



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

**WRIT PETITION NO. 5010 OF 2022
WITH
INTERIM APPLICATION NO. 4298 OF 2023
IN
WRIT PETITION NO. 5010 OF 2022**

Shree Raj Shrushti Residency Private Ltd.
A private limited company, duly incorporated
under the Indian Companies Act, 1956, having
its Registered office at Block No.1, Ground Floor,
Navyug Sagar, 183, Walkeshwar Road,
Mumbai-400 006.

... Petitioner/Applicant

Vs.

1. Shri Romesh Sharma of
Bombay Indian Inhabitant residing
At Sant Sadan Bungalow No. 10,
Union Park, Khar-Pali Hills,
Bombay-400 052.
And plot of admeasuring about
438.70 sq. Meters situated at
Ghandhigram Road, Juhu, Mumbai-400 049.

2. M/s Ramnarain Sons Pvt. Ltd.
A Company incorporated under
the Companies Act, 1956 and
having its Registered office at
State Bank of India Annex Building,
Bank Street, Fort, Bombay-400 023.

3. M/s Jayems Engineering Co. Pvt. Ltd.
a Company incorporated under the
Companies Act, 1956 and having its office at
Great Western Building, 1st Floor, 130/132,
Shahid Bhagat Singh Road, Mumbai-400 023.

4. Expired

5. Mrs. Gayatri Vinay Parekh
having address at 14-15, D. I'LL Plazo,
Little Gibbs Road, Malabar Hill,
Mumbai-400 006.

6. Vasantraai Chhaganlal Dave
both of Bombay, Indian Inhabitants
having their office at C/o. Jaymes Engineering Ltd.
Great Western Building, 1st Floor, 130132,
Shahid Bhagat Singh Road, Mumbai-400 023

... Respondents.

Mr. Zal Andhyarujina, Senior Advocate with Mr. Shrey Sancheti, Mr. J. A. Khan and Mr. Bipin Joshi for Applicant/Petitioner.
Mr. G. S. Godbole, Senior Advocate with Mr. R. L. Gonsalves i/b Ms Eventa Gonsalves for Respondents.

CORAM : ABHAY AHUJA J.
RESERVED ON : 25TH JULY, 2023
PRONOUNCED ON: 28TH NOVEMBER, 2023

JUDGMENT:-

1. The Petitioner has filed the above Writ Petition under Article 227 of the Constitution of India assailing the order of the Appellate Court dated 30th March, 2022, passed in Appeal No. 23 of 2022 in Exhibit No. 279 in RAE & R Suit No. 54/176 of 1994 before the Small Causes Court, Bandra, (the “said suit”) allowing the Appeal of the original Defendant No.2.

2. The Petitioner as the original Plaintiff has earlier filed the said suit for eviction against the Respondents/Original Defendants in respect of suit premises being sub plot no. 3 of Plot No. A-2, CS No. 164/2 of Vile Parle Division along with shack and structure at Gandhigram Road, Juhu, Mumbai-400 049 (the “said premises/suit premises/ the said property”), admeasuring about 438.70 sq. meters, on the grounds of illegal subletting, arrears of rent and *bona fide* requirement.

3. The suit was resisted by the Respondents/Original Defendants by filing their written statement and additional written statement. The suit was taken up for evidence. The Petitioner filed their affidavit of evidence along with documents. The documents were, according to the Petitioner, marked by the Trial Court and kept for cross-examination of PW-2.

4. It is the case of the Petitioner that on 4th March, 2010 a Power of Attorney (“first Power of Attorney”) was executed by Respondent No.1 in favour of Harish Chandar Mishra as Respondent No.1 was in judicial custody *inter alia* granting Harish Chandar Mishra physical possession of the said property and to represent the donor of the power before any official authorities of any State/Central Government or local body, which

may be connected and/or concerned with the suit property in any manner and to make any statement, applications, affidavits, undertakings, etc. on behalf of the donor in his name in respect of the said property and to deal with all matters.

5. During the pendency of the suit, the Petitioner took out an interim application being Exhibit No. 236 for injunction and other reliefs. The said exhibit came up for hearing on 20th January, 2021. The Trial Court granted an order of status-quo on 20th January, 2021, which was continued and the application under Exhibit 236 was made absolute on 24th September, 2021.

6. On 20th January, 2021, the learned Single Judge of the Small Causes Court (the “Trial Court”) granted status-quo till filing of the reply in Exhibit No. 236 in the following terms :-

“In the interest of justice Both Parties Are Directed To Maintain Status-Quo Till Filing Of Reply By Deft no.2.”

