

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

FAO 37/2020 & CM. APPL. No.3126/2020

Reserved on : 20/05/2022

Date of Decision : 29/08/2022

IN THE MATTER OF:

RATTAN MEHTA & ANR.

..... Appellants

Through: Mr. Harish Malhotra, Sr. Advocate
with Mr. Lalit Gandherva, Advocate
versus

GAYATRI SHAH & ORS.

..... Respondents

Through: Mr. Rajesh Yadav, Sr. Advocate with
Ms. Ruchira V. Arora & Mr.
Dhananjay Mehlawat, Advocates for
respondent Nos.1 and 2.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

MANOJ KUMAR OHRI, J.

1. By way of present appeal filed under Order XLIII Rule 1(f) read with Section 151 CPC, the appellants have assailed the order dated 23.12.2019 passed by the learned ADJ-04, Patiala House Courts, New Delhi in CS No.55540/2016, whereby the appellants'/defendants' defence was struck off and the written statement filed by them was directed to be taken off the record.

2. Brief facts, in nutshell, to appreciate the challenge are that the respondents/plaintiffs preferred a suit for possession, mesne profits and

damages. In the plaint, the respondents claimed themselves to be owners of property bearing *No. 25-A, C Block, Vasant Vihar Market (Local Shopping Centre-1), New Delhi* (hereinafter, referred to as '*the suit property*'). It was further claimed that a shop on the ground floor of the suit property was leased to *Smt. Anju Mehta* and appellant No.1 vide Lease Deed dated 15.05.1984 at a monthly rent of Rs.1,500/-, whereafter the defendants created a sub-tenancy in favour of *M/s Mahima Caps (P) Ltd.* by entering into an Agreement dated 15.07.2004 (hereinafter, referred to as '*the Agreement*'). The Agreement, a copy of which was filed alongwith the plaint, was statedly executed on behalf of defendants' partnership firm *M/s Rain* through *Smt. Anju Mehta* and her son *Rattan Mehta*-the appellant. Under the said Agreement, *M/s Mahima Caps (P) Ltd.* was required to pay Rs.1 lac per month as minimum guaranteed proceeds towards the profit/sale.

3. It was pleaded before the Trial Court that the defendants having created sub-tenancy were no longer entitled to protection under the Delhi Rent Control Act, 1995. In support of the averment, they had placed on record a copy of the Agreement and averred that the original Agreement was in possession of the defendants.

4. While the alleged sub-tenants were proceeded *ex-parte*, the appellants appeared and filed a written statement, wherein they admitted the partnership of their firm *M/s Rain* with *M/s Mahima Caps (P) Ltd.*, but not the execution, existence and possession of the Agreement. On 30.01.2018, the issues were framed by the Trial Court and those relevant to the present controversy are extracted below:-

"1. Whether the suit of the plaintiff's is barred under Section

50 of the Delhi Rent Control Act, 1958? OPD 1 and 2.

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5. Whether the amount received as monthly minimum guaranteed profit of Rs.1,00,000/- by defendant no.1 and Smt. Anju Mehta (since deceased now represented by defendant no.1 and 3) from defendant no.4 under the agreement dated 15.07.2004, was in the nature of the rent or not? OPP.

6. Whether the plaintiff's are entitled to a decree of possession of the suit premises in terms of prayer clause (a)? OPP."

(emphasis added)

5. An application came to be filed on behalf of the plaintiffs under Order 11 Rule 1 read with Section 151 CPC seeking leave to deliver following interrogatories to defendant Nos.1 and 2:-

"(a) Was not the agreement dated 15.07.2004, a true photocopy of which has been placed on record by the Plaintiffs, entered/executed between M/s. Rain, through its partners Smt. Anju Mehta w/o late Shri Surinder Mehta and Shri Rattan Mehta s/o late Shri Surinder Mehta (Defendant No.1 herein), and M/s. Mahima Caps Private Limited (Defendant No.4 herein), through its Managing Director Shri Dhiraj Arora, with respect to property No.25-A, situated in C Block, Vasant Vihar Market (local shopping Centre-I), New Delhi-110057, whereby M/s Mahima Caps Private Limited was to pay minimum guaranteed profit of Rs 1,00,000/- per month to M/s RAIN of which Smt Anju Mehta and Shri Ratan Mehta were partners."

