

(2001) 02 BOM CK 0050

In the Bombay High Court

Case No : Writ Petition No. 1427 of 1993

Ganpat Shankar Waghmare

APPELLANT

Vs

Smt. Anjalibai Rao Waghmare and Another

RESPONDENT

Date of Decision : 01-02-2001

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2001) 3 ALLMR 149 : (2001) 3 BomCR 31 : (2001) 2 BOMLR 425 : (2001) 2 MhLj 756

Hon'ble Judges : A.M. Khanwilkar, J

Bench : Single Bench

Advocate : Shri Anil V. Anturkar, for the Appellant; Shri V.A. Thorat, for the Respondent

Judgement

A. M. Khanwilkar, J. 1. This writ petition, under Article 227 of the Constitution of India, takes exception to the order passed by the Civil Judge, J. D., Medha, District Solapur dated 16.1.1993 below Exh. 41 in D. F. No. 159 of 1981.

2. Petitioner filed an application before the lower Court being Exh. 41 praying for permission to cross-examine the plaintiff. The said application was opposed by the Respondent plaintiff mainly on the ground that the Court has already struck out the defence of the petitioner by passing an order below Exh. 28 dated 24.10.1991 in exercise of powers under Rule 11 of Order 39 and therefore it is not open to the Petitioner to insist for permitting him to cross-examine the Respondent plaintiff. The Court below accepted the said objection on behalf of the Respondent and concluded that since the defence of the Petitioner has been struck off by virtue of provisions under Rule 11 Order 39 of the C.P.C., it amounts to striking out defence of the defendant in all respects and matter should proceed ex parte against him and he has got no right to cross-examine the plaintiff's witness.

3. The learned Counsel for the petitioner contends that striking off the defence would only mean that the defendant is deprived of filing written statement or

pleadings before the Court, but that by itself, would not take away the defendant's right to cross-examine the plaintiff or plaintiffs witnesses. No authority has been relied upon in support of this submission. In my view, this submission clearly over looks the intention behind Introducing Rule 11 by Bombay amendment. Order 39 Rule 11 as applicable to Bombay reads thus :-

"11. Procedure on parties, defying orders of Court and committing breach of undertaking to the Court - Where the Court orders any party to a suit or proceeding to do or not to do a thing during the pendency of the suit or proceeding, or where any party to a suit or proceeding gives any undertaking to the Court to do or to refrain from doing a thing during the pendency of the suit or proceeding, and such party commits any default in respect of or contravenes such order or commits a breach or such undertaking, the Court may dismiss the suit or proceeding, if the default or contravention or breach is committed by the plaintiff or the applicant, or strike out the defences, if the default or contravention of breach is committed by the defendant or the opponent.

(2) The Court may, on sufficient cause being shown and on such terms and conditions as It may deem fit to impose, restore the suit or proceeding or may hear the party in defence, as the case may be, if the party that has been responsible for the default or contravention or breach as aforesaid makes amends for the default or contravention or breach to the satisfaction of the Court :

Provided that, before passing any order under this sub-rule notice shall be given to the parties likely to be affected by the order to be passed."

4. The purport of the said provision is to ensure that the party before the Court shall obey and carry out each and every writ or directions passed by the Court in its letter and spirit. Clause (1) of Rule 11 clearly indicates that if the plaintiff commits any breach the Court may dismiss the suit or proceedings taken out by him. From this it is evident that for non-compliance of any direction or order of the Court such party would not get any indulgence from the Court. If this is the legislative intent in introducing the above provision, I have no hesitation in holding that: in relation to the defendants, the expression "strikeout the defence" would mean that the defendant who has committed breach or default of any of the undertaking or directions given by the Court would not be entitled for any further indulgence, which would also include his right to cross- examine the plaintiff or plaintiffs witnesses. The said provision is an enabling provision and also provides for ample safeguards in the said Rule. Inasmuch as sub-rule (2) of Rule 11 provides that the Court may condone the default and permit the party to pursue the remedy if sufficient cause is shown. Admittedly, in the present case no application has been filed by the petitioner within the meaning of sub-rule (2) and no sufficient cause has been shown, whereas the record would indicate that the Court had directed the Petitioner-defendant to deposit amount of Rs. 1000/- vide order dated 21.11.1990 and since that direction was not complied with the Court had no option but to strike out the defence by order dated 21.10.1990. It

is too late in the day for the Petitioner to contend to the contrary. After the defence is struck out, in view of the abovesaid provision, the defendant would lose his right including the right to cross-examine the plaintiff.

5. In the circumstances I find no reason to interfere with the approach adopted by the lower Court.

6. This writ petition fails and is dismissed. No order as to costs.

7. Interim relief if any is vacated forthwith.