

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR No.399 of 2017

Date of decision: 20.01.2017

Babu Lal through next friend Punit Kumar

..Petitioner

Versus

Sodagarmal (since deceased) through L.Rs.

..Respondents

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present: Mr. P.R. Yadav, Advocate
for the petitioner.

Daya Chaudhary, J.

The petitioner has approached this Court by way of filing the present revision petition under Article 227 of the Constitution of India for setting aside order dated 13.12.2016 (Annexure P-1) to the extent “it is made clear that in case cost is not paid on the next date of hearing this application shall be deemed to have been dismissed” and consequently setting aside order dated 15.12.2016 (Annexure P-2) passed by Additional Civil Judge (Senior Division), Rewari, whereby, the application for additional evidence has been dismissed for non-payment of cost of ₹2000/-

Briefly the facts of the case as made out by the petitioner in the present revision petition are that the plaintiff is an insane person for the last about 17 years. There is a joint Haveli of the parties in Rewari in Mohalla Meharwara bearing House No.491. When the defendant tried to dispossess the plaintiff from the disputed land then the suit for declaration was filed by the plaintiff through his next friend i.e., his son, namely, Punit Kumar as

other family members were shunted out from the joint Haveli and they were residing in a rented accommodation in some other house. An application for leading additional evidence in the shape of medical record of the plaintiff was moved regarding his insanity, which was allowed by the trial Court vide order dated 13.12.2016 subject to payment of costs of ₹2000/-. It was mentioned in the said order that in case, the amount of costs was not paid on the next date of hearing i.e., 15.12.2016, the application shall be deemed to have been dismissed. The said amount of ₹2000/- could not be arranged by the next friend of the plaintiff due to cash crunch in the nation due to demonetization and application for additional evidence was dismissed vide order dated 15.12.2016. The petitioner has approached this Court for setting aside the condition that in case, the amount of costs is not paid then the application shall be deemed to have been dismissed.

Learned counsel for the petitioner submits that only two days time was given to the next friend of the plaintiff and money could not be arranged on the next date of hearing because of shortage of cash in the Banks. Learned counsel further submits that the plaintiff through his next friend wanted to bring on record the medical evidence for proving his insanity. In case, the said condition is not set-aside, the plaintiff would suffer an irreparable loss and injury. The case is pending for rebuttal evidence. At the end, learned counsel for the petitioner submits that the application for additional evidence has been dismissed for non-payment of costs of ₹2000/- whereas the medical evidence is necessary to be adduced. Learned counsel for the petitioner prays that the condition for payment of costs of ₹2000/- and order of dismissal of application for non-payment of

costs be set-aside.

Heard arguments of learned counsel for the petitioner and have also perused the impugned orders dated 13.12.2016 (Annexure P-1) and 15.12.2016 (Annexure P-2) as well as other documents available on the file.

The facts relating to filing of suit and moving of application for additional evidence are not disputed. It is also not disputed that the application for additional evidence was dismissed on the ground of non-payment of costs of ₹2000/-.

It is the argument of learned counsel for the petitioner that the plaintiff is an insane person and cannot understand his right and wrong. By way of filing application for additional evidence, the plaintiff wants to produce the medical record with regard to his insanity as the same could not be produced at the time of evidence of the plaintiff despite due diligence, which was allowed subject to payment of costs of ₹2000/-. When the cost amount was not paid, the application was dismissed on 15.12.2016. The case is still fixed for rebuttal evidence.

The Full Bench of this Court in ***Shri Anand Parkash vs. Shri Bharat Bhushan Rai and another, 1982(1) RCR (Rent) 1 (P&H)***, has laid down that in the event of the party failing to pay the costs on the date next following the date of the order imposing costs, it is mandatory on the Court to disallow the defence. The observation made therein is reproduced as under: -

“In accordance with the majority decision it is held that in the event of the party failing to pay the costs on the next following the date of the order imposition costs, it is mandatory on the Court to disallow the

prosecution of the suit or the defence, as the case may be and that no other extraneous consideration would weigh with the court in exercising its jurisdiction against the delinquent party. However, where the costs are not paid as a result of the circumstances beyond the control of the defaulting party, then the Court will be within its jurisdiction to exercise its power under Section 148 of the Code in favour of the defaulting party is a strong case is made out for the exercise of such jurisdiction.”

