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In the Calcutta High Court

Case No : S.A.T. No. 1184 of 1977

Dibakar Naskar and Others — APPELLANT

Vs

Rotary Village Co-Operative Multipurpose Society Ltd. and Others — RESPONDENT

Date of Decision : 09-09-1977

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1, Order 41 Rule 33, Order 7 Rule 11, 151

Citation : 82 CWN 44

Hon'ble Judges : D.C. Chakraborti, J;A.K. Janah, J

Bench : Division Bench

Advocate : Saktinath Mukherjee, Asish Kumar Sanyal, Bhaskar Ghose, Bimal Kumar Chaterjee and B. Mitra, for the Appellant;Tapas Chandra Roy, Samaresh Banerjee and Alak Chakraborty, for the Respondent

Judgement

A.K. Janah, J.—This appeal is by the plaintiffs and it is against a decision of the Lower Appellate Court dismissing the plaintiffs'' suit in an appeal which, was filed by the plaintiffs against an order passed by the trial court holding that the court had no jurisdiction to entertain the suit upon the allegations made in the plaint. The plaintiffs instituted the suit for a declaration that the defendant Nos. 2 to 13 were not entitled to act as the members of the Managing Committee of M/s. Rotary Village Co-operative Multipurpose Society Ltd. and for an injunction restraining the defendants from acting as such. A few days after the institution of the suit the plaintiffs filed an application under Order 40 Rule 1 read with S. 151 of the CPC and for appointment of ad-interim Receiver in respect of the management of the defendant No. 1, Co-operative Society. On this application the trial Court appointed an ad-interim Receiver on the 4th February, 1977. On the very next day an application was filed by the defendants No. 1, 3, 5, 9 and 11 for stay of the aforesaid order for appointment of Receiver. On 7th February, 1977 a learned Advocate was appointed Receiver and she was directed to take possession of all properties and the books of accounts of the defendant No. 1, Co-

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operative Society. On the same day when the defendant''s application for stay of the order of appointment of Receiver was put up it was contended on behalf of the defendants that the court had no jurisdiction to entertain the suit and as such the order for appointment of Receiver should be stayed. Ultimately, on the 15th February, 1977 the learned Munsif took up the defendants'' petition for stay and heard the parties on the point whether the Court had jurisdiction to entertain the suit in view of the provisions of the West Bengal Co-operative Societies Act, 1973. The learned Munsif came to the conclusion that the court had no jurisdiction to decide the dispute involved in the suit, and accordingly he held that the defendants'' petition for stay of the order of appointment of Receiver should succeed. Before the question of jurisdiction of Court was decided the plaintiffs had filed an application for amendment of the plaint. The learned Munsif by the same order directed the said petition to be put up on a subsequent date after a copy of the petition was served upon the contesting defendants. From the copies of the order-sheet of the trial Court which was handed up to us by the learned Advocate for the respondents it appears quite clearly that the suit was kept pending by the learned Munsif.

2. Against the aforesaid order of the trial Court passed on the 15th February, 1977 holding that the defendants'' application for stay of appointment of Receiver should succeed on the ground that the Court had no jurisdiction to entertain the suit the plaintiffs preferred an appeal, being Misc. Appeal No. 154 of 1977 of the 10th Court of the Additional District Judge, Alipore. The learned Judge by his judgment and order, dated April 29, 1977 affirmed the decision of the trial Court that the defendants'' stay application should succeed but at the same time he dismissed the suit with costs. The present Second Appeal has been preferred against the said decision of the lower appellate Court.

3. Mr. Mukherjee, learned Advocate for the appellants, had contended before us that the Courts below were wrong in their view that the jurisdiction of the Civil Court to entertain the present suit was barred by the provisions of the West Bengal Co-operative Societies Act, 1973 (hereinafter referred to as the ''Act''). He has contended that although Section 132 bars the jurisdiction of the Civil Court in respect of a dispute required to be referred to the Registrar u/s 86 of the Act there being no dispute in the present case u/s 86 of the Act, the jurisdiction of the Court was not barred. Section 86 of the Act provides that certain disputes between parties mentioned in the said section shall be referred to the Registrar for settlement. The relevant provisions of Section 86 are as follows :

86. Disputes to be referred to Registrar--

(1) Any dispute relating to the affairs of a co-operative society or of the liquidator of a society shall be referred to the Registrar if the parties thereto are among the following, namely :--

(a) the society, its managing committee, any past or present officer, agent or

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employee or the liquidator of the society; or

(b) a member, past member or person claiming through a member past member or deceased member of the society ; or

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.....

