

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CR No. 749 of 2019

Date of Decision: 06.02.2019

Jaswinderjit Singh and another

.....Petitioners

vs.

Kamlesh Kumar and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Mayank Mathur, Advocate,
for the petitioners.

AMOL RATTAN SINGH, J. (ORAL)

By this petition, the petitioners challenge the order of the learned trial Court [Civil Judge (Junior Division), Patiala], dated 06.12.2018 (Annexure P-1), by which the respondent-defendants have been granted one last opportunity to get the first respondent herein, i.e. DW-1 Kamlesh Kumar, cross-examined on behalf of the plaintiffs, thereby dismissing the application filed by the petitioners-plaintiffs seeking that the defence of the defendants be struck off.

2. The background of the matter is that on 03.11.2018, the trial Court, noticing that “no defendants' evidence is present”, had granted a request for adjournment by counsel for the defendants, with the hearing adjourned to 15.11.2018 for defence evidence.

The defendants were also directed to conclude the entire evidence on that date, with it being shown to be a “special last opportunity”, subject to payment of costs of Rs. 400/-.

Thereafter, on 15.11.2018 again no witness for the defendants was present and instead an application under Order 14 Rule 5 CPC was filed by them,

seeking to frame additional issues, which application was not entertained by that Court, holding that issues had already been framed on 03.12.2015, with issue no. 1 being a comprehensive issue pertaining to entitlement of the plaintiffs to a decree for specific performance in respect of an agreement of sale contended to have been entered into between the parties.

The relief of possession of the suit property was also held to be an issue to be decided as an ancillary issue thereof and consequently, it was held that no separate issue was required to be framed for that purpose.

3. As regards the question that arises in the present petition, it is to be noticed that vide the order dated 15.11.2018, it was also noticed by the trial Court that costs earlier imposed on 03.11.2018 had not been paid but yet, in the interest of justice, one more opportunity was granted to the defendants to conclude their entire evidence subject to further payment of costs of Rs. 1,000/-, failing which their evidence was to be closed by the Court itself on 21.11.2018.

4. On that date, again an adjournment was sought for the purpose of cross-examination of DW1-Kamlesh Kumar, because counsel for the defendant was not available on that date, with it further noticed by that Court that neither the costs imposed earlier of Rs. 400/-, nor subsequently of Rs. 1,000/-, had been paid; though the contention of the defendants that they were ready to pay the costs was also noticed. (A copy of the order dated 21.11.2018 is annexed as Annexure P-4 collectively).

5. On that date itself counsel for the plaintiffs had filed the aforesaid application seeking that the defence of the defendants be struck off due to non-payment of costs of Rs. 400/-, with counsel having further stated that he did not wish to accept the costs as were offered to be paid by the defendants' witness on that date.

Even so, one more opportunity was granted for the purpose of cross-examination of the witness and the matter was adjourned to 28.11.2018, as also for consideration of the application.

6. Learned counsel submits that on that date a reply to the application of the petitioners-plaintiffs was filed by the respondents-defendants and the matter adjourned to 06.12.2018, on which date the impugned order has been passed.

While doing so, the judgments cited on behalf of the petitioners-plaintiffs, including one of a Full Bench judgment of this Court in **Shri Anand Parkash** vs. **Shri Bharat Bhushan Rai and another** 1982 (1) RCR (Rent) 1, were duly noticed by the trial Court, to the effect that once costs have not been paid, the Court is bound to strike off the defence of the defendants.

7. Even so, the trial court, while rejecting the application for striking off defence, observed as follows:-

“On perusal of zimini orders, it can be seen that DW-1 Kamlesh Kumar was examined-in-chief on 10.07.2018. He was partly cross-examined on several dates. The defendants kept on seeking several adjournments for the purpose of examining this witness. They were granted last opportunity to conclude the evidence subject to costs of Rs. 400/- on 03.11.2018. On 15.11.2018, defendants failed to pay cost of Rs. 400/- and in the interest of justice another adjournment was granted with further costs of Rs. 1,000/- payable to the plaintiffs. On the next date of hearing, DW-1 Kamlesh Kumar was present and even offered to pay previous cost of Rs. 1,400/-. However, learned counsel for the plaintiffs pressed for striking of defence of the defendants as the costs were not paid on the previous date and refused to accept the costs being offered. This Court is of the opinion that the defendants have not been prudent enough despite being given several opportunities to conclude their evidence. However, the interest of justice demands that a harsh order be not passed against a party

which might result in failure of justice. The Courts are always pleased to hear the parties on merits. If, the defence of the defendants is struck off, it shall result in serious prejudice to the defendants. The parties have fought this case since the last several years and it is not the aim of this Court to slaughter the case due to failure of the counsel for defendants appear in the Court to get the witness DW-1 Kamlesh Kumar cross-examined.”

