

(2003) 08 CAL CK 0029
In the Calcutta High Court
Case No : F.M.A. No. 214 of 2003

Calcutta Cosmopolitan Club Ltd.

APPELLANT

Vs

Bhanwarlal Bhandari and Others

RESPONDENT

Date of Decision : 27-08-2003

Acts Referred:

City Civil Court Act, 1953 — Section 5(2), 5(3), 5(4)
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, Order 7 Rule 10, Order 7 Rule 11
Companies Act, 1956 — Section 2(7)

Citation : (2004) 1 CHN 498 : 108 CWN 1191

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Joydwip Kar, Paritosh Sinha and Anna Malhotra, for the Appellant; Ashoke Banerjee, for the Respondent

Final Decision : Allowed

Judgement

D. K. Seth, J.—This appeal is directed against the order dated 27th September, 2002 passed by the learned Judge, 10th Bench, City Civil Court, Calcutta in Title Suit No. 1430 of 2002, disposing of an application under Order 39 Rules 1 and 2 read with Section 151 of the CPC (CPC). The plaintiff/ respondent had sought for an injunction permitting the plaintiff to participate in the Annual General Meeting (AGM) and the Extraordinary General Meeting (EGM) of the defendant/appellant sought to be held on 28th September, 2002. The learned Judge, while disposing of the application for injunction was of the view that the plaintiff had the status of a permanent member of the club as such he should have a chance to participate in the EGM and AGM to be held on 28th September, 2002.

2. A preliminary objection has been taken by Mr. Ashoke Banerjee, the learned counsel for the respondents, that this appeal is not maintainable on two-fold grounds. First, that the meeting has already been held on 28th September, 2002, and nothing remains to be decided. In support, he refers to the order dated 30th April, 2003 passed in this appeal refusing stay of operation of this order appealed

against on the self-same ground that the order has lost its force. The second ground is that the order that was granted is not an order within the meaning of Order 39 Rules 1 and 2, appealable under Order 43. Since no injunction was granted against the appellant restraining him from holding the meeting, it was only a chance to participate was allowed to the plaintiff.

3. This contention has since been opposed on behalf of the appellant on various grounds. One of the grounds is that an application under Order 39 Rule 2A CPC has since been filed by the plaintiff alleging the breach of the interim order by preventing the plaintiff from participating in the meeting held on 28th September, 2002, which is in the nature of execution and not a contempt and as such, if the order remains, in that event, the Order 39 Rule 2A would also remain pending. In support of his contention, Mr. Mukherjee had relied on a few decisions to which the reference would be made at an appropriate stage.

4. Having regard to the facts and circumstances of the case, we do not propose to enter into this question in view of the fact that the application under Order 39 Rule 2A is pending and is to be disposed on its merit. We are not supposed to decide any question touching the merit of the said application.

5. So far as the other ground raised by Mr. Banerjee with regard to the maintainability of the appeal does not seem to be of any substance. An order under Order 39 Rules 1 and 2 CPC has been made appealable under Order 43 Rule 1(r). It does not specify the nature of the order. It only specifies an order passed under Order 39 Rules 1 and 2. It is not the case as to how it affects the parties that is relevant. It is the nature and character of the order and in exercise of what jurisdiction such order is or could have been passed that is relevant. It is to be looked into whether this order is passed under the provisions of Order 39 Rules 1 and 2 or not. If one is aggrieved against such order, an appeal can be maintained by him irrespective of the form or mode in which the order is coined.

6. That apart on facts the respondent was not being allowed to participate in the AGM and EGM by the appellants. By reason of the order when the respondent was allowed to participate the natural consequence was that the appellants were restrained from disallowing or preventing or obstructing the respondent from participating in the meeting. It is irrelevant whether the form is mandatory or prohibitory or couched in a manner different to suit a particular need in a particular situation.

7. Mr. Mukherjee for the appellant had contended that this application was filed on 25th September, 2002, and this was directed to be put up on 26th September, 2002. The matter was heard on 26th September, 2002, in the presence of the caveator/appellant without serving notice to the other defendants in the suit. By an order dated 27th September, 2002, the injunction application was disposed of without granting any opportunity either to the appellant or to any of the other defendants to file opposition. It was decided only on the basis of the averments made in the petition and the submissions made from the bar in course of

hearing. This contention, however, may not be gone into at this stage since the interim order is already granted and its purpose appears to have been over.

