

Ramesh Chandra Vs. Sarpanch

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Court : Rajasthan

Decided On : Jul-22-2002

Reported in : RLW2003(3)Raj2044; 2002(4)WLC341; 2002(5)WLN243

Judge : B.S. Chauhan, J.

Acts : Code of Civil Procedure (CPC) - Order 11, Rule 21

Appeal No. : S.B. Civil Revision Petition No. 599 of 2002

Appellant : Ramesh Chandra

Respondent : Sarpanch

Advocate for Pet/Ap. : K.C. Samdaria, Adv.

Disposition : Petition dismissed

Judgement :

Chauhan, J.

1. This revision petition has been preferred against the order dated 8.7.2002 by which the application under Order 11 Rules 12 and 14 of the Code of Civil Procedure (for short 'the Code') of the non-petitioner has been allowed.

2. The facts and circumstances giving rise to this case are that the non-petitioner filed an application under Order 11 Rule 12 of the Code for discovery of document

i.e. sale-deed dated 11.9.1993 which has been allowed on the ground that the petitioner is in possession of the said document though it has been submitted before the Court below that the document is in possession of the petitioner but was not traceable as at the time of white-wash of the house, it had been put by the ladies of the house at some other place. The Court below has directed the petitioner to produce the said sale-deed dated 11.9.1993, Hence, this revision petition.

3. Shri Samdaria, learned counsel for the petitioner has submitted that undoubtedly there is no material irregularity of exercise of jurisdiction by the court below but the order has a very serious repercussions as if the order impugned is not complied with for the reason that the document may not be traced/available even after diligent search, in exercise of the powers under Order 11 Rule 21 of the Code, the trial Court shall dismiss the suit for want of prosecution.

4. I am of the considered opinion that such an apprehension is totally misconceived that in case of non-compliance of an order passed under Order 11 Rule 14 of the Code, an order under Order 11 Rule 21 is necessarily to be passed. Before passing any such order for dismissing the suit if the plaintiff does not comply with such an order or striking off the defence of the defendant in case he does not comply with the order, it may be necessary for the Court to examine as to whether such a party is not complying with the order knowingly, purposely and intentionally and unless there is wilful defiance of the order of the Court, the court may not adopt such a strict view. Even otherwise, in case the party fails to produce such a document for the genuine reason i.e. it is not traceable and it is not a wilful defiance of the order, Section 65 of the Evidence Act may be helpful to the parties and Court may consider the application of the party to permit leading of secondary evidence or under Section 114 of the Evidence Act, adverse inference may be drawn against such a party. Therefore, it is difficult to imagine that without recording the finding of fact that non-compliance of the order is wilful by a party, the power under Order 11 Rule 21 of the Code can be resorted to by a Court.

5. The aforesaid proposition stands fortified by the judgment of the Hon'ble Supreme Court in Babbar Sewing Machine Co. v. Trilok Nath Mahajan (1), wherein

after considering a large number of judgments, the Court observed as under:-

'Even assuming that in certain circumstances the provisions of Order XI, Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order XI, Rule 21, unless the court is satisfied that the plaintiff was wilfully withholding information refusing to answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give: *Denvillier v. Myers* (1883 WLN 58). In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. The power for dismissal of a suit or striking out of the defence under Order. XI, Rule 21, should be exercised only where the 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.'

The Court further held as under:-

'It is well settled that the stringent provision of Order 1, Rule 21 should be applied only in extreme cases, where there is contumacy on the part of the defendant or a wilful attempt to disregard the order of the court is established.'

6. Thus, the Court held that the power under Order 11 Rule 21 of the Code can be exercised for dismissing the appeal of striking out the defence only when the default is found to be wilful and as a last resort court should exercise such power when the party is guilty of such a contemptuous conduct or there is a wilful attempt to disregard the order of the court that the trial of the suit is arrested. While deciding the said case, the court placed reliance upon large number of judgments including *Khajah Assenoolla Joo v. Khajah Abdool Azc.* (2); *Banshi Singh v. Palit Singh* (3); *Allahahad Bank Ltd. v. Ganpat Rai* (4); *Haigh v. Haigh* (5) and *Twycroft v. Grant* (6).

7. In *Jawandsingh Jwala Singh v. Krishnakumar Ganga Prasad Bajpai* (7), it has been held that the provisions of Order 11 Rule 21 of the Code, even if required strict enforcement, does not mean that a suit can be lightly thrown out or defence struck off without adequate reason. The test laid down is whether the default is wilful. Unless that test is satisfied, no order under Order 11 Rule 21 of the Code can be passed.

8. In *A.B. Tamboli v. G.I.P. Railway*, (8), the Court held that 'wilfully means that; the act is done deliberately and knowingly, not by accident or inadvertence, but so that the mind of the person who does the act goes with it'.

9. 'Wilful' means that the act is done deliberately and not by accident or inadvertence. It must show that the mind of the person who does the act goes with it. It also means done purposely or deliberately. It means consensus, intentional having full knowledge of legal consequences flowing therefrom. It does not take in its ambit something done by inadvertence or carelessness or negligence, ignorance or by accident, under compulsion or circumstances beyond control of a human being (vide *Ramchandra Narasimha Kulkarni v. State of Mysore* (9); *S. Harnam Singh v. The State (Delhi Admn.)* (10); *Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao and Anr.* (11); *Niaz Mohammad and Ors. etc. etc. v. State of Haryana and Ors.* (12); *Indian Airports Employees' Union v. Ranjan Chatterjee and Anr.* (13); and *Chordia Automobiles v. S. Moosa and Ors.* (14).

10. In *Kapildeo Prasad Sah and Ors. v. State of Bihar and Ors.* (15), the Hon'ble Supreme Court held as under:-

'Wilful would exclude casual, accidental or bonafide or intentional acts or bonafide inability to comply with the terms of the order. A petitioner who complains breach of the Court's order must allege deliberate or contumacious disobedience of the Court's order.'

11. Similar view has been reiterated in *J. Jermons v. Aliammal and Ors.* (16).

12. In *Amarsingh v. Chaturbhuj and Ors.* (17), the Court considered the scope of powers of the Court under Order 11 Rule 21 of the Code and observed as under: -

'These provisions cannot warrant the dismissal of the suit of a plaintiff or striking out the defence of a party which is guilty of non-compliance of the order unless willful disobedience is established.'

The Court further held as under:-

'It may further be pointed in this connection that where a party fails to produce certain documents under Order 11 Rule 14, the court would be entitled to raise the adverse presumption against that party on account of the non-production required, but that would not justify in dismissing a suit in the case of a plaintiff or striking out of the defence in the case of a defendant.... The provisions of this Rule is of a very drastic nature and it is only in rare cases that the rigidity of the penalty contemplated in the rule should be resorted.'

13. Similar view has been taken in *Amar Chand Butail v. Union of India and Ors.* (18).

14. In *Ranipet Chemicals and Engineering Co. Pvt. Ltd. v. Swastik Stainless Steels Stores* (19), a Division Bench of the Calcutta High Court held that neither a suit can be dismissed nor defence can be struck off in exercise of the powers under Order 11 Rule 14 of the Code unless defiance is proved to be wilful.

15. thus, in view of the above, the apprehension of the learned counsel for the petitioner is unfounded and there is no ground for interference at this stage. The petition is accordingly dismissed.

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