

(1993) 01 CAL CK 0027

Calcutta High Court

Case No: F.M.A.T. No's. 3362 and 3363 of 1992

The Calcutta Swimming Club and
Another

APPELLANT

Vs

Deokinandan Bubna
 The
Calcutta Swimming Club and
Others Vs Rabindra Nath
Mukherji and AnotherRESPONDENT

Date of Decision: Jan. 25, 1993**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 6, Order 1 Rule 8, 151, 94, 99

Citation: 97 CWN 614**Hon'ble Judges:** Nikhil N. Bhattacharjee, J; Mukul Gopal Mukherji, J**Bench:** Division Bench**Advocate:** P.K. Mallick, J. Mitra, S.P. Sarkar, D. Deb, S. Dube and T.K. Chandani, Sudhis Dasgupta, S.P. Roychowdhury, B. Chatterji, Bajoria, A.K. Roy and Tandan, for the Appellant; A.K. Roy and Tandan, for the Respondent**Final Decision:** Allowed

Judgement

Mukul Gopal Mukherji, J.

The Calcutta Swimming club, its Secretary S. Dutta and its President D.S. Jain have preferred an appeal against the order dated 18.9.92 passed by the learned Chief Judge-in-Charge, City Civil Court at Calcutta in Title Suit No. 1934 of 1992. The said suit was brought by one Rabindra Nath Mukherjee, a member of the Calcutta Swimming Club praying for a declaration that the list of candidates for election of the club prepared by the defendants in terms of Rule 35(c) is illegal, bad in law and is liable to be cancelled, praying further for a degree of permanent injunction restraining the defendants from action and/or functioning and/or administering and/or taking any decision whatsoever and/or giving effect to the decision taken by them or to take any step in furtherance therewith. There, was a further prayer for a

decree for permanent injunction restraining the defendants from giving effect and/or further effect to their notice for Annual General Meeting dated 28.8.92 and taking further steps in aid of the said notice and also restraining the defendants from giving effect and/or further effect to the list of the candidates for the Committee election 1992-93 issued by the defendant No. 3 under Rule 35(c) dated 28.8.92 and from giving effect or further effect or to take steps in aid of alleged election of the Calcutta Swimming Club for the Committee members and the President which was allegedly held on 12th September, 1992, there was also a prayer for appointment of a Receiver upon the Club to run and administer the said Club and to conduct the election on the basis of valid permanent members as per the rules and regulations of the club. The learned Trial Judge issued notice upon the defendants asking them to show cause as to why the petition for injunction should not be allowed and considering the urgency in the matter he directed an order of status quo to be issued against both the parties as on that day till the disposal of the said petition.

2. Even though a leave under Order 1 Rule 6 the CPC was prayed for it does not appeal that the court was moved in this regard and no leave was granted by the court prior to the granting of an interim order of maintenance of status quo on 18.9.92.

3. The appeal preferred by the Calcutta Swimming Club and its Secretary and President against the said Rabindra Nath Mukherjee is numbered as F.A.M.T. 3363 of 1992. As and when the said appeal was admitted the court directed inter alia that further proceedings in Title Suit No. 1934 of 1992 pending in the court of learned Chief-Judge-in-Charge. City Civil Court, Calcutta would be stayed.

4. On 22.9.92 one Deoki Nandan Bubna filed another suit in the City Civil Court at Calcutta being Title Suit No. 2012 of 1992 against the Calcutta Swimming club and its President, D.S. Jain praying for a declaration that the election of the club held on 12th September, 1992 in terms of the notice dated 28th August, 1992 is illegal and is liable to be struck down, for a declaration that the resolution of the committee meeting dated 24th March, 1992 as well as the resolution of the committee meeting dated 27th May, 1992 which empowered the President to nominate two regular members of his choice is illegal, and is liable to be set aside, for a further declaration that after the resolution in the General meeting held in 1984 all the new members admitted by the club except under rule 15A and 15C are illegal and are liable to be set aside and/or cancelled. He prayed for a permanent injunction restraining the defendants from giving any effect and/or further effect to or to take steps regarding the election held on 12th September, 1992 pursuant to the notice dated 28th August, 1992, a permanent injunction restraining the Club's men, agents and servants from allowing the enjoyments and privileges to any person who is allegedly an admitted member of the Club after the resolution was passed in the Annual General meeting in 1984 excepting any member taken in terms of Rule 15A and 15C

