

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**

S.B. Civil Misc. Appeal No. 1393/2008

1. Legal Representatives of Shri Om Prakash
son of Shri Rang Lal:-
 - 1/1. Smt. Lalita Devi wife of Late Shri Om Prakash
 - 1/2. Deepak Kumar son of Late Shri Om Prakash
both by caste Agarwal Mahajan, resident of
Tehsil Bhadra, District Hanumangarh.
2. Bihari Lal son of Shri Rang Lal
3. Ved Prakash son of Shri Rang Lal
both by caste Mahajan, resident of Bhadra,
Tehsil Bhadra, District Hanumangarh.

----Appellants/Plaintiffs

Versus

1. Balwant son of Shri Sheochand
2. Bhup Singh son of Shri Sheochand
3. Pradeep son of Shri Balwant
4. Kuldeep son of Shri Balwant
5. Mst. Ramheti wife of Balwant
6. Ashok Kumar son of Shri Bhup Singh
7. Chandro wife of Bhup Singh
all by caste Jat, resident of Dhani Berwalan,
Tehsil Bhadra, District Hanumangarh.

----Respondents/Defendants

For Appellant(s)	:	Mr. Gopi Ram Goyal
For Respondent(s)	:	Mr. Amit Saran Mr. Raj Bishnoi Mr. S.S. Gour

HON'BLE MR. JUSTICE SANDEEP SHAH
Judgment

REPORTABLE

1.	Date of conclusion of arguments	13.02.2026
2.	Date on which judgment was reserved	13.02.2026
3.	Whether the full judgment or only the operative part is pronounced:	Full Judgment
4.	Date of pronouncement	26.02.2026

1. By way of filing the present Civil Miscellaneous Appeal under Order XLIII Rule 1(f) CPC, 1908, the appellants–plaintiffs have challenged the order dated 03.09.2008 passed by the learned Additional District Judge, Bhadra in Civil Suit No.08/2003 (*Om Prakash & Ors. v. Balwant & Ors.*), whereby the application filed by the respondents/defendants under Order XI Rule 21(1) CPC was allowed and the suit was dismissed on the ground of alleged non-compliance, of the order dated 23.03.2006 passed by learned Trial Court, by the appellants.

Factual Matrix:-

2. Succinctly stated, the facts are that the appellants–plaintiffs filed a suit alleging therein that the lands, particulars whereof are in paragraphs no.1 and 2 of the plaint, were owned by respondent Nos.1 and 2, who had agreed to sell the same to the appellants for a total consideration of Rs.6,30,000/-. Pursuant to the verbal agreement, a written agreement dated 09.04.2001 was executed, and the appellants–plaintiffs paid a sum of Rs.5,57,000/- by different cheques, with a specific understanding that the balance amount of Rs.73,000/- would be paid at the time of registration of sale deed. The period for execution of the sale deed was fixed as two years. According to the appellants–plaintiffs, they regularly contacted the respondents–defendants, and the defendants asked the appellants–plaintiffs to be present for registration on 01.04.2003, however, the respondents–defendants did not turn up.

2.1. Upon inquiry initiated by the appellants–plaintiffs at the office of the Patwari on 17.06.2003, they came to know that

respondent Nos.1 and 2 had filed a suit for transfer of the lands in favour of their sons and wives and, by virtue of a judgment and decree dated 20.09.2002, the lands in question had been transferred in the names of respondent Nos.3 to 7, i.e., the sons and wives of respondent Nos. 1 and 2. Further, the revenue records also reflected the names of respondent Nos.3 to 7. Consequently, the appellants–plaintiffs filed a suit for specific performance of the agreement dated 09.04.2001 along with other reliefs on 03.07.2003.

3. After receipt of notice, the respondents filed a written statement, alleging that the appellants and their father, Shri Ranglal, originally resided at Village Nethrana but later shifted to Bhadra, where they were running a cloth shop and an electrical equipment shop on the Bhadra main road. It was further alleged that the appellants were engaged in the business of purchasing grains from farmers. The defendants stated that since 1995–96, they had also been selling their produce to the appellants and on 09.04.2001, they approached the appellants for a sum of Rs.1,10,000/- as they were in need of money. The appellants advanced the said amount; however, under the pretext of preparing certain documents for income tax purposes, the appellants fraudulently obtained their signatures on the agreement in question. The respondents–defendants further stated that they had repaid the entire amount taken on 09.04.2001 and, despite the same, the appellants were showing an outstanding amount of Rs.4,48,416/-. Thus, they prayed for dismissal of the suit.

