



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.9556 OF 2023**

Prakash Namdev Shinde and Ors. ... Petitioners
versus
Dhananjay Ramchandra Bhosale ... Respondent
WITH
CONTEMPT PETITION NO.324 OF 2022

Mr. Dilip Bodake, for Petitioner.

Mr. B.H.Goswami, for Respondent in WP.

Ms. Bhakti Wast i/by Mr. Prakash Deshmukh for Respondent Nos.1 to 3 in CP 324 of 2022.

Mr. S.D.Rayrikar, AGP for Respondent No.4 in CP 324 of 2022.

CORAM: N.J.JAMADAR, J.

DATE : 23 JANUARY 2025

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally.
2. Heard the learned Counsel for the parties.
3. The challenge in this Petition is to an order dated 21 April 2023 passed by the learned Civil Judge, Jr. Division, Satara, on an application (Exhibit 55) preferred by the Petitioners/Plaintiffs to strike out the defence of the Defendant/Respondent herein.
4. By the impugned order, the said application came to be rejected observing, inter alia, that the application for striking out defence was made on the premise that there was disobedience of the injunction order passed

against the Defendant and the Plaintiffs, thus, had specific remedy under Rule 2-A of XXXIX, and, therefore, recourse to the provisions of Order XXXIX Rule 11 (Bombay amendment) was not warranted.

5. The Petitioners/Plaintiffs instituted a suit seeking relief of perpetual injunction to restrain the Defendant from causing obstruction to the access of the Plaintiffs over the 'suit way'. In the said suit, the Petitioners filed an application for temporary injunction. By an order dated 16 June 2021, the trial Court was persuaded to allow the application and restrain the Defendant from causing obstruction to the access of the Plaintiffs over the suit way. The Defendant carried the matter in appeal being Misc. Civil Appeal No.79 of 2021. By a judgment and order dated 9 November 2021, the learned District Judge, Satara, was persuaded to allow the appeal and set aside the order passed by the trial court. The Petitioners approached this Court in WP No.9329 of 2021 and by an order dated 21 December 2021, this Court allowed the Petition by setting aside the order passed by the appeal Court and restored the injunction in favour of the Petitioners granted by the learned Civil Judge, Satara. This court explicitly recorded that the 'suit way', being Grampanchayat road (village road), no party had right to block the access.

6. Asserting that despite the order passed by this Court in the aforesaid Writ Petition and the restoration of the temporary injunction order granted by the trial Court, the Defendant continued to cause obstruction to the access

and put hindrances in the use of the 'suit way', the Petitioners filed an application for striking out the defence of the Defendant under Order XXXIX Rule 11 of the Code. The said application was resisted by the Defendant. By the impugned order, the learned Civil Judge rejected the application as a specific remedy was available under Order XXXIX Rule 2-A of the Code.

7. Mr. Bodake, learned Counsel for the Petitioners, submitted that the trial Court has taken an incorrect view of the matter. The provisions contained in Order XXXIX Rule 11 (Bombay Amendment), equally apply to an order of temporary injunction, in the event there is disobedience of the said order. The existence of the remedy to initiate an action for contempt under Rule 2-A of Order XXXIX does not preclude a party aggrieved by the disobedience to seek the dismissal of the suit or striking of the defence, as the case may be.

8. Learned Counsel for the Respondent, on the other hand, submitted that the Plaintiffs have falsely claimed that the suit way is a Village Panchayat Road. In fact, the Plaintiffs had not approached the Court with clean hands and were guilty of suppression of facts. In these circumstances, the learned Civil Judge did not commit any error in rejecting the application.

9. I am afraid, at this stage, it may not be permissible to canvass the submissions which are in derogation of the order passed by this Court explicitly recording that the suit way is a village road. The only question that warrants consideration in this Petition is, whether the learned Civil Judge was

justified in rejecting the application for initiation of action under Order XXXIX Rule 11 on the count that the Plaintiffs had statutory remedy under Order XXXIX Rule 2-A of the Code ?

10. The provisions contained in Order XXXIX Rule 11 of the Code read as under :

“11. Procedure on parties defying orders 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 proceeding 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:

Provided that before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order to be passed”

11. A plain reading of the aforesaid provisions indicates that disobedience,

contravention or breach of any order may entail the consequence of the dismissal of the suit or striking out the defence if the disobedience or breach is committed by the Plaintiff or defendant, as the case may be. Undoubtedly, the allegations of breach of order of injunction passed under Order XXXIX Rules 1 and 2 can be redressed by resorting to the provisions contained in Rule 2-A of Order XXXIX. However, it does not necessarily imply that the party aggrieved by disobedience or breach of an order of the Court is precluded from seeking relief under Order XXXIX Rule 11 of the Code.

12. A Division Bench of this Court in the case of Ramavatar Surajmal Modi V/s. Mulchand Surajmal Modi¹ had an occasion to consider the import of the provisions contained in Order XXXIX Rule 11. Appraising the historical context of the introduction of Order XXXIX Rule 11 and the object thereof, the Division Bench observed as under :

“7. Rule 11 of Order 39 as introduced by the Bombay amendment provides for a procedure on parties defying orders of the Court and/or committing breach of any undertaking to the Courts. We are concerned with the question whether Sub-rule (1) of Rule 11, Order 39 leaves no discretion on the Court and that it obliges the Court to visit the defaulting party with the penalty prescribed therein irrespective of the circumstances that default is not wilful or the conduct of the party responsible for the default is not contumacious or there is reasonable explanation for default. The meaning and intention of the rule making authority must govern, and these are to be ascertained not only from the