for a further injunction on similar terms from giving any effect or further effect to and/or to take steps and/or further steps in aid therewith of the resolution passed by the Annual General Meeting held on 27th May, 1992 Vide Minute 9A(1) dated 24th March, and 24th July, 1992. In this suit also there was a submission made in the plaint that the plaintiff having filed the suit for his own self and on behalf of the other members claiming privileges and benefits of all the members of Calcutta Swimming Club, he craved leave under order 1 Rule 8 of the CPC for filing the suit in a representative capacity. The plaintiff further submitted that since the defendant No. 1 is an unregistered society, the plaintiff also craved leave under Order 1 Rule 8 of the Code of Civil Procedure. Immediately after the filing of the suit which was numbered as Title Suit No. 2012 of 1992, the learned Registrar of the City Civil Court passed an order on 22.9.92 directing the petition to be placed before the learned Judge, Bench VII on the same day for orders fixing 16.12.92 for further orders. Later, on the same day, an application for temporary injunction filed by the plaintiff against the defendants was forwarded by him to the learned Judge, Bench VII for hearing. The learned Judge-in Charge, Bench VII on hearing the learned advocate of the plaintiff passed an order no. 4 dated 24.9.92 issuing a rule calling upon the defendants to show cause within a week of the receipt of the notice as to why the order of temporary injunction should not be granted in terms of the plaintiffs prayer and till the hearing of the application, the defendants were restrained from giving further effect or to take any steps regarding the election held on 12th September, 1992 until further orders. It is against this order that the defendant appellants preferred an appeal before this Court which has been numbered as F.M.A.T. 3362 of 1992. At the time of admission of appeal, this Court also passed an order to the effect that all further proceedings in Title Suit No. 2012 of 1992 before the learned Judge, 7th Bench. City Civil Court, Calcutta would remain stayed.

5. In this suit also even though a prayer was made for a leave under Order 1 Rule 8 of the Code of Civil Procedure, the petition containing the prayer does not appear to have been moved and no such leave was granted to the plaintiff.

6. Both the appeals have been heard together simultaneously one after the other for the sake of convenience since common questions of fact and law are involved in them.

7. Before we go through this matter we have to keep in view the background of the case. Against the alleged misbehavior of Deoki Nandan Bubna on 29th July, 1992, a complaint was lodged by another member, P.D. Lata on 30th July. 1992 before the Club Authorities with request to take suitable action against Sri Deoki Nandan Bubna. On 4th August, 1992 there was a meeting of the Executive Committee which resolved that a written explanation would be asked for from Sri Deoki Nandan Babna. On 6th August, 1992 a letter having been issued by the Calcutta Swimming Club to Sri Deoki Nandan Bubna calling upon him to submit a written explanation for his conduct in club which took place on 29th July. 1992. Sri Deoki Nandan Bubna

by his letter dated 17th August, 1992 to the club authorities asked for one month's time to submit a written explanation. In the mean time Sri Deoki Nandan Bubna, suppressing the fact that he asked for time for submission of a written explanation, filed a suit in the City Civil Court at Calcutta being Title Suit No. 1670 of 1992 challenging the notice of the Calcutta Swimming Club dated 6th August, 1992 and made an application for interim injunction. On 17th August, 1992 the learned Judge, 10th Bench, City Civil Court, Calcutta passed an ex parte order restraining the club from taking any action against Sri Deoki Nandan Bubna on the basis of the letter dated 6th August, 1992 the Club preferred an appeal before this Court and by an order dated 28th August, 1992 this Court was pleased to dispose of the appeal by vacating the order dated 17th August, 1992 and directing the learned Trial Judge to dispose of application for interim injunction by 8th September, 1992 positively. On 8th September, 1992 the learned Trial Judge having heard both the parties dismissed the application for interim injunction. On the 9th September, 1992 one Vikrant Matta filed Title Suit No. 1869 in the City Civil Court, Calcutta. An application under order 1 Rule 8 was also filed. The learned Registrar directed the application to be placed before the 7th Bench. The other application for temporary injunction was also directed by the learned Registrar to be placed before the learned Judge, 7th Bench.

