

(1961) 07 BOM CK 0001
In the Bombay High Court
Case No : Suit No. 411 of 1951

Biharilal Ramcharan Cotton Mills Ltd.

APPELLANT

Vs

China Cotton Exporters

RESPONDENT

Date of Decision : 17-07-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 15, Order 18 Rule 16, Order 26 Rule 11, Order 26 Rule 12, Order 26 Rule 17

Citation : AIR 1963 Bom 59 : (1962) 64 BOMLR 611

Hon'ble Judges : Shah, J

Bench : Single Bench

Advocate : K.H. Bhabha and Palan, for the Appellant; Pandya, for the Respondent

Judgement

1. The question that is raised on "his summons is as to whether the Commissioner appointed by this Court to whom a partnership suit is referred for the purpose to taking accounts of the partnership is "a Court" within the meaning of the Code of Civil Procedure, so that where such Commissioner is prevented by death, transfer or other cause from concluding the reference, his successor may deal with the evidence recorded by the former as if it had been recorded by himself and proceed with the reference from the stage at which his predecessor had left it under the provisions of Rule 15 of Order 18 of the Code,

2. It was contended by Mr. Pandya, the learned counsel for the defendants, that the office of the Commissioner was a part of this High Court and that inasmuch as by virtue of the provisions of Rule 3 of Order 49 of the Code, some of the Rules of Order 18 including Rule 15 did not apply to the Chartered High Courts" in exercise of their Ordinary or extra-ordinary original civil Jurisdiction, those Rules would not also apply to the Commissioner to whom a partnership suit was referred for taking accounts of that partnership.

3. Now, the Letters Patent of this Court do not contemplate and specifically provide for the appointment of any Commissioner for taking accounts or

otherwise as such Clause 8 of the Letters Patent which provides for the appointment of officers of the Court runs as follows:--

"And We do hereby authorise" and empower the Chief Justice of the said High Court of Judicature at Fort William in Bengal, from time to time, as occasion may require, and subject to any rules and restrictions which may be prescribed by the Governor General in Council, to appoint so "many and such clerks and other ministerial officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these Our Letters Patent."

This clause clearly refers to the appointment of officers charged only with ministerial duties to help in the administration of justice by the High Court. The Commissioner appointed by this Court from time to time is obviously one of such officers appointed under this clause of the Letters Patent and as such officer he would have no Judicial powers of any kind whatever.

4. Then, clause 37 of the Letters Patent under the heading "Civil Procedure" provides as follows:--

"And We do further ordain that it shall be lawful for the said High Court of Judicature at Fort William in Bengal, from time to time, to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate and Matrimonial Jurisdictions, respectively: Provided always that the said High Court shall be guided in making such rules and orders as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VIII of 1859 and the provisions of any law which has been made amending or altering the same, by competent legislative authority for India".

By virtue of this clause, it will appear, the High Court is entitled to make rules and orders for that purpose of regulating all proceedings in civil cases which may be brought before it under several of its jurisdictions. The clause, however, provides that in making such rules and orders, the High Court shall be guided, as far as possible, by the provisions of the Code of Civil Procedure.

5. Now, Order 26, rule 11 of the CPC provides (or the issue of a commission to such person as the Court thinks fit directing him to examine or adjust accounts in any suit in which an examination or adjustment of accounts is necessary. My attention was not drawn to any rule made by the High Court on its Original Side which contemplates the issue of such commission or the appointment of a commissioner for examining or adjusting accounts in any suit. The rules to which my attention was invited are rules 462, 463, 466, and 467 of the High Court Rules. All that the first three of these rules provide for is the authority of the Commissioner to obtain process of the Court to compel attendance of witnesses or for the production of any document which he may desire to inspect and the liberty to examine such witnesses on oath or solemn affirmation touching the

matters referred to him as he shall think proper and to make separate reports whenever he thinks necessary and also special reports. Rule 467 provides that the report of the Commissioner when made would be binding on parties unless discharged or varied. Thus, the High Court has made rules under Clause 37 of the Letters Patent providing for the powers of a Commissioner in respect of matters referred to him by the Court but has not made any rule for the appointment of such commissioner on the lines of Rule 11 of Order 26 of the Code of Civil Procedure. Except for clause 37 of the Letters Patent under which the High Court can only make rules for regulating its proceedings and Rules 462, 463, 466 and 467 are made under this clause there is no provision in the Letters Patent which I have been able to find or which has been shown to me by either of the counsel appearing before me which empowers the High Court to appoint a commissioner for taking accounts with reference to suits in which accounts may be necessary to be taken. Where, therefore, an order for issue of a commission and appointment of a commissioner for the purpose of taking accounts in any suit is required to be made, the High Court has to be guided by the provisions of the CPC in that behalf as enacted by clause 37 of the Letters Patent and Order 26, Rule 11 is the only provision in the Code under which a commissioner for taking accounts can be appointed. It was conceded by Mr. Pandya, the learned counsel for the defendants, that so far as the commissioner's appointment in the present case was concerned, it was governed by Order 26, Rule 11 of the Code of Civil Procedure. As a matter of fact, paragraph 3 of Form 40 in the Rules to the Original Side of this High Court in terms states as follows:--

