

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 10071 OF 2015

Bheemacharya Balacharya Varakhedakar
And Anr

...Petitioners

Versus

Diwan Uttaradi Matha
And Ors

...Respondents

....

Mr.Bheemacharya Balacharya Varakhedakar, petitioner No.1 is
present in person.

Mr.Ajay A. Joshi, Advocate for respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 16th FEBRUARY, 2017

P.C.

1. Heard Mr.Bheemacharya Balacharya Varakhedakar,
petitioner No.1 appearing in person and Mr.Ajay Joshi, learned
Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of
India, the petitioners, hereinafter referred to as the 'plaintiffs'
have challenged the judgment and order dated 5.9.2015 passed
by the learned Civil Judge, Senior Division,, Pandharpur below
Exhibit-375 in Regular Civil Suit No.92/1997. By that order, the
learned trial Judge rejected the application Exhibit-375 made by

the plaintiffs for recalling order dated 29.10.2014 below Exhibit-371 as also the order dated 2.1.2015 below Exhibit-372 thereby permitting the plaintiff to give detailed reply to application Exhibit-371 as also reserving liberty to the plaintiffs to file detailed say to the application Exhibit-371.

3. It appears that the plaintiffs had filed application at Exhibit-348 which was partly allowed on 24.2.2014. The learned trial Judge granted leave to deliver interrogatory by way of question No.1 to defendant No.1. Defendant No.1 was directed to give answer to question No.1 in writing on or before the next date.

4. The plaintiff filed application under Order XI Rule 21 of C.P.C. at Exhibit-368 on 18.7.2014 *inter alia* contending that though by order dated 24.2.2014 below Exhibit-348 defendant No.1 was directed to give answer to question No.1 before the next date of hearing, defendant No.1 did not comply that order. Consequently the plaintiffs evidence could not be completed. The plaintiffs, therefore, prayed for striking out defence of defendant No.1. On the same day, the learned trial Judge directed other side to say. On 28.7.2014, defendant No.1 filed

reply opposing Exhibit-368. On 2.8.2014, defendant No.1 filed application Exhibit-369 seeking time to give reply to question No.1. On the same day, the learned trial Judge passed order other side to say. The plaintiffs filed reply on 2.8.2014 *inter alia* contending that the time prescribed for filing reply was over and there is no provision for enlarging time fixed by the Court. That apart, defendant No.1 has also not given satisfactory explanation for not giving reply within the stipulated period. The plaintiffs, therefore, prayed for rejection of the application Exhibit-369 filed by defendant No.1. On 8.8.2014, application Exhibit-370 was filed by defendant No.1 seeking time for filing reply. On the same day, the learned trial Judge passed order other side to say. The plaintiffs filed reply on 8.8.2014 *inter alia* contending that application Exhibit-370 is not tenable and is made with a view to delaying further proceeding. On 20.9.2014, defendant No.1 filed purshis at Exhibit-371 enclosing therewith reply to the interrogatories of the plaintiffs. On the same day, the learned trial Judge passed order other side to file say. The plaintiffs filed reply *inter alia* contending that the reply filed by defendant No.1 is beyond the prescribed period of limitation. Though applications were made for extension of time for filing

reply, no orders were passed. It is, therefore, not proper to accept the reply filed by defendant No.1 and if it is accepted it will be contrary to the provisions of law. The plaintiffs, therefore, reserved right to file a detailed reply in case the reply is taken on record. On 29.10.2014, the learned trial Judge after perusing the purshis at Exhibit-371 as also after considering the objections raised by the plaintiffs, took on record the reply filed by defendant No.1 by observing that defendant No.1 filed applications seeking extension of time for filing reply. As against this, it is the case of the plaintiffs that the reply is beyond the prescribed period of limitation. In the interest of justice it is necessary to take out on record reply filed by defendant No.1.

5. The plaintiffs filed application Exhibit-372 on 8.11.2014 for review of the order dated 29.10.2014 below Exhibit-371. Defendant No.1 resisted that application by filing reply on 19.11.2014. By order dated 2.1.2015, the learned trial Judge rejected application with costs. The plaintiffs thereafter filed application Exhibit-374 on 13.2.2015 (wrongly typed as 13.2.2014) under Order XI Rule 11 of C.P.C. for cross-examining defendant No.1 in respect of reply given to question No.1. On the

same day, the learned trial Judge passed order other side to say. On 16.2.2015, defendant No.1 filed reply inter alia contending that the reply given by defendant No.1 is proper and is not incomplete. By order dated 24.3.2015, the learned trial Judge rejected the application.

6. The plaintiffs thereafter filed application Exhibit-375 for reviewing order dated 29.10.2014 below Exhibit-371 and order dated 2.1.2015 below Exhibit-372. By the impugned order, the learned trial Judge has rejected the application. It is against this order, the plaintiffs have instituted present petition.

7. In support of this Petition, petitioner No.1 in person submitted that Order XI Rule 8 of C.P.C. prescribes the period of 10 days for answering the interrogatories by affidavit or within such other time as the Court may allow. He submitted that as against this Section 148 provides that where any period is fixed or granted by the Court for the doing of any prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period not exceeding 30 days in total, even though the period originally fixed or granted may have expired.

