PETITIONER:
BABBAR SEWING MACHINE CO.

Vs.

RESPONDENT:
TRILOK NATH MAHAJAN

DATE OF JUDGMENT07/08/1978

BENCH:
SEN, A.P. (J)
BENCH:
SEN, A.P. (J)
SINGH, JASWANT
DESAI, D.A.

CITATION:
1978 AIR 1436 1979 SCR (1) 57
1978 SCC (4) 188
CITATOR INFO :
RF 1989 SC 162 (12)

ACT:
Defence in a suit, striking out of for non-compliance With order for discovery Civil Procedure Code 1908, (Act V) order XI rule 21 read With Section 151, Scope of-Right to cross examine, whether lost.

HEADNOTE:
The plaintiff-respondent claiming to be an assignee of a debt under a deed dated 27th April, 1965, filed a suit against the defendant-appellant for recovery of a certain sum alleged to be due to M /s Chitra Multipurpose Cooperative Society, the assignor. On an interlocutory application moved by the respondent under order XI rules 14 and 18 C.P.C. for the production of certain documents, despite the objection by the appellant the Trial Court directed their production. The appellant produced all the documents in his possession on 7-2-67, but he was permitted to take back The account books as they were required to Be produced before the Income Tax officer on that day with the direction that he should produce them on 23-2-67. On 23-2-67, when the appellant appeared in the Court with his books the trial judge directed him to produce them on 16-3-67 and in the meanwhile allow their inspection to the respondent with three days' notice. The appellant accordingly sent a. letter dt. 25-2-67 asking the respondent to take inspection of the account books on 27-2-67 at 6 p.m. in the office d his Counsel. On his failure to do so, the appellant sent once again a registered letter dt. 1-3-1967 asking the respondent to inspect the records on 9-3-67 in his lawyer's office between 7 p.m. and 9 p.m. The respondent never sent any reply to the notice. Nor, did he avail of the opportunity of inspecting the account books at the office of the appellant's lawyer on 9-3-67. On 16-3-67 the Trial Court passed an order saying that the appellant should produce the books within four days in the Court to enable the respondent's counsel to inspect them before 29-3-67 i.e. the date fixed for evidence. After the examination of three witnesses of the respondent, the trial Court asked the respondent's Counsel to apply under order XI rule 21 to

strike out the defence of the appellant. On 31-3-67 the respondent filed an application accordingly which was vehemently opposed by the appellant. The appellant also moved both the District Court and the High Court for transfer of the suit to some other Court of competent jurisdiction. The High Court declined to interfere. Thereupon the trial Court passed an order on 23-5-67 striking out the defence of the appellant and on 21-6-67 refused permission to the appellant's counsel to cross-examine the respondent's witnesses. The revision filed by the appellant in the High Court was rejected on 14-8-1968.

Allowing the appeal by special leave, the Court

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HELD: 1. 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 5-520SCI/78

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down therein. The stringent provisions of order XI, rule 21 should be applied only in extreme eases where there is contumacy on the part of the defendant or a wilful attempt to disregard the order of the Court is established. [62E, 63E]

2. The test laid down is whether the default is wilful. In the case of the plaintiff, it entails in the dismissal of the suit and, therefore, an order of dismissal ought not to be made under order XI, rule 21, unless the Court is satisfied that the plaintiff was wilfully withholding the documents which the defendant 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. In the case of 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. [63 B-D]

3. 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 any cause substantial or serious prejudice to the opposite party. The rule must be worked with caution and may be made use of as a last resort. [63D,E]

Denvillier v. Myers, (1883) WN 58, Banshi Singh v. Palit Singh, 7 C.I.J. 295, Haigh, L.R. (1886) Ch.D. 478, Twycroft v. Grant, 1875 W.N. 201, Reg v. Senior, [1889](1) QBD 283; quoted with approval.

Khajah. Assenoolla Joo v. Khajah Abdool Aziz, I.L.R. 9 Cal. 923 and Allahabad Bank Ltd. v. Ganpat Rai, T.L.R. 1 Lah. 209; approved.