"This Court doth order that it be referred to. . . .as Commissioner appointed for that purpose in pursuance to the Code of Civil Procedure, rules II and 12 to Order XXVI to take an account of all dealings and transactions between the plaintiff and defendant in the pleadings mentioned. . .". This will leave no doubt that the High Court on its Original Side can appoint a commissioner for taking accounts in every case where the need for such appointment arises only in pursuance of the provisions of Rules 11 and 12 of Order 26 of the Code. It is true that this High Court has created a permanent office of a commissioner for taking accounts and different persons are appointed to that office from time to time. Every such appointment, however, is made, as is shown by the terms of paragraph 3 to Form) Mo. 40 of the Rules of the Original Side as aforesaid, in pursuance of Rules 11 and 12 of Order 26 of the Code, for the specific purpose of taking accounts in suits which require the examining and adjusting of accounts. This mode of appointment of a commissioner apparently seems to have been adopted for administrative convenience, so that instead of appointing different persons as commissioners in different suits requiring taking of accounts who may not execute the commissions in the precincts and under the direct supervision of the Court, the Court may refer all such suits to one person occupying the office of the Commissioner for the time being who has his office in the precincts of the Court and would execute the References under the supervision of the Court.

6. The question, however, raised by Mr. Pandya was as to whether the

Commissioner for taking accounts at this Court, though appointed in pursuance of Rules 11 and 12 of Order 26 of the Code is or is not a part of the High Court. I am afraid, the question is too vague to admit of a single answer. If it is once conceded that this High Court in cases where occasion arises for the appointment of a commissioner for taking accounts may, if it so chooses, appoint different persons as such commissioner under rule 11 of Order 26 of the Code, the mere fact that there exists in this Court an office of a commissioner for taking accounts does not make the incumbent to that office for the time being appointed in pursuance of that rule a part of this High Court, so that the provisions to the Code which do not apply to the Chartered High Courts will not apply to such commissioner while executing the Reference for taking accounts in any suit. In my opinion, no commissioner who has been appointed by a Court either on the Original Side of the High Court or in the mofussil for the purpose of taking accounts in any suit can ever be said to be a part of that Court. It may be noted that an incumbent in the office of the commissioner for taking accounts of this Court has also got to perform certain ministerial functions as a commissioner. To that extent he may be called an officer appointed under clause a of the Letters Patent and as such officer he may be said to be a part of the High Court. In my judgment, therefore, it is a fallacy to call the commissioner for taking accounts of this Court as part of the High Court in reference to any particular suit which is referred to him for the purpose of taking accounts, so that the provisions to the Code which do not apply to Chartered High Courts would not apply to such Commissioner while executing such reference for taking accounts in any suit.

7. The next question then is as to whether, such a commissioner is a "Court" within the meaning of the provisions of the CPC or otherwise. To answer this question let us turn to the provisions, if any, contained in Order 26 under which a commissioner is appointed as aforesaid. Rule 17 of that order seems to have made a provision in this behalf. That rule figures under the heading "General provisions" and runs as follows:--

"(1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court".

Sub-rule (2) provides that a Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper. So far as the latter sub-rule is concerned, it will be clear that the High Court itself has made a separate rule for the purpose of enabling the commissioner for taking accounts to whom a suit is referred by it for the

purpose of taking accounts to apply to the Court to issue process against any witness who is required to be present at the hearing of the Reference. Rule 462 to which I have already made a reference may be reproduced for the sake of convenience and it reads as follows:

"The Commissioner shall be at liberty in all matters referred to him to obtain the process of the Court to compel the attendance of witnesses or for the production of any document which he may desire to inspect, and to examine such witnesses on oath or solemn affirmation touching the matters referred to him as he shall think proper."

The High Court, however, has made no rule in super session of sub-rule (1) of Rule 17 of Order 26 as aforesaid. It, therefore, follows that the Commissioner for taking accounts while dealing with a Reference in any suit Shall be deemed to be "Civil Court" for the purposes of Rule 17 of Order 26 as a whole, that is to say, for the purposes of Sub-rule (I) of Rule 17 and Rule 462 of the High Court Rules.

