

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

**CR-1560-2023
DECIDED ON: 13.09.2023**

MAMO DEVI AND ORS

.....PETITIONERS

VERSUS

AJMER SINGH

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE VIKRAM AGGARWAL.

Present: Mr. Sumeet Goel, Senior Advocate with Mr. Samir Rathore,
Advocate for the petitioners.

Mr. B.S. Rana, Senior Advocate with Mr. Nayandeep Rana,
Advocate and Mr. Navdeep Doon, Advocate
for the respondent.

VIKRAM AGGARWAL, J (ORAL)

1. The present revision petition assails the order dated 13.10.2017 (Annexure P-5) passed by the Additional Civil Judge (Senior Division), Kaithal, vide which defence of the petitioners was struck off and the order dated 11.01.2023 (Annexure P-9), vide which the application seeking recall/review of the said order was dismissed.

2. A suit for possession was filed by the respondent/plaintiff-Ajmer Singh by way of specific performance of agreement to sell dated 07.08.2012. It was the case of the respondent-plaintiff that the petitioners-defendants had agreed to sell 4 Kanals 11 Marlas of land situated in Village Kheri Matarwa (fully described in the plaint), by way of a registered agreement to sell dated 07.08.2012. The total sale consideration was ₹8,00,000/- out of which ₹4,75,000/- was paid as earnest money. The date of execution of the sale deed was fixed as 07.05.2013. Since the sale deed was not executed, the suit was filed by the respondent-plaintiff.

3. The petitioners-defendants duly appeared before the trial Court and filed their written statement (Annexure P-2).

4. During the course of the proceedings, an application was filed by the respondent-plaintiff (Annexure P-3) seeking a direction to the petitioners-defendants to produce documents relied upon by them in the written statement. The petitioners-defendants were called upon to file reply to the said application. However, since the same was not filed nor were costs paid, the defence of the petitioners-defendants was struck off, issues were framed and the matter was posted for evidence of the respondent-plaintiff.

5. After the evidence of the respondent-plaintiff was closed, the trial Court, vide order dated 30.01.2019 (Annexure P-6) adjourned the case for arguments observing that the defence of the petitioners-defendants had already been struck off.

6. Under the circumstances, an application for recalling/reviewing the order dated 13.10.2017 was filed, which was also dismissed vide order dated 11.01.2023, leading to the filing of the present revision petition.

7. I have heard learned counsel for the parties and have perused the paper book.

8. On behalf of the petitioners, it was submitted that the trial Court gravely erred in striking off the defence of the petitioners-defendants on account of non-filing of reply to the application. It was submitted that written statement was duly filed and only the reply to the application for production of the documents referred to in the written statement was not filed and, therefore, at best, the petitioners-defendants could not have been permitted to lead evidence qua the said documents. It was submitted that the trial Court could not have struck off the defence of the petitioners-defendants in the main case. It was submitted that even the petitioners-defendants were not aware of this since the issues had been framed and even the onus to prove certain issues had been placed

upon the petitioners-defendants. It was contended that only when the evidence of the respondent-plaintiff was closed and the trial Court abruptly posted the matter for arguments, the petitioners-defendants realized the manner in which the order was being interpreted. It was contended that the order is not sustainable and deserves to be set aside.

9. On the other hand, it was contended on behalf of the respondent that there is no illegality in the impugned order because on account of non-payment of costs, the defence was struck off. It was contended that as per the provisions of Section 35-B CPC, once the costs are not paid, the defence can be struck off. It was submitted that the trial Court proceeded in accordance with law in striking off the defence of the petitioners-defendants and that there is no illegality in the impugned orders. Learned counsel placed reliance upon the judgment passed by a Full Bench of this Court in ***Civil Revision No.1878 of 1978*** titled as '***Shri Anand Parkash Vs. Shri Bharat Bhushan Rai and another***', ***1982 (1) RCR (Rent) 1***.

