

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

LYALLPUR SUGAR MILLS CO., LD. AND ANOTHER (DEFENDANTS) v.
RAM CHANDRA GUR SAHAI COTTON MILLS CO., LD. (PLAINTIFFS).*

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April, 5.

Civil Procedure Code (1908), order XI, rules 14, 18 and 21—Order on defendant for production of documents—Order not complied with—Defence struck out.

Non-compliance with an order served on a defendant for the production only of documents under rule 14 of order XI of the Code of Civil Procedure does not warrant the striking out of the defence. It is only in case of the refusal to answer interrogatories, the refusal to make discovery of documents, or the refusal to permit inspection of documents that a trial court is justified in striking off the defence of a defendant or in dismissing the suit of a plaintiff.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Mr. *B. E. O'Connor*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—There are three connected appeals before us today pending between the same parties, namely, Nos. 319 and 186 of 1919 and one other appeal from order which has been admitted by us today but which has not been numbered by the office. This last appeal which we have admitted and No. 186 of 1919 are appeals from orders. The appeal No. 319 of 1919 is a regular first appeal from an *ex parte* decree.

The facts which have given rise to the three appeals are as follows:—The parties to the three appeals are the Ramchandra Gur Sahai Cotton Mills Co., Ltd., as plaintiffs, and the Lyallpur Sugar Mills Co., Ltd., through their manager, L. Jai Ram Das, and the Cotton Ginning Factory at Lyallpur through their proprietors L. Mathura Das and Thakur Das, as defendants.

The plaintiff company sued for the recovery of Rs. 32,759-8 as damages, on the allegation that the defendants had promised to supply the plaintiff firm with 320 bales of Lyallpur cotton at Rs. 45-8 per maund, to be delivered at Lucknow in the months of November and December, 1917 and in the month of January, 1918. The contract was entered into at Cawnpore on the 14th of November, 1917. The defendant failed to deliver the goods at

* First Appeal No. 186 of 1919, from an order of Muhammad Husain, Additional Subordinate Judge of Cawnpore, dated the 20th of August, 1919.

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the specified time. The plaintiff firm had to go into the market and purchase the bales of cotton that were required, and as in the meantime the price of the bales of cotton had gone up, the plaintiff firm suffered a loss of Rs. 32,759-8.

The suit out of which these appeals have arisen was instituted in the court of the Additional Subordinate Judge of Cawnpore, on the 12th of August, 1918, presumably because the contract was entered into at Cawnpore and because Jai Ram Das, defendant No. 1, lives at Cawnpore and carries on his business there. Jai Ram Das purchases sugar from Messrs Begg Sutherland & Co., Cawnpore, and carries on the business of selling sugar at Lyallpur. Thakur Das and Mathura Das admittedly live at Lyallpur, where they have got a cotton ginning factory. The suit was resisted on various grounds. The issues were fixed by the learned Additional Subordinate Judge on the 23rd of October, 1918. On the 23rd of November, 1918, the plaintiff firm made an application purporting to be under order XI, rule 14. By the said application the plaintiff firm asked the court to require the defendants to produce in court certain books and other documents which were detailed in the application. On the 29th of November, 1918, the learned Subordinate Judge made an order to the effect that notice should be issued. On the 13th of January, 1919, a notice on the said application was issued and was served upon the pleader for the defendants. The notice was in the form No. 6, given in appendix C to the Code of Civil Procedure. As the notice was not complied with, a second application was made on behalf of the plaintiff firm on the 4th of April, 1919. The pleader for the defendant No. 1 stated to the court that the papers called for by the court would be produced if all or any of them were found in the possession of Jai Ram Das. No papers seem to have been filed. On the 24th of April, 1919, a third application was made on behalf of the plaintiff firm to the same effect. A notice was issued, which was affixed to the gate of the house of Jai Ram Das, as the latter was not found at home. This application also proved infructuous. On the 2nd of June, 1919, a fourth application was made on behalf of the plaintiff firm to the same effect. The learned Subordinate Judge allowed the defendant No. 1 ten days

within which to produce the documents called for. The order was not complied with. On the 28th of July, 1919, the plaintiff filed an application purporting to be under order XI, rule 15. The learned Subordinate Judge directed that notice should issue. The notice was served upon the pleader for defendant No. 1 on the 4th of August, 1919. The case came up for hearing on the 12th of August, 1919, and the plaintiff firm applied to the court for an order striking off the defence of the two defendants. The learned Subordinate Judge put off the case to the 15th of August, 1919, directing the production of the books and the documents called for from Jai Ram Das. On the 15th of August, 1919, Jai Ram Das filed an application stating that he had the books with him in court and implying that he had brought them also into court before, but stating that none of the books or documents was in any way relevant to the dispute between him and the plaintiff firm. He, however, offered to make over the books to the court and allow their inspection. This offer was not accepted by the plaintiff firm, which insisted upon its prayer to the court to strike off the defence, and the learned Subordinate Judge acceded to the request of the plaintiff firm.