7. Thereafter, on 10th February, 2021, the learned Single Judge of the Small Causes Court adjourned the matter for reply till 22nd February, 2021. On 22nd February, 2021, the Single Judge passed a direction under Exhibit

No.236 *inter alia* stating “*Reply not filed keep for arguments. Adjourned for Hrg. in 236*”. On 9th March, 2021, Respondent No.1 filed an application being Exhibit No. 252 for setting aside the “No Reply” order dated 22nd February, 2021. On 7th April, 2021, the Single Judge extended the order of status-quo till the decision was passed under Exhibit No.236 i.e. the status-quo application in the following terms:-

“ In The Interest of Justice Order Below Ex. 236 Is Extended Till Decision of Ex.236 on Merit”

8. On 26 July, 2021, the Single Judge allowed the Respondents to file a reply setting aside the No Reply order, subject to costs of Rs.2,000/- as under :-

“App Is Allowed Sub. To Cost Of Rs.2000/-. To Be Paid To Plff On or Before 09-08-2021”

9. On 9th August, 2021, reply was filed to the status-quo application viz. Exhibit No. 236, which was taken on record as Exhibit No. 265 on 2nd September, 2021.

10. A Power of Attorney dated 2nd September, 2021 (“Second Power of Attorney”), came to be executed by Respondent No.1 in favour of Mr. Taizun Nisar Hassonjee, *inter alia* to have physical possession of the said

property and to represent any Office/Authorities of the State/Central Government or local body, which may be connected and / or concerned with the said property, in any manner whatsoever, and to make any statement, application, undertaking, etc. and on behalf of the donor and in his name in respect of the Suit Property or to deal with all matters. The said Power of Attorney also stated that the averments/contents in the said irrevocable Power of Attorney have been explained in vernacular language and after admitting it as correct the same had been signed. Clauses 1 and 9 of the said Power of Attorney are usefully quoted as under:-

“1. To have physical possession of my “said property” and to represent me before any office/authorities of my state/Central Govt. or local body which may be connected and / or concerned with the “said property” in any manner whatsoever and to make any statement, applications, affidavits, undertakings, etc and on my behalf and to my name in respect of our said property or to deal with all matters.

9. That the averments/contents this irrevocable Power of Attorney have been read over and explained in my vernacular language and after admitting it as correct have signed the same.

AND whereas I hereby agree to ratify and confirm all and whatever other acts may said Attorney shall lawfully do execute or perform or cause to be done, executed or performed in connection with the said property under and by virtue of the deed not withstanding no express powers in that behalf is hereunder provided”

11. On 24th September, 2021, an order was passed under Exhibit No. 236 *inter alia* granting temporary injunction from dispossessing or altering the suit property, which is usefully quoted as under :-

“22. Plaintiff no.2 has prima facie pointed out that it has right to preserve the suit premises till decision of the suit. Plaintiff no.2 has also pointed out that Defendant no.2 has from time to time made additions and alterations of permanent nature in the suit premises since beginning, so it has right to preserve the suit premises, being landlord. Thus, Plaintiff no.2 has shown that it has prima facie, balance of convenience, lies in its favour as well as it will suffer irreparable loss. If Defendant no.2 is not restrained. Therefore, considering all these aspects, I answer Point No.1 to 3 in the affirmative.”

12. It is the case of the Petitioner that by execution of Power of Attorney dated 2nd September, 2021 by the Respondent No.1 in favour of Taizun Nisar Hassonjee, the order of status-quo dated 20th January, 2021 was violated. Mr. Andhyarujina, learned Senior Counsel for the Petitioner/ Original Plaintiff No. 2, would submit that as there was contravention of the status-quo order dated 20th January, 2021, passed below Exhibit No. 236, which was later extended till decision of Exhibit No. 236 on 7th April, 2021 and allowed on 24th September, 2021, Petitioner was constrained to take out Exhibit No. 279 for striking off defence of the Respondent/original Defendant No.2. The said application viz. Exhibit No. 279 was resisted by the Respondent by filing Affidavit in reply to which

rejoinder was filed by the Petitioner. Paragraph 7 of the Respondent's reply is usefully quoted as under:-

