

(2014) 07 BOM CK 0290

In the Bombay High Court

Case No : Writ Petition No. 381 of 2013, Appeal From Order Nos. 40-43 of 2013
and Civil Application Nos. 129-132 of 2013

V.G. Quenim (D)

APPELLANT

Vs

Bandekar Brothers Pvt. Ltd.

RESPONDENT

Date of Decision : 03-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 21, Order 39 Rule 2A, 39
Constitution of India, 1950 — Article 227

Citation : (2015) 2 ABR 67 : (2014) 6 ALLMR 563 : (2015) 4 BomCR 171 :
(2015) 1 MhLj 421

Hon'ble Judges : F.M. Reis, J

Bench : Single Bench

Advocate : Y.V. Nadkarni, Hendrea Fernandes and Nuno Noronha, Advocate for
the Appellant; M.S. Doctor, Ranjit Shetty and Esperdiao Dias, Advocate for the
Respondent

Judgement

F.M. Reis, J.—All the above Petitions have been taken up together for final hearing with the consent of both the learned Counsel as the challenge is to the same Impugned Order dated 4.05.2013 passed by the learned Civil Judge Senior Division, at Panaji, disposing off the application under Order 39 Rule 2-A and under Order 39 Rule 11 of the Civil Procedure Code filed by the Respondents herein. Heard Shri Y.V. Nadkarni, learned Counsel appearing for the Appellants-Petitioners herein and Mr. Doctor, learned Counsel appearing for the Respondents herein.

2. APPEALS FROM ORDER:

Admit

3. WRIT PETITION:

Rule

4. All the Petitions heard finally with the consent of the learned Counsel

appearing for the respective parties as the Petitions were also fixed for final disposal at the stage of admission. Learned Counsel appearing for the Respondents waives service. The party shall be referred in the manner as they so appear in the cause title of the above Petitions.

5. Before I proceed to examine the rival contentions raised by the parties herein it would be appropriate to briefly state the facts relevant for the disposal of the above Petitions. The Plaintiffs filed Special Civil Suit No. 7 of 2000, for recovery of a sum of Rs. 67,44,716.50. The Plaintiffs also filed two Misc. Applications in the said suit for interim reliefs. A Counter Claim was also filed by the Defendants in the said suit claiming a sum of Rs. 120,83,079.44. An ex parte relief was granted restraining the Defendants from creating further interest in the Ore lying at the stockyard. Another suit bearing No. 8/2000 was filed against the Defendants for recovery of a sum of Rs. 5,45,190.83p. A counter claim was also filed in the said suit by the Defendants for a sum of Rs. 71,03,759.07p. The Plaintiffs filed another suit bearing No. 14/2000 against the Defendants for recovery of a sum of Rs. 1,16,12,450/- wherein an application for ad-interim relief was filed.

6. Thereafter, another suit was filed for recovery of a sum of Rs. 2,97,58,558.49p, against the Defendants wherein interim reliefs were also sought by the Plaintiffs. The applications for interim reliefs filed by the Plaintiffs in the said suits were, inter alia, praying for a temporary injunction restraining the Defendants from creating any third party right in respect of the bungalow located at Miramar, Panjim, besides that they will not part with the shares and other machinery from the mine. The other application was for the attachment of the said bungalow as well as the machinery at the mines. The learned Judge by Order dated 05.09.2001 granted the application for temporary injunction and attachment filed by the Plaintiffs. It will also be pertinent to note that the said Order dated 05.09.2001 was a common Order which was passed on the same application filed by the Plaintiffs therein. Being aggrieved by the Order dated 05.09.2001, the defendants preferred an Appeal before this Court which came to be disposed of by Judgment dated 13.12.2001, whereby the appeal came to be dismissed. Being aggrieved by the said Order, the defendants preferred an Appeal before the Apex Court being Civil Appeal No. 2832-33/2002. The Hon'ble Supreme Court set aside the Order of this Court by Judgment dated 19.04.2002 and directed the defendant to give an undertaking before the Trial Court that they will not part with the shares of M/s. Vilman Packaging as well as house No. 436 at Miramar and the mining machinery. The orders granting the temporary injunction in favour of the Plaintiff restraining the defendants from parting with the possession of the said bungalow came to be confirmed. Thereafter, in compliance with the Order of the Apex Court, the Defendants filed the undertaking before the learned Trial Court in the said suit as well as the three pending suits. It appears that the matter was thereafter taken up for hearing and common evidence was recorded in the said suit as well as the three companion suits and the matter reached the final stage. In the meanwhile, an application

