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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE CIVIL JURISDICTION

CIVIL REVISION APPLICATION NO. 262 OF 2010

1. Ms. Eva Drdakova, Consul General of the Czech Republic having her office at Marcopia, 5, Dr. G. Deshmukh Marg, Mumbai - 400 026.

2. The Consulate General of the Czech Republic having its Consulate offices at Marcopia, 5, Dr. G. Deshmukh Marg, Mumbai – 400 026. ...Petitioners. (Ori. Def/Res. Nos. 1 and 3)

V/s.

1. M/s. Khemka Exports Private Ltd. A Company incorporated under the provisions of the Companies Act, 1956 having its Registered office at 1011 – 15, Raheja Complex 231 Free Press Journal Marg, Nariman Point, Mumbai – 400 021. ...Respondent. (Ori. Pltf/- Appellant.)

Mr. S.K. Sen with Mr. D. Vyas i/by Mr. R.A.K. Nijam Es Sani for the Applicants.

Mr. V.A. Thorat, Senior Counsel with Mr. Niranjan Lalshiya & Mr. R. Kadam and Ms. Leena J. Shah i/by M/s. Niranjan & Co. for Respondent.

Mr. D.J. Khambatta, ASG with Mr. Rajguru and Vikramaditya Deshmukh for Union of India, Intervenor.

CORAM: **GIRISH GODBOLE, J**
RESERVED ON : OCTOBER 13, 2011
PRONOUNCED ON : NOVEMBER 30, **2011**

JUDGMENT :

1. Rule. Rule made returnable forthwith and heard by consent of the learned Counsel for the Applicants and Respondent and the Intervenor.

2. The learned Advocate for the Respondent and Intervenor waives service of Rule.

3. The original Defendants in R.A.D. Suit No. 1913 of 2007 have filed this Revision Application under section 115 of the Code of Civil Procedure, 1908. The Respondent has filed the said Suit in the Court of Small Causes Court for a declaration of alleged tenancy, alleged to have been protected under the provisions of Maharashtra Rent Control Act, 1999 and for consequential relief of mandatory and permanent injunction. The Trial Court by its Judgment and Order dated 18.12.2007, rejected the Plaint by exercising powers under Order VII Rule 11 of the Code of Civil Procedure, 1908 by relying on the provisions of Section 86 of the

Code. Appeal No. 24 of 2008 filed by the Respondent/ Plaintiff has been allowed by the impugned Judgment and Order dated 6.5.2009. The Petitioner had initially filed W.P. No. 6129/2009 in which written submissions were filed by the Respondent. By order dated 1.4.2010, the Writ Petition No. 6129 of 2009 has been allowed to be converted in a Civil Revision Application.

4 Thereafter on 25th October, 2010, learned single Judge has passed the following order in CRA No. 262 of 2010:

> *1 By this revision application under Section 115 of the Code of Civil Procedure, 1908 the revision applicants who ar e defendants in a suit filed by the 1st respondent have challenged the order dated 18th December, 2007 passed by the learned Judge of the Court of Small Causes. By the impugned order, the application made by the revision applicants for rejection of the plaint under Rule 11 (d) of Order VII of the Code of Civil Procedure, 1908 has been rejected. The second and the third respondents to this Revision are the Union of India and the State of Maharasthra. The said respondents are not parties to the suit. The only challenge in this revision application is to the impugned order by which the application for rejection of the plaint has been rejected. As the 2nd and 3rd respondents are not parties to the suit, the said respondents cannot be impleaded as parties. The revision applicants are directed to delete their names. The amendment to be carried out within two weeks from today. Civil Revision Application shall be placed on board for admission on 26th November, 2010.*
>
> *2 Ad interim relief granted earlier will continue to operate till the next date.*

3. Subsequently, the Union of India has filed C.A. No. 577 of 2010 which has been allowed by the learned single Judge (D.G. Karnik, J) on 24th January, 2011 and the Union of India has been allowed to intervene without being added as party to the Revision Application essentially for assisting the Court only in relation to the interpretation of Vienna Convention and Extent of Diplomatic Immunity Enjoyed by the Diplomatic Agents of the Foreign States.