“7. With reference to paragraph 6: it is true that, the Defendant No.2, has executed Power of Attorney dated 2.9.2021. I crave leave to refer to and rely upon the said Power of Attorney, when produced. I say that, in the month of September, 2021, I was unavailable to act, as the Constituted Attorney of the Defendant No.2 on account of my personal commitments. The defendant No.2 was required to challenge the order dated 25.8.2021 passed on Application Exhibit 259, by filing Revision Application, before the Hon'ble Appellate Bench of this Hon'ble Court. Since the said Revision Application was to be filed, expeditiously, and as I was not available, and the defendant no.2 was not able to personally attend to the filing of the said application, he executed Power of Attorney, in favour of Mr. Taizun Nisar Hassonjee, with identical powers as to have been conferred upon me, under the earlier Power of Attorney, Interpretation of paragraph No.1 of the said Power of Attorney, dated 2.9.2021, which is reproduced in paragraph No.6 of the Application is a complete sinister, false, misleading and misconceived, interpretations of power. The Plaintiffs are well aware that, the Defendant No.2 has to regularly stay at Delhi and is not able to come to Mumbai frequently. It is, therefore, necessary to permit his respective Constituted Attorneys, including myself to have physical possession of the suit premises and we have the keys of the suit premises, not as a matter of right but, for the protection and safeguarding of the suit premises. The said Constituted Attorneys are not claiming any rights whatsoever in respect of the suit premises and are holding the suit premises, for and on behalf of the Defendant No.2 as his agents, only for the purpose of protecting the suit premises.”

(emphasis supplied)

13. On 20th January, 2022, the Small Causes Court *inter alia* struck off the defence of Respondent No.1 i.e. the written statement and additional written statement filed by Respondent No.1, under Order 39 Rule 11 of the Civil Procedure Code, 1908, *inter alia* for the following reasons:-

“19. In this background, question requires consideration is whether Defendant no.2 has committed breach of order or not? It is a matter of record that status quo order has been passed on 20/01/2021 in presence of both the parties and therefore Application (Exh 236) is decided on 24/09/2021 on merit after hearing both sides, Defendant no.2 has clearly stated in clause no.1 of second POA executed on 24/08/2021 and registered/notarized on 02/09/2021, that Taizun Nisar Hassonjee is placed in physical possession of the suit premises. Therefore, as per Section 91 of the Indian Evidence, Act, 1872, documentary evidence, excludes oral statement as regards, contents in written documents are concerned. Thus, it is clear that Defendant no.2 fully knowing that status order dated 20/01/2021 is in existence, still he placed Taizun Nisar Hassonjee in physical possession of the suit premises. This activity amounts to willful default and breach of status quo order.

20. Learned advocate for Defendant no.2 submitted that order dated 24/09/2021 below Application (Exh.236) is challenged before Hon'ble Appellate Bench, Small Causes Court in Appeal No.174 of 2021. This aspect is totally different because what is required to see is that whether at relevant time either party commits breach or contravene order of the Court. As discussed above, the plaintiffs have satisfactorily pointed out that defend No.2 has committed breach of order dated 20/01/2021, which is confirmed on 24/09/2021. Therefore, defence of defend no.2 is liable to be struck out as per provisions of Order XXXIX Rule 11 of the C.P. C. Hence, considering all these aspects, I answer point number one in the affirmative.”

14. Being aggrieved by the order dated 20th January, 2022, the Respondents filed an Appeal No. 23 of 2022 challenging the same *inter alia* on the following grounds:-

“(E) The Learned Trial Judge ought not to have taken cognizance of the false, misleading, misconceived, interpretation of the 2nd Power of Attorney by the Appellant.

(L) The Learned Trial Judge erred in not appreciating the statement made by the department in the affidavit in reply that neither of the Constitution returnees are claiming any rights whatsoever, in respect of the suit premises, or any part.

(M) The Learned Trial Judge Heard in not taking due cognizance of the statement, made in the affidavit in reply, that the Constituted Attorneys were permitted to have physical possession of the suit premises, and to have the keys of the suit premises, not as a matter of right, but for protecting and safeguarding the suit premises.

(R) The Learned Trial Judge erred, in not appreciating the solemn statement of the Deponent. That the defendant No.2, has not conferred any rights to the constitute attorneys under the said Power of Attorney.

(X) The Learned Trial Judge erred in not appreciating that the provisions of Order 39 Rule 11 are applicable in Maharashtra is directory and not mandatory and hence the Learned Trial Judge ought not to have used her discretion against the Appellant/Defendant No.2 in light of the facts of this case.”