3.1 That on 24.08.2005, respondent Nos.1 and 2 filed an application under (without specifying any Provision/Rule/Order, under which the same was filed), stating therein that, as asserted in the written statement, the defendants had been engaged in business transactions with the appellants since the year 1995-96. To substantiate the same, appellant Om Prakash had provided photocopies of the account books to the defendants for the period from 23.05.1999 to 05.05.2001, which formed part of the record of the case, wherein the entry dated 09.04.2001 was also reflected. It was further asserted that the said entry was made by appellant-Om Prakash himself and that the original record was in his possession. It was thus contended that there was a requirement to produce the original record, as the statements of the appellants were to be recorded by the learned Trial Court. The respondents-defendants, therefore, prayed for **production of the original account books** of appellant-Om Prakash for the period from 23.05.1999 to 05.05.2001. The prayer made was under:-

“लिहाजा दरखास्त पेशकर निवेदन है कि वादीगण को आदेश दिया जावे कि वे प्रतिवादीगण द्वारा वादी ओमप्रकाश के हाथ से लिखे गये दि० 23.05.99 से दिनांक 5.5.2001 तक के हिसाब का विवरण की मूल बहीया जो वादीगण के कब्जा में है को न्यायालय में पेश करें।”

4. The appellant-Om Prakash filed a reply on 27.01.2006 to the above-mentioned application and submitted that the original documents prayed for pertained to the accounts maintained by his father, Shri Ranglal, who resides at Village Nethrana, whereas the appellant-Om Prakash resides at Bhadra, where he carries his own business. He further submitted that the respondents had requested for the entries maintained by his father, and, therefore,

when he visited Nethrana, he got the entries as requested by the respondents, written in his own hand and furnished the same to the respondents. He further submitted that he is not in possession of the original record, as the same belongs to his father. It was further asserted that, as far as the entry dated 09.04.2001 is concerned, the amount in question was paid by cheque, in respect whereof, the entry has already been produced by the appellants before the learned Trial Court.

5. The matter was thereafter considered by the learned Trial Court on two different applications, i.e., one filed by the respondents as stated above, and the another filed by the appellants as well. As per the order sheet dated 23.03.2006, the appellants agreed to produce the documents as demanded by the respondents. Consequently, a consent order was passed on 23.03.2006 itself, directing the appellants to produce the account books, the details whereof were mentioned in the application, on the next date of hearing. The relevant portion of order dated 23.03.2006, is as under:-

“वकुलाय फरीकेन उपस्थित। वादी व प्रतिवादी दोनों पक्षों द्वारा प्रस्तुत दरखास्ते 011R12CPC पर बहस सुनी गयी। दरखास्तों के साथ प्रस्तुत हल्फनामों का अवलोकन किया। वादी ने प्रतिवादी की दर. में समय अवधि में बहीखाता प्रस्तुत करने की सहमति जाहिर की। वांछित दस्तावेज सुसंगत होने के कारण प्रतिवादी की दर. दिनांक 24.08.2005 स्वीकार कर आदेश दिया जाता है कि वादी अपनी बहीखाता जो दर. में वर्णित है, आयंदा पेशी पर न्यायालय में प्रस्तुत करे।”

5.1 A perusal of the order in question will reveal that, though it was shown to have been passed under Order XI Rule 12 CPC, the language of the order, which required the appellants to produce the documents, specifically indicates that the same was passed under Order XI Rule 14 CPC and not under Order XI Rule 12

CPC, which only provides for passing an order for filing an affidavit with regard to discovery of documents or essentially with regard to the availability of the documents with the party concerned.

5.2 On 20.09.2006, another application came to be filed by the respondents, asserting that, despite the order dated 23.03.2006, the appellants had not produced the relevant record. It was submitted that photocopies of the documents were already part of the record; however, the original account books had not been placed on record by appellant Om Prakash. Therefore, a request was made for compliance with the order dated 23.03.2006 by directing the appellants to produce the documents in question. The above-mentioned application was replied to by the appellants on 10.01.2007, while asserting in their affidavit that they had already clarified that they were not in possession of the original account books of Shri Ranglal, qua which photocopies were already part of the record. It was further submitted that, as far as the account books of the appellants for the period in question were concerned, the same had been brought by the appellants and shown to the counsel for the respondents; thus, compliance with the order dated 23.03.2006 had been made by the appellants. However, as far as the account books of Shri Ranglal were concerned, the appellants stated that the same were not in their possession and, therefore, could not be produced.

