
(1982) 02 CAL CK 0039

In the Calcutta High Court

Case No : Appeal No. Nil of 1982 in Suit No. 29 of 1982

Bidhu Bhusan Ghose and Others

APPELLANT

Vs

Bimal Saha and Others

RESPONDENT

Date of Decision : 24-02-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 11, Order 26 Rule 12, Order 39 Rule 7, Order 43 Rule 1

Citation : AIR 1983 Cal 220

Hon'ble Judges : Ramendra Mohan Datta, J;C.K. Banerji, J

Bench : Division Bench

Advocate : Somnath Chatterjee, P.K. Das and J.N. Roy, for the Appellant; P.C. Sen and S.B. Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Ramendra Mohan Datta, J.—This interlocutory application originally came up before us for the stay of the operation of the order of the Court below dated January 27, 1982 in so far as the order directed the appointment of an auditor and gave various directions to him to act in accordance with the order.

2. In course of hearing of this application all the parties appearing before us agreed that the entire appeal may conveniently be heard and decided by Court along with the application. We decided accordingly and ordered that the appeal be treated as on the day's list and directed the appeal to appear in the list from the next day of hearing along with the application until the hearing would be over and also directed that the filing of the paper book would be dispensed with. All papers of the Court below including the order appealed from and the order admitting the appeal were directed to be treated as papers and documents in the appeal. The notice of appeal was waived by the parties. The undertaking given by the appellants at the time of the admission of the appeal was to continue until the certified copies of the orders were filed. It was recorded that the parties consent that such certified copies would be filed immediately the same were

obtained and non-filing thereof at this stage would not stand in the way of the Court's disposing of the appeal herein.

3. The matter arises out of an order passed in an application for the appointment of the receiver of the books of accounts, papers, documents, minute books, counter-foils of the receipt books for the year 1980-81, vouchers and all papers of the East Bengal Club lying at its tent or wherever those might lie with the respondents forthwith. There was another prayer in the said application for an injunction restraining the respondents or any of them from holding the Annual General Meeting pursuant to the purported notice published in the newspapers and scheduled to be held on January 28, 1982. There was a further prayer for the appointment of the receiver to get the accounts of the said Club for the year 1980-81 duly audited by a chartered accountant to be appointed by this Court and to submit a report and the audited account within the time to be fixed by the Court. There was also prayer that after the said report and audited account would be filed the receiver would convene the Annual General Meeting of the said Club for holding the same according to the rules of the said club. The meeting of the executive committee of the club was fixed to be held on January 21, 1982. On that very date the application was moved and after hearing the parties an ad interim order was made, inter alia, to the effect that no resolution if passed in the meeting of the executive committee would be given effect to till further orders. Directions were given for filing the affidavits. The executive committee held its meeting on that date and passed, approved the audited statement of accounts and the report thereon and also approved and ratified the various actions of the General Secretary. On the adjourned date the learned Judge after hearing the parties and after considering their respective affidavits made an order whereby he appointed Mr. Prasanta Mullick, partner of Price Water House- Peat & Co. to conduct an independent audit of the accounts of the East Bengal Club for the year ending 30th Sept., 1981 and directed the parties to make over to the auditor all necessary books, papers and records including vouchers and even empowered the said auditor to remove any such books papers and documents to his office, if necessary, for audit. In so far as the Annual General Meeting was concerned the learned Judge did not grant the prayer but had it recorded that in case such meeting would be held any resolutions passed relating to the passing of the accounts would be subject to the report of the auditor and also subject to the further orders of this Court. The matter was directed to appear in the list of the learned Judge after 8 weeks for further directions.

4. In the petition before us it is stated that the Annual General Meeting was held and the accounts were passed as per rules of the Club and the proposed resolutions were also passed therein.

5. It is contended by Mr. Somnath Chatterjee on behalf of the appellants that the order is wholly without jurisdiction. Such an order for the appointment of the auditor with direction upon him to remove the books of accounts to his custody was neither prayed for nor could be made under the CPC and Section 151 thereof

could not have any application. Mr. Chatterjee has referred to the Supreme Court decision in the case of Padam Sen and Another Vs. The State of Uttar Pradesh, which has been followed and applied by a Division Bench of this Court in the case of The Institution of Engineers (India) and Another Vs. Bishnu Pada Bag and Another, . Mr. Chatterjee contends that the Court by its orders cannot help a party to collect evidence from the other party. Furthermore the Court has no power to order forcible possession of the books of accounts and documents and papers from a party. In case a party would require the other party to produce the documents from its or his custody the usual procedure in respect thereto is provided in the Code by asking for discovery and in case such documents would not be produced in spite of such orders then the law of evidence provides for drawing adverse inference against such party who would fail to produce such documents from its custody.