4. It is not in dispute that on 19th June, 2009, the Union of India through its Ministry of Foreign Affairs has issued a Certificate under section 9 of the Diplomatic Relations (Vienna Convention Act), 1972 which reads thus :

"MINISTRY OF EXTERNAL AFFIARSS
NEW DELHI.

CERTIFICATE

No.D111/455/112/2006 *19th June, 2009*

1 The entire building known as 'Marcopia' situated at 5, G. Deshmukh Marg is recognised as the Consulate of the Czech Republic for the purposes of the Vienna Convention on Consular Relations and the Diplomatic Relations (Vienna Convention) Act, 1972.
2 This is to further certify that the Consul General, Mrs. Eva Drdakova, holds the said premises on behalf of the Diplomatic Mission of the Czech Republic.
3 This is to further certify that the Consul General, Mrs.Eva Drdakova is immune from the civil, criminal and

administrative jurisdiction of the Union of India under Art. 31 of the Schedule to the Diplomatic Relations (Vienna Convention) Act, 1972 by herself and/or in respect of any portion of the building `Marcopia' described above.

4 This is further to clarify that the proviso to S.86 (1) of the Code of Civil Procedure 1906 relates to immovable property held otherwise than for the purposes of the Diplomatic Mission of the Czech Republic as is made clear by the Diplomatic Relations (Vienna Convention) Act, 1972.

This certificate is issued under Section 9 of the Diplomatic Relations (Vienna Convention) Act, 1972.

(H.R. Singh)
Deputy Chief of Protocol (F)."

5. It is clear that this certificate has been issued after passing of the impugned Judgment. Section 9 of the said Act reads thus :

> *"9. Evidence.-- If in any proceedings any question arises whether or not any person is entitled to any privilege or immunity under this Act, a certificate issued by or under the authority of the Secretary to the Government of India in the Ministry of External Affairs stating any fact relating to that question shall be conclusive evidence of that fact."*

6. Article 1, Article 22, Article 30 and Article 31 of the Vienna Convention and Diplomatic Relations, 1961 which have the force of law being part of the Schedule of the Diplomatic Relations (Vienna Convention) Act, 1972 (Act No. 43 of 1972) read thus :

"*Article 1*

For the purpose of the present Convention, the following expressions shall have the meanings hereunder assigned to them :

(a) the "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(b) the "members of the mission" are the head of the mission and the members of the staff of the mission;

(c) the "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the "members of the diplomatic staff" are the members of the staff of the mission having diplomatic rank;

(e) a "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

(f) the "members of the administrative and technical staff" are the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) the "members of the service staff" are the members of the staff of the mission in the domestic service of the mission;

(h) a "private servant" is a person who is in the domestic service of a member of the mission and who is not an employee of the sending State;

(i) the "premises of the mission" are the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including the residence of the head of the mission.

Article 22

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any

disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 30

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of :

(a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1 of this Article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State. ”

7. Written submissions have been filed by Mr. Khambatta, learned Additional Solicitor General which are restricted to the interpretation of the aforesaid provisions and the same are taken on record. Mr. Thorat, learned Senior Counsel for the Respondent has also filed written submissions and the same are also taken on record. Mr. Sen has also filed written submissions which are taken on record.

8. Relevant portions of section 86(1) and 87-A of the Code of Civil Procedure, 1908 read thus :

> *“86. Suits against foreign Rulers, Ambassadors and Envoys- (1) No.****[59] foreign State may be sued in any Court otherwise competent to try the suit except with 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 [60][a foreign State] from whom he holds or claims to hold the property.”*
>
> *“87A. Definitions of "foreign State" and "Ruler" - (1) In this Part,?*
>
> *(a) "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 recognized by the Central Government to be the head of that State.*
>
> *(2) Every Court shall take judicial notice of the fact ?*
>
> *(a) that a state has or has not been recognized by the Central*

Government;

(b) that a person has or has not been recognized by the Central Government to be the head of a State".