6. The learned Trial Court thereafter proceeded to hear the arguments and, vide order dated 30.11.2007, dismissed the application dated 20.09.2006 filed by the respondents for discovery and production of documents, while observing that

documents which are not in the possession of a party cannot be directed to be produced. It was further observed that, if the respondents were aggrieved, they could proceed in accordance with Section 65 of the Evidence Act. Aggrieved thereby, the respondents filed a writ petition before this Court, being S.B. Civil Writ Petition No.8283/2007 (*Balwant Singh & Anr. v. Om Prakash & Ors.*), which came to be dismissed by this Court vide order dated 17.12.2007, with the following observations:-

"Heard learned counsel for the petitioners.

It appears that the petitioners-defendants submitted an application under Order 11 Rule 12 CPC for discovery of documents, upon which, the plaintiffs-non-petitioners agreed that they will produce the relevant documents. On this statement, the trial court passed the order dated 23rd March, 2006 and directed the plaintiffs to produce the relevant books of accounts. The plaintiffs did not produce the said books of accounts then the defendants-petitioners again submitted an application on 20th Sept., 2006 and complained that plaintiffs have not produced the books of accounts and, therefore, direction may be issued to the plaintiffs to produce the books of accounts in court. Said application was dismissed by the trial court vide order dated 20th Nov., 2007 on the ground that plaintiffs stated that some of the books of accounts they have already shown to the counsel and rest of the books of accounts are not in their power and possession. The trial court observed that in that situation, the petitioners-defendants may seek permission to produce secondary evidence and the trial court rejected the petitioner's application vide order dated 30th Nov., 2007, hence, this writ petition.

It is clear from the order dated 23rd March, 2006 that the court already passed the order for production of the documents against the plaintiffs- non-petitioners. Despite this order, if the plaintiffs have not produced the books of accounts then the procedure as provided under rest of the provisions under Order 11 CPC could have been followed and ultimately an application under sub-rule (1) of Rule 21 of Order 11 CPC could have been submitted, but the petitioners submitted the application for same relief, which was granted by the trial court vide order dated 23rd March, 2006.

Be that as it may be, it will be relevant to mention here that in case despite the order of the court dated 23rd March, 2006 if the plaintiffs-non- petitioners have not submitted the books of accounts then the defendants-petitioners may at appropriate stage request

the court to draw adverse inference for non-production of the documents and also seek any relief and so far as further order for production of the documents is concerned, the same could not have been obtained. So far as trial court's observation that the petitioners-defendants can seek permission to produce secondary evidence is concerned, that may be very much appropriate relief to the petitioners because of the reason that the petitioners can seek permission to produce secondary evidence only when other party failed to produce the documents and petitioners have the copies of the documents. If they possess the copies of the documents then they can certainly produce the copies of the documents. The trial court may pass appropriate order after the trial after taking into account all the facts of petitioners' moving application for production of the documents and court's order for production of document dated 23rd March, 2006 and therefore, I do not find any reason for interfering in the impugned order.

In view of the above, the writ petition of the petitioner is dismissed."

7. After passing of the above-mentioned order, the respondents filed an application under Order XI Rule 21 CPC, on 08.01.2008 asserting that since the appellants had failed to comply with the order dated 23.03.2006, the suit filed by the appellants deserved to be dismissed, as the relevant books of account, which was agreed to be produced on record, had not been produced. The respondents also referred to the order dated 30.11.2007 passed by learned Trial Court while filing the application in question. The appellants filed a reply on 01.03.2008 to the above-mentioned application and submitted that the provisions of Order XI Rule 21 CPC were not applicable and there was no direction in the order dated 30.11.2007 passed by learned Trial Court granting any liberty to the respondents to file an application under Order XI Rule 21 CPC. The appellants further stated that the record available with them had already been filed and, even otherwise, the learned Trial Court as well as the High Court had granted liberty to the respondents to proceed under Section 65 of the

Evidence Act, if they were aggrieved by non-production of the original documents. Thus, no case for dismissal of the suit under Order XI Rule 21 CPC was made out.

