(1971) 02 CAL CK 0021

In the Calcutta High Court

Case No : Suit No. 69 of 1963

Himangsu Sekhar Paul APPELLANT

Vs

Kishori Lal Paul and Others RESPONDENT

Date of Decision : 16-02-1971

Acts Referred:
Calcutta High Court (Original Side) Rules, 1914 — Rule 3, 51
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : AIR 1972 Cal 77 : (1974) 2 ILR (Cal) 530

Hon'ble Judges : Ramendra Mohan Datta, J

Bench : Single Bench

Judgement

Ramendra Mohan Datta, J.—This matter has come up before me lor review of taxation of the Bill of Cost No. 272 of 1967 and for an order, inter alia for varying and/or setting aside the findings of the Taxing Officer given on 12th August, 1970. The matter in question arises out of an application made before A. N. Sen J. by one of the parties herein claiming the following reliefs :--

(a) Time to file the report by the Special Referee be extended by two months from date of the order to be made hereon;

(b) The Special Referee be directed to proceed with the reference in terms of the consent decree and orders dated 8th March, 1965 and 26th August, 1965)

(c) That the Special Referee be directed to follow the procedure laid down by the reference rules of this Court and in the CPC :

(d) The Special Referee do proceed with reference in respect of matters and/or issues which arise under the consent decree and not to bring in matters which are beyond the scope of enquiry;

(e) The orders by Special Referee for filing of additional or amended statement of facts by oral application on behalf of plaintiff may be set aside :

(f) In the alternative. Special Referee do file a special report as to wiry the plaintiff is allowed to file the additional statement of facts in the manner sought to be done and at this stage :

(g) Costs of and incidental to this application may be paid by the plaintiff, and

(h) Such further order or orders be made as to this Hon''ble Court may seem fit and proper.

2. That application was moved before A. N. Sen J. on a notice of motion and an order was made inter alia to the following effect :

"And it being made clear that this Court in setting aside the order of the Special Referee as hereinafter mentioned only on the ground that he made the order without a proper application and without giving the defendant opportunity to oppose the same and that this Court is not setting aside the said order on the ground that such an order should not have been made.

It is ordered that the time for the Special Referee to file his report herein be and the same is hereby extended by six months from the date hereof. And it is further ordered that the orders of the said Special Referee for filing of additional or amended statement of facts by oral application on behalf of the plaintiff be and the same is hereby set aside. And it is further ordered that the plaintiff be at liberty to make proper application before the Special Referee for leave to file the additional statement of facts and that such application for leave shall have to be moved upon notice thereof to all the defendants with a copy of the proposed additional statement and also the grounds on the basis of which it is sought to be made and that the defendants be at liberty and entitled to oppose the said application if so advised by using affidavit and that the said Special Referee shall thereupon decide the question in accordance with law upon the materials placed before him. And it is further ordered that the parties concerned and the Special Referee do act on a copy of the minutes of this order signed by an officer of this Court being shown to them and it is further ordered that each party do bear and pay its own costs of and incidental to this application to be if necessary taxed by the Taxing Officer of this Court."

3. When the matter came up before the Assistant Taxing Officer it was contended on behalf of the applicant that the matter before A. N. Sen J. should have been moved by chamber summons and not by way of notice of motion and the bill of cost should be allowed in accordance with the scale of fees or charges prescribed for chamber summons. The Assistant Taxing Officer upheld the contention. The matter was heard on appeal by the Taxing Officer on 12th August. 1970 and the same was set aside by the said Taxing Officer. It has now come up before this Court for review.

4. Two points are involved in this application. Firstly, whether the application before A. N. Sen J, was such that it should have been moved by way of chamber summons or by way of a notice of motion and secondly, if it was to be moved on chamber summons whether at the stage of taxation the charges should be

allowed by the officer concerned on the basis as prescribed for chamber summons.

