

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 116 OF 2005**

1. Shashikant Yeshwant Pal,
major of age,
son of Yeshwant Pal,
Businessman and his wife,
2. Sumitra Shashikant Pal,
major of age, housewife,
both residing at H. No.2519,
Shantaram Nagar,
Bordem, Bicholim Goa. ... Appellants

Versus

1. Tanaji Yeshwant Pal,
major of age,
son of Yeshwant Pal,
and his wife,
2. Sudhabai Tanaji Pal,
major of age, housewife,
both residing at H.No.62,
Bordem, Bicholim Goa. ... Respondents

Mr. Valmiki Menezes, Advocate for the appellants.

None for the respondents though served.

Coram:- F. M. REIS, J.

Date:- 20th March, 2017

ORAL JUDGMENT

Heard Mr. V. Menezes, learned counsel appearing for the appellants. None for the respondents though served.

2. The above appeal came to be admitted by an order dated 20.09.2006 on the following substantial questions of law.

(i) The provisions of Order XXXIX Rule 11 of the Civil Procedure Code, being directory and jurisdiction exercised there under being of discretionary nature, whether the Appellate Court has acted contrary to law and in excess of its jurisdiction by directing that the defenses and counterclaim be struck off and the bathroom structure be demolished ?

(ii) When the respondents had not led any evidence on their application under Order XXXIX Rule 11 of the Civil Procedure Code, whether the Appellate Court's decree was contrary to the evidence on record ?

3. Mr. V. Menezes, learned counsel appearing for the appellants has pointed out that the learned Judge has relied upon the judgment of the Division Bench of this Court reported in ***A.I.R. 2004 Bombay 212*** in the case of ***Ramavatar Surajmal Modi V/s Mulchand Surajmal Modi***, by misreading the ratio laid down therein wherein it has been clearly held that the powers to be exercised in terms of Order 39 Rule 11 of the Civil Procedure Code are not mandatory but discretionary. The learned counsel further submits that the Division Bench of this Court has held that in order to undo an act committed by the contemnor, the party has to show the prejudice which would cause to him in case such activities are not unsettled. The learned counsel further pointed out that the learned Trial Judge while examining such aspect has taken note of the apology by the appellants and that no prejudice would occasion to the respondents as the renovation of the bathroom could be taken into consideration at the time of the final partition of the house property. The learned counsel further pointed out that the discretion exercised by the learned Trial Judge was in accordance with law and as such there is no reason

for the Appellate Court to interfere in such discretion in an appeal preferred by the respondents. The learned counsel further pointed out that the case of the respondents that they were the exclusive owners of the subject property has been rejected by both the Courts and in fact both the Courts have found that the appellants and the respondents are co-owners of the subject property wherein the appellants are entitled to half and the respondents are entitled for the remaining half. The learned counsel further submits that a well reasoned judgment passed by the learned Trial Judge has been unsettled by the Appellate Court on erroneous and vexatious ground. The learned counsel further submits that the counter claim has been dismissed on the ground that the appellants had committed contempt and consequently, the decree of partition granted by the learned Trial Judge has been unsettled. The learned counsel has thereafter taken me through the judgment of the learned Trial Judge to point out that the learned Judge has examined every material aspect to come to the conclusion that the appellants were entitled for decree of partition to get the property divided by metes and bounds. The

respondents though served have failed to remain present. On the last couple of dates when the matter was heard, an opportunity was given to the respondents to remain present in Court. It was also brought to my notice that the counsel appearing for the respondents was intimated that the matter was on final hearing board. In such circumstances, as none appeared for the respondents, the matter was heard finally.

