

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

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Judgment reserved on: 01st September, 2015

Judgment delivered on: 19th January, 2016

+ FAO(OS) 458/2015 & CM No. 15177/2015

MAJ RETD SUKESH BEHL & ANR

..... Appellants

versus

KONINKLIJKE PHILIPS ELECTRONICS N V

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Ravi Gupta, Sr. Adv. with Mr. Ajay Gulati & Mr. N.K. Bhardwaj, Adv

For the Respondents : Mr. Pravin Anand & Ms. Vaishali Mittal, Adv.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The appellant (defendant in the suit) has filed the present appeal impugning the order dated 20.07.2015 whereby the application filed by the respondent (plaintiff in the suit) under Order 11 Rules 12, 14 and 21 of the Code of Civil Procedure (hereinafter referred to as the CPC) has been allowed and the appellant has been directed to produce on oath the documents referred to in the said application.

2. The appellant has contended that the respondent, to prove its claim for damages, had to produce evidence on its own and the appellant could not be

compelled to produce documents in respect of issues, the onus of which is on the respondent. The appellant has further contended that an order for production of documents could only be passed only in respect of documents relating to any matter in question in the suit and as there were neither any pleadings nor any issue with regard to the claim of damages so there could not be any order for production of the documents. It is contended that the documents, the production of which is sought by the respondent, are accounts and sales related documents of the appellant and in the absence of any pleadings/issue in respect of damages, the appellant could not be directed to produce his accounts and other related documents. It is contended that the respondent had to plead specific facts constituting the nature and extent of damages or loss caused to it and the appellant could not be called upon to produce his accounts related information so as prove his defence in the negative. It is further contended that the appellant has already stated on oath that the documents sought to be produced could not be located by him and as such there could be no direction for production more so in view of the fact that non compliance of the said direction could gravely prejudice the appellant and his defence would be liable to be struck off under order 11 rule 21 CPC.

3. The learned counsel for the respondent has contended that the documents are very much in the power and possession of the appellant and he has rightly been directed to produce the same. It is further contended that the documents are relating to the matters in question in the suit and their production can be sought/directed. Without prejudice to the submissions on

merits, the learned counsel for the respondent has raised a preliminary objection as to maintainability of the appeal contended that the impugned order is not an order deciding any rights of the parties and is not an order in the nature of a judgment having a bearing on the rights and liabilities of the parties and thus no appeal is maintainable.

4. Before we go on to decide the merits of the appeal, we are examining the preliminary objection raised with regard to maintainability of the appeal. In case we conclude that the appeal is not maintainable, we would not be required to examine the impugned order on merits.

5. Encompassed in the question whether the present appeal is maintainable is the question whether the consequences of dismissal of suit or of striking of the defence as prescribed by Order 11 Rule 21 can follow in respect of failure to comply with directions, to produce documents, issued under Order 11 Rule 14 of the CPC.

6. In **Shah Babulal Khimji v. Jayaben D. Kania**, (1981) 4 SCC 8, the Supreme Court held that for an order to be appealable, it has to satisfy the requirements of a judgment in other words, the order is such that it affects vital and valuable rights of the parties and decides matters of moment.

7. In the present case, the appellant has been directed to produce documents in exercise of powers under order 11 rule 14 CPC. The order directing production of documents does not by itself affect any vital and valuable rights of the parties and does not decide matters of moment. If the

consequences of failure to produce documents in compliance of the order under order 11 rule 14 were severe, then situation may be different. To determine what are the consequences of failure to comply with such a order we need to examine the relevant provisions and also as to how various courts over the years have interpreted the same.

8. Order 11 Rule 14 of the CPC reads as under:-

14. Production of documents.- It shall be lawful for the court, at any time during the pendency of any suit, to Order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents, when produced, in such manner as shall appear just.

9. Order 11 Rule 14 empowers the Court at any point to order production of such documents relating to any matter in question in a suit as are in the power and possession of a party as the Court thinks right. On production of the documents, the Court is empowered to deal with such documents as appears to Court to be just.

10. Order 11 Rule 21 reads as under: -

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.

11. The question is whether the consequences of dismissal of the suit or striking out defence can follow for failure to comply with the order for production under order 11 rule 14. Order 11 Rule 21 envisages that where any party fails to comply any order to answer interrogatories, or for discovery or inspection of documents, if it were to be the plaintiff then the suit is liable to be dismissed for want of prosecution and if non compliance was by the defendant then his defence, if any, is liable to be struck out and he is to be placed in the same position as if he has not defended the suit.