8. Thereafter, in paragraph 9 of the order, it was observed that in fact 'no penalty was imposed' on 03.11.2018 when costs of Rs. 400/- were imposed and therefore, when circumstances are beyond the control of a defaulting party, the Court would be within its jurisdiction to exercise its power under Section 148 of the Code of Civil Procedure, “if a strong case was made out for the exercise of such jurisdiction.”

Immediately thereafter, it was observed as follows:-

“On the date fixed for the payment of costs witness was present and was willing to make the payment of costs of Rs. 400/-. However, the same could not be paid as no one appeared on behalf of the plaintiffs to receive the costs. The case would have been different if the witness had not appeared on 15.11.2018 also and had failed to offer the costs awarded. In such circumstances, this Court is of the opinion that the interpretation of Section 35-B CPC makes it directory in nature when no penalty is imposed. The citation cited by learned counsel for the plaintiffs will therefore, not apply to the facts of the present case as no penalty for striking of defence has been imposed, vide order dated 03.11.2018.”

9. Before this Court, learned counsel for the petitioners points out that the observation that the costs of Rs. 400/- could not be paid as no one appeared on behalf of the plaintiffs to receive the costs, is a wholly erroneous observation as such costs were to be paid on 15.11.2018, on which date an order was passed duly reflecting the presence of Sh. Ashok Kumar, Advocate for the plaintiffs (present

petitioners) and as such, it could not have been held that no one was present to receive the costs.

As a matter of fact, the said order does not even show that an offer to pay such costs was made on that date, though it was made on a subsequent date.

10. Having considered the matter, including the aforesaid arguments, learned counsel is absolutely correct with regard to what has been seen from the order dated 15.11.2018 (copy Annexure P-3), and as such, the trial Court could not have made the observation that it did on 06.12.2018 (in paragraph 9 of its order), in the face of the fact that the presence of the counsel for the plaintiffs was recorded in the order dated 15.11.2018.

This Court is aware that sometimes counsel are marked present either inadvertently, or otherwise on a request subsequently made on the same day. However, that is not reflected in the impugned order, because if that were so, it should have been specifically stated to be so by the trial court.

11. Even so, before adjudicating on the matter, the judgment of the Full Bench of this court, cited before the trial court and another judgment, of the Supreme Court, need to be referred to.

12. In Anand Parkashs' case (supra), Justice M.R. Sharma (as is Lordship then was), after referring to the judgment of another Full Bench of this Court in **The Amritsar Improvement Trust** vs. **Smt. Ishri Devi** 1979 (2) RCJ 422, in his minority judgment observed as follows:-

“It is no doubt true that in coming to this conclusion the learned Chief Justice took note of the words “unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage”, but the absence of these words in the section under consideration hardly makes any material difference. Clause (b) of [Section 35B](#)

provides that the Court may, for reasons to be recorded, make an order requiring a party to pay costs. This implies that the questions whether an adjournment should be granted on payment of costs or without costs and if it is granted on payment of costs, their quantum are left to the discretion of the Court. The only requirement of law is that if the costs are awarded, then they should be commensurate with expenses incurred by the opposite party in attending the court on that day. A Court which has the jurisdiction to pass a discretionary order also possesses the power to modify its order to meet the hardship accruing to a party. The statute does not lay down that if the costs are not paid that would have the automatic effect of the dismissal of the suit of the plaintiff or the striking out of the defence of the defendant. Even for that purpose, the Court has to pass an order. In other words the right of the party to proceed with the case in contradistinction with its right to pray to the Court to allow him to proceed with the case above has been taken away.

