(1952) 07 CAL CK 0031

In the Calcutta High Court

Case No : Suit No. 2357 of 1949

Satyaprasad Ghosal APPELLANT

Vs

Subodh Chandra RESPONDENT

Date of Decision : 01-07-1952

Acts Referred:

Calcutta High Court (Original Side) Rules, 1914 — Rule 3
Calcutta High Court (Original Side) Rules, 1940 — Rule 10, 11, 12, 9
Civil Procedure Code, 1908 (CPC) — Order 40 Rule 2

Citation : AIR 1953 Cal 672

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : C. Sarkar, for the Respondent

Judgement

P.B. Mukharji, J.—These are objections to the passing of the accounts of the Official Receiver in this partnership suit and relate to three periods of time. The first period of time is the second half of 1949, the second period of time is the first half of 1950 and the third period is the second half of 1950. In other words these objections cover a period of one year and a half from the middle of 1949 till the end of 1950.

2. The objections are made on three grounds. In the first instance it is said that the Official Receiver has charged commission on gross collections made by the Manager who is the defendant in this suit. Secondly the Official Receiver has debited the account with the salary of (i) a drawn at Rs 50/- per month and (ii) an estate clerk at Rs. 60/- per month. Thirdly it is said that the accounts as filed by the Official Receiver do not show what amount has been received by him in gross on which he has been charging the commission. These are the only three objections made before me to the passing of the Official Receiver''s accounts.

3. The order appointing the Official Receiver as Receiver in this suit was made by Banerjee J. on 21-7-1949. It is necessary to set out the relevant portions of that order because most of the arguments relating to the first objection concern the

terms of that order. The relevant terms of the order appointing the receiver are:

"It is ordered that the Official Receiver of this Court be and is hereby appointed the Receiver of the business carried on under the name and style of ''India Hotel'' at 62, Mirzapore Street, Calcutta including all the assets & books of account in the plaint in this suit mentioned (thereinafter collectively referred to as the said property) with power to him to get in (sic) collect the outstanding debts and claims due in respect of the said property and with all the powers provided for in Order 40, Rule 1 Clause (d) of Civil P. C."

''The order thereafter proceeds to direct:

"And it is further ordered that the defendant and all persons claiming under him do deliver up quiet possession of the said property together with all accounts books papers memoranda and writings relating thereto to the said Receiver."

Then the order continues to direct:

"And it is further ordered that the said Receiver do take possession of the said property together with the documents and papers as aforesaid and collect the issues and profits thereof."

Then the order proceeds to provide:

"And it is further ordered that subject to the defendant furnishing security within a fortnight from the date hereof for the sum of Rs. 5,000/- to the satisfaction of the Registrar of this Court the said Receiver be at liberty to appoint the defendant Manager of the said business of ''India Hotel'' and it is further ordered that the defendant so to be appointed the Manager of the said business as aforesaid to submit a weekly statement of accounts in respect of the said business."

Thereafter the order concludes by providing that:

"The receipt or receipts of the receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver and directs the receiver to file half yearly accounts."

4. Upon this it is contended on behalf of the objectors by the learned counsel Mr. Sarkar appearing for them, that the defendant Manager was managing the business and the collections that were made from the hotel business were really his collections and not the Receiver''s collections. Therefore it is his contention that the Receiver has earned no commission on such collections. This argument, in my view, proceeds on a wrong interpretation of the order appointing the Receiver. As I construe the terms of that order it appears to me that the Receiver is in possession of the entire business of the ''India Hotel'' and that he was given the liberty to appoint the defendant as Manager in order to aid him as a Receiver in charge of the business.

This is a very usual and common form of the order when a Receiver is appointed of a running business. The Receiver, in such a case, although legally responsible for the running of the business, does not in fact run the business himself but through a competent Manager or an Agent and it is customary and the usual practice in such cases to give liberty to the Receiver to appoint such Manager. That is exactly what is done by the present order appointing the Official Receiver. It does not mean that the Manager is in legal possession of the business. That legal possession and the legal responsibility for the management of the business remain with the Receiver and not with the Manager.

In law, therefore, it is the collection made by the Receiver although the collection is through the hand of an agent who is described as the Manager. It is the Receiver''s receipt that alone can give a proper discharge and it is to the receiver again who is by the express terms of the Order to collect all debts and claims of the business as well as all issues and profits. The order makes it clear that liberty was given to the Receiver to appoint the defendant as Manager but that does not mean that the order itself appointed the Manager so that the Manager also becomes an officer of the Court.

