

(2006) 08 BOM CK 0036

In the Bombay High Court

Case No : Appeal From Order No. 73 of 2006

Zilla Parishad and Another

APPELLANT

Vs

Punarjanma Rewinders and Electricals

RESPONDENT

Date of Decision : 31-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8

Citation : (2006) 6 MhLj 661

Hon'ble Judges : Vasanti A. Naik, J

Bench : Single Bench

Advocate : B.R. Surwase, for the Appellant; S.R. Deshpande, for the Respondent

Final Decision : Allowed

Judgement

Vasanti A. Naik, J.—Admit. The appeal is being heard and finally disposed at the stage of admission.

2. By this appeal, the appellant Zilla Parishad, Aurangabad challenges the order passed by the Civil Judge, Senior Division, Aurangabad on 3-2-2006 below Exhs. 27 and 28 in Special Civil Suit No. 372 of 2004 striking out the defence of the appellant Zilla Parishad under the provisions of Order 39 Rule 11 of the Code of Civil Procedure. By this appeal, the appellants have also challenged the order passed below Exh. 30 on 4-7-2006 rejecting the application filed by the appellants for setting aside the order dated 3-2-2006 by which the Court had directed that the defence of the appellants be struck off. A few facts giving rise to the controversy in question are stated as under:

The respondent Contractor filed Special Civil Suit No. 372 of 2004 for recovery of amount of Rs. 25,10,401/- against the appellant Zilla Parishad, Aurangabad. The Zilla Parishad, Aurangabad resisted the claim of the plaintiff contractor by filing written statement and also filed a list of documents along with the written statement. On 21-10-2005, the plaintiff contractor filed an application for production of six documents under the provisions of Order 12 Rule 8 of the CPC

and the Civil Judge, Senior Division, Aurangabad, by an order dated 16-1-2006, directed the defendant Zilla Parishad, Aurangabad to produce the documents as per the notice. The appellant Zilla Parishad, Aurangabad was, however, not able to produce all the documents which were directed to be produced by order dated 16-1-2006. According to the appellant Zilla Parishad, Aurangabad, one of the documents was available with the Zilla Parishad, Aurangabad and, therefore, it had produced it on record. It could not produce the other documents in time as the appellant/defendant was a public body having various departments and the present matter pertained to water supply department. It was also brought to the notice of the Court by a civil application dated 28-2-2006 by the appellant that the plaintiff had already received the approved bill for the years 1999-2000 and 2000-2001 and the said copies were in possession and custody of the plaintiff. Since the appellant was not able to comply with the order passed by the trial Court dated 16-1-2006, the plaintiff filed an application under provisions of Order 39 Rule 11 of the CPC praying that the defence of the Zilla Parishad, Aurangabad be struck off as there was non-compliance of the orders passed by the Court on 16-1-2006. Though the appellants sought time for production of the documents, the Court refused to grant the same and by the impugned order dated 3-2-2006, struck off the defence of the Zilla Parishad, Aurangabad.

3. Thereafter the appellant Zilla Parishad, Aurangabad produced copies of certain documents, as per the list and requested the Court that the copies of measurement book etc. be taken on record and the order passed by the Court on 3-2-2006 be set aside. After considering the application and the say filed by the respondent/plaintiff, the Civil Judge, Senior Division, Aurangabad rejected the application filed by the appellant Zilla Parishad, Aurangabad for setting aside the order dated 3-2-2006, by order dated 28-2-2006. The appellants have challenged the orders passed by the Civil Judge, Senior Division, Aurangabad on 3-2-2006 and 28-2-2006 in the instant appeal.

4. Shri B.R. Surwase, learned Counsel appearing on behalf of the appellants submitted that the trial Court exceeded its jurisdiction while allowing the application filed by the plaintiff under the provisions of Order 39, Rule 11 of the Code of Civil Procedure. It was canvassed on behalf of the appellants that in case the appellants had failed to produce the documents as per the direction of the Court by order dated 16-1-2006, the Court at the most could have drawn an adverse inference against the Zilla Parishad, Aurangabad at the time of deciding the suit on merits but could not have struck off the defence of the defendant Zilla Parishad, Aurangabad by invoking the provisions of Order 39, Rule 11 of Code of Civil Procedure. It was then canvassed on behalf of the appellants that the order dated 3-2-2006 is a cryptic order and the only reason for allowing the application of the plaintiff under Order 39, Rule 11 of the CPC for striking out the defence of the appellant Zilla Parishad, Aurangabad was that the direction of the Court for production of documents was not complied. It was submitted on behalf of the appellants that the order dated 4-7-2006 was also not justified as the appellants had sought to produce certain other documents in the form of measurement

book etc. on record along with the list of documents, which was sought to be produced on behalf of the defendant.