6. The defendants filed a reply to the said application and did not admit the existence or their possession of the Agreement. The relevant portion of

the reply is extracted below :-

"2. ...The plaintiffs are to prove the said documents in accordance with law and not by way of alleged interrogatory which is in the form of fishing enquiry. The original of the said document will speak for itself. It is denied that the said document for all intent and purposes is an agreement of sub-lease as alleged in the paragraph under reply. The plaintiffs cannot seek any information about any profit given to Smt. Anju Mehta since deceased. It is absolutely false to say that the said profit was in the nature of rent. It is absolutely false to say that Delhi Rent Control Act became inapplicable to the suit premises as alleged in the paragraph under reply.

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4. ...It is reiterated that the alleged agreement no more subsists."

7. The aforesaid application filed on behalf of the plaintiffs came to be allowed vide order dated 01.08.2019, whereby the defendants were directed to answer the interrogatories. The defendants challenged the said order before this Court by way of CM Main 1738/2019. This Court, vide judgment dated 06.12.2019, dismissed the challenge by concluding as under:

"21. ...The interrogatories have been correctly directed to be served upon the Defendants and due to non-compliance, an adverse inference can be drawn by the ld. Trial Court.

22. Further vide order dated 26th November 2019, the ld. Trial Court has directed as under:

"Ld. Counsel for Plaintiff states that the D-1 and D-2 have not complied with the directions passed vide order dt. 01.08.19 despite having delivered the interrogatories to them and which are not answered.

Ld. counsel for D-1 & 2 states that pursuant to the Para No.12 of the order dt. 01.08.19, the interrogatories were to be delivered to D-1 & 2 afresh and not the ones i.e. proposed interrogatories annexed along with the application of the plaintiffs. Be that as it may, The Defendants have failed to explain the compliance of the directions since 01.08.19 and this seems to be an attempt to delay the proceedings on their part.

In view of the provisions under Order 11 Rule 21 CPC, Defendants are hereby directed to explain in writing the non-compliance of the order within a month before any adverse order against them is considered.

Ld. Counsel for Plaintiffs seeks to move an application for striking out the defence of D-1 and D-2 for failure to comply with the order.

Relist for filing the explanation by D-1 & D-2 and consideration over application of Plaintiffs on 11.12.19 at 12.P.M."

23. Accordingly, the petition is dismissed with Rs.20,000/- as costs. All pending applications are also disposed of. Rs.10,000/- each shall be paid, in equal sum, by the Petitioners/Defendants to the two Plaintiffs/Respondents, on or before the next date before the ld. Trial Court. The proceedings before the ld. Trial Court shall go on in accordance with law. Dasti."

8. The Special Leave to Appeal (C) No. 8279/2020 filed on behalf of the defendants against the aforesaid judgment dated 06.12.2019 was dismissed as withdrawn vide order dated 27.11.2020.

9. Before the Trial Court, the plaintiffs made a submission that the defendants did not comply with the directions contained in the decision dated 01.08.2019 passed by the Court, inasmuch as, they had not answered

the interrogatories. The defendants were directed to file an explanation for non-compliance as well as an answer to the interrogatories.

In the answer, while defendant No.1 claimed that he was only a sleeping partner at the relevant time, defendant No.2 claimed that she was not a partner at the relevant time. It was further claimed by defendant Nos. 1 and 2 that they were not actively engaged in the day-to-day business of the restaurant and it was their mother who was looking after the business of the restaurant at premises in question. Both the defendants also denied the Agreement and stated, to their knowledge, that the same was neither entered into nor executed. An objection was further taken to the effect that the document dated 15.07.2004 filed alongwith the application and relied upon by the plaintiffs was not only a photocopy, but also not properly and duly stamped.

10. The plaintiffs preferred an application under Order 11 Rule 21 read with Section 151 CPC seeking striking out of the defence of defendant Nos. 1 and 2 for having failed to answer the interrogatories and non-compliance of the order dated 01.08.2019 passed by the learned ADJ. The defendants contested the said application and denied willful non-compliance.

Vide the impugned order, the Trial Court directed that defendants' defence in the suit be struck off. Consequently, the written statement filed by the defendant Nos.1 and 2 was also directed to be taken off the record.

