

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 4326/2021

[SHRI NAMDEO S/O DUKRU KAMBLE ..VS.. SHRI SUKHDEO S/O SHRIRAM KUTHE]

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Mr. Vikrant M. Vishwarupe, Advocate with Mr. R.R. Vyas,
Advocate for the petitioner
Mr. S.M. Prasad, Advocate for the respondent.

CORAM : MANISH PITALE, J.

DATED : 15/09/2022

Heard the learned Counsel appearing for the parties.

2. By this writ petition, the petitioner i.e. original defendant has approached this Court challenging an order dated 27.08.2021, whereby the Court of Civil Judge, Junior Division, Lakhni, District-Bhandara has allowed an application filed by the respondent (original plaintiff) under Order XXXIX Rule 11 of the Code of Civil Procedure, 1908 (Bombay High Court Amendment) [for short the "CPC (Bombay Amendment)"], as a consequence of which, the defence of the petitioner has been struck off, on the ground that the petitioner has breached the direction given in an order passed by the Court below allowing the application for temporary injunction filed by the respondent.

3. In the present case, the respondent has filed Suit bearing Regular Civil Suit No. 50/2015 for grant of permanent injunction against the petitioner. The grievance of the respondent is that the petitioner has illegally obstructed flow of water through a canal, as a result of which, the respondent is deprived of water to his agricultural field. In the said Suit, the respondent had moved an application for grant of interim injunction (Exh. 5), which was partly allowed by an order dated 27.04.2016. The operative part of the order passed by the Court below reads as follows:-

“1. The application vide Exh.05 is hereby partly allowed.

2. The defendant or anybody else on his behalf is hereby restrained from obstructing the flowing of the water from the Purkabodi dam and Khursipar water reservoir to the land of plaintiff through the disputed water track till the final disposal of the case.

3. The defendant or anybody else on his behalf is hereby restrained from breaking or damaging the disputed water track till the final disposal of the case.

4. Costs in main cause.”

4. It was the case of the respondent that despite the specific direction given in the above quoted order against the petitioner, he continued to obstruct the flow of water, thereby breaching and disobeying the aforesaid directions issued by the Court below. In this situation, the respondent filed two applications on 19.09.2016, one

application under Order XXXIX Rule 2A of the Code of Civil Procedure, 1908 (for short the “CPC”) pertaining to consequence of disobedience of breach of injunction and another application under Order XXXIX Rule 11 of the CPC (Bombay Amendment) pertaining to procedure when parties defy the order of the Court or commit breach of undertaking given to the Court. The Court below found in both the applications that the petitioner had indeed disobeyed and breached the above quoted order when the application for interim injunction was allowed. By an order dated 12.05.2021, the Court below allowed the application under Order XXXIX Rule 2A of the CPC, thereby directing that the property of the petitioner be attached. The petitioner has filed an Appeal before the District Court bearing Misc. Civil Appeal No. 129/2021, challenging the said order, which is pending.

5. On the basis that there was indeed breach and disobedience of the above quoted order, by the impugned order dated 27.08.2021, the Court below struck off the defence of the petitioner by exercising power under Order XXXIX Rule 11 of the CPC (Bombay Amendment).

6. The learned Counsel appearing for the petitioner submitted that the exercise of power under Order XXXIX Rule 11 of the CPC (Bombay Amendment) is discretionary in nature and this is so held in the judgment of the Division Bench in the case of ***Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi [2004(2) Mh.L.J. 1]***. It is

submitted that in the present case, the Court ought not to have exercised its discretion by allowing the application filed by the respondent and striking off the defence of the petitioner. It is submitted that the said order has drastic consequence for the petitioner particularly when the Suit has reached at an advanced stage of the proceedings. An attempt was also made to contend that both the applications under Order XXXIX Rule 2A and Rule 11 of the CPC could not have been filed simultaneously by the respondent. But, the learned Counsel for the petitioner fairly brought to the notice of this Court that in the case of ***Pralhad s/o Nagorao Bodkhe Vs. Sulochana Ramchandra Kawarkhe and ors. [2021(4) Mh.L.J. 419]***, in a similar situation, this Court held that both the proceedings could simultaneously be initiated, if the party in question had indeed breached or disobeyed an order of the Court.