8. The learned Trial Court thereafter proceeded to consider the arguments and, vide its impugned order dated 03.09.2008, held that the case in hand falls within the four corners of Order XI Rule 21(1) CPC and since there was deliberate non-compliance of the order dated 23.03.2006, the suit filed by the appellants deserved to be dismissed. Being aggrieved thereof, the present Civil Miscellaneous Appeal has been filed.

Arguments on behalf of counsel for the appellants/plaintiffs:

9. Mr. Gopi Ram Goyal, learned counsel for the appellants–plaintiffs, submits that the learned Trial Court failed to consider that, insofar as the documents available with the appellants were concerned, they had agreed to place on record the account books available with them, for which, a specific noting was also made in the order dated 23.03.2006 itself. He submitted that the same were produced before the learned Trial Court and were also shown to the counsel for the respondents. As per the averments of the respondents themselves, the photocopies of the documents in question were already part of the record. Thus, there was no occasion for the learned Trial Court to dismiss the suit filed by the appellants. He further submitted that the appellants had clarified that the documents in question were in handwriting of Om Prakash, which he had copied from the account books of his father, and the appellants were not in possession of their father's

account books. Learned counsel thus submitted that, in view of the aforesaid averments, the subsequent application filed by the respondents had already been dismissed by the learned Trial Court vide order dated 30.11.2007, which order was affirmed by the Hon'ble High Court also.

9.1 Learned counsel further submitted that, since there was no specific order, there was no question of compliance therewith and, therefore, the impugned order has been wrongly passed, while assuming that the jurisdiction, not vested with the learned Trial Court. Learned counsel further submitted that the learned Trial Court misconstrued the order dated 17.12.2007 passed by this Hon'ble Court while deciding the earlier writ petition filed by the respondents–defendants. Referring to the judgment dated 17.12.2007 passed by a Coordinate Bench of this Court in S.B. Civil Writ Petition No.8283/2007 (Balwant Singh & Anr. v. Om Prakash & Ors.), it was submitted that the High Court nowhere granted liberty to file an application under Order XI Rule, 21(1) CPC and had instead observed that, in case the defendants–petitioners were aggrieved, they could request the Court to draw an adverse inference for non-production of the documents or could avail the remedy under Section 65 of the Evidence Act for leading secondary evidence, as photocopies of the documents were already available with the respondents–defendants and were, rather part of record. Thus, he submitted that the learned Court below has wrongly assumed that any liberty had been granted by this Court to the respondents to file an application under Order XI Rule 21 CPC. Learned counsel further submitted

that initiation of proceedings under Order XI Rule 21 CPC is to be resorted in the rarest of rare cases and cannot be invoked in a routine manner.

9.2 To buttress his submission, learned counsel relies upon the judgment passed by the Hon'ble Apex Court in the case of ***Babbar Sewing Machine Co v. Trilok Nath Mahajan***, reported in **1978 4 SCC 188**, wherein the Hon'ble Apex Court has held in paragraph Nos.14, 15 and 16, which read as under:-

"14. 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 willfully withholding information by refusing to answer interrogatories or by withholding the documents which he sought 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.(2) 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.

15. It is well settled that the stringent provisions of order XI 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.

16. An order striking out the defence under order XI 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. The rule must be worked with caution, and may be made use of as a last resort:"

9.3 Learned counsel thus submitted that it was not a case wherein obstinacy or contumacy on the part of the appellants–plaintiffs or a wilful attempt to disregard the order of the Court was established. Learned counsel further placed reliance upon the judgment passed by a Coordinate Bench of this Court in ***Faiz Mohammed v. Bulaki Khan***, in S.B. Civil Miscellaneous Appeal No.990/2010, decided on 26.10.2010, wherein, while relying upon the judgment of the Hon’ble Apex Court in *Babbar Sewing Machine Co.* (supra), this Court had held that mere non-production of a document, despite an order, would not make out a case for exercising jurisdiction under Order XI Rule 21(1) CPC and that the said power can be exercised only in exceptional circumstances. Learned counsel, therefore, prayed for quashing and setting aside the impugned order with directions to the learned Trial Court to proceed with the trial expeditiously.