5. Shri Deshpande, learned Counsel appearing on behalf of the sole respondent contractor supported the order passed by the Civil Judge, Senior Division, Aurangabad striking out the defence of the appellant Zilla Parishad, Aurangabad as well as the order rejecting the application for setting aside the order striking out the defence. It was submitted on behalf of the respondent that the appellant Zilla Parishad, Aurangabad has not produced six documents on record even till this date and the order passed by the trial Court on 16-1-2006 is not complied till today. It is further canvassed on behalf of the respondent that Rule 11 of Order 39 of the CPC provides for penalty of striking out the defence if the contravention or breach of the order passed the Court is committed by the defendant or the opponent. According to the counsel for the respondent, when a Court orders any party to a suit or proceeding to do or not to do a thing during pendency of the suit or proceeding and if such party commits any default in respect of the order or commits any breach of the order, the trial Court is empowered to strike out the defence in case default is committed by the defendant. It is submitted on behalf of the respondent that since in the instant case, the trial Court had directed the appellants to produce six documents by order dated 16-1-2006 and since the aforesaid order was not complied with, the provisions of Order 39, Rule 11 of the CPC came into play and the trial Court was justified in striking out the defence of the defendant Zilla Parishad, Aurangabad.

6. I have perused the order passed by the trial Court on 16-1-2006 as also the orders passed by the Court on 3-2-2006 and 4-7-2006. which are impugned in this appeal. The provisions of Order 39, Rule 11 of CPC are also perused. Order 39 of the CPC deals with (the matters relating to temporary injunction and interlocutory orders which are referred to in Order 39. The provisions of Order 39 CPC deal with temporary injunctions, consequences of disobedience or breach of injunctions, power to order interim sale, detention, preservation, inspection etc. of subject matter of suit, directions to put a person in immediate possession of land which is the subject-matter of suit, deposit of any money in the Court etc. Rule 11 of Order 39 stipulates that when 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 the proceeding or where any party to a suit or proceeding gives any undertaking to the Court to do or restrain from doing a thing during pendency of the suit or proceedings and such party commits any default or contravenes such order or commits a breach of such undertaking, the Court may dismiss the suit or proceeding if the breach is committed by the plaintiff or strike out the defence if the breach or default is committed by the defendant/opponent. The words "to do or not to do a thing during pendency of a suit or proceeding" would not be referable to each and every direction which is issued by the trial Court under the provisions of the Code of Civil Procedure. The phraseology used in Rule 11 of Order 39 of CPC would be normally referable to an act which is directed to be done under the provisions of Order 39 of the Code of Civil Procedure. The

directions which can be issued or the interlocutory orders which can be passed by the Court under the provisions of Order 39 of the CPC are already enumerated hereinabove. In the instant case, the trial Court had, by an order dated 16-1-2006, directed the appellant Zilla Parishad, Aurangabad to produce certain documents of which a notice to produce the documents was filed on behalf of the plaintiff. The appellant Zilla Parishad, Aurangabad was not able to produce those documents before the Court on the date which was specified in the order. Non-production of the documents, which are directed to be produced in pursuance of a notice, would not entail or result into consequences which are provided under the provisions of Order 39 Rule 11 of the Code of Civil Procedure. The drastic step of striking out the defence of the defendant or the opponent could not be taken merely because the defendant has failed to produce a document which was directed to be produced by the Court. Normally, failure to produce a document which is directed to be produced, would at the most result in drawing an adverse inference against the party who fails to produce it thereby resulting in an advantage to the other party at whose instance the document was sought to be produced on record. However, the Court cannot exercise the jurisdiction under Rule 11 of Order 39 of the CPC in such a case for either dismissing the suit of the plaintiff or striking out the defence of the defendant or the opponent. To hold that the powers under Order 39 Rule 11 of the CPC could be invoked in such a case would result in drastic consequences.

7. In the instant case, the Civil Judge, Senior Division, Aurangabad has exceeded its jurisdiction in striking out the defence of the defendant Zilla Parishad, Aurangabad merely because the defendant had failed to produce certain documents on record as per the directions of the Court. The said directions were issued by the Court on an application filed by the plaintiff/notice to produce the document. The impugned order dated 3-2-2006, therefore, suffers from a jurisdictional error and is, therefore, liable to be interfered with in this appeal. Since the order dated 3-2-2006 suffers from a jurisdictional error, the consequential order dated 4-7-2006 refusing to set aside the order dated 3-2-2006 also has to fall. The orders dated 3-2-2006 and 4-7-2006 cannot be sustained.

8. For the aforesaid reasons, appeal is allowed. The orders passed by the Civil Judge, Senior Division, Aurangabad on 3-2-2006 and 4-7-2006 are hereby quashed and set aside. In the facts of the case, there would be no order as to costs.

9. Civil Application No. 7585 of 2006 also stands disposed of.