15. On 30th March, 2022, the Appellate Court allowed the appeal and set aside the order of striking off defence *inter alia* holding that there was no order of status-quo on 2nd September, 2021 and moreover by execution

of Power of Attorney dated 2nd September, 2021, the Defendant No. 2 had not transferred any right, title and interest in the suit property and therefore, the question of striking off defence of Defendant No. 2 did not arise and that the Trial Court had erred in coming to the conclusion that by executing the Power of Attorney, the Defendant No. 2 had given possession of the suit premises to Mr. Taizun Nisar Hassonjee in contravention of the order of status-quo and thereby setting aside the order of the Trial Judge, striking off the defence.

16. It is against this appellate order that the Petitioner has filed the Writ Petition for the following relief :-

(b) That this Hon'ble Court be pleased to call for the records and proceedings of Appeal No. 23 of 2022 in Exhibit No. 279 in RAE & R Suit No. 54/176 of 1994, CR No. 41, Small Causes Court, Bandra Branch, Mumbai and after going through the propriety, tenability and legality thereof be further pleased to set aside and or quash the impugned the Judgment and order dt. 30/3/2022 passed in Appeal No. 23 of 2022 in Exhibit No. 279 in RAE & R Suit No. 54/176 of 1994, CR No. 41, Small Causes Court, Bandra Branch, Mumbai"

and pending the hearing and final disposal of the Writ Petition the Petitioners have filed the Interim Application for deposit of the Power of Attorney dated 2nd September, 2021 in this Court and that the Respondent No. 1 and/or his agents be restrained from acting upon the Power of

Attorney dated 2nd September, 2021 in any manner whatsoever and for Court Receiver and Public Caution Notice in respect of the suit property.

17. I have heard the learned Senior Counsel for the parties and considered the rival contentions.

18. Mr. Andhyarujina, firstly takes this Court through the array of parties and submits that the Petitioner herein is Shri Raj Shruti Residency Pvt. Ltd. who is the owner of the said premises. The Petitioner had filed the said eviction suit No. RAE & R Suit No. 54/176 in the Small Causes Court at Bandra against one Romesh Sharma. It is submitted that the said Romesh Sharma is an illegal occupant on the suit property, who acquired possession of the suit property from Respondents No.4 and 5 vide Leave and License Agreement dated 1st March, 1986. Thereafter by an Agreement of Sale dated 24th May, 1986. Ms. Ramnarain Sons Pvt. Ltd. viz. the Original Plaintiff No.1 and Original owner of the Suit property, who vide by Deed of Assignment dated 29th September, 2014 assigned the suit property to the Petitioner. The suit has also been filed against the Respondent No.3-Ms. Jayems Engineering Company Private Limited, who was the original tenant of the suit property through its Proprietor Kimatral

Khushalani, who passed away on 22nd June, 1969. The petition is also filed against Respondent No.4, who had been deleted as she had expired. The Respondent No.5 is Mrs. Gayatri Vinay Parekh and Respondent No.6 is Vasantraai Chhaganlal Dave, who is the executor and trustee of Kimatral Khushalani i.e. Respondent No.3 - proprietors' estate vide Will dated 15th May, 1969.

19. Learned Senior Counsel for the Petitioner, would submit that the Petitioner is not only seeking setting aside of the Appellate Court's order but also a stay on the Power of Attorney on 24th August, 2021 executed by the Respondent No.1 in favour of Mr. Taizun Nisar Hassonjee and registered/notarized on 2nd September, 2021, on the ground that the same is in violation of the order of status-quo dated 20th of January, 2021 passed by the Trial Court.

20. Mr. Andhyarujina, would submit that the basis for taking out the application for striking off the defence is the Power of Attorney dated 2nd September, 2021 referred to in Exhibit No. 279. Learned Senior Counsel would submit that a plain reading of the Power of Attorney and particularly clauses no. 1 and 9 indicate that Mr. Taizun Nisar Hassonjee

has been granted possession of the said property and that the Power of Attorney is an irrevocable Power of Attorney and the deponent has agreed to ratify the acts referred to in the Power of Attorney as well as not referred in the Power of Attorney. Learned Senior Counsel has drawn the attention of this Court to the Clauses 1 and 9 in the said Power of Attorney. It is submitted that the conduct of the Respondent no. 1 is required to be taken into consideration. The *modus operandi* of Respondent No.1 suggests that the Respondent No.1 is delaying the matter, despite the suit being expedited by this Court. That under the pretext of the Power of Attorney, the Respondent No.1 is attempting to deal with the suit property with a view to create complications in the matter. Mr. Andhyarujina, would submit that judicial notice of the contents of the Power of Attorney is required to be taken.