4. It is travesty of justice that the trial Court should have, in the facts and circumstances of the case, passed an order striking out the defence of the defendant under order XI, rule 21 and that the High Court should have declined to set it aside. [62D-E]

5. Applying the principle governing the Court's exercise of its discretion under order XI, rule 21, in the instant case, there was no wilful default on the part of the defendant of the Court's order under Order XI, rule 18(2) for the production of documents for inspection, and consequently, the order passed by the trial court on 23 May, 1967, striking out the defence of the defendant must be vacated and the trial must proceed afresh from the stage where the defendant was not permitted to participate. [66C-E]

6. A perusal of order XI, rule 21 shows that where a defence is to be struck off in the circumstances mentioned therein, the order would be that the defendant 'be placed in the same position as if the has not defended'. This indicates that once the defence is struck off under order XI, rule 21, the position would be as if the defendant had not defended and accordingly the suit would proceeds ex-parte. If the Court proceeds ex-parte against the defendant under order IX, rule 6(a), the defendant is still entitled to cross-examine the witnesses examined by the plaintiff. If the plaintiff makes out a prima facie ease the court unable pass a decree for the plaintiff. If the plaintiff fails to make out a prima facie case, the Court may dismiss the plaintiff's suit. Every Judge in dealing with an ex-parte case has to take care that the plaintiff's case is, at least, prima facie proved. [66E-G]

Santram Singh v. Election Tribunal, [1955] (2) S.C.R. 1 referred to.

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2126 of 1968.

Appeal by Special Leave from the Judgment and order dated 14-8-1968 of the Punjab and Haryana High Court in Civil Revision No 430 of 1967

In person (C.K. Babbar) for the Appellant.

Harbans Singh for the Respondent.

The Judgment of the Court was delivered by

SEN, J.- This appeal by special leave in directed against the order of the. Punjab and Haryana High Court dated 14 August, 1968 upholding an order of the trial court dated 23 May, 1967 striking out the defence of the defendant under order XI, rule 21 read with section 151 of the Civil Procedure Code, 1908 and directing that the defendant cannot be permitted to cross-examine the plaintiff's witnesses.

The suit out of which this appeal arises was brought by the respondent Trilok Nath Mahajan, as plaintiff, against the appellant-defendant M/s. Babbar Sewing Machine Co., on 9th March, 1966 for recovery of a certain sum alleged to be due to M/s. Chitra Multipurpose Co-operative Society (Jogyana) Ltd., Ludhiana which remained unpaid towards the price of sewing machines sold on credit from time to time, claiming to be an assignee under a deed dated 27 April, 1965. The transaction sued upon was of the year 1959, and the suit was obviously barred by limitation. The plaintiff however, pleaded that the defendant had acknowledged his liability by his letter dated 8 March, 1963 for Forwarding cheque No. 01194 dated 7 March, 1963 for Rs. 50 drawn on the Punjab National Bank Ltd., Yamunanagar. The defendant disputed the plaintiff's claim and pleaded, inter-alia, that he does not owe anything to the said society and as such the suit was not maintainable, that there was no privity of contract between the parties nor does any relationship of a creditor and debtor exists between them. He further pleaded that the suit was barred by limitation. He also pleaded that the trial court had no jurisdiction to try the suit.

On 11 November, 1966, the plaintiff moved an application under order XI, rules 14 and 18 for production and inspection of the following documents:

(a) Cash book, day book and ledger for the year 1-4-1959 to 31-3-1960 and 1-4-1960 to 31-3-1961. H

(b) Cash book and ledger for the years 1-4-1961

to 31-3-1966

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(c) All the original bills issued in favour of the defendant by M/s. Chitra Multipurpose Cooperative Society Jogyana Ltd., including Bill No. 22 dated 13-5-1960, Bill No. 43 dated 2-8-19607 Bill No. 49 dated 14-9-1960, Bill No. 53 dated 26-9-1960.

(d) Original letters written by the plaintiff to the defendant and letters addressed by M/s. Chitra Multipurpose Cooperative Society Jogyana Ltd., to defendant.

(e) Counterfoils of cheque book in use on 7-3-1963.

(f) The original cheque No. 01194 dated 7-3-1963.

(g) Bank pass book from 1-4-1962 to 31-3-1964 with counterfoils of the cheque books with which the respondent (T.N. Mahajan) firm had an account.

Despite objection by the defendant, the trial court by its order dated 11 January, 1967, directed their production on 30 January, 1967 holding that they were relevant for the determination of the controversy between the parties.

