

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V. ASHA

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

FAO.No. 4 of 2013 ()
ORDER DTD 20.3.2012 IN IA.999/07 IN OS.129/04 OF SUB COURT, KOCHI

APPELLANT(S)/PETITIONER/PLAINTIFF:

ESMARIO EXPORT ENTERPRISES,
KAVANAD P.O., KOLLAM 691 003.
REPRESENTED BY ITS GENERAL MANAGER AND
POWER OF ATTORNEY HOLDER, ARAVINDAKSHA KURUP.

BY ADVS. SRI. PAUL MATHEW (PERUMPILLIL)
SRI. PRASUN. S

RESPONDENT(S)/RESPONDENTS 1 & 2/DEFENDANTS 1 & 2:

1. M/S. MAERSK SEALAND, A.P. MOLLER,
ESPLANADEN 50 1098 COPEN HAGEN K, DENMARK REPRESENTED
BY THEIR AGENT AT KOCHI, M/S. MAERSK SEALAND INDIA PVT LTD.,
AMALAGAM HOUSE, 24/1604, PLOT NO.9,
BRISTOW ROAD WILLINGTON ISLAND, KOCHI -9.
2. M/S. MAERSK SEALAND INDIA PVT. LTD.,
AMALAGAM HOUSE, 24/1604, PLOT NO.9,
BRISTOW ROAD, WILLINGTON ISLAND, KOCHI -9.

R1,R2 BY ADV. SRI.V.M.SYAM KUMAR
R1,R2 BY ADV. SMT.KRIPA ELIZABETH MATHEWS
R1,R2 BY ADV. SRI.V.N.HARIDAS
R1,R2 BY ADV. SMT.DIVYA C.MOHAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
13-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

F.A.O.No.4 of 2013

Dated this the 13th day of November, 2015

JUDGMENT

Antony Dominic, J.

1.This appeal is filed by the plaintiff in O.S.129/04 on the file of the Sub Court, Kochi. The suit was filed against the respondents herein for recovery of damages to the tune of ₹35,50,817.90. In the suit, appellant filed I.A.426/05 calling upon the respondents defendants to produce four documents. The said IA filed under section 151 of the Code of Civil Procedure was allowed and order dated 15.6.2006 was passed by the trial court requiring the respondents to produce the documents.

2.To the IA, the respondents had filed a counter affidavit stating that in so far as the 2 Bills of Lading which were called upon to be produced are concerned, they were available at their Bombay office and that steps were being taken to obtain the same and would be produced in court. In so far as the remaining two documents, viz., Part Low Charts are

concerned, in the affidavit, they had stated that these documents were available at their office in Spain and would be produced if and when they are received from that office. Subsequently, on 12.7.2006, along with a memo filed by the counsel for the respondents, 4 documents were produced and among them, item Nos.1 and 2 are the Bills of Lading mentioned in IA.426/05.

3.Later, on 31.7.2007, appellant filed IA.999/07 under Order XI Rule 21 of the CPC with a prayer for striking off the defence of the respondents for the alleged non-compliance with the order for discovery passed under Rule 12 of the said Order. After considering the objection raised by the respondents, the said IA was dismissed by order dated 20.3.2012. It is this order which is challenged before us.

4.we heard learned counsel for the appellant and the learned counsel appearing for the respondents.

5.Order XI Rule 21 reads thus:

"21. Non-compliance with order for discovery - (1) Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard.

(2) Where an order is made under sub-rule (1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action. "

6.This provision has been interpreted in several judgments and it seems to be settled that the provision can be invoked only in a case of deliberate abstinence or refusal on the part of a party to comply with an order for discovery or inspection of documents.

7.In so far as this case is concerned, as we have already stated, the counter affidavit filed by the

respondents to IA.426/05 shows that they had offered to produce the bills of lading from their Bombay office. It was subsequently received and were produced also. In so far as the part low charts are concerned, the case was that they were available in their office in Spain and that the documents would be produced if and when the same are received from that office. This itself shows that their case was that the documents were not available with them and that if they receive the same, the documents would be produced. The case of the defendants was that their non production of the documents was on account of its non availability and such a case does not come within the meaning of willful negligence or failure to attract the fatal provisions of Rule 21 of Order XI. In that view of the matter, we do not find any illegality in the order passed by the court below calling for its interference.

8.It is true that the learned counsel for the appellant relied on the judgments of the Apex Court in Aero Traders (P) Ltd. v. Ravinder Kumar Suri [AIR 2005 SC 15], M.L.Sethi v. R.P.Kapur [AIR 1972 SC 2379] and

Delta Distilleries Limited v. United Spirits Limited [AIR 2014 SC 113] and this Court in Parukutty Amma v. Thankamma Amma [1988 (1) KLT 883]. However, in the light of the aforementioned finding, we do not think that these judgments would support the appellant to sustain their challenge against the impugned order.

Appeal fails and is accordingly dismissed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

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PS to Judge