

(2016) 08 RAJ CK 0014

In the Rajasthan High Court

Case No : Civil Writ Petition No. 17338 of 2015 with Civil Misc. Stay Application No. 15380 of 2015

Hindustan Petroleum Corporation Limited

APPELLANT

Vs

Ram Bagh Palace Hotel Pvt. Ltd.

RESPONDENT

Date of Decision : 03-08-2016

Acts Referred:

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

Citation : (2017) 173 AIC 479 : (2016) AIR(Raj) 195 : (2016) 3 DNJ 1276 : (2016) 4 RLW 3385 : (2017) 1 WLC 107 : (2016) 4 WLN 296

Hon'ble Judges : Mr. Dinesh Chandra Somani, J.

Bench : Single Bench

Advocate : Mr. S. Kasliwal, Senior Advocate with Ms. Sukriti Kasliwal, Advocate, for the Appellant; Mr. G.K. Garg, Senior Advocate with Mr. Yash Sharma, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Mr. Dinesh Chandra Somani, J.—;This petition has been filed by defendant-petitioner Hindustan Petroleum Corporation Ltd. assailing the order passed by learned trial Court on 08.09.2015 on an application dated 16.09.2011 filed by the plaintiff-respondent under Order 11, Rule 21 of C.P.C.

2. Skeletal material facts necessary for the purpose of deciding this petition are that plaintiff-respondent has filed the suit against the defendant-petitioner for eviction and recovery of arrears of rent which is pending before the trial Court. During pendency of the suit plaintiff filed an application under Order 11, Rule 12 , 14, and 15 read with Section 151 of C.P.C. seeking production of the documents as mentioned in the said application which are allegedly in the power and possession of the defendant. The said application was resisted by defendant by filing a reply. The learned trial Court allowed the said application vide order dated 01.02.2011 and directed the defendant to produce the documents as sought for by the plaintiff. Thereafter the matter adjourned several times at the

request of defendant's counsel for production of the said documents. On 16.09.2011., the plaintiff submitted an application before the trial Court under Order 11, Rule 21 of C.P.C. for striking out the defence of the defendant on the ground that the defendant has not complied with the order dated 01.02.2011. The defendant resisted the application by filing reply. The learned trial Court allowed the said application vide order dated 03.03.2012 and struck out the defence of defendant under Order 11, Rule 21 of C.P.C. The defendant challenged both the orders dated 01.02.2011 and 03.03.2012 by filing writ petition and civil misc. appeal respectively, which were decided by this Court on 29.01.2013 by a common order, setting aside both the orders and directed the trial Court to decide both the applications afresh in accordance with law. Thereafter, the plaintiff filed another application under Order 11, Rule 21 of C.P.C. on 10.05.2013. The defendant filed reply to that application. Later on the plaintiff withdrew the aforesaid application on 11.11.2013 and filed an another application under Order 11, Rule 12 of C.P.C. The defendant filed reply to the said application. Learned trial Court allowed the said application vide order dated 27.01.2014 and directed the defendant to disclose the documents which are in his possession and power, on an affidavit. In response thereof the defendant filed an affidavit on 21.02.2014. The learned trial Court allowed the plaintiff to file counter-affidavit in reply to the aforesaid affidavit of defendant, vide order dated 25.02.2014. The defendant then filed an application mentioning that counter-affidavit cannot be filed in rebuttal to the affidavit filed under Order 11, Rule 12 of C.P.C. In the meantime plaintiff filed counter-affidavit and pleaded that application of the defendant has become infructuous. Learned trial Court dismissed the defendant's application vide order dated 09.10.2014. The defendant assailed the aforesaid order dated 09.10.2014 by filing Writ Petition No. 997/2015. The said writ petition was allowed by this Court on 04.02.2015 holding that no further counter-affidavit could either be directed to be filed by the plaintiff or permitted to be taken on record and set aside the order dated 09.10.2014. Thereafter, learned trial Court heard arguments on the application filed by the plaintiff under Order 11, Rule 21 of C.P.C. filed on 16.09.2011 and allowed the aforesaid application vide impugned order and struck out the defence of the defendant-petitioner. The said order is under challenge in the instant writ petition.