12. We would like to examine the interpretation give by the various High Courts over the years as to whether the consequences of order 11 rule 21 can follow in case of non compliance of an order passed for production of documents under order 11 rule 14.

13. **Krishnan, J. of High Court of Judicature at Madras in Sithamalli Subbayyer Vs. M.L.M. Ramanathan Chettiar (1924) 46 MLJ 350** held as under:

“2. Rule 21 in terms does not apply to an order for production it speaks only of interrogatories or discovery or inspection. In the repealed Code the words " or production " were in the corresponding section but they have been omitted in

the new Code. It is argued that the omission is due to a desire to avoid redundancy, as an order for production implied discovery and inspection. The opinion of Broadway J., of the Lahore High Court in the case Ramnath v. Parabhu Dayal (1921) 65 IC 661 is cited in support of the argument that the object of the omission was to avoid redundancy. The learned Judge does not give a very decided opinion on the point nor has he discussed the question. On the other hand a Bench of the Allahabad High Court* has held that Rule 21 does not apply to case of "production" orders. With all respect to the opinion of the learned Judge of the Lahore Court I am unable to follow his view. In the corresponding English Rule, Order 31 Rule 21 of the English rules of Practice, the words "or production" do not occur and it was apparently to bring the practice here into conformity with the English practice on the point that the omission was made. An order for production is quite different from an order for discovery or an order for inspection and cannot be said to imply either. In the present case the order for discovery was refused and the order for inspection was passed as a subsequent order. It is impossible to hold therefore that in the present case the order for production was anything more than for bare production in Court of specified documents. In the case Joy v. Hadley Cited in 22 Ch. D. 571 the order was for production and inspection it was in reality an order for inspection in Court of documents to be produced in Court for the purpose. That case is thus not an authority on the point before us. Some support was sought to be drawn from the wording of the Form 6 under Order 11 Rule 14, first Schedule, Appendix C of the Code. That form can be properly used only where the order is "to produce for inspection" as the title of the form shows. Rule 14 contemplates further orders being-passed on the documents being produced. An order for inspection of documents may, I think, therefore be passed under that rule itself after hearing parties; Rule 18 also enables a party to obtain an order for inspection. The form 6 cannot be relied on as showing that an order under Rule 14 involves an order for

inspection, for documents may be directed to be produced in Court for various other reasons, for example, for preventing tampering with them.

3. It was suggested that if we do not apply the provisions of Rule 21 in cases of orders for production there will not be a sufficiently effective method to make the party obey the order of the Court. There is no basis for this argument, for there are several ways of making a party produce a document shown to be in his possession and for which privilege is not established; and the presumption that arises against a party who is called upon and does not produce a document in his possession or power is in itself of serious consequence to him.

4. In the view I take that Rule 21 does not apply to orders for production, the appeal fails. It is true that plaintiff has not definitely stated in his affidavit whether he has the chitta books with him or not. Defendant may apply to the lower Court to call for a further affidavit from him. Defendant can always take any further steps, he may be advised to, under the rules for inspection. This appeal fails and is dismissed with costs.”

(underlining supplied)

14. In *The Lyalpur Sugar Mills and Co. And Anr. Vs. The Ram Chandra Gur Sahai Cotton Mills and Co. through Sri Ram* *AIR 1922 All 235*, the Division Bench of Allahabad High Court held as under:

“All the applications on behalf of the plaintiff firm except the last one dated the 28th July 1919, were applications under Order XI, Rule 14. They were merely for the production of documents into Court. At the first blush it does appear that the conduct of Jai Ram Das was contumacious, but we find that there is evidence on the record to show that as early as the 31st