9. By my Order dated 4th October, 2011 I had framed following 3 points in which submissions were required to be advanced :

(a) whether the words "shall be conclusive evidence of that fact" used in section 9 of the 1972 Act raise a rebuttable presumption or foreclose any evidence to the contrary;

(b) whether the activity of letting out the ground floor of the premises on a sub-tenancy basis for running a showroom where the Diplomatic Agent was a tenant would be covered within the ambit of clause (c) of Article 31 of the Schedule to 1972 Act, though the petitioner do not admit the factum of creation of such sub-tenancy which is a disputed question of fact which would be decided in case the suit is required to be tried;

(c) whether the Bar, if any, contained in section 86 of the Code of Civil Procedure, 1908 can be a ground for exercising power to reject Plaint under Order 7 Rule 11 of the Code.

10. Mr. S.K. Sen advanced the following submissions.

(a) The Defendant Nos. 1 and 2 are impleaded in their official

capacity whereas the Defendant No. 3 is a Consulate. In plaint paragraph-16, the Plaintiffs have claimed tenancy right as against the Defendant No.3 Consulate and paragraphs 15 and 16 of the plaint claim wrongful ouster/dispossession.

(b) Relying on Article 1(e) of the Vienna Convention it was submitted that the term of "diplomatic agent" includes head of mission or a member of diplomatic staff. Article 31 (1)(c) is an exception. Therefore Suit can be filed only against a diplomatic agent i.e. head of a mission or any one who carries out business or profession outside their official capacity. Since this was not the case in hand, the Suit against the Defendant Nos. 1 and 2 was not maintainable.

(c) In so far as the Defendant No. 3 is concerned, the Suit was not tenable since there is no legal entity like Defendant No. 3 which is shown as the Consulate General of the Czech Republic.

(d) There was no pleading in the plaint against the Defendant Nos. 1 and 2 as to their commercial activities and hence the entire Suit was liable to be dismissed.

(e) On the second point it was submitted that the cause of action which was pleaded arose from the ouster/dispossession of the Plaintiffs and hence this activity of alleged unlawful dispossession is not a commercial activity so as to fall under the exception carved out

by the Article 31. Since the Defendant Nos. 1 and 2 are not the persons who have alleged to have created sub-tenancy or who are alleged to have accepted the rent, the said diplomatic agents namely, Defendant Nos. 1 and 2 could have never done the alleged commercial activity in the year 1972 as they were not in India. In so far as Defendant No. 3 is concerned, it is not a juridical person and it has no capacity other than the official capacity.

(f) Relying on Article 31(1)(a) of Vienna Convention it was submitted that the Suit was not a real action relating to private immovable property since the entire building was given on rent to the Consulate General which is certified as Foreign Mission.

(g) Regarding the point relating to Certificate issued under Section 9, Mr. Sen submitted that even prior to Section 9 being placed on the Statute Book, the Supreme Court Court had an occasion to consider the similar issue in the case of ***M/s. Hardeodas Jagannath v/s. State of Assam AIR 1970 SC 724***[1]. Mr. Sen relied upon the following passage of the said Judgment.

> *"6. When the appeals were originally heard we considered that the material on the record was not sufficient to enable us to determine the disputed question, namely whether the Dominion of India was entitled to exercise extra provincial .jurisdiction over the Shillong Administered Areas on April 15, 1948 which was the material date. The question at issue is not purely a question of fact but a question relating to a "fact of State" which is*

1 AIR 1970 SC 724

peculiarly within the cognizance of the Central Government (For expression "Fact of State" see Halsbury--Laws of England, 3rd edn. Vol. 7, p. 285). In view of the insufficiency of material we thought it proper to avail ourselves of the procedure indicated by s. 6 of the Act of 1947 which enacts:"

(h) He also relied upon the commentary from Halsbury's Laws of England and particularly on paragraph 1420 which reads thus :

