

Chinnappan Vs. Ramachandran

Chinnappan Vs. Ramachandran

SooperKanoon Citation : sooperkanoon.com/797283

Court : Chennai

Decided On : Jul-20-1988

Reported in : AIR1989Mad314

Judge : Ratnam, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 11, Rules 14 and 21

Appeal No. : A.A.O. No. 876 of 1983

Appellant : Chinnappan

Respondent : Ramachandran

Advocate for Def. : T.N. Rajagopalan, Adv.

Advocate for Pet/Ap. : Bhagirathi Narayanan, Adv.

Disposition : Appeal dismissed

Judgement :

Ratnam, J.

1. The plaintiff in O.S. 12 of 1982, Sub-Court, Pattukotai, is the appellant in this civil miscellaneous appeal. The appellant instituted that suit against the respondent herein and others praying for the relief of partition and separate possession of his one-fourth share in the A and B schedule properties. That suit is

pending. In I. A. 219 of 1983 in O.S. 12 of 1982, filed under Order 11, Rule 14 and Section 151, C.P.C. the petitioner prayed that the respondent may be directed to produce into court certain documents detailed in the application. On 12-4-1983, the learned Subordinate Judge passed an order directing the respondent herein to produce the documents set out in I. A. 219 of 1983, Later on 13-9-1983, learned counsel for the respondent made an endorsement to the effect that the documents are not available. Thereupon, the appellant filed I. A. 562 of 1983 in O. S. 12 of 1982 purporting to be under Order 11, Rule 21, C.P.C. praying that the defence of the respondent in the suit should be struck out and that he should be placed in such a position as if he had not defended the claim of the appellant in the suit for partition in O.S. 12 of 1982 instituted by the appellant. In the affidavit filed in support of that application, the appellant stated that the order directing the production of the documents by the respondent was passed after hearing the respondent and if the documents were not available, then he should have stated so prior to the passing of the order on 12-4-1983, and the subsequent endorsement made by the learned counsel for the respondent to the effect that the documents are not available amounts to a wilful refusal to obey the directions of Court, and for the failure of the respondent to produce material document despite an order of Court, the legal consequences in terms of Order 11, Rule 21, C.P.C. would follow and, therefore, the defence of the respondent in the suit should be struck out. The respondent in his counter-affidavit, reiterated that the documents directed to be produced were not in his possession or custody and that it was not his intention to disobey or disregard any direction of Court. An objection that the application filed by the appellant under Order 11, Rule 21, C.P.C. is not maintainable on the facts and circumstances of the case was also raised. The learned Subordinate Judge, Pattukottai, held that the appellant had not established by prima facie evidence that the respondent had the custody of the documents directed to be produced and that the non-production of the documents by the respondent had not been established to be wilful. Dealing with the objection that the application under Order 11, Rule 21, C.P.C. was misconceived and not maintainable, the learned Subordinate Judge held that the refusal to produce the documents under Order 11, Rule 14, C.P.C. would not fall within the scope of Order 11, Rule 21, C.P.C. and, therefore, the provisions of Order 11, Rule 21,

C.P.C. could not be invoked by the appellant. On the aforesaid conclusions, the application filed by the appellant in I. A. 562 of 1983 was dismissed. It is the correctness of this that is questioned in this civil miscellaneous appeal.

2. Learned counsel for the appellant contended that the order for the production of the documents was passed after hearing the learned counsel for the respondent and it even at the time of the passing of that order the respondent did not have the custody of the documents directed to be produced, that fact could have been brought to the notice of the court, which, however, was not done, but after the lapse of nearly five months after the order for production of the documents, an endorsement was made to the effect that the documents are not available and this clearly indicated contumacy on the part of the respondent or a wilful attempt to disregard the order of Court for production of documents justifying the striking out of the defence of the respondent in the suit. Per contra, learned counsel for the respondent submitted that the application filed by the appellant under Order 11, Rule 21, C.P.C. was not maintainable, as there was no failure on the part of the respondent to answer interrogatories or failure to comply with an order for discovery or inspection of documents and a mere failure to produce documents as directed by the Court would not fall within the scope of Order 11, Rule 21, C.P.C. Strong reliance in this connection was placed by the learned counsel for the respondent upon the decision in *Sithamalli Subbayer v. Ramanathan Chettiar* : (1924)46MLJ350 and *Subramania Ayyar v. Bomer Cooty Haji* : AIR1933 Mad870 .

3. There is no dispute that the appellant secured in I.A. 219 of 1983, an order under Order 11, Rule 14, C.P.C. directing the respondent herein to produce into court five items of documents and despite a direction by court to the respondent to produce the documents called for, the documents were not produced on the ground that they were not available It is true that if the documents, the production of which was asked for by the appellant, were not available even at the time when the court proceeded to pass the order directing the production, the respondent could have stated so. However, the failure of the respondent to bring it to the notice of the Court even then that the documents were not in his custody cannot be equated to contumacy on the part of the respondent or even be characterised as a wilful attempt to disregard the order of the Court, especially when there is no

material available on record to show that the respondent in fact had the custody of those documents, but had deliberately and wilfully retained from producing them into court in utter disregard of direction of court. No doubt, the respondent, by means of an endorsement through his counsel, belatedly brought to the notice of the Court that the documents directed to be produced were not available. Merely from this circumstance, it cannot be readily assumed that the respondent, with the intention of disobeying and disregarding orders of Court, did not produce the documents directed to be produced. There is, therefore, no question of the respondent being guilty of contumacious conduct or a wilful attempt to disobey the direction of court. It would be relevant in this connection to bear in mind the caution administered by the Supreme Court in *Babbar Sewing Machine Co. v. Tirlok Nath Mahajan* : [1979]1SCR57 , to the effect that an order under Order 11, Rule 21, C.P.C. striking out the defence should be worked with caution and should not be made unless there has been obstinacy or contumacy on the part of the defendant or a wilful attempt to disregard an order of court. Earlier, it has been seen how on the facts of this case, there is no evidence of contumacious conduct on the part of the respondent or a wilful attempt on his part to disobey orders of court. In view of this, in the present case, there is no justification for resorting to and exercising the drastic powers of Court under Order 11, Rule 21, C.P.C. to strike out the defence of the respondent in the suit, even on the assumption that the application filed by the appellant under Order 11, Rule 21, C.P.C. is maintainable.