The principle laid down in the Full Bench judgment is also applied to the facts and circumstances of the case. However, the Court has power for granting relaxation if, non-payment of costs are due to circumstances beyond the control of the defaulting party.

A Full Bench judgment of the Delhi High Court in ***M/s Panchseel Electronic Corporation, Sonapat vs. Jupiter General Insurance Co. Limited, Bombay, 1975 PLR (Delhi Section) 66*** is also there regarding non-payment of costs amount. In that case, a period of 1411 days was spent in pursuing the application. Request for extension of time was sought by filing an application under Section 148 read with Section 151 CPC for filing written statement and payment of costs of ₹3000/-. It was found that the delay occurred due to *bonafide* reasons and same was condoned.

It has been held by this Court in ***Sohal Lal Jhanji and another vs. Rekha Jhanji Brar and others, 2014(2) RCR (Civil) 675*** that once the amendment has been allowed merely on technicalities viz. delay, non-payment of costs, the substantive rights of the petitioners, cannot be curtailed. The relevant portion as mentioned in para No.6 of the judgment is

reproduced as under: -

“Once the amendment has been allowed merely on technicalities viz. delay, non-payment of costs, the substantive rights of the petitioners cannot be curtailed. It is worthwhile to mention here that vide receipt No.65 dated 20.05.2010 (Annexure P-9), costs have already been paid. Only amended plaint is required to be placed on record. No prejudice is likely to be caused to respondent no.1, as at the most, the resultant delay in disposal of suit will effect the petitioners-plaintiffs. Otherwise also, the impugned order is perverse, because the suit could not have been dismissed even if amended plaint was not placed on record it should have proceeded on the original plaint. Keeping in view the above and in the interest of justice, this court deems it fit and appropriate that it would be proper to grant one effective opportunity to the petitioners to place on record the amended plaint, subject to costs of Rs. 10,000/- (Rs. 8,000/- to be deposited with District Legal Services Authority and Rs. 2,000/- to be paid to respondent no.1).”

The similar issue was raised in judgment of case in ***Manak Chand vs. Suresh Chand Jain, AIR 1970 Punjab and Haryana 229*** wherein the Rent Controller allowed the petitioner to summon additional witnesses subject to payment of ₹15/- as costs and adjourned the case for a period of one month. On that date, the petitioner did not produce the additional witnesses nor he himself appeared in the witness box. Even he did not pay the costs and the case was adjourned on his request again, subject to payment of ₹10/- as costs. On the adjourned date, again he did not

pay the costs and application was moved by the respondent that the petitioner had forfeited his right of prosecution of the application under Section 35-B of the Code as he failed to pay the costs. The Rent Controller dismissed the application. The revision petition filed by the respondent against the order passed by the Rent Controller was dismissed by holding that the view taken by the Rent Controller was correct. The relevant observations from said judgment are as under: -

“From a reading of the above section, it is evident that if costs are awarded to the Respondent on the ground that the Petitioner failed to take the step which he was required under the Code to take on some date, or obtained an adjournment for taking such step, or for producing evidence or on any other ground, the payment of costs on the next following date of the order shall be a condition precedent for further prosecution of the case by the Petitioner. It is further evident that if he fails to do so, he would not be allowed to prosecute the case. The words "on the date next following the date of such order" are important. (Emphasis supplied by underlining the words). The section deprives the Petitioner to prosecute the case if he fails to pay the costs, on the date next following the date of the order. This is an extreme penalty and shall not be imposed unless the case squarely falls within the four corners of the section. It is also well established that a penal section is to be construed strictly. The provisions of the section, being penal in nature, shall apply where on the date when the costs are to be paid, the fact is brought to the notice of the Court before the party liable to pay the costs takes step in the case. If on

that date it is not brought to the notice of the Court and the party takes steps or leads evidence, he cannot be deprived of his right to further prosecute the case on the subsequent date. The reason for arriving at this conclusion is that if the fact had been brought to his notice at the relevant time, he might have paid the costs. It is also worth highlighting that if costs are not paid to a party, he has got the right to recover them under Sub -section (2).”