8. Now, we may turn our attention to the question as to whether the order has lost its force rendering the appeal infructuous. In fact, Mr. Mukherjee had sought to strike at the very root. According to him, (i) this order was passed on the basis of the averments made in the plaintiff, which does not disclose any cause of action; (ii) the Court had no jurisdiction to entertain the suit, which is otherwise barred in law. Mr. Banerjee, however, opposes these contentions on the ground that two applications have since been filed by the appellant. One is under Order 7 Rule 10 and the other under Order 7 Rule 11 CPC. These applications have since been directed by this Court to be disposed of at the earliest in its order dated 30th April, 2003, while disposing of the application for stay in this appeal. According to him, any observation made by this Court would affect the merit of the application under Order 7 Rule 10 and that under Order 7 Rule 11. Therefore, this Court should refrain from deciding this question.

9. This submission of Mr. Banerjee does not seem to be of any consequence. Inasmuch as observation made in this order would always be tentative and for the purpose for deciding this appeal confined to the question relevant for the purpose of the application under Order 39 Rules 1 and 2 CPC alone. It cannot influence the Court in deciding the application under Order 7 Rule 11 and that under Order 7 Rule 10 CPC. Those applications are to be decided independently on its own merit without being influenced by any observation made in this appeal. Inasmuch as this order is an interlocutory order and interim in nature. It does not create any precedent as was held in the decision in *Empire Industries Limited and Others Vs. Union of India and Others*, , cited by Mr. Mukherjee.

10. In order to ascertain the validity of the interim order, the Court has to look into as to whether a prima facie case has been made out. The question of balance of convenience is immaterial for our present purpose. Therefore, we refrain from dealing with those questions. We will confine ourselves only to the question of existence of prima facie case enabling the Court to grant an interim order. The prima facie case is decided on the basis of the averments made in the plaint and the application for injunction respectively. Various factors are to be weighed with, in arriving at a conclusion as to whether a prima facie case has been made out or not. The question of jurisdiction or existence of cause of action arising out or within the jurisdiction are also matters which are relevant factors for the purpose of considering the question of existence of prima facie case. The Court cannot be oblivious of these factors and stress only on the basis of the conclusion relating to balance of convenience and inconvenience ignoring the facts giving rise to the cause of action. The Court has to weigh all the materials relevant for the purpose of arriving at a conclusion judicially, not mechanically.

11. In this case Mr. Mukherjee had taken two grounds, one with regard to the cause of action arising outside the jurisdiction of the Court and the other the very root of the jurisdiction of the Court to entertain the suit within its

competence. He also contended that while looking at the prima facie case, the Court had also made an observation with regard to the status of the plaintiff, which is damaging for the appellant. According to him, any damage that might have been caused by virtue of an interim order can be corrected at the hearing. But this is a settled proposition of law for which no decision would be necessary. Inasmuch as, the order is interim in nature, which survives only during the pendency of the proceedings. When a final order is passed, all interim orders merge in the final order. It is the final order that becomes operative. All interim orders stand superseded. Therefore, the order dated 30th April, 2003 would not stand in the way of disposing of the appeal nor the observation made in the order dated 27th September 2002 would affect the defendant in the ultimate decision in the suit. But if any damage is caused during the pendency of the suit by reason of the said order, it is open to challenge the same before a higher forum and get it corrected through appeal or otherwise. Therefore, there is no scope for holding that the appeal is not maintainable.

12. In the plaint Annexure-H (at page 37 supplementary affidavit) in paragraph 14, it has been pleaded that on 12th September, 2002, the plaintiff all of a sudden received an intimation from a member of the club at the plaintiff's office that the defendants have issued a notice of AGM to be held on 28th September, 2002. In paragraph 22 at page 48, it has been pleaded that the cause of action of the suit arose on 13th September, 2002, at 3B, Raja Raj Ballav Street. Nowhere in the plaint it is pleaded that any notice was served upon the plaintiff at any place within the jurisdiction of the City Civil Court at Calcutta. The address of the defendants is given at 58/2, Ballygunge Circular Road, which is outside the jurisdiction of the City Civil Court at Calcutta. Therefore, primarily the cause of action based on the receipt of the information by the plaintiff at his office at Raja Raj Ballav Street. Thus, it appears that prima facie the alleged cause of action that has been pleaded cannot be said to have been arising within the jurisdiction of the City Civil Court at Calcutta since receipt of intimation from a third party would not be a cause of action within the meaning of Section 20(c) CPC for attracting jurisdiction of a Court. The cause of action is the holding of the meeting by the defendant at Ballygunge Circular Road outside the jurisdiction of City Civil Court at Calcutta. Service of notice by the defendant upon the plaintiff may give rise to the cause of action on account of something positive done by the defendant. But receipt of information through someone else will not be a cause of action. Cause of action is a bundle of facts arising out of the action of which the plaintiff is aggrieved. Sending of notice is an integral part of the action for holding the AGM. Receipt of information and service of notice are two distinct things, which cannot substitute the other. If such a wide proposition is adopted, in that event, the purpose of laying down the principle of place of cause of action for determining the jurisdiction would be rendered ineffective and anyone would be entitled to sue at a place of his choice only on the simple allegation of receiving intimation/information at a place of his choice. Had it been the case of service of notice at a particular address within the jurisdiction of a particular