May 1919 in answer to the interrogatories served upon him by the plaintiff firm he had stated distinctly that the documents that were called for from him were not in his possession. But if it be conceded for the sake of argument for a moment that Jai Ram Das was guilty of disobedience of the order of the Court, was the Court justified in striking off his defence? The order of the Court to Jai Ram Das to produce the books was an order made under Order XI, Rule 14, The non-compliance of that order does not warrant the striking off the defence of the party, which is guilty of the not-compliance of the order. The grounds upon which the discretion is given to a Trial Court for striking off the defence of a defendant are given in Rule 21 of Order XI of the Civil Procedure Code. According to the said rule there are three grounds only upon which a Trial Court is justified in striking off the defence of a defendant or dismiss the suit of a plaintiff, namely, (1) the refusal to answer interrogatories, (2) the refusal to make discovery of documents, (3) refusal to permit inspection of documents. Now, Rule 14 of Order XI of the Code of Civil Procedure does not relate either to the answering of interrogatories or the discovery or inspection of documents. The rule relating to discovery is embodied in Rule 12 of Order XI and the rule relating to the inspection of documents is to be found in Rule 18 of the same Order. In the present case the learned Subordinate Judge made no order either under Rule 12 or Rule 18 of Order XI of the Code of Civil Procedure. It is, however, contended on behalf of the plaintiff firm that the notice, which was issued to Jai Ram Das, was one that required inspection of documents called for from him. The form of notice to be issued under Order XI, Rule 14 is given in appendix C, Form No. 6. The notice that was issued in the present case does not comply with the Form given in Appendix C.”

(Underlining supplied)

15. In **Koduri Krishnarao Versus. State of Andhra Pradesh, Hyderabad AIR 1962 AP 249** a Division Bench of Andhra Pradesh High Court held that

“A plain reading of O. XI, R. 21 shows that the Court could have invoked the penal provisions of that rule only if there had been an order to answer interrogatories or for discovery or for inspection of documents under Rules 11, 22, and 18 of O. XI.”

16. In **Sahu Munnalal versus Tara and Anr AIR 1929 All 83** the Allahabad High Court held as under:

“The second reason why I consider the order of the Assistant Collector to be without jurisdiction is that the penalty does not attach to an order for the production of documents. This follows from what I have already stated. The penalty does not arise from any action of the Court but arises from an action of a party. Under Rule 14, the Court is permitted to order production and on failure of such production, there is no penalty because Rule 21 does not permit of a penalty on the motion of the Court. It is only where a party makes application and fails to obtain the evidence, which it seeks, from the opposite party that the penalty of Rule 21 follows. There is thus a very clear distinction between Rule 14 and Rules 6 to 8, 12 and 15. Rules 6 to 8, 12 and 15 apply to parties who have been given the right to move for serving of interrogatories, for discovery of documents and for inspection thereof as regards matter within the knowledge of the other party and documents within the control of the other party. Rule 21 does not apply without a party making a motion and, therefore, no penalty can attach to Rule 14 because under that rule the Court acts of itself and not on the motion of a party. There is a recent judgment of a Bench of two Judges of the Madras High Court in which it was held that Order XI, Rule 21 of the Code of Civil Procedure did not justify the dismissal of a suit for non-compliance with an order under Order XI, Rule 14 of the Civil Procedure Code for production of documents [Sithamalli Subayyer v. Ramanathan Chettiar, A.I.R. 1924 Mad. 582.]”

(underlining supplied)

17. *In Chinnappan versus Ramachandran, AIR 1989 Mad 314*, the High Court of Judicature at Madras following the decision in **Sithamalli Subbayer_ (Supra)** held as under:

“It may now be considered whether the application filed by the appellant before the court below for the exercise of powers under Order 11, Rule 21, C.P.C. was maintainable. Order 11, Rule 21, C.P.C. to the extent to which that provision is relevant on the facts of this case, states that where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a defendant, 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. It is thus seen that the remedy of having the defence of a defendant struck out would arise only when he fails to comply with an order to answer interrogatories or for discovery or inspection of documents and not in other cases. In this case, the respondent was not delivered interrogatories for being answered by an order of Court under Order 11, Rule 1, C.P.C. Likewise, the respondent was not directed by an order of court to make discovery on oath of the documents in his possession or power relating to any matter in question in the suit under Order 11, Rule 12, C.P.C. No order for inspection of documents was also passed against the respondent under Order 11, Rule 12, C.P.C. The exercise of the power vested in the Court to strike out the defence of a defendant and to place him in the same position as if he had not defended the suit is limited under Order 11, Rule 21, C.P.C. to cases where the defendant fails to comply with an order to answer interrogatories or an order for discovery or inspection of documents. In other words, an order under Order 11, Rule 21, C.P.C. cannot be passed in cases falling

outside the purview of Order 11, Rules 12 and 18; C.P.C. In Sithamalli Subbayer v. Ramanathan Chettiar : (1924) 46 MLJ 350, an order was passed by Court under Order 11, Rule 14, C.P.C. directing the plaintiff to produce some documents upon oath and on the production of some, documents, the defendant inspected a few of them and finding that some documents directed to be produced were not produced, applied to the court to take action under Order 11, Rule 21, C.P.C. dismissing the suit. That application was dismissed holding that Order 11, Rule 21, C.P.C. did not apply to cases of non-compliance with an order for production and, the dismissal of the application was upheld by this Court.