The case involved interpretation of Section 35-B of the Code was heard by a Full Bench in **Anand Parkash's case (supra)**.

After the decision of Full Bench case, a similar issue was considered by four Single Benches in **CR No.968 of 1982 (Assa Nand vs. Shri Harish Kumar etc.)**, 1982 (2) RCR 410 decided on 16.07.1982, **CR No.836 of 1982 (Smt. Lachhmi etc. vs. Nirmal etc.)**, decided on 05.08.1982, **CR No.1574 of 1982 (Smt. Balwant Kaur vs. Smt. Harbans Kaur) decided on 23.08.1982** and **CR No.1307 of 1982 (Dharma Pal Nanda etc. vs. Smt. Prem Nanda etc.)**, decided on 03.06.1982. In all these cases, the Hon'ble Judges came to the conclusion that defence could not be struck off on a subsequent date. The relevant observation made in **Assa Nand's case (supra)** is reproduced as under: -

“..... Section 35B of the Code inter alia provides that if on any date fixed the case is adjourned on payment of costs, the payment of such costs shall be a condition precedent to the further prosecution of the suit by the plaintiff where the plaintiff was ordered to pay such costs. Thus, it will be reasonable to conclude that in a case where the costs imposed are not paid, on that very date when the costs are to

be paid, the attention of the Court should be drawn so that further prosecution of the suit may take place only if necessary compliance has been made. If no such step is taken by the party who intends to invoke the provisions of section 35B of the Code, and remains silent and allows the court to proceed with the suit, he cannot be allowed to agitate the alleged non-payment, if any, after that date. In such a situation, the provisions of section 35B of the Code are not at all attracted.”

It is relevant to mention here that the Full Bench judgment in **Anand Parkash's case (supra)** was not brought to the notice of the learned Judge in the said case. The observation made in **Smt. Lachhmi's case (supra)** is reproduced as under: -

".....it has been made clear that in case the act of non-payment of costs is not intentional and wilful attempts to disregard the order of the (sic) Court may not impose the extreme penalty on a delinquent. It has further been held that if a party is prevented from making payment of the costs for the reasons beyond his control and a request is made for extension of time for making payment, then the Court may exercise its discretion and allow more time to the delinquent to make the payment of costs and the extreme penalty as provided in the section may not be imposed on the date on which costs are to be paid. It has also been observed that it does not estop the Court from taking note of the events and circumstances which have happened before the payment is to be made. In the present case, admittedly, the case was adjourned for December 19,

1981, for compromise. Under the circumstances, the non-payment of costs on December 10, 1981, could not be said to be intentional or a wilful attempt to disregard the order of the Court. Moreover in the above-mentioned Full Bench decision of this Court the delinquent had refused to pay the costs awarded on the date fixed and the other party had moved the Court inter-alia for proceeding against the delinquent under section 35B of the Code. This prayer was not accepted and the trial Court had proceeded with the suit. Aggrieved against the same a revision petition was filed in this Court which came up for hearing before the Full Bench on a reference.....it was held by the Full Bench that in the event of the party failing to pay the costs on the date next following the date imposing the costs, it was mandatory on the Court to disallow the prosecution of the suit or the defence, as the case may be, and that no extenuating considerations should weigh with the court in the exercise of its jurisdiction against the delinquent party. At the same time, it was also observed that where the costs are not paid as a result of the circumstances beyond the control of the defaulting party, then the Court will be well within its jurisdiction to exercise its powers under section 148 of the Code in favour of the defaulting party if a strong case is made out for the exercise of such jurisdiction. Thus, in the Full Bench decision of this Court in Anand Parkash's case (supra) (majority view), it was never laid down that in case the costs are not paid by the delinquent party on the date next following the date of such order and the Court is allowed to proceed further with the suit

by the other party without drawing its attention to the provisions of section 35B of the Code, the other party may invoke the same on any subsequent date. As a matter of fact, this was never the point before the Full Bench in the afore-mentioned case, nor it was never agitated before it therein. Therefore, the application of the ratio of the above-mentioned Full Bench decision of this Court to such circumstances as in the present case, is misconceived and unwarranted."