So far we have recited the facts that led to the striking off of the defence of Jai Ram Das. The facts relating to the striking off of the defence of Mathura Das and Thakur Das are somewhat different. On the 24th of April, 1919, interrogatories were filed on behalf of the plaintiff with a request that they should be served upon Mathura Das and Jai Ram Das for replies. The interrogatories for Mathura Das were served upon his pleader. Jai Ram Das made replies to the interrogatories that were served upon him and they were filed on the 23rd of May, 1919. No replies were received from Mathura Das. The plaintiff firm again applied to the court to compel Mathura Das to file answers to the interrogatories. The pleader for Mathura Das stated that there was martial law at Lyallpur and he could not get into touch with his client. On the 17th of June, 1919, the learned Subordinate Judge made an order that the replies to the interrogatories should be filed in court within ten days after the termination of the martial law at Lyallpur. On the

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28th of July, 1919, no replies having been received, the plaintiff firm asked the trial court to strike off the defence of Mathura Das. The pleader who was appearing for him stated that though martial law had been withdrawn, yet the whereabouts of his client were not known. He had made all attempts to get into communication with him but had failed. Thereupon the case was put off to the 12th of August, 1919. On the 12th of August, 1919, the pleader for Mathura Das stated that he had received a wire from his client that he (Mathura Das) was suffering from fever and could not reach Cawnpore in time. The pleader asked for an adjournment, which request was rejected. The defence of Mathura Das was thereupon struck off on the 12th of August, 1919. In respect of the application against Jai Ram Das, referred to above, the learned Subordinate Judge, according to the learned counsel for Jai Ram Das who appears before us, made an oral order on the 13th of August, 1919, striking off the defence of Jai Ram Das also. The written order was, however, made on the 28th of August, 1919. The statement of the learned counsel for Jai Ram Das that the defence of his client was struck off really on the 15th of August, 1919, is borne out by the fact that the claim of the plaintiff firm was tried on the 16th of August, 1919, *ex parte*. The suit was tried on the 16th of August, 1919, and decreed *ex parte* the same day.

Jai Ram Das and Mathura Das have preferred two separate appeals from the orders striking off their defence. The appeal of Jai Ram Das is No. 186 of 1919 and the other appeal is the one that has not yet been numbered. The third appeal, *i. e.*, the one from the *ex parte* decree, No. 319 of 1919, is jointly by Jai Ram Das and Mathura Das. They contend that the orders of the learned Subordinate Judge striking off their defences are invalid in law and, in any case, were passed without the exercise of proper discretion.

We will take up the case of Jai Ram Das first. There is no doubt that several attempts were made by the plaintiff firm to compel Jai Ram Das to produce in court certain documents. All the applications on behalf of the plaintiff firm, except the last one, dated the 28th of July, 1919, were applications under

order XI, rule 14. They were merely for the production of documents in court. At the first blush it does appear that the conduct of Jai Ram Das was contumacious, but we find that there is evidence on the record to show that as early as the 31st of May, 1919, in answer to the interrogatories served upon him by the plaintiff firm he had stated distinctly that the documents that were called for from him were not in his possession. But if it be conceded for the sake of argument for a moment that Jai Ram Das was guilty of disobedience of the order of the court, was the court justified in striking off his defence? The order of the court to Jai Ram Das to produce the books was an order made under order XI, rule 14. The non-compliance with that order does not warrant the striking off of the defence of the party which is guilty of the non-compliance of the order. The grounds upon which the discretion is given to a trial court for striking off the defence of a defendant are given in rule 21 of order XI of the Code of Civil Procedure. According to the said rule, there are three grounds only upon which a trial court is justified in striking off the defence of a defendant or dismissing the suit of a plaintiff, namely, (1) the refusal to answer interrogatories, (2) the refusal to make discovery of documents, (3) refusal to permit inspection of documents. Now, rule 14 of order XI of the Code of Civil Procedure does not relate either to the answering of interrogatories or the discovery or inspection of documents. The rule relating to discovery is embodied in rule 12 of order XI and the rule relating to the inspection of documents is to be found in rule 18 of the same order. In the present case the learned Subordinate Judge made no order either under rule 12 or rule 18 of order XI of the Code of Civil Procedure. It is, however, contended on behalf of the plaintiff firm that the notice which was issued to Jai Ram Das was one that required inspection of documents called for from him. The form of notice to be issued under order XI, rule 14, is given in Appendix C, form No. 6. The notice that was issued in the present case does not comply with the form given in Appendix C. The said form begins thus :—

