

INDIA FAILS TO GET SUMMARY JUDGMENT AGAINST PAKISTAN IN HYDERABAD FUNDS CASE

High Commissioner for Pakistan in the United Kingdom v National Westminster Bank (and various interveners) [2016] EWHC 1465 (Ch)

Introduction

By a decision handed down on 21 June 2016 in *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank (and various interveners)* [2016] EWHC 1465 (Ch), the Chancery Division of the English High Court (Henderson J) held that a claim by Pakistan to beneficial entitlement to money that was paid into an English bank account in 1948 by the former independent state of Hyderabad (known as “the Hyderabad Funds”) had a real prospect of success. Further, Pakistan’s arguments that the underlying transaction was non-justiciable or an ‘act of state’ in respect of which the English courts were precluded from exercising jurisdiction also had a real prospect of success. In respect of Pakistan’s limitation defences against other competing claims to the Hyderabad Funds from India (which had invaded and annexed Hyderabad) and from the descendants of Hyderabad’s ruler these also had a good prospect of success, except as against claims based on resulting and constructive trust. Finally, Henderson J held that India’s restitution claim against the bank could not be dismissed as ‘unarguable’.

Background

The underlying account had been opened at the defendant English bank in 1948 in the name of Habib Ibrahim Rahimtoola, the first High Commissioner for Pakistan in the United Kingdom. The funds had been transferred into that account by officials of the Government of Hyderabad, which was, at the time, an independent state (the ruler of Hyderabad, the VIIth Nizam, had elected to remain independent following the enactment of the Indian Independence Act 1947). Shortly after the transfer had been effected, India completed its invasion and annexation of Hyderabad and installed a military governor there. Thereafter, instructions were received from the Government of Hyderabad that the transfer had been unauthorised. The defendant bank, however, replied that the transfer was already complete and it could not take any steps to reverse the transfer without the agreement of all concerned parties or a court order.

In 1954, proceedings were brought against Mr Rahimtoola seeking the return of the ‘Hyderabad Funds’. Pakistan exercised her right to sovereign immunity and those proceedings were stayed by the House of Lords in *Rahimtoola v Nizam of Hyderabad* [1958] AC 379.

When proceedings were restarted in 2013, competing claims were put forward by Pakistan, India (claiming entitlement, inter alia, as the successor to Hyderabad), and by two grandsons of the VIIth Nizam (“the Princes”) (claiming entitlement under a discretionary trust and as the legitimate heirs to the VIIth Nizam).

Applications / Issues

The parties brought competing applications for the summary disposal of the others' cases, or, alternatively, of specific parts of those cases. India (supported by the Princes) applied to summarily dismiss Pakistan's case on the grounds that it had "no real prospect of success". Pakistan applied to dismiss India's and the Princes' claims on the grounds that they were time-barred. Pakistan also applied for the dismissal of any direct claim by India against the defendant bank in restitution on the grounds that it was unarguable.

Henderson J thus identified the following as the issues to be decided on the parties' applications:

- (1) whether Pakistan's claim to beneficial entitlement to the Hyderabad Funds had any real prospect of success;
- (2) whether Pakistan's primary contention that the separate but related doctrines of non-justiciability and 'act of state' applied had any real prospect of success (India submitted that these arguments should fail because Pakistan had already been found to have waived her sovereign immunity, and, further, that the 'act of state' doctrine was inapplicable because Hyderabad no longer existed);
- (3) whether Pakistan's invocation of limitation defences constituted an abuse of the court's process because the only reason claims could not be pursued within the limitation period was because of Pakistan's reliance on sovereign immunity in the 1954 proceedings;
- (4) whether, if Pakistan's limitation defences could otherwise be put forward, those defences actually had any substantive merit; and
- (5) whether India's restitutionary claim against the defendant bank had any real prospect of success.

Decision

In general terms, Henderson J held that the case needed to go to a full trial and was inappropriate for dismissal on a summary basis only.

Beneficial Entitlement

As regards India's application (supported by the Princes) against Pakistan on beneficial entitlement, the court was presented with evidence that had been adduced before the House of Lords in the 1954 proceedings and, further, significant evidence that had been collated from UK archival sources. Henderson J held that it was a realistic possibility that the appropriate inference to draw from these materials was that at the relevant time of the transfer from Hyderabad to Pakistan both had intended Pakistan to take the funds beneficially, and specifically not to hold it in the capacity of a trustee or agent for the VIIth Nizam or his government.

Pakistan, in this regard, argued that a sovereign state could not be made a trustee without its clear and unequivocal consent, and, furthermore, that it could not realistically have been intended for a trust relationship to ensue in circumstances where Hyderabad was under imminent threat of being forcibly annexed by India. Henderson J recognised that there was

force in the contrary arguments as well but held that Pakistan's arguments had a real prospect of success.

Summary judgment on the question of beneficial ownership was not appropriate in circumstances where it was likely that the answer to that question would turn on the inferences to be drawn from a unique set of events that took place almost 70 years previous, where further documentary evidence might be forthcoming on disclosure, and where the evidence of certain witnesses would require cross-examination.

Non-Justiciability and 'Act of State'

Henderson J recognised that these two separate but related doctrines were currently being developed by the English courts at the highest level, and that this alone would normally amount to a powerful reason militating against summary disposal of a case or a point of law. Nevertheless, even on the existing case law, Henderson J was satisfied that one could not rule out the potential applicability of these doctrines to the underlying transactions surrounding the opening of the account at the defendant bank merely because these transactions did not all take place within the actual territorial boundaries of the sovereign states of Pakistan and/or Hyderabad. The evidence put forward by Pakistan showed that it was possible to conclude that the relevant transactions were conducted at intergovernmental level.

India's argument that the doctrines of 'act of state' and non-justiciability were capable of being waived (and had been waived by Pakistan) was wrong because, unlike state immunity (which could be waived as a procedural defence), these doctrines went to the court's substantive adjudicative competence. On that basis, Pakistan's reliance on non-justiciability could not amount to an abuse of process.

Further, India's contention that the underlying transaction could not be characterised as an 'act of state' because Hyderabad had ceased to exist was wrong both in fact and in law.

Limitation

As a matter of English law, limitation defences were permissive in nature, i.e. they did not have to be invoked (indeed, a party could contract out of them or be estopped from invoking them). Henderson J was therefore satisfied that as a matter of general principle and in certain circumstances, reliance on a limitation defence could amount to an abuse of process.

Henderson J held that Pakistan was able to rely on a limitation defence against India and the Princes in respect of their claims based on restitution. However, Henderson J held that there was no statutory limitation period applicable to the claims based on resulting/constructive trust and therefore Pakistan's limitation defence to those claims should be struck out. Notwithstanding that decision, Henderson J recognised that there were valid case management reasons why all of the limitation defences should go to full trial.

India's restitutionary claim against the defendant bank

Henderson J was satisfied, on the basis of a line of authority recognised in *Jones v Churcher* [2009] EWHC 722 (QB), that India's restitutionary claim against the defendant bank could not properly be characterised and dismissed as an unarguable claim suitable for

summary disposal.

Concluding Remarks

The Hyderabad Funds case contains numerous points that are of significant legal and historical interest. As a result of Henderson J's judgment, the case will proceed to a full trial unless amicably settled by the parties.

Khawar Qureshi QC, Head of McNair Chambers, acted as lead counsel for the Government of Pakistan.

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