

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5165 OF 2019

M/s. Chetan Associates, a partnership
firm, duly registered under the Indian
Partnership Act, 1932 and having its
office at Abhilasha Building, 46, August
Kranti Marg, Gowlia Tank,
Mumbai 400 036

...Petitioner

Versus

Abhilasha Co-op. Hsg. Soc. Ltd.
A co-operative housing society registered
under the Maharashtra Co-operative
Societies Act, 1960, and having their
Registered office at Abhilasha, 46,
August Kranti Marg, Gowlia Tank,
Mumbai 400 036.

...Respondent

Mr. Sharan Jagtiani, a/w Mr. Zain Najamessani, Ms. Pinky
Patel, Mr. Sahil Harjani, i/b Desai & Diwanji, for the
Petitioner.

Mr. Amogh Singh, i/b Mr. D. P. Singh, for the Respondent.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 27th SEPTEMBER, 2019.

PRONOUNCED ON: 21st NOVEMBER, 2019.

JUDGMENT:-

1. Rule. Rule made returnable forthwith and, with the
consent of the Counsels for the parties, heard finally.

2. This petition under Article 226 of the Constitution of India
takes exception to an order dated 18th December, 2018, passed
by the learned Judge, City Civil Court, Greater Bombay, in
Notice of Motion No.1816 of 2013 in Suit No.6672 of 2001,

whereby the learned Judge was persuaded to reject the notice of motion taken out by the petitioner – plaintiff for, *inter alia*, attachment of the property of the defendant – society, detaining its office bearers in civil prison, and a direction for removal of the tiles fixed, in breach of the order passed by the Court in Notice of Motion No.58 of 2001, on 20th December, 2001, in terms of the minutes of the consent ad-interim order (“consent order”, for short).

3. Shorn of unnecessary details, the background facts leading to this petition can be summarised as under:

(a) The petitioner has instituted a suit against the defendant – society for injunctive reliefs in the nature of restraining the defendant from encroaching upon the plot bearing City Survey No.1/528 and 529 of Malbar and Cumbala Hill Division, wherein the petitioner was carrying construction of additional buildings (wing ‘C’ and ‘D’ and bungalow), and from obstructing and/or interfering with the plaintiff’s said construction and further restraining the defendant – society, its members, office bearers, servants and agents from using or parking cars in the parking spaces and/or creating any third party rights in respect of the parking spaces, not sold or allotted by the plaintiff.

(b) The plaintiff averred that the dispute arose as the defendant, an association of the flat purchasers of the buildings (wing 'A' and 'B'), attempted to exercise proprietary rights over the property of the plaintiff and asserted claims over the open places and parking spaces not allotted to the apartment owners of the said buildings.

(c) In the said suit, the plaintiff took out a Notice of Motion No.58 of 2001, seeking interim reliefs. The said notice of motion came to be disposed of in terms of the consent order, agreed to by and between the plaintiff and the defendant. Under Clause (4) thereof, it was, *inter alia*, agreed and undertaken by the defendant not to extend or carry out any further tiling work in the open portion.

(d) The plaintiff alleged that despite the said undertaking, in terms of which the Court had passed a consent order dated 20th December, 2001, the defendant in an egregious breach of the said order started carrying out tiling work on the open portion of the suit property over which the proposed 'C' and 'D' Wings were to be constructed by the plaintiff. The defendant paid no heed to the letter dated 5th December, 2011, which called upon it to cease and/or desist from carrying out the said tiling work and/or remove the tiles which were fixed.

No response was given by the defendant to another communication dated 12th December, 2012, which again called upon the defendant to purge the contempt. Hence, the plaintiff took out instant Notice of Motion No.1816 of 2013, for the attachment of the property of defendant i.e. Wings 'A' and 'B' of Abhilasha society, detaining its Chairman, Mr. Chandrakant J. Shah; Secretary, Mr. Sunermal D. Jain and member of managing committee, Mr. Chimanlal S. Mehta in civil prison, and for directing the defendant to remove the tiles fixed in breach of the consent order.

(e) The defendant resisted the notice of motion. The above named office bearers filed Affidavits-in-reply in opposition to the prayers in the notice of motion. It was their firm stand that they have not committed any breach of the consent order. The tiles were fixed in an area which was not covered by the consent order to facilitate smooth and safe ingress to and egress from the society premises.

(f) Initially, the learned Judge, City Civil Court by order dated 16th September, 2015, dismissed the notice of motion opining that there was no willful breach of the order on the part of the defendant. The work of fixing tiles, on the contrary, was found to be of beneficial nature.