“ Upon hearing . . . and upon reading the affidavit of
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In the present case no affidavit was filed on behalf of the plaintiff, stating the reasons for which the books were summoned from Jai Ram Das or showing in what manner they were relevant to the dispute between the parties. It is, however, contended that when a set form is given by the Legislature for the issue of notice and that form is complied with, the notice, if not bad, would entail the penalty exacted by the trial court from Jai Ram Das. The argument may be called a technical argument. The obvious reply, a technical one also, is that the notice which we find on the record is not strictly in accordance with form No. 6. As we find that the learned Subordinate Judge had made no order for the inspection of documents, and indeed he could not have made one as the provisions of rule 18 of order XI had not been complied with, the non-compliance with the order to produce books or documents in court did not justify the trial court to strike off the defence of Jai Ram Das.

Now we take up the case of Mathura Das. The interrogatories were served upon his pleader. There is no material on the record to show whether the pleader sent those interrogatories to Mathura Das. It may, however, be said that if they were not sent, that was the fault of the pleader, and the omission by the pleader would in no way affect the right of the plaintiff to demand the court below to enforce the provisions of rule 21, order XI, against Mathura Das. However that may be, it is in evidence that Lyallpur was under martial law up to somewhere in the beginning of July, 1919. Subsequent to the date, the pleader for Mathura Das lost touch with him and could not get into communication with him. On the 12th of August, 1919, before the order for striking off the defence of Mathura Das was made, his pleader requested the court to allow a few days to enable his client to come up to Cawnpore, on the ground that his client had been ill with fever. The statement of the pleader may or may not have been correct, but we think that under the circumstances of the conditions of life in the Punjab at that time, the learned Subordinate Judge would have exercised a wiser discretion in allowing a few days' adjournment to Mathura Das. Moreover, if the case has to go back for the admission of the defence of Jai Ram Das, the trial would be quite incomplete

if the defence of Mathura Das is kept out. We, therefore, allow both the appeals of Jai Ram Das and Mathura Das and set aside the orders of the learned Subordinate Judge, dated the 12th of August and the 28th of August, 1919, respectively, striking off the defence of Jai Ram Das and Mathura Das. The result, therefore, is that we set aside the *ex parte* decree in the connected appeal No. 319 of 1919 and also direct that the case be restored to the file of the court below, defences from Jai Ram Das and Mathura Das received, and the case tried according to law. As to costs, we direct that they should be costs in the cause.

Appeals allowed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

BASDEO RAI AND ANOTHER (DEFENDANTS) v. JHAGRU RAI (PLAINTIFF.) *

Pre-emption—Pleadings—Suit based on custom dismissed on finding of want of proof—Case of contract set up in appeal—Remand—Form of order.

In a suit for pre-emption based on an alleged custom the court of first instance found that the custom was not proved, and accordingly dismissed the suit. On appeal the plaintiff raised an oral plea that the village papers afforded evidence of a subsisting contract which would support a decree in the plaintiff's favour. With reference to this plea the lower appellate court set aside the decree of the first court and remanded the case for trial on the merits.

Held, that the proper course for the lower appellate court was to remand the case with permission to the plaintiff to amend his plaint, basing his case on the ground of contract, the defendants being allowed to put in their defence to the new plea and to produce evidence, if necessary. *Ram Gharib Tewari v. Shankar Tewari* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Piari Lal Banerji, for the appellants.

The respondent was not represented.

RAFIQ and PIGGOTT, JJ.:—This appeal is from an order of remand made by the lower appellate court under order XLI, rule 23. It appears that Munna Rai executed a deed of sale in favour of Basdeo Rai and Sat Narain Rai in respect of certain immovable

* First Appeal No. 212 of 1921, from an order of Piari Lal Rastogi, Additional Subordinate Judge of Basti, dated the 2nd of June, 1921.

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