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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 1185 OF 2022

Prerana Magaswargiya Co-op. Industries
Ltd., a co-operative society. ... Petitioner.

V/s.

Vaishnavi Impex ... Respondent

Mr. Manoj Patil, Advocate a/w Mr. Nilabh Toshniwal i/by Mr.
Ashish P. Pawar for the Petitioner.

Mr. Yogesh M. Birajdar, Advocate i/by Mr. Nagraj S. Shinde
for the Respondent.

CORAM : ROHIT B.DEO, J.

DATE : JULY 29, 2022

PC :

1. The respondent has instituted Special Civil Suit 11 of 2013 against the petitioner for money decree of Rs.5,63,000/- (Rs.Five lakhs & sixty-three thousand only) with interest *pendent lite* and future on the premise that price of goods supplied is unpaid.

2. The plaintiff preferred an application, seeking direction to the defendant to produce the documents detailed in

paragraph -1. The documents are, *inter-alia*, the account books which the defendant-society is mandatorily obligated to maintain under the provisions of the Maharashtra Co-operative Societies Act, 1960 (Act).

3. The learned trial Judge allowed the application for production of documents vide order dated 15.11.2017.

4. It appears that since the documents were not produced, the plaintiff preferred an application seeking an order of striking out the defence.

5. The learned trial Judge exercised power under Order 11 Rule 21 of the Civil Procedure Code, 1908 (Code) and ordered striking out the defence. The learned trial Judge recorded a finding that there is deliberate disobedience of the order of production of documents.

6. According to the learned counsel for the defendant the documents of which production was ordered are, as a fact, placed on record on 05.07.2019.

7. In the interregnum the defendant preferred application dated 05.07.2019 for setting aside the order of striking out of the defence, which the learned trial Judge rejected vide order dated 23.08.2019.

8. The defendant preferred an application seeking review of the said order dated 23.08.2019, which is rejected by the trial Judge vide order dated 18.01.2020.

9. The learned counsel for the defendant has twin submissions to canvas. The first submission is that the defence could not have been struck out in exercise of power under Order 11 Rule 21 of the Code. According to the learned counsel, the said provision has no applicability to the order of production documents which is passed in exercise of power under Order 11 Rule 14. The said submission merits outright rejection.

10. The provisions of Order 11, Rule 21 read thus :

O. 11. Rule 21

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. While Rules 1 and 2 of Order 11 refer to the delivery of interrogatories and in deciding the issue, the Court is obligated to take into account any offer which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, and then grant leave, the power of striking out defence is certainly not restricted to the leave granted by the Court under Rules 2 of Order 11 of the Code.

12. Notably Rule 12 provides for an application for discovery of documents. The said provision reads thus :

Rule 12 of Order 11

12. Application for discovery of documents. -

Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application for Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Rule 13 then speaks of the affidavit which shall be made by the party against whom an order under Rule 12 is prayed and Rule 14 provides that it shall be open for the Court, at any time, during the pendency of any suit, to order the production by any party, upon oath of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court may think right.

13. In no reasonable understanding of Rule 21, is it possible to interfere that the expression “fails to comply with any order to answer interrogatories, or for discovery or inspection of documents” excludes the production of documents which is directed under Order 11 Rule 14 of the Code. Such an interpretation shall clearly fall foul of the plain language of the provision.

14. The other submission is that the power of striking out defence is a drastic power and must be sparingly used. To this extent, the learned counsel for the defendant is right.

15. It is true that the conduct of the defendant is not above board. It is further obvious that the adjudication is delayed by several years due to the unreasonable defiance of the order to produce the documents which even otherwise the defendant society is statutorily obligated to maintain. However, the mitigating factor is that wisdom dawned, albeit belatedly on the defendant and the documents are produced on 05.07.2019.

16. In this view of the matter, I am inclined to offer an opportunity to the defendants to contest the said claim on merits, subject to the condition that the amount of Rs. 50,000/- (Rs. Fifty thousand) which is deposited in this court, shall be paid to the plaintiff as costs of the litigation.

17. The order impugned is set aside.

18. The amount of Rs. 50,000/- deposited in this court by the defendant, who is the petitioner herein, shall be paid to the respondent-plaintiff.

19. The learned trial Judge is requested to expedite the hearing of the suit and to finally decide the same within the next nine months.

20. Petition is disposed of in the afore-stated terms.

(ROHIT B. DEO, J.)

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