubt the Defendant had not taken the defence of Section 86 CPC in the written statement, however, the averment has been made in the application under Order 7 Rule 11 CPC and the permission required under Section 86 CPC was mandatory before filing of the suit as per law and, therefore, the question of abandonment and waiver under the said circumstances does not arise. Even otherwise, it is well settled law that while deciding the application under Order 7 Rule 11 CPC the court has to see the allegations made in the plaint and documents attached therewith.
5. We have gone through the impugned order, pleadings and documents in the matter. The short point involved in the present case is as to whether the suit is barred by the provisions of sub-section(1) of Section 86 of the Code of Civil Procedure or not and/or the plaint is liable to be rejected under Order 7 Rule 11 (d) of the Code of Civil Procedure.
6. Section 86 of the Code of Civil Procedure provides:-

**“86. Suits against foreign Rulers, Ambassadors and Envoys. – (1) No 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. Provided that a person may, as a tenant of immovable property, sue without such consent as aforesaid [a foreign State] from whom he holds or claims to hold the property.**

7. In order to invoke the provisions of Section 86 CPC it would be advantageous to look at the laws of Saudi Arabia Airlines. The bylaws was a decision of the Council of Ministers. The Council of Ministers had decided and decreed the bylaws and relevant bylaws for the purposes of the present order would be the 1<sup>st</sup> and 2<sup>nd</sup> and are reproduced herein below;-

First: Approval of the by-laws of the Saudi Arabian Airlines Corporation in the text attached hereto.

Second: The Deputy Prime Minister and the Minister of Defence and Aviation shall implement this Decree of ours.

Article 1 further reads as under:-

Article 1: Name, Head Office and Legal Capacity of the Corporation.

The Saudi Arabian Airlines Corporation is a public and independent organization having legal capacity and attached to the Ministry of Defence and Aviation. Its Head Office shall be in Jeddah and the Counsel of Ministers may determine the transfer of its Head Office to another town within the Kingdom.

Article 4 describes about the management of the said corporation and is being reproduced again for the sake of facility.

#### Management of the Corporation.

The Corporation shall be managed by a Board presided over by H.R.H. Minister of Defence and Aviation, or his nominee, and composed of nine members appointed by a resolution of the Council of Ministers on nomination by the Minister of Defence and aviation from among those persons who have suitable qualifications, and shall include:

- (1) The Assistant Minister of Defence and Aviation for Civil Aviation Affairs, the Director General of the Corporation and the President of Civil Aviation.
- (2) Representatives of related Government units.
- (3) Nominees of the Minister of Defence and Aviation other than those mentioned above.

The council of Ministers resolution shall determine the tenure of office of the members appointed by it, and the remuneration granted to them in consideration of such membership.

The By-laws show that the Deputy Prime Minister and the Minister of Defence and Aviation have to implement the decree of the Council of Ministers. The Saudi Arabian Airlines Corporation is a public and independent organization. It is attached to the Ministry of Defence and Aviation. It is managed by a board which is presided by the Minister of Defence and Aviation and comprises of 9 members appointed by the resolution of Council of Ministers on nomination by Minister of Defence and Aviation.

8. It clearly shows that the control over the Defendant Airlines Corporation is with the State. Merely because it is carrying on an independent work will not take it away from the purview of sub-section 1 to Section 86. It will still be a foreign State because of the nature of the bylaws and the control which is almost complete with the State and its functionaries. Consequently before the suit could be filed the consent of the Central Government certified in writing by the Secretary to the Government was necessary.
9. The Hon'ble Supreme Court in the decision rendered in the case of *V. D. S Rostock (D.S.P. Lines, Deptt. of G.D.R. vs. N.C. Jute Mills Co. Ltd. AIR 1994 SC 516* referred to the said principle in paragraph 5 in the following words:

“One of the principles of International Law is that every sovereign State respects the independence of every other foreign State. This absolute independence and the international comity underlines, the relationship between sovereign States. The object of Section 86 of the Code is to give effect to the principles of International Law. But, in India it is only a qualified privilege because a suit can be brought with the consent of the Central Government in certain circumstances. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued so can it provide rights and liabilities of foreign States to and be sued in its Courts. It can be said that effect of Section 86 then is to modify the extent of doctrine of immunity recognized by the International Law. If a suit is filed in Indian Courts with the consent of the Central Government as required by Section 86, it shall not be open to any foreign State to rely on the doctrine of immunity.”