4. On perusal of the judgment of the learned Lower Appellate Court, the learned Judge has found that once the contempt by disobeying the order has been established, the Court has no other option but to direct the demolition of the subject construction. The learned Judge has noted that the act committed by the appellants of the renovation of the existing bathroom was in violation of the order of status quo operating against the appellants. The learned Trial Judge while rejecting the claim of the respondents that they were in exclusive possession of the suit house has proceeded to take a view that the appellants are entitled to get the house property partitioned by metes and bounds and

further that the subject bathroom would be considered at the time of such partition in case it falls in the area which may ultimately be allotted to the appellants herein. The learned Judge has accepted the unconditional apology of the appellants to hold that the claim of the respondents that the counter claim and defence of the appellants be rejected would not at all be justified in the facts and circumstances of the case. This Court in the judgment reported in **2015(1) Mh. L. J. 421** in the case of **V. G. Quenim (D) V/s Bandekar Brothers Pvt. Ltd.**, has observed at paras 16 and 18 thus :

“16. The Division Bench of this Court in the Judgment reported in **2004(1) ALL M. R. 822**, in the case of **Ramavatar Surajmak Modi vs. Mulchand Surajmal Modi**, has observed at Para 7 thus :

“7. Rule 11 of Order 39 as introduced by the Bombay amendment provides for a procedure on parties defying orders of the Court and/or committing breach of any

undertaking to the Court. We are concerned with the question whether sub-rule (1) of Rule 11, Order 39 leaves no discretion on the Court and that it obliges the Court to visit the defaulting party with the penalty prescribed therein irrespective of the circumstances that default is not willful or the conduct of the party responsible for the default is not contumacious or there is reasonable explanation for default. The meaning and intention of the rule making authority must govern, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other. Inter alia the courts have applied the test whether the object of the provision will be defeated

or furthered by holding the provision mandatory or directory. Let us not forget that the dismissal of suit or proceeding or striking out the defence of a defendant for non-compliance of the Courts order or breach of an undertaking is serious and grave consequence. By making provision of serious penalty of dismissal of suit or striking out the defence against the party responsible for default, the rule making authority did not intend to leave no discretion to the Court. The object of the provision of Order 39, Rule 11(1) is not defeated if it is held to be directory as the Court can in its discretion for adequate reasons visit the defaulting party with the penalty envisaged therein. On the other hand if the provision is held mandatory, the Court "shall" be left with no discretion and peremptorily shall have to dismiss

the suit where the plaintiff is responsible for the default or to strike off the defence when the defendant is guilty of default even though the default is not found willful or conduct of such party not obstinate or contumacious. In our considered view, the provision in sub-rule (1) merely vests power in the Court to dismiss the suit or proceeding where the default is by the plaintiff and strike off the defence of the defendant where the defaulter is the defendant. It does not obligate to do so in every case of default. This is further fortified by the provision contained in sub-rule (2) which gives a discretion to the Court that even after the order contemplated under the sub-rule (1) of Rule 11 has been passed, upon sufficient cause being shown by the party responsible for the default or contravention or breach and such

party makes amend for the default or contravention or breach to the satisfaction of the Court, the Court may restore the suit or hear the defence on such terms and conditions it deems fit. If the Court has power to restore the party to the same position even after the adverse order has been passed under sub-rule (1) of Rule 11 if the case is made out under sub-rule (2), the provision of sub-rule (1) has to be held to be directory and not imperative. The provision in the nature of sub rule (2) leaves no manner of doubt the intention of the rule making authority that the provision of sub-rule (1) of Rule 11 is directory and that by such provision power has been vested in the Court to dismiss the suit or proceeding where the plaintiff is in default or striking off the defence of the defendant, where

defendant is responsible for the default. Unfortunately, neither in Ratnakar D. Patade nor in Smt. Asha M. Joshi, the learned Judges adverted to sub-rule (2) of Rule 11 and its effect. The Supreme Court in (M/s. Babbar Sewing Machine Co. v. Tirlok Nath Mahajan)⁶, A.I.R. 1978 S.C. 1436 held that the power of dismissal of suit or striking out of the defence under Order 11, Rule 21 of the Code of Civil Procedure should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party. It was further observed that an order striking out the defence under Order 1, Rule 21 should be made unless there has been obstinacy or contumacy on the part of the defendant or

willful attempt to disregard the order of the Court to produce the documents.....