Arguments on behalf of counsel for the respondents/defendants:

10. *Per contra*, Mr. Amit Saran, Mr. Raj Bishnoi and Mr. S.S. Gour, learned counsel for the respondents–defendants, while supporting the impugned order, argued that the learned Trial Court had considered the provisions under Order XI Rule 21(1) CPC and had also considered the entire record threadbare prior to passing the impugned order. The Court below has rightly observed that it was a case of wilful default on the part of the appellants–plaintiffs in complying with the order dated 23.03.2006 and, thereafter, rightly

dismissed the suit in question. Learned counsel further argued that, in the earlier round of litigation, this Hon'ble Court itself had specified that the respondents-defendants were free to file an application under Order XI Rule 21(1) CPC, rather than filing an application seeking the same relief, which had already been granted by the learned Trial Court on 23.03.2006. Learned counsel, therefore, submitted that the respondents had rightly filed the application in question, which was considered by the learned Trial Court in its correct perspective.

10.1 Learned counsel also placed reliance upon the judgment passed by the Hon'ble Apex Court in *Babbar Sewing Machine Co.* (supra), while asserting that, if the Court comes to the conclusion that obstinacy or contumacy on the part of the appellants-plaintiffs is proved and a wilful attempt is made to disregard the order of the Court, then the Court should exercise powers under Order XI Rule 21(1) CPC. In the present case, the obstinacy or contumacy of the appellants and their wilful default was established, inasmuch as, they had agreed to submit the documents and, based on their agreement, the order dated 23.03.2006 was passed. Thereafter, the appellants resiled from their undertaking and refused to produce the documents. Thus, the learned Trial Court has rightly passed the impugned order.

10.2 Learned counsel further placed reliance upon the judgment of the Andhra Pradesh High Court in ***Kuchimanchi Subba Rao & Ors. v. Kanchana Prabhakara Rao***, MANU/AP/0106/2006, and judgment of Bombay High Court at Nagpur Bench, in the case of ***Manager, Ramkrishna Ramnath Bidi Factory v. First Civil***

Judge, First Class, Nagpur & Ors., MANU/MH/0061/1959,

while asserting that, in case there is a wilful default in not answering interrogatories or producing the documents, the learned Trial Court should proceed to strike out the defence under Order XI Rule 21(1) CPC.

11. Heard, learned counsel for both the parties and perused the entire record.

QUESTIONS FOR CONSIDERATION:-

There are two questions for consideration before this Court;

(1) **Under what circumstances the power under Order XI Rule 21(1) CPC can be exercised by the learned Trial Court?**

(2) **Whether, in the facts of the present case, the power under Order XI Rule 21(1) CPC could have been invoked by the learned Trial Court?**

Analysis:-

Re- Question No.1:-

12. As far as Question No.1 is concerned, consideration of a few provisions of the CPC would be relevant prior to answering the same. Order XI CPC deals with discovery and inspection. Rule 1 provides for discovery by interrogatories. Rule 2 specifies the particulars of interrogatories to be submitted, whereas Rule 3 deals with costs of interrogatories and Rule 4 deals with the form of interrogatories. Rule 5 deals with the procedure when the party is a corporation. Rule 6 deals with objections to interrogatories by answer, whereas Rule 7 deals with setting aside and striking out interrogatories on the ground of being unreasonable, vexatious or on other grounds. Rules 8 and 9 deal with affidavits and answers

in the form of affidavits, whereas Rule 10 deals with no exception to affidavits in certain cases. Rule 11 deals with an order to answer or answer further interrogatories and provides as under:-

"11. Order to answer or answer further.—

Where any person interrogated omits to answer, or answer insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by viva voce examination, as the Court may direct."

Rule 12 deals with an application for discovery of documents and provides as under:-

"12. Application for discovery of documents.—

Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oaths, of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion be thought fit:

Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

Rule 14, on the other hand, deals with production of documents and provides as under:-

"14. Production of documents.—

It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just."

Rule 15 deals with inspection of documents and provides as under:-

"15. Inspection of documents referred to in pleadings or affidavits.—

Every party to a suit shall be entitled [at or before the settlement of issues] to give notice to any other party, in whose pleadings or affidavits reference is made to any document, [or who has entered any document in any list annexed to his pleadings,] to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit."

Rules 16, 17 and 18, on the other hand, deal with the aspects relating to notice to produce, time for inspection and orders for inspection. Rule 19 deals with verification of copies, and Rule 20 deals with premature discovery.