4. The proviso to that section makes the provisions of sub-section (1) inapplicable in certain cases but we are not concerned with the same in this appeal. Sub-section (2) of Section 86 provides that any dispute mentioned in sub-section (1) other than a dispute relating to the recovery of money shall be referred to the Registrar within one month from the date of the cause of action. Mr. Mukherjee argued that Section 21 provides for holding the general meeting by a co-operative society within a certain time. If no such meeting is held the section enables the Registrar to call such a meeting within a certain time. If the Registrar does not exercise his power under the said Section the State Government has the power to permit the Registrar to call a general meeting after the expiry of the period mentioned in the section. According to Mr. Mukherjee in the present case the general meeting of the society not having been held and the Registrar or the State Government not having exercised their powers under the said section the appellants are left with no other remedy than to approach a Civil Court for a direction upon the Registrar to perform his statutory duties. Mr. Mukherjee stated that in fact an application for amendment of plaint for adding the Registrar as a party to the suit had been filed by his clients in the trial Court. That being the position, Mr. Mukherjee argued, there was no dispute within the meaning of Section 86 and, therefore, the Civil Court had jurisdiction to entertain the suit. He relied upon the decision in Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, in support of this contention of his. In that case the Supreme Court laid down certain principles regarding exclusion of jurisdiction of Civil Court. These are as follows :--

(1) Where the statute gives a finality to the orders of the special tribunals the civil courts'' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the enquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that

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all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under the Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

In the aforesaid case the appeals before the Supreme Court arose out of a suit for a declaration that some provisions of law relating to assessment under Madhya Bharat Sales Taxes Act were ultra vires and for refund of the taxes illegally collected. The Supreme Court held upon a review of a number of authorities that such a suit was not barred.

5. In the present case the plaintiffs have alleged in their plaint that the defendants Nos. 2 to 11 who are the members of the managing committee of the defendant No. 1 Co-operative Society have not held the general meeting in accordance with the provisions of Section 21 and they were illegally functioning as members of the managing committee and the plaintiffs brought the suit for an injunction restraining the defendants from acting as such. According to Mr. Mukherjee there is no dispute which can be referred to the Registrar u/s 86 of the Act. ''Dispute'' has been defined in Section 2 (Q) of the Act. It "means any matter capable of being the subject of civil litigation, and includes a claim in respect of any sum payable to or by a Co-operative Society, whether such claim be admitted or not." It is quite clear, therefore, that the allegations in the plaint in the present case constitutes a ''dispute'' as defined in the Act. The relevant provisions in sub-section (2) of Section 132 is as follows :--

S. 132 (2). Save as provided in this Act, no Civil or Revenue Court shall have any jurisdiction in respect of.....

(d) Any dispute required u/s 86 to be referred to the Registrar.

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Reading these provisions together it is quite clear that the jurisdiction of the Civil Court to entertain a suit involving a dispute as in the present case is expressly barred. Mr. Mukherjee tried to get over this difficulty created by Section 132 with the argument that at the date of the suit the managing committee had become defunct. No general meeting of the Co-operative Society was held in terms of sub-sections (1) and (2) of Section 21 and the time for calling the meeting by the Registrar had also elapsed, and therefore, the plaintiff had no remedy under the Act. Mr. Mukherjee further contended that the general meeting of a Co-operative Society shall have to be held at least once in every co-operative year. Under sub-section (2) such meeting shall not be held more than 15 months after the date of the last preceding meeting held under sub-section (1). If no such meeting is held within this extended period sub-section (3) empowers the Registrar to call a general meeting. Under sub-section (4) the State Govt. may, in special circumstances, permit the Registrar to call the general meeting even after the expiry of 18 months from the date of the last preceding meeting held under sub-section (1). In the present case the grievance of the appellants is that the respondents Nos. 2 to 11 did not call a general meeting of the respondent No. 1 Society even within the extended period of 15 months as provided in sub-section (2). That being so after the expiry of the said period of 15 months and before the expiry of 18 months the appellants could have approached the Registrar to take appropriate steps under sub-section (3) of the Act. This is certainly a matter "relating to the affairs of a Cooperative Society". Under the definition ''dispute'' means any matter capable of being the subject-matter of civil litigation. The grievance made by the appellants in the present suit is, therefore, a dispute within the meaning of section 86 of the Act. In our view, therefore, the civil courts'' jurisdiction is expressly barred u/s 132 (2) (d).

