

IN THE HIGH COURT OF BOMBAY AT GOA.**APPEAL FROM ORDER NO. 34 OF 2017.**

Shri Anil Shripad Naik,
Son of Late Shri Shripad Nai,
Aged 60 years, Residing at
Neelashri, Near Marwa
Building, Dhavali, Ponda, Goa.

..... Appellant.

Versus

1. Goa Group Vocational
Training Centre, Through
its authorised representative
Mr. G. K. Kulkarni,
Treasurer of the Governing
Council of the Centre, having
office at Supriya Apartments,
First Floor, Haveli, Curti
Ponda, Goa.
2. Dena Bank,
Having office at Meghjee
Dada Mansion, Ponda-Belgaum
Road, Ponda, Goa.

..... Respondents.

Shri P. Talaulikar, Advocate for the appellant.

Shri Parag Rao, Advocate for the respondent no.1.

Coram:-PRITHVIRAJ K. CHAVAN,J.
Reserved on 4th October, 2017.
Pronounced on :-11th October, 2017

ORDER

Aggrieved with the rejection of an application under Order XI Rule 21 of Code of Civil Procedure, 1908(for short "Code") by the Senior Civil Judge on 22.6.2017 (Exh. 117/D), original defendant no.1 has preferred this appeal under Order XLIII

Rule 1 of the Code.

2. A few facts germane for the decision of this appeal, can be stated as follows:-

The respondent has filed a suit for recovery of an amount of ₹63,92,664.40 paise alongwith interest. Respondent no.1 contends that it has employed the appellant who was entrusted with duties to take charge of furniture and office equipment, maintain new records and personal files of all the staff members and also to maintain accounts, etc. It is contended that appellant had opened a bogus account with Dena Bank, who is respondent no.2, in the name of appellant and had unauthorisely embezzled the aforesaid amount.

3. During examination of Shri Satish Dhume(PW2) the appellant filed an application Exh.109/D for direction to respondent no.1 to produce documents as mentioned in paragraph 4 of the application by contending that the said documents are necessary and relevant for resolving the dispute involved in the case and also for the purpose of establishing defence.

4. Learned trial Court found that under Order XI Rule 14 of CPC at any time during the pendency of the suit, it can order production by any party thereto, upon oath, of such of the documents, in its possession or power which the Court finds necessary. The Trial Court therefore, allowed the application.

5. Respondent no.1 herein, being aggrieved challenged the said order by way of Writ Petition No.571 of 2016 before this Court. By an order dated 18.7.2016, this Court rejected the petition by observing thus:-

“10. In my considered view, no exception can be taken to the order directing production of the documents which claim is now restricted to the documents at Serial No.1 to 13 in para 4 of the application Exhibit 109/D. At any rate, the petitioner has not shown any prejudice much less a manifest injustice if such documents are produced.”

6. It is pertinent to note that this Court while disposing of the aforesaid Writ Petition did not direct respondent no.1 (Petitioner in Writ Petition No.571/2016) to produce the documents in question as per the direction in the impugned order. The appellant, therefore, moved an application under Order XI Rule 21 of CPC on 8.11.2016 before the Trial Court for dismissal of the suit of the respondent no.1 for non-compliance of order dated 15.3.2016.

7. Heard Shri P. Talaulikar, learned Counsel for the appellant and Shri P. Rao, learned Counsel for the respondent no.1.

8. It is submitted by the learned Counsel for the appellant that despite directions of this Court in Writ Petition No. 571/2016, respondent no.1 did not comply with the same for a considerable long period which constrained the appellant to move an application under Order XI Rule 21 of CPC. It is also argued by the learned Counsel for the appellant that respondent no.1 has been changing his stand which is convenient to him who had already admitted before this Court that it is in possession of all the documents. The learned Counsel has assailed the impugned order by submitting that it is sans reasons and there is absolutely no mention of direction given by this Court in Writ Petition no.571/2016. It is argued that respondent no.1 has submitted only some of the documents. Respondent no.1 took a stand that some of the documents are not in its possession.

9. On the other hand, the learned Counsel for respondent no.1 supported the impugned order by stating that there is no infirmity as the order is perfect as per order XI Rule 21 of CPC. He further argued that there is substantial compliance of the order except few documents which could not be filed by respondent no.1, as they are in the Court of Judicial Magistrate First Class and those documents are against the appellant. Respondent no.1 has not committed any willful default, however, there is just a delay for which at the most, an adverse inference can be drawn against respondent no.1. It is submitted that original application was only

under Order XI Rule 14 of CPC for production of the documents and therefore, it would not be within the purview of Rule 21 Order XI of CPC.

10. Undisputably, the trial Court by its order dated 15.3.2016 on an application under Order XI Rule 14 of CPC, directed respondent no.1 to produce the documents enlisted in paragraph 4 of the application or copies of the documents which are possible to be furnished. The said order came to be upheld by this Court in Writ petition No.571/2016. It is specifically observed in paragraph 9 of the Order of this Court that respondent no.1(Appellant herein) had not sought discovery of the documents under Order XI Rule 12 of the CPC. It is also observed that after the amendment in the Code in the year 2002, the provisions of Order XI Rule 15 of the Code mandate that notice for inspection of the documents referred to in the pleadings on affidavit has to be given at/ or before the settlement of issues. However, power under Order XI Rule 14 of CPC is a distinct power vesting in the Court. As such, it is held that under Order XI Rule 14 of CPC, the Court could direct production of the documents. It is submitted by the learned Counsel for respondent no.1 that there is substantial compliance of the directions in view of its application dated 1.12.2016, by which most of the documents have been produced before the trial court. My attention is drawn to copies of Exh.J(colly) indicating the documents which were produced by respondent no.1 and a few documents which could not be

produced.