This Court has observed that the provisions and nature of sub-rule (2) leaves no manner of doubt that the intention of the rule making authority is that the provisions of sub rule (1) of Rule 11 of Order 39 of the Civil Procedure Code, is directory and by such provision, power has been vested in the Court to dismiss the suit when the Plaintiff is in default and struck off the defence of the defendants when the defendant is responsible for the default. In this connection, taking note of the fact that the defendants made amends to the default by furnishing a fresh undertaking of the new bungalow constructed in the same property, the question of passing a harsh Order striking off the defence would lead to grave consequences to the defendant and, as such, would not be justified in the facts of the present case.

18. On perusal of the impugned Order, the very fact that the learned Judge has granted an application under Order 39 Rule 2-A of the Civil Procedure Code, without even specifying the period of such detention would itself suggest that the learned Judge has not examined the predicates of granting said punishment under the said provisions. No doubt, under the provisions of Order 39 Rule 2-A of the Civil Procedure Code, the Court can detain the person in breach of an Order to civil imprisonment in cases in which there is contemptuous breach of a temporary injunction. Nevertheless, the provisions also recognises that the properties of the defaulter can be attached or be detained in civil imprisonment. No doubt, these powers are not in the alternative but can be exercised independently. But, however, the said provisions are not exhaustive. The Court has power and can pass appropriate Orders to ensure

that the directions issued by the Court are implemented and enforced. In such circumstances, Rule 2-A of Order 39 of the Civil Procedure Code, is a curative provision. Its purpose is to ensure that the direction of the Court is implemented and the disobedience of the Orders are remedied and status quo ante is restored. Any punishment awarded on the party disobeying the Orders is primarily for upholding the dignity of the Court and showing respect for judicial process. There should be no element of vindictiveness and the proceedings should not be allowed to be used for feeding personal grudge or as an offensive weapon to satisfy private vendetta.”

5. On perusal of the judgment of the learned Trial Judge, I find that the learned Judge has minutely considered the different aspects to come to the conclusion that the appellants were entitled for the relief of partition in the counter claim though it was further held that the subject bathroom would be considered

in the context of the partition to be effected of the subject property by metes and bounds. To that effect, the learned Judge cannot be faulted in excising the discretion in the manner so exercised while disposing of such counter claim filed by the appellants herein. Needless to say, the appellants would not be entitled to claim any equity on account of reconstruction of the subject bathroom and in case such area is allotted to the respondents, the appellants would not be entitled to claim any equity with that regard.

6. On perusal of the judgment of the learned Lower Appellate Court, I find that the learned Judge has proceeded to strike the defence of the appellants and dismissed the counter claim merely because there was a breach of the order of status quo by the appellants herein. As held in the said judgment in the case of **V. G. Quenim** (supra) the provisions to strike the defence are discretionary and the Court is empowered to issue any directions to ensure that the alleged breach is cured and no prejudice is caused to the parties on account of such infraction by

the appellants. In the present case, taking note of the nature of the disobedience stated to have been committed by the appellants and as the learned Trial Judge has accepted the unconditional apology of the appellants, I find that the appellants can be directed to pay an amount of Rs.10,000/- in lieu of the punishment imposed by the learned Appellate Court on account of breach of the order. The said amount of Rs.10,000/- shall be deposited by the appellants with the State Legal Services Authority.

7. On perusal of the judgment of the learned Trial Judge, I find that the learned Judge has proceeded to decree the claim of partition by metes and bounds. But however, a preliminary decree would precede the final decree in the suit for partition. In such circumstances, the judgment of the learned Judge would have to be modified accordingly.

8. In view of the above, I pass the following :

ORDER

- (i) The appeal is partly allowed.
- (ii) The impugned judgment dated 07.05.2005 passed by the learned Lower Appellate Court is quashed and set aside.
- (iii) The judgment and decree passed by the learned Trial Judge dated 31.03.2003 stands modified in the following manner.
- (iv) The counter claim filed by the appellants is partly decreed.
- (v) A preliminary decree be drawn to the effect that the share of the appellants is to the extent of half and remaining half to the respondents herein.
- (vi) The Collector is directed to partition the property by metes and bounds in the light of the observations made herein above.
- (vii) The learned Trial Judge is accordingly directed to partition the property in the light of the observations made herein above.

(viii) The appeal stands disposed of accordingly with no order as to costs.

F. M. REIS, J.

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