

(1977) 12 CAL CK 0006

Calcutta High Court

Case No: None

Institution of Engineers (India)
and Another

APPELLANT

Vs

Bishnupada Bag and Another

RESPONDENT

Date of Decision: Dec. 20, 1977

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115, 151

Hon'ble Judges: P.K. Banerjee, J; G.N. Roy, J

Bench: Division Bench

Advocate: Saktinath Mukherjee and Subrata Ray, for the Appellant; K.K. Maitra and Asit Kr. Banerjee, for the Respondent

Judgement

1. This Rule is directed against the exparte or No. 3 dated 6th January, 1977 u/s 151 and the exparte order No. 7 dated 11th January, 1977 u/s 151 and Order 39 Rule 7 of the CPC directing for issuing a writ of commission since modified by another exparte order No. 8 dated 14th January, 1977 passed by the learned Subordinate Judge, 4th Court, Alipore in Title Suit No. 2 of 1977. The aforesaid Title Suit No. 2 of 1977 was instituted by the Plaintiff opposite party No. 1 inter alia praying for the leave under Order No. 1 Rule 8 of the Code of Civil Procedure, for a declaration that there solutions passed in the three meetings dated October 31, 1976 and November 1, 1976 by the Institution of Engineers (India) were illegal, arbitrary and void and also for a decree for permanent injunction restraining the Defendants to carry into effect any of the resolutions passed in the said meetings and for other reliefs.

2. The short facts of the case are that the Petitioner No. 1 viz. the Institution of Engineers (India) was initially incorporated at Madras in 1919 under the Indian Companies Act and under the Royal Charter Granted to the Said institution, the said institution is constituted and administered in the manner as laid down in its Bye-laws and regulations from time to time. Under the Bye-laws existing form time to time the Council of the Institution was empowered to make or amend or rescind

regulations so that the same are not repugnant to the Charter and Bye-laws. It further appears that after consideration of suggestion from the local centers of the Institution at its 489th meeting held at Shillong on the 31st May, 1976 and 490th meeting held in New Delhi on the 17th August, 1976 the Council passed various resolutions recommending changes in the Bye-laws and the Regulation, inter alia, relating to the proposed new constitution of the Council and allied matters. On 31st October, 1976, an extra ordinary general meeting was held for considering the proposed amendment of the Bye-laws and according to the Petitioner viz. The Institution of Engineers, the proposed amendment of the Bye-laws was passed on the said date. For the purpose of the said meeting proxies held by the persons concerned were ascertained and declared at the meeting. After the said resolution was passed adopting the proposed amendments of the Bye-laws, a special general meeting was also held on the said date and in the said special general meeting the proposed amendments to the regulations were also approved and the proxy forms submitted for the said meeting were counted. On November 1, 1976 another special general meeting was held and the said meeting was a requisition meeting. The said requisition meeting did not pertain to change the Bye-laws and regulations but was concerning the proposed Council resolution recommending to Government for formation of an all India services of Engineers and after discussion the said resolution was put to vote and lost and the proceedings of the said meeting were duly published. The Petitioners contend that after the institution of the said Title Suit No. 2 of 1977, the Plaintiff wrongfully obtained exparte order u/s 151 read with Order 39 Rule 7 CPC which was modified by another exparte order dated 14th January, 1977 for appointment of a Pleader Commissioner for the purpose of preparation of the proxy vote from Utkal on the allegation that the countering of proxy forms was wrong. The Petitioner, thereafter, made an application u/s 151 of the CPC praying setting aside the exparte order and the Plaintiff filed a written objection to the said application u/s 151 of the CPC but the said application of the Defendant was rejected and the learned Pleader Commissioner was directed to proceed with the inventory commission and to submit his report. It may be stated in this connection that by the first exparte order the learned Pleader Commissioner was directed to count the proxy votes from Utkal and to prepare an inventory of such proxy votes and to bring those votes to the Court under sealed cover duly signed by the parties and by the amended order on 14th January 1977 the Pleader Commissioner was directed to count the proxy votes from Utkal and others and to perform the other works as indicated in the earlier order, namely, Order No. 7 dated 11th January, 1977.

3. Mr. Saktinath Mukherjee, the learned Advocate appearing for the Petitioner s contends that the said exparte orders were par se illegal inasmuch as there cannot be any commission for the purpose of the fishing out evidence. Mr. Mukherjee submitted that the subject matter of the suit was not the proxy form and wrong counting of proxy forms may be an evidence favourable to the Plaintiff but it was

