

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8890 OF 2015

Vishal R. Lodha .. Petitioner
vs.
Richa V. Lodha .. Respondent

Mr. Sanjay Bhojwani for the Petitioner.
Mr. H.P. Vyas for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 16 SEPTEMBER 2015.

P.C. :-

1] This petition challenges the order dated 17 July 2015, by which the Family Court has refused to strike of the defence of the Respondent-Wife in the Petitioner's petition seeking restitution of conjugal rights.

2] The Petitioner vide Exhibit-16 applied for striking of defence under the provisions of Order 39 Rule 11 of the Civil Procedure Code, 1908 (CPC) alleging that the Respondent-Wife has intentionally disobeyed the order dated 5 February 2014 made by the Family Court directing her to produce copy of chargesheet which was referred to or shown during the course of arguments on 19 October 2013.

3] In the impugned order, the Family Court has held that the order of Court is flouted, but the provisions of Order 39 Rule 11 of the CPC being discretionary, no case is made out for making of a harsh order in the nature of striking of defence, merely because the said chargesheet was not produced, despite directions in the order dated 5 February 2014.

4] Mr. Sanjay Bhojwani, learned counsel for the Petitioner, submitted that once the Family Court has recorded a finding that there was flouting of the order of the Court, discretion has to be exercised in a reasonable manner. In the present case, on 19 October 2013, reference was made and even the chargesheet in-question was shown during the course of arguments. However, later on it transpires that the chargesheet was filed before the concerned Magistrate at Noida only on 23 June 2014. In these circumstances, a serious issue arises as to how the chargesheet was shown before the Family Court in the course of arguments on 19 October 2013. It is with a view to avoid explanation upon this serious discrepancy, the order made by the Family Court on 5 February 2014 has been flouted. Such intentional and deliberate flouting of order was required to be viewed very seriously by the Family Court and this

was a fit case for exercise of powers under Order 39 Rule 11 of the CPC. Mr. Bhojwani also submitted that in the written statement filed by the Respondent, she had herself admitted that the chargesheet was yet to be filed and such written statement was filed on 15 March 2014.

5] Mr. Bhojwani placed reliance upon the decisions of this Court in the following matters:

- 1] *Ramavatar S. Modi vs. Mulchand S. Modi*¹;
- 2] *Mrs. Vimi Vinod Chopra vs. Vinod G. Chopra*²;
- 3] *Sonali R. Ayyar vs. Ramachandran V. Ayyar*³ and
- 4] *Rajesh H. Parikh vs. Deepika R. Parikh*⁴.

6] Mr. H.P. Vyas, learned counsel for the Respondent, submitted that the Respondent in her response dated 23 April 2014 had offered sufficient explanation in the matter of alleged non-compliance with the order dated 5 February 2014. In the response, it was stated that the Respondent was unable to procure the certified copy of the chargesheet and since the Petitioner was arraigned as the accused in the said chargesheet, the Petitioner would be entitled to get a copy

1 (2004) 2 MhLJ 1 ; (2004) Supp2 BomCR 298

2 2012(2) ALL MR 860

3 (2014) 3 ALL MR 354

4 (2012) 3 ALL MR 9

of chargesheet from the Court at Noida, free of costs. Mr. Vyas submitted that in any case, even before the impugned order dated 17 July 2015 was made, certified copy of the chargesheet was produced on record by the Respondent on 25 September 2014 and that this constitutes sufficient compliance.

7] Mr. Vyas submitted that if the certified copy of chargesheet is perused, then according to him, it bears date 30 May 2013 though it may have been filed before the C.J.M., Noida on 23 June 2014. In such circumstances, Mr. Vyas submitted that the allegation that the Respondent was in possession of the chargesheet, even before the same was really prepared or stated to be prepared is untenable. For all these reasons, Mr. Vyas submitted that absolutely no case was made out to exercise powers under Order 39 Rule 11 of the CPC.

8] Mr. Vyas also submitted that the Petitioner is bent upon delaying the proceedings, particularly since the Respondent has applied for divorce. Mr. Vyas submitted that several proceedings are being initiated by the Petitioner from time to time and notwithstanding the rejection of the same, the Petitioner persists on instituting further proceedings, only with a view to delay the proceedings instituted by the Petitioner.

9] Having heard the learned counsel for the parties and perused the record, in my judgment, there is no case made out to direct that the defence of the Respondent be struck off, in the facts and circumstances of the present case.

10] In the first place, from the tenor of application as also the submissions in support thereof, it does appear that the purpose of taking out the application under Order 39 Rule 11 of the CPC was not as much for striking of the defence of the Respondent, but rather to create some foundation or grounds of defence in the chargesheet which has been filed before the C.J.M. at Noida. This was an additional circumstance, which the Family Court should have taken into consideration at the time of deciding the Petitioner's application under Order 39 Rule 11 of the CPC.

11] The issue as to whether the chargesheet shown during the course of arguments on 19 October 2013 was some '*prepared chargesheet*' or not or the issue as to how such chargesheet was available with the Respondent on the said date, are really not the issues which were germane or relevant for the purposes of deciding an application under Order 39 Rule 11 of the CPC. However, the entire emphasis has been laid on the said issues.