21. Mr. Andhyarujina, would further submit that it is wrong on the part of the Appellate Court to say that there was no order of status-quo on 2nd September, 2021. That the Appellate Court has failed to consider the provisions of Order 39 Rule 11. Learned Senior Counsel refers to paragraphs 18 and 19 of the order dated 20th January, 2022 of the Trial Court striking off the defence of the Defendants and submits that there is

a clear finding of willful default of the status-quo order. Learned Senior Counsel submits that the same has been fully considered and an order has been passed on the point, whereas the Appellate Court has failed to consider the same. Mr. Andhyarujina, relies upon the Division Bench decision of this Court in the case of ***Tejram Gulab Hazare and Ors Vs. State of Maharashtra and Ors.***¹ to submit that the expression status-quo implies the existing state of things at any given point of time. Learned Senior Counsel would submit that it is obvious that the status-quo cannot mean anything else except the status-quo as existing when the order was passed. It implies that the situation as on the date of the order is to be preserved.

22. Learned Senior Counsel submits that this view was earlier propounded by the Hon'ble Supreme Court in the case of ***Messrs Bharat Coking Coal Limited Vs. State of Bihar and Ors.***² Learned Senior Counsel would submit that the proper course for the Defendants would have been to approach the Court, if there was any doubt, before executing the Power of Attorney dated 2nd September, 2021. That like the Hon'ble Supreme Court in the case of ***Messrs Bharat Coking Coal Limited Vs. State of Bihar***

1 2010 (6) Mh. L. J.

2 1987 (Supp) SCC 394

and Ors. (supra), this Court should deprecate the conduct of the Respondent No.1 of executing the Power of Attorney dated 2nd September, 2021 in favour of Mr. Taizun Nisar Hassonjee *inter alia* granting him physical possession of the suit property, despite the status-quo order.

23. Learned Senior Counsel submits that the grantor of the Power of the Attorney as well as the grantee are not having clean antecedents. From the events which have happened since the date of Power of Attorney, it is apparent that the Respondent No.1 is contemplating to deal with, dispose of and create third party rights on the basis of the Power of Attorney. Learned Senior Counsel would submit that the Trial Court had already passed an order maintaining status-quo against the Respondent No.1, but with a view to wriggle out of the said order the Respondent No.1 is trying to misuse the Power of Attorney. Learned Senior Counsel submits that the Applicant has downloaded the position and relevant information about the suit property from the google website, which reflects the location of Tricon of whom the Power of Attorney holder, Mr. Taizun Nisar Hassonjee, is a director. Learned Senior Counsel would submit that from the documents annexed to the proceedings, it is a newspaper published fact that the Respondent No.1 has linkages to the mafia world and now after issuance

of such Power of Attorney virtually a free hand has been given to him in respect of the subject property. That from the conduct of Respondent No. 1, it is very clear that they want to misuse the machinery of this Court, so that the Petitioners to get ensnared in petty issues such as inspection of pleadings etc.

24. Learned Senior Counsel would therefore submit that this Court not only set aside the order dated 30th March, 2022 but also stay the Power of Attorney by restraining the Respondent No.1 and/or his agents from acting upon the said Power of Attorney dated 2nd September, 2021 and also direct that the same be deposited in this Court. Learned Senior Counsel would submit that in order to protect the property this Court also consider appointing the Court Receiver, High Court Bombay with all powers under Order XL Rule 2 of the Code of Civil Procedure, 1908, in respect of the said property.

25. On the other hand, Mr. Godbole, learned Senior Counsel for the Defendants would submit that every breach of an order should not give rise to an action under Order 39 Rule 11 of the CPC. Learned Senior Counsel would submit that the power under Order 39 Rule 11 is directory

and not mandatory. Learned Senior Counsel relies upon a Division Bench decision of this Court in the case of ***Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi***³. Learned Senior Counsel submits that both the Powers of Attorney are similar and concurrent. The first Power of Attorney to Mr. Harish Chandar Mishra is in fact not revoked. Learned Senior Counsel refers to the reply filed by the first Power of Attorney holder viz. Shri Harish Chandar Mishra to Exhibit No. 279 and submits that since the first Power of Attorney holder was not available on account of his personal commitments, and since Defendant No.2, viz. Respondent No. 1 was expeditiously required to challenge the order dated 25th August, 2021, passed on Application Exhibit No. 259, by filing Revision Application before the Appellate Bench and also since Defendant No. 2 was not personally available, the second Power of Attorney was required to be executed in favour of Mr. Taizun Nisar Hassanjee on 2nd September, 2021 with identical powers. That Defendant No. 2 was required to regularly stay at Delhi and unable to come frequently to Mumbai, therefore, it was necessary to permit his respective Constituted Attorneys to have physical possession of the suit properties and the keys thereto not as a matter of right but for the protection and safeguarding of the suit property. That the

3 2004 (2) Mh. L. J.