8. It does not appear that the application under order 1 Rule 8 C.P.C. was moved and no leave to sue in a representative capacity was granted. Yet the learned Trial judge passed on 11th September, 1992 an order of temporary injunction restraining the Club from holding its Annual General Meeting on the 12th September, 1992. The Club filed an appeal to this court impugning the order dated 11th September, 1992. A Division Bench while admitting the appeal passed an interim order to the effect that while the Club could hold the Annual General Meeting including the election, results thereof should not be declared. The Annual General Meeting was accordingly held and the election to the office bearers also took place but the results thereof were not published.

9. On 16th September, 1992 an application was filed by the plaintiff Vikrant Matta to withdraw Title Suit No. 1869 of 1992. On the same day Rabindra Nath Mukherjee filed an application in the said suit to be added as a party. On 17th September, 1992 the learned Judge, 7th Bench passed an order adding Rabindra Nath Mukherjee as a co-plaintiff in the suit while allowing Vikrant Matta to withdraw from the suit and accordingly the name of Vikrant matta was deleted from the cause title. It is against this background that Rabindra Nath Mukherjee filed a separate suit in his individual name being Title Suit No. 1934 of 1992. Though in paragraph 22 of his plaintiff averred that he had some interest and some grievance as that of Vikrant Matta who failed the suit in the representative capacity and he had also claimed to be added as a party in the said suit but he came to know from one Mr. S.K. Matta, father of the said Vikrant Matta that Vikrant matta was not keen to continue the suit and as such he had in the said suit no scope to be added and sought necessary leave against the

club authority. It will, however, not be out of place in this context to note that the appeal preferred by the Calcutta Swimming Club against the order of ad interim injunction granted on the 11th September, 1992 has already been disposed of and the interim order stands vacated, but while the said appeal was disposed of by a Division Bench of this Court, the said Court made it clear that the interim orders as obtained by Rabindra Nath Mukherjee and Sri Deoki Nandan Bhubna in their respective suits were in no manner affected.

10. The main contention raised by the appellants in both these two appeals is to the effect that while no leave was granted under Order 1 Rule 8 of the CPC for both these two suits since the Calcutta Swimming Club is an unregistered society the suits were not maintainable at all without such leave. In such state of affairs, no interim order could at all be passed even though so prayed for.

11. Before we enter into the merits of the respective cases it would be relevant to take into account the different provisions as set out in the Rules of the Calcutta Swimming Club. There are several classes of membership and they are i) Permanent ii) Associate iii) Missionary and iv) Expatriate.

12. Rule 14(b) provides that subscriptions shall be payable in advance, and every member shall pay the subscription quarterly or annually at his or her option. The due dates for quarterly subscriptions shall be the first days of January, April, July and October and shall be paid on or before January 31, April 30 July 31 and October 31 respectively and the due date for the annual subscription shall be on the first day of the month following the expiry of the period for which the subscription shall have been paid and shall be paid on or before the last day of the month.

13. Rule 19 deals with non-payment of subscription. It reads as follows :-

a) Should any member fail to pay his or her subscription within one month of its due date notice of such default shall be served on the member, and should the subscription still remain unpaid after 10 days from service of such notice, the Member shall be advised by registered post to the Member's registered address that his or her name will be posted on the Club Notice Board one week later unless payment is received. No Member shall be entitled after his or her name has been so posted, during such default, to exercise any privileges of membership until the amount due, in respect of which his or her name has been posted shall have been paid.

b) If within one month from the date of such posting, all sums due to of the club be unpaid, the committee shall remove the name of the member from the Membership Records and such removal shall be notified to the Member who shall cease to be a Member but shall nevertheless remain liable for the payment of all arrears of subscriptions unpaid up to the date of so ceasing to be a member.

c) The Committee shall have power to readmit any such member at any subsequent time upon receiving from the Member a satisfactory explanation of the delay in payment.

14. There is also a provision for loss of membership under Rule 20(c) by reason of non-payment of subscription as provided in Rule 19.