6. The next point for consideration is whether the lower appellate court was justified in dismissing the entire suit in the circumstances of the present case. The appeal before the lower appellate court was an appeal against an order holding that the petition for stay of appointment of Receiver filed by the defendants should succeed on the ground that the court had no jurisdiction to entertain the suit. The appeal was registered as a miscellaneous appeal i.e. an appeal from an order refusing to appoint a Receiver. So the question is what was the scope of the appeal, and whether in an appeal from an order it was competent for the appellate court to dismiss the suit itself, which was pending in the trial court. In support of his contention that the suit could not have been dismissed Mr. Mukherjee relied upon the decision in Institute Indo-Portuguese and Others Vs. Theotonio Borges and Others, . In that case it was held that in an appeal arising out of an application for appointment of an interim Receiver and for an order of interim injunction it was not open to the appellants to contend that the court which has appointed Receiver had no jurisdiction to pass such an order. In such an appeal the appellate court could not consider the said question which can properly be gone into in the suit itself. It was further held that if the defendant so chooses he could raise the question as a separate issue in the suit

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itself. Mr. Mukherjee placed before us a passage from Woodrooffs Law relating to Receiver, 5th Edition, page 95. The said passage is as follows :--

The appointment of a Receiver in limine, therefore, like granting of a preliminary and interlocutory injunction is not an ultimate determination of right and title and the court, in passing an order upon the application, in no manner decides the question of rights involved, nor anticipates its final decision upon the merits of controversy.

7. There is no doubt that the decision of the court either appointing a Receiver or refusing to appoint a Receiver is without prejudice to the final decision which the court is required to arrive at in course of hearing of the suit. In such an interlocutory proceeding the court expresses no opinion about the ultimate question to be decided in the suit. If the plaintiff satisfies that it has a prima facie case and shows his apparent right to the subject-matter in the suit and that there is an imminent danger or loss which cannot be prevented without the intervention of court, the court may in an appropriate case appoint a Receiver. It must not, however, be lost sight of that here in the present case the defendants resisted the plaintiffs'' prayer for appointment of Receiver on the ground that the suit itself could not be entertained by the court because of the bar created by the special statute in question. Mr. Roy, learned Advocate for the respondents has contended before us on the basis of several orders passed by the trial court that in the present case both the parties were perfectly aware about the point in dispute between them. He has contended that whether an issue regarding the maintainability of suit was framed or not the parties were perfectly aware that the dispute between them was on the question whether the court had jurisdiction to try the suit or not. That being so, argued Mr. Roy, it was immaterial whether any issue was raised or not. He contended that the order passed by the lower appellate court was, therefore, perfectly justified. He relied on the provisions of order 41 rule 33 of the Code in support of his contention that it was open to the lower appellate court to make such order which ought to have been passed by the trial court, and as such, the order could have been passed by the lower appellate court although no appeal was preferred before that court by the defendants. Several decisions were cited by him in support of his contention, but it is not necessary for us to enumerate those decisions for the purpose of present appeal. It has already been noticed that the appeal before the lower appellate court was only against an order. In such an appeal the entire suit does not come up before the appellate court. What comes up for decision before the appellate court is the correctness of the order which has been appealed against. In Khushro S.Gandhi and Others Vs. N.A. Guzder and Others, , the Supreme Court has pointed out that in a revision against an interlocutory order of a trial court the High Court cannot try other issues arising in a case even by concession of the parties. Mr. Roy on behalf of the respondents contended that since the parties were aware that the dispute between them was with regard to the question of jurisdiction of the court to entertain the suit, the lower appellate court was right in dismissing the suit was not maintainable. We are unable to accept this

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contention of Mr. Roy. In our view, the lower appellate court went beyond the scope of the appeal in making an order of dismissal of the suit. The provisions of order 41 rule 33 relied upon by Mr. Roy in this regard does not help him. The lower appellate court could not, in our view, enlarge the scope of appeal by resorting to the power conferred upon the appellate court under order 41 rule 33. Upon the view taken by the lower appellate court it was certainly open to that court to dismiss the plaintiffs'' appeal. But the lower appellate court should have stopped there without proceeding any further. It would have been for the trial court then to pass appropriate orders. If the trial court was of the view that the suit is barred under some provisions of law it could have rejected the plaint under clause (d) of Rule 11 of Order 7.

8. In the above view of the matter the appeal must succeed in part. The judgment and decree of the court of appeal below dismissing the plaintiffs'' suit is set aside. But the order dismissing the miscellaneous appeal is maintained. The matter will now go back to the trial court for passing appropriate orders in the suit. This appeal is accordingly allowed in part as indicated above. In the circumstances of the case we make no orders as to costs. Learned Advocate for the appellants prays for stay of operation of the order for the purpose of enabling him to file an application for leave to appeal to the Supreme Court.

In a matter like this, we do not think we will be justified in passing an order for stay, as prayed for.

The prayer is accordingly rejected.

D.C. Chakravorti, J.

I agree.

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