"1420. Facts of state. There is a class of facts, which may be termed "facts of state", which consists in matters the determination of which is solely in the hands of the executive. Examples of "facts of state" are :

(1) whether a state of war exists between Her Majesty and another state, and if so, when it began;
(2) whether a state of war exists between other states;
(3) whether a particular territory is hostile, or foreign, or within the boundaries of a particular state;
(4) whether the Crown claims that a place is within its dominions;
(5) whether British jurisdiction exists in any particular foreign place;
(6) whether and when a particular government is recognised as the government of an independent sovereign state;
(7) the status of property which is the subject of claims by a foreign state to immunity;
(8) the status of a person claiming immunity from the jurisdiction on the ground of his diplomatic status; and
(9) the status of British and allied armed forces.

The court will take notice of such facts of state, for this purpose, in any case of uncertainty, will seek information from the executive, and the information received is conclusive, except in cases where what is involved is the construction of some term in a commercial document, or an Act of Parliament."

Relying on this paragraph, he submitted that if there is any doubt

about interpretation of section 9 of the 1972 Act or of Article 31 of the Vienna Convention, Court must ask for advise of the executives i.e. Union of India and must accept the interpretation of Union of India as it is.

(i) Mr. Sen further relied upon the Judgment of a Constitution Bench of the Supreme Court of India in the case of ***Smt. Somawanti and Ors. v/s. The State of Punjab and Ors. AIR 1963 SC 151***[2] and he laid down great emphasis on paragraph-19 of the said Judgment which reads thus :

> *The object of adducing evidence is to prove a fact. The Indian Evidence Act deals with the question as to what kind of evidence is permissible to be adduced for that purpose and states in s. 3 when a fact is said to be proved. That section reads thus :*
>
> *"'Evidence' means and includes-*
>
> *(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence ;*
>
> *(2) all documents produced for the inspection of the court ; such documents are called documentary evidence.*
>
> *A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."*
>
> *Since evidence means and includes all statement which the court permits or requires to be made when the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact it implies that that*

2 AIR 1963 SC 151

> *fact can be proved either by evidence or by some other evidence which the Court permits or requires to be advanced. Where such other evidence is adduced it would be open to the Court to consider whether, upon that evidence, the fact exist or not. Where on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. If that were not so, it would be meaningless to call a particular piece of evidence as conclusive evidence. Once the law says that certain evidence is conclusive it shuts out any other evidence which would detract from the conclusiveness of that evidence. In substance, therefore, there is no difference between conclusive evidence and conclusive proof. Statutes may use the expression 'conclusive proof' where the object is to make a fact non-justiciable. But the legislature may use some other expression such as 'conclusive evidence' for achieving the same result. There is thus no difference between the effect of the expression conclusive evidence' from that of 'conclusive proof', the aim of both being to give finality to the establishment of the existence of a fact from the proof of another."*

Mr. Sen therefore submitted that the Certificate issued by the Union of India is non-justiciable and no Court can question the validity of the said certificate and no further enquiry is permissible at all. He submitted that in view of the aforesaid Judgment of the Constitution Bench even the Supreme Court of India will not have any jurisdiction to look into the correctness or otherwise of the said Certificate or go into the question whether the certificate is validly issued or not and in short the entire certificate is completely beyond the purview of any judicial enquiry from any Court.

(j) It was further submitted that section 86 of the Code deals with a foreign State whereas 1972 Act deals only with diplomatic agents and, hence, the immunity given to diplomatic agent is greater than the immunity given to a foreign State. It was submitted that section 86 provides for suits against foreign Ruler, Ambassador and Envoys and the proviso to the said section carves out an exception. According to Mr. Sen on the other hand section 2 of the 1972 Act begins with a non-obstantee clause and hence, immunity granted by section 3 of the said Act is a complete immunity which is non-justiciable.