5. At this stage it will be appropriate to notice an incidental argument made on this point by Mr. Sarkar. The basis of that argument is the Bond signed by the Manager on 3-8-1949. By this Bond the defendant Subodh Chandra Sen Gupta and one Jatindra Nath Banerjee bound themselves to the Registrar of this Court for the sum of Rs. 5,000/- for the purpose of the security as Manager. This was in pursuance of the direction of the order to furnish security to the satisfaction of the Registrar. Jatindra Nath Banerjee acted as the surety. This Bond provides the condition that the Manager

"shall duly account for all and every sum or sums of money or other property which the Manager has received or shall hereafter receive or has or shall become or be held liable to pay or account for as such Manager as aforesaid and do and shall pay or deliver the same as the said High Court or a Judge thereof has directed or shall hereinafter direct."

6. Upon this term of the condition of the Bond Mr. Sarkar argues that the Manager''s liability to pay or account is to the High Court or to a Judge thereof and not to the Receiver. That again is an untenable argument. The condition of the Bond as I have quoted makes it quite clear that this liability of the Manager is to the High Court or to a Judge thereof according to the direction already given or to be hereafter given by the Court or the Judge. Now the Court had already given by its very order of appointment of the Receiver the direction upon the Manager to submit weekly statements of accounts to the Official Receiver. By express terms of the order the Receiver is to have possession of all accounts. The Official Receiver in this case by the terms of the order again is the arm of the High Court itself. Therefore this argument of Mr. Sarkar is also unavailing.

7. On these grounds I hold that the collections made through the Manager were and are in law the collections of the Receiver.

8. Mr. Sarkar then argues that there is no provision for the Official Receiver charging any commission even though it is held that the collections by the Manager are in law the Receiver''s Collections. This argument is based on Rule 3 Appendix 11 of the Original Side Rules framed under the Calcutta Official Receiver''s Act. The relevant items provide that the Official Receiver is entitled to charge fee by way of percentage or otherwise (1) at the rate of 5 per cent on rents recovered from house properties, (2) 5 per cent on outstandings recovered, (3) 5 per cent on sales of properties movable or immovable calculated on the total value realised in any one estate and (4) 5 per cent on the estimated value of moveable properties (other than securities) not sold but taken charge of.

The argument on this point on behalf of the objector is that the Official Receiver in this case does not come in any of the items I have just mentioned and therefore, cannot charge a 5 per cent commission. It is clear from the terms and the nature of the order appointing the Receiver that the Official Receiver in this case is in charge of the business of the Hotel which includes rent for boarding and seats as well as outstanding bills on accounts of food and other supplies bought by the boarders and lodgers. So far as supplies are sold by the hotel to its boarders and lodgers I am satisfied that such income arises out of sales of movables and fairly conies within the meaning of item 3 under Rule 3 which provides 5 per cent

"on sales of properties movable or immovable calculated on the total value realised in any one estate."

The bills that are outstanding and realised from time to time from the inmates of the hotel also, in my view, come within Item No. 2 of Rule 3 which provides for 5 per cent "on outstandings recovered". These bills will ordinarily also include seat rents or room rents for the boarders, Even if they did not, such seat rents or room rents do, in my view, come within the meaning of Item (1) of Rule 3 which provides for 5 per cent "on rents recovered from house properties."

9. For these reasons I hold that the Official Receiver is justified in charging the commission at the rate of 5 per cent on collections made from the hotel business and its assets even though such collections were made through the agency of the Manager. I would only refer here to the fact that the order appointing the defendant as Mannager does not entitle the Manager to charge any commission on the collections made by him. 3, therefore, overrule the first objection.

10. The second objection relates to the debit made by the Official Receiver against the accounts of the estate with the salary of a ''durwan at the rate of Rs. 50/- per month and the salary of an estate clerk at Rs. 60/- per month.

11. The substance of this argument is based on the New Rules 9, 10, 11 and 12 introduced by way of amendment in 1940 and added to Chapter 21 of the Original Side Rules of this Court. The argument is that such an appointment if objected to can only be allowed provided sanction of the Court being the senior Judge sitting on the Original Side is taken and that sanction has not been taken

in this case. Before deciding this point it is necessary to set out the facts.

12. To me it appears on the facts of this case that far from there being an objection to such appointment there was in fact a consent of the parties. With a view to get the real state of fact on this point a reference to the Minutes of 11-8-1949 show that both the parties represented by Mr. Ganguly, Solicitor for the plaintiff and Mr. Bose, Solicitor for the defendant made the categorical statement

"With regard to the preparation of inventory the Official Receiver is at liberty to appoint a clerk for the said purpose at a remuneration of Rs. 3/- per day. The Official Receiver will also appoint a whole time ''durwan'' who will remain posted at the said Hotel.

It is true at that stage Mr. Ganguly, Solicitor for the plaintiff, said

"The plaintiff here and now gives an undertaking through me to pay and bear the salary of the ''durwan'' and other establishment charges".