came to be filed by the Plaintiff on 30.11.2007 under Order 39 Rule 2-A and Rule 11 of the Civil Procedure Code on the ground that the Plaintiffs noticed that the bungalow which was the subject matter of the said undertaking had been demolished by the defendant. It was further their case that such act on the part of the defendants was in willful disobedience of the Orders passed in the temporary injunction application as well as a breach of the undertaking given to the learned Trial Court pursuant to the Judgments passed by the Hon"ble Supreme Court. The said application was opposed by the Defendants on different grounds. It was stated, inter alia, that the Defendants had not parted with the possession of the disputed bungalow, but however, they were in the position of reconstructing the said bungalow upon the death of the original defendant No. 1, who was also party to the suit. It was further their case that the reconstruction was being done for the benefit of the family of the defendant and further that they had no intention to disobey the orders of the Court or commit any breach. It appears that the defendants also offered to furnish a Bank Guarantee for the amount claimed in the sum estimated to be the value of the Bungalow in lieu of the said undertaking. There was also an apology given in the affidavit filed by the defendants.

7. Upon hearing the parties, the learned Judge by Order dated 06.06.2009 granted the application under Order 39 Rule 11 of the Civil Procedure Code and the defence of the defendants was struck off. As far as the application under Section 39 Rule 2-A of the Civil Procedure Code is concerned, the same came to be dismissed. Being aggrieved by the said Order the Plaintiff as well as Respondents preferred an Appeal before this Court. Both the Appeals filed by the parties came to be disposed of by this Court by Judgment dated 14.12.2009, thereby quashing and setting aside the impugned Order and remanding the matter for reconsideration to the learned Trial Court. Being aggrieved by the said Order of this Court, the Plaintiffs filed a Civil Appeal before the Apex Court bearing No. 3533-3540 of 2012. Upon hearing both the parties, the Special Leave Petitions came to be disposed of on 13.04.2012. The Apex Court confirmed the Order of remand passed by this Court and by directing the Trial Court to pass appropriate orders. The Hon"ble Supreme Court permitted the Petitioner No. 1 (e) and 1 (f) to file an affidavit in the form of an undertaking before the learned Trial Court not to part with any possession or not to create any third party rights in the subject bungalow. Accordingly, an affidavit/undertaking came to be filed by the said two defendant Nos. 1(a) and defendant No. 1(f) on 06.06.2012. In view of the directions of the Apex Court, the learned Judge heard the said applications under Order 39 Rule 2-A and Rule 11 of the Civil Procedure Code afresh and by Orders dated 04.05.2013, both the applications came to be granted thereby the defendants in the suit were ordered to be detained in civil imprisonment and the defence was struck off. The counter claim filed by the defendants also came to be dismissed. Being aggrieved by the said Orders, the defendants filed the Writ Petition allowing the application under Order 39 Rule 2-A of the Civil Procedure Code and Appeals challenging the Orders in the

application under Order 39 Rule 11 of the Civil Procedure Code.

8. Shri Y.V. Nadkarni, learned Counsel appearing for the Defendants-Petitioners, has assailed the impugned Order on the following grounds:

"It is his contention that in view of the fact that the Apex Court in the said Order directed the defendant Nos. 1(e) and 1(f), to file an undertaking in respect of the reconstructed bungalow to the effect that they will not create any third party rights therein, it was itself sufficient to the Court to refuse the relief of rejecting the defence in terms of Order 39 Rule 11 of the Civil Procedure Code. Learned Counsel has taken me through the Order passed by the Apex Court and pointed out that there is a reference therein to the effect that the Counsel appearing for the defendants had stated that the acts committed by the Defendants was not parting with possession as, according to him, it amounted to doing some reconstruction of the existing bungalow. Learned Counsel further pointed out that considering that the motive of granting the temporary injunction and directing the defendants to file an undertaking was essentially to secure the recovery of any amount in case the Plaintiffs succeed in the suit, this itself suggests that the alleged disobedience has been purged. Learned Counsel further pointed out that in any event, the undertaking given by the defendants was that they would not part with possession and, according to the Defendants what they have done was only to reconstruct the bungalow as it was an old structure and required such repairs. Learned Counsel further pointed out that the defendant had not created any third party rights in respect of the said bungalow and, as such, according to him, there was no breach of undertaking as also to the injunction granted by the Court. Learned Counsel further pointed out that while filing the reply to the original application, there was a specific averment therein to the effect that the defendants were willing to furnish a Bank Guarantee for the value of the said bungalow as security for any Decree in favour of the Plaintiff. Learned Counsel further pointed out that there was no willful disobedience committed by the Defendants which would entail the closing of the defence and directing civil imprisonment of the defendants. Learned Counsel further pointed out that the relief granted by the learned Judge to direct civil imprisonment is without any application of mind as, according to him, law stipulating the period of such detention which cannot exceed more than three months and the relief granted by the learned Judge in the impugned Order does not disclose any such period. Learned Counsel further pointed out that in any event, in terms of Order 39 Rule 11(2) of the Civil Procedure Code as the defendants have amended the situation by giving a fresh undertaking pursuant to the directions of the Apex Court, the question of directing the striking of defence, is not at all justified. Learned Counsel further pointed out that in any event, the defendants are even prepared to give a Bank Guarantee for the total amount claimed by the Plaintiff in all the suits which they undertake to keep alive until the disposal of the suit on merits. Learned Counsel further pointed out that the defendants have no interest to, in any manner, disobey the orders of the Court and, on account of some bona fide mistake on their part, they chose to demolish the structure without realising that

it would amount to any disobedience of the Orders of the Court. Learned Counsel further pointed out that considering the observations of the Apex Court while directing the said Defendants to file an undertaking by itself suggests that the impugned Order passed by the Trial Court is totally unjustified. Learned Counsel further pointed out that even assuming there was any breach of the Orders passed in the temporary injunction application, considering that the Defendant has filed a fresh undertaking and are prepared to give even a Bank Guarantee would itself suggest that the Order of civil imprisonment is very harsh. Learned Counsel further pointed out that even in terms of Order 39 Rule 2-A of the Civil Procedure Code, in case contempt is proved, the question of granting a harsh sentence of imprisonment is not at all justified. Learned Counsel further pointed out that the Court can even grant compensation in case it comes to the conclusion that there is any breach of any Order of temporary injunction. Learned Counsel as such pointed out that the impugned Orders deserve to be quashed and set aside.

In support of his submission, the learned Counsel has relied upon the Judgment of this Court reported in *Ramavtar Surajmal Modi Vs. Mulchand Surajmal Modi*, and the Judgment of the Gujarat High Court in the case of *The District Collector, A" Bad and Chairman of Sale Committee v. Gujarat Industrial Investment Corporation Ltd., & 8 Ors.*"

9. On the other hand, Shri Doctor, learned Counsel appearing for the Respondents, has supported the impugned Order. Learned Counsel further pointed out that the conduct of the defendants in justifying the breach of the undertaking and the disobedience of the Order of the temporary injunction could itself show that the defendants have not shown any remorse for committing contempt of the Orders of the Court. Learned Counsel further pointed out that Order 39 Rule 2-A of the Civil Procedure Code, has two parts. In such proceedings, the Courts can undo the wrong as well as impose punishment. In the present case, merely because a fresh undertaking is given in respect of the constructed bungalow by itself would not satisfy the rigors and punishments to be imposed for committing breach of an Order in terms of Order 39 Rule 2-A. Learned Counsel further pointed out that though the undertaking given by the defendants was not to part with possession of the disputed property, the very fact that they had demolished the whole bungalow and made the bungalow not to exist would itself imply that there was parting of possession of the disputed bungalow. Learned Counsel further pointed out that an apology without showing any remorse for the breach of the Order cannot be accepted by the Court. The learned Counsel further submits that as the defendants defiantly committed the breach of the Orders of temporary injunction as well as the undertaking given to the Court, the impugned Order closing the defence as well as directing the detention of the defendants in civil imprisonment is totally justified. Learned Counsel further pointed out that there are no observations in the Order of the Supreme Court which suggests that the Apex Court had accepted the contention of the learned Senior Counsel appearing for the Defendants before the Apex