11. Mr. Harish Malhotra, learned Senior Counsel for the appellants while assailing the impugned order submitted that in the interrogatories filed by the plaintiffs alongwith the application under Order 11 Rule 1 CPC, the inquiry was limited to whether the Agreement was entered and executed between *M/s Rain* (through defendant Nos. 1 and 2) and *M/s Mahima Caps*

(P) Ltd. and the plaintiffs had not sought production of the Agreement. It was further contended that once the defendants had denied the execution and possession of the Agreement, only an adverse inference could have been drawn against them in trial but the defence ought not to have been struck off as the penalty envisaged under Order 11 Rule 21 CPC is not applicable to non-production of documents. In support of the submissions, reliance was placed on following decisions :-

- i) Babbar Sewing Machine Company v. Trilok Nath Mahajan reported as **(1978) 4 SCC 188**;
- ii) Sawhney Brothers v. Hong Kong & Shanghai Banking Corporation & Others reported as **2001 SCC OnLine Del 795**;
- iii) Sh. Shravan Kumar Gupta v. Sh. Tara Chand Gupta & Ors. reported as **2013 SCC OnLine Del 3623**; and
- iv) Maj Retd Sukesh Behl & Anr. v. Koninklijke Philips Electronics NV reported as **2016 SCC OnLine Del 352**.

12. Per contra, Mr. Rajesh Yadav, learned Senior Counsel for the respondents herein, supported the impugned order. It was submitted that defendants have been guilty of not truthfully answering the interrogatories. It was further submitted that defendants have not specifically denied the existence of the original Agreement either in the written statement or in their Affidavit of admission/denial of documents. In this regard, learned Senior Counsel referred to the following extract of judgment dated 06.12.2019 passed by this Court in CM (M) 1738/2019:

“21. Disclosure of the said agreement is therefore crucial for the adjudication of the suit. The Defendants are clearly not coming clean to the Court. The denial of the said

document is completely evasive and such a denial is no denial in the eyes of law.”

Mr. Yadav also placed reliance on the following decisions in support of his submissions:

- i) Shri M.L. Sethi v. Shri R.P. Kapur reported as **(1972) 2 SCC 427;**
- ii) Vikas Aggarwal v. Anubha reported as **(2002) 4 SCC 468;**
- iii) D. Ram Mohan Rao v. Sridevi Hotels Private Limited, Nizamabad and others reported as **2003 SCC OnLine AP 30;**
- iv) Hari Shankar v. Sardar Harnam Singh and Ors. reported as **MANU/DE/3024/2013;**
- v) Hindustan Zinc Ltd. v. Durha Construction Pvt. Ltd. reported as **2021 SCC OnLine Del 3333.**

13. I have heard learned Senior Counsels for the parties and also gone through the material placed on the record.

14. It is worthwhile to note that the plaintiffs had preferred an application under Order 11 Rule 1 read with Section 151 CPC before the Trial Court, thereby seeking leave to deliver interrogatories to defendant No.1/*Rattan Mehta* and defendant No.2/*Ms. Mona Mehta* (i.e., daughter of *Smt. Anju Mehta*). The interrogatories were directed to be delivered and the same stand answered by the defendants in pursuance of the judgment dated 06.12.2019 passed by a Co-ordinate Bench of this Court.

15. The only issue that arises for consideration in the present case is whether the defendants' answer to the interrogatories, in the manner it was given, i.e., denying entering into and execution of the Agreement, would attract consequences envisaged under Order 11, Rule 21 CPC.

16. As per the scheme of Order 11 CPC, parties, with the leave of the Court, are allowed to deliver interrogatories to each other relating to matters in question in the suit. As per Rule 1, party to a suit may seek leave of the concerned Court to deliver interrogatories in writing for the examination of the opposite party. Under Rule 2, the Court is required to decide whether such leave is to be granted. If leave is granted by the Court, the opposite party is required under Rules 8 and 9 to answer the interrogatories in Form No. 3 in Appendix-C of CPC with such variations as circumstances may necessitate.

The interrogatories are to be answered by way of an affidavit, which may include any objection to it on account of privilege or otherwise, as prescribed in Rule 6. Further, in terms of Rule 11, if the party interrogated omits to answer or if the answer is perceived insufficient, the party interrogating may apply to the concerned Court for an order directing the party interrogated to answer, or answer further, as the case may be.

