
(2003) 11 CAL CK 0031
In the Calcutta High Court
Case No : G.A. No. 2101 of 2003

Crompton Greaves Ltd.

APPELLANT

Vs

West Bengal State Electricity Board

RESPONDENT

Date of Decision : 21-11-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21

Citation : AIR 2004 Cal 71

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Judgement

Jayanta Kumar Biswas, J.—This is an application filed by the plaintiff in suit No. 9 of 1996 for striking out the defence of the defendant for failure to file the affidavit of documents according to Rules. This application has been filed under Order XI, Rule 21 of the Code of Civil Procedure.

2. Briefly stated the facts of the case are these. The suit was filed in the year 1996 claiming a decree for around Rs. 5 crores against the defendant. On service of writ of summons the defendant filed written statement on May 24th, 2002. By an order dated March 29th, 2001 direction was given for expeditious hearing of the suit. The plaintiff took out an application being G.A. No. 2859 of 2002 praying for direction upon the defendant to file affidavit of documents and furnish legible copies of the disclosed documents and allow inspection of the originals. By an order dated July 23rd, 2002 this application was disposed of by directing the defendant to discover the documents within a fortnight from the date of communication of that order. It was mentioned in that order that in default of discovering the documents the plaintiff would be entitled to apply for striking out the defence of the defendant. The defendant did not file the affidavit of documents. The plaintiff took out another application (G.A. No. 445 of 2003) for striking out the defence of the defendant, This application was disposed of by an order dated April 17th, 2003 and by that order last chance was given to the defendant to file affidavit of documents within 4 (four) weeks from April 17th,

2003. It was mentioned in this order that in default of filing the affidavit of documents the defence of the defendant would be struck off and the suit would be heard ex parte. In terms of the order dated April 17th, 2003 the defendant filed a purported affidavit of documents dated May 12th, 2003. This affidavit has not been filed in Form No. 5 prescribed in Appendix C of the Code of Civil Procedure. This affidavit has been filed rather in the form of an affidavit dealing with the case of the plaintiff and annexing the copies of certain documents.

3. Mr. Khanna, learned counsel appearing for the plaintiff, submits that the affidavit dated May 12th, 2003 filed by the defendant cannot be considered to be an affidavit of documents filed by the defendant in terms of the order dated April 17th, 2003. He submits that the affidavit was required to be filed in the statutory form and conforming to the requirements indicated in the form. It is his submission that as the defendant has failed to comply with the order dated April 17th, 2003, the default clause incorporated therein has taken effect and as a result it is required to be recorded that the defence of the defendant stood struck out. He contends that because of the casual approach given by the defendant in filing the purported affidavit of documents, the trial of the suit has been delayed and it will appear from the conduct of the defendant that the defendant has not been complying with repeated orders passed by this Court, and hence, in the interest of justice it is required that the striking out of the defence of the defendant is a recorded in this case. The difficulty that is faced by the learned advocate on record for the plaintiff because of the improper affidavit of documents filed by the defendant has been indicated by the learned counsel for the plaintiff by stating that it is not possible to prepare the Judges brief and proceed with the trial of the suit. In support of his contention Mr. Khanna has relied on the Supreme Court decision in the case of Babbar Sewing Machine Company Vs. Trilok Nath Mahajan, and the Division Bench Judgment of this Court in this case of Ranipet Chemicals and Engineering Co. Pvt. Ltd. Vs. Swastik Stainless Steel Stores, .

4. The learned counsel for the defendant submits that the affidavit of document was filed by the defendant within the time granted by this Court by an order dated April 17th. 2003 and if it is found that such affidavit does not conform to the rules and form as prescribed in the Code of Civil Procedure, the defendant may be given one more opportunity to file proper affidavit of documents on any condition.

5. After hearing the learned counsel for the parties and perusing the materials on record and particularly the affidavit of documents filed by the defendant on May 12th, 2003. I find that the defendant actually did not act in any contumacious manner. True that there was delay on the part of the defendant in filing the affidavit of documents. There is no dispute that repeated opportunities were given to the defendant to file affidavit of documents. Admittedly, the purported affidavit of documents of May 12th, 2003 was filed within the time fixed by the Court by an order dated April 17th, 2003. This being the position, in my view, it

will be too difficult to say that the affidavit of documents in terms of the order dated April 17th, 2003 having not been filed the default clause incorporated in this order took effect. The affidavit of documents filed may not be considered to be a proper affidavit of documents, but it cannot be said that no affidavit of documents was filed in terms of the order dated April 17th, 2003. Thus, I find that the default clause did never take effect.

6. On the facts of this case, I am unable to agree with Mr. Khanna that the case reflects obstinacy and contumacy on the part of the defendant. The defendant did not file affidavit of documents in time, but it will appear that this Court was pleased to extend time to the defendant to file affidavit of documents. Once the time was extended by this Court, in my considered view, for the present purpose, the past conduct of the defendant is no longer remains relevant. Past laches, if any, on the part of the defendant, must be held to have been condoned by the Court while passing the order dated April 17th, 2003.

7. I am of the view that in the strict sense of the matter the affidavit of documents filed by the defendant on May 12th 2003 cannot be considered to be a proper affidavit of documents filed in terms of provisions of Order XI, Rule 21 of the Code of Civil Procedure. The provisions of Order XI, Rule 13 specifically provide that such affidavit should be filed in Form No. 5 of Appendix C. There can be no dispute that the present affidavit does not conform to the requirements of Form No. 5. This being the position, the affidavit filed by the defendant cannot be accepted as a valid affidavit. I am, however, of the view that for the interest of the justice the defendant should be given one more: opportunity to file proper affidavit of documents. As I have already found that this is not a case where the defendant is guilty of obstinacy and contumacy, I find no just reason to strike out the defence of the defendant and also not to give any further opportunity to the defendant to file the affidavit of documents. I am, however, of the view that since the defendant in spite of getting opportunity failed and neglected to file the affidavit of documents in proper form, it should be given opportunity on the condition of paying costs at this stage of the suit.

8. In view of the above, this application is disposed of with a direction upon the defendant to file a fresh affidavit of documents in accordance with law within 4 (four) weeks from date. The defendant shall supply legible copies of all the documents and give inspection of the originals thereof.

9. The affidavit of documents to be filed in terms of this order will be accepted subject to payment of costs by the defendant which is assessed at 500 GMs.

10. All parties are to act on a signed xerox copy of the operative portion of this judgment and order.

11. Xeroxed certified copy of this judgment and order shall be made available to the parties, if applied for.