6, Mr. P. C. Sen, on the other hand, contends that every member has a right to inspect the records of the Club with the permission of the Hony. General Secretary in terms of Rule 12 (d) of the Rules of the Club as amended up to January 27, 1974. Accordingly, the Supreme Court decision cannot have any application in the facts of this case. That is a case where the Court passed an order appointing a Commissioner to seize the account books in the possession of the plaintiff in the application of the defendant on the apprehension that the same might be tampered with. There the Supreme Court held (para 10) :

"The defendants had no rights to these account books. They could not lay any claim to them. They applied for the seizure of these books because they apprehended that the plaintiff might make such entries in those account books which could go against the case they were setting up in Court."

Mr. Sen contends that the plaintiffs respondents being the members of the Club have a proprietary right over the said books and particularly the right to inspect the same in terms of Rule 12 (d) and, accordingly, such an order, if passed, would not be an order passed without jurisdiction. Mr. Sen contends that in the suit filed herein a prayer has been made for enquiry into accounts and for a decree for the amount to be found due upon such enquiry. That being so, the Court is empowered to make an order appointing a Commissioner to go into accounts under the provisions of Order 26, Rules 11 and 12 of the Code. It being a suit for accounts the Court below is right in appointing an auditor to reaudit the accounts of the Club for the year 1980-81. Mr. Sen contends that the report to be submitted by the auditor would be a confidential one solely for the purpose of being used by the Court and not by the parties.

7. Mr. J. N. Roy on behalf of the Hony. General Secretary and Mr. P. K. Das, Junior to Mr. Chatterjee on behalf of the appellants contend that the scope of an order under Rules 11 and 12 of Order 26 of the Code is completely different. Such an order is usually passed at the time when the preliminary decree for accounts is passed. Sub-rule (2) of Rule 12 provides that the proceedings and the report (if any) of the commissioner shall be evidence in the suit. It is

contended that in case such accounts would be directed by the preliminary decree, the same would be conducted in a reference proceedings in accordance with the rules of this Court whereby the parties would be directed to file statements and counter-statements; issues would be raised; evidence would be allowed to be adduced in proof of the issues and so on. In this case Mr. Mullick has been appointed an auditor to make his audit and to file his confidential report to Court with a view that the Court might act on it without the same being disclosed to the parties. The whole idea was that the Court wanted to find out from an independent auditor the actual position relating to the allegations of fraud, mismanagement, misappropriation etc. Mr. Roy contends that such a procedure would cause enormous prejudice to the interest of the Club inasmuch as his client would have no opportunity to explain such accounts if necessary by adducing evidence and the audit report would be nothing but an opinion of the auditor and could not be a safe guide for the Court to act upon. Mr. Roy contends that except that in the prayers in the plaint an enquiry into accounts have been prayed for, there is no statement or averment in the body of the plaint in support of any case for accounts. Furthermore, in a case like this the plaintiffs in the suit could not have asked for a decree in their favour and as such an order for enquiry into accounts would not be of any effect. The suit is mainly directed to stop the annual general meeting and the appointment of Receiver and audit are prayed for in aid thereof. Accordingly both Mr. Roy and Mr. Das contend that the order is without jurisdiction.

8. In our opinion, the appointment of Mr. Mullick could not have been made under Order 26, Rules 11 and 12 of the Code. That provision cannot be applied in a case where the Court appoints a commissioner to inspect the state of affairs of the accounts and to make a report thereon. This is a case where allegations have been made about falsification of accounts, mismanagement, misappropriation of funds, fraud, collusion etc. Admittedly a sum of Rs. 14 lakhs have not been deposited with the Club's banking accounts. This is clearly contrary to the rules of the Club. It may be that ultimately full accounts could be submitted in respect thereto. It may further be that the Court would ultimately be satisfied with the keeping of accounts and the receipts and disbursements thereof. But in considering the question of appointment of a receiver under the circumstances the Court may legitimately make an order in order to ascertain the correct position as to accounts and in that respect may have to order an independent audit for the same. But in order that such an order may be passed by the Court a strong case is bound to be made out by the applicant. In our opinion, such a strong case has been made out when the allegations made in the petition in the Court below are read with the admitted facts as stated in opposition thereto.