Section 30 CPC provides that the Court can also exercise powers on its own motion and pass such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admissions of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.

17. At this stage, it is deemed expedient to advert to Order 11, Rule 21 CPC which provides as under:-

“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.”

18. In the present case, it is apparent that the interrogatories supplied by the plaintiffs were in connection with the Agreement dated 15.07.2004 which forms the fulcrum of the plaintiffs' case that the defendants created a sub-tenancy in favor of *M/s Mahima Caps (P) Ltd.*, resulting in not only violation of the terms of Lease Deed dated 15.05.1984, but also taking out of the case from the purview of DRC Act. As such, there is no doubt that the interrogatories delivered to the defendants were related to '*matters in question in the suit*' and rightly directed to be answered by this Court.

19. In Halsbury's Laws of England, fourth edition, volume 13 in para 1, the nature and extent of discovery has been considered thus:-

“The term "discovery" in this title is used to describe the process by which the parties to civil cause or matter are enabled to obtain, within certain defined limits, full information of the existence and the content of all relevant documents relating to the matters in question between them. The process of the discovery of documents operates generally in three successive stages, namely (1) the disclosure in writing by one party to the other of all the documents which he has or has had in his possession, custody or power relating to matters in question in the proceedings: (2) the inspection of the documents disclosed,

other than those for which privilege from or other objection to production is properly claimed or raised: and (3) the production of the documents disclosed either for inspection by the opposite party or to the court.

The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their respective cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to use before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him to eliminate surprise at or before the trial relating to documentary evidence and to reduce the costs of the litigation.”

20. In Shri M.L. Sethi (Supra), the Supreme Court has opined that if a party obtains an order for inspection, and the opposite party fails to make an affidavit of documents pursuant thereto, the latter will be subject to the penalty under Order 11, Rule 21 CPC. Relevant excerpt from the judgment is reproduced hereunder:-

“6. ...Generally speaking, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. If a party wants inspection of documents in the possession of the opposite party, he cannot inspect them unless the other party produces them. The party wanting inspection must, therefore, call upon the opposite party to produce the document. And how can a party do this unless he knows what documents are in the possession or power of the opposite party? In other words, unless the party seeking discovery knows what are the documents in the possession or custody of the opposite party which would throw light upon the question in controversy, how is it possible for him

to ask for discovery of specific documents? ...

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7. When the Court makes an order for discovery under the rule, the opposite party is bound to make an affidavit of documents and if he fails to do so, he will be subject to the penalties specified in Rule 21 of Order 11. An affidavit of documents shall set forth all the documents which are, or have been in his possession or power relating to the matter in question in the proceedings. And as to the documents which are not, but have been in his possession or power, he must state what has become of them and in whose possession they are, in order that the opposite party may be enabled to get production from the persons who have possession of them (see Form No. 5 in Appendix C of the Civil Procedure Code). After he has disclosed the documents by the affidavit, he may be required to produce for inspection such of the documents as he is in possession of and as are relevant.

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9. ...The documents sought to be discovered need not be admissible in evidence in the enquiry or proceedings. It is sufficient if the documents would be relevant for the purpose of throwing light on the matter in controversy. Every document which will throw any light on the case is a document relating to a matter in dispute in the proceedings, though it might not be admissible in evidence. In other words, a document might be inadmissible in evidence yet it may contain information which may either directly or indirectly enable the party seeking discovery either to advance his case or damage the adversary's case or which may lead to a trail of enquiry which may have either of these two consequences. The word 'document' in this context includes anything that is written or printed, no matter what the material may be upon which the writing or printing is inserted or imprinted. We think that the documents of which the discovery was sought, would throw light on the means of the respondent to pay court fee and hence relevant."

21. While examining the principles underlying Order 11, Rule 21 CPC, the Supreme Court in Babbar Sewing Machine Company (Supra) has further observed that the defendant's defence may be struck off for non-compliance of an order of the Court only as a last resort, provided the conduct and/or attempt to default is willful. Relevant excerpt from the judgment is extracted below:-

“10. In this appeal, two questions are involved: firstly, whether the trial Court was justified in striking out the defence of the defendant under Order XI, Rule 21 of the C.P.C., 1908, and secondly, whether the High Court was right in observing that in view of the clear language of Order XI, Rule 21 the defendant cannot be permitted to cross-examine the plaintiff's witnesses.