Court, the question would have been otherwise.

13. The City Civil Court has been established under the City Civil Courts Act, 1953. This Act has prescribed the limit of jurisdiction in Section 5. It prescribes its limits within the City of Calcutta. The City of Calcutta is defined in Section 2(3) to mean the area comprised within the local limits for the time being of the Ordinary Original Civil Jurisdiction of the High Court. In Section 2(4), High Court has been defined to mean the High Court at Calcutta. The Ordinary Original Civil Jurisdiction of the High Court does not stretch beyond the Circular Road beyond which the 58/2, Ballygunge Circular Road, is situated. The Raja Raj Ballav Street is definitely within the Original Side jurisdiction of the High Court and is within the jurisdiction of City Civil Court. But it could not give jurisdiction to the City Civil Court simply on the basis of the receipt of the intimation/information as pleaded in paragraph 14 of the plaint.

14. That apart, Sub-section (2) of Section 5 of the City Civil Courts Act prescribes that subject to Sub-sections (3) and (4), the City Civil Court shall have jurisdiction in respect of proceedings of the value mentioned therein. Sub-section (4) of Section 5 prescribes that the City Civil Court shall have no jurisdiction to try suits or proceedings specified in the First Schedule. The First Schedule in item No. 10 (i) precludes suits and proceedings under the Indian Companies Act, 1913 or the Banking Companies Act, 1949 or (ii) suits and proceedings relating to or arising out of constitution, incorporation, management or winding up of Corporations. Thus, a suit relating to or arising out of its affairs relating to management of a Corporation cannot be maintained. A "Corporation" under the Companies Act has been defined in Section 2(7) of the Companies Act to include Companies. AGM and EGM of a Company are held for the purpose of constitution of the Board, which manages the company. Various other businesses are transacted in AGM and EGM of a Company. These transactions are for the management of the Company. The word "Company" or "Corporation" has not been defined in the City Civil Courts Act. Therefore, the ordinary meaning of the word is to be given to it. The ordinary meaning is to be found in the Companies Act. Section 2(7) of the Companies Act while defining Corporation includes Companies. Therefore, the competence/jurisdiction of City Civil Court excludes matters referred to Clause (ii) relating to Companies.

15. This question had cropped up before this Court in Mining-Geological Metallurgical Institute of India v. Shyamalesh Nath Bhadury 1978 CRILJ 563 : 1978 CHN 669, the Hon'ble Chittotosh Mukherjee, J. (as His Lordship then was), sitting singly had occasion to deal with this question and hold that a suit relating to a Company or a Corporation is not maintainable in the City Civil Court at Calcutta, while interpreting the meaning of the provision contained in item 10 of the First Schedule read with Section 5 of the City Civil Court Act relying on the definition of Corporation as given in Section 2(7) of the Companies Act, 1956. We are in agreement with the said decision and adopt the reasoning given therein.

16. It appears that after this decision was rendered on 6th April, 1978, there

were successive amendments in the City Civil Court Act including the Schedule by West Bengal Act 60 of 1980 and West Bengal Act 19 of 1982. When these amendments were made, the item 10 of the First Schedule remained untouched. Therefore, the interpretation of item 10 of the First Schedule as held in Mining-Geological Metallurgical Institute of India (supra) seem to have been accepted by the legislature, or in other words, the interpretation given in the said decision had correctly followed the intention of the legislature incorporated in item 10 of the First Schedule? Therefore, it appears that this was the real interpretation of the said provision as was held in the said decision. In *Renuka Pachal Vs. Sm. Chapa Guha Neogi and Others*, , this Court had held that if there is an amendment in the legislation after an interpretation of a particular provision by Court and no expression is used in the legislation, while amending, differing from the interpretation given in the decision, in that event, it is to be presumed that the legislature had intended to adopt or accept the interpretation so given in the decision and approve that the intention of the legislature was correctly interpreted.