4. Being aggrieved by the aforesaid order, the plaintiff preferred Writ Petition No.12439 of 2015. This Court, by order dated 21st September, 2016, quashed and set aside the said order and directed that the notice of motion be heard afresh. This Court was of the view that the learned Judge had not adverted to the question; as to whether the tiling work was done in excess of what was stipulated under the consent order and, therefore, a factual finding was required to be arrived at as to whether the work allegedly carried out by the defendant was in excess of the said stipulation. This Court, thus, gave liberty to the learned Judge, City Civil Court to appoint a Court Commissioner so as to elucidate the controversy, on that score, and then decide the notice of motion.

5. In pursuance of the said order, the learned Judge passed an order on 16th December, 2016 and appointed the Court Commissioner to inspect the suit property and submit a report in terms of the directions contained in the said order. On 19th January, 2017, the Court Commissioner visited the site and carried out the inspection in the presence of the parties and their architects and thereafter submitted his report on 27th January, 2017.

6. Post the receipt of Court Commissioner's report, the learned Judge heard the parties afresh and by the impugned order rejected the notice of motion. The learned Judge was of the clear view that the tiling work was not carried out over the portion of the suit property, which the defendant had undertaken not to carry out in the consent order. Even otherwise, it was found by the learned Judge that there was no intentional disobedience or willful breach of the order by the defendant. Being again aggrieved by and dissatisfied with the impugned order, the plaintiff has invoked writ jurisdiction of this Court.

7. I have heard Mr. Sharan Jagtiani, the learned Counsel for the petitioner and Mr. Amogh Singh, the learned Counsel for the respondent, at some length. With the assistance of the learned Counsel for the parties, I have also perused the pleadings, affidavits in support of and opposition to the notice of motion and the consent order, over the construction of which the fate of the notice of motion hinges to a considerable extent.

8. Before noticing rival submissions, it may be apposite to extract Clause (4) of the said consent order, which reads as under:

"4. The Defendants declare having carried out only some tiling work in the open portion of the land admeasuring about

2500 sq. ft. as shown in the accompanying plan and coloured in red which portion is a part of the property. The Defendants shall not extend or carry out any further tiling work in the said open portion. The Defendants shall not use the said tiled portion for any other purpose except for maneuvering and turning of the motor cars of their members.”

9. Mr. Jagtiani would urge that in view of the aforesaid clear, explicit and unambiguous undertaking on the part of the defendant not to extend or carry out any further tiling work, the action of the defendant to carry out extensive tiling work is in flagrant violation of the consent order. The learned Counsel for the petitioner further submitted that there is no denial of the fact that the tiling work has been carried out. The defence of the defendant, in justification of the said work, wavered from half-hearted denial to disowning its authorship by contending that the said work was carried out by the Government out of the local MLA's constituency development fund. In view of the report of the Court Commissioner dated 27th January, 2017, no other inference than that of a deliberate and willful breach on the part of the defendant can be drawn.

10. On the aforesaid premise, Mr. Jagtiani urged, with a degree of vehemence, that the learned Judge completely misread the report of the Court Commissioner nay referred to an earlier report and non-suited the plaintiff. Once, it is established, by cogent material, that the defendant has carried out the tiling

work, the defendant cannot be permitted to wriggle out of the consequences on the specious plea that there was no willful breach as it would amount to giving the parties the licence to play with the order of the Court. This would severely undermine the sanctity of the judicial process, urged Mr. Jagtiani.

11. Mr. Jagtiani further submitted that the fact that the consent order was on the basis of the agreement arrived at between the parties, does not command less compliance. He canvassed a submission that the parties are not at liberty to construe the order to suit their case or convenience. In order to buttress the aforesaid submission Mr. Jagtiani placed a strong reliance upon a Division Bench judgment of this Court in the case of *Gopal L. Raheja vs. Vijay B. Raheja*¹. Emphasis was laid on the following observations in paragraph 42:

“42. Both on principle and on a parity of reasoning contained in the judgment we are clearly of the opinion that if according to a party an order is confusing or unintelligible or meaningless he is not entitled to interpret it in such manner as he likes and insist thereafter that the court ought to accept his interpretation or even that his interpretation is a plausible one. In that event a party ought to approach the court for a clarification.”