Constituted Attorneys are not claiming any rights whatsoever in respect of the suit property and are holding the suit property for and on behalf of Defendant No. 2 as his agents only for the purposes of protecting the suit property. Learned Senior Counsel relies upon the decision of the Hon'ble Supreme Court in the case of *M/s Babbar Sewing Machine Company Vs. Trilok Nath Mahajan*⁴, which was also relied upon by the Division Bench of this Court in the case of *Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi (supra)* and submits that as in the present case, where the default is not willful or the conduct of the party responsible for the default is not contumacious and there is reasonable explanation for default, this Court is not obliged to exercise the power under Order 39 Rule 11 (1) of the CPC to impose a serious penalty such as striking off the defence against the party responsible for default. Learned Senior Counsel would submit that sub-Rule (2) which gives a discretion to the Court that even after the order contemplated under sub Rule (1) of Rule 11 has been passed, upon sufficient cause being shown by the party responsible for the default or contravention or breach and such party makes amends for the default or contravention or breach to the satisfaction of the Court, the Court may restore the suit or hear the defence on such terms and conditions as it

4 (1978) 4 SCC 188

deems fit. Learned Senior Counsel urges this Court to consider the decision of the Hon'ble Supreme Court in the case of *M/s Babbar Sewing Machine Company Vs. Trilok Nath Mahajan (supra)* and apply Order 39 Rule 11 (1) as directory using discretion and not mandatorily as there has been no obstinacy or contumacy on the part of the Defendants or willful attempt to disregard the order of the Court. Learned Senior Counsel submits that the rule of striking off of defence should be worked with caution and used only as a last resort only in extreme cases, which is not the case here.

26. The Trial Court has considered whether Defendant No.2 has committed breach of the status-quo order or not. In paragraph 19 of the Order dated 20th January, 2022, it has observed that the status-quo order was passed on 20th January, 2021 in the presence of both the parties and thereafter, the application under Exhibit No. 236 was decided on 24th September, 2021 on merits after hearing both the sides. That the Defendant No.2 has stated in Clause 1 of the Power of Attorney executed on 24th August, 2021 and registered / notarized on 2nd September, 2021 that Mr. Taizun Nisar Hassonjee is placed in physical possession of the said premises. The Small Causes Court has cited Section 91 of the Indian

Evidence Act, 1872 to observe that since documentary evidence excludes oral evidence, as regards contents in written documents are concerned, it was clear that Defendant No. 2 was fully aware of the existence of the status-quo order dated 20th January, 2021 and despite that placed Mr. Taizun Nisar Hassonjee in physical possession of the said property. Observing thus, the Small Causes Court held that the said act clearly amounted to willful default and breach of status-quo order. Accordingly, in view of the provisions of Order 39 Rule 11 of the CPC, the defence of Defendant No.2 put forth in written statement and additional written statement was struck off.

27. The Appellate Court on the same set of facts has come to a conclusion that on the date of execution of the second Power of Attorney, no status-quo order was in force. It is observed from the dates set out in the paragraph 9 of the Appellate Court's order that the date of 7th April, 2021, which extended the order of status-quo below Exhibit No. 236, has not been taken into consideration by the Appellate Court, while arriving at the said conclusion that there was no order of status-quo in force on the date of execution of the second Power of Attorney. Obviously, therefore, the Appellate Court order clearly appears to be erroneous on this finding

that there was no order of status-quo on the date of execution of the second Power of Attorney dated 2nd September, 2021. The Appellate Court has thereafter gone ahead and compared the two Powers of Attorney and observed in paragraph 22 that since the words used are “to have possession” and not “put in possession”, there is a difference, which means Mr. Taizun Nisar Hassonjee is to act as an agent and has possession of the suit premises on behalf of Defendant No.2. That the Power of Attorney is not an instrument of transfer and also nowhere the same suggests that it is an instrument of transfer of right, title, interest, possession in the suit premises. The word “to have possession” cannot be read in isolation and therefore, the Appellate Court expressed its opinion that Defendant No.2 had not transferred any possession in the name of Mr. Taizun Nisar Hassonjee. That the Defendant No. 2 had only appointed Mr. Taizun Nisar Hassonjee as a Power of Attorney holder and he has been given the right to have possession of the suit premises to make statements, applications, undertaking, etc. on his behalf and to his name in regard to the suit premises or to deal with all the matters on his behalf.