17. In the cause title of the plaint, the appellant has been described as a company registered under the Companies Act, 1913. In paragraph 2 of the plaint, it is pointed out the appellant-defendant No. 1 is a limited liability Company incorporated under the provision of the Companies Act, 1956. It is also not disputed by Mr. Banerjee that the appellant is a Company. Admittedly, the relief that was sought for in the plaint is related to the holding of the AGM and EGM, which are necessarily related to the management of the Company, which is a Corporation within the meaning of item 10 of the First Schedule. It cannot be disputed or doubted that the AGM and EGM are matters related to management of the Corporation/Company. Thus, patently on the face of the plaint case, prima facie, it appears that the City Civil Court has no jurisdiction in respect of matters related to the management of the Corporation, namely, the defendant No. 1.

18. Averments made in the plaint, failing to indicate the rising of cause of action within the jurisdiction, or otherwise pointing out to any legal incompetence to entertain a particular kind of suit are matters to be taken into consideration for the purpose of arriving at a conclusion with regard to the existence of a prima facie case. In the order, though these questions were not raised but the application having been disposed of immediately on its filing without any opportunity to file any opposition, the defendant/appellant could not have the opportunity to raise these questions. But that will not affect the case since it is for the Court to arrive at a conclusion with regard to the existence of prima facie case on the basis of the materials placed before it. The Court cannot be oblivious of these questions since it goes to the root of the jurisdiction of the Court to pass an order whether in the nature of interim or otherwise. If the Court is incompetent and lacks jurisdiction, it cannot pass an order. Therefore, before passing an order, the Court has to examine as to whether it has jurisdiction or not and has to prima facie satisfy itself that it has jurisdiction on the face of the averments made in the plaint even if not raised. This is so because the Court

cannot assume jurisdiction when it had none. In Shiv Kumar Chadha and Others Vs. Municipal Corporation of Delhi and Others, , it was held that maintainability of a suit is also a factor for determining the existence of prima facie case.

19. Prima facie, having regard to the materials placed before us and having regard to the observation made above, we are of the view that the Court had lacked jurisdiction to entertain the suit and as such prima facie it appears that there was no existence of prima facie case. As such no injunction could have been granted.

20. Mr. Mukherjee next contended relying on the decision in Morgan Stanley Mutual Fund Vs. Kartick Das, , that the disposal of the application without notice to the other respondents is impermissible. In this case, in fact, notices were not issued in the other respondents. Only upon hearing the caveator/appellant, the application was disposed of finally. The Court cannot decide the rights of the parties without notice to interested parties. There was no finding that the other respondents are not interested. However, the Court can do so by way of interim measure. It cannot dispose of the application finally without notice to the other respondents, unless it dispenses with notice upon the other respondents or finds that the other respondents would not suffer any prejudice or would not at all be affected or that they are not interested in it. In Morgan Stanley Mutual Fund (supra), the Apex Court had taken such a view in paragraphs 40, 41, 42 and 47 of the decision. In order to avoid prolixity, we refrain from reproducing the said paragraphs.

21. Mr. Mukherjee next contended that the application under Order 39 Rule 2A is in the nature of execution. He relied on the decision in State of Bihar v. Rani Sonabati Kumari AIR 1961 SC 211 V-23. It is not necessary to go into this question at this stage since this application under Order 39 Rule 2A is to be decided on its own merit. Therefore, we refrain from making any observation with regard thereto.

22. On the other hand, Mr. Banerjee had relied on the decision in Tayabbhai M. Bagasarwalla and another Vs. Hind Rubber Industries Pvt. Ltd. etc., , to contend that even if the order is without jurisdiction, the violation thereof cannot be overlooked nor the mischief under Order 39 Rule 2A CPC could be avoided. As observed earlier, we need not deliberate on this question here at this stage.

23. Another contention has been raised with regard to the merit of the case, particularly, with reference to the order of status quo passed on 2nd August, 2002 in the appeal pending before the learned District Judge, being the T.A. No. 233 of 2002, arising out of the ex parte decree obtained by the plaintiff in Title Suit No. 54 of 2000 declaring the status of the plaintiff herein as a permanent member of the club. But we are not required to go into those questions. This was, however, dealt with in the order dated 30th April, 2003 holding that the interim order was no more operative. However, the order dated 24th July, 2002 passed in C.O. No. 1946 of 2002 by this Court had admittedly spent its force on