10. I have given my thoughtful consideration to the arguments addressed by learned counsel for the parties.

11. Before advertng to the merits of the case, it would be essential to refer to the relevant provisions.

Section 35 B CPC lays down as under:-

"35-B. Costs for causing delay. If, on any date fixed for the hearing of 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 indicting 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."

Order 8 Rule 1 A CPC lays down as under:-

1A. Duty of defendant to produce documents upon which relief is claimed or relied upon by him.

(1) Where the defendant bases his defence upon a document or relies upon any document in his possession or power, in support of his defence or claim for set off or counter claim, he shall enter such document in a list, and shall produce it in court when the written statement is presented by him and shall, at the same time, deliver the document and a copy thereof, to be filed with the written statement.

(2) Where any such document is not in the possession or power of the defendant, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the defendant under this rule, but, is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to documents-
(a) produced for the cross-examination of the plaintiff's witnesses, or

(b) handed over to a witness merely to refresh his memory.

12. Let us now examine the law on the subject. In the case of ***Shri Anand Parkash Vs. Shri Bharat Bhushan Rai and another (supra)***, Hon'ble Full Bench of this Court was dealing with a similar issue. A suit for recovery was filed by one Anand Parkash against Bharat Bhushan Rai and Another. Before the evidence of the plaintiff could be recorded, an application was filed on behalf of the defendants that defendant No.2 had died and as her LRs were not brought on record, the suit had abated. The factum of death was admitted by the plaintiff but the date of death was disputed. Parties were directed to lead evidence about the date of death of defendant No.2-Smt. Dhanvantri Devi. After some evidence had been led, the case was adjourned to 23.08.1978 for remaining evidence. On this date, an adjournment was prayed for on behalf of the defendants on the ground that the counsel had gone out of station. The prayer for adjournment was granted subject to payment of ₹35/- as costs. The defendants stated that they did not wish to pay the costs as they were not wanting to lead any evidence. An application was filed by the plaintiff under Order 18 Rule 17 read with Sections 151 and 35-B CPC to the effect that since the defendants had refused to pay the costs intentionally in order to delay the proceedings, they be debarred from prosecuting their defence any further. The trial Court accepted the said plea and held that that the defendants could not be allowed to further prosecute their

application but the plea of the plaintiff that the defence be struck off was negatived.

13. However, the Hon'ble Full Bench held that where costs had deliberately not been paid, the defence on the whole would be struck off. The relevant part of the judgment is extracted hereinbelow:-

“3. Anand Parkash petitioner filed a suit for the recovery of Rs. 400/- against Bharat Bhushan Rai and another, defendants. Before the evidence of the plaintiff could be recorded, an application was filed on behalf of the defendants to the effect that Smt. Dhanvantri Devi, defendant No. 2, had died and as her legal representatives were not brought on the record, the suit had abated. The plaintiff admitted the factum of the death of Smt. Dhanvantri Devi but disputed the date of death as given by the defendants, with the result that the parties were directed to led evidence about the date of the death of Smt. Dhanvantri Devi. After some evidence was led, the case was adjourned for recording the remaining evidence of the parties, to August 23, 1978, on which date an adjournment was prayed for on behalf of the defendants on the ground that their counsel had gone out of station. The prayer for adjournment was granted by the court subject to the payment of Rs. 35/- as costs and the case was adjourned to August 30, 1978, for the evidence of the parties. On august 30, 1978, the defendants stated that they did not wish to pay the costs as they were not wanting to lead any evidence. On this an application was filed by the plaintiff under Order 18, Rule 17, read with Sections 151 and 35-B of the Code of Civil procedure (hereinafter referred to as the Code) to the effect that the defendants had refused to pay the costs of Rs. 35/- intentionally in order to delay the proceedings in the suit and that the defendants were debarred from prosecuting their defence any further. The other prayer made under Order 18, Rule 17 of the Code with which we are not concerned in this petition was that the plaintiff be allowed to be recalled as a witness. The

application was opposed on behalf of the defendants. The learned subordinate Judge, on considering the entire matter, came to the conclusion that as the defendants had failed to pay the costs, they could not be allowed to further prosecute their application dated July 27, 1977, the plea of the plaintiff that the defence of the defendants be struck off, was negatived. It is earlier observed, against that order of the learned subordinate Judge that the present revision petition has been filed.

