



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.15969 OF 2024**

Babu Sawliram Shinde (deceased)
through legal heirs
Sobha Babuy Shinde and Ors. ... Petitioners
versus
Rajendra Rasiklal Shah and Ors. ... Respondent

Mr. Sanjay P. Shinde with Mr. Rajesh Kamble, for Petitioners.
Mr. R.D.Soni i/by Ram and Co., for Respondent No.1.

CORAM: N.J.JAMADAR, J.

DATE : 6 JANUARY 2025

P.C.

1. Heard the learned Counsel for the parties.
2. The Petitioners / original Plaintiffs have preferred this Petition assailing the legality, propriety and correctness of an order dated 6 May 2024 passed by the learned Civil Judge, Sr. Division, Nashik, on a application (Exhibit 215) in Special Civil Suit No.217 of 2015, whereby the application preferred by the Plaintiffs to strike out the defence of Defendant Nos.1 to 28 for non-compliance of the order passed by the Court impounding the documents purportedly under Order 39 Rule 11, as amended by the Bombay High Court, came to be rejected.
3. It would be superfluous to delve deep into the thickets of facts. Suffice to note that pursuant to order dated 13 April 2017, two documents filed at Exhibits 131/3 and 131/1 were impounded by the learned Civil Judge as they

were not adequately stamped and those documents were sent to the Collector of Stamps, Nashik, for adjudication of the deficient stamp duty and penalty thereon, as per rules.

4. The Plaintiffs preferred an application asserting that despite adjudication of the stamp duty, Defendant Nos.1 to 28 have not complied with the order of the Court, and, therefore, defence of Defendant Nos.1 to 28 needs to be struck off.

5. The learned Judge was of the view that lengthy proceedings ensued before the Collector of Stamps and Inspector General of Stamps on the aspect of the liability of the Defendant Nos.1 to 28 to pay the stamp duty, and, thus, it cannot be said that there was a willful default on the part of the Defendants. The Court has also noted that, while raising a genuine dispute as to the payment of the stamp duty, the Defendants have paid the stamp duty as determined by the authorities under the Maharashtra Stamp Act, 1958. Thus, the application came to be rejected.

6. Mr. Shinde, learned Counsel for the Petitioners, submitted that in view of the order of impounding the documents passed by the learned Civil Judge, Defendant Nos.1 to 28 were duty bound to pay the deficit stamp duty and penalty thereon, as determined by the authorities under the Maharashtra Stamp Act, 1958 and the deliberate default in payment of the stamp duty must entail the consequence of striking off the defence of the Defendant

Nos.1 to 28.

7. Under Section 33 of the Maharashtra Stamp Act, 1958, insufficiently stamped instrument is required to be impounded, and, thereafter, sent to the authorities under the Maharashtra Stamp Act, 1958 for adjudication of the stamp duty. Section 34 of the Maharashtra Stamp Act, 1958, contains an interdict against admitting the instrument chargeable with duty unless such instrument is duly stamped. Primarily, the bar is against the admissibility of the document in evidence. The instrument which is chargeable with stamp duty cannot be admitted in evidence until the requisite stamp duty and penalty, if any, is paid. The proviso to Section 34 makes it abundantly clear that once the stamp duty and penalty is paid on the instrument, such an instrument shall be admitted in evidence.

8. In the facts of the case, it appears that, there was a genuine and bonafide dispute as to the liability to pay stamp duty and proceedings were conducted before the authorities under the Maharashtra Stamp Act, 1958. The learned Judge has recorded, inter alia, that the Defendants have paid the stamp duty as adjudicated by the authorities under the Maharashtra Stamp Act, 1958. At any rate, the finding of the learned Judge that no case of willful disobedience of the order of the Court is made out, appears impeccable.

9. A useful reference can be made to a Division Bench judgment of this Court in the case of **Ramavatar Surajmal Modi V/s. Mulchand Surajmal**

Modi¹ wherein it was enunciated that sub-rule (1) of Rule 11 of Order 39 of the Code, is directory and the discretion exercisable by the court in passing an order under sub-rule (1) of Rule 11 of Order 39 has to be in consonance and in conformity with the legal position laid down by the Supreme Court in the case of M/s. **Babbar Sewing Machine Co. V/s. Trilok Nath Mahajan**². The power of dismissal of suit or striking out the defence, as the case may be, under Order 39 Rule 11(1) of the Code 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 wilful and the conduct of the defaulting party contumacious and that results in causing substantial or serious prejudice to the opposite party.

10. In the case of **Babbar Sewing Machine Co. (supra)**, the Supreme Court has administered caution in the matter of striking out the defence under Order 11 Rule 21 of the Code, as under :

“16An order striking out the defence under Order 11 Rule 21 of the Code, should therefore not be made unless there has been obstinacy or contumacy on the part of the defendant or wilful attempt to disregard the order of the Court and Rule must be worked with caution and may be made use of as last resort.”

11. In view of the aforesaid exposition of law, exercise of discretion by the trial court in declining to strike out defence of the defendant cannot be faulted

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

2 AIR 1978 SC 1436

at. Thus, no interference, in exercise of extra-ordinary writ jurisdiction, is warranted.

12. The Writ Petition, thus, stands dismissed.

(N.J.JAMADAR, J.)