

Kishore Kumar and anr. Vs. Rakesh Kumar,

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Court : Gujarat

Decided On : Oct-30-1990

Reported in : AIR1992Guj95

Judge : K.G. Shah, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 75 and 115 - Order 26, Rules 9 and 10A

Appeal No. : Civil Revn. Appln. No. 1102 of 1990

Appellant : Kishore Kumar and anr.

Respondent : Rakesh Kumar, ;jayaprakash Agarwal and ors.

Advocate for Def. : V.P. Shah, Adv.

Advocate for Pet/Ap. : D.D. Vyas, Adv.

Judgement :

ORDER

1. Rule, Ms. V. P. Shah, the learned counsel for the contesting opponents has waived the service of the Rule.

2. In paragraph 14 of the memo of the revision application, the petitioners have firstly prayed for an order under S. 24 of the Code of Civil Procedure transferring Special Civil Suit No. 473 of 1990 pending in the Court of Shri A. J. Brahmbhatt,

the learned Civil Judge (S.D.), Surat to the Court of any other Judge competent to try and decide that suit. In the alternative, the petitioners have prayed that the orders passed below applications Exhs. 5, 7, 8 and 36 in the aforesaid suit by the learned Civil Judge (S.D. at Surat be set aside. However, at the time of hearing of this Civil Revision Application, Mr. D. D. Vyas, for the petitioners fairly conceded that the order passed by the trial Court on Exh. 5 cannot be the subject-matter of this revision petition for that is an order under Order XXXIX of the Code of Civil Procedure, issuing certain injunctions and such an order could only be challenged by way of an appeal from order under S. 104 read with Order XLIII of the Code of Civil Procedure.

So far as the request for transfer of the suit under S. 24 of the C.P. Code is concerned, that request was also hot seriously pressed by Mr. Vyas, at the hearing of this C. R. A. for it was apparent that in the present Revision petition, such a request cannot be entertained.

3. However, at the hearing of this C.R.A. Mr. Vyas for the petitioners very vehemently challenged the orders passed by the trial Court on the applications Exhs. 7 and 8 moved by the original plaintiff who is Opponent No. 1 before me, and the order on application Exh. 36, which was moved by petitioner No. 2, who is the defendant No. 5 in the suit.

4. Opponent No. 1 Rakeshkumar Jaiprakash Agarwal for himself and as the Manager and Karta of his Hindu Joint Family filed the aforesaid suit, from which this revision petition arises against the present two revision petitioners and opponents Nos. 2 to 7. In that suit opponent No. 1 as the plaintiff prayed for a declaration that all the properties and businesses mentioned in the Schedule annexed to the plaint are the joint Hindu family properties and business of the plaintiff and defendants Nos. 1 to 4. It may be mentioned that defendants Nos. 1, 2 and 3 in the suit are opponents Nos. 2, 3 and 4 respectively in this petition and defendant No. 4 is petitioner No. 1 in this petition. Opponent No. 1 also prayed for a declaration that he has one-fourth share in the suit properties. He also prayed for a declaration that a certain writing taken by defendants Nos. 1 to 4 from him is nominal, bogus and not to be acted upon, and is even otherwise fraudulent, illegal

and null and void. He also prayed for an order for cancellation of that document. He also prayed for an injunction restraining defendants Nos. 1 to 4 from alienating the suit properties. A relief for accounts and getting his share in the properties on taking accounts, was also prayed for by opponent No. 1.

5. Along with the suit which was filed on August 20, 1990, the plaintiff on the same day moved three applications Exhs. 5, 7 and 8. However, the plaintiff's learned advocate did not take those three applications to the learned Judge for orders up to August 26, 1990. For the first time, the learned Advocate for the plaintiff presented those three applications Exhs. 5, 7 and 8 before the learned Judge for passing first orders, on August 27, 1990, and the ground that was put up by the plaintiff's learned advocate for not having pressed those applications earlier was that he operated upon. Be that as it may, on the three applications Exhs. 5, 7 and 9 which were filed before the Court along with the Suit on August 20, 1990, the Court's first orders were sought by the plaintiff-opponent No. 1 through his advocate, for the first time on August 27, 1990.

6. By Exh. 5 opponent No. 1 plaintiff prayed for an interim injunction restraining defendants Nos. 1 to 4 from alienating any movable or immovable properties mentioned in the Schedule annexed to the plaint, or those that may be found on taking inventories, in any way whatsoever, or from inducing anybody in those properties till the suit is finally decided. It appears that the learned trial Judge by his order dated August 27, 1990, passed on that application Exh. 5, issued an interim injunction as prayed, in respect of immovable properties only.

7. The other application that was moved by the plaintiff on August 20, 1990 on which orders were sought on August 27, 1990 is Exh. 7. By that application Exh. 7, the plaintiff-opponent No.1 prayed for appointment of various Commissioners for making certain inventories of the properties lying at different places. The trial Court issued commissions and appointed five different persons as Commissioners for the purpose of preparing the inventories as prayed by the plaintiff in that application Exh. 7.

8. The third application which was moved by the plaintiff on August 20, 1990 on which orders were sought on August 27, 1990, is Exh. 8. By that application Exh.

8, the plaintiff contended that the defendants keep computers and they maintain accounts on computers. According to the plaintiff, even the accounts of 'black and white income' is kept by the defendants on computers in code language. It is the say of the plaintiff that in fact the computers are the real account books on which the accounts are maintained by the defendants. According to the plaintiff, as and when the Commissioners for the purpose of preparing the inventories would visit the various places, they would find the computers there, and the Commissioners would not be able to operate the computers and decipher the data/ material recorded on the computers, and such data / material could be deciphered by the persons trained in such work. The plaintiff contended that when the work of preparing inventories would be going on, it would not be possible to call the persons trained in the science of operating the computers and deciphering the data recorded thereon, 'Therefore, the computers in possession of the defendants were required to be kept in boxes or cup-boards under proper locks and seals. According to the plaintiff, as contended by him in this application Exh. 8, within a few days trained personnel would be taken to the concerned premises for operating the computers and deciphering the data recorded on the computers and reducing that data into writing and thereafter the computers could be released to the defendants concerned. It is the say of the plaintiff that that was in the interest of justice. Otherwise, the defendants would decipher all the accounts and figures recorded on the computers and the plaintiff would not be able to know the same and the plaintiff (in the application through typographical error the word 'defendant' is written), would suffer irreparable loss , and the important evidence of the accounts would be destroyed and would slip away from the plaintiff and the Court and that would, thereafter not be obtainable by any means whatsoever. The plaintiff, therefore, in the name of interest of justice, in para 2 of that application Exh. 8, prayed for the following reliefs:

'2. The plaintiff, therefore, prays: That any computers, hard discs, floppy discs, record, etc. or any material pertaining to the computer that would be found by any Commissioner appointed in this case be ordered, to be put into any box or cup-boards to be supplied by the plaintiff or the defend which is convenient and the same be kept in lock and key, by the Commissioner and also sealed, and the same be released in few days when trained men reduces into writing or into discs

everything in the computers. For that the Commissioner may be empowered to put the computers, etc. in the box, cup-board, etc. and to lock the same, and (to open the same) and to reopen the same for reading the computer by the trained persons and then release it to the defendants in whose possession the computer was, after the above work is done.

9. Thus, by this application Exh. 8, what the plaintiff prayed for, in substance, is that the data recorded on the computers in possession of the defendants be copied on the floppy discs. The other material on the record shows that the plaintiff had requested the Court to ask the Commissioners to copy the data recorded on the computers, on the floppy discs with the aid of the experts in that science, and to produce those floppy discs before the Court in sealed condition. In essence the plaintiff wanted to be brought to the Court, what according to him, was the accounts maintained by the defendants on the computers with them, and for that purpose, the plaintiff wanted the Commissioners to be appointed with the directions to copy or transfer with the assistance of the experts 'in the line on the floppy discs, the data/material recorded on the computers in the possession and custody of the contesting defendants.

10. On that application Exh. 8, the Court on August 27, 1990, passed the following order:

'Heard Mr. J. Z. Halatwala, learned advocate for the plaintiff. Read application after perusing the same, it establishes that defendants keep computers and they keep accounts on computers and when Commissioners go to make inventory, they will find any computers, the Commissioner will not be able to read the computers and decipher its contents, and it can be done only by the persons trained in such work and during the inventory working it is not possible to call trained men to decipher computer and therefore, I am of the opinion that if the said computers are ordered to be kept in lock and seal, it would serve the purpose and the interest of justice also be maintained. Otherwise the defendants will decipher all accounts and figures and the plaintiff will not be able to know the same. In the result, I pass the following order:

'Court Commissioners appointed vide order below Exh. 7 are hereby directed that if the Commissioners found any computers in the property at the time of inventory, he is authorised to put the same along with any computer discs or material in any cupboard or box or room in the property and to lock and seal the same. If there is no suitable place in the property to keep the computer, etc. in the box under the lock and key, the plaintiff is ordered to supply the same, and the Commissioners shall put the computers, etc. in such box and lock it and seal it.

The computers, etc, to remain under lock and key for 15 days, i.e. up to 10-9-90 during which the plaintiff shall get the contents of the computer recorded by a competent person in discs or any other manner in presence of the Commissioners and any computer discs or any material on which the contents of the computers are recorded to the Commissioner, who shall immediately seal the same, and produce the same in Court.

Plaintiff is authorised to get the content of the computer recorded on his own discs in the presence of the Commissioner.

Additional remuneration for the aforesaid work will be fixed after completion of the Commissioners' work.

11. It appears that the same Commissioners as were appointed by the Court by its order on Exh. 7 to prepare the inventories order on Exh. 8. It further appears from the record that the Commissioners prepared the inventories of the properties as per the order on Exh. 7. The Commissioner also kept certain computers which were found at the places of the contesting defendants into locks and seals. It is further an admitted position that thereafter certain material which were recorded on some of the computers have been copied / transferred / transcribed on floppy discs, by the Commissioners with the assistance of the persons who are claimed to be, trained in the line. The above extracted order of the trial Court, below Exh. 8 makes it clear that the computers were to remain in lock and key up to 15 days, i.e. up to September 10, 1990, and during that time, the plaintiff was, expected to get the contents of the data/material recorded on the computers copied / transferred / transcribed by the competent persons on discs or in any other manner in the presence of the Commissioners, and the computer discs and any

other material on which the contents on the computer were copied, were expected by the Commissioners to be produced before the Court immediately, and in any case within a period of 15 days ending on September 10, 1990. It appears that for diverse reasons, the Commissioners have not been able to, or could not or did not complete copying/ transferring/ transcribing on floppy discs, all the material and data recorded on all the computers, even after taking the assistance of the persons who are claimed to be trained, or experts in the line.

12. As the Commissioners appointed by the Court have placed certain computers of the defendants under locks and seals, the defendants were experiencing difficulties in carrying on their business and activities. Further, according to the contesting defendants, the Commissioners have illegally sealed certain premises which were in their (the contesting defendants) possession. According to the contesting defendants, the persons whose services were procured by the plaintiff as experts or trained personnel for copying/ transferring/ transcribing on the floppy discs the data/ material recorded on the computers have, while attempting to copy/transfer/transcribe such material recorded on the computers, caused damage to their computers and have destroyed valuable data recorded on the computers, and thus the process of the Court has been misused. On these allegations, Defendant No. 5 moved application Exh. 36 before the trial Court on September 7, 1990, with a request that the further work of the Commissioners in respect of copying/transferring/ transcribing on floppy discs the data/ material recorded on the computers be .stayed. By that application, the said Defendant No. 5 also prayed for the early hearing of the injunction application Exh. 5, and for vacating the interim injunction. In that application, Defendant No. 5 also expressed its apprehension that if the further execution of the work assigned to the Commissioners is not stayed immediately, the so-called experts, whose services were procured by the plaintiff, would cause further damage to the discs, etc.

13. This application Exh. 36, as said above, was moved by Defendant No. 5 on September 7, 1990. The trial Court, by its order dated September 17, 1990, rejected that application Exh. 36.

14. Mr. D. D. Vyas, for the revision petitioners firstly contended that the order passed by the learned trial Judge on Exh. 7 is not only bad in law, but is without jurisdiction. As said above, Exh, 7 is the application filed by the plaintiff for an order for appointment of Commissioners. On that application, the Court passed an order appointing some five persons as Commissioners for the purpose of preparing certain inventories.

15. Though before the trial Court, the parties were at variance on the question whether all the work of preparing the inventories has been completed, at the hearing of this revision- petition, it was not seriously in dispute that, almost all the work of preparing the inventories has been completed by the Commissioners and that now remains to be done is only to copy/ transfer/transcribe on the floppy discs, with the assistance of the experts some data material recorded by the defendants on some of the computers. According to Ms. V. P. Shah, the learned counsel for the contesting opponents, the Commissioners with the assistance of the experts, have already copied/ transferred / transcribed some material/data recorded on some of the computers, while the remaining data/material recorded on some other computers is yet to be copied transferred / transcribed on the floppy discs, with the assistance of the experts. What I want to emphasise at this juncture is that the order passed by the trial Court on Exh. 7 has, almost completely been carried into effect, and the inventories have been made by the Commissioners. Therefore, whether the order passed by the Court on Exh. 7, was or was not proper, legal, reasonable, etc. would, at this juncture, become only of academic interest. The fact remains that the Commissioners have prepared the inventories, in execution of the order passed by the Court on Exh. 7. In that view of the matter, the challenge by the petitioners, to the order passed by the trial Court on Exh, 7, becomes only of an academic interest, and it would be better, if this Court does not proceed further in this revision petition, to decide that challenge. The reason is that, while deciding the revision petition like this, this Court should speak the minimum, and should examine only that much which is absolutely necessary to be examined. The matter before the trial Court is yet in its initial stages and any observations made by this Court while deciding this revision petition, even if technically and in law, may not have finality while deciding the matter finally before the trial Court, is surely likely to affect the thinking of the trial Court on the merits of

the case. It is therefore, that I say that it is better that I should not enter into the question about the legality, propriety, reasonableness, etc. or the question about jurisdictional error in the order on Exh. 7.

16. Coming to Exh. 36, the prayer there was that the Court should stay the further execution of its order below Exh. 8. The other prayer was that the Court should expeditiously decide application Exh. 5 on which injunction order was passed. So far as the later request is concerned, Ms. V. P. Shah, for the contesting opponents did not dispute that the trial Court should be asked to hear and decide application Exh. 5 as early possible . However, she strongly opposed the request for the stay of the further execution of the order passed by the trial Court on Exh. 8. Therefore, it would be clear that the fate of the first request about the stay of the further execution of the order on Exh. 8 as is contained in Exh. 36 is linked with the order on Exh. 8 itself.

17. Mr. D. D. Vyas for the revision petitioners very strenuously contended that the trial Court had no jurisdiction whatsoever to appoint the Commissioners for copying/ transferring/ transcribing or ask the Commissioners to copy/ transfer/ transcribe on floppy discs, the data/material recorded on the computers in the possession and custody of the defendants. According to Mr. Vyas, the order on Exh. 8 was clearly without jurisdiction. What the plaintiff in essence wanted to be done, by obtaining the order on Exh.8, submitted Mr. Vyas, was to bring before the Court the data/ material recorded and contained on the computers in the possession and custody of the contesting defendants and that was impermissible to the plaintiff. In the submission of Mr. Vyas, the Court had no jurisdiction to render any assistance to the plaintiff in such approach of his, by appointing the Commissioners and/or directing the Commissioners appointed, to copy/ transfer/transcribe on the floppy discs the data/ material recorded and contained on the computers of the defendants.

18. Mr. Vyas submitted that the case in so far as application Exh. 8 is concerned, it was not and could not be covered by Section 75 read with Order XXVI of the Code of Civil Procedure. Therefore, the Court's order below Exh. 8 was clearly without jurisdiction and it should be set aside.

19. Mr. Vyas took me through the various material on the record of the trial Court and submitted that the plaintiff has no case whatsoever to succeed in the suit for the substratum of the plaintiff's case about there being a Joint Hindu Family and about the suit properties being the Joint Hindu Family properties, has no basis whatsoever. In the submission of Mr. Vyas, the Joint Hindu Family has already been disrupted by a decree, of the Ghaziabad Court, and in that suit before the Ghaziabad Court, a consent decree has been passed whereunder, the present plaintiff has got his share. Therefore, the present suit on the basis of the existence of a Joint Hindu Family, and for the partition of the Joint Hindu Family properties, in the submission of Mr. Vyas, is thoroughly misconceived, and the plaintiff has no prima facie case to succeed in the present suit. Mr. Vyas, nextly submitted that petitioner No. 2 which is, the original defendant No. 5 in the suit is a private limited company which cannot be termed as a Joint Hindu Family, and the properties of petitioner No. 2 can never be the subject-matter of the suit for partition of the Joint Hindu Family properties. Mr. Vyas further submitted that defendant No. 5, which is Opponent No. 5 in this revision petition, is a partnership firm, and the assets of that firm also cannot be the subject matter of a suit for partition of Joint Hindu Family properties.

20. I think, while deciding this revision application, I should not decide these questions raised by Mr. Vyas, about the maintainability of the suit for partition of the Joint Hindu Family properties. As I will presently point out, the challenge to the order on application Exh. 8, which is the main challenge in this revision petition can be resolved without touching upon the question of maintainability of the suit. It is therefore, not necessary for me to consider the question whether the suit is maintainable.

21. The contention of Mr. Vyas for the petitioners that the case, so far as Exh. 8 is concerned, is not covered either under S. 75 or under Order XXVI of the Code of Civil Procedure was sought to be met by Ms. V. P. Shah for the contesting opponents by submitting that the case is clearly covered by the provisions of S. 75 read with Order XXVI of the Code of Civil Procedure, and in the alternative Ms. Shah submitted that in any view of the matter, the case would be covered by the provisions of S. 151 of the C.P. Code.

22. After having heard Mr. D. D. Vyas, the learned Advocate for the petitioners and Ms. V. P. Shah the learned Counsel for the contesting opponents at length, I think the order passed by the trial Court on Exh. 8 cannot be sustained. That order, in my opinion, inherently lacks the trial Court's jurisdiction to pass the same.

23. To recapitulate, by Exh. 7, the plaintiff asked for the appointment of Commissioners for preparing inventories. That request was granted. The Commissioners were appointed and, as said above, almost all the inventories which were prayed for, have been prepared. Simultaneously, the plaintiff, bying the Commissioners firstly to place the computers in locks and seals, and secondly to get the data/material recorded and maintained on the computers, copied /transferred/ transcribed on some floppy discs, with the assistance of the experts in the line, and to produce those floppy discs before the Court. The request of the plaintiff, read in between the lines is clear. The request is that the Court should ask the Commissioners to get the data / material on the computers, copied/ transferred/ transcribed on the floppy discs, with the assistance of the experts and to produce those floppy discs in the Court, so that he can utilise the data/ material recorded and maintained on the computers by the defendants, as his evidence in the suit. According to the plaintiff, if the order as prayed by him in Exh. 8 is not passed, the apprehension is that the contesting defendants might obliterate or erase or remove the data/material recorded and maintained on the computers, and if that happened, the plaintiff would lose valuable evidence.

24. The question is whether on the relevant facts of the case as mentioned hereinabove, the Court had, under S. 75 read with Order XXVI of the Code of Civil Procedure, jurisdiction to pass the order it has passed on Exh. 8.

25. Though in his order below Exh. 8, the learned trial Judge has not referred to the provision of law under which that order was passed, it becomes clear if we refer to the order passed by the Court below Exh. 36 that even while passing the order below Exh. 8, the trial Court had purported to exercise its jurisdiction and powers under Order XXVI, Rule 9 of the Code of Civil Procedure. By Exh. 36 filed by it, defendant No. 5 inter alia challenged the Court's jurisdiction to pass an order as was passed on Exh. 8. While considering that challenge raised by defendant

No. 5, this is what the learned trial Judge, in paragraph 6 of the order below Exh. 36 said:

'To my mind, when the Commissioners (are) already appointed under Order XXVI, Rule 9, C. P.C. to make local investigations, unless and until that commission work (is) completed by the appointed Commissioners, no stay could be given for performing the remaining commission work for local investigation. As per the provisions of Order 26, Rules 9 and 10A, there is a provision for making appointment of Commissioner to make local investigation, and Commissioners for scientific investigation perform all investigation acts, no stay can be granted.'

Thus, it is clear that while passing the order on Exh. 8, the learned Judge has purported to do so in exercise of the jurisdiction and power conferred upon him under Rules 7 and 10A of Order XXVI of the Code of Civil Procedure.

26. Section 75 of the Code of Civil Procedure, reads as follows:

'75. Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission -

(a) to examine any person;

(b) to make a local investigation;

(c) to examine or adjust accounts;

(d) to make a partition;

(e) to hold a scientific, technical or expert investigation;

(f) to conduct the sale of property which is subject to speedy and natural decay and which is in the custody of the Court pending the determination of the suit;

(g) to perform any ministerial act.'

Section 75 makes it clear that the Court has jurisdiction and power to issue a commission for any of the seven purposes mentioned in clauses (a) to (g) of that section. In the present case, we are not concerned with the purposes mentioned in

clauses (a), (c), (d), (f) and (g) at all. As indicated hereinabove, the learned Judge of the trial Court has purported to exercise the jurisdiction and power to appoint the Commissioners for the purposes mentioned in clauses (b) and (e).

27. Order XXVI, Rule 9 of the C.P. Code deals with the issuance of commission for local investigation, and that would be corresponding to the purpose mentioned in Clause (b) of S. 75 of the C.P. Code. Rule 10A of Order XXVI deals with the issuance of commission for scientific investigation, i.e. for the purpose corresponding to the one mentioned in Clause (e) of Section 75 of the Code of Civil Procedure.

28. In the present case, issuance of commission or directions given to the Commissioners to copy/ transfer/ transcribe the data/ material recorded or maintained on the computers on the floppy discs, with the assistance of experts could never be said to be an appointment of the Commissioner or direction to the Commissioner for the purpose of making local investigation, and asking the Commissioner to get the data/ material recorded and contained on the Computers, copied/ transferred/ transcribed on the floppy discs and to bring the floppy discs to the Court for the purpose of enabling the plaintiff to rely upon that data/material, at the trial, could never be said to be carrying out local investigation. There was nothing on the premises of the defendants which was required to be locally investigated. The case is therefore, clearly out of the scope of the issuance of commission for the purpose of making local investigation. A bare reading of the opening words of Rule 9, Order XXVI would make it clear that a commission for local investigation could be issued if the Court deems it to be requisite or proper for the purpose of elucidating any matter in dispute, or for ascertaining the market value of any property, etc. In the present case, there was no question of elucidating any matter in dispute for which the local investigation of the type which was contemplated by the learned trial Judge while passing the order on Exh. 8, would be necessary.

29. The case is also not covered by clause (e) of Section 75 of the Code of Civil Procedure and Rule 10A of Order XXVI of the Code of Civil Procedure. What was sought to be done- by the order on Exh, was not, in any sense, to hold scientific or

technical or expert investigation. What was sought to be done was only to bring to the Court, on floppy discs, the data/material which was contained on the Computers. Nothing of the sort of expert/ scientific/ technical investigation was involved in what was sought to be done by the order on Exh. 8. The question that arose in the suit could never be said to involve any scientific investigation for which the issuance of commission could be said to be necessary.

30. What was sought to be done by the prayer made in Exh. 8 and the order passed by the Court thereon is something like this:

The defendants had in their possession and power certain material regarding accounts and account entries recorded and maintained on the Computers and the plaintiff wanted that material to be brought to the Court on floppy discs. It is the plaintiff's case that the defendants maintain accounts on computers, and the plaintiff wanted those account materials to be brought to the Court. Before the advent of computers, the known method of maintaining accounts was in the shape of entries in the account books. With the scientific advancement and the advent of computers it is now known that the accounts could also be maintained on computers. What is sought to be done by the order on Exh. 8 would be something parallel to this in past, viz. that the defendants had certain entries in their account books and the plaintiff by seeking an order of the Court for issuance of the commission wanted to have those account entries in the account books copied and brought to the court with a view to bring those entries at the trial as his evidence. The question is, if instead of maintaining the account entries on the computers, the defendants had maintained those entries in the account books made of ledger papers, etc. could the Court have jurisdiction and power to order issuance of a commission for the purpose of getting the copies of those account entries in the account books prepared and brought to the Court? The answer simpliciter should be in the negative. If such is the answer in relation to the entries made in the account books, the answer should not be different in relation to the entries of accounts made on the computers. In principle, it makes no difference whether by the Court's order what is sought to be done is copying the account entries from the account books and bringing the same to the Court, or copying on floppy discs, the account entries and the data and material recorded on the

computers and bringing those floppy discs to the Court. For such a purpose, in neither case, could the Court have any jurisdiction and power to issue a commission.

31. What is done in this case by Exh. 8 filed by the plaintiff is to seek the assistance of the Court in collecting evidence for him, and what is done by the Court by its order below Exh. 8 is to render active assistance to the plaintiff in collecting evidence for him. This could certainly never be done, and the Court certainly has no jurisdiction or power to do this either under S. 75 of the Code of Civil Procedure or under Rules 9 and 10A of Order XXVI of the Code of Civil Procedure.

32. Though in different context, a question very much similar to the one before me arose in the case of *Padam Sen v. State of U.P.* AIR 1961 SC 218. In that case, the plaintiff had filed a suit against the defendant for money, on the basis of certain promissory notes. The defendants apprehended that the plaintiff would fabricate his books of accounts with respect to payments made by them. The defendants, therefore, applied for the seizure of the account books of the plaintiff. The Additional, Munsiff, by his order, appointed Shri Raghubir Pershad, Vakil, as the Commissioner to seize all those books of accounts. The Commissioner accordingly seized those books of accounts and brought them to the Ghaziabad. Thereafter the appellants of that case approached that Commissioner with an offer of bribe for being allowed an opportunity to tamper with those books of account. Those appellants were, therefore, prosecuted and ultimately convicted for an offence under S. 165-A of the I.P. Code. The only question that was canvassed on behalf of the appellants of that case was that Shri Raghubir Pershad, the Commissioner was not a 'public servant' and therefore, the appellants could not be said to have committed an offence punishable under S. 165-A of the Code. It was contended on behalf of the appellants that the Civil Court had no jurisdiction to appoint a Commissioner for the purpose of seizing the account books of the plaintiff. The contention was that neither under Section 75 nor under Order XXVI of the Code of Civil Procedure, the Civil Court had any jurisdiction or power, on the facts of the case, to appoint a Commissioner for the purpose of seizing the account books of the plaintiff. On behalf of the State-Prosecution, the order

appointing the Commissioner was sought to be supported by placing reliance on S. 151 of the C.P. Code. In that connection, their Lordships of the Supreme Court in paragraph 7 of the report, examined the scheme of S. 75 and O. XXVI of the C. P. Code. It appears that before S. 75 of the C. P. Code and the corresponding provisions of Order XXVI came to be amended, there was only four purposes enumerated in clauses(a), (b), (c) and (d) of S. 75, for which the Court was empowered to issue commissions. Of course, after the amendment, three new purposes envisaged by clauses (e), (f) and (g) in S. 75 and certain rules in O. XXVI have been added. So far as this addition is concerned, for purpose, only C1. (e) of S. 75 and Rule 10-A of Order XXVI would be relevant and I have dealt with the same hereinabove and I have held that the present case is not even governed by the scope of holding a scientific, technical or expert investigation. Reverting to the Supreme Court decision in the case of Padam Sen, it was decided on the basis of S. 75 as it stood before the amendment, and in para 7 of the report, their Lordships have said that Section 75 of the Code empowers the Court to issue a commission subject to the conditions and limitations, which may be prescribed, for four purposes viz. the purposes mentioned in clauses (a), (b), (c) and (d) of S. 75 of the C. P. Code. It was submitted before the Supreme Court on behalf of the appellants of that case that the powers of the Court to issue a commission must be found within the four corners of the Code and that when the Code has expressly dealt with the subject matter of Commissions in S. 75, the Court cannot invoke its inherent powers under S. 151, and thereby add to its powers. That argument on behalf of the appellants was sought to be met by the State-Prosecution by submitting that the Code is not exhaustive and the Court in the exercise of its inherent powers, can adopt any procedure not prohibited by the Code expressly or by necessary implication if the Court considers it necessary, for the ends of justice or to prevent abuse of the process of the Court.

33. In paragraph 8 of the report, after reproducing S. 151, C. P. Code, their Lordships of the Supreme Court, observed as follows:

'The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the court is free to exercise them for the purposes

mentioned in S. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intention of the Legislature. It is also well recognized that the inherent power is not to be exercised in a manner which will be contrary to or different from the procedure expressly provided in the Code.'

34. After making the aforesaid observations, coming to the facts of that case, this is what their Lordships of the Supreme Court have said in paragraphs 9, 10 and 11 of the Report:

'9. The question for determination is whether the impugned order of the Additional Munsif appointing Sri Raghubir Pershad Commissioner for seizing the plaintiff's books of account can be said to be an order which is passed by the Court in the exercise of its inherent powers. The inherent powers saved by S. 151 of the Code are with respect to the procedure to be followed by the Court in deciding the case before it. These powers are not powers over the substantive rights which any litigant possesses. Specific powers have to be conferred on the courts for passing such orders which would affect such rights of a party. Such powers cannot come within the scope of inherent powers of the Court in the matters of procedure, which powers have their source in the Court possessing all the essential powers to regulate its practice and procedure. A party has full rights over its books of account. The Court has no inherent powers forcibly to seize its property. If it does so, it invades the private rights of the party. Specific procedure is laid down in the Code for getting the relevant documents or books in Court for the purpose of using them as evidence. A party is free to produce such documents or books in support of its case as may be relevant. a party can ask the help of the Court to have produced in Court by the other party such documents as it would like to be used in evidence and are admitted by that party to be in its possession. If a party does not produce the documents, it is lawfully called upon to produce the Court has the power to penalize it, in accordance with the provisions of the Code. The Court has the further power to draw any presumption against such a party who does not produce the relevant document in its possession, especially after it has been summoned from it. Even in such cases where the Court summons a document from a party, the Court has not been given any power to get hold of the

document forcibly from the possession of the defaulting party.

10. Tire defendants had no rights to these account books. They could not lay any claim to them, They applied for the seizure of these books because they apprehended that the plaintiff might make such entries in those account books which could go against the case they were setting up in Court. The defendants' request really amounted to the Court's collecting documentary evidence which the defendants considered to be in their favour at that point of time. It is no business of the Court to collect evidence for a party or even to protect the rival party from the evil consequences of making forged entries in those account books. If the plaintiff does forge entries and uses forged entries or evidence in the case, the defendants would have ample opportunity to dispute those entries and to prove them forgeries.

11. We are therefore, of opinion that the Additional Munsif had no inherent power to pass the order appointing a Commissioner to seize the plaintiffs account books, The order appointing Shri Raghubir Pershad as Commissioner for the purpose was therefore , an order passed without jurisdiction, and was therefore, a null and void order.'

35. Thus, it is clear that in Padam Sen's case (AIR 1961 SC 218), their Lordships have clearly laid down that a party has full rights over its books of accounts and the Court has no inherent power forcibly to seize its property, and if the Court did so, that would amount to the invasion on the private rights of the party. Their Lordships of the Supreme Court, in para 9 of the report clearly indicated that a specific procedure is laid down in the code for getting the relevant documents and books in Court for the purpose of using them as evidence. The various modes that could be adopted for the purpose, have been indicated in that paragraph. The different consequences that would follow, if a party who is legally called upon to produce the documents or account books in its possession falls to do so, have been indicated. Even so, it has clearly been laid down that the Court has not been given any power to get hold of the documents forcibly from the possession of the defaulting party.

In para 10 of the report, their Lordships of the Supreme Court clearly observed that the defendants of that case had no right to the account books of the plaintiff, and the defendants' request before the Civil Court really amounted to the Court's collecting documentary evidence, that the defendants considered to be in their favour at that point of time. Then their Lordships of the Supreme Court clearly laid down as a proposition of law that it is not the business of the Court to collect evidence for a party or that even to protect a rival party from the evil consequences of making forged entries in the account books, and if the plaintiff did forge entries and use the forged entries as evidence in the case, the defendants would have ample opportunity to dispute the entries and prove them to be forged. With these observations, in para 11 of the report, their Lordships held that the Civil Court in that case had no inherent powers to pass an order appointing the Commissioner to seize the plaintiff's account books. Therefore, the order appointing the Commissioner for that purpose was an order passed without jurisdiction, and the same was, therefore, null and void.

Of course, the question in that case arose before the Supreme Court, in a criminal trial, where the contention was that the Commissioner to whom the appellants of the case offered bribe, was not a public servant as he was not appointed under an order passed by the Court having jurisdiction to pass the same. But the principle of law bearing on S. 75 of the C. P. Code, read with O. XXVI and S. 151 of the C. P. Code, is clear, the same having been enunciated in a criminal case, notwithstanding the principles of law is that the Court's jurisdiction and power to appoint a Commissioner should flow from S. 75 read with O. XXVI of the C. P. Code, and if the jurisdiction to pass an order appointing the Commissioner cannot be traced either to S. 75 or to O. XXVI of the Code of Civil Procedure, the Court cannot fall back upon Section 151, to pass such an order appointing the Commissioner. This, in my opinion, is the law laid down by their Lordships of the Supreme Court in Padam Sen's case (AIR 1961 SC 218) which was very heavily relied upon by Mr. D. D. Vyas, for the Revision Petitioners. Applying the proposition of law, laid down by their Lordships of the Supreme Court in Padam Sen's case, to the facts of the present case, it has got to be said that as the case for an order made out in Exh. 8, did not fall in any of the clauses of S. 75 of the C. P. Code, and as it clearly did not fall within Rules 9 and 10A of O. XXVI of the C.

P. Code, the appointment of Commissioners can never be justified by taking resort to S. 151 of the C. P. Code. As I have hereinabove indicated with reference to the observations made by the trial Court in para 6 of the order below Exh. 36, the Court while passing an order on Exh. 8, purported to do so in exercise of its powers under Rules 9 and 10A of O. XXVI. I have herein indicated that the case was clearly out of the scope of Rules 9 and 10A of O. XXVI of the C. P. Code, and it was equally out of the scope of clauses (b) and (c) of S. 75 of the Code. That being the position, the Court had no jurisdiction to pass an order such as the one it has passed on Exh. 8. By passing that order on Exh. 8, the Court has ordered collection of documentary evidence for the plaintiff, and as laid down by the Supreme Court in Padam Sen's case, the Court had no business to collect evidence for any party to a suit, or even to protect the other party from the evil consequences, which would follow, if an order was not made. Applying the ratio of Padam Sen's case, to the facts of the case before me, I have no doubt in my mind that the trial Court had no jurisdiction or power whatsoever to pass the order which it has passed on Exh. 8.

36. Ms. V. P. Shah, the learned Counsel for the plaintiff-opponent relied upon the decision in the case of Mancharlal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, AIR 1962 SC 527 in which the Padam Sen's case (AIR 1961 SC 218) (supra) has been referred to. Manchar Lal's case had a bearing on the Court's powers to issue temporary injunction in cases which were not governed by the provisions of O. XXXIX, Rule 1, of the Code of Civil Procedure. On one hand, in that case, it was contended that if the case is not clearly governed by O. XXXIX, Rule 1, C.P. Code, the Court would have no power to issue interim injunction taking resort to S. 151 of the Code of Civil Procedure. On the other hand, a contrary proposition was canvassed. On that question, the Supreme Court was divided in its opinion, Justice K. N. Wanchoo, K. C. Das Gupta and Raghubar Dayal took the view in favour of the proposition that in a case which is not governed by O. XXXIX, R.1, C.P. Code, if the fact so justified, the Court can resort to S. 151 of the Code of Civil Procedure and issue temporary injunction. On the other hand, Justice J. C. Shah, held that the Civil Court generally has no inherent jurisdiction in cases not covered by Rules 1 and 2 of O. XXXIX, Civil Procedure Code, to issue temporary injunction restraining parties. to the proceedings before it from doing certain acts.

Both the majority view in that case as also the minority view of Justice J. C. Shah, have considered the decision in the case of Padam Sen (supra). However, it is clear that in Manohar Lal's case, their Lordships of the Supreme Court have neither overruled nor disapproved the view expressed in Padam Sen's case. It would be interesting to note that Raghubar Dayal J. was a party to both the decisions, (1) in Padam Sen's case (AIR 1961SC 218) and (2) in Manohar Lal's case (AIR 1962 SC 527). In Padam Sen's case, the opinion of the Court was unanimous, and was rendered by Raghubar Dayal J. In Manohar Lal's case also, the opinion of the majority of the Court was rendered by Raghubar Dayal J. Neither in the minority view in Manohar Lal's case, nor in the majority view in that case, the proposition of law, laid down by the Supreme Court in Padam Sen's case has been overruled, disapproved or dissented from the proposition of law laid down in Padam Sen's case, therefore, remained unaffected even by Manohar Lal's case, though in Manohar Lal's case, Padam Sen's case has been specifically referred to and analysed. The proposition of law laid down in Padam Sen's case is, therefore, the correct principle of law which holds the field, the decision in the case of Manohar Lal notwithstanding. The proposition of law laid down in Padam Sen's case, as indicated hereinabove, when applied to the facts of the case before me, would go to show that the trial Court here, had no jurisdiction and / or power to appoint the Commissioner for getting or to direct the Commissioner appointed to get the copies of the data/ material contained in the computers prepared on floppy discs, with the assistance of the experts in the line. That order being clearly without jurisdiction, has got to be set aside in this revision petition, and appropriate orders, consequent upon setting aside that order, in the facts and circumstances of the case, shall have to be passed.

37. In the view that I have taken about the order on Exh. 8, that order, as said just now, is required to be set aside. There would, therefore, remain no question of considering the first request of defendant No. 5 in Exh. 36 for the stay of the further execution of the order on Exh. 8. However, as said above, so far as Exh. 5, the injunction application is concerned, Ms. V. P. Shah, the learned Counsel for the plaintiff-opponent, was agreeable to an order directing the trial Court to expeditiously hear and decide that application Exh. 5.

38. In the result, the order passed by the trial Court on Exh. 8, is hereby set aside. The contesting defendants are at liberty to remove the locks and seals applied by the Court Commissioners to their computers, discs, and other material. If there be in the possession of the Court, any keys of the locks applied to the rooms, cupboards or boxes, wherein the computers, discs, etc. might have been kept or to the computers and other material, then, the keys along with the discs, etc. that may be in possession of the trial Court should be handed over by the trial Court, immediately to the concerned defendant.

The trial Court shall give, as high a priority to the hearing and disposal of the plaintiff's interim application Exh. 5, as is possible to be given, regard being had to the exigencies of other matters before it.

The Rule is made absolute to the aforesaid extent.

39. Order accordingly.

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