

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 30.11.2011*

+ **CM (M) No. 770/2003**

SH. BANKEY BIHARI LAL & OTHERS Petitioners.
Through: Mr. P.R. Aggarwal, Advocate.

Versus

SHIV MANDIR (GUFAWALA) SABHA
(REGD.) & OTHERS Respondents
Through: Mr. Anil Sapra, Sr. Advocate
with Mr. Maneesh Goyal,
Advocate.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (Oral)

1 Impugned order is the order dated 25.09.2003 vide which the order passed on the application filed by the plaintiffs under Order XXXIX Rules 1 & 2 of the Code of Civil Procedure (hereinafter referred to as the 'Code') and under Order XL of the Code had been reversed. Vide order dated 17.05.2003, the prayer made by the plaintiffs seeking appointment of a receiver had been allowed; further prayer for grant of interim relief had also been afforded to them; the trial Court was of the view that a prima-facie case is made out by the plaintiffs for grant of ad-interim injunction in their favour; pursuant thereto, the management i.e. defendants

No. 2 & 4 were restrained from managing the affairs of the society i.e. of defendant No. 1 and a retired Additional District Judge Mr. S.M. Aggarwal had been appointed as receiver to look after the affairs of the defendant No. 1 as also to conduct elections for the said purpose. This order was subject matter of an appeal which was disposed of vide the impugned order dated 25.09.2003. The impugned order had upset these findings holding that neither a prima-facie case is made out in favour of the plaintiffs for grant of injunction and nor is any ground made out for appointment of a receiver.

2 At the outset, it has been urged by learned counsel for the respondents that this Court is sitting in its power of superintendence under Article 227 of the Constitution of India and unless and until there is a manifest error or an illegality committed by the first appellate court, interference under powers of superintendence is not called for. It is in this background that the arguments of the respective counsels have to be appreciated.

3 Written submissions have been filed by the plaintiff. Contention is that the trial Court had correctly appreciated the averments made in the plaint which were to the effect that the affairs of defendant No. 1 society were regularly being managed

by defendants No. 2 to 4 where financial irregularities were being committed and the said defendants are liable to render accounts of the society; contention being that the strength of the members of the society had earlier increased immensely from 160 to 500 but now it had been brought down to 51 all of whom are family members of the defendant No. 1 society which is being run at the whims and fancies of its management. Contention being that the impugned order upsetting this finding of the trial court suffers from an infirmity.

4 Arguments have been refuted.

5 Record has been perused.

6 Present suit is a suit for declaration and mandatory injunction. The averments made in the plaint have been perused. They are largely to the effect that financial irregularities have been committed by the defendant society along with its office bearers. Contention in the plaint is that the four plaintiffs are all founder members of the plaintiff society; this has been averred in para 12; further contention being that they seek renewal of their membership to which they have a legal right. Prayer 'b' of the plaint also specifically states that a decree of declaration be

passed in favour of the plaintiffs and against the defendants declaring that the action of the defendant in depriving the plaintiffs of their membership by not renewing it be set aside. In the written statement these contentions have been refuted. In the written statement it has specifically been pointed out that the plaintiffs were never the founder members of the society. In reply to this para of the plaint i.e. para 4 of the written statement, it has been stated that plaintiff No. 2 who had earlier been the Vice-President has left the society in 1998 and has since ceased to be a member of the society; plaintiffs No. 3 & 4 were never executive members of the society; plaintiff No. 3 was not even an ordinary member of the society; plaintiffs No. 1 & 4 had also not got their membership renewed after 1996. This contention which has been made in the written statement has not been refuted. Even before this Court, there is no counter submission. Learned counsel for the respondents/defendants has pointed out that the complete record of the society which includes list of its members and minutes of meeting have been placed on record and these facts which have specifically been stated in the written statement emanate from the record to which even otherwise there is no dispute. Contention being that the plaintiffs have not come to the

Court with clean hands and they deserve no relief. Further
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contention being that the impugned order has noted all the contentions raised by the petitioners in the correct perspective and it calls for no interference.

7 The Apex Court in AIR 1971 SC 966 Smt. Damyanti Naranga Vs. Union of India and others has laid stringent test which are required to be passed before a Receiver can be appointed. These five tests which have to be noted by the Court while exercising this equity jurisdiction have been summarized herein as under:-

"(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the court. The discretion is not arbitrary or absolute; it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

(2) The court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the

court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio' that is to say, in the enjoyment of no one, as the court can hardly do wrong in taking possession; it will then be the common interest of all the parties that the court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a court with jurisdiction to appoint a receiver.

(5) The court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to court with clean hands and should not have disintitiled himself to the equitable relief by laches, delay, acquiescence etc."

8 The averments made in the application under Order XL of the Code seeking appointment of a Receiver have also been perused which have to be read along with the contents of the plaint. The financial irregularities purported to have been carried out by the defendants have not been detailed or spelt out; they are by and large general allegations. In fact it is the plaintiffs themselves who are facing charges of mis-conduct; plaintiff No. 3 is facing trial under Section 302 of the IPC which has been converted into charges under Section 304 of the IPC for which he has suffered imprisonment; an FIR is pending against plaintiff No. 1 under Sections 406/420 of the IPC and an FIR has also been

registered under the Maintenance of Internal Security Act (MISA) against plaintiff No. 4. These facts are also not in dispute and have been noted in the impugned order.

9 The impugned order has also noted that the comparative statement of the gross receipts collected for the period during which Receiver had been appointed under consent orders of the Court i.e. for October, 1999, 2000, 2001 & 2002 shows that the collections made for prior period i.e. period during which the defendants were managing the affairs of the society were much more as compared to the receipts for the aforementioned period when the Receivers were getting the election conducted. This prima-facie indicates that the affairs of the defendant No. 1 Society were in fact better managed by defendants No. 2 to 4. Order appointing the Receiver was thus rightly set aside.

10 The impugned order refusing the relief under Order XXXIX Rules 1 & 2 of the Code also suffers from no infirmity. The Court had correctly noted that in the main suit there was no prayer made in the plaint that the defendants should be restrained from managing the affairs of the society and as such the relief prayed for by way of interim relief which has not been sought for in the main suit could not have been granted. Even otherwise, the

plaintiffs as noted supra have not come to the Court with clean hands; they have concealed the fact about their membership; such a party is not entitled to an injunction which is a discretionary relief to be granted only if a prima-facie case is made out by the plaintiff; balance of convenience should also lie in his favour and the Court is of the prima-facie view that³² non grant of the injunction an irreparable loss would be suffered by him in case such relief is not granted to him. Impugned order had been passed taking all the aforementioned parameters into account; it suffers from no infirmity.

11 Dismissed.

NOVEMBER 30, 2011
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INDERMEET KAUR,J