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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL LODGING NO. 106 OF 2018
IN
SUIT NO. 2012 OF 2009
WITH
NOTICE OF MOTION LODGING NO. 199 OF 2018

1. Shri Ram Nagar Trust No.1 and anr. .. Appellants

Versus

1. Mehtab Liaq Sheikh and ors. .. Respondents

Mr. Pankaj Savant, Senior Advocate a/w Mr. Prasad Shenoy a/w Mr. Naishadh Bhatia i/by M/s. Crawford Bayley and Co. for appellants.

Ms. Gargi Bhagwat a/w Mr. Gautam Bhagwat i/by Divekar Bhagwat and Co. for respondent no.1.

CORAM: NARESH H. PATIL &
G. S. KULKARNI, JJ.

MARCH 07, 2018.

P.C.

1. The appeal is directed against the order dated 27/2/2018 passed by the learned Single Judge (Coram: G.S.Patel,J.) in Suit No.2012 of 2009 directing plaintiffs to pay cost of Rs.4,50,000/- on failing to file an affidavit.

2. A Suit for injunction was filed by the appellants-plaintiffs on 27/2/2009. The appellants-plaintiffs failed to submit affidavit of evidence in lieu of examination-in-chief. On 18/8/2016 contesting parties were heard and parties were directed to maintain status quo, which order still continues. Issues were framed on 26/9/2016 and on 27/10/2016 the matter was listed before the court and on plaintiffs' request, the matter was adjourned for filing affidavit. Since then the appellants failed to file affidavit.

3. The learned Senior Counsel appearing for the appellants submits that after 27/10/2016, the matter was listed before the court on 27/2/2018. On earlier occasions though the matter was listed before the court but could not reach for further hearing. The learned counsel submits that plaintiff, whose affidavit was to be filed, is a senior citizen of the age of 79 years. The learned counsel submits that reasonable view of the matter be taken. Awarding of costs by calculating 1000 rupees per day sounds unreasonable, which needs to be reconsidered by the court.

4. The learned counsel appearing for the respondents submits

that there is abnormal delay on the part of the plaintiffs to file affidavit. The appellants have failed to make out a convincing case for the delay. The suit was filed in the year 2009 and issues were framed on 26/9/2016. As the plaintiffs failed to submit affidavit, defendants could not take further steps for seeking modification of the ad-interim order or for vacating the same. The learned counsel, therefore, submitted that prayer made by the appellants be rejected.

5. We have perused the record and considered the submissions advanced. In the facts, we find that the cost awarded by the learned Single Judge need to be reduced to a reasonable extent taking into consideration the plea advanced by the plaintiffs and in the facts and attending circumstances of the present case.

6. We may observe that Section 35-B of the Code of Civil Procedure provides for costs to be awarded on a litigating party for causing delay. This provision provides that on any date fixed for the hearing of a suit or for taking any step therein, if a party to the suit fails to take the step which he was required by or under this Code to take on that date, or obtains an adjournment for taking such step or

for producing evidence or on any other ground, the court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs, as may be, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date, and payment of such costs, on the date next following, shall be a condition precedent for further prosecution of the suit. It would be desirable to note the contents of the said provision.

“35B. Costs for causing delay.- (1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit—

(a) fails to take the step which he was required by or under this Code to take on that date, or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the court may, for reasons to be recorded, make an order requiring such party to pay to the other party such costs, as would, in the opinion of the court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the court on that date, and payment of such costs, on the date next following the date of such order, shall be a condition precedent to the further prosecution of,—

(a) the suit by the plaintiff, where the plaintiff was ordered to pay such costs,

(b) the defence by the defendant, where the defendant was ordered to pay such costs.

Explanation : Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons.”

From the Statement of Objects and Reasons incorporating Section 35-B by the Code of Civil Procedure (Amendment) Act, 1976, it can be seen that this provision confer on the Court a discretion to impose compensatory costs on parties who are responsible for delaying the suit, to be imposed any stage of the litigation, and such costs would be irrespective of the ultimate outcome of the litigation. It is also stated that there were instances where a party with a bad case tries to delay the matter. It was thus opined that in order to avoid delay in the disposal of the suits, payment of compensatory costs for causing delay should be a condition precedent to the further prosecution of the suit or the defence, by the plaintiff or defendant concerned. plain reading of Section 35-B clearly indicates the legislative intent that when a party fails to take steps on the date fixed for hearing or obtains an adjournment, the Court for the

reasons to be recorded may make an order imposing such costs which would be “*reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date.*”