15. Rule 35 deals with the election procedure of the Committee. Rule 35(c) reads as follows :-

Not less than 14 days before the date of the Annual General meeting, a printed circular shall be issued to those members entitled to vote at general meeting giving the names of Members willing to serve on the committee of the ensuing year.

The procedure of election is further delineated in Rule 35(d) which reads as follows :-

Election papers giving names of members willing to serve on the committee for the ensuing year will be issued only at the General meeting to those attending members entitled to vote. Such Members will be requested to return the papers at a proper time during the General meeting duly marked (X) against the names of those members, not exceeding eleven in all, for whom they wish to vote.

Counting takes place as per report made by two scrutineers as delineated in Rule 35(e) which reads as follows :-

At the Annual General meeting the Chairman shall appoint from the Members present two scrutineers who shall examine the voting papers and who shall report to the Meeting the names of the eleven members who have the greatest number of votes, and such persons shall be declared members of the Committee, the contents of the voting papers shall not in any other respects be disclosed.

16. The provision with regard to members entitled to vote at the General Meeting as contained in Rule 47 reads as follows :-

Only permanent members (other than those on the absentee List) whose subscriptions have been duly paid up to the date of the Notice calling any General meeting shall be entitled to receive notice of such General meetings and to attend and vote thereat.

17. The rule with regard to holding of the Annual General Meeting as set out in Rule 48 gives out :-

A general Meeting of the Club shall be held on a day to be fixed by the Committee as soon after the close of the Club's financial year as may be practicable. Such general Meetings shall be called Annual General Meeting and all other General meetings shall be called Special General Meetings.

Business of the Annual General meeting is conducted as per Rule 49 which reads as follows :-

The business of the Annual general Meeting shall be to consider and adopt the annual Report; to receive and pass the audited Accounts for the preceding financial year which shall close on the 31st December, in each year; to elect the president Committee and Auditors; and to consider or transact any business which under these rules ought to be transacted at an Annual General Meeting. All other business shall be deemed special, but no such special business shall be brought forward unless notice thereof shall have been given to the Secretary and or Managing Member at least seven days before the date of such Meeting.

18. The case as brought out in the plaint inter alia is to the effect that according to rule 14(b) if subscriptions are not paid in respect of the quarterly subscription (becoming due on 1st of January, 1st of July and 1st of October) on or before January 31, April 30, July 31 and October 31 respectively and in respect of such members who paid their subscriptions annually (which falls due on the first day of the month following the expiry of the period for which the subscription shall have been paid) on or before the last day of the month, notice of such default shall be served on the members and should the subscriptions still remain unpaid after 10 days from service of such notice, the members shall be advised by registered post that his or her name will be posted on the Club. Notice Board one week later, unless payment was received in the mean time. No Member shall be entitled after his or her name has been so posted, during such default to exercise any privileges of membership until the amount due, in respect of which his or her name has been posted shall have been paid. If within one month from the date of such posting, all sums due to the club be unpaid, the Committee shall remove the name of the member from the membership records and such removal shall be notified to the member who shall cease to be a member but shall nevertheless remain liable for the payment of all arrears of subscriptions unpaid upto the date of so ceasing to be a Member. What the club Authorities in the instant case, did prior to the holding of the Annual General Meeting was to accept the membership subscriptions from the defaulting members so that all such defaulting members were allowed to be a present and to cast their votes in the annual General Meeting. It has been contended by the plaintiff in both the cases that only permanent members whose subscriptions have been duly paid upto the date of notice were entitled to receive the notice for such Annual General meeting so as to attend the same and to cast their vote thereat. But this Rule was transgressed in accepting the membership subscription beyond the stipulated date. A list of some such members whose subscriptions were accepted beyond the stipulated date was given out in the Annexure to the injunction application.

