

**Present:**

**Mr. Justice Md. Salim**

**CIVIL REVISION NO.3567 OF 2023**

Dr. Rajib Kumar Goswami and another

..... Petitioners

Versus

Md. Al Mamun Kha

..... Opposite party

Mr. S.N. Goswami, Advocate with

Ms. Afsana Begum, Advocate

..... For the petitioners

None appeared

For the opposite party

**Heard on 23.01.2025 and 30.01.2025**

**Judgment on 30.01.2025**

By this Rule, the opposite parties were called upon to show cause as to why the Judgment and order dated 06.07.2023 passed by the learned Senior District Judge, Naogaon in Miscellaneous Appeal No.27 of 2023 affirming the order dated 28.02.2023 passed by the learned Senior Assistant Judge, Manda, Naogaon in Title Suit No.29 of 2021 (O.C.) rejecting an application under Order XI Rule 21

of the Code of Civil Procedure filed by the plaintiffs should not be set aside and/or pass such other or further order or orders as to this Court may seem fit and proper.

Short facts leading to disposal of the Rule is that the petitioners as plaintiffs instituted the title suit No. 29 of 2021(O.C) before the Senior Assistant Judge, Naogaon, praying for a decree for a mandatory injunction on the averments that on 03.02.2021 corresponding to 20 Magh 1427 B.S. the defendant with the help of some unknown musleman made an attempt to dig pond in the cultivable paddy land of the plaintiffs and others but failed to the resistance of the bargaders of the plaintiffs and local people. The defendant, being annoyed, threatened them they would continue to dig the pond in the 'Kha' scheduled land. If a pond is dug out, the cultivable lands of the plaintiffs and others will be damaged, hence the suit.

The defendant entered his appearance and contested the suit, filing a written statement denying the material allegations made in the plaint and contested that the 'Kha' schedule land belonged to Sharat Chandra and, while in

possession, died, leaving only son Ashit Chandra Sanyal who sold the said land in favor of the defendant by a registered sale deed No.7477 dated 23.8.2017 and handed over possession in his favor. As the surrounding lands are a wasteland, the defendant, with the A.C. (Land) 's permission, attempted to dig out a pond in the "Kha" scheduled land as described in the plaint. But the plaintiffs, residents of Dhaka City having no accurate picture, have instituted the instant suit with the ill instructions of some local people who prayed for dismissal of the suit.

During the pendency of the suit, the plaintiffs filed an application to the trial court, stating that while filing the written statements, the defendant did not produce the relevant document as required under the provisions of Order VIII Rule 1(2) of the Code of Civil Procedure.

Consequently, the plaintiffs filed an application on 25.09.2022 under Order XI Rule 14, read with Section 151 of the Code of Civil Procedure, before the trial Court praying for a direction upon the defendant to produce the

documents in support of the statements made in paragraph No.5 of the written statement upon which the trial Court by an order directed the defendant to produce those documents as mentioned in paragraph No.5 of the written statements on or before 02.11.2022, but the defendant failed to comply with and the trial Court again directed to the same effect to produce on or before 30.11.2022. As the defendant, this time too, could not produce those documents, the plaintiffs, on 12.02.2023, filed an application under Order XI Rule 21 of the Code of Civil Procedure, praying to be struck out the written statements. After the hearing, the trial Court rejected the said application by its order dated 28.02.2023.

Being aggrieved, the plaintiffs then preferred Miscellaneous Appeal No.27 of 2023 before the learned District Judge, Naogaon. Eventually, the learned Senior District Judge, Naogaon, disallowed the appeal in affirming those passed by the trial Court by the Judgment and order dated 06.07.2023.

Being aggrieved, the plaintiffs, as petitioners, preferred this Civil Revision before this Court under section 115(1) of the Code of Civil Procedure and obtained the Rule.

Mr. S. N. Goswami, the learned Advocate appearing on behalf of the plaintiffs-petitioners, submits that the plaintiffs applied to the trial court, stating that while filing the written statements, the defendant did not produce the relevant document as required under the provisions of Order VIII Rule 1(2) of the Code of Civil Procedure upon which the trial Court by directed the defendant to produce those documents as mentioned in paragraph No.5 of the written statements on or before 02.11.2022 but the defendant failed to comply with and the trial Court again directed to the same effect to produce on or before 30.11.2022. As the defendant, this time too, could not produce those documents, the plaintiffs, on 12.02.2023, filed an application under Order XI Rule 21 of the Code of Civil Procedure, praying to be struck out the written statements rather, both the Courts below committed an error of law in their decisions causing failure of justice. In

support of his contention, the learned Advocate cited the decision in the case of Yusuf Vs. Mafzal Ahmed Swadagar reported in 45 DLR (AD) 178.