3. Mr. S. Kasliwal learned senior counsel for the petitioner has submitted that learned trial Court has erred in ignoring the affidavit filed by the defendant-petitioner in which it was categorically stated as to which of the documents are in its actual power and possession and directed to produce the documents on record which are not in its power and possession. Learned senior counsel also submitted that learned trial Court has erred in striking out the defence of the defendant on the ground that the defendant has failed to produce documents in accordance with order dated 01.02.2011, whereas the said order has already been set aside by this Hon'ble Court vide order dated 29.01.2013. Learned trial Court has seriously erred in striking out defence of the defendant-petitioner

under Order 11, Rule 21 of C.P.C., whereas the defendant has already been filed affidavit on 21.02.2014 disclosing as to which documents are in its power and possession, as such the defendant made full compliance of Order 11, Rule 12 of C.P.C. thus, defence could not be struck out by the learned trial Court for non-compliance of order of discovery of documents under Order 11, Rule 21 of C.P.C. Learned senior counsel further submitted that the order of production of documents can be passed by the Court under Rule 14 and not under Rule 12, and non-compliance of order of production of the documents is not covered under Rule 21. As such the learned trial Court has completely ignored the legal position and struck out the defence of the defendant.

4. On the other hand, Mr. S.K. Garg learned senior counsel for the respondent has submitted that the affidavit filed by the defendant was not in compliance of Order 11, Rule 12 and 13 of C.P.C. The affidavit is false and did not make discloser as per law and prayed to dismiss the writ petition being devoid of merits.

5. In order to decide the controversy herein and to appreciate the rival contentions of learned counsels, it will be appropriate to reproduce the relevant provisions of Order 11, Rule 12 , 13, 14 and 21 of C.P.C. which read 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 oath 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.

13. Affidavit of documents. - The affidavit to be made by a party against whom such order as is mentioned in last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

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.

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."

From conjoint reading of above provisions, it transpires that Rule 12 deals with power of the Court to give necessary directions, on the application of the party to the suit seeking directions against other party, to make discovery on oath of the documents which are or have been in his possession or power. Rule 14 deals with the power of the Court to order the production by any party to the suit upon oath, of such of the documents in his possession or power relating to any matter in question in such suit. According to Rule 13, the party against whom an order under Rule 12 has been passed, he has to file an affidavit in Form No. 5 in Appendix-C, if he has any objection against the production of the documents. Thus, it is clear that the order for production of documents can be made by the Court under Rule 14 and not under Rule 12. Rule 21 deals with the situation where any party fails to comply with any order to answer interrogatories or for discovery or inspection of documents. If such party is plaintiff, he will be liable to have his suit dismissed for want of prosecution, and, if he is defendant, to have his defence, if any, struck out but non-compliance of the order for production of the documents is not covered under Rule 21, as the production of the documents can be ordered under Rule 14 Order 11, and that non-production of the documents pursuant to the order passed by the Court under Rule 14, would not entail stringent consequence of striking out defence of the defendant under Rule 21 Order 11 of C.P.C.

6. So far as the facts of the present case are concerned learned trial Court allowed the application of the plaintiff on dated 01.02.2011 filed under Order 11, Rule 12 , 14 and 15 of C.P.C. directing the defendant to produce the documents sought for by the plaintiff. Learned trial Court on 03.03.2012, also allowed the application of plaintiff filed under Order 11, Rule 21 of C.P.C. for non-compliance of the order dated 01.02.2011. Both the aforesaid orders were challenged by the defendant before this Court. Vide judgment dated 29.01.2013, this Court set aside both the orders and directed the learned trial Court to decide the applications afresh in accordance with law. The effect of setting aside of the aforesaid orders and remand of the matter amounts to revival of the applications filed by the plaintiff. After remand of the matter, the plaintiff filed another application under Order 11, Rule 12 of C.P.C. seeking discovery of the documents which was allowed by learned trial Court on 27.01.2014 and directed the

defendant to disclose the documents which are in its power and possession. In compliance of the aforesaid order dated 27.01.2014., the defendant filed an affidavit on 21.02.2014. This Court in its earlier order dated 04.02.2015 passed in Writ Petition No. 997/2015 opined that the filing of affidavit by the petitioner on 21.02.2014 in response to the order dated 27.01.2014 served the purpose of Rule 13 Order 11 and set aside the order of learned trial Court dated 25.02.2014 permitting the plaintiff to file counter-affidavit and also the order dated 09.10.2014 rejecting application of the defendant for rectification of the mistake.

7. In view of discussion made above and looking to the provisions of Section 114, illustration (g) of the Evidence Act, at the most an adverse inference can be drawn against the defendant for non-production of the relevant documents or withholding the material evidence but under no circumstances the defence can be struck out for non-production of the documents under Rule 21 of Order XI.

8. In view of the legal position summarised above, we are of the opinion that the impugned order dated 08.09.2015 passed by the learned trial Court cannot be sustained and is therefore set aside and the writ petition is allowed.

9. Stay application also stands disposed of.