19. In order to satisfy the magnitude of difference of votes in between the candidates who stood elected and the candidates who lost the election marginally, we called for the entire records of the election that took place in the annual General Meeting held on 12th September, 1992 and on a proper scrutiny we found the margin to be wide enough to exclude the possibility of the balance being tilted in

favour of those candidates who won the election by inclusion of at best 5 or 6 members who are mentioned as persons who have been illegally allowed to join the Annual General Meeting with due clearance of their outstanding dues beyond the stipulated day of July 31, 1992. The plaintiff in each case has not yet been successful to give out an entire list of all such candidates do as to impress upon the point that a significant number of ineligible voters were allowed to come in and join the Annual General Meeting and cast their votes. Despite the fact that they were not so eligible, just because their outstanding dues were accepted beyond the stipulated date beyond the last day of the clearance of the dues, obviously a controversy does arise whether all these rules regarding non-enjoyment of the privileges and the rights of membership on account of the default in payment of subscription, are merely directory or mandatory. It is contended on behalf of the respondent that in each case such rules were mandatory whereas on behalf of the appellants it was urged that the rules were merely directory in as much as provisions are contained in the Rules that with the clearance of the dues their rights and privileges could be restored. But that as it may, it is significant enough that the plaintiff, Rabindra Nath Mukherjee proposed in the election in the Annual General Meeting some candidates who were themselves defaulters, thus given a go by to the contention that defaulting members despite the clearance of their dues were ineligible to vote.

20. It was contended on behalf of the respondent in both the appeals that only permanent members whose subscriptions have been duly paid up till the date of the notice were entitled to notice and were conferred with the rights to attend the General Meeting and vote thereat. If upto the date of the notice any member's subscriptions were due he could not later on pay off his dues and accept notice and attend the General Meeting and vote thereat. A detailed argument was made as regards the different privileges of joining the swimming pool or enter restaurant but then as regards the rights of such members to be treated as a member as such so as to be entitled to notice and to attend the General meeting and to vote thereat, it was considered by the members that there was indeed no provision for reinstatement of the privileges on clearance of the dues. It was contended on behalf of the respondent in each case that infraction of the rules conferring privileges and violation of the rules given rights, are not to be treated alike. The temporary suspension of a member on account of the non-clearance of dues by the stipulated date could be removed immediately with the clearance of the subscription but one isolated error on the part of a member in not clearing his or her dues by the stipulated date had the cumulative effect of multiple disqualifications regarding the enjoyment of rights with regard to entitlement of notice for attendance in the General Meeting and to vote in the said General Meeting. We have taken into account the election procedure clearly delineated in Rule 35 and we cannot really persuade ourselves to agree that there has been any serious infraction of the Rules by acceptance of the subscription from some of the defaulting members so as to restore the privilege and/or rights in participation at the Annual General Meeting.

21. The finding we make on this account, however, is a prima facie finding and we leave the matter to be finally adjudicated upon at the stage by final disposal of the temporary injunction application. At the stage of hearing the injunction application in all finally, the present appellants as defendants not only will have an effective opportunity to deal with the question of such isolated cases of members who were allowed to clear off their dues beyond the stipulated date in a full-throated manner but the Trial Court would also be satisfied on production of proper documents on this regard as to whether the balance may at all tilt in favour of the plaintiff in each case so as to make the plaintiff entitled to an order of injunction rendering the entire election procedure in the Annual General Meeting to be rendered mandatory at the present stage. As indicated above, we are not prima facie satisfied that the plaintiff in each case has been able to bring out a case of the election being held illegally in flagrant violation of rules regarding the procedure of election.

22. It was urged on behalf of the respondents, however, in this context relying upon a Privy Council decision in T.S. Murugesam Pillai vs. Manickavasaka Desika Gnan Sambanda Pangara Sanndhi reported in AIR 1917 P.C. 6= 21 CWN 761 that with regard to the parties to the suit, those desiring to rely upon a certain state of facts are not justified in withholding documentary evidence in their possession which would throw light upon the proposition, merely because the onus of proof may be on the other party. When it is so withheld, the Court is free to conclude that if they had been produced, they would have supported the case of their opponent.