9. But even then the question remains under which provision can such an order be made if at all? Mr. Sen contends that if Order 26, Rules 11 and 12 has no application then Order 39, Rule 7 is an answer to that. That provision clearly applies because it relates to the inspection of the Club's books of accounts for the said year as the accounts of the Club for that year is the subject matter of

the suit filed herein and as to which the questions of falsification misappropriation of funds, maladministration, mismanagement, fraud, collusion etc. have directly arisen. The provision empowers the Court to authorise any person to go into the accounts: and to make a report for the said year if the Court would so think necessary and expedient in the facts and circumstances of the case for the purpose of obtaining full information or evidence.

10. Mr. Bhabra appearing on behalf of the appellants on the last day of hearing contends that the said provision cannot apply because the scope thereof is limited to detention, preservation or inspection of any property. But it does not empower the Court to order fresh audit of accounts.

In my opinion, this provision should not be read and understood in such a narrow sense. It has a wider application so as to embrace within its scope the power of Court to order the audit of accounts by an independent person if the facts and circumstances of the case so warrant. In fact, the Supreme Court in the above case reported in *Padam Sen and Another Vs. The State of Uttar Pradesh*, has considered the provision of Order 39, Rule 7 but in the facts of that case found this provision to be not applicable, as the suit was for recovery of money lent on promissory note in which the books of account of the plaintiffs were not property which were the subject matter of the suit nor any question could arise with regard to them. They could at best be evidence if the plaintiffs relied on them. There the plaintiffs had full right over their books of account which the Court could not seize forcibly.

In this case the books of accounts are as much the plaintiffs books as they are of the defendants. Here in this case every member has a right to inspect and to have a true and faithful account of his Club and for that purpose to have the accounts audited by an independent person if the occasion would so arise and for the purpose of the preservation and protection of the Club's property, funds and assets in which the members have a right of ownership. Here certain members have filed a representative suit the basis whereof is mismanagement, misappropriation falsification of accounts, fraud, collusion etc. and such questions are directly involved in the suit and on the basis whereof a receiver has been prayed for, inter alia, in respect of the books of accounts. In my opinion, the learned Judge was justified in making the order under this provision inasmuch as the learned Judge in the facts and circumstances of the case before him was justified in thinking it necessary and expedient for the purpose of obtaining full information or evidence so as to come to a definite finding to make an effective order in the application.

11. In my opinion, under very similar circumstances the provisions of Order 39, Rule 7 was found applicable by the Andhra Pradesh Bench decision in the case of *Kruthiventi Kutumba Rao Vs. Muthi Venkata Subba Rao and Others*, . In that case the Division Bench explained the decision; of the above Supreme Court case. I respectfully agreed with the ratio of the said decision and the reasons recorded therein in respect of the application of the provision of Order 39, Rule 7 in that

case.

12. From that point of view the Supreme Court decision in Padam Sen and Another Vs. The State of Uttar Pradesh, and our High Court decision in the case of (The Institution of Engineers (India) and Another Vs. Bishnu Pada Bag and Another,) which followed the Supreme Court decision are distinguishable from the facts involved in the case before us.

13. On the merits of the application before the Court below it is contended that the appellants petitioners had been ready and willing to furnish full accounts of the receipts and disbursements in respect of the said huge amounts by cash, as indicated in the petition made herein, if the Court would so direct. The audit report for the year ending September 30, 1981 has made it abundantly clear that neither the amounts were deposited with the banks nor a suitable explanation was given to the auditor for keeping such amounts in hand. In spite of such notice the general body of the members have passed the said accounts in the general meeting although the same has not been given effect to by the trial Court orders. That being so, no fresh audit should be ordered and the same should be held unnecessary. Mr. Prasanta Mullick would be likely to find the same irregularities in the accounts if he would be allowed to audit again. It is to be noted, however, that on behalf of the plaintiffs respondents the holding of such annual general meeting has been disputed and denied but they could not produce any material to show that such meeting was postponed and not held. On the contrary, on behalf of the appellants minute book of the Club has been produced in Court to show that such meeting actually took place on the notified date when accounts were passed and auditors were appointed.