(k) Referring to Section 87 of the Code it was submitted that while Section 86 empowers the Central Government to grant permission to file the suit against a Foreign Ruler, the Legislature has consciously not provided any such permission in 1972 Act. Hence, by necessary implication section 86 has been ousted by operation of 1972 Act as it does not apply to the diplomatic agent but applies only to a Foreign State. Relying on provisions of Section 87-A of the Code, it is submitted that Court must take judicial notice of the said section and since Union of India has recognised Czech Republic as a Foreign State, the Court must take judicial notice of that fact; more so when the Central Government has issued a

certificate.

(l) Mr. Sen sought to distinguish the Judgment of the Delhi High Court in ***Rani Pushpa Kumari Devi vs. The Embassy of Syrian Arab Republic 104 (2003) DLT 682***[3] by contending that in that case a permission under section 86 had been given and therefore the case was distinguishable since in that case plea of diplomatic immunity under 1972 Act was never raised. It was submitted that the Division Bench of the Delhi High Court in fact held in paragraph-15 that Certificate under section 86 was referable to section 9 of the 1972 Act.

(m) While summerising his submission Mr. Sen submitted that the oral application for rejection of the plaint was essentially done under Order 7 Rule 11 but on account of the 1972 Act there is a jurisdictional bar which has to be decided at the threshold and for deciding this, apart from the averments in the plaint, something more than the averments in the plaint can also be looked into and considered since no commercial activity of Defendant Nos. 1 and 2 is even pleaded and since Defendant No.3 does not exists and does not have any independent entity and since as on today even the Consulate in Mumbai does not exist; the Suit must be dismissed. It

3 104 (2003) DLT 682

was urged that the wrongful dispossession/ouster is an integral part of the cause of action which is not pleaded to be a commercial activity and hence applying the test laid down by Halsbury as to what constitute "Fact of State"; this matter must be considered to be a matter between 2 sovereigns namely Czech Republic and Union of India and this relationship is not at all justiciable, since the legislative intent to make it non-justiciable is clear from the section 9 of the 1972 Act.

(n) Mr. Sen ultimately relied upon the Judgment of the Supreme Court in the case of ***Ms. Kanta Udharam Jagasia v/s. C.K.S. Rao AIR 1998 SC 569***[4] and by relying on paragraph-18 Mr. Sen submitted that section 9 of 1972 Act in fact stands on a higher footing than section 13 (a) (1) of the Bombay Rent Act, 1947 and it is impermissible to go beyond the certificate issued by the Central Government under section 9.

11. Mr. Khambata, learned Additional Solicitor General appearing for the Union of India as an Intervenor advanced following submissions :

(a) Though the certificate under Section 9 of the 1972 Act has

4 AIR 1998 SC 569

been issued on 16/9/2009 and has been produced in the present proceedings, this is curious case where the Respondent has chosen not even to challenge the certificate which is concluded decision by the Union of India.

(b) Very limited judicial review is available once such a certificate is issued. Validity or the conclusivity of the certificate cannot be gone into by the Court and no argument is available to the Respondent as the Respondent has not challenged the certificate for more than 2 years.

(c) There are 3 aspects or areas in which questions of immunity or right to file Suit arises.

1. Section 86 of the Code applies only where the property is enjoyed by a foreign State. There is fundamental difference between a Foreign State and Diplomatic Agent. Paragraph-9 of the plaint contains pleadings only about diplomatic agents and there are no pleadings in respect of a Foreign State.
2. The second aspect/area is about inviolability of a diplomatic mission. Consulate and Embassy of Foreign State are in fact parts of a Foreign State and are deemed to be forming part of the geographical area of a Foreign State. When a property is held by a Foreign State, then it becomes a part of diplomatic mission.

3. The third aspect/area is regarding Article 22 and 31 of the Schedule of 1972 Act. A Foreign State actually acquires property either by itself or a diplomatic agent of a foreign State acquires the property. Article 31 has to be read in the context of the Statement of the Objects and Reasons of the 1972 Act. No exception has been carved out for Article 22 whereas an exception has been carved out for Article 31. Article 22 deals with the immovable property of a diplomatic mission whereas Article 31 deals with individuals who may be occupying respective posts in a diplomatic mission which is clear from Articles (d) and (e) of the Schedule. Article 30 gives an absolute immunity and except the limited exception under clause 3 of the Article 31 the property of a diplomatic agent enjoys inviolability. Thus the premises enjoy absolute immunity under Article 22 r/w Article 30 and Article 31 which deals with individuals has no application to the facts of the present case.