None appeared for the defendant-opposite party.

I have very meticulously perused the Civil Revision application, impugned orders, and supplementary affidavit and heard the learned Advocate for the petitioners.

The moot question of the case in hand is whether the documents referred to in the written statements need to be filed is directory or mandatory, as provided in Order VIII Rule 1(2) of the Code of Civil Procedure. In order to substantiate the submission advanced by the Bar, the relevant law may be quoted as below:--

"Order VIII Rule 1(2):

"Where the defendant relies upon the documents in his possession or power as evidence in support of his defence or claim of set off, he **shall** produce them in Court when the written statement is presented and **shall** at the same

time deliver the documents to be filed with the written statements."

It manifests that the legislature has purposely inserted the word "shall" in the provision for filing the documents along with the written statements at the time of its presentation. This means that the defendant is bound to produce the documents along with the written statements, which clearly indicates that they are mandatory in nature; otherwise, the whole purpose of the word "shall" will be nugatory. The purpose of filing the documents along with the written statement is for the plaintiffs' examination. In the case at hand, it further appears that the defendant did not file the documents referred to therein at the time of presentation of the written statements, which amounts to a clear violation of mandatory provisions of Order VIII Rule 1(2) of the Code.

It is revealed from the record that as the defendant did not file the documents along with the written statement, a mandatory provision, the plaintiff, on 25.09.2022, filed an application under Order XI Rule 14 of

the Code of Civil Procedure for the production of the documents as referred to the written statements. The trial Court, upon hearing allowing the application, directed the defendant to produce the documents as mentioned in the written statements on or before 02.11.2022, but the defendant failed to comply with the order, and the trial Court again directed to the same effect to produce the required documents on or before 30.11.2022. Rather, this time, too, the defendant failed to comply with the Court's order intentionally. The defendant's demeanor clearly shows that he had avoided producing the documents in violation of the Court's lawful orders.

Finally, the plaintiffs filed an application on 12.02.2023 under Order XI Rule 21 of the Code of Civil Procedure, praying to be strike out the written statements filed by the defendant as he failed to comply with the orders of the Court. The learned Judge of the trial Court rejected the application by the order dated 28.02.2023, and on appeal, the learned Senior District Judge disallowed the appeal, affirming the rejection order passed by the trial Court.



For ready reference, I thus feel it expedient to reproduce Order XI Rule 21 of the Code read as under:--

"Non-compliance with order. 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 had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, an order may be made accordingly."

The case at hand manifests that the defendant failed to comply with the order twice, which was passed by the trial court directing him to produce the documents mentioned in the written statements. Consequently, the plaintiffs filed the application under Order XI Rule 21 of the Code of Civil Procedure to be strike out the written statements filed by the defendant.

I have gone through the case of Yusuf Vs. Mofzal Ahmed Swadagar case(Supra), their Lordship of the Appellate Division says that:-----

The foundation for the exercise of the power under this rule is the fulfilment of the two requirements of rule 21 of Order 11 of the Code. The first is the failure of the interrogated party to comply with any order to answer the interrogatory, and the second is the interrogating party applying to the court to impose the penalty.

By contrast, on going through impugned Judgment and order, it reveals that in the instant case, the plaintiffs-petitioners filed applications twice, and the trial Court also directed the defendant twice to produce the documents as referred to in the written statements. But the defendant willfully failed to comply with the orders of the Court, and thus, the written statements presented by him are liable to be struck off. However, it appears to me that both the Courts below failed to appreciate the case properly and

rejected the petitioners' application filed under Order XI Rule 21 of the Code to be strike out the written statement, so their decision occasioned a failure of justice.

Regard being had to the above facts and circumstances, I find substance in this Rule.

As a result, the Rule is made absolute but without any order as to costs. The impugned orders passed by both the Courts below are hereby set aside. ,

Let the written statements presented by the defendant are to be struck off.

The order of stay granted earlier is hereby vacated.

Communicate the Judgment at once to both the Courts below.

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**(Md. Salim, J)**