Most importantly, Rule 21 deals with non-compliance with an order for discovery and provides as under:-

"21. Non-compliance with order for discovery.—

[(1)] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to 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.]

[(2) Where an order is made under sub-rule (1) dismissing any suit, the plaintiff shall be precluded from bringing a fresh suit on the same cause of action.]”

13. A perusal of the framework of the provisions under Order XI Rule 21(1) CPC would reveal that it deals with three different situations. The first relates to an order to answer or answer further the interrogatories Order XI Rule 11, wherein, if a person interrogated fails to answer or answers insufficiently, the procedure to be followed is provided. The second relates to an application for discovery of documents Order XI Rule 12, which can be filed by any party without an affidavit. Third deals with inspection of documents Order XI Rule 15, wherein a provision has been made enabling any party to the suit to give notice to the other party for production of documents for inspection, as referred to in the pleadings or affidavits. Rule 14, on the other hand, provides for production of documents, whereby a party can apply on oath, specifying that the documents in question are in the power or possession of the other party and are relevant for adjudication of the matter, whereafter the Court may direct the other party to produce such documents.

13.1 It is thus clear that answering of interrogatories, application for discovery of documents, application for production of documents and inspection of documents are distinct and different. The legislature never uses two separate words for the same thing in a statute. In the present case, “production of documents” and “discovery of documents” have been used separately, signifying two different concepts, and different procedures have been

prescribed, as is evident from a perusal of Rules 12 and 14 under Order XI CPC. This, coupled with the fact that Rule 21 confines its applicability within the four corners of the provisions specified therein, i.e., failure of a party to comply with any order to: (i) answer interrogatories, (ii) make discovery of documents, and (iii) permit inspection of documents. Only in such eventualities, the question of striking out the defence, in the case of defendants, or dismissal of the plaint, in the case of non-compliance by the appellants–plaintiffs, would arise.

13.2 As far as answering of interrogatories is concerned, the same is provided under Order XI Rule 11, for discovery of documents specific provisions are provided under Order XI Rule 12; and for inspection of documents, a specific provision is provided under Order XI Rule 15. The Legislature, in its wisdom, did not include Order XI Rule 14 within the ambit of Rule 21, inasmuch as there is no reference to non-compliance with an order for production of documents. Thus, the Legislature consciously kept non-compliance of an order under Rule 14 of Order XI outside the ambit of Order XI Rule 21(1) CPC. Therefore, for bringing a case within its sweep and/or passing an order under Order XI Rule 21(1) CPC, the applicants/plaintiffs have first to show that there was an order under Rule 11, Rule 12, or Rule 15 of Order XI and that there was non-compliance thereof. In other words, proceeding cannot be initiated under Order XI Rule 21(1) in case of non-compliance of order passed under Order XI Rule 14 CPC.

14. A perusal of the provisions, as well as the judgments passed by the Hon'ble Apex Court in the case of *Babbar Sewing Machine*

Co. (supra) and by a Coordinate Bench of this Court in the case of *Faiz Mohammed v. Bulaki Khan* (supra), will reveal that, even if there is non-compliance with the provisions under Rules 11, 12 and 15, an order under Order XI Rule 21(1) cannot be passed in a routine manner. The Court concerned, prior to passing such an order, has to record satisfaction, firstly, that a specific order to answer the interrogatories or for discovery or inspection of documents has been passed, and secondly, that the order has not been complied with and the plaintiff or defendants concerned have wilfully defaulted in complying with the order. Further, where the obstinacy or contumacy of the plaintiff/defendant in disregarding the order of the Court is established, then such an order can be passed and not otherwise. Question No.1 is thus answered accordingly.

Re- Question No.2:-

15. As far as Question No.2 is concerned, in the present case, interestingly, the first application was not filed under Order XI Rule 12, which came to be allowed on 23.03.2006, wherein there is a specific reference to Order XI Rule 12, but the order passed was under Order XI Rule 14 by the learned Trial Court. The non-compliance alleged is also of the order dated 23.03.2006, that too is an under Order XI Rule 14. Thus, until and unless the respondents were in a position to show that there was an order passed under Order XI Rule 12 CPC and there was non-compliance thereof, the provisions of Order XI Rule 21(1) CPC could not have been invoked by the respondents/defendants. Admittedly, the language of the order dated 23.03.2006 clearly specified that the

same was passed under Order XI Rule 14 CPC; therefore, the provisions of Order XI Rule 21(1) CPC could not have been applied and no application in this regard was maintainable. Though no objection in this regard was taken by the appellants/plaintiffs, however, when a Court exercises its jurisdiction, it is duty-bound to first verify and check whether the Court has the jurisdiction to pass an order on such an application or not. In the present case, the learned trial Court has failed to exercise the above-mentioned caution, and in view of the fact that there was no order passed under Order XI Rule 12 CPC and the order dated 23.03.2006 was essentially passed under Order XI Rule 14 CPC, the provisions of Order XI Rule 21(1) CPC could not have been invoked.