12. Mr. Thorat, learned Senior Advocate appearing for the Respondent advanced following submissions.

(a) Relying on the Judgment of the Supreme Court in ***Dhulabhai***

vs. State of Madhya Pradesh and Anr. AIR 1969 SC 78[5] and ***Rajasthan State Transport Corporation & Anr. vs. Bal Mukund Bairwa (2009) 4 SC 299***[6], it was submitted that under section 9 every civil action can be instituted in Civil Court and the ouster of the jurisdiction of the Civil Court has to be either an express ouster or an implied bar. The 1972 Act which is sought to be relied upon as an express bar to the jurisdiction of the Civil Court nowhere contains any such express bar.

(b) Relying on Judgment of the Supreme Court in ***Krishna Ram Mahale v/s. Mrs. Shobha Venkat Rao AIR 1989 SC 2097***[7] it was submitted that in India dispossession of any person without following the process prescribed by law is a serious action and no immunity of whatsoever nature can be pleaded as a defence against an action of unlawful dispossession.

(c) Relying on the judgment of the Supreme Court in the case of ***Kamala and others v/s. K.T. Eshwarya Sa & ors. 2008(12) SCC 661***[8] it was submitted that Order 7 Rule 11(d) of the Code has limited application and for its applicability it must be shown that the Suit is barred under any law and such a conclusion can be drawn only from the averments made in the plaint. For the purpose of

5 AIR 1969 SC 78
6 (2009) 4 SC 299
7 AIR 1989 SC 2097
8 2008(12) SCC 661

applicability of Order 7 Rule 11(d) only the averments made in the plaint are relevant and there cannot be any addition or subtraction, no other material or evidence can be looked into and the issues on merit of the matter which may arise between the parties would not be within the realm of the Court at that stage. A question involving mixed question of law and fact which may require not only the examination of the plaint but also other evidence cannot be determined at the stage of proceedings under Order 7 Rule 11(d) of the Code. The Trial Court has precisely committed this mistake which has been corrected by the Appellate Court and hence, no interference is warranted.

(d) The concept of international immunity is meant only for certain purposes and there is no blanket immunity. Section 86 of the Code contains exceptions in relation to the suits against foreign rulers, ambassadors and envoys and in the present case the Plaintiff has invoked the exception carved out by the proviso to sub-section 1 of section 86. Sub-section 2 of section 86 provides for another class of exceptions. In paragraph-9 of the plaint there are clear averments about the commercial activity being carried out by the Defendants and in such a case, Order 7 Rule 11(d) had no application and for attracting the said provisions there has to be an absolute bar to the maintainability of the Suit. The question involved is mixed question

of law and fact and hence cannot be gone into even under section 9A or under Order 14 Rule 2 of the Code.

(e) Section 9 of the 1972 Act is in the realm of evidence. Section 5 of the said Act provides for waiver and a diplomatic immunity is capable of being waived. Entire Act does not provide for either an express or implied bar of jurisdiction of Civil Court. Only an immunity is given vis a vis certain proceedings in Court and this immunity cannot be equated with an express bar of the jurisdiction. Even this immunity is not permanent and can always be withdrawn if reciprocal immunity is not given and in such a case Central Government is empowered to decline to grant immunity and also empowered under section 4 of the 1972 Act to withdraw privileges or immunity.

(f) Immunity can never be equated with a bar of jurisdiction and the 1972 Act does not create a bar.

(g) In the plaint there is specific relief claimed about the immovable property by pleading that the case is one governed by the exceptions carved out under Article 31. The certificate issued under section 9 is only an evidence and does not create a bar in any manner.