7. The party who declines to pay the costs, of course, does not in a sense obey the order passed by the Court, but if the Court itself condones this default or allows a party to obey the order on a subsequent date, it cannot be said that the party concerned has flouted the order of the Court. In this context, the controversy raised before the Law Commission assumes some importance. I am not for a moment suggesting that the views expressed before it, or the final recommendation made by it to the government are binding on a Court of Law. All that I want to emphasise is that this report gives an insight to the working of the mind of those who made the recommendation to the Legislature. In Part No. 1-D, 89, extracted above, the Commission itself was of the view that it would not be wise to make a rigid provision. It is noticed that it would be useful to give a

discretion to the Court to take into account such delay for passing an order which is just and proper in the circumstances of the case.”

Thereafter, after discussing the issue further, it was held by him as follows:-

“As a result of the foregoing discussion, I am of the view that:--

(a) The provision is directory in nature; but

(b) even then it would not be proper for the Courts to ignore this provision. If an objection is raised at the appropriate time, the Court will be under an obligation to act in accordance with the letter of the law unless the defaulting litigant makes out a strong case for a different course being adopted.”

13. However, the majority judgment was delivered by Justice Prem Chand Jain, with hon'ble the Chief Justice agreeing with him, thereby making it the judgment of the Full Bench.

In that judgment, after noticing the provisions of Section 35-B of the Code of Civil Procedure, 1908, (hereinafter referred to as the Code), it was first observed as follows:-

“10. In order to get a correct answer it has to be seen as to what was the intention of the Legislature in enacting this provision. There can be no gainsaying as it is a well established proposition of law that by mere use of word 'shall' a statutory provision would not be rendered mandatory and that for determining the real character of the Section the court has to ascertain the intention of the legislature by carefully considering the scope of the entire statute. In other words, mere use of the word "shall" in a section does not necessarily make it mandatory.”

Thereafter, it was observed as follows:-

“15. Further, as is clear from the judgment of my learned brother, even before the enactment of [Section 35B](#), the law as it stood earlier was that even when an adjournment

had been granted on payment of costs the action regarding the disposal of the suit or the striking off the defence in the event of the non-payment of costs, was not considered proper unless the awarding of costs had been made a condition precedent for the grant of adjournment. If this was the state of law as interpreted by the Courts earlier, then now by enacting [Section 35B](#) the Legislature had done nothing else but incorporated expressly that law in the statute

However, it may be made clear that in case the act of non-payment of costs is not intentional and willful attempt to disregard the order of the Court, then the court may not impose the extreme penalty on delinquent. What I wish to say is 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. There can be no doubt that orders passed under [Section 35B](#) are procedural though they assume preemptory nature in view of the Legislature. Such orders are in essence in terrorem so that the unscrupulous litigants may not indulge in dilatory tactics. They do not, however, completely estop a Court from taking note of events and circumstances which have happened before the payment is to be made.

16. Cases are not wanting in which the Courts have moulded their practice to meet a situation over which a party has had no control and for that purpose, the Court has ample power under [Section 148](#) of the Code which reads as under:--

"Where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Code, the Court may in its discretion,

from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

Immediately, thereafter, the ratio of the judgment was stated to the following effect:-

"As a result of the aforesaid discussion, I hold 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 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, in cases, where 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 power 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."

14. Thus, while holding that it is mandatory for the Court to disallow the prosecution of the suit, or its defence, on non-payment of costs by the party concerned, a word of caution was added that where costs are not paid in circumstances beyond the control of the defaulting party, then the Court would be within its jurisdiction to exercise its discretion under Section 148 of the Code in favour of that party, if it makes out a strong case for the exercise of such discretion.

15. Next, a judgment of the Supreme Court in Manohar Singh vs. D.S. Sharma and another (2010) 1 SCC 53, needs to be looked at, wherein it was held as follows with regard to the provisions contained in Sections 35-B and 148 of the Code:-

*“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.”

(All emphasis applied in the present judgment only).

16. Next, their Lordships referred to Rule 1 of Order 17 of the Code, which reads as follows:-

"1. Court may grant time and adjourn hearing.-

(1) The Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the suits.

(2) Costs of adjournment.--In every such case the Court shall fix a day for the further hearing of the suit, and shall make such orders as to costs occasioned by the adjournment of such higher costs as the Court deems fit:

Provided that, --

(a) when the hearing of the suit has commenced, it shall be continued from day to-day until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reasons to be recorded by it, the

adjournment of the hearing beyond the following day is necessary,

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

(d) where the illness of a pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for a adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be, by the party or his pleader not present or not ready as aforesaid.”