11. In the impugned order, the learned trial Court in a brief order discussed the scope of Order XI of CPC by specifically observing that Rule 21 of that order deals only with disobedience of orders to answer interrogatories, orders to allow inspection of documents and orders to make discoveries. It does not deal with the orders to produce documents and, therefore, dismissed the application being not maintainable.

12. The learned Counsel for respondent no.1 has therefore, placed reliance on a case law of ***Amar Singh Vs. Chaturbhuj, (RLW 1957)***. It would be apposite to refer to paragraph 9 of the judgment which reads thus:-

“Now, from the terms of Order XI, Rule 21, set forth above, it is clear that even assuming that the defendant had been called upon by the Court to produce certain documents in original and that he had failed to do so- although I should like to add that the defendant had never been called upon by the Court to produce any such documents- it cannot be postulated that rule 21 is at all attracted into application. Refusal to produce certain documents (see O. XI, R.14), is not a lapse within the meaning of Rule 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 Rule 14 is not one of the orders contemplated under this rule and, therefore, any disobedience thereof could not be punished under O.11, r.21(See *L. Sugar Mills Vs. R. C. G. Sahai Cotton Mills*(19),] *Subbayar Vs. M. L. M.Ramanathan Chettiar*(20), *S.P.S.R. Subramania Ayyar Vs. C. Bomwer Cooty Haji*(21), *Manohar Das Vs. Darbara Singh*(22), *Tafazzul Vs. Shah Mohammad*(23), *Shyamlal Guruprasad Vs. Ganpatlal*(24). These cases clearly establish the principle that the non-compliance with an order Under O.XI 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.XI r.14, the Court would be entitled to raise an adverse presumption against

that 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 visitation of 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 striking off of the defence of Ratanlal was wholly without justification and that in passing that order that court exercised jurisdiction which did not vest in it in accordance with law. It necessarily follows that the order passed was wholly bad and that the order was not covered by or. XI r. 21 of the Civil Procedure Code at all. It would, therefore, follow, in my opinion, that where a Court acts without jurisdiction in passing an order under this rule as where it dismiss a suit or strikes off a defence for failure to comply with an order to produce documents under Rule 14, the order cannot be said to be one passed

under this rule, and consequently, it cannot be urged that the order was an appellable one and as no appeal was filed therefrom, it could not be challenged in any further appeal from the decree. This contention is not without force."

13. Similarly in the case of ***Lyalpur Sugar Mills & Co. and another Vs Ram Chandra Guru Sahal Cotton Mills & Co. thro' Shree Ram, AIR 1922 ALL 235*** while discussing the scope of Order XI Rule 14 it was observed thus:-

"All the applications on behalf of the plaintiff firm except the last one dated the 28th July, 1919, were applications under Order 11 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 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 O.11, R.14. The non-compliance of that order does not warrant the striking off the defence of the party which is guilty of the non-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 11 of the CPC. 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 11 of the 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 the same order. In the present case the learned subordinate Judge made no order either under Rule 12 or Rule 18 of Order 11 of the CPC. 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 11 Rule 14 is given in Appendix C for No. 6. The notice that was issued in the present case does not comply with the form given in Appendix C."

14. In view of the aforesaid case laws as well as from the legal position, it is apparent that there is no question of non-compliance as contemplated in Rule 21 of CPC by the respondents and therefore, the penal consequences prescribed in Rule 21 could

not be imposed. It is quite clear from a plain reading of Rule 21 that an order for production of documents under Rule 14 is not the one of the orders contemplated under this Rule and, therefore, any disobedience thereof could not be punished under Order XI Rule 21. Thus, it is quite clear that non-compliance of an order under Order XI Rule 14 would not warrant dismissal of the suit or even for that matter striking off the defence of the party which is guilty of non-compliance of the order.

15. On the other hand, learned Counsel for the appellant has pressed into service a case law of ***Bharat Petroleum Corporation Limited Vs, Indequip Limited, 1992)2 Bom CR501***. The learned Single Judge of this High Court directed that there was non-compliance of the direction by the plaintiff viz. "Inspection to be furnished within two weeks. No order as to costs." and, therefore, as per Order XI Rule 21 of the CPC, the suit was ordered to be dismissed. I am afraid this authority would not be of any assistance to the appellant because there was non-compliance of the inspection of the documents, which is not the case in hand where there is direction under Order XI Rule 14 of CPC.

16. In case of ***Feroze Homi Duggan Vs Benzer Interiors Pvt. Ltd. Ors. 2006(supp. 1) Bom. C.R. 68***, the defendant failed to abide by undertaking given to the Court from 1997 to 2001 and only when they found that it would be impossible to keep possession they

surrendered possession to receiver with promise of payment of royalty which they failed to keep. This Court, therefore, granted the prayer of striking off the defence. There is no such undertaking given by the respondent no.1 and, therefore, there is no question of invoking provisions of Order XXXIX Rule 11 of CPC.

17. In view of the aforesaid discussion, the impugned order does not warrant interference in the appeal and, as such, appeal needs to be dismissed. The appeal stands dismissed accordingly with no order as to costs.

PRITHVIRAJ K. CHAVAN,J.

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