12. In contrast to this, Mr. Amogh Singh submitted that the notice of motion was totally misconceived. It was taken out by the plaintiff with an oblique motive when the suit itself was ripe

¹ Notice of Motion No.1327/2006 in Appeal No.334/2005
in Notice of Motion No.3185/2004 in Suit No.3121/2004.

for final hearing. The notice of motion for contempt was untenable as the plaintiff had taken out the same after one year of the alleged breach, which the plaintiff claimed to have noticed on 5th December, 2011. According to Mr. Singh, the impugned order does not suffer from any infirmity or error which warrants interference by this Court in writ jurisdiction, especially when the learned Judge, for justifiable reasons, declined to exercise the discretionary power to proceed for contempt. Lastly, it was submitted that, on facts, the conduct attributed to the defendant is neither willful nor contemptuous to warrant the drastic action of attachment of property, detention in civil prison or striking off the defence of the defendant, as sought by the plaintiff.

13. To lend support to these submissions, Mr. Singh placed reliance on the judgment of the Supreme Court in the case of *Om Prakash Jaiswal vs. D. K. Mittal & another*², wherein the discretionary nature of the jurisdiction and the circumstances under which it has to be resorted to were postulated.

14. To begin with, from a plain reading of the clause (4) of the consent order, extracted above, the following inferences become deducible:

² (2000) 3 Supreme Court Cases 171.

(i) The defendant had declared that it had carried out only some tiling work in the open portion of the land admeasuring about 2,500 sq. ft. shown in the map in red colour.

(ii) The defendant agreed that it shall not extend or carry out further tiling work in the said open portion.

(iii) The defendant shall not use the already tiled portion for any purpose except for maneuvering and turning of the motor-car of the members of the society, and

(iv) Conversely, the defendant was not to use the tiled portion of the suit property for any other purpose.

15. The controversy between the parties revolves around the question as to whether the defendant carried out the tiling work over the area which it had undertaken not to carry.

16. The defendant contends that it has not carried out the tiling work over the portion, which was the subject matter of the consent terms i.e. 2500 sq. ft. It is indisputable that the Court Commissioner's report reveals that the tiling work has been carried out beyond the area admeasuring 2500 sq. ft. Whether the parties had agreed that the defendant shall not carry out the tiling work in the rest of the portion of the area admeasuring 2500 sq. ft. shown in red colour or in the rest of

the open portion of the suit premises beyond the said area as well, is the bone of contention. The text of Clause (4), extracted above, *ex facie*, does not appear to be unambiguous in this context. Though, the learned Judge had endeavoured to hold that the defendant has not carried out the tiling work over the area which it had agreed not to carry out, in the consent terms, yet, in the peculiar facts of the case, the said question can be legitimately determined on the basis of the evidence at the time of final adjudication.

17. This impels me to consider as to whether the facts of the case warrant the invocation of the discretionary power to proceed in contempt or resort to the provisions contained in Order XXXIX Rule 11 (Bombay High Court Amendment), on which a strong reliance was placed by Mr. Jagtiani. To this end, it is necessary to assume that the defendant had carried out the tiling work in contravention of aforesaid Clause (4) of the consent terms.

18. It was submitted by Mr. Jagtiani, with tenacity, that in the facts of the instant case, even if the conduct of the office bearers of the defendant may not justify the drastic action of detention in civil prison, yet, in view of willful defiance of the consent order the defence of the defendant can be very well be directed

to be struck out under Order XXXIX Rule 11, lest the orders of the Court would remain paper orders.

19. I have given my anxious consideration to this submission as well. The nature of the alleged breach cannot be lost sight of. What is alleged is that the defendant carried out the tiling work in the open area of the suit premises. The office bearers of the defendant have affirmed that the said work was necessitated as the ingress to and egress from the society premises had become difficult. Mr. Chimanlal Mehta has further affirmed that the said work was carried out by the Government agency out of the funds of the local MLA earmarked for constituency development. In the backdrop of these assertions, the grievance of Mr. Jagtiani that there is incongruity in the defence of the office bearers of the defendant – society has some substance. However, the fact remains that the tiling work is carried out in the open area and nothing more. It is not the case of the plaintiff that on account of carrying out of the tiling work, the plaintiff suffered any significant prejudice. Nor any other circumstance is brought on record which would exacerbate the situation.

20. In the aforesaid backdrop, I find it rather difficult to accede to the submission on behalf of the plaintiff that the office bearers of the defendant – society are guilty of willful

disobedience or deliberate contemptuous conduct. I am also not to impelled to agree with the submission on behalf of the plaintiff that the panacea of striking out the defence is innocuous.

