

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

CR-3944-2022 (O&M)
Date of decision : 16.09.2022

Sahiram

... Petitioner(s)

Versus

Yadram & Ors.

... Respondent(s)

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Ms. Pratibha Yadav, Advocate for the petitioner.

ALKA SARIN, J. (ORAL)

The present revision petition has been filed under Article 227 of the Constitution of India challenging the order dated 27.05.2022 (Annexure P-3) whereby the application filed by the plaintiff-petitioner for striking off the defence of defendant-respondent No.1 for non-deposit of the costs has been dismissed.

The brief facts relevant to the present *lis* are that an application was filed by the plaintiff-petitioner under Order 39 Rule 2-A read with Section 151 of the Code of Civil Procedure, 1908 (CPC) in the proceedings. On 27.02.2019 PW3-Hoshiyar Singh, PW4-Nonihal Singh and PW5-Lal Chand were present for their examination-in-chief. Their cross-examination was deferred as counsel appearing for defendant-respondent No.1 submitted that he was busy before other Court and the witnesses were discharged and bound down for 11.03.2019 subject to payment of costs of Rs.200/- each to be paid by defendant-respondent No.1 to the witnesses. Thereafter, on the

next two dates i.e. 11.03.2019 and 29.03.2019, the file was not taken up as the learned Magistrate was on casual leave. On 15.05.2019 PW5-Lal Chand was present and examined without any objection being raised by learned counsel appearing on behalf of the plaintiff-petitioner therein. The remaining witnesses did not come present despite being bound down. However, it is noticed in the order dated 15.05.2019 that the costs would be paid on the next date of hearing. On 26.07.2019 no PW was present and the matter was adjourned to 09.09.2019 for evidence of the plaintiff-petitioner. Costs were also to be paid on that day. Yet again on 09.09.2019 no PW was present and the counsel for the plaintiff-petitioner closed his evidence with a request to tender documentary evidence and the matter was thereafter adjourned to 25.09.2019 for tendering documentary evidence. Vide order dated 25.09.2019 the case was adjourned to 19.10.2019 for evidence of the defendant-respondents at their own responsibility. On 19.10.2019 an application was filed by the plaintiff-petitioner for striking-off the defence of the defendant-respondent No.1 for non-payment of costs. Reply to the said application was filed. The Trial Court vide a detailed order dated 27.05.2022 dismissed the said application. Hence, the present revision petition.

Learned counsel for the plaintiff-petitioner would contend that payment of costs was a condition precedent and hence, defence ought to be struck off. Learned counsel for the plaintiff-petitioner has relied upon the judgment of Hon'ble Supreme Court in the case of **Manohar Singh Vs. D.S. Sharma & Anr. [2010 (1) SCC 53]** to contend that the payment of costs is a condition precedent.

Heard.

In the present case a perusal of the *zimni* orders reveals that on 15.05.2019 only one PW namely, Lal Chand, was present despite the fact that three witnesses i.e. PW3-Hoshiyar Singh, PW4-Nonihal Singh and PW5-Lal Chand were bound down for 11.03.2019. PW5-Lal Chand was examined and no objection which might have been raised by learned counsel on behalf of the plaintiff-petitioner has been recorded in the order dated 15.05.2019, however, it states that the costs shall be paid on the next date of hearing. On 26.07.2019 none of the PWs came present. Vide order dated 09.09.2019 it has been recorded that counsel for the plaintiff-petitioner closed his oral evidence with a request to tender documentary evidence. Yet again the issue of costs was not raised. On 25.09.2019 the documents were tendered and the matter was fixed for the evidence of the defendant-respondents at their own responsibility. It is thereafter that the application for striking-off the defence has been filed. The plaintiff-petitioner himself has been not complying with the orders of the Trial Court inasmuch as despite the fact that two witnesses who were bound down, chose not to appear before the Trial Court and thereafter after seeking adjournments the plaintiff-petitioner closed his evidence without the said witnesses stepping into the witness box for their cross-examination. The question of paying costs to these witnesses would not hence arise. The argument of the learned counsel for the plaintiff-petitioner regarding condition precedent would be of no help inasmuch the payment of costs could have been treated as a condition precedent for the purposes of the cross-examination of the

witnesses. Out of the three witnesses two witnesses did not step forward for their cross-examination inasmuch as their cross-examination could not be conducted due to the fact that despite being bound down they did not appear before the Trial Court. Regarding the cross-examination of PW5-Lal Chand, it is to be seen that on 15.05.2019 Lal Chand was present and examined. Any objection which had to be raised was to be raised prior to the cross-examination being conducted. Since no such objection was raised or recorded in the order, argument of learned counsel cannot be accepted.

Para Nos.6 to 8 of the judgment in the case of **Manohar Singh** (*supra*) relied upon by learned counsel for the plaintiff-petitioner, reads as under :

“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.

7. We may also refer to the provisions of Rule 1 Order 17 of Civil Procedure Code which deals with grant of time and adjournments. The said provision is extracted below :

*“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 an 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.” (emphasis supplied)

It is evident from Rule 1(2) proviso (e) of Order 17 that where a witness is present in court but the other side is not ready to cross-examine the witness, the court can dispense with his cross-examination. But where a genuine and bona fide request is made for adjournment, instead of resorting to forfeiture of the right to cross-examine, the court may grant time by levying costs.

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.”

A perusal of the above reproduced paragraphs of the judgment in **Manohar Singh's** case (*supra*) clearly reveals that the Supreme Court in the said case held that the scheme of the Civil Procedure Code is that a suit cannot be dismissed for non-payment of costs. Non-payment of costs can result in forfeiture of the right to further prosecute the suit or defence as the case may be. In case of non-payment of costs, the appropriate course would be to close the cross-examination of the witness and prohibit further prosecution of the suit or the defence as the case may be by the defaulting party. In the present case, two of the witnesses who were to step into the witness box for their cross-examination defaulted despite being bound down and did not appear for their cross-examination. One of the witnesses namely, PW5-Lal Chand, who appeared for his cross-examination was cross-examined. However, on the said date no objection was raised qua non-payment of costs. In any case, the *zimni* orders reveal that in the order dated 27.02.2019 it has not been mentioned as to what could be the consequences of non-payment of costs. That being so, the judgment relied upon by the learned counsel for the plaintiff-petitioner would also be of no avail.

In view of the above, I do not find any merit in the present revision petition. The present petition is accordingly dismissed. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

16.09.2022
Yogesh Sharma

NOTE : Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO