

## APPELLATE CIVIL.

Before Mukherjea J.

HARA DAYAL NAG

v.

CHANDPUR CENTRAL CO-OPERATIVE BANK,  
LIMITED.\*

1937

Dec. 21, 22;

1938

Jan. 14.

*Co-operative Bank—Payment of dividend—Registrar's sanction—Declaration of resolution as ultra vires—Jurisdiction—Rule 28 (3), if ultra vires—Rule-making power, if limited to matters provided for in s. 43, cl. (2)—Co-operative Societies Act (II of 1912), s. 43, cl. (2)—Rule 22 framed under s. 43 of Co-operative Societies Act.*

Where a preference share-holder of a co-operative bank sues for a declaration that a resolution passed at an extraordinary general meeting of the share-holders, rescinding a previous resolution for payment passed at the annual general meeting, was *ultra vires* and as a consequential relief prays for payment of a dividend, the suit is not barred by r. 22 framed under s. 43 of the Co-operative Societies Act.

*Ramendranath Mukherji v. Bāluwghāt Central Co-operative Bank, Ltd. (1) and Barisal Co-operative Central Bank, Ltd. v. Benoybhusan Gupta (2) followed.*

The matters set out in s. 43, cl. (2) of the Co-operative Societies Act regarding which rules may be made by the Local Government are not exhaustive. Rule 28 (3) forbidding payment of dividend without the Registrar's sanction even in cases of societies with limited liability is not *ultra vires* of the Co-operative Societies Act.

APPEAL FROM APPELLATE DECREE by a preferential share-holder.

The material facts and arguments in the appeal appear in the judgment.

*Ajit Kumar Dutt* for the appellant.

*Naresh Chandra Sen Gupta and Sanat Kumar Chatterji* for the respondent.

*Cur. adv. vult.*

\*Appeal from Appellate Decree, No. 1795 of 1936, against the decree of Dwarka Nath De, Subordinate Judge, 2nd Court of Tippera, at Comilla, dated July 25, 1936, modifying the decree of Satish Chandra Bagchi, Esq., Munsif, Third Court, Chandpur, dated July 27, 1935.

(1) (1932) I. L. R. 59 Cal. 1165.

(2) (1933) 38 C. W. N. 459.

MUKHERJEA J. This is an appeal on behalf of the plaintiff, and arises out of a suit commenced by him against the defendant bank for recovery of a sum of Rs. 46 and annas odd, alleged to be due to him as dividend on certain preference shares held by him on a declaration that a resolution of the Managing Committee, dated September 20, 1934, as well as another resolution passed by the share-holders, at a meeting held on September 30, 1934, under which the payment of the said dividend was refused, were illegal and *ultra vires*.

1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.

To appreciate the various points raised in the case, it is necessary to set out the material facts briefly: The defendant bank is a co-operative institution which is governed by the Co-operative Societies Act of 1912. It is a mixed type of society and its members are partly other affiliated societies, registered under the Act, and partly individuals who are called preference share-holders. At an annual general meeting of the share-holders of the bank held on July 29, 1934, it was resolved that out of the profits available for distribution for the year ending June 30, 1934, which amounted to Rs. 21,803-8-4, a sum of Rs. 3,500 be carried to the reserve fund, and out of the balance, a sum of Rs. 755-14 be paid as dividend to the preference share-holders. The plaintiff says that, in accordance with this resolution, the dividend payable on the thirty preference shares held by him came up to Rs. 46 odd. He asked the secretary to pay this amount, but his demand was refused. The bank resisted payment of the dividend on the ground that the major portion of the assets shown in the auditor's report was illusory, and the real profits were not even sufficient to meet the expenses of the society. The committee of management accordingly moved in the matter, and on the strength of its resolution passed on September 20, 1934, an extraordinary general meeting of the share-holders was held on 30th September following, which rescinded the earlier resolution passed on July 29, 1934. The plaintiff challenges the legality of this subsequent

1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjee J.

meeting of the share-holders, as well as that of the previous resolution passed by the committee of management. His allegations are, that the committee of management was not duly constituted according to law, inasmuch as it included persons who were not members of the co-operative society and were not elected in the manner contemplated by r. 13(1) of the co-operative rules framed by the Local Government. It is also contended that bye-law 28 of the defendant bank, under which the board of directors purported to be constituted, was illegal and *ultra vires* of the Co-operative Societies Act. Lastly, it is said, that the extraordinary general meeting held on September 30, 1934, was not properly convened and its proceedings were vitiated by various irregularities and non-compliance with the provisions of law. The defence of the defendant bank in substance was that the suit was not triable by the Civil Court, and the remedy of the plaintiff, if any, lay in filing a dispute before the Registrar under the provision of r. 22 framed under s. 43, Co-operative Societies Act. It was urged in the next place that as the Government auditor, in his audit-report, had reported that a considerable portion of the profits were not realisable, no dividend was payable without the sanction of the Registrar under r. 28(3) of the Government rules. The defendant further contended that the board of directors was properly constituted in accordance with bye-law 28, which was neither illegal nor *ultra vires*, and there was no irregularity in the extraordinary general meeting of September 30, 1934, which cancelled the earlier resolution of the share-holders.

The trial Court negatived all these defences, and gave the plaintiff a decree. On appeal the decision was modified by the lower appellate Court. The Sub-Judge has held *inter alia* that the suit was triable by a Civil Court, and the resolution passed at the annual general meeting on July 29, 1934, was perfectly legal. He has given the plaintiff a declaration that the constitution of the board of directors for the year

1932-33 was illegal and the resolution passed at the extraordinary general meeting on September 30, 1934, which was convened by the said board, was *ultra vires*. He has, however, dismissed the plaintiff's claim for dividend on the ground that the auditor's report showed that a portion of the profits was not recoverable and as such no dividend could be paid without the sanction of the Registrar, as provided for in cl. 28(3) of the Government Rules. It is against this decision that the present Second Appeal has been preferred. The defendant bank has also filed cross-objections.

Mr. Dutt who appears for the plaintiff appellant has contended before me that the Court of Appeal below, having held that the resolution passed at the general meeting on July 29, 1934, was valid and proper, should not have dismissed the plaintiff's claim for dividend, on the ground that no dividend was payable without the sanction of the Registrar, under r. 28, cl. (3). His argument is that r. 28 is itself *ultra vires* of the statute and there being no evidence that the auditor was duly authorised by the Registrar his report was not a report in the eye of law. It is also urged that if the auditor's report is taken along with his oral evidence, it would appear that no portion of the assets was really irrecoverable.

Dr. Sen Gupta who appears for the respondent has, besides attempting to repel the above contentions, put forward four grounds in support of the cross-objections preferred by his clients. He has argued first of all that the suit was not maintainable in a Civil Court. In the second place, it is said that the resolution sanctioning the payment of dividend which was passed on July 29, 1934, is itself *ultra vires*, inasmuch as there was no distributable profit out of which the dividend could be paid. The third ground is that the Court of appeal below was wrong in holding that the board of directors for the year 1932-33 was not legally constituted and that the resolution passed at the extraordinary general meeting on September 30, 1934, was *ultra vires*. Lastly, it is

1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjee J.

1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjea J.

urged that the plaintiff's claim for dividend having been dismissed, the Court of Appeal below should not have made any declaration in his favour.

I will take up at the beginning the first two points urged by Dr. Sen Gupta in support of his cross-objections. They relate to the jurisdiction of the Court and the very foundation of the plaintiff's claim and, in case they are decided against the plaintiff, the other questions would not arise at all.

Now so far as the maintainability of the suit is concerned, Dr. Sen Gupta relies upon para. 22 of the Rules framed by the Local Government under s. 43 of the Co-operative Societies Act. Sub-section (1) of that paragraph runs as follows:—

Any dispute touching the business of a registered society between members or past members of the society, or persons claiming through a member or past member, or between a member or past member or persons so claiming and the Committee or any officer, shall be referred in writing to the Registrar.

It is argued that payment of dividend on preference shares is a matter touching the business of a registered society and the dispute having arisen between the plaintiff, who is a member of the society, on the one hand and the committee of management on the other, it was incumbent upon the plaintiff to make a reference to the Registrar.

This contention does not appear to me to be sound. The payment of dividend may be a part of the business of the board of directors. But that is a mere consequential relief which the plaintiff has prayed for in this case. He wants among others a declaration that the constitution of the board itself was illegal, that it had no authority to function or to call an extraordinary general meeting of the shareholders, and that the resolution passed at the meeting thus convened was itself *ultra vires*. I am unable to say that this is a dispute between a member and the committee touching the business of the society. The duties of the board of directors are set out in bye-law 31, and none of its clauses can,

by any stretch of imagination, cover a matter of this character. This view is supported by two recent pronouncements of this Court, which are to be found in *Ramendranath Mukherji v. Bálurghât Central Co-operative Bank, Ltd.* (1) and *Barisal Co-operative Central Bank, Ltd. v. Benoybhusan Gupta* (2). Dr. Sen Gupta has relied upon a decision of S. K. Ghose J. in *Ram Krishna Sen Gupta v. Haripur Co-operative Bank* (3). The point decided in that case was totally different. The dispute there was as regards the amount of loan which a past member had taken from a co-operative society and it was held by my learned brother, and in my opinion rightly, that it came within the purview of r. 22, and the mere fact that the dispute was described to be one between a past member and the society itself was really immaterial and did not affect the validity of the reference.

1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjea J.

In the present case the dispute relates to the constitution of the board of management itself and its powers to convene an extraordinary general meeting of the share-holders. In my opinion, this is not a matter which is withdrawn from the Court by r. 22. The first contention therefore fails.

The second point raised by Dr. Sen Gupta in support of his cross-objection also seems to me to be without any substance.

Under s. 33 of the Co-operative Societies Act, no part of the funds of a registered society shall be divided by way of bonus or dividend or otherwise among its members. The first proviso engrafted upon the section lays down that, after at least one-fourth of the net profits in any year have been carried to a reserve fund, payment for the remainder of such profits or from any profit of past years available for distribution may be made among members to such extent and under such conditions as may be provided

(1) (1932) I. L. R. 59 Cal. 1185.

(2) (1933) 38 C. W. N. 459.

(3) (1935) 39 C. W. N. 1301.

1938  
 Hara Dayal Nay  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjea J.

by the rules or bye-laws. Bye-law 51 of the defendant society, as far as is material for our present purposes, runs as follows :—

At the close of each working year of the bank, the nett profits shall be divided as follows and in the order given :—

- (1) Twenty-five per cent. shall go to the reserve fund in accordance with the Co-operative Societies Act.
- (2) The balance shall first be applied to the payment of a dividend up to  $6\frac{1}{4}$  per cent. on the amount paid on preference shares.
- (3) From the remainder a dividend shall be paid up to  $6\frac{1}{4}$  per cent. on the amount paid on ordinary shares.

It appears from the profit and loss account of the defendant bank that for the year ending June 30, 1933, there was a nett profit of Rs. 12,140-12-6 pies. There was also a further sum of Rs. 9,662-11-10 pies as representing the undistributed profits of the previous year. The total amount of profits that were available for distribution, therefore, came up to Rs. 21,803-8-4 pies and out of that a sum of Rs. 3,500 was carried to the reserve fund. *Prima facie*, therefore, there was no breach of any provision of the Act itself or any of its bye-laws by the resolution passed at the annual general meeting of July 29, 1934, which declared a dividend of  $6\frac{1}{4}$  per cent. upon the preference shares. It is suggested that the profits shown above were apparent and not real profits. It may be that a considerable portion of the profits thus shown were unrealised interest income, but I am unable to say that the share-holders assembled at the annual general meeting were not the best persons to consider and decide as to whether there was any chance of the assets being realised and what dividend, if any, could reasonably be paid on the basis of that expectation. In my opinion, therefore, the resolution of July 29, 1934, was not in any way illegal or *ultra vires*, and did not contravene any of the provisions of the Co-operative Societies Act.

This takes me to the next point which has been decided against the plaintiff by the lower appellate Court, and which is the only ground put forward by the plaintiff in support of his appeal, *viz.*, whether having regard to the auditor's report in the present

case, any dividend was payable without the sanction of the Registrar. The Sub-Judge based his decision upon cl. 28(β) of the Rules framed by Local Government which runs as follows :—

In any society in which the liability of the members is limited by shares, if the auditor reports that any asset is irrecoverable no dividend shall be paid without the sanction of the Registrar.

1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjea J.

It is not disputed that in the audit report for the year 1932-33, the auditor stated that a sum of Rs. 5,000, which was invested by the defendant bank in the Chandpur Sale Society, was in his opinion irrecoverable. Mr. Dutt argues that r. 28(β) is itself *ultra vires* of the Co-operative Societies Act, and he relies upon s. 43(2) (r) of the Act, which lays down that the Local Government may prescribe the conditions under which profits may be distributed to the members of a society with unlimited liability and the maximum rate of dividend which may be paid by societies. Mr. Dutt's argument, in substance, is that in case of societies with unlimited liability the Local Government can make rules laying down the conditions under which profits may be distributed; but where, as here, the society is with limited liability there is no authority in the Local Government to make rules for distribution of dividend. This contention is not tenable. The first proviso to s. 33 of the Act itself indicates that, after one-fourth of the nett profits in any year have been carried to a reserve fund, payment from the remainder could be made among members, in such a way as may be prescribed by rules and bye-laws. The expression "rules" has obvious reference to rules framed under s. 43 of the Co-operative Societies Act and sub-s. (1) of that section expressly authorises the Local Government to make rules for carrying out the purposes of the Act. It is to carry out the purpose specified in s. 33 that r. 28 has been framed by the Local Government. In my opinion the limits, within which the rule-making powers could be exercised, are contained in sub-s. (1) of s. 43. Sub-section (2) simply sets out by way of illustration certain matters, on which



1938  
 Hara Dayal Nag  
 v.  
 Chandpur  
 Central  
 Co-operative  
 Bank, Limited.  
 Mukherjea J.

rules are considered desirable. It does not in any way limit the powers given by sub-s. (1) and the items mentioned therein do not exhaust the list of matters on which rules might be framed by the Local Government. I am unable, therefore, to hold that, simply because there is no specific item mentioned in s. 43(2), relating to distribution of profits in case of societies with limited liability, r. 28, which was framed by the Local Government with a view to carry out the purpose of the Act as laid down in s. 33, is *ultra vires*.

The next contention raised by Mr. Dutt is that the auditor in this case was not proved to have been authorised by the Registrar, as is necessary under s. 17, Co-operative Societies Act. This question was not raised at any stage of the suit, in any of the Courts below. Had it been raised, the defendant could certainly have adduced evidence on this point. As this is not a pure point of law I am not inclined to allow this question to be raised for the first time in Second Appeal.

The last point raised by Mr. Dutt is that the auditor's evidence would show that the sum of Rs. 5,000 which was invested in Chandpur Sale Society was not altogether unrealizable. Rule 28(3) refers to the auditor's report and not to his oral evidence and I find nothing ambiguous in the report itself which stated that a portion of the assets was not recoverable. The oral evidence is not very clear and does not show that the statement in the report was not correct. This contention must also fail.

There remains for me to consider the only other question that has been raised by Dr. Sen Gupta, *viz.*, whether the lower appellate Court was right in giving the plaintiff a declaration that the constitution of the committee of management was illegal by reason of its including one Mr. A. Sattar, who was not elected but was only nominated by the Registrar, and that the resolution passed at the extraordinary general meeting held on September 30, 1934, was

void. It is contended that the lower appellate Court was not right in its interpretation of r. 13(1) of the co-operative rules and it is not necessary that all the members of the managing committee should be elected by open votes. It is permissible to have in the committee some members who are not elected but only nominated, and bye-law 28 of the defendant bank expressly lays down that two out of the sixteen members of the board would be nominated by the Registrar. It appears that the language of r. 13, cl. (1), is extremely unhappy, and it is very difficult, if not altogether impossible, to spell out of it any consistent meaning. It says that "in every registered society the members of the managing committee shall be elected by nomination and open vote at a general meeting". The Subordinate Judge has held that the word "nomination" means nomination as a candidate and what the rule contemplates is that all the members should be elected, the procedure being that they should first be proposed or nominated as candidates, and then the matter would be put to open vote. A nominee of the Registrar, as such, has no right to sit in the committee. Dr. Sen Gupta argues that the use of the word "elected" is misleading and is responsible for the confusion that the rule has created. The word according to him really means "selected" and the selection would be both by nomination and open vote. The rule thus sanctions both forms of "election" or "selection" and hence bye-law 28 as framed by the defendant bank is not *ultra vires*. It is true that the bye-laws of the defendant have proceeded upon this footing, but I am not sure that it is not a strained meaning to put upon the word "elected" to make it mean "selected" or "appointed".

I agree, however, with Dr. Sen Gupta that, having regard to the fact that the plaintiff's claim for dividend fails, it would not be necessary to decide this question finally in the present litigation. The plaintiff cannot have his dividend because of r. 28(3)

1938  
*Haru Dayal Nag*  
 v.  
*Chandpur*  
*Central*  
*Co-operative*  
*Bank, Limited.*  
 Mukherjea J.

1938  
Hara Dayal Nag  
 v.  
*Chandpur*  
*Central*  
*Co-operative*  
*Bank, Limited.*  
Mukherjea J.

which necessitates the sanction of the Registrar before the payment can be made.

If the matter had stood thus, that the Registrar had not yet exercised his descretion either one way or other and had neither granted nor refused the sanction, I should have thought that the declaration would still be of some assistance to the plaintiff. He could then have approached the Registrar and invited him to sanction the payment. I am told, however, that the Registrar has already given his fiat, and that he has refused sanction under r. 28(3). The declaration therefore would be of academic interest, so far as the present suit is concerned, and of no material advantage to the plaintiff. On the other hand, the consequences of such declaration may have far-reaching effects regarding other actions of the committee of management, which do not form the subject-matter of the present suit. Under the circumstances I deem it proper that this question should remain open and should not be decided in this litigation. The result is that, subject to the modification mentioned above, both the appeal and the cross-objections stand dismissed. There will be no order as to costs.

*Appeal and cross-objections dismissed.*

G. K. D.