Court to the effect that the act committed by the defendants would not amount to parting of possession. Learned Counsel has taken me through the Judgments of the Apex Court and pointed out that the provisions of Order 39 Rule 2-A has two parts which can be exercised by the Civil Court. The learned Counsel further pointed out that considering the adamant and abusive attitude of the defendants of demolishing the bungalow without even showing that they have taken legal advice to that effect would show the willful disobedience by the defendants of the Orders of the Court and the breach of undertaking. Learned Counsel further pointed out that considering the facts and circumstances of the case, this Court cannot interfere with the discretionary Orders passed by the Trial Court in exercise of jurisdiction under Article 227 of the Constitution of India. Learned Counsel further pointed out that the learned Trial Court has rightly upon appreciating the material on record, has come to the conclusion that the defendants have disobeyed the Orders of injunction as well as committed the breach of the undertaking and, consequently, the interference in the present Petition by this Court would not arise. The learned Counsel has further pointed out that there was no unconditional apology given by the defendants which can be accepted by this Court. Learned Counsel has relied upon the Judgments of the Apex Court reported in Samee Khan Vs. Bindu Khan, , J. Vasudevan Vs. T.R. Dhananjaya, , Rajendra Prasad and Others Vs. Raja Ratan Gopal Sainchar and Others, , The State of Bihar Vs. Rani Sonabati Kumari, and Major Genl. B.M. Bhattacharjee (Retd.) and another Vs. Russel Estaqte Corporation and another,

10. On perusal of the records and considering the submissions of the learned Counsel, the point for consideration in the above Appeal preferred by the defendants would be as follows:

"(1) Whether the learned Judge was justified to strike off the defence of the defendants in terms of Order 39 Rule 11 for breach of the undertaking given to the Court to the effect that they would not part with possession of the bungalow located at Miramar?

(2) Whether once a fresh undertaking has been given by the defendant Nos. 1(e) and 1 (f) pursuant to the direction of the Apex Court, the learned judge was justified to strike off the defence of the defendants?"

11. As far as the Writ Petition is concerned, the point that arises for consideration is as follows:

"(1) Whether the learned Judge was justified to direct civil imprisonment of the defendants for committing breach of the Order of temporary injunction."

12. In the present case, as already pointed out herein, the suit filed by the Plaintiff was for recovery of money. The disputed bungalow was not the subject matter of the suit. The temporary injunction as well as the undertaking given by the defendant was essentially in the nature of security from the defendants to make it available in case a decree is passed at the final disposal of the suit. Hence, the relief of temporary injunction and undertaking was to secure and

facilitate the recovery of money in case any decree is passed in favour of the plaintiffs herein. In this background I shall now proceed to examine the facts of the case. The records reveal that this Court had by Order dated 14.12.2009, remanded the matter for re-consideration by the Trial Court of the application under Order 39 Rule 11 and Rule 2-A of the Civil Procedure Code filed by the Plaintiffs. The said Order of remand came to be assailed by the Plaintiffs before the Apex Court. Whilst disposing of the Special Leave Petition filed by the Plaintiffs, by Judgment dated 13.04.2012, the Apex Court has observed at Paras 6, 7 and 8 thus:

"6) It is brought to our notice that pursuant to the order of the High Court dated 14.12.2009, the trial court has proceeded to hear the arguments on the applications and, in fact, heard arguments on the said applications for a period of 11 days commencing from 06.01.2010 ending on 20.02.2010. It is seen from the records that the grievance of the plaintiff in all the applications under consideration is that even though the defendants have given an undertaking that they will not part with the shares of M/s. Vilman Packaging Private Limited, House No. 436 at Miramar, Panaji and the Mining Machinery on 13.05.2002 pursuant to the order of this Court dated 19.04.2002, the defendants have demolished the said residential bungalow, which was the subject matter of the undertaking given by them. In view of the long history of the case and various earlier orders passed by the High Court as well as by this Court, we are not inclined to go further and probe the matter once again.