* * * * *

It is clear from the decision referred to above, that failure to produce documents directed to be produced by an order of Court passed under Order 11, Rule 14, C.P.C. does not fall under Order 11, Rule 21, C.P.C. To similar effect is the decision in Subramania Iyer v. Bonier Cooty Haji: AIR 1933 Mad 870. In that case also, for failure to produce certain documents pursuant to orders passed under Order 11, Rule 14, C.P.C. the suit was dismissed and in considering the correctness of this order, Pandalai J. observed as follows -

".....From the terms of the Judge's order as well as from the previous orders for production which are on the record, there is no doubt that those orders were passed under Order 11, Rule 14, C.P.C. and that respondent-defendant No. 1 applied for orders under that provision. This being so, it would be enough to dispose of this appeal to say that the learned Judge had no authority to dismiss the plaintiffs suit for disobedience of an order under Order 11, Rule 14, C.P.C. That was decided in so far as this Court is concerned in Subbayer v. Ramanathan Chettiar : (1924) 46

MLJ 350 which followed a decision of the Allahabad High Court in Lyalpur Sugar Mills Co. Ltd. v. Ramchandra Gursahai Cotton Mills Co. Ltd : AIR 1922 All 235 "

It is thus seen that this Court has consistently taken the view that a failure to produce documents directed to be produced by an order of court passed under Order 11, Rule 14, C.P.C. does not enable the court to exercise its powers under Order 11, Rule 21, C.P.C. In view of this, the application filed by the appellant seeking the assistance of the court to exercise its powers under Order 11, Rule 21, C.P.C. was misconceived and not maintainable.”

(Underlining supplied)

18. In *M/s. Gur Prasad Shyam Babu and others Versus State Bank of India and another AIR 1994 All 151*, the Allahabad High Court has held

“The main question which falls for determination in the present case is as to whether the order which had been passed by the trial Court on 21-8-1987 could be passed under O. 11, R.21, C.P.C.

From the provisions of the aforesaid R. 21 it is thus clear that the Court can exercise the power under the aforesaid rule in three circumstances i.e. when a party fails to comply (a) with any order to answer interrogatories; (b) with any order for discovery of documents; and (c) with any order for inspection of documents.

The learned counsel for the applicant has frankly conceded that the order which had been passed by the trial Court on 16-7-1987 did not fall in either of the three categories and was an order of production of documents. I have also carefully examined the order which has been passed by the trial Court and I am of the opinion that the aforesaid order is only an order for the production of documents. Such an order could be passed

by the Court below only under the provisions of Order 9, Rule 14, C.P.C. A bare perusal of Order 9, Rule 21 would show that the suit could not be dismissed for non-compliance of the directions of Order 9, Rule 14, C.P.C. and at best the Court could draw an adverse inference because of non-production of the documents by the plaintiff. A Division Bench of this Court in the case of Lyalpur S. M. Company v. Ram (AIR 1922 All 235) has also held that provisions of Order 11, Rule 21 are not applicable to cases of non-compliance with Order for production of documents under Order 11, Rule 14, C.P.C.
.....”

19. The Lahore High Court in **Manohar Das Versus Darbara Singh and Anr. AIR 1933 Lah 248** held as under:

“The defendant had been directed as a party to the suit to produce his documents at a particular date and he failed to do so. The only effect of his default could be that he might lose the right to produce those documents at a later stage in support of his case. The circumstances which enable a Court to strike off a plaint or a defence under Order 11, Rule 21, had not come into existence in this case. No interrogatories had been served upon the defendant and no order for discovery or inspection of documents such as is contemplated by Order 11 had been passed.”