4. It may now be considered whether the application filed by the appellant before the court below for the exercise of powers under Order 11, Rule 21, C.P.C. was maintainable. Order 11, Rule 21, C.P.C. to the extent to which that provision is relevant on the facts of this case, states that where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a defendant, have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard. It is thus seen that the remedy of having the defence of a defendant struck out would arise only when he fails to comply with an order to answer interrogatories or for discovery or

inspection of documents and not in other cases. In this case, the respondent was not delivered interrogatories for being answered by an order of Court under Order 11, Rule 1, C.P.C. Likewise, the respondent was not directed by an order of court to make discovery on oath of the documents in his possession or power relating to any matter in question in the suit under Order 11, Rule 12, C.P.C. No order for inspection of documents was also passed against the respondent under Order 11, Rule 12, C.P.C. The exercise of the power vested in the Court to strike out the defence of a defendant and to place him in the same position as if he had not defended the suit is limited under Order 11, Rule 21, C.P.C. to cases where the defendant fails to comply with an order to answer interrogatories or an order for discovery or inspection of documents. In other words, an order under Order 11, Rule 21, C.P.C. cannot be passed in cases falling outside the purview of Order 11, Rules 12 and 18; C.P.C. In *Sithamalli Subbayer v. Ramanathan Chettiar* : (1924)46MLJ350 , an order was passed by Court under Order 11, Rule 14, C.P.C. directing the plaintiff to produce some documents upon oath and on the production of some, documents, the defendant inspected a few of them and finding that some documents directed to be produced were not produced, applied to the court to take action under Order 11, Rule 21, C.P.C. dismissing the suit. That application was dismissed holding that Order 11, Rule 21, C.P.C. did not apply to cases of non-compliance with an order for production and, the dismissal of the application was upheld by this Court. In so holding, Krishnan J. with whom Waller J. agreed, observed as follows-

'.....An order for production is quite different from an order for discovery or an order for inspection and cannot be said to imply either. It is impossible to hold therefore that in the present case the order for production was anything more than for bare production in court of specified documents....Rule 14 contemplates further orders being passed on the documents being produced. An order for inspection of documents may, I think, therefore, be passed under that rule itself after hearing parties; Rule 12 also enables a party to obtain an order for inspection. The Form 6 cannot be relied on as showing that an order under Rule 14, involves an order for inspection for documents may be directed to be produced in court for various reasons, for example, for preventing tampering with them.'

'...It was suggested that if we do not apply the provisions of Rule 21 in cases of orders for production there will not be a sufficiently effective method to make the party obey the order of the Court, There is no basis for this argument, for there are several ways of making a party produce a document shown to be in his possession and for which privilege is not established; and the presumption that arises against a party who is called upon and does not produced document in his possession or power is in itself of serious consequence to him.

In the view, I take that Rule 21 does not apply to orders for production, the appeal fails.'

It is clear from the decision referred to above, that failure to produce documents directed to be produced by an order of Court passed under Order 11, Rule 14, C.P.C. does not fall under Order 11, Rule 21, C.P.C. To similar effect is the decision in Subramania Iyer v. Bonier Cooty Haji : AIR1933 Mad870 . In that case also, for failure to produce certain documents pursuant to orders passed under Order 11, Rule 14, C.P.C. the suit was dismissed and in considering the correctness of this order, Pandalai J. observed as follows -

'.....From the terms of the Judge's order as well as from the previous orders for production which are on the record, there is no doubt that those orders were passed under Order 11, Rule 14, C.P.C. and that respondent-defendant No. 1 applied for orders under that provision. This being so, it would be enough to dispose of this appeal to say that the learned Judge had no authority to dismiss the plaintiffs suit for disobedience of an order under Order 11, Rule 14, C.P.C. That was decided in so far as this Court is concerned in Subbayer v. Ramanathan Chettiar : (1924)46MLJ350 which followed a decision of the Allahabad High Court in Lyalpur Sugar Mills Co. Ltd. v. Ramchandra Gursahai Cotton Mills Co. Ltd : AIR1922 All235 '

It is thus seen that this Court has consistently taken the view that a failure to produce documents directed to be produced by an order of court passed under Order 11, Rule 14, C.P.C. does not enable the court to exercise its powers under Order 11, Rule 21, C.P.C. In view of this, the application filed by the appellant seeking the assistance of the court to exercise its powers under Order 11, Rule

21, C.P.C. was misconceived and not maintainable. On this ground also, the dismissal of the application has to be upheld though it may still be open to the court, in the course of the trial of the suit, to draw such adverse inference, if it is established on evidence that the respondent had the custody of the documents directed to be produced, but did not produce them. Consequently, the civil miscellaneous appeal fails and is dismissed. There will be, however, no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com