7. It is implicit from the provisions of Section 35-B of the Code of Civil Procedure that the costs have to be those which are reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date. They cannot be punitive and arbitrary in nature. We may observe that the discretion which is conferred under Order 17 Rule 1 sub-rule (2) is not subject to any definite rules, but has to be exercised in rational namely on judicial and reasonable consideration. The Division Bench of this Court in the case “**Jadavbai Narayandas Vs. Shrikisan**”¹ (*Lokur and Gajendragadkar, JJ.*) in interpreting Order 17 Rule 1 Sub-rule(2) has observed that the principle underlying the sub-rule is that the party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be “occasioned by the adjournment” and as might reasonably compensate him for the expense incurred by reason of the adjournment and it should not be a condition in the nature of a penalty or punishment to the party asking for adjournment and hence, the costs awarded should in no case exceed a sum commensurate with the expense. Justice Lokur speaking for the

1 AIR 1946 Bom 113

Bench observed thus:-

“2. In granting an adjournment under O.17, R.1, sub-r. (1) of the CPC, the Court is empowered by sub-r.(2) “to make such orders as it thinks fit with respect to the costs occasioned by the adjournment.” The expression “occasioned by the adjournment” is deliberately used in order that the discretion of the Court should not be restricted to the taxable costs of the day. The Principle underlying the sub-rule is that the party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be “occasioned by the adjournment,” and as might reasonably compensate him for the expense incurred by reason of the adjournment. Of course the condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment, and hence the costs awarded should in no case exceed a sum commensurate with the expense, which, in the opinion of the Court, the party ready to proceed reasonably incurs as a result of the adjournment.”

8. We are also in agreement with the decision of the Delhi High Court in the case *M/s. Progressive Constructions Ltd. Vs.*

M/s.Sharma Associates & Contractors Pvt.Ltd. & Anr.², that the adjournment costs imposed should be reasonable and not by way of a penalty. The Division Bench in taking review of the entire law on this issue in this context made the following observations in paragraphs 20 and 21 which read thus:-

“20. The aforementioned decisions affirm the principle of common law in England governing the taxing of party and party costs. The principle is that costs are awarded not as punishment to the defeated party, nor as a bonus to the party which receives them but as a recompense to the successful party in order to indemnify him, though not completely, for legal expenses to which he has been subjected in prosecuting his suit or his defence.

21. The above principles have ultimately received legislative recognition in Section 35-B of the Code of Civil Procedure, which provides for award of costs for causing delay in the progress of a suit. If, on any day fixed for the hearing of a suit or for taking any step therein, a party to the suit: (a) fails to take the step which he was required by or under the Code to take on that date, or (b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

the Court is thereunder empowered, for reasons to be recorded, to make an order requiring such a party to pay to the other party such costs as would, in the opinion of the Court, be reasonably sufficient to reimburse the other party in respect of the expenses incurred by him in attending the Court on that date.”

9. Adverting to the above legal principles we may observe that the parties must be diligent enough to complete the pleadings so that delays could be avoided in determination of the issues brought before the court. The appellants ought to be conscious of the fact that being plaintiffs they were duty bound to take necessary steps and one such step was to file affidavit in lieu of plaintiffs' evidence before the court. Even if the suit could not reach for hearing, there was no embargo on the plaintiffs not to file an affidavit within reasonable time.

10. The learned counsel appearing for the appellants submits that at 3.00 p.m. on 27/2/2018 plaintiffs made request to the learned Single Judge that they were ready to produce the affidavit of the plaintiffs and in fact made request for accepting the affidavit.

O R D E R

(a) The impugned order dated 27/2/2018 passed by the learned Single Judge is set aside. Instead, the amount of cost awarded by the learned Single Judge is substituted with Rs.50,000/- (Rupees Fifty Thousand only). The appellants shall deposit the cost amount within one week from today with the office of Prothonotary and Senior Master of this court. The defendant no.1 is at liberty to withdraw the said cost amount.

(b) Time to file affidavit of evidence in lieu of examination-in-chief by the appellants, subject to depositing cost amount, is extended by one week.

11. The appeal is partly allowed.

12. Notice of Motion (L) No. 199 of 2018 does not survive and disposed of as such.

(G. S. KULKARNI J.)

(NARESH H. PATIL,J.)