7) Mr. Mukul Rohtagi, learned senior counsel for the respondents fairly stated that though the respondents have demolished the bungalow, they have not encumbered or sold the same to anyone, on the other hand after demolition, a new bungalow was constructed. He also pointed out that the said plot was adjoining to one which also belongs to them. In the form of an affidavit, Shri Prasad Vassudev Keni, respondent No. 6 and his wife, Smt. Vini Prasad Keni, respondent No. 7 filed an undertaking. In both the affidavits, they highlighted that their ownership and entitlement of the property in question, construction of new bungalow and the two plots, namely, Chalta Nos. 11 and 15 of P.T. Sheet No. 116, which bungalow has been allotted House No. 13/436/A. They also asserted that as on date both of them are the owners of the said new bungalow and the land on which the said bungalow is existing. They also made a specific undertaking that pending disposal of the suits, viz., Special Civil Suit Nos. 7/2000, 8/2000, 14/2000 and 21/2000 pending in the Court of Civil Judge, Senior Division at Panaji, Goa, they shall not part with the possession of the said bungalow bearing House No. 13/436/A as also the land on which the said bungalow is existing nor the said bungalow and land on which the bungalow is existing shall be encumbered in any manner in favour of any third party nor any interest will be created in favour of any third party. Mr. Rohtagi prayed for recording of the said undertakings of respondent Nos. 6 and 7. As far as the sale of iron ore and machinery etc. is concerned, it is claimed that the injunction order was not served on them on the date when the alleged disposal took place.

It is a matter for verification and it is for the trial Court to ascertain from the records.

8) Though Mr. Ranjit Kumar and Mr. Krishnan Venugopal vehemently opposed the order of the remand and the conduct of the respondents herein, as observed earlier, considering various disputes and orders passed by the trial Court, the High Court and this Court on different occasion and in order to shorten the litigation, taking note of the stand taken by the respondents, particularly, respondent Nos. 6 & 7 in the form of affidavits, we are not inclined to interfere with the impugned order of the High Court. On the other hand, we permit both parties to clarify their stand briefly before the trial Court and leave it to the Court for passing appropriate orders, as directed by the High Court. Respondent Nos. 6 and 7 are permitted to file an affidavit in the form of an undertaking before the trial court as filed in this Court."

13. Thus, the Apex Court has taken note of the undertaking given by the defendant Nos. 1(e) and (f) before the Apex Court to the effect that they will not part with the possession of the bungalow bearing No. 13/436/A and the land pending the disposal of all the four suits before the learned Trial Court. In terms of said Order, an affidavit cum undertaking has been duly filed by the said defendants on the same terms before the learned Trial Court.

14. Shri Doctor, learned Counsel appearing for the Respondents, does not dispute that the said undertaking was essentially to secure any Decree which might be passed in favour of the Plaintiffs in the suits for recovery of money. The learned Counsel appearing for the Plaintiffs also does not dispute that the value of the bungalow as of today would cover the whole claim of the Plaintiffs in all the suits pending before the Trial Court. In such circumstances, by furnishing such an undertaking, the purpose for which the undertaking was initially ordered to be given, has been duly amended. In this context, it would be appropriate to examine the provisions of Order 39 Rule 11 sub-rule (1) and (2) of the Civil Procedure Code, which 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 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 of 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 of contravention or 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 subrule notice shall be given to the parties likely to be affected by the order to be passed."