16. A perusal of the language of Order XI Rule 12 will itself reveal that the purpose of the same is to obtain a clear answer from the party concerned with regard to the documents which he admits to be in his power or possession and which have a bearing on the matter in dispute. Order XI Rule 14, on the other hand, pertains to a direction to produce the documents which are in the possession of a party to the suit. Thus, both the Rules operate in different fields. The same can be further fortified by the form of order as provided under Appendix C of CPC, more particularly Form Nos.4, 5 and 6, which provide as under:-

"No. 4

ORDER FOR AFFIDAVIT AS TO DOCUMENTS

(O. XI, r. 12.)

(Title as in No. 1, supra)

Upon hearing.....;It is ordered that the.....do within.....form the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit, and that the costs of this application be.....

**No. 5****AFFIDAVIT AS TO DOCUMENTS****(O. XI, r. 13.)**

(Title as in No. 1, supra)

I, the above-named defendant C. D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the First Schedule hereto.
2. I object to produce the said documents set forth in the second part of the first schedule hereto [state grounds of objection].
3. I have had but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the Second Schedule hereto.
4. The last-mentioned documents were last in my possession or power on. [State when and what has become of them and in whose possession they now are].
5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter memorandum, paper or writing, or any copy of or extract from any such document, or any other documents whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and Second Schedules hereto.

No. 6**ORDER TO PRODUCE DOCUMENTS FOR INSPECTION****(O. XI, r. 14.)**

(Title as in No. 1, supra)

Upon hearing.....and upon reading the affidavit of.....filed the..... day of.....19...../20.....;It is ordered that the.....do, at all reasonable times, on reasonable notice, produce at....., situate at, the following documents, namely,....., and that the..... be at liberty to inspect and produce the documents so

produced, and to make notices of their contents. In the meantime, it is ordered that all further proceedings be stayed and that the costs of this application be.....”

16.1 A perusal of Form No.4, which corresponds to Order XI Rule 12, will reveal that the direction is only with regard to the filing of an affidavit stating the documents which are in the power or possession of the party concerned. Form No.5 further clarifies the affidavit to be filed by the party concerned as per Order XI Rule 13, wherein he specifies the documents which are in his possession. On the contrary, Form No.6 will reveal that the pattern of the order under Order XI Rule 14 is with regard to directions to produce the documents. This, coupled with the prayer made in the application dated 24.08.2005 as well as the order dated 23.03.2006, will reveal that though the same has been quoted to be an order under Order XI Rule 12, but since it directed production of the documents, it was in fact an order under Order XI Rule 14 CPC. Needless to emphasize that the law in this regard is no longer *res integra*, that the wrong quoting of the provisions would make no difference whatsoever; rather, the actual language of the order is to be seen for determining under which provision the same has been passed. Since the original order itself was passed while exercising powers under Order XI Rule 14 CPC, the provisions of Order XI Rule 21(1) would not be applicable to the case in hand.

17. Furthermore, a perusal of the application filed by the respondents/defendants dated 24.08.2005 will reveal that they had requested production of the original account books of the appellants/plaintiffs, from Om Prakash, for the period from 23.03.1999 to 05.05.2001. The appellants/plaintiffs filed a reply

stating therein specifically that the account books belong to Shri Ranglal and that he is not in possession of the same. He shall, however, produce the documents in his possession. Based upon this, a consent order dated 23.03.2006 was passed directing the appellants/plaintiffs to produce the original account books, as stated in the application. The appellants/plaintiffs admittedly have produced their account books and had also shown them to the counsel for the respondents/defendants, which in fact has not been disputed by the respondents/defendants themselves.