8. The question that next arises is as to whether Order 18 of the CPC would apply to such Commissioner. This Order is entitled "Hearing of the suit and Examination of Witnesses." Rule 4 of that Order provides that the evidence of witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge. Rule 5 provides the manner in which evidence of each witness is to be taken in cases in which an appeal is allowed. Rule 6 of that Order provides for the deposition of a witness to be interpreted to him when it is taken down in a language different from that in which it is given and the witness does not understand the language in which it is taken down. Rule 10 provides that the Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing. The next Rule provides the manner in which questions objected to and allowed to be put by the Court have got to be dealt with. Rule 12 invests a Court with a discretion to pass such remarks as it thinks material respecting the demeanour of any witness while under examination. Rule 13 deals with the manner of taking down evidence in unappealable cases and Rule 14 provides that where the Judge is unable to make a memorandum as required by the provisions of that Order, he shall cause the reason of such inability to be recorded and shall cause the memorandum to be made in writing from his dictation in open Court, and that every memorandum so made shall form part of the record. Then comes Rule 15 which runs as follows:--

"(1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it."

Sub-clause (2) of this Rule is not necessary for the purpose of the question that I have to decide on the summons. The next Rule provides for the power of the Court to examine a witness immediately in certain circumstances and Rule 17 empowers the Court to recall and examine any witness who has been examined at any stage of the suit. It will appear that the rules referred to above and the other rules of Order 18 to which I have not found it necessary to make a specific reference herein, all deal with and refer to examination of witnesses at the hearing of the suit. It may be noted that some of these Rules refer to "Court" and some others refer to "Judge". Nevertheless, all these rules deal with one subject, namely, "Examination of witnesses". Rule 17 of Order 26 of the Code refers to the provisions of the Code relating inter alia to the examination of witnesses and it says that for the purpose of that rule the Commissioner shall be deemed to be a Civil Court. Rule 15 of Order 18 of the Code, which is already quoted above, is one of the rules comprised in the Order dealing with examination of witnesses and, therefore, in my opinion, the Commissioner to whom a suit is referred for taking accounts, should be deemed to be a Court for the purposes of that Rule as well. In this connection, a reference may be made to *Kashiram Budhia Vs. Chajuram Budhia*, in which the Calcutta High Court has held that in proceedings conducted by a commissioner of partition and special referee appointed by the Original Side of the High Court, the provisions of rules 6 and 15 of Order XVIII of the CPC would apply and that the deposition of witness should be read over and explained to him after it is completed and, if necessary, translated into a language which he understands, it was contended in that case, it appears, that the Commissioner should not be deemed to be a Court within the meaning of the provisions of the CPC and that rules 4, 5, 8, 9, 10, 11, 13, 14, 15 and 16 of Order 18 did not apply to Chartered High Courts by virtue of the provisions of rule 3 of Order 49 of the Code. The learned Judge, however, held that there was no substance in that contention, that the commissioner of partition in that case was a commissioner appointed under Order XXVI of the CPC and that by virtue of the provisions of Rule 17 of that Order the Commissioner was constituted a Court and accordingly, the provisions of rule 5 and 6 of Order 18 of the Code would apply. With respect, I agree with the reasons given by the learned Judge in the Judgment in that case.

9. It was, however, contended by Mr. Pandya that although with reference to this case rules 5 and 6 might have been made applicable to the commissioner of partition by the Calcutta High Court, rule 15 of Order 18 was quite a different matter. It was urged by Mr. Pandya that the present Commissioner for taking accounts in this particular suit could not proceed with the Reference and make his report on the evidence already recorded by his predecessor in office, inasmuch as in his submission no Judge could give finding on evidence recorded by his predecessor in office. The normal rule, according to Mr. Pandya is that the Judge who hears and records the evidence should decide the case himself and the provision to rule 15 of Order 18 is only an exception to that rule. It is difficult to say whether the provision in this particular rule is an exception to the

rule as propounded by Mr. Pandya. As a matter of fact, I am not concerned with whether this rule 15 is an exception to the alleged rule or not. All that one finds in this rule is a provision made by the Statute and it must be given effect to wherever it applies. As already observed above, a commissioner, appointed for taking accounts in any particular suit -- and in this case it is the "commissioner for taking accounts to whom "the suit is referred for taking accounts of the partnership is to be deemed to be a Civil Court in regard to the provisions of the Code relating inter alia to examination of witnesses and inasmuch as Rule 15 is one to the rules under Order 13 which deals with examination of witnesses, the commissioner would be deemed to be a Court and a Judge for the purposes of that rule. In my opinion, therefore, the Commissioner for taking accounts in this case is as much a court and a Judge for the purpose of rule 15 of Order 18 of the Code as for the purpose of rules 5 and 6 of the same Order, as held by the Calcutta High Court in the case referred to above.

10. in the result, the commissioner for taking accounts in the present case may proceed with the Reference on the basis of the evidence recorded and heard by his predecessor in office. The Chamber Summons, is therefore, made absolute. Costs costs in the Reference. Counsel cetified.

11. Order accordingly.