15. On plain reading of Sub-section (2) of Order 39 Rule 11 of Civil Procedure Code, I find that in case the party who has been responsible for the default or contravention, makes amends for such default or contravention to the satisfaction of the Court and shows sufficient cause, the Court may hear the parties in defence upon such terms as it deems fit. In the present case, taking note of the fact that it is not in dispute that the value of the re-constructed bungalow would exceed the total claim of the Plaintiffs in the said suits, the breach or contravention, if any, by the defendants can be said to have been amended. These aspects have not been considered by the learned Judge whilst passing the impugned Order. No doubt, the conduct of the Plaintiffs to demolish the bungalow without taking any permission from the Court nor informing the Court to that effect is deplorable. The defendants ought to have taken necessary precautions to see that they had taken appropriate permission from the Court before embarking into the exercise of demolishing the construction. In fact the Judgments relied upon by the learned Counsel appearing for the Plaintiffs clearly suggests that it is not open to a party to make its own interpretation of the order to defeat such orders. In the present case, the defendants are not at all justified to demolish the construction without informing the Court what further course of action they wanted to follow after such demolition. In such circumstances, the apprehension of the Plaintiffs that the defendants wanted to breach the orders of temporary injunction and the undertaking, were well founded. But, however, in order to suffice the consequences provided in Order 39 Rule 11 as well as Order 39 Rule 2-A of the Civil Procedure Code there should be willful disobedience of such orders and the party should persist in committing such contempt. In the present case, in the reply filed to the application, the defendant offered to give a Bank Guarantee covering the value of the said bungalow. Apart from that, they have clearly stated that they had no intention not to comply with the Orders passed by the Court. In this connection, there is also an apology given by the Defendants. In such circumstances, considering that the Defendants made amends to the contravention or the default of the undertaking, I find that the learned Judge was not justified to strike off the defence of the defendants and dismiss the counter claim filed by the Defendants. No doubt, exercise of such powers under Order 39 Rule 11(2) of the Civil Procedure Code, would have to be upon terms deemed fit. The terms to be imposed would be dealt with whilst dealing with the challenge to the Orders under Order 39 Rule 2-A of the Civil Procedure Code.

16. The Division Bench of this Court in the Judgment reported in Ramavatar Surajmal Modi Vs. Mulchand Surajmal Modi, , has observed at Para 7 thus:

"7. Rule 11 of Order 39 as introduced by the Bombay amendment provides for a

procedure on parties defying orders of the Court and/or committing breach of any undertaking to the Court. We are concerned with the question whether sub-rule (1) of Rule 11, Order 39 leaves no discretion on the Court and that it obliges the Court to visit the defaulting party with the penalty prescribed therein irrespective of the circumstances that default is not willful or the conduct of the party responsible for the default is not contumacious or there is reasonable explanation for default. 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. Inter alia the courts have applied the test whether the object of the provision will be defeated or furthered by holding the provision mandatory or directory. 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 consequence. 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 provision 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. This is further fortified by the provision contained in sub-rule (2) which gives a discretion to the Court that even after the order contemplated under the sub-rule (1) of Rule 11 has been passed, upon sufficient cause being shown by the party responsible for the default or contravention or breach and such party makes amend for the default or contravention or breach to the satisfaction of the Court, the Court may restore the suit or hear the defence on such terms and conditions it deems fit. If the Court has power to restore the party to the same position even after the adverse order has been passed under sub-rule (1) of Rule 11 if the case is made out under sub-rule (2), the provision of sub-rule (1) has to be held to be directory and not imperative. The provision in the nature of Sub-rule (2) leaves no manner of doubt the intention of the rule making authority that the provision of sub-rule (1) of Rule 11 is directory and that by such provision power has been vested in the Court to dismiss the suit or proceeding where the plaintiff is in default or striking off the defence of the defendant, where defendant is responsible for the default. Unfortunately, neither in Ratnakar D. Patade nor in Smt. Asha M. Joshi, the learned Judges adverted to sub-rule (2) of Rule 11 and its effect. The Supreme Court in Babbar Sewing Machine Company Vs. Trilok

Nath Mahajan, held that the power of dismissal of suit or striking out of the defence under Order 11, Rule 21 of the Code of Civil Procedure 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. It was further observed that an order striking out the defence under Order 1, Rule 21 should be made unless there has been obstinacy or contumacy on the part of the defendant or willful attempt to disregard the order of the Court to produce the documents.....