On 30 January, 1967, when the suit came up for hearing, the court adjourned the suit to 7 February, 1967, for production of the documents. In compliance with the court's order, on 7 February, 1967, the defendant produced all the documents in his possession viz., account books for the years 1959-60 to 1965-65 but he was permitted by the trial court to' take back the account books as they were required to be produced before the Income Tax officer, Yamunanagar on that day, with the direction that he should produce the same on '23 February, 1967. On 23 February, 1967 the defendant appeared in the court with his books but the trial judge directed him to produce them on 16 March, 1967 and in the meanwhile allow their inspection to the plaintiff with three days' notice. The defendant accordingly sent a letter dated 25 February, 1967 asking the plaintiff to take inspection of the account books on 27 February, 1967. On 28 February, 1967, the plaintiff made an application that the defendant had not produced the documents for inspection but this was apparently wrong, as is evident from the registered notice dated 1 March, 1967, sent by the defendant to the following effect:

"After the last date of hearing on 23.2.1967 I wrote you a letter from Yamuna Nagar on 25.2.1967 informing you that I shall be present in the office of my counsel Sh. H. L. Soni on 27th February, 1967 at 6 p.m. for affording you the inspection of the documents. I reached at my counsel's office at the scheduled informed time but you did not turn up. I

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kept waiting for you uptil 8.30 p.m. On that day. Later A I contacted your lawyer Shri S. R. Wadhera but he expressed his inability to contact you.

Now I would be reaching Ludhiana again on the 9th March, 1967 and shall be available in my lawyer's Shri H. L. Soni's office from 7 p.m. to 9 p.m. and you will be free to inspect the documents at the afore-mentioned venue and during the above-noted time.

Three days' clear notice is being given to you. Please be noted to this effect "

Admittedly, the plaintiff never sent any reply to the notice. Nor did he avail of the opportunity of inspecting the account books at the office of the defendant's lawyer on 9 March, 1967.

On 16 March, 1967 the trial court passed an order saying that the defendant should produce the books within four days in the court to enable the plaintiff's counsel to inspect them before 29 March, 1967 i.e.. the date fixed for evidence, failing which the defence of the defendant would be struck off. On 29 March, 1967 three witnesses of the plaintiff were examined. After the examination of these witnesses, the trial court asked the plaintiff's counsel that he should apply under order XI, rule 21 to strike out the defence of the defendant. On 31 March, 1967, the plaintiff accordingly made an application under C'order XI, rule 21 read with section 151 of the Code asserting that the defendant had failed to comply with the order of the court as regards production of documents inasmuch as he had not produced them for inspection.

The defendant opposed the application stating, that there was no failure on his part to produce the documents ordered. It was stated that all the documents as were capable of identification had been produced in the court. It was alleged that the plaintiff had already inspected the documents that were specifically set out in the application. It was also alleged that the plaintiff had not once but thrice or even four times inspected the documents to his entire satisfaction except that he was prevented from making fishing, roving and searching enquiries into the entries which had no relevance to the suit transaction. It was, therefore, urged that the striking out of the defence would not he warranted by law.

Feeling apprehensive that he would not get a fair trial at the hands of the trial Judge, the defendant applied to the District Judge, Ludhiana for the transfer of the suit on 10 April, 1967. While the District Judge was seized of the transfer application, the defendant moved the
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High Court for transfer of the suit to some other court of competent jurisdiction. The High Court by its order dated 15 May, 1967 declined to interfere.

On 23 May, 1967, the trial court passed an order under order XI, rule 21 striking out the defence of the defendant stating that he was placed in the same position as if he had not defended the suit and adjourned the suit to 21 June, 1967, for examination of the remaining witnesses of the plaintiff. On 21 June, 1967, the court did not allow the defendant's counsel to cross-examine plaintiff's witnesses holding that in view of the fact that his defence has been struck off, he had no right to participate and, therefore, could not cross-examine the witnesses produced in the court. The defendant filed a revision before the High Court which was rejected on 14 August, 1968.

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 are of order XI, rule 21 the defendant cannot be permitted to cross examine the plaintiff's witnesses.

It is a travesty of justice that the trial court should have, in the facts and circumstances of the case, passed an order striking out the defence of the defendant under order XI, rule ''1 and that the High Court should have declined to set it aside. The penalty imposed by order XI. rule 21 is of 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.