28. Holding that there was no status-quo order on 2nd September, 2021 and the Power of Attorney dated 2nd September, 2021 has not transferred

any right, title and interest in the suit premises, the Appellate Court held that there was no question of striking off defence of Defendant No.2 and the order of the Trial Court was set aside.

29. Both the learned Senior Counsel have put forth their points of view with great erudition. There can be no doubt that an order of status-quo by a Court implies the existing state of things at the given point of time when the order was passed and when such an order is passed, the parties are obliged to preserve the situation as on the date of the order. Both the decisions, *Messrs Bharat Coking Coal Limited Vs. State of Bihar and Ors. (supra)* as well as *Tejram Gulab Hazare and Ors Vs. State of Maharashtra and Ors. (supra)*, cited on behalf of the Petitioner clearly supports this rule. It has been brought out before this Court that the Appellate Court was not aware of the order dated 7th April, 2021, extending the order below Exhibit No. 236. The second Power of Attorney has been executed on 2nd September, 2021, whereby Mr. Taizun Nisar Hassonjee has been granted power by the Respondent No.1 to “have” physical possession of the said property, which is after 7th April, 2021, when the status-quo order was extended. Therefore, it cannot be said, as observed by the Appellate Court

above that there was no status-quo order on the date on which the second Power of Attorney was executed. It has been noted above that the Appellate Court does not appear to have taken into consideration the date of 7th April, 2021 of the extension of the status-quo order. Status quo, as held by this Court in the case of *Tejram Gulab Hazare and Ors Vs. State of Maharashtra and Ors.(supra)* while relying upon the decision of the Hon'ble Supreme Court in the case of *Messrs Bharat Coking Coal Limited Vs. State of Bihar and Ors.(supra)*, means the existing state of things at any given given point of time and cannot mean anything else except that state as existing when the order was passed. Status quo implies that the situation as on the date of the order is to be preserved. On 20th January, 2021 both sides were directed to maintain status quo which was extended on 7th April, 2021 till the decision was passed in Exhibit 236 which was made absolute on 24th September, 2021. The second Power of Attorney was executed on 2nd September, 2021 which is during the subsistence of the status quo order. Therefore clearly there was a breach of the order of status quo. Although, it would, therefore, have been appropriate for this Court to remand the matter back to the Appellate Court for consideration of the said order and decide the appeal denovo, however, as already much time has elapsed, this Court considers it appropriate to decide the matter

here itself keeping in mind that the status-quo order was in fact in place when the second Power of Attorney was executed.

30. However, the striking off of defence of a Defendant for non compliance of a Court's order or breach of an undertaking is a serious and grave consequence. A Division Bench of this Court in the case of ***Ramavatar Surajmal Modi vs. Mulchand Surajmal Modi (supra)*** observed that by making provision of serious penalty of striking off the defence against the party responsible for default, the rule making authority did not intend to leave no discretion to the Court. That, the object of the provision of Order 39, Rule 11(1) is not defeated if it is held to be directory as the Court can in its discretion for adequate reasons visit the defaulting party with the penalty envisaged therein and that if the provision was held mandatory with no discretion to the Court, that could lead to striking off the defence even when the default was not found to be wilful or conduct of such party not obstinate or contumacious. As observed by the Division Bench of this Court, the provision does not obligate the Court in every case of default of a Defendant to strike off the defence. Pertinently Sub-rule (2) gives a discretion to the Court that even after the order contemplated under Sub-rule (1) of Rule 11 has been passed, upon

sufficient cause being shown by the party responsible for the default or contravention or breach and such party makes amend for the default or contravention or breach to the satisfaction of the Court, the Court may restore the suit or hear the defence on such terms and conditions it deems fit. That, if the Court has power to restore the party to the same position even after the adverse order has been passed under Sub-rule (1) if a case is made out under Sub-rule (2), the provision of Sub-rule (1) has to be held to be directory and not imperative. The Hon'ble Supreme Court in case of *M/s. Babbar Sewing Machine Company vs. Trilok Nath Mahajan (supra)*, as also noted by the Division Bench of this Court, held that the power of dismissal of suit or striking the defence under Order 11 Rule 21 of the Code of Civil Procedure should be exercised only where a 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. Relying upon the findings of the Hon'ble Supreme Court in paragraph 14 of the Hon'ble Supreme Court's decision, the Division Bench of this Court held that Sub-Rule (1) of Rule 11 of Order 39 of CPC to be directory and the discretion exercisable by the Court while passing an order under Sub-rule (1) of Rule 11 of Order 39 CPC has to be in consonance and in conformity with the decision laid down by the Hon'ble