(h) Relying on the Judgment of the learned Single Judge dealing with a situation prior to enactment of 1972 Act in ***M/s Earth***

Builders Bombay v/s. State of Maharashtra & ors. AIR 1997 Bombay page 148 (Coram : A.P. Shah, J)[9] it was submitted that immunity contemplated by Article 31 is an absolute immunity. The same view is also taken by learned Single Judge of the Delhi High Court in the case of Rani Pushpa Kumari Devi(supra) and the Division Bench Judgment of the Delhi High Court in the case of Syrian Arab Republic vs. A.K. Jajodia, which has upheld the Judgment of the learned Single Judge. It was submitted that the immunity is only for certain specific purposes.

(i) Relying upon the judgment of the Division Bench of the Calcutta High Court in ***Union of India and Anr. v/s. Bilas Chand Jain The Socialist Republic of Romania (2001) 3 CALL 352 (HC)***[10], it was submitted that there was no need to challenge the certificate under section 9 as the same was never produced either before the Trial Court or the Appellate Court and in fact did not exist as the same has been issued after the delivery of the impugned Judgment. Hence, the said certificate cannot be looked into for the first time in this C.R.A. Hence, C.R.A. should not be entertained.

13. During the course of hearing it has been brought to my notice that Application has been filed in the Suit below Exh. 6 of 2007 to which reply has been filed and the same is not yet decided.

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9 AIR 1997 Bombay page 148
10 (2001) 3 CALL 352 (HC)

14. I have carefully considered the respective submissions. In the present case without any formal Application having been filed by the Defendants the learned Judge of the Trial Court summarily rejected the plaint. Neither a preliminary issue was framed nor any issue as to any bar under Order VII Rule 11 of the Code was framed. Perusal of the Judgment and Order of the Trial Court clearly shows that the Order is completely unsatisfactory and does not show judicious application of mind. Apart from the fact that the Order is very cryptic, the same does not contain even satisfactory reasons.

15. In so far as the power of rejection of plaint under Order VII Rule 11 is concerned, it is settled law that the Court can look only into the averments made in the plaint and cannot have recourse to any extraneous material. This proposition of law is well settled by catena of Judgments and Mr. Thorat is justified in relying upon the Judgment of the Supreme Court of India in **Kamala(supra)** and particularly paragraphs 21 and 22 of the said Judgment. Similar principles have been laid down in the following Judgments of the Supreme Court :-

(i) ***(2005) 7 SCC 510 Popat and Kotecha Property v/s.***

State Bank of India Staff Association[11]**.**

(ii) ***(2004) 3 SCC 137 Sopan Sukhdeo Sable & ors. v/s. Assistant Charity Commissioner and ors.***[12]

(iii) ***(2005) 10 SCC 760 Church of North India v/s. Lavajibhai Ratanjibhai & ors.***[13]

16. The Appellate Court was therefore justified in entertaining the Appeal and setting aside the cryptic order passed by the learned Judge of the Trial Court. Section 86 of the Code does not contain any bar of jurisdiction. In the present case the Plaintiff is claiming to be a protected sub-tenant. Proviso to Sub-Section (1) of Section 86 clearly excludes claims relating to tenancy rights and thus the present case is squarely covered by the said proviso. In fact, understanding this difficulty, Mr. Sen did not try to support the Judgment of the Trial Court or assail the Judgment of the Appellate Court on that ground and his submissions essentially centered around the certificate issued by the Central Government under Section 9 of the 1972 Act which is admittedly issued after filing of the present Petition. In such situation, the moot question arises as to whether this Court should consider the legal effect of such certificate produced for the first time in this court and set aside the order of the

11 (2005) 7 SCC 510
12 (2004) 3 SCC 137
13 (2005) 10 SCC 760

Appellate Bench and dismiss the Suit as suggested by Mr. Sen or whether this Court should ignore the said certificate at this stage and leave it open to the parties to agitate their respective contentions before the Trial Court.