Same issue was there before the Orissa High Court in ***Kasi Biswanath vs. Parmananda Routrai, AIR 1982 Orissa 80***. In that case, the plaintiff was examining his evidence and he was burdened with costs of ₹15/-. Subsequently, after various hearings the evidence of both the parties was closed. The defendant made an application that the plaintiff had not paid ₹15/- as costs and, therefore, his suit was liable to be dismissed. The trial Court rejected the application. In revision, the learned Single Judge did not accept the contention raised on behalf of the defendant-petitioner. The relevant observations of learned Judge are as under: -

"..... I am inclined to take the view that the cause of the justice is paramount and a procedural law cannot be raised to the pedestal of being such a mandatory provision as would take away the Court's right in a given case to exercise its discretion in the interest of justice."

Hon'ble the Apex Court in ***Manohar Singh vs. D.S. Sharma & anr., 2010(1) SCC 53*** has held that the defaulting party has to pay cost on next date of hearing but the discretion is with the Court to extend the date

for payment of costs by exercising power under Section 148 CPC. The observation made is reproduced as under: -

“Section 35B provides that if costs are levied on the plaintiff for causing delay, payment of such costs on the next hearing date, shall be a condition precedent to the further prosecution of the suit by the plaintiff. Similarly, if costs are levied on the defendant for causing delay, payment of such costs on the next date of hearing, shall be a condition precedent to the further prosecution of the defence of the suit by the defendant. This takes us to the meaning of the words "further prosecution of the suit" and "further prosecution of the defence". If the Legislature intended that the suit should be dismissed in the event of non-payment of costs by plaintiff, or that the defence should be struck off and suit should be decreed in the event of non-payment of costs by the defendant, the Legislature would have said so. On the other hand, Legislature stated in the rule that payment of costs on the next date shall be a condition precedent to the further prosecution of the suit by plaintiff (where the plaintiff was ordered to pay such costs), and a condition precedent to the further prosecution of the defence by the defendant (where the defendant was ordered to pay such costs). This would mean that if the costs levied were not paid by the party on whom it is levied, such defaulting party is prohibited from any further participation in the suit. In other words, he ceases to have any further right to participate in the suit and he will not be permitted to let in any further evidence or address arguments. The other party will of course

be permitted to place his evidence and address arguments, and the court will then decide the matter in accordance with law. We therefore reject the contention of the respondents that section 35B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by plaintiff.

6. We may also refer to an incidental issue. When section 35B states that payment of such costs on the date next following the date of the order shall be a condition precedent for further prosecution, it clearly indicates that when the costs are levied, it should be paid on the next date of hearing and if it is not paid, the consequences mentioned therein shall follow. But the said provision will not come in the way of the court, in its discretion extending the time for such payment, in exercise of its general power to extend time under section 148 of CPC. Having regard to the scheme and object of section 35B, it is needless to say that such extension can be only in exceptional circumstances and by subjecting the defaulting party to further terms. No party can routinely be given extension of time for payment of costs, having regard to the fact that such costs under section 35B were itself levied for causing delay.”

Hon'ble the Apex Court allowed the appeals and set aside the judgments of the High Court and the trial Court and restored the suit to its file, subject to the following conditions: -

“(i) The right of the plaintiff to cross-examine DW2 stands forfeited and he is barred from prosecuting the suit further.

(ii) The trial Court shall however permit the

defendants to let in any further evidence, hear arguments and then dispose of the suit.
(iii) However, if plaintiff-appellant tenders the costs with an appropriate application under section 148 Civil Procedure Code, the trial Court may consider his request in accordance with law. Even if the court extends the time for deposit, permits the plaintiff to pay the costs and prosecute the suit further, that will not entitle the plaintiff to cross-examine DW2.”

In view of the facts as mentioned above, the present revision petition is allowed and impugned orders dated 13.12.2016 (Annexure P-1) and 15.12.2016 (Annexure P-2) are set-aside. However, the trial Court is directed to re-consider the application for leading additional evidence afresh in view of law position and observation as mentioned above subject to payment of costs of ₹2000/- already imposed to be deposited on the date as directed by the trial Court.

20.01.2017
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(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned	√ Yes/No
Whether Reportable	√ Yes/No