Order XI, rule 21 of the Code of Civil Procedure reads:

"21. Where any party fails to comply with any order to answer interrogatories, or for discovery of 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 accordingly."

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 Judi-

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cature Act. The practice of the English Courts is, and it has always A been, to make the order a conditional one, and to grant a little further time for compliance. In practice this provision is virtually obsolete(l).

Even assuming that in certain circumstances the provisions of order Xl, 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 XT, 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.(2) 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.

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.

An order striking out the defence under order XI, rule 21 of the Code should, therefore, not be made unless there has been obstinacy or contumacy on the part of the defendant or wilful attempt to disregard the order of the court. The rule must be worked with caution, and may be made use of as a last resort: Mulla's C.P.C. 13th Ed. Vol. I, p. 581, Khajah Assenoolla Joo v. Khajah Abdool Aziz(3), Banshi Singh v. Palit Singh(4), Allahabad Bank Ltd. v. Ganpat Rai(5), Haigh v. Haigh(6) and Twycroft v. Grant(7).

(1) Halsbury's Laws of England, 4th Ed., Vol. 13. p. 32.
(2) (1883) WN 58.
(3) I.L.R. 9 Cal. 923.
(4) 7 C.L.J. 29S.
(5) I.L.R. 11 Lah. 209.
(6) L.R. (1886) Ch. D. 478.
(7) 1875 W.N. 201.

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In Haigh v Haigh (supra) Pearson J. observed:

"I have no hesitation in saying that I have the strongest disinclination, as I believe every other Judge has, that any case should be decided otherwise than upon its merits. But this order was introduced to prevent plaintiffs and defendants from delaying causes by their negligence or willfulness. So great was my anxiety to relieve this lady from the consequence of her wrong headedness if, by any possibility, I could on proper terms, that I hesitated to refuse to make the order asked for, and I have looked into all the cases I could find on the subject to see that the practice of the Court has been on this order. And I can find no case in the books where it has been applied, where a man knowingly and wilfully has allowed judgment to go by default."

In Twycroft v. Grant (supra) Lush J. interpreting corresponding order XXXI, rule 20 of the Judicature Act, held that he would only exercise the powers conferred by the rule in the last resort. In England, the party against whom such an order is made would, it seems, be entitled to come in and ask that the order might be set aside on showing sufficient grounds for such an application.

In Khajah Assenoolla Joo v. Khajah Abdool Aziz (supra), Pigot J. therefore made an order striking out the defence of the defendant under section 136 of the C.P.C. 1882 in consequence of non-compliance with the earlier order for production of certain documents, and at the same time mentioned that the party against whom the order was made might come in and seek to set it aside on showing sufficient grounds for the application.

It is settled law that the provisions of order XI, rule 21, should be applied only in extreme cases where obstinacy or contumacy on the part of the defendant or a wilful attempt to disregard the order of the court is established. As pointed out by Lord Russel C.J. in Reg. v. Senior (1) and affirmed by Cave L. C. in Tamboli v. G.l.P. Rail way(2), "wilfully" means that:

"the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it."

In this case, there was no default, much less any wilful default, on the part of the defendant, to comply with any order of the court under order XI, rule 18(2). In obedience of the order of the court dated

(1) [1899] (1) Q.B.D. 283.

(2) I.L.R. 52 Bom. 169 (P.C.).

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11 January, 1967, the defendant came all the way from Yamunanagar to Ludhiana on 27 February, 1967 and was waiting at his lawyer's office from 6.00 p.m. to 8.30 p.m. when the plaintiff or his counsel did not turn up. Thereafter the defendant sent a registered notice dated I March, 1967 offering inspection of the documents at his lawyer's office on 9 March, 1967, but the plaintiff did not avail of the opportunity of inspecting the documents. The defendant had filed an affidavit that the rest of the documents were not in his possession and could not be produced. The account books for the years 1961.. 62, 1962-63 and 1963-64 had to be produced by the defendant before the Income Tax officer, Yamunanagar on 31 January, 1967, then 7 February, 1967 and 16 March, 1967. An affidavit to this effect was also filed. It is somewhat strange that the trial court should have fixed the dates which were the dates fixed by the Income Tax officer