The Court also took into consideration various other judgments and considered their implication, some of which are as

follows :-

- (i) **Mirza Ali Akbar Kashani v. The United Arab Republic & Anr** AIR 1996 SC 230
- (ii) **M/s. B.L. Gupta Constrn. Co. v. Sri Lanka High Commission in India & Anr.**, (Arb. P. No.295/2004 decided on 29.9.2005).
- (iii) **Uttam Singh Duggal & Co. P. Ltd. v. United States of America, Agency of International Development**, ILR (1982) II Del 273.

10. It was of the view that two conditions precedent for entertaining of a suit under Section 86 of the Code are: (a) the competence of the Court to try such suits; and (b) certificate issued by the Central Government. The certificate of the Central Government was necessary only if the body/person sued satisfies the conditions of being a 'foreign state'. The Court noted that the expression 'foreign state' is explained in Section 87-A of the Code. It also took into consideration provisions of Article 367(3) of the Constitution of India, which is not necessary to be discussed herein.

11. This Hon'ble court in the case of **Deepak Wadhwa vs. Aeroflot, 1983 DLT Page No.1** referred to the same principle in almost identical terms and in Para 5 recognised the said principle and gave its findings in Para 13 of the said decision which is reproduced as under:-

“A statute ought to be construed in a manner that, if it can be prevented, no clause, sentence or word shall be superfluous or insignificant. This can only be if the relevant provisions of the Code are only looked into for consideration of the claims of sovereign immunity. The transformed principles of International Law after the enactment of the Code, have no application in India, unless the legislature

amends the statutory provisions.”

12. In yet another recent case decided by this Hon’ble Court and reported in *Vol. 149 (2008) DLT 505 (DB) Royal Nepal Airlines Corporation vs. Arun Jain* it was held as under:-

“Section 86 of the Code is a part of the Municipal Law of India. Therefore, the question is not to be answered by relying upon the doctrine of immunity under the International Law. If immunity is granted under Section 86 of the Code, consent of the Central Government will be required. Immunity under Section 86 of the Code is not absolute. A plaintiff is required to seek permission and obtain consent from the Central Government. Reference may also be made to the decision of the Bombay High Court in the case of *Kenya Airways vs. Jinibhai*, reported in AIR 1998 Bom 287(DB). The High Court approved of the views expressed in the cases of *Baccus S.R.L. v. Servicio Nacional Del Trigo*, reported in (1956) 2 All ER 715 and *Krajina v. The Tass Agency*, reported in (1949) 2 All ER 274, 280. In both cases observation of the Court was that, before arriving at a conclusion and decision, one must look at the relevant legislation and related facts to decide whether the foreign State has intended to give up its immunity generally or only for limited and defined purposes. However, it may be noted that doctrine of Immunity has undergone a change in England since 1975.”

13. In view of the well settled law, it is clear that Section 86 of the Code is applicable to the facts of the present case as the said provision is directly applicable to the facts of the present case. It appears from the pleadings and documents that Constitution of the Kingdom of Saudi Arabia indicates that it is a sovereign Islamic State. Article 5 reveals that system of Government is that of monarchy. Under Article 14 of the said Constitution all the wealth under the ground or on the surface or in the

international territorial waters in the land or maritime domain is the property of the State. The Bye-laws filed by the Defendant clearly gives the indication that the Saudi Arabian Airlines Corporation although is a public and independent organization but it is attached to the Ministry of Defence and Aviation which is managed by the Board and is presided by the Minister of Defence and Aviation and the said Airlines Corporation is duly controlled by the Government.