21. The provisions contained in order XXXIX Rule 11 of the Code of Civil Procedure have been introduced by the Bombay High Court amendment, which reads thus:

“Order XXXIX Rule 11: Procedure on parties defying order of Court, and committing breach of undertaking to the Court. -

(1) Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention or breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as it may deem fit to impose, restore the suit or proceedings or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court.”

22. The remedy of the striking out the defences, on account of default or contravention or breach by the defendant, by its very nature has serious and prejudicial consequences. On a plain reading of Sub-rule (1) of Rule 11, coupled with Sub-rule (2) thereof, which empowers the Court with the power to undo the direction for striking out the defence or dismissal of the suit, as

the case may be, it becomes abundantly clear that the power is directory and the discretion is required to be exercised judiciously only when a case of willful default or disobedience is made out. It is not obligatory upon the Court to strike out the defence or dismiss the suit, on account of the default or contravention or breach on the part of the defendant or plaintiff, as the case may be, in every case where such default or contravention or breach occurs, *de-hors* the nature and contumacy of such default, contravention or breach.

23. A profitable reference in this context can be made to a judgment of the Division Bench of this court in the case of *Ramavatar Surajmal Modi vs. Mulchand Surajmal Modi*³, wherein, after analyzing the provisions of the aforesaid rule, and placing reliance upon the judgment of the Supreme Court in the case of *M/s. Babbar Sewing Machine Co. vs. Tirlok Nath Mahajan*⁴, wherein the provisions of Order 11 Rule 21 of the Code were construed, and it was held that the provision of Sub-rule (1) of Rule 11 of Order XXXIX is directory and the discretion exercised by the Court in passing the order under Sub-rule (1) of Rule 11 of Order XXXIX has to be in consonance and in conformity with the legal position laid down by the Supreme

³ AIR 2004 Bombay 212.

⁴ AIR 1978 SC 1436.

Court in the case of *M/s. Babbar Sewing Machine Co.* (supra).

In the said case, it was observed that the power of dismissal of the suit or striking out the defence, as the case may be, under Order XXXIX Rule 11 (1) of the Code of Civil Procedure should be exercised for adequate reasons, where the defaulting party fails ultimately in complying with the order of the Court or the undertaking, where the default is willful and the conduct of the defaulting party contemptuous and that results in causing substantial or serious prejudice to the opposite party.

24. The aforesaid pronouncement was followed by another Division Bench in the case of *Ashapura Minechem Ltd. vs. Pacific basin IHX (UK) Ltd.*⁵. In the latter case, the Division Bench, again after placing reliance upon the judgment of the Supreme Court in the case of *M/s. Babbar Sewing Machine Co.* (supra), observed that it is settled principle of law that an order for striking out pleadings cannot be passed as a matter of course merely because a party is in breach of a condition imposed by the Court. Striking out of pleadings is a matter of serious prejudice. When a defence is struck off the party whose defence is not to be taken into account, loses a basic right to defend itself in a proceedings.

⁵ 2013 (4) Mh.L.J. 103.

25. In view of the aforesaid exposition of the legal position, it can be legitimately inferred that while exercising the jurisdiction under Order XXXIX Rule 11 to strike out the pleadings, the enquiry is not confined only to the factum of alleged default, contravention or breach. Two further considerations, namely, (i) whether the default was willful and contemptuous and (ii) the nature of the default, whether the default entailed serious or prejudicial consequences to the opponent, must also inform the exercise of judicious discretion.

26. Re-adverting to the facts of the instant case, in the backdrop of the aforesaid legal position, the matter can be looked at from two angles. First, there is an element of uncertainty as regards the true import of undertaking given by the defendant in Clause (4), particularly as regards the area to which it relates. This aspect can be legitimately determined on the basis of the evidence at the stage of the final hearing. Second, having regard to the nature of the alleged breach, even on the assumption that there is such a breach, a case for willful or contemptuous default warranting action either under Order XXXIX Rule 2A or Rule 11 of the Code cannot be said to have been made out.

27. It is, however, clarified that, in the event, the trial court, at the stage of final adjudication comes to the conclusion that there is a disobedience of the consent order, on the part of the defendant, the trial court may pass appropriate order; corrective, restitutive or otherwise, in accordance with law.

28. The upshot of the aforesaid consideration is that the impugned order does not suffer from any perversity, infirmity or illegality warranting interference by this Court in exercise of writ jurisdiction. The petition thus deserves to be dismissed, subject to the observations in paragraph no.27 above. Hence, the following order:

The petition stands dismissed. No costs.

Rule discharged.

[N. J. JAMADAR, J.]