not the duty of the Court to help the Plaintiff to fish out such evidence of wrongful counting of proxy votes by appointing a Pleader Commissioner for the purpose. Mr. Mukherjee, further submitted that Order 39 Rule 7 applies to the subject matter of the suit and not to nay evidence in a suit. Mr. Mukherjee also submitted that even u/s 151, such commission could not be issued by the Court because issue of an inventory commission for helping a party to fish out evidence is opposed to justice. In this connection, Mr. Mukherjee relied on a decision of the Supreme Court in the case of [Padam Sen and Another Vs. The State of Uttar Pradesh](#),. It was held in the said case that if there is any allegation that certain documents are forged, the party can prove forgery by evidence but it was not the business of the Court to collect evidence for the party. Mr. Mukherjee further submitted that even tin the case of interrogatories, it is an accepted principle of law that interrogatories, should not be prolix, oppressive, unnecessary or scandalous no such interrogatories should be allowed which are intended for fishing out a case for a party. For this contention of Mr. Mukherjee, reliance was made in a case reported in ILR 37 Bom, 347 .Bhagwan v. Barjori. Mr. Mukherjee also relied on a decision reported in [Ramswarup Vs. Mst. Kesar and Another](#), where it was held that under Order 39 Rule 7 of the CPC it was not open to the Court to seize certain documents for the purpose of sue of the same as evidence in the case. Mr. Mukherjee also raised further objection as to propriety of the impugned orders. Mr. Mukherjee submitted that the Pleader Commissioner was appointed by the Court below for inventory of the proxy votes of all States duly signed by he parties to be brought before the court. Mr. Mukherjee submitted that inspection of ballot papers should not be ordinarily made but if it is essentially necessary to be inspected, the same should be made as a last resort and with great care and caution. In this connection Mr. Mukherjee relied on a decision reported in [Pulakam Ramakristnareddi and Another Vs. Nooney Panakalu](#), wherein it was held that order for inspection of ballot papers may be made with greatest circumspection and if it is to be inspected at all it should be made by Judge himself or by a subordinate in whose impartiality he has extreme confidence and the parties themselves should never have any access on the ballot papers. The said case related to a dispute concerning an election under the Municipal Act. Similar view was also expressed in another decision reported in AIR 1949 Mad 835 Tadulinga v. Shakuntala and it was held in the said case that the mode in which a voter has exercised his right of franchise should not be discovered whenever there is any dispute and before any order for inspection is made, there must be satisfaction of the Court on evidence in oath that such inspection is necessary and a very strong case is required to be made out to justify the production of ballot papers. Mr. Mukherjee contended that it is quite apparent from the plaint that the Plaintiff raised objection about counting of some proxy votes concerning Utkal in respect of a meeting held on a particular day but the learned Judge by his subsequent order directed for inventory of all the ballot papers relating to Utkal and other States even though there was and could not be any objection about the irregularity of counting of proxy votes in respect of other States.

4. Mr. Maitra the learned Advocate appearing for the Plaintiff/opposite party submitted that the revisional application u/s 115 of the CPC is not maintainable because by the impugned orders, the case has not been decided and in support of his said contention he relied on a decision in the case of Gyanand Chowdhury v. Jayanand Chowdhury, reported in AIR 1977 RC 53. In the said case, reliance was made to another case reported in AIR 1972 Pat 449 Ramgolan v. Nawin. But this contention of Mr. Maitra cannot be accepted because it has been provided for in Section 115 CPC as amended that interlocutory orders may also be challenged within the definition of a case decided. The explanation of Sub-section (1) of Section 115 as amended provides as follows:

In this Sub-section the expression "any case which has been decided" includes any order made or any order deciding an issue, in the course of a suit other proceeding.

5. Mr. Maitra next contended that irregularities about the counting of ballot papers and proxy votes were referred to in Annexure E/1 to the plaint and as such it cannot be contended that the dispute was related only to the proxy votes of Orissa. Mr. Maitra, further contended that for passing an order under Order 39 Rule 7 of the CPC it is not necessary that the said provision must confine to the subject matter of the suit itself and appropriate order can be passed under Order 39 Rule 7 CPC even in respect of matters in respect of which any question may arise in the suit and for this proposition Mr. Maitra relied on a decision reported in [Ram Charan and Others Vs. Murli and Others](#), . It may be stated in this connection that even assuming that the provision of Order 39 Rule 7 may relate not only to the subject matter of the suit but also in other matters in which any question may arise relating to the suit, no commission can be issued for the purpose of collecting evidence in a suit. In any event, such commission should not be issued for making inventories relating to ballot papers by ex parte orders without proper verification as to the essential requirement of such step even in a case where order 39 Rule 7 CPC is otherwise applicable. Mr. Maitra, further contended that in appropriate cases, the Election Tribunal has looked into the ballot papers for ascertaining the position and in this context he refers to a decision reported in [Ram Sewak Yadav Vs. Hussain Kamil Kidwai and Others](#), . It may be stated that as a proposition of law it cannot be said that even in appropriate cases the ballot papers cannot be looked into by the Court for proper adjudication of a dispute between the parties but what is emphasized is that such action should not be taken without extreme care and caution and only in such cases where inspection of ballot paper is essentially necessary for proper adjudication and the Court is satisfied on evidence that such extreme step is necessary. Mr. Maitra further contended that issue of an inventory commission is a matter of discretion of the Court and if the Court has exercised such discretion there should be no interference u/s 115 CPC particularly when such exercise of discretion is not perverse. The question of exercising discretion, however, does not arise in this case because we are of the view that an inventory commission cannot be issued for the purpose of fishing out some evidence which may be adduced by either if the

parties in the suit. It is, therefore, an improper exercise of jurisdiction by the Court below and such improper exercise has occasioned material failure of justice. The Rule is, therefore, made absolute. There will however, be no order as to cost. The prayer for stay of the operation of the order is refused.

P.K. Banerjee, J.

6. I agree.