12] That apart, though the impugned order, without much discussion, in paragraphs 4 and 5 of the impugned order, records the finding that the Respondent has flouted order of the Court dated 5 February 2014, to my mind, such a finding was not really warranted, in the facts and circumstances of the present case. In any case, there is really no discussion as to why the explanation offered by the Respondent in the reply dated 23 April 2014 was not satisfactory.

13] The order dated 5 February 2014, had no doubt directed the Respondent to file the chargesheet referred to by her during the course of arguments. In response, the Respondent stated that she is unable to procure the certified copy of chargesheet. Finally, however, on 25 September 2014, after certified copy of the chargesheet was procured, the same was filed on record. The circumstance that on 25 September 2014, certified copy of the chargesheet was indeed filed on record has not even been taken into consideration by the Family Court whilst making the order dated 17 July 2015 and recording a finding that the Respondent had flouted the order of the Court.

14] That apart, even assuming that there was some inaction or delay in the matter of compliance and production of chargesheet,

this was certainly not a case where the harsh provisions of Order 39 Rule 11 of the CPC were required to be invoked and the defence of the Respondent struck off. As noted earlier, the chargesheet has been filed against the Petitioner, as such the Petitioner will have received or will eventually receive the copy of the same. In any case, even before the impugned order could be made, the certified copy of the chargesheet was placed on record. The purpose of proceedings under Order 39 Rule 11 of the CPC are certainly not to enable the Petitioner to create some sort of foundation for his eventual defence to the chargesheet. Accordingly, there was no question to entertain any submissions as to whether the chargesheet shown on 19 October 2013 was some prepared chargesheet or not.

15] The decisions relied upon by Mr. Sanjay Bhojwani offer no parallel to the facts and circumstances of the present case. In case of *Ramavatar Modi (supra)*, the Division Bench of this Court has held that the provisions of Order 39 Rule 11 of the CPC are directory and not mandatory. This means that even where an order is established as breached, it is not mandatory for the Court to exercise powers under Order 39 Rule 11 of the CPC. Of course, the discretion is judicial and therefore not unfettered or unguided. In case of *Sonali*

R. Ayyar (supra), the learned Single Judge of this Court has held that no action be taken under Order 39 Rule 11 of the CPC, in the event, the Applicant is able to satisfy the Court by setting out reasonable grounds for default or contravention or breach of the Court. This is in fact, a decision which assists the Respondent rather than the Petitioner. Because in this case, the reasonable grounds were set out and finally even before the impugned order was made, the chargesheet was produced on record.

16] In case of *Vimi Chopra (supra)* what was defied was a custody order and in this context, it was held that the Trial Court was justified in invoking the provisions under Order 39 Rule 11 of the CPC. Similarly, in case of *Rajesh H. Parikh (supra)*, what was defied was an order for payment of maintenance and therefore, defence was struck off under order 39 Rule 11 of the CPC. None of these cases offer parallel to the facts and circumstances of the present case.

17] There is no jurisdictional error in the impugned order. In fact, the finding in the impugned order to the effect that the order dated 5 February 2014 was flouted is itself infirm. Further, the impugned order has not taken into consideration the explanation offered by the

Respondent. For all these reasons, no case was made out to exercise discretion and to strike of the defence of the Respondent.

18] At the conclusion of this order, Mr. Sanjay Bhojwani, learned counsel for the Petitioner submitted that there is a direction from the Family Court, which requires the Petitioner to file evidence in the two proceedings, which have been clubbed, on or before 21 September 2015 and that some extension be granted for compliance with this direction, since the Petitioner resides at Ranchi. The request is reasonable and therefore, extension is granted upto 21 October 2015.

19] Mr. Sanjay Bhojwani makes a statement that the Petitioner will not seek any further adjournments in the matter of filing evidence in the two proceedings. This statement is accepted. Accordingly, time for filing affidavit in lieu of examination-in-chief in both the proceedings is extended as and by way of last opportunity upto 21 October 2015.

20] The learned counsel for the parties point out that there is already an expedition order insofar as the restitution petition is

concerned and thereafter, the restitution petition has been clubbed alongwith the petition seeking divorce filed by the Respondent. In these circumstances, it is made clear that both the proceedings have to be decided expeditiously. Accordingly, the Family Court is directed to decide both the proceedings as expeditiously as possible and in any case within a period of six months from today.

21] The parties are directed to cooperate in the matter of expeditious disposal of both the proceedings.

22] Mr. Sanjay Bhojwani, learned counsel for the Petitioner fairly admits that the prayer clause (ii) of the petition will not survive. In any case, prayer clause (ii) relates to the order dated 13 August 2015 by which the petition for restitution and the petition for divorce were clubbed together. Such order was obviously correct, in the facts and circumstances of the present case and there is no reason to interfere with the clubbing of two matters.

23] This petition is, therefore, dismissed. There shall, however, be no order as to costs.

(M. S. SONAK, J.)

CERTIFICATE

**“Certified to be true and correct copy of
original signed Judgment/Order.”**