23. The respondents also cited the decision in [Hiralal and Others Vs. Badkual and Others](#), at Page 227 which was a case of adjustment of running accounts and as to whether an acknowledgement operates as a fresh cause of action. The other redeeming feature of the case was that the case was not merely based on acknowledgement but on the mutual dealings and the accounts stated between them where the question arose about the production of the proper documents. The Supreme Court chose to rely on the previous decision of T.S. Murugesam Pillai vs. Manickavasaka Desika Cana Sambanda, AIR 1917 Privy Council page 6-21 CWN 761 in finding that there was an adjustment, of accounts actually done by the clerks of the respective parties which were accepted by the principals where it was ultimately found that after adjusting the amounts Rs. 34,000/- was found correctly payable. The acknowledgement was made in the ledger of the plaintiff in which earlier account was stated. The suit based on mutual dealings and the accounts stated between them was found to be clearly maintainable. The said case has practically no other relevance to the present case.

24. In [Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others](#), it was held that a party in possession of best evidence which would throw light on the issue in controversy should not be withholding the same and the court can obviously draw an adverse inference against him for such withholding, notwithstanding that the onus of proof does not lie on him and the party not producing such documents in its

possession cannot rely on the abstract doctrine of onus of proof that he was not called upon to produce it.

25. Relying on the ratio propounded by all these decisions, the respondent in both the appeals urged that even if the initial onus of proof was on the plaintiff in each case to prove to the satisfaction of the Trial Court the magnitude of the members in whose case despite the default, their subscriptions were accepted beyond the stipulated date and they were illegally allowed to receive the notice of the Annual General meeting and to attend the said meeting and to cast votes thereat, the best evidence on the point being with the club authorities, the defendants, the latter ought to have produced the counterparts of the receipt books and account books on this score. We can not however, lose sight of the fact that the observation of the Privy Council is application in respect of trials as and when they take place, and not applicable at the present stage of issuance of an order of ad interim injunction or refusal of the said prayer on this account. As and when the Trial Court would adjudicate on the question of a temporary injunction being clamped down on the club authorities while disposing of the said application for temporary injunction in all finality, the court may really call upon the defendants to bring such records into court. The stage has obviously not reached at the present moment to dilate on the same. Nor can we hold the club authorities guilty for withdrawing the documentary evidence in their possession at the present stage which would have otherwise thrown light upon the exact stage of affairs merely because the onus to prove initially is on the plaintiff. We cannot also conclude that had such evidence been produced they would have supported the case of the plaintiffs.

26. A Division Bench judgment of our Court was cited by the learned advocate for the respondents in State Bank of India Staff Association & Ors. vs. Monindra Bhattacharyya & Ors. reported in 96 CWN 350 for the proposition that only eligible voters will vote in an election to a society and club rules have to be strictly adhered to. The case, however, took into account the law relating to limited interference by a court of law in rule-contract cases coming from a domestic forum. A suit could be filed if the domestic forum vested with authority exercised it illegally or failed to exercise it altogether, thus abandoning its authority improperly. Exhaustion of prior remedies would be sufficiently complied with if the domestic body refuses to take up and properly decide the matter. The ratio decided in the case, however, does not call into play in the present case in view of the fact that the pleadings in the present two cases are somewhat different from the reported decision and not really alike.

27. The learned advocate for the respondent cited before us the decision in [Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal](#), for the proposition that it is well-settled that the provisions of the CPC are not exhaustive for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. Even though it is more or less settled that ordinarily the

court does not use its inherent powers to make the necessary orders in the interest of justice but is merely to see whether the circumstances of the case bring it within the prescribed rule, temporary injunctions even though not otherwise permissible could be so passed in the exercise of its inherent jurisdiction. Thus if there be no expression in Section 94 of the Code prohibiting the issue of a temporary injunction in circumstances not covered by Order 39 or by any rules made under the Code, the courts have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39 of the Code of Civil Procedure, if the court is of opinion that the interests of justice requires the issue of much interim injunction. The Supreme Court in this case chose to follow the decision of [Padam Sen and Another Vs. The State of Uttar Pradesh](#), Following the observation of the Supreme Court in [Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal](#), (ibid) Mr. Sudhis Dasgupta the learned advocate for the respondent argued that even if order 1 Rule 8 of the CPC was a clear bar to the maintainability of the present suit without a proper leave being granted in this context, the Court had still a jurisdiction to pass appropriate order of temporary injunction.