Thereafter Mr. Bose, Solicitor for the defendant, stated

"The Official Receiver should engage a whole time estate clerk who is unconnected with both the parties to this suit at a reasonable remuneration which he thinks fit and proper. The estate clerk shall check the account of running the Hotel every evening and will countersign the vouchers."

Thereupon the Official Receiver agreed by saying

"Yes, I shall appoint a ''durwan'' and an estate clerk as requested by the parties". While therefore the appointment of an estate clerk and a ''durwan'' was agreed to by both the parties as these were intended to be independent persons not connected with the parties and as the defendant himself was going to be the Manager conducting the business Mr. Ganguly, Solicitor for the plaintiff, not unreasonably retracted his undertaking to pay for them by saying "My client shall have no hand in the management of running the business, incurring of liabilities or in collecting of moneys. In these-circumstances my client cannot give the undertaking required by the Receiver."

The word "undertaking" here refers to the demand for indemnity from the parties to the Official Receiver against all liabilities, if any incurred by the Official Receiver for running the business through the defendant as Manager.

13. The next stage is reached at the Minutes of the Official Receiver held on 22-8-1949. Those Minutes definitely record consent to the appointments now objected to by the defendant. I will quote the Minutes on this point so that the consent will appear from the very language of such Minutes. The record of the Minutes is in these terms.

"The parties agree that a part-time supervisor be appointed by the Official Receiver at a remuneration of Rs. 60/- per month with effect from 13-8-1949.

The appointment of the caretaker appointed is confirmed at a remuneration of Rs. 60/- per month with effect from the 13th August last."

14. On these facts, therefore, I am satisfied that in this case the parties consented to both these appointments of the ''durwan'' and supervisor or estate clerk. It is noteworthy that since 1949 when these Minutes recorded the appointment by consent there has been no objection at any stage by any of the parties to the correctness of these Minutes.

15. Having set out the facts I propose now to interpret the Rules to which my attention has been drawn.

16. Now Rule 3 provides that clerical or other establishment and the cost thereof chargeable to the estate shall "if possible" be detailed in the Order. Although the Form under the Rules so provides, ordinarily it is never possible to detail this in the order appointing the receiver for the simple reason that unless actual charge is taken of the estate, it is difficult to know and anticipate what charges are necessary to be incurred for establishment, and the order appointing the Receiver in this case also does not detail such costs. Now Rule 9 goes on to provide that a Receiver shall not "normally" be allowed to make any charge on account of establishment but if he is of the opinion that it is necessary in the interest of the estate that he should engage ''Durwans, Sircars'' or other servants he shall be at liberty to do so.

But in that case the receiver shall within 7 days give notice to the attorneys or the parties that such engagements have been made and shall with such notice include a notice of a meeting to be held within 14 days where the question of such engagement shall be discussed. New Rule 10 then proceeds to say that if it is decided at that meeting that the employment is unnecessary the receiver shall forthwith dispense with the services of such servant or servants, But if there is any disagreement on this question between the Receiver and the parties or if any party objects to such appointment and the Receiver is still of the opinion that the retention of such servant is necessary in the interest of the estate, the Receiver shall forthwith make an application to the Judge on notice to the parties for permission to employ such servant. Upon such application the Judge shall then determine whether the engagement is necessary and if the Judge is of the opinion that objection to such employment was made on sufficient grounds, the Judge may direct the party objecting to bear the costs of the application.

17. Now as I read New Rules 9, 10, and 11, they provide a scheme when there is objection or disagreement and have no application where the employment of such servant is by consent of all parties''

18. Then comes New Rule 12 which provides that in the event of no objection, the Receiver shall prepare a statement for submission to the Judge setting out the particulars mentioned in R. 9 and such statement shall be submitted through the Registrar to the Senior Judge sitting on the Original Side for his confirmation of the engagement of the servant or servants.

19. Strictly speaking on the language of this New Rule 12, it applies where there is "no objection." Now objections are referred to in the preceding Rule 10 and this obviously means and refers to the case where the Receiver has made the appointment on his own initiative under Rule 9 without consulting the parties and without their consent and then when he calls a meeting the party or parties object to the appointment but the Receiver nevertheless felt that in the interest of the estate such appointment should be made. This New Rule 12, therefore, on its terms is silent on the point which is now raised before me, as to what the Receiver should do in case where the initial appointment is made not on his own initiative, but after calling a meeting of the parties where all parties consent to the proposed appointment and ask the Receiver so to appoint.