Supreme Court in the case of *M/s.Babbar Sewing Machine Company vs. Trilok Nath Mahajan (supra)*. Summarized simply, power to strike off the defence under Order 39 Rule 11(1) should be exercised for adequate reasons where the defaulting party fails ultimately in complying with the order of the Court or undertaking; where the default is wilful and the conduct of the defaulting party is obstinate, contumacious that results in causing substantial or serious prejudice to the opposite party.

31. Therefore, whether Order 39 Rule 11 (1) is directory or mandatory does not require any further discussion in view of the decision of the Hon'ble Supreme Court in the case of *M/s Babbar Sewing Machine Company Vs. Trilok Nath Mahajan (supra)* which has been relied upon by a Division Bench of this Court in the case of *Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi(supra)*. The penalty of striking off a defence is indeed very harsh and such an order must be applied only in extreme cases, where there has been obstinacy or contumacy. A party should not be rendered defenceless unless the entire substratum of the suit has been wiped off.

32. In the facts of this case, as noted above, evidently, there has been a breach of the status-quo order by the execution of the second Power of Attorney dated 2nd September 2021. However, a perusal of the reply filed by the first Power of Attorney holder Shri.Harish Chandar Mishra Exhibit 279, as quoted above, does not suggest that the said power has been deliberately executed to breach the order of status quo or the conduct is contumacious. No right, title or interest in the said property appears to have been transferred. Since the first Power of Attorney holder was not available on account of his personal commitments and since the Respondent no.1 was expeditiously required to challenge the order dated 25th August, 2021 passed on Application Exhibit 259 by filing Revision Application before the Appellate Bench and that Respondent no.1 was also personally not available being in Delhi, the second Power of Attorney came to be executed in favour of Mr.Taizun Nisar Hassonjee on 2nd September 2021 with identical powers. It has been submitted that the physical possession as well as the keys of the suit property is not for the purposes of conferring any right, title and interest to the Constituted attorneys but only for the protection and safeguarding of the suit property. In my view, therefore there appears to be a reasonable explanation that has been offered on behalf of the Defendants for the default. No contrary

fact has been brought to my notice. The conduct of the defaulting party cannot be said to be contumacious or obstinate, to be visited with such a severe consequence of striking off the defence put forth in the written statement and additional written statement. It is a principle of law that the rights of the parties be decided in a trial after considering the pleadings of the plaintiff and the defendant. Striking off of the defence in the form of a written statement will take away that valuable right of the defendant, which the circumstances of the case as noted above do not warrant.

33. For the above reasons, the order dated 30th March, 2022 of the Appellate Court setting aside the order of the Trial Court dated 20th January, 2021 striking off of the defence of the Respondent No. 1 (Defendant No.2) as contained in the written statement and the additional written statement is upheld.

34. However, even though the breach of the order of status quo as observed in the facts of this case is not to be visited with serious consequences of striking off of defence, however, that does not mean that the breach can be allowed to continue particularly in view of the restraint. It would therefore only be fair to direct the deposit of the second Power of Attorney as well as injunct the Respondent No.1 and/or the second Power

of Attorney holder and/or their agents from acting in accordance with the second Power of Attorney in any manner whatsoever.

35. Ergo, in view of the above discussion and in view of the breach of the order of status-quo as noted above, the Respondents are directed to deposit the second Power of Attorney dated 2nd September, 2021 in the Small Causes Court and Respondent No. 1 and/or Mr. Taizun Nisar Hassonjee and/or their agents, employees, servants etc. are restrained from acting in accordance with the said second Power of Attorney in any manner whatsoever.

36. The Trial Court to proceed with the said RAE & R Suit No. 54/176 of 1994 and to complete the trial preferably within a period of one year.

37. The Writ Petition and Interim Application accordingly stand disposed in the above terms.

38. It is made clear that any observation on the merits of the said suit, is only for the purposes of deciding the present Writ Petition and Interim Application and the trial Court to decide the suit on its own merits in accordance with law.

(ABHAY AHUJA, J.)