This Court has observed that the provisions and nature of sub-rule (2) leaves no manner of doubt that the intention of the rule making authority is that the provisions of sub rule (1) of Rule 11 of Order 39 of the Civil Procedure Code, is directory and by such provision, power has been vested in the Court to dismiss the suit when the Plaintiff is in default and struck off the defence of the defendants when the defendant is responsible for the default. In this connection, taking note of the fact that the defendants made amends to the default by furnishing a fresh undertaking of the new bungalow constructed in the same property, the question of passing a harsh Order striking off the defence would lead to grave consequences to the defendant and, as such, would not be justified in the facts of the present case.

17. On perusal of the impugned Order, the learned Judge took a view that there was willful disobedience of the injunction Order as well as the undertaking given to the Court considering the stand taken by the Defendants to justify their action with regard to the demolition of the bungalow. The learned Judge also took note of the fact that the reply of the Petitioners does not denote any apologetic attitude on the part of the Defendants. The learned Judge further noted the Judgments of the Apex Court to come to the conclusion that action for punishment by detaining in civil prison is independent remedy from attachment of property. The learned Judge has also taken note of the observations of the Apex Court that there is a reserve of discretion vested in the Court under Order 39 Rule 11 entitling it not to struck off the defence and that the fact that the Order has been implemented subsequently has no relevance. The learned Judge has further held that it was for the defendants to approach the Court and seek for clarifications about the interpretation of the Order and the undertaking as understood by them. The learned Judge further noted the Judgment of the Apex Court reported in *The State of Bihar Vs. Rani Sonabati Kumari*, wherein it was inter alia held that the question whether a party has understood an Order in a particular manner and has conducted himself in accordance with such a construction is primarily one of fact and where the materials before the Court do not support such a state of affairs, the Court cannot attribute an innocent intention based on presumptions, for the only reason, that ingenuity of Counsel can discover equivocation in the Order which is the subject of enforcement. The arguments being in effect that a party who had bonafidely misconstrued the Order and acted on that basis, could not be held to have willfully and deliberately disobeyed the Order. Such a plea could obviously be urged only when it is proved

that a party was in fact under misapprehension as to the scope of the Order. This was never the plea of the contemptner herein and to ascertain bonafides there should be an act of regret for the unintentional wrong. The learned Judge also noted the Judgment of the Apex Court which, inter alia, held that the Court has to come to the conclusion that the conduct of the defendant is abstinent and contumacious or amounts to useful attempt to disregard the Orders of the Court. The learned Judge as such found that the defendants have admittedly demolished the bungalow in respect of which there was an Order from the Trial Court and an undertaking given by the Respondents that they would not part with possession of the said bungalow and merely offering to give Bank Guarantee and further undertaking tendered on 18.12.2007, it can never be said that the Order of the Court is remedied and the status quo ante is brought into effect and, consequently, the application under Order 39 Rule 2-A was granted and the defence of the defendants was struck off.

18. On perusal of the impugned Order, the very fact that the learned Judge has granted an application under Order 39 Rule 2-A of the Civil Procedure Code, without even specifying the period of such detention would itself suggest that the learned Judge has not examined the predicates of granting said punishment under the said provisions. No doubt, under the provisions of Order 39 Rule 2-A of the Civil Procedure Code, the Court can detain the person in breach of an Order to civil imprisonment in cases in which there is contemptuous breach of a temporary injunction. Nevertheless, the provisions also recognises that the properties of the defaulter can be attached or be detained in civil imprisonment. No doubt, these powers are not in the alternative but can be exercised independently. But, however, the said provisions are not exhaustive. The Court has power and can pass appropriate Orders to ensure that the directions issued by the Court are implemented and enforced. In such circumstances, Rule 2-A of Order 39 of the Civil Procedure Code, is a curative provision. Its purpose is to ensure that the direction of the Court is implemented and the disobedience of the Orders are remedied and status quo ante is restored. Any punishment awarded on the party disobeying the Orders is primarily for upholding the dignity of the Court and showing respect for judicial process. There should be no element of vindictiveness and the proceedings should not be allowed to be used for feeding personal grudge or as an offensive weapon to satisfy private vendetta.