2nd August 2002. But the learned District Judge had passed an order on 2nd August, 2002 in T.A. No. 233 of 2002 by passing an order of status quo on the basis of the order passed by this Court. Therefore, the order of status quo seems to be continuing on the date when the order was passed by the City Civil Court. Whether that order is in conflict with the order dated 2nd August, 2002 passed in T.A. No. 233 of 2002, is a question, which ought to have been taken into account in order to find out a prima facie case for grant of interim order. The learned District Judge in its order dated 2nd August, 2002, in T.A. No. 233 of 2002 has passed an order of status quo as was passed by the High Court. The High Court in its order dated 24th July, 2002 has passed the order of status quo as on that date but it had given reasons which clarifies the meaning of the order of status quo intended to be passed in the said order. We may quote the observation of this Court from the said order :

"The revisional application is directed against the order dated 2nd July, 2002, passed by the Court of appeal below thereby fixing the petition filed by the defendant/petitioner for stay of operation of the judgment and decree passed in Title Suit No. 54 of 2002 for hearing on 2nd August, 2002 without granting any ad interim order of stay. Evidently, the plaintiff/opposite party was dismissed from the membership of the defendant-club. Such order of dismissal was challenged by the plaintiff/opposite party in the above suit. In the said suit, the prayer for an interim order of injunction restraining the respondent-club from giving effect to the said order of dismissal of the membership of the plaintiff/opposite party called up to the Hon'ble Supreme Court. Thus, it became evident that the dismissal of the plaintiff/opposite party from the membership of the defendant-club had been given effect to during a period of about last two years. However, the suit having been decreed ex parte, Title Appeal No. 233 of 2002 has been filed by the defendant-club and in that appeal, the prayer for stay of operation of the judgment and decree passed ex parte in the said suit was made. Having regard to the fact that the order of dismissal of the petitioner from the membership of the defendant-club had continued to be in force for a period of about last two years and considering the facts and circumstances under which the aforesaid judgment and decree was passed ex parte in the aforesaid Title Suit No. 54 of 2002, I am of the view that no serious prejudice will be caused to the plaintiff/opposite party if he maintains status quo as on to-day in relation to the Club. I, therefore, dispose of this revisional application by directing the parties to maintain status quo as on to-day till 2nd August, 2002 on which date the said petition for stay has been fixed for hearing. Since, the plaintiff/opposite party is appearing in this revisional application, so he is directed to make his appearance on the said date fixed for hearing of the stay matter and in the meantime he will file objection against the stay petition, if there be any. It is further observed that the learned District Judge will take up the matter for hearing on 2nd August, 2002 as fixed by him without granting any adjournment whatsoever to either of the parties."

24. Thus, it seems that a very important factor relevant for the finding of a prima

facie case has since been omitted to be considered in the order under appeal. Reference to the order of status quo has been mentioned in the order, but no attention was paid to that as to how the order appealed against would affect the order of status quo already existing. On the other hand, it had proceeded on the basis that by reason of the ex parte decree, the petitioner continues to be a permanent member and as such is entitled to participate in the meeting. It is not necessary to go into this question as to what would be the effect of the ex parte decree, which has not been stayed. But on the stay application when a particular order is passed that order cannot be of no consequence. Even if by reason of the ex parte decree, the petitioner's status of permanent member is restored, even then such permanent status is bound by the order of status quo that has been passed. He cannot exercise his right as a member with permanent status except within the scope and ambit of the order of status quo. The order of status quo has to be interpreted in the manner in which it has been passed by the Court. The nature of the order has to be gathered from the observation made in the order itself and the reasons for granting such order. In our view, prima facie, it appears that the order of status quo bears the nature of the observation made in the order as quoted above and it cannot have any other meaning. Thus, we find that the order appealed against was passed overlooking and being oblivious of the factors, which were to be considered and weighed with for the purpose of finding out a prima facie case. Such an order cannot be sustained and, is, therefore, liable to be set aside.

25. However, all observations made above are tentative for the purpose of deciding this appeal. The observations and finding will in no way influence the learned Judge in deciding the suit or interlocutory matters pending before it, particularly the applications under Order 39 Rule 2A, Order 7 Rule 10 and Order 7 Rule 11 of CPC respectively. The learned Judge shall be free to decide the question according to his own wisdom and discretion and in accordance with law.

26. In the result, the appeal succeeds and is allowed. The order No. 6 dated 27th September, 2002 passed in Title Suit No, 1430 of 2002 by the learned Judge, 10th Bench, City Civil Court at Calcutta is hereby set aside.

There will, however, be no order as to costs.

R.N. Sinha, J.

27. I agree.