17.1 However, the respondents stated that the original account books of the appellants, photocopies of which were produced by the respondents themselves, were not produced, and therefore, a subsequent application was filed. The subsequent application came to be dismissed by the learned trial Court vide a reasoned order dated 30.11.2007, while emphasizing the fact that in case of non-production, the respondents have a remedy of leading secondary evidence with the aid of Section 65 of the Evidence Act, 1872. It was further observed that there was no wilful default on the part of the appellants, as the appellants had produced the relevant documents available to them, and beyond that, the documents which were in the possession of their father could not be produced.

17.2 Aggrieved by the same, the respondents filed a writ petition, which also came to be dismissed by this Court vide judgment dated 17.12.2007, while specifically observing that the respondents, at an appropriate stage, could make a request to the Court below to draw an adverse inference for non-production of the documents and could also seek permission to produce

secondary evidence, while emphasizing that the same would be an appropriate relief for the appellants (therein for the reason that photocopies of the documents were available with them). The Hon'ble Court had dealt with the provisions under Order XI Rule 21(1) CPC; however, no finding with regard to its applicability was recorded.

18. The argument raised by the learned counsel for the appellants/plaintiffs thus has substance, inasmuch as there was no direction of this Hon'ble Court to file an application under Order XI Rule 21(1) CPC, nor was any observation with regard to the maintainability of such an application made. Rather, on the contrary, this Court had directed the respondents to take appropriate remedy, either by filing an application for drawing an adverse inference or for seeking permission to place on record secondary evidence. The Court below, rather than considering that aspect of the matter, proceeded to pass the impugned order while treating the judgment passed by this Court as if it had directed the filing of an application under Order XI Rule 21(1) CPC and allowing the same.

19. The order impugned is totally silent with regard to the consideration as to whether there was any wilful attempt to disregard the order of the Court or whether there was obstinacy or contumacy on the part of the appellants/plaintiffs in non-compliance with the order. Rather, the Court below has not even considered whether the documents prayed for were in the possession of the appellants/plaintiffs and whether there was any direction to produce the documents which belonged to his father or whether any such directions could have been issued by the

Court. The judgments passed by the Hon'ble Apex Court in the case of *Babbar Sewing Machine Co.* (supra) and by this Court in the case of *Faiz Mohammed v. Bulaki Khan* (supra) clearly lay down the law that until and unless there is wilful default and obstinacy or contumacy is shown, the powers under Order XI Rule 21(1) CPC cannot be exercised by the Court below.

20. In the present case, even assuming that the order was for discovery of documents under Order XI Rule 12 and not for production of documents under Order XI Rule 14, even then such powers could not have been exercised unless the Court had come to its specific conclusion that there was wilful default on the part of the appellants/plaintiffs. More particularly, when the appellants/plaintiffs, upon inspection, had clearly stated that the photocopies of the documents were handwritten and were copied by the appellant–Om Prakash from the account books maintained by his father at another village. It is not even disputed that in compliance with the order dated 23.03.2006, the appellants/plaintiffs had produced the original account books belonging to them. Thus, no case of wilful default was made out so as to dismiss the suit filed by the appellants/plaintiffs while exercising powers under Order XI Rule 21(1) CPC.

Conclusion:

21. As an upshot of the above, it is held that the provisions under Order XI Rule 21(1) CPC were not applicable to the case in hand, as there was no direction for discovery of documents and the direction given was for production of documents, which is clear from the order dated 23.03.2006 itself. Furthermore, the respondents/defendants have failed to prove wilful default on the

part of the appellants/plaintiffs. Thus, while **allowing** the present Civil Miscellaneous Appeal, the order impugned dated 03.09.2008 passed by the learned Additional District Judge, Bhadra, in Civil Suit No.08/2003 (*Om Prakash & Ors. v. Balwant & Ors.*) is quashed and set aside. The learned trial Court is directed to proceed with the trial from the stage at which the order dated 03.09.2008 was passed. Since the suit in question was filed in the year 2003, the learned trial Court is directed to expedite the trial. The respondents shall, however, be at liberty to file appropriate application before the learned Trial Court for drawing of an adverse inference against the appellants or for production of secondary evidence under Section 65 of the Evidence Act, 1872, in view of the alleged non-compliance of the order dated 23.03.2006, if so available to them as per law.

22. All pending applications, if any, stand disposed of.

23. The record of the case be sent back forthwith.

(SANDEEP SHAH),J

devrajP/-