20. The procedure laid down in new Rule 12 appears to me to apply in the case where the Receiver makes an appointment on his own initiative which he has power to make under new Rule 9. But it does not apply to the case such as the present where the Receiver does not make the appointment on his own initiative but does so act on the consent of the parties concerned. That is why it is clearly provided in new Rule 9 that when the Receiver on his own initiative makes such an appointment he should call the meeting of the parties and obtain their consent and if there is no consent and the parties object he should apply to the Court under new Rule 11 read with new Rule 10.

In that context new Rule 12 coming as a sequel to this procedure can in my opinion only refer when it says "in the event of no objection being made" to the case where the Receiver makes an appointment on his own initiative and to which no formal objection is taken by any party and not to a case where the parties themselves consent and ask the Receiver to make the appointment.

21. On a reading of these new Rules which I have mentioned, it appears to me that the only reasonable and practical construction is to hold that where the Receiver at a meeting of all the parties is requested by consent of all to make an appointment, such appointment and the expenses therefore are not vitiated for lack of sanction contemplated under new Rule 12 and that new Rule 12 applies only in the case where the Receiver makes the appointment on his own initiative and no formal objection is made by any of the parties. To hold otherwise and say that in spite of such consent and in spite of the Receiver acting only on the consent of parties the Receiver has still to obtain the sanction of the Court under new Rule 12 is to produce the most insensible procedure and unjustified red tape and expense.

After all for what purpose can that sanction be required even in that case? In ordinary cases, the Court in order to determine whether the appointment is justified or not has for all practical purposes to rely on the facts as presented by the parties and the Receiver and if they are all agreed as to that appointment I do not see the rationale of this ritual of a sanction as laid down under new Rule 12 and I do not see how in that case the Court is going to decide who is the party who should be responsible for the extra expenses disallowed under new

Rule 12 but nevertheless incurred in the meantime by the Receiver with the consent of all parties.

If by consent any gross or unreasonable expenditure is incurred in any particular case, then in that case the Court always has the power to disallow any grossly excessive expenditure at the time of the passing of accounts under new Rule 21 read with new Rules 18, 19 and 20. No question of grossly unreasonable expenditure in this case arises as a ''Durwan'' at Rs. 50/- p. m. and an estate clerk at Rs. 60/- p. M. are, in my view, eminently reasonable and fair expenditure in this case. The objection on this score now appears to be a ruse of the defendant who as Manager finds that he does not earn a commission on the collections and that the Receiver is getting the commission on the work that the defendant is doing.

22. As the point relates to administration by the receivers, I called for a report on this point from the Assistant Registrar (Accounts) of this Court to state what has been the practice in this Court since these new amended Rules came into operation in 1940. The practice so far confirms the interpretation I have given to these Rules and the report says:

"The Receiver convenes a meeting when such request is recorded and all other parties interested are consulted and only when they are of the opinion that the appointment should be made, their consent is also recorded in that meeting and the Receiver makes the appointment. He does not thereafter take any further step for obtaining confirmation from the Court."

23. If this practice, however, was in my view in breach of the Rules, I would have had no hesitation in upsetting that practice, although it has lasted for these last twelve years. But it appears to me that the practice in this respect has followed the practical course and in my judgment is in accord with these Rules as I interpret them and the intention with which these Rules were made. I, therefore, overrule the second objection.

24. The third objection does not properly mean any objection on principle. The main complaint on this third ground is that the account as filed by the official Receiver does not show the details of what amount has been received by him in gross on which he has been charging the commission. That is an objection to the method of keeping accounts rather than the principle. Regarding the method of keeping of accounts the Official Receiver''s Act lays down u/s 9 of the Act and the Rules made under the Act including new Rule 17 what is to be done on this point. I do not find any breach of those Rules. The defendant could have seen not only the original accounts but also the explanation appended to any item in the account which he might have chosen to call from the Official Receiver and thus get any item explained in the account which according to him was not clear.

Mr. Sarkar did not ultimately pursue this point and I myself am of the opinion that there is nothing illegal or improper in the accounts filed. The only illustration on which Mr. Sarkar relied was an entry in the account filed under the date

31-8-1949,

"Government commission on Rs. 1,187-5-0 at 5 per cent vide note of S. K. Roy from 13th to 19th August 1949"

against which a sum of Rs. 94-3-0 is shown. Mr. Sarkar''s comment is that the Official Receiver should have set out the note of S. K. Roy in that item. I do not agree. It gives sufficiently express indication to the reference by which it can always be checked and if Mr. Sarkar''s client wanted to examine the note of S. K. Roy he could have easily called for it and satisfied himself.

25. I, therefore, also overrule the third objection.

26. In these circumstances I pass the Official Receiver''s account disallowing all the objections of the defendant. The defendant will pay the costs of these proceedings as an application; certified for counsel.