8. He submitted that under Order XI Rule 8, the Court

can permit submitting affidavit answering interrogatories within 10 days and not exceeding 30 days. If the Court grants time exceeding 30 days, it will be contrary to Section 148 of C.P.C.. He further submitted that without giving full opportunity to the plaintiffs, the learned trial Judge has passed orders. He, therefore, submitted that the impugned order deserves to be set aside thereby recalling the order passed below Exhibits-371 and 372.

9. On the other hand Mr. Joshi supported the impugned order. He submitted that basically the provisions of Order XI Rule 21 are held to be directory and not mandatory. In any case, defendant No.1 has filed reply to question No.1 on 20.9.2014. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs had filed application at Exhibit-348 for directing defendant No.1 to file reply to the interrogatory filed by them. On 24.2.2014, the

learned trial Judge partly allowed the application. Operative part of the order dated 24.2.2014 reads thus :

- “1. The application is partly allowed.
2. The leave is granted to deliver the interrogatories by way of question No.1 to the defendant No.1.
3. The defendant No.1 is directed to put his answer to the question no.1 in writing on or before next date.
4. Both parties to take the note of order.”

11. Perusal of above extracted portion shows that the learned trial Judge directed defendant No.1 to give answer to question No.1 before next date of hearing. It appears that defendant No.1 did not give reply which gave rise to the plaintiffs filing application at Exhibit-368 under Order XI Rule 21 of C.P.C. for striking out the defence of defendant No.1. It is also evident from record that said application was not disposed of. In the meantime defendant No.1 went on filing applications for extension of time to give answer to question No.1. Eventually on 20.9.2014, defendant No.1 filed reply to question No.1. In the case of **Ramavatar Surajmal Modi v. Mulchand Surajmal Modi, 2004(2) Mh.L.J. 1**, the Division Bench of this Court dealt with the provisions of Order XXXIX Rule 11 of C.P.C. Division

Bench of this Court also referred to the decision of Apex Court in the case of ***M/s. Babbar Sewing Machine Co. v. Tirlok Nath Mahajan, AIR 1978 SC 1436***. In paragraphs-14, 16 and 24, Apex Court observed thus:

- "14. Even assuming that in certain circumstances the provisions of Order XI, Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order XI, Rule 21, unless the Court is satisfied that the plaintiff was wilfully withholding information refusing to, answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give : *Denvillier v. Myedrs*, (1883) WN 58. In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. The power for dismissal of a suit or striking out of the defence under Order XI, Rule 21, 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.
16. An order striking out the defence under Order XI, Rule 21 of the Code should, therefore, not be made unless there has been obstinacy or contumacy on the part of the defendant or wilful attempt to disregard the order of the Court. The rule must be worked with caution, and may be made use of as a last resort:

Mulla's Civil Procedure Code 13th Ed., Vol. 1, p. 581, Khajah Assenoolla Joo v. Khajah Abdool Aziz, ; Banshi Singh v. Palit Singh, ; Allahabad Bank Ltd. v. Ganpat Rai, : ; Haigh v. Haigh, and Twycroft v. Grant,

24. The principle governing the Court's exercise of its discretion under Order XI, Rule 21, as already stated, is that it is only when the default is wilful and as a last resort that the Court should dismiss the suit or strike out the defence, when the party is guilty of such contumacious conduct or there is a wilful attempt to disregard the order of the Court that the trial of the suit is arrested. Applying this test, it is quite clear that there was no wilful default on the part of the Defendant of the Court's order under Order XI, Rule 18(2) for the production of documents for inspection, and consequently, the order passed by the trial Court on 23rd May, 1967, striking out the defence of the defendant must be vacated, and the trial must proceed afresh from the stage where the defendant was not permitted to participate."

12. Perusal of the above extracted portion shows that Apex Court held that Order XI Rule 21 of C.P.C. is directory.

13. In the present case, as noted earlier, application filed by the plaintiffs under Order XI Rule 21 of C.P.C. was not disposed of by the learned trial Judge and in the meantime defendant No.1 filed purshis on 20.9.2014 for taking on record reply to question No.1. By order dated 29.10.2014 below Exhibit-371, the learned trial Judge had taken on record the reply given by defendant No.1. The plaintiffs filed application at Exhibit-372

for reviewing that order. By order dated 2.1.2015, the learned trial Judge rejected that application. The plaintiffs, therefore, took out application Exhibit-375 for reviewing orders below Exhibits-371 and 372 dated 29.10.2014 and 2.1.2015 respectively. By the impugned order, the learned trial Judge has rejected the application. In the case of **M/s. Babbar Sewing Machine Co.** (supra), Apex Court has held that the provisions of Order XI Rule 21 are directory. In view thereof as also having regard to the fact that defendant No.1 has placed on record answer to interrogatory No.1, no case is made out for interfering with the impugned order. Hence, Petition fails and the same is dismissed.

14. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of C.P.C.

(R. G. KETKAR, J.)