14. Reverting to the second argument of the learned counsel for the Plaintiff the counsel has placed reliance on Section 7 of the Carriage by Air Act, 1972. The same reads as under:-

“Provisions regarding suits against High Contracting Parties who undertake carriage by air  
(1) Every High Contracting Party to the Convention or the amended Convention, as the case may be, who has not availed himself of the provisions of the Additional Protocol thereto shall, for the purposes of any suit brought in a Court in India in accordance with the provisions, of Rule 28 of the First Schedule, or of the Second Schedule, as the case may be, to enforce claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that Court and to be a person for the purposes of the Code of Civil Procedure, 1908 (5 of 1908).

(2) The High Court may make rules of procedure providing for all matters which may be expedient to enable such suits to be instituted and carried on.

(3) Nothing in this section shall authorize any Court to attach or sell any property of a High Contracting Party to the Convention or to the amended Convention.”

15. Learned counsel for the Plaintiff has urged that every High Contracting Party to the Convention would be deemed to have been submitted to the jurisdiction of that court subject to the other conditions which are not relevant for the purpose in this matter. It was further argued that Section

7 has been incorporated with the purpose of holding that High Contracting Parties shall be person for purposes of Civil Procedure Code and they would be taken as a person so that the civil suit in this regard do not fail. This question has been considered by this Hon'ble court in the case of Deepak Wadhwa (supra). Para 14 of the said decision reads as under:-

“The objection that the special form of procedure prescribed by the Carriage by Air Act, 1972 would prevail over the one prescribed by Section 86 of the Code is not seriously pressed by the counsel for the decree holder. There is no provision in the matter of sovereign immunity contained in the Act. The Code deals with procedural matters that is the matters relating to the machinery for the enforcement of substantive rights. Those substantive rights may be contractual or flowing from the statutory provisions, including the Act. The Act allows suits to be filed in a civil Court relating to the matters under it, but the procedure to be followed in such suits will be governed by the provisions of the Code. The Act does not confer jurisdiction on the Civil Court or provide a special procedure in dealing with the claims arising out of or under the statutory provisions. The suit had to be determined according to the law of procedure laid down in the Code. No foreign State could 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.”

16. From the above said discussion it is clear that the said contentions of the learned counsel for the plaintiff have also no force. Learned counsel for the Plaintiff has also made another submission that the appeal is also liable to be allowed as after passing of the impugned order the permission has been granted by the Central Government on 26th November 2001 in order to comply with the provisions of Section

86 of the Code of Civil Procedure. In reply to the argument, the learned counsel for the Defendant has made the submission that the present suit was filed on 10<sup>th</sup> November, 1998. The application under Order 7 Rule 11 CPC was dated 14<sup>th</sup> March 2000, the impugned order was passed on 23<sup>rd</sup> July 2001 and the permission was sought by the plaintiff after passing of the impugned order and even the present appeal was filed, after grant of permission to the plaintiff on 26<sup>th</sup> November 2001, in second week of July 2002. On the date of institution of the suit i.e. 10<sup>th</sup> November 1998 the suit was not maintainable, therefore, the present appeal is also liable to be dismissed. We agree with the submission of the learned counsel for the Defendant as it is clear from the record that on the date of filing of the suit there was no compliance of Section 86 of CPC and the permission was sought after passing of the impugned order which was ultimately granted on 26<sup>th</sup> November 2001.

17. Learned counsel for the plaintiff has informed that after obtaining permission under Section 86, no fresh suit was filed by the plaintiff against the Defendant and he argued that the present appeal may be allowed due to the fact that since the permission has now been granted, this court should consider the said change of circumstances. We are afraid we cannot accept the submission of the learned counsel for the Plaintiff as we feel that the suit itself was not maintainable on the date of its institution.
18. The real object of Order 7 Rule 11 of the Code is to keep out of courts irresponsible law suits. Rule 11 of Order 7 lays down an independent remedy made available to the Defendant to challenge the maintainability

of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the Defendant.

19. In view of the above said circumstances we find no infirmity in the observations made by the learned single Judge and the appeal is hereby dismissed. There will be no order as to costs.

**MANMOHAN SINGH, J**

**August 8, 2008**  
sa/sd

**A.K. SIKRI, J**