20. The High Court of Tripura in **Shri Baba Shiva Sambhu and another Versus Raj Mohan Deb Nath and others AIR 1966 Tri 16** held as under:

“Now, from the terms of O. 11, R. 21 set forth above, it is clear that even assuming that the plaintiff had been called upon by the Court to produce certain documents in original and that he had failed to do so as the documents were lying with the Settlement Department, it cannot be postulated that R. 21 is at

all attracted into application. Refusal to produce certain documents (see O. 11 R.14) is not a lapse within the meaning of R. 21 at all and, therefore, the penal consequences prescribed thereunder could not have been imposed. There is ample authority for holding that an order for production of documents under R. 14 is not one of the orders contemplated under this rule and, therefore, any disobedience thereto could not be punished under O. 11 R. 21. See *Lyalpur Sugar Mills and Co. v. R.C.G. Sahai Cotton Mills and Co.* : AIR 1922 All. 235; *Subbayyar v. Ramanathan Chettiar* : AIR 1924 Mad 582; *Subramania Ayyar v. Bommer Cooly Haji* : AIR 1933 Mad 870; *Manohar Das v. Darbara Singh*: AIR 1933 Lah 248; *Tafazzul v. Shah Mohammad*, : AIR 1949 All 261; *Shamalal Guruprasad v. Ganpatlal*, AIR 1954 MP 65.

These cases clearly establish the principle that the non-compliance with an order under O. 11 R. 14 does not and cannot warrant the dismissal of the suit of a plaintiff or the striking off of the defence of the party which is guilty of the non-compliance of the order as such non-compliance does not fall within the ambit of the three grounds which are stated in the rule and which only would justify the striking off of the defence. It may further be pointed out in this connection that where a party fails to produce certain documents under O. 11 R. 14, the Court would be entitled to raise an adverse presumption against the party on account of the non-production of the documents required, but that would not justify its dismissing a suit in the case of a plaintiff or striking off of the defence in the case of a defendant. It has to be emphasised in this connection, and I would do so even at the risk of repetition, that the provisions of this rule are of a very drastic nature, and it is only in rare cases that the penalty contemplated under the rule should be resorted to. Bearing these principles in mind, I have no hesitation in coming to the conclusion that the order passed by the Court of first instance dismissing the suit of the

plaintiff was wholly without justification and that in passing that order the Court exercised jurisdiction which did not vest in it in accordance with law.”

(underlining supplied)

21. The consistent view taken by various High Courts across the country for a considerably long period of time i.e. nearly over 90 years is that an order under 11 order rule 14 is merely an order to produce documents. Non compliance of the said order may have several consequences, but the set of consequences as stipulated by order 11 rule 21 is not one of them. The court is not given discretion under rule 21 to dismiss the suit for non prosecution or strike out the defence in case of non compliance of the order of production. Various other measures may be available/consequences provided for dealing with a failure to comply with an order of production under order 11 rule 14, however, we are not in the present case called upon to deal with the said issue.

22. The impugned order is an order made under Order 11, Rule 14, The non-compliance of that order does not warrant the striking out of the defence of the appellant. The grounds upon which the discretion is given to a Court to strike out the defence of a defendant are given in Rule 21 of Order 11 CPC. According to the said rule, there are three grounds only upon which a Court is justified in striking out the defence of a defendant or in dismissing the suit of a plaintiff, namely, (1) the refusal to answer interrogatories, (2) the refusal to make discovery of documents, (3) refusal to permit inspection of documents. Rule 14 of Order 11 CPC does not relate either to the answering of interrogatories or the discovery or inspection of documents.

The rule relating to discovery is embodied in Rule 12 of Order 11 and the rule relating to the inspection of documents is to be found in Rule 18 of order 11. In the present case the learned Judge has not passed any order either under Rule 12 or Rule 18 of Order 11 CPC. An order under Rule 14 is clearly not covered within the ambit of rule 21.

23. Further, an order for production under order 11 rule 14 CPC does not decide or affect any vital and valuable rights of the parties or decide matters of moment. In any event, prior to passing any order under order 11 rule 21, the court is to put the defaulting party to notice and give him an opportunity of being heard. The impugned order does not satisfy the test as laid down in *Shah Babulal Khimji (Supra)* and as such the present appeal is not maintainable.

24. Since we are of the view that the appeal is not maintainable, we are not going into the question of relevancy of the documents or their availability with the appellant or the issue qua production of secondary evidence by the respondent.

25. In view of the above, the appeal is held to be not maintainable. The appeal is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

January 19, 2016/rs