28. Mr. Dasgupta appearing for the respondents further contended with reference to a Division Bench judgment of the Bombay High Court in Totaram wani and ors. vs. Dattu Mangu Wani & Ors., reported in AIR 1943 Bombay 143 that in a cause of action where the plaintiff sought to sue in forma pauperism, the suit when the application for leave in sum in forma pauperis is presented. Even if such a prayer to allow him to sue as a pauper is not disposed of at that stage, the court has still the power even in that stage to appoint a receiver or to grant a temporary injunction ex parte in such cases.

29. Mr. Dasgupta also cited before us the decision of [Manorama Dasi Vs. Sabita Dasi](#), for the proposition that the court could exercise its inherent power u/s 151 of the CPC where an application to sue in forma pauperis is filed and before any suit has commenced and even if there is a specific provision in the Code for making a certain orders, the court in exercise of its inherent jurisdiction can pass orders for the ends of justice, but the court should be extremely careful in passing orders in this context and should pass such orders only when no other relief is possible and when the relief is urgently called for and in doing so should limit the scope of such exercise to as narrow a compass as possible.

30. Mr. Jayanta Mitra appearing on behalf of the appellants, contended before us that unless leave under Order 1 Rule 8 of the CPC is actually obtained, the plaintiff in each case has really no cause of action.

31. We are quite conscious of the position that the provisions of order 1 Rule 8 applied only if (i) the parties are numerous, (ii) have the same interest and (iii) the necessary permission of the court is obtained or a direction under Clause B of sub-rule 1 is given and notice under sub-rule (2) is given. The notice is given by the court though at the plaintiff's expense but the provision as to notice is mandatory.

The provisions of Order 1 Rule 8 have to be strictly complied with. More so, if it is a case of an unregistered society, no one member can sue alone if he has not filed the suit on his own behalf but on behalf of other members. The proper course is to obtain permission before the suit is instituted, but if that is not done, the rule does not forbid leave being granted afterwards. Permission under this rule may be granted even after the institution of the suit and even at the appellate stage by allowing an amendment, if such amendment does not materially change the nature of the suit. It has been consistently held in various decisions that the rule is mandatory and that failure to comply with its requirements cannot be condoned u/s 99 nevertheless if the suit is laid in the representative character, leave could be granted under this rule even at a later stage, but still then all the formalities prescribed in the rule should be observed.

32. In *Rajendranath vs. Royal Calcutta Turf Club* reported in 67 CWN 903, however, our High Court held that an amendment by which a suit instituted against an incorporated and un-registered club is converted into one under Order 1 Rule 8 of the CPC cannot be permitted as that would change the character of the suit. However, that decision is not really called into play in the facts and circumstances of the present two cases.

33. We must, therefore, distinguish the present cases from cases instituted in forma pauperis or the suit filed by an indigent person where the suit commenced with the filing of the application in this regard and Court is vested with the jurisdiction to pass appropriate interim orders for securing the ends of justice. There not having been a proper leave taken under Order 1 Rule 8 of the CPC at the time of passing of the ex parte order of interim order or status quo as the case may be no suit commenced and we should vacate those orders under appeal and/or set aside the impugned orders and direct the Trial court in each case to proceed in accordance with law after consideration of the prayer under Order 1 Rule 8 of the CPC made in each case and then take up the hearing of the injunction matter in all finality where according to our observations made hereinbefore, the Trial Court can minutely scrutinize the contention of the plaintiff in each case about the participation of the defaulting members in the annual General meeting and the connected consequent election held thereat and decide the matter in accordance with law.

34. In the result both the appeals stand allowed, impugned orders stand set aside, the Trial Court being directed to take up the application under order 1 Rule 8 of the CPC immediately and thereafter decide the question of temporary injunction in all finality after following the observations as set out hereinbefore within the period of one month from this date. The Calcutta Swimming Club is not fettered to publish the results of the impugned election but whatever is done pursuant to the election impugned, shall abide by the decision of the Trial Court in respect of the temporary injunction matter and final decision of the suits. This judgment covers both the appeals viz. KMAT 3362 of 1992 and FMAT 3363 of 1992.

35. There will be no order as to costs in both the appeals.

Let a xerox copy of this order be given to the learned Advocates for the respective parties on their usual undertaking.

Nikhil Nath Bhattacharjee, J.

I agree.