19. In the present case, as pointed out herein above, the purpose of granting the injunction as well as taking an undertaking has been attained as the defendants have given a fresh undertaking in respect of the same land and the reconstructed bungalow in terms of the directions of the Apex Court referred to herein above. Apart from that, the defendants also offered during the course of the hearing that in lieu of such undertaking, they would even furnish a Bank Guarantee of a Nationalised Bank to the satisfaction of the Court to cover the total claim of the Plaintiffs if decreed in the suit as security during the pendency of the suit. The said offer was not accepted by the learned Counsel appearing for the Plaintiffs. In such circumstances, the provisions of Order 39 Rule 2-A and Rule 11 of the Civil

Procedure Code, cannot be used as a tool to get the private rights of the parties decided or to satisfy any private vendetta. Taking note of the observations of the Apex Court, as referred to herein above, I find that detaining the defendants in civil imprisonment would be very harsh and inappropriate in the facts and circumstances of the case. The Plaintiffs as pointed out herein above are adequately secured in case any Decree for recovery of money is passed in their favour ultimately in the suits filed by the Plaintiffs. But, however, the act of the defendants to demolish the bungalow without informing the Court cannot be condoned and for this act, the defendants should be directed to pay an amount as compensation/fine in the facts and circumstances of the case instead of being detained in civil imprisonment. It is also to be noted that the original undertaking was given by the defendant No. 2, who is the widow and her deceased husband. The conduct of the defendants, inter alia, to furnish the undertaking, offer to furnish a Bank Guarantee, tendering an apology in the reply, cannot rule out that the Defendants had bonafidely misinterpreted the Order and the undertaking. As such, the Judgments relied upon by Shri Doctor, learned Counsel appearing for the Respondents, would not be applicable to the facts of the present case considering the view taken herein above. Thus, looking at the facts in its entirety, I find that the directions to detain the defendants in civil imprisonment is unjustified and in lieu thereof, an amount of compensation/fine would meet the interest of justice in the peculiar facts of this case. The undertaking given by the Defendant Nos. 1(e) and 1 (f) in terms of the directions issued by the Hon'ble Supreme Court in the Judgment dated 13.04.2012 is accepted and shall continue to be in force during the pendency of all the four Suits filed by the Plaintiffs.

20. The contention of Shri Doctor, learned Counsel appearing for the Plaintiffs, that this Court should not interfere in the impugned Order as they are discretionary Orders, cannot be accepted in the facts of the present case. When it is found that the Court below has failed to exercise jurisdiction in accordance with law or has not considered all the relevant facts to exercise such discretion, it is always open for this Court to interfere in such Orders when otherwise it would lead to an unreasonable situation. As such and for the reasons herein above, the interference of this Court in the impugned Order is justified.

21. In the present case, considering the conduct of the defendants as referred to herein above and taking note of the fact that lot of judicial time has been lost on account of an unilateral and irresponsible act committed by the defendants in demolishing the bungalow, I find that the defendants are liable to pay compensation/fine on that count. It is not in dispute that the Plaintiffs have filed four suits which were pending before the Trial Court. The orders of striking of the defence came to be passed in all the four suits. The Appeals filed against the said Orders are also being disposed of by the present Judgment. Considering that there were four suits filed by the Plaintiffs which were pending for adjudication, I find that a total sum of Rs. 2,00,000/- payable to the Plaintiffs and a further sum of Rs. 1,00,000/- to be paid to the State Legal Services Authority would serve

the interest of justice. All the points of consideration are answered accordingly. In view of the above, I pass the following:

ORDER

"(1) The Appeals and the Writ Petitions are partly allowed.

(2) The impugned order dated 04.05.2013 is quashed and set aside.

(3) The defendants are directed to pay a sum of Rs. 2,00,000/- in lieu of the civil imprisonment to the Plaintiffs and a further sum of Rs. 1,00,000/- to the Goa State Legal Services Authority as condition precedent. The learned Judge shall proceed to dispose of the suits and the counter claims filed by the Defendants in accordance with law.

(4) Rule stands disposed of accordingly with no Orders as to costs."