Thereafter, it was observed as follows:-

“8. A conspectus of the above provisions clearly demonstrates that under the scheme of Civil Procedure Code, a suit cannot be dismissed for non-payment of costs. Non-payment of costs results in forfeiture of the right to further prosecute the suit or defence as the case may be. Award of costs, is an alternative available to the court, instead of dispensing with the cross-examination and closing the evidence of the witness. If the costs levied for seeking an adjournment to cross-examine a witness are not paid, the appropriate course is to close the cross-examination of the

witness and prohibit the further prosecution of the suit or the defence, as the case may be by the defaulting party.”

17. In the circumstances of that case before the Supreme Court, where the suit had been dismissed for non-payment of costs, their Lordships held that upon non-payment of costs, the Court should have closed the evidence of the witness while still permitting the defendants to further produce any evidence, without any right to the plaintiff to cross-examine such witnesses, and thereafter should have proceeded to dispose of the suit on merits.

18. Thus, the ratio of the judgment can be culled out from paragraphs 6 and 8 thereof (Law Finder Edition), in the first of which it is held that when costs are levied they should be paid on the next date of hearing and if not paid the consequences stipulated in Section 35B would follow, but the provision would not come in the way of the court in exercising its discretion for extending the time for such payment, in exercise of its general power under Section 148 of the CPC, though extension should not be given routinely even in the exercise of such power.

Paragraph 8 of course lays down that non-payment of costs results in forfeiture of the right to further prosecute the suit or defence (as the case may be).

Hence, as per the ratio of the law settled in the aforesaid judgment, non-payment of costs should normally entail closure of prosecution or defence of the party not paying such costs, but if the court finds that it was due to valid reasons, then it can exercise its jurisdiction under Section 148 of the Code of Civil Procedure and extend such time for payment of costs, thereby not closing the prosecution or defence of the party concerned at that stage.

19. In the present *lis*, there is no question of the suit having been dismissed for non-payment of costs and in fact what the petitioner (plaintiff in the suit) seeks is that the defence of respondents no. 1 and 2 in this petition, i.e.

defendants in the suit, be struck off, with the impugned order set aside.

As already noticed, the trial Court has held that the defendants were not “prudent enough” despite being several opportunities, to conclude their defence but that the interest of justice demanded that a harsh order be not passed against a party which may result in a failure of justice. It was also observed that “the courts are always pleased to hear the parties on merits.”

It has also been observed in the impugned order that the examination-in-chief of DW1 Kamlesh Kumar was conducted on 10.07.2018 and he was partly cross-examined on several dates. The defendants however kept seeking several adjournments for the purpose of examining this witness and were granted a last opportunity to conclude their evidence subject to payment of costs of Rs.400/-, on 03.11.2018. On the next date, i.e. 15.11.2018, they did not pay the costs, but yet another opportunity was granted to them in the interest of justice, upon further costs of Rs.1000/- having been imposed, after which on the next date (i.e. 21.11.2018), DW1 was present and had offered to pay the costs of Rs.1400/- but with counsel for the plaintiff pressing to strike off the defence as the costs were not paid on the previous date, he having refused to accept the costs being offered on 21.11.2018.

20. In the aforesaid background, in the present case, in my opinion, extra costs having been imposed, the impugned order would not otherwise be unsustainable; yet, in view of the ratio of the judgment of the Full Bench, as also of the Supreme Court, to the effect that only if there are sufficient reasons beyond the control of the party not paying the costs already imposed, the Court would exercise its jurisdiction under Section 148 of the Code to favour such defaulting party upon a strong case being made out, but not otherwise, it is considered appropriate to set aside the impugned order and direct the trial Court to pass a

fresh order in terms of the ratio of the judgment of the Full Bench of this Court in Anand Parkashs' case, as also of the Supreme Court in Manohar Singhs' case (both *supra*).

Ordered accordingly.

21. The trial Court would look at the issue afresh in the light of the ratio of the aforesaid judgments and then pass a reasoned order on the application of the petitioners-plaintiffs, as to whether strong circumstances justify allowing the respondents-defendants to continue to lead their defence, or it is required to be struck off.

The petition stands allowed to the aforesaid extent.

No order as to costs.

February 06, 2019
nitin/dinesh

(AMOL RATTAN SINGH)
JUDGE

Whether speaking/reasoned
Whether Reportable

Yes
Yes