

Order Below Ex.65.
(Passed on 05.02.2020)

Perused the application and say. Heard both sides. Advocate for the defendant relied on *(1) Kavita Krishnamurthy -vs- K.N. Krishnamurthy, 2015(1) Mh.L.J. 941, (2) Ramavatar Surajmal Modi -vs- Mulchand Surajmal Modi, 2004 (Supp.2) Bom.C.R. 298 and (3) Ashapura Minechem Ltd. -vs- Pacific Basin IHX (UK) Ltd., 2013(4) Mh.L.J. 103.*

2] Advocate for the plaintiffs submitted that the present suit has been filed for eviction and possession under the provisions of Maharashtra Rent Control Act, 1999 (the Act). He submitted that the record will show about the delay tactics of defendant since his appearance. The first application of the defendant filed under O. 7 R.11 of C.P.C. was rejected by this Court against which the revision filed in Hon'ble High Court Nagpur Bench vide CRA No.150/2018 was dismissed on 18/11/2019. He submitted that this Court has permitted to defendant to file the written statement. It has been directed by this Court to proceed in the matter expeditiously. But the defendant is prolonging the matter by filing one and another application. The defendant has intentionally flouted with the specific direction issued by the Court while passing the order below Ex. 25 dated 20/06/2018. He submitted that again the Court has directed while passing the order below Ex. 36 to proceed in the matter expeditiously. The defendant has intentionally flouted with the specific directions of the order passed below Ex. 36. The defendant is bound to obey the directions of the Court. But the defendant is interesting to prolong the matter. Therefore, he submitted to struck of the defence of the defendant as per the provisions of O.39 R.11 of the C.P.C. He also prayed in alternative to kept the hearing of the suit on day to day basis.

3] The defendant has strongly opposed this application. Advocate for the defendant submitted that it is a matter of record that the defendant has filed several applications by taking the recourse of provisions of law. He fairly submitted that it is a matter of record that some applications were rejected by this Court on merits. The said orders of this Court were subsequently challenged by the defendant in Hon'ble High Court of Bombay Nagpur Bench. Further, he submitted that the orders passed by this Court have been confirmed by Hon'ble High Court. He has not at all disputed these facts. He submitted that the filing of the applications under the provisions of law is the valuable right of the defendant. The plaintiff cannot impose their terms upon the defendant from filing the applications by taking the assistance of provisions of law. He submitted that the application filed by the plaintiff is not tenable in the eyes of law. The defendant has not flouted with any order of this Court. On the contrary, the defendant has filed the application to exercise the lawful right. Therefore, he submitted to reject the application.

4] I consider submissions of both advocates. The record of the case shows that several applications were filed by the defendant under the provisions of law. It has not been disputed by the defendant that these applications were rejected on merits. The grievance of the plaintiff is that the defendant has flouted with the directions issued by the Court while passing the order below Ex. 25 and 36. No doubt, while passing the order below Ex. 25 and 36, the Court has directed the parties to proceed in the case expeditiously. The record shows that various applications came to be filed by the defendant. These applications were decided on the merits. Now, the question at this juncture is whether the defendant has made disobedience of the order of this Court.

5] To decide this point, I must mention here that the filing of the application at the hands of the defendant shows their activeness in the proceeding. It is not the contention of the plaintiff that the defendant has kept mum without taking any steps in the matter. The contention of the plaintiff is that the defendant is prolonging the matter. In this regard, I must mention here that the record of the case indeed shows the filing of various applications at the hands of defendant. No doubt, the defendant has exercise the right as per law. According to the defendant, the filing of the application is part and parcel of the decision of the suit. Now, in order to ascertain the willful disobedience of the defendant let us consider the legal position laid down by Hon'ble Bombay High Court in case of **Kavita Krishnamurthy** cited supra, wherein Hon'ble Division Bench of Bombay High Court has stated in para no.6 in respect of legal position of O.39 R.11, which reproduced as under –

“Rule 11 provides for passing a drastic order of striking out the defence of the defendant or of dismissal of a suit. On plain reading of Rule 11, it is apparent that mere non-compliance or mere breach of the orders of the Court is not sufficient to pass a drastic order of striking out a defence or dismissal of the proceedings. What is required to be proved is something more than mere violation of breach. It is only in the case of willful disobedience of the orders of the Court that the drastic power under Rule 11 can be exercised. While dealing with such prayer, it is open for the party against whom breach is alleged to show cause as to why the orders could not be complied with. Moreover, power under Rule 11 of Order XXXIX is a discretionary power. It is not necessary that in case of every case of willful disobedience that the Court should exercise the power. In a case where the breach is of an order of custody of minor or access to minor, the Court has to keep in mind that in some cases the compliance with the order depends on the inclination of the child.”