5. As regards the first point the question is to be decided with reference to the Original Side Rules of this Court. Chapter VI. Rule 11 enumerates 18 items which are to be disposed of in chambers by a Judge. Items Nos. 12, 13 and 18 thereof are relevant for the purpose of consideration of this application and they are set out as follows :--

"12. Applications for time to plead, for leave to amend, for discovery and production of documents, and generally all applications relating to the conduct of any suit or matter.

13. All proceedings in execution. or otherwise under a decree or order.

18. Such other matters as are not expressly required to be disposed of in Court, and which the Judge thinks fit to be heard in Chambers, and such other applications as are directed to be made in Chambers."

6. The main Chapter which concerns an application to be made in a pending reference matter is Chapter XXVI of the Original Side Rules which deals with Reference Rules. The relevant rules under the said Chapter XXVI are Rules 50 and 51 which are as follows :

"50. Any officer taking a reference may at any time, pending the reference or on its conclusion, apply for the opinion of the Court on any question which may arise on the reference and for such purpose may report specially. Such special report may be made at the instance of any of the parties or of the officer himself, and shall be brought before the Court or Judge, within such time and by such party as the officer shall direct, by motion on notice that such special report may be confirmed, discharged or varied or that any directions may be given thereon; and on the hearing of such motion the same may be confirmed, discharged or varied as the Court or Judge shall deem just, or such direction may be given as shall appear to be necessary or expedient in that behalf.

Where such special report is not brought before the Court or Judge in accordance with the directions given, the officer may himself place the same before the Court or Judge, and such directions may be given as may be thought necessary."

51. In case an officer refuses or declines to make a special report when requested by a party so to do, such party may apply to the Judge in Chambers, on summons to the other parties to the reference, for an order requiring the officer to report specially.

The Judge may in his discretion make such order, upon such terms as to costs and otherwise as he may think fit."

7. Another provision under the Original Side Rules which need consideration are items 54 and 55 of Appendix Z which prescribes a list of prescribed Chamber Matters.

8. Chapter XX of the Original Side Rules deals with matters relating to Motions and Rules Nisi and Rule 3 thereof will required consideration in deciding this application. The said Rule 3 is set out as follows :

"3. Except where otherwise provided by Statute or prescribed by these rules, all applications, which in accordance with these rules cannot be made in Chambers, shall be made on motion after notice to the parties affected thereby, unless, according to the practice existing at the time of the passing of these rules, an order might be made ex parte in the first instance; but the Court, where satisfied that the delay cause by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order, ex parte, upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the Court may think just, and any party affected by such order may move to set it aside."

9. In the light of the above provisions, the facts leading to the said application made before A. N. Sen J-have to be considered. In the pending reference proceeding before the Special referee directions were given whereby the plaintiff was to file an additional statement of facts. The same was objected to by the clients of Messrs. J. N. Mitra & Co. who requested the Special Referee to make a Special report seeking the view of the Court about the filing of such additional statement of facts. The Special Referee declined to do so. Thereupon Messrs. J. N. Mitra & Co. on behalf of the defendant Nos. 1 to 6 and 8 made the said application before A. N. Sen J.

10. The several prayers made herein if considered together would substantially make it an application relating to the conduct of the reference proceedings pending before the Special Referee.

11. In my opinion, the said application before A. N. Sen J. is essentially an application made under Chapter XXVI Rule 51 which expressly provides that such an application has to be made to the Judge in Chambers on Summons to the other parties to the reference. Under the said provision the Judge may, in his discretion, make such order as he would think fit

12. The sum and substance of the said order of A. N. Sen J. was to the effect that the Special Referee should not have made the order on the oral application of the plaintiff and should have given an opportunity to the defendants to oppose the said application. Obviously that order has been made by the learned Judge under Rule 51 Chapter XXVI of the Original Side Rules. Chapter VI Rule 11, Item 13 of the Original Side Rules contemplates that all proceedings under a decree could be made by Chamber Summons. So also under Item 21 all matters relating to the conduct of any suit or matter should be done by Chamber summons.