In view of the notice dated 1 March, 1967, there can be no doubt that the defendant had tried to comply with the order of the court by offering inspection on 27 February, 1967. There is no dispute that 27 February, 1967 was the date mutually agreed upon between the counsel for the parties. The only controversy is about the scheduled time. The time fixed according to the plaintiff's application dated 28 February, 1967 was 2.30 p.m. at his lawyer's office while that according to the defendant's notice dated 1 March, 1967 it was 6.3() p.m. in his lawyer's office. The plaintiff has not examined his counsel, S.R. Wadhera, nor is there any affidavit by Wadhera. From the material on record it is amply clear that the appointed scheduled time and place for inspection of the defendant's account books was 6.30 p.m. at his lawyer's office. The plaintiff was afforded another opportunity of inspection of the account books on 9 March, 1967 at the office of the defendant's lawyer from 7.0 p.m. to 9.0 p.m. In the circumstances, the trial court was not justified in holding that there WAS any non-compliance of its order under order XI, rule 18(2).

It is common ground that the account books for the years 195960 and 1960-61 were Lying in court. The suit transactions are of the year 1959. Nothing prevented the plaintiff from inspecting these books. As regards the account books for the years 1961-62 to 1964-65, they were required to be produced before the Income Tax Authorities at Yamunanagar on 20 March, 1967 and - on subsequent dates. It is not clear what relevance these books could have to the controversy between the parties unless the plaintiff wanted to find some entries to show that there was carry forward of the entries relating to the suit transaction in the account books for the years 1959-60 to the subsequent years So as to bring his claim within time. Apparently, there were no such entries in the account books for the years 1959-60
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and 1960-61. As regards the bank pass book of the defendant's account with the Punjab National Bank Ltd., for the period 1 April, 1962 to 31 March, 1963 and 1 April, 1963 to 31 March, 1964 and the counterfoil of cheque No. 01194 dated 7 March, 1963, alleged to be drawn by the defendant in plaintiff's favour, the defendant has sworn an affidavit that he had no account with Punjab National Bank Ltd., Yamunanagar during that period nor he had issued any such cheque as alleged. In view of this, the order of the trial court dated 23 May, 1967, striking out the defence of the defendant was wholly unjustified .

The principle governing the court's exercise of its discretion under Order XI, rule 21, as already stated, is that it is only when the default is wilful and as a last resort that the court should dismiss the suit or strike out the defence, when the party is guilty of such contumacious conduct or there is a wilful attempt to disregard the order of the court that the trial of the suit is arrested. Applying this test, it is quite clear that there was no wilful default on the part of the defendant of the courts order under order XI, rule 18(2) for the production of documents for inspection, and consequently, the order passed by the trial court on 23 May, 1967, striking out the defence of the defendant must be vacated, and the trial must proceed afresh from the stage where the defendant was not permitted to participate.

It was further contended that the High Court was in error in observing that 'in view of the clear language of order X[, rule 21' the defendant has no right to cross-examine the plaintiff's witness. A persual of order XI, rule

,?1 shows that where a defence is to be struck off in the circumstances mentioned therein, the order would be that the defendant 'be placed in the same position as if he has not defended'. This indicates that once the defence is struck of under Order XI, rule 21, the position would be as if the defendant had not defendant and accordingly the suit would proceed ex-parte. In Sangram Singh v. Election Tribunal(l) it was held that if the court proceeds ex-parte against the defendant under order IX, rule 6(a), the defendant is still entitled to cross-examine the witnesses examined by the plaintiff. If the plaintiff makes out a prima facie case the court may pass a decree for the plaintiff. If the plaintiff fails to make out a prima facie case, the court may dismiss the plaintiff s suit. Every Judge in dealing with an ex-parte case has to take care that the plaintiff's case is, at least, prima facie proved. But, as we set aside the order under order XI, rule 21, this contention does not survive for our consideration. We, therefore, refrain from expressing any opinion on the question.

(1) [1955] (2) S.C.R. 1.

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For the reasons given, the order passed by the trial court dated A 23 May, 1967 striking out the defence of the defendant under order XI, rule read with section 151 of the C.P.C., and its subsequent order dated 21 July, 1967 are both set aside and it is directed to proceed with the trial according to law. There shall be no order as to costs.

S.R. Appeal allowed.

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