6] Further in case of **Ramavatar Modi** cited supra, Hon'ble Division Bench of Bombay High Court has considered the legal position of O.39 R.11 of the C.P.C., which is as under –

“The meaning and intention of the rule making authority must govern, and these are to be ascertained not only from the 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. Let us not forget that the dismissal of suit or proceeding or striking out the defence of a defendant for non-compliance of the Courts order or breach of an undertaking is serious and grave consequences. 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 willful or conduct of such party not obstinate or contumacious. In our considered view, the provisions 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.”

7] Further, in case of **Ashapura Minechem Ltd.**, cited supra, wherein Hon'ble Supreme Court of India has considered the legal position of O.39 R.11 of C.P.C. as -

“It is a settle principle of law that an order for striking out pleadings cannot be passed as a matter of course merely because a party is in breach of a condition imposed by the Court. Striking out of pleadings is a matter of serious

prejudice. When a defence is struck off the party whose defence is not to be taken into account, loses a basic right to defend itself in a proceeding. Failure of the appellant to comply with the order of the Court imposing a condition for the furnishing of security for the grant of an adjournment of the Petition filed by the respondent seeking enforcement of the foreign Award should not on these facts result in a striking off the defence of the appellant.”

8] Thus, it is clear from the above case laws in respect of the legal position of O. 39 R.11 of the C.P.C that it is the discretionary power of the Court to dismiss the suit or strike out the defence. It does not obligate to do so in every case. It is a drastic step to pass the order under the provisions of O.39 R. 11 of C.P.C. It should be exercised where there is a wilful disobedience on the part of the plaintiff or the defendant. It is pertinent to note that the orders passed below Exh. 25 and 36 was based upon the situation of the proceeding at the relevant time. The suit was pending for written statement of the defendant while passing the order below Exh. 25. The suit had not attained the progress at that time. What is required to be proved is something more than mere violation or breach. On considering the above legal position, the facts of the present case indeed shows that the defendant has filed the applications in order to exercise the right. The record shows that there is progress in the proceeding. The matter has reached upto the stage of evidence recording. The filing of the applications by one another is not come under the purview of willful disobedience. Had it been the willful violation of any of the order of Court, then would have been proper to struck off the defence of the defendant. But the record shows that there is no as such willful disobedience at the hands of defendant. The defendant has exercised the right which has given by the law. Further, the defendant has exercised to challenge the order of this Court in Hon'ble Bombay High Court, Nagpur Bench. Thus, I come to the conclusion that it would not be proper to

struck off the defence of the defendant. Rather, it is not the fit case to struck off the defence of the defendant.

9] Further, the plaintiff has prayed to keep the hearing of the suit on day to day basis. This is the alternate prayer of the plaintiff. Advocate for the plaintiff indeed submitted to keep this matter on day to day basis for its early disposal. On the contrary, advocate for the defendant submitted that the prayer of the plaintiff is nothing but putting pressure upon the Court and the defendant. I consider submissions of both advocates. Let me mention here that there are other five and ten years old civil matters pending in the Court. As per the directions of Hon'ble High Court, the old matters has to be disposed off by giving the priority. Moreover, there are more than 2000 criminal matters pending in this Court. Thus, in these circumstances, it is not possible to keep this matter on day to day basis. Thus, considering the above discussion, I pass following order.

Order

- 1] The application is rejected.
- 2) The matter be kept on 18.02.2020.

Place : Shegaon.
Date : 05/02/2020.

Sd/-
(V. V. Kulkarni)
Civil Judge Junior Division
Shegaon, Dist. Buldana.

CERTIFICATE

I affirm that the contents of this PDF file are same word for words as per original.

Name of Steno : A.I. Shastri.
Name of Court : CJJD. Shegaon.
Upload date : 07.02.2020.