7. On behalf of the respondent, it was submitted that both the applications were clearly maintainable and this was further supported by an order dated 17.08.2021 passed by this Court in ***Priya Narayan Pawar Vs. Smt. Kantabai Narayan Pawar and ors.*** (Writ Petition No. 10287/2019), wherein it was observed that there was no prohibition for moving an application under Order XXXIX Rule 11 of the CPC (Bombay Amendment), even if an application for the same cause had been moved under Order XXXIX 39 Rule 2A of the CPC. It was submitted that the petitioner had even refused to make any amends as

contemplated under Order XXXIX 39 Rule 11(2) of the CPC (Bombay Amendment) and that, therefore, the impugned order does not deserve any interference.

8. This Court has considered the rival contentions. A perusal of the material on record indicates that the findings rendered in the impugned order by the Court below, that there is a clear breach and disobedience of the order dated 27.04.2016 passed by the Court below, are based on cogent reasoning and material available on record, including statements made in evidence adduced by the petitioner, indicating clear breach and disobedience of the order of the Court. Therefore, circumstances clearly existed before the Court below for invoking jurisdiction under Order XXXIX Rule 11 of the CPC (Bombay Amendment).

9. On the question as to whether in such circumstances, the respondent could have simultaneously moved the applications under Order XXXIX Rule 2A and Rule 11 of the CPC, this Court has already held in the case of *Pralhad s/o Nagorao Bodkhe* (supra) that such course of action is certainly available for the Court and that merely because the application under Order XXXIX Rule 2A of the CPC was moved, it cannot be said that an application under Order XXXIX Rule 11 of the CPC (Bombay Amendment) could not have been moved by the respondent to seek appropriate remedy against the petitioner. In the said judgment, this Court has

emphasized upon the importance of the necessity for parties to abide by specific directions given by the Court and following observations have been made, which read thus:-

“10. The matter of violation of an order of injunction, by a party, and specifically in circumstances where the party, to a lis is shown to have knowledge of the passing of the order, is something which goes to the very root of the administration of justice. Any violation of an order by the Court by a party, aware of it, has to be dealt with an iron hand, for the reason that such a violation undermines the cause of justice. It indicates, the mindset of the party, to violate an order by the Court, howsoever wrong, which cannot be countenanced. If a party feels that the order by the Court is incorrect or wrong, there is always available to a party, a remedy, in the form of an appeal, where it is a final order and in the form of an application for vacating the same or by filing a reply and getting the application decided, in case it is an ad interim order. By no stretch of imagination, can a party, having knowledge of such an order of injunction, who defies the same, be granted any immunity from the consequences of such defiance.”

10. There can be no quarrel with the proposition that the power available under Order XXXIX Rule 11 of the CPC (Bombay Amendment) is discretionary in nature, as recognized by the judgment of this Court in ***Ramavatar Surajmal Modi*** (supra). In the said judgment, while holding that the power is discretionary, it has been observed that under Sub-Rule 2 of Rule 11 of Order XXXIX of the CPC (Bombay Amendment), since the party is in

breach of the order, an option is available for making amends.

11. In this case, the learned Counsel for the petitioner submits that the petitioner has given no instructions to make any amends for the breach or disobedience of the said order passed by the Court below, perhaps because the same may prejudicially affect the Appeal that he has filed to challenge the order dated 12.08.2021, passed by the Court below allowing the application under Order XXXIX Rule 2A of the CPC. In these circumstances, this Court is of the opinion that no fault can be found in the Court below exercising power under Order XXXIX Rule 11 of the CPC (Bombay Amendment) and striking off the defence of the petitioner. Although the effect of the impugned order is drastic, but, the same must follow in the interest of justice.

12. In view of the above, the writ petition is dismissed. No costs.

JUDGE

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