11. ...The penalty imposed by Order XI, Rule 21 is of a highly penal nature, and ought only to be used in extreme cases, and should in no way be imposed unless there is a clear failure to comply with the obligations laid down in the rule.

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13. Section 136 of the Code of Civil Procedure, 1882, corresponding to Order XI, Rule 21, of the C.P.C. 1908, was based upon Order XXXI, Rule 20, now replaced by Order XXIV, Rule 16 framed under the Judicature Act. The practice of the English Courts is, and it has always been, to make the order a conditional one, and to grant a little further time for compliance. In practice this provision is virtually obsolete.

14. Even assuming that in certain circumstances the provisions of Order XI, Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order XI, Rule 21, unless the court is satisfied that the plaintiff was

willfully withholding information by refusing to answer interrogatories or by withholding the documents which he sought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give : Denvillier v. Myers. In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. The power for dismissal of a suit or striking out of the defence under Order XI, Rule 21, 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.

15. It is well settled that the stringent provisions of Order XI, Rule 21 should be applied only in extreme cases, where there is contumacy on the part of the defendant or a wilful attempt to disregard the order of the court is established.”

22. Although other decisions were also cited at the Bar, the law on the issue involved appears to be well-settled by the aforementioned decisions by the Supreme Court.

23. Coming back to the facts of the present case, it is observed that the Trial Court vide order 01.08.2019 directed the defendants to answer interrogatories. However, the same were not answered by them and they rather chose to challenge the order dated 01.08.2019 and avoided answering the interrogatories. It was when this Court, vide judgment dated 06.12.2019, called upon the defendants to explain their non-compliance and answer the interrogatories, that the interrogatories supplied by the plaintiffs came to be answered.

24. Plaintiffs have doubted the veracity of the answer given by the defendants and argued that they were evasive in their reply. In this

regard, it is noted that in proceedings dated 08.01.2019 before the Trial Court, a specific query was made to learned counsel for defendant Nos. 1 and 2 as to whether the said defendants were in possession of original Agreement dated 15.07.2004. In response, it was submitted by the learned counsel that defendant Nos. 1 and 2 were not in possession of the Agreement and the defendants would file their affidavits to that effect. Subsequently, affidavits on behalf of defendant Nos. 1 and 2 were filed before the Trial Court, deposing in unambiguous terms that they were not in possession of the Agreement dated 15.07.2004.

25. On a reading of Order 11 Rule 21 CPC, this Court is of the opinion that a party is obligated to answer the interrogatory served upon it with the leave of Court and there shall not be willful non-compliance of the order of the Court. Further, under Rule 11, where any person omits to answer or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer or to answer further, as the case may be. Insufficient answers would mean incomplete or incoherent answers, and not incorrect answers, since at the time of exchange of interrogatories and answers between the parties, the Court is not required to conduct a summary trial to assess the veracity of the answers. Consequence of striking off of the defendant's defence is a result only of 'failure' to answer the interrogatory, and does not follow when the answer may not be to the liking of the person delivering the interrogatory or allegedly incorrect.

26. Under Order 11, Rule 22 CPC, the answer given in response to an interrogatory can be used in evidence, and therefore, its correctness

and veracity will be established only at trial. Undoubtedly, it is incumbent upon a person answering the interrogatories to be truthful in the answers, and if the person is eventually found to have given false answers, they can be visited with consequences like perjury, in accordance with law, since the answer given in response to interrogatory can be used in evidence under Rule 22. All such consequences are within the domain of the Trial Court which shall eventually deal with the evidence produced by the parties before it.

27. In view of the aforesaid, the impugned order dated 23.12.2019 passed by the Trial Court is liable to be set aside. The appeal is allowed and it is ordered accordingly. Miscellaneous application is disposed of as infructuous. The written statement filed by defendant Nos. 1 and 2 is directed to be taken on record. Mindful of the above observation, the Trial Court is directed to proceed with the suit in accordance with law.

(MANOJ KUMAR OHRI)
JUDGE

AUGUST 29, 2022

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