17. Accepting the submissions of Mr. Sen that the certificate can be looked into for the first time in this Court is fraught with risk. If the further submission of Mr. Sen to the effect that the certificate is conclusive, final and binding in all respects and hence, the Suit cannot proceed further and must be dismissed is to be accepted or rejected at this stage, that would deprive either the Plaintiff or the Defendant of an important right of an Appeal. On the other hand, in case the Defendant is granted liberty to produce the certificate in the Suit before the Trial Court and advance all available factual and legal submissions in that regard, the Trial Court would be in a position to appreciate the rival contentions and decide the question on the basis of applicable provisions of law. I am therefore of the view that it would be imprudent and unsafe to rely on such certificate at this stage of the proceedings unless the parties are given a liberty to lead their respective evidence about validity or otherwise of such certificate. In my opinion, the subsequent event of issuing of certificate under Section 9 of the 1972 Act should not

and cannot influence the decision of this Petition and present Petition must be decided only on the basis of the material which was available before the Trial Court and Appellate Court.

18. However, before relegating the Petitioners to adopt such proceedings as may be available to them in law, it is necessary to consider whether even prima facie the submission of Mr. Sen has any merit or otherwise. Section 9 of the 1972 Act is a rule of evidence and a certificate issued by the Government of India is stated to be conclusive evidence of any fact relating to the question whether or not any person is entitled to any privilege or immunity under that Act. Prima facie such certificate therefore merely raises a rebuttable presumption and does not raise an absolute presumption as contended by Mr. Sen. I am inclined to take this view for more than one reason. Firstly, issuance of such a certificate is not a quasi judicial function and, hence, the decision of the Government of India to issue such certificate is purely an administrative decision. Whether a particular activity of a diplomatic agent falls within the excepted category or not is a matter which has to be decided on a case to case basis depending upon the facts of each case and the oral and documentary evidence on record.

19. According to the Plaintiff and the averments in the plaint, the activity of the Defendant was a commercial activity. I am of the view that no general rule or proposition of law can be laid down as to what would be commercial activity as contemplated by Article 31 and even this aspect will certainly depend on the facts of each case. In a given case, for the purpose of benefit of the persons employed in an Embassy or Consulate (Foreign Mission), some portion of the premises may be permitted to be used by outsider and such outsider may be paying certain rent/licence fee/compensation to the Foreign Mission. In such situation, the activity of permitting such outsider to use the premises would qualify to be an incidental activity in aid of and for the benefit of the principal activity of the Foreign Mission. In such a situation, the agent of the Foreign Mission will certainly enjoy the immunity. However, there may be another case where an outsider may have been inducted for monetary consideration by permitting such outsider to use the premises of the Foreign Mission for conducting an activity completely unconnected with the Sovereign functions of a Foreign Nation. In such a situation, no immunity would be available and such a case will be governed by Sub-Article C of Article 31(1) of the Schedule to the 1972 Act. It is therefore unsafe to lay down any straight jacket formula for arriving at a conclusion that any activity of a Foreign Mission invariably

enjoys immunity. Reliance placed by Mr. Thorat on the Judgment of the learned Single Judge of this Court (A.P. Shah, J), as also the Judgment of the learned Single Judge and Division Bench of the Delhi High Court is apt and since it is risky to adopt any straight jacket formula, in my opinion, this is a fit case where the certificate will have to be ignored at this stage by reserving liberty to the Petitioners to produce such certificate in the Trial Court and leaving it open to the Trial Court to consider legal effect of such a certificate on the maintainability or otherwise of the Suit after permitting the parties to lead appropriate evidence.

20. Mr. Khambata submits that since Union of India has been allowed to intervene in the present proceedings, I should direct the Trial Court to permit the Union of India to intervene. Mr. Thorat opposes such request. In my opinion, whether a party should be permitted to intervene or not is a prerogative of the Trial Court. No such application had ever been made before the Trial Court, and, hence, it will be open for the Union of India to make such application before the Trial Court which shall also be considered on its own merits and in accordance with law.

21. Subject to the aforesaid clarifications the Civil Revision

Application is dismissed. Rule is discharged with no order as to costs.

GIRISH GODBOLE, J