1 (2004) 2 Mh.L.J. 1

phraseology of the provision but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other. Inter-alia the Courts have applied the test whether the object of the provision will be defeated or furthered by holding the provision mandatory or directory. Let us not forget that the dismissal of suit or proceeding or striking out the defence of a defendant for non-compliance of the Court's order or breach of an undertaking is a serious and grave consequence. By making provision of serious penalty of dismissal of suit or striking out the defence against the party responsible for default, the rule making authority did not intend to leave no discretion to the Court. 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. On the other hand if the provision is held mandatory, the Court 'shall' be left with no discretion and peremptorily shall have to dismiss the suit where the plaintiff is responsible for the default or to strike off the defence when the defendant is guilty of default even though the default is not found wilful or conduct of such party not obstinate or contumacious. In our considered view, the provision in Sub-rule (1) merely vests power in the Court to dismiss the suit or proceeding where the default is by the plaintiff and strike off the defence of the defendant where the defaulter is the defendant. It does not obligate to do so in every case of default. This is further fortified by the provision contained in Sub-rule (2) which gives a discretion to the Court that even after the order contemplated under the 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. 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) of Rule 11 if the 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 provision in the nature of Sub-rule (2) leaves no manner of doubt the intention of the rule making authority that the provision of Sub-rule (1) of Rule 11 is directory and that by such provision power has been vested in the Court to dismiss the suit or proceeding where the plaintiff is in default or striking off the defence of the defendant, where defendant is responsible for the default.”

13. Undoubtedly, the provisions of Rule 11 are directory in nature and the Court has to form an opinion that the disobedience or breach of the order has an element of obstinacy or contumacy on the part of the Defendant. But the said provision cannot be rendered nugatory by taking a view that the party who alleges breach of injunction can only resort to the remedy under Rule 2-A of Order XXXIX. In a given case, the consequences of breach provided for in Rule 2-A of Order XXXIX may not have effective deterrence or the injury caused to the party affected by the breach of the order of injunction is such that the provisions contained in Rule 2-A may not provide a complete and effective redressal. In a case of the present nature, where breach of order of injunction which restrained the Defendant from causing obstruction to the Plaintiffs access to the suit way is alleged, the order of striking out the defence may entail a more effective remedy as the Plaintiff can seek a decree for perpetual injunction for want of defence. Therefore, the Plaintiffs could not

have been precluded from seeking relief under Rule 11 of Order XXXIX on the premise that they must work out their remedies under Rule 2-A.

14. In the case of Pralhad s/o Nagorao Bodkhe versus Sulochana Ramchandra Kawarkhe and Ors.², a learned Single Judge of this Court had an occasion to consider the applicability of the provisions of Rule 11 of Order XXXIX in the face of a submission that the only remedy for breach of an injunction order was to resort to Rule 2-A of Order XXXIX. The learned Single Judge expressly repelled the submission that the only remedy is under Rule 2-A of Order XXXIX. The observations in paragraph No.18 read as under :

“18. Reliance on Shiv Kumar Sharma versus Haryana State Electricity Board³ by Mr. C.A.Joshi, learned Counsel for the Petitioner, is also misplaced. Shiv Kumar Sharma (supra) was a case of service jurisprudence, in which a penalty of depriving the employee of the benefit of one increment for one year was imposed, which was without any further effect, in light of which it was held that the same would not have any effect on his seniority and the action of the Board in placing the employee, lower in seniority was held to be amounting to punishing the employee, twice for the same act of misconduct, and was held not to be sustainable in law. The principle that a person cannot be punished for a misconduct or action twice, would be applicable in service or criminal jurisprudence, the same however, would not be attracted and applicable in the present case. Can it be said that since the petitioner, stands convicted under Order XXXIX Rule 2-A of CPC for having defied and violated the order of injunction passed by the Court, by executing and registering the sale deeds of the suit

² 2021(5) ALL MR 31

³ AIR 1988 SC 1673

property, in contravention thereof, the violation goes away, vanishes, that too without the petitioner taking any steps to purge his violative action and restore the status quo ante ? If it is so held, then every order of injunction or for that matter, every decree passed in a suit, would become un-operational *unexecutable*, once the defendant/judgment debtor is sent to civil prison, for having declined to obey the order/decreed and has suffered the sentence, for then it would be permissible to say that since he has already suffered imprisonment for not obeying the order/decreed, now the same has become unexecutable/unenforceable against him on the ground of double jeopardy. Thus, in my humble opinion, cannot, and is not, and can never be the purport and intent of the principle of double jeopardy. When a party to the lis disobeys the order of a court, with full knowledge of the same, such disobedience, nay defiance, cannot be countenanced for any reason whatsoever, as there cannot be any justifiable disobedience/defiance, whatsoever.” (emphasis supplied)

15. The learned Civil Judge, it appears, committed a manifest error in rejecting the application on the premise that the Petitioners had an efficacious remedy under rule 2-A of Order XXXIX of the Code. However, since the exercise of the power to dismiss the suit or strike out the defence is discretionary in nature, and the Court is required to consider whether the disobedience is willful and contumacious, it is necessary to remit the application back to the trial court to decide the prayer of striking out the defence for the alleged disobedience of the injunction order, on merits. Hence, the Petition deserves to be partly allowed.

16. Thus, the following order :

ORDER

- (i) The Petition stands partly allowed.
- (ii) The impugned order dated 21 April 2023 stands quashed and set aside.
- (iii) The application (Exhibit 55) stands remitted to the Court of Civil Judge, Jr. Division, Satara, for afresh decision, after providing an opportunity of hearing to the parties.
- (iv) The learned Civil Judge, Jr. Division, Satara, is requested to decide Application (Exh. 55) as expeditiously as possible.
- (v) Writ Petition stands disposed.
- (vi) Contempt Petition No.324 of 2022 be listed on 20 February 2025.

(N.J.JAMADAR, J.)