13. Mr. B. C Dutt appearing on behalf of the clients of Mr. H. K. Mitter, Solicitor, contended that Chapter XX Rule 3 should be applied end such a matter should be made by way of notice of motion as has been done before A, N. Sen J. In my opinion, that provision has no application in the facts and circumstances of the application which was disposed of by A. N. Sen J. That provision cannot have any

application when there is an express provision prescribed by the said Original Rules dealing with such matter. Accordingly. I cannot accept that contention. Mr. Dutt then contended that the said application before A. N. Sen J. must have been made u/s 151 of the CPC and the said section had to be invoked in the interest of justice inasmuch as the Special Referee failed to do justice by his said order. It is settled law that Section 151 of the CPC can have no application when there is an express provision whereunder the application can be made. Lastly, Mr. Dutt contended that in deciding the said application A. N. Sen J. should be deemed to have taken into consideration the maintainability of the said application by way of Notice of Motion and that point should not be re-opened and re-considered at the stage of taxation. In other words, that point was finally decided by A. N. Sen J. and the application for re-opening the same over again at the stage of taxation would be barred by res judlcata

14. I have already held that for the purposes of taxation the application before A. N. Sen J. was such that it should have been moved by way of Chamber Summons and not by way of Notice of Motion. The Court at that stage must have proceeded on the basis that it was a proper application to be disposed of in Court. The point was neither urged nor decided by the learned Judge In that view of the matter for the purposes of taxation unless otherwise ordered the point should be gone into at that stage.

15. On the second point my attention has been drawn to the rule of practice which is being followed by the Taxing Office in such matters ever since 1917 pursuant to the Rulings of Chitty and Chaudhury JJ. The said practice direction provide as follows :

"Note by the Regr. (Mr. Hechle as Taxing Officer) on 14-5-1917 I suggest that the profession should be Informed that in future if application which can be made in Chambers are made in Court the Taxing Officer will in the absence of a certificate tax the costs of the application as of a Chamber application.

"I see no particular objection of the registrar in writing to the incorporated Law Society to remind them of what are properly Chamber matters but I think the attorneys ought to learn the Rules for themselves. I do not allow them to evade responsibility or to plead ignorance of the Rules with regard to paragraph 2 of the Note (I felt that 1 must take it that the Court considered that the application in question was proper for disposal in Court) I think that Counsel should not be allowed on taxation unless there has been a special certificate to that effect. This should apply to matters which have by inadvertence been dealt with to Court though they were real- ly Chamber matters. It is the duty of the Counsel and Attorneys to see that the application is made in the proper place."

C. W. Chitty.

15-5-1917."

Chaudhury 3. "I do not think it Is any use to write to the incorporated Law

Society Chamber application If made in Court should be taxed as. Chamber application unless otherwise directed by the Court. The mere fact they are disposed in Court sometime, does not affect the question of taxation I do not usually certify for Counsel in Chamber application.

A. Chaudhury

17-5-1917."

"The Taxing Office will please note and act accordingly.

H.H. Hechle

22-5-1917."

16. The said directives were being followed ever since 1917 in similar matters and accordingly such a practice has become the law of the Court. As observed by Tindal C. J. in Scales v. Cheese, (1844) 12 M & W 685 at p. 687 "Every Court is the guardian of its own records and master of its own practice."

17. In my opinion, since this practice has existed since at least 1917 I see no reason why the same should not be adhered to without even Questioning the reason for doing so. In the case of Hanutmull Boid v. Federation Bank of India in Suit No. 2020 of 1947 (Cal) a similar point was raised in taxation and the same came up before G. K. Mitter J. who by his judgment and order D/- 13-9-1961 (unreported) disallowed the fees of counsel charged on the basis of a motion and allowed the fees on the basis of a Chamber application.

18. That being the position I decide that the Bill of cost No. 272 of 1967 in so far as the same related to the application which was disposed of by A. N. Sen J. should be passed in accordance with the charges prescribed for Chamber Summons and not as that of Notice of Motion. The applicant having succeeded should get the costs from Mr. Dutt''s clients who opposed. Certified for Counsel.

19. Let the Registrar Original Side circulate the order in a concise form as a practice direction for the benefit of the profession and of the Taxing Office.