14. In my opinion, the audit as directed by the Court below has a different purpose. It is for the Court's guidance and appreciation as to the real position of the state of affairs with regard to the finances of the Club for the said year. Such audit has been directed not for the purpose of examining whether or not the accounts as audited by I. M. Saha and Co. or passed in the general meeting should be thrown out. It is so ordered in aid of the main prayer as to whether a receiver should be appointed or not. In my opinion, the application before the Court below to that extent has not been finally disposed of and the learned Judge has directed the matter to come up before him for further consideration.

15. Mr. S. B. Mukherjee on behalf of the club auditors Messrs. I. M. Saha & Co. contends that there are vague allegations of collusion, conspiracy, fraud etc. against the Club auditors but such allegations should hardly be relied on. The auditor could not have any scope for indulging in all such activities and had that been so the auditor would not have given such adverse remarks in the audit report. In any event, nobody has asked for his removal and as such it would be most embarrassing for another auditor to go and audit the accounts which have already been audited by another firm of auditors. According to Mr. Mukherjee the auditor's duty is to check the accounts as maintained by the party and in the matter of such audit he has to follow strict rules and if the auditor would collude

or conspire in any such manner then the Institute of Chartered accountants would take steps against the firm and might also cancel the membership and in any such event the auditor would be debarred from practising as such auditor any more. Apart from the question of embarrassment of his client in respect of the order made herein Mr. Mukherjee contends that the order is clearly without jurisdiction. There is no prayer to that effect, nor is there any provision in the Code whereunder such an order can be made by the Court. In my opinion, the question of embarrassment could be relevant had the Club auditor made a clean report in the audit report for the year ending September 30, 1981. Far from it they have pointed out various irregularities which have not been challenged either on behalf of the club authorities or on behalf of the appellants herein.

16. On behalf of the appellants it is contended that most of the relevant paragraphs dealing with fraud, misappropriation, mismanagement, collusion, conspiracy etc. as alleged in the petition are verified as submissions in paragraph 21 thereof. The other relevant paragraphs viz. paragraphs 14, 15 and 16 of the petition relating to books of accounts and manipulations thereof are based on informations received from the Assistant General Secretary A. R. Bhattacharjee and believed by the deponent to be true. But the said A. R. Bhattacharjee did not affirm any affidavit in support of such statements as true to his knowledge. In the affidavit-in-reply the said A. R. Bhattacharjee filed an affidavit where although he stated that such informations were true to his knowledge but the same has been verified as submissions. But as observed hereinabove, in so far as the order of the Court below is concerned the said verification has lost much of its force in view of the admitted position relating to various items of accounts and the Court can rely thereon to make such an order. But the matter is left for the Court below for final decision thereon at the final hearing of the application before the Court below.

17. Admittedly Rs. 21 lakhs was received by the club authorities during the year in question of which Rs. 14 lakhs was not deposited in banks and is now said to have been spent in cash. Admittedly there has been violation of various rules of the club by the club authorities. The report of the club auditors does not exhibit a very happy picture as to maintenance of the accounts and disbursement of monies.

18. In my opinion, since the order has been made under Order 39, Rule 7 no appeal would lie therefrom as would appear from Order 43, Rule 1 of the Code. Consequently in view of our finding that the order has been made under this specific provision of Order 39, Rule 7 wherefrom no appeal lies under the Code the appellants cannot come under the provision of Clause 15 of the Letters Patent, 1865 to make it an appealable order. In any view of the matter, the order appealed from does not finally decide any of the rights of the parties and in the facts and circumstances of this case cannot cause any real prejudice to the appellants. We, accordingly, hold that the said order is not an appealable order.

19. In that view of the matter the appeal must be and is hereby dismissed with

costs and there will be no further order on this application except that the appellants must pay the cost of the application to the respondents represented by Mr. P. C. Sen. All interim orders are vacated. Mr. Prasanta Mullick the auditor appointed by the Court below and all parties concerned would be at liberty to act on a signed copy of the minutes;

C.K. Banerji, J.

20. I agree.