- - - - -
- - - - -

In order to effectively deal with the matter, it would be appropriate to notice the provisions of Section 35-B of the Code, which read as under:--

"35-B. Costs for causing delay. If, on any date fixed for the hearing of 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 indicting 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."

- - - - -
- - - - -

19. The admitted facts of the case are that an adjournment was sought for leading evidence on the application that was filed with a prayer that as Sm. Dhanvantri Devi, defendant No. 2, had died, the suit had abated. The application was contested. As the date of death of Smt. Dhanvantri Devi was disputed the parties were allowed to lead evidence. The defendants led some evidence ad for the remaining evidence. The case was adjourned to 23rd of August, 1978. On this date evidence was not led and an adjournment was sought on the ground that the counsel had gone out of station. The adjournment was granted on payment of Rs. 35/- as costs and the case was adjourned to 30th of August, 1978, for the evidence of the parties on which date instead of paying the costs and leading evidence the counsel for the defendants gave statement that he did not want to pay the costs as he had not to lead any evidence. In view of this statement an application was filed under Section 35B of the Code praying that the defendants be debarred from prosecuting the defence any further. The learned trial Court allowed the application only to the extent that the prosecution of the application was debarred. The order of the trial Court has been challenged through this revision petition.

20. *There can be no gain-saying that adjournment was sought for leading evidence on the application which was a step taken in the suit. The learned Sub Judge acted illegally and with material irregularity in disallowing the prosecution of the application only. The act of the defendants in refusing to pay the costs were contumacious. On the admitted facts straightaway a case for taking penal action against the defendants had been made out. The trial Court acted illegally and with, material irregularity in debarring the defendants from prosecuting the application only. The impugned order of the trial Court cannot be legally sustained.*

21. *Consequently, I allow this revision petition, set aside the order of the trial Court dated 6th September, 1978 and hold that as the costs were not paid by the defendants, they are debarred from prosecuting their defence any further. In the circumstances of the case, I make no order as to costs. The parties through their counsel are directed to appear before the trial Court on 20th July 1981.*

22. *I have the privilege of perusing the detailed and lucid judgments recorded by my learned brothers Jain and Sharma, JJ. With greatest deference to the view expressed by Sharma, J. I agree with Jain, J.*

23. *In accordance with the majority decision it is held 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, 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 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.*

24. *The revision petition is allowed and the order of the trial*

Court dated 6th September, 1978, is set aside and the defendants are debarred from prosecuting the defence any further. In the circumstances of the case the parties to bear their own costs.

25. The parties through their learned counsel have been directed to appear before the trial Court on 20th July, 1981.

After the judgment of the Hon'ble Full Bench, a number of judgments by Co-ordinate Benches of this Court, while following the judgment of the Hon'ble Full Bench have reiterated the aforesaid principle of law. In the case of “**Rajender Vs. Ishwar Singh**”, 2020 (1) RCR (Civil) 784, the costs imposed for non-filing of written statement had not been paid as a result of which the defence was struck off. The said decision was upheld by the High Court while referring to the judgment of the Hon'ble Full Bench.

14. However, after the Hon'ble Full Bench in the case of **Shri Anand Parkash Vs. Shri Bharat Bhushan Rai and another (supra)**, there is another Full Bench Judgment of this Court in the case of in **Prem Sagar Vs. Phul Chand, 1983 AIR (Punjab and Haryana) 385**, in which a slightly different view was taken. It was held that if the issue of costs is not raised on the date immediately after the date on which costs were imposed and defence is not struck off, the issue cannot be raised subsequently if the proceedings are permitted to continue. The Hon'ble Full Bench laid down as under:-

“6. Adverting back to the language of Section 35B as also to the ratio of Anand Parkash's case(supra) it would be obvious therefrom that the crucial date on which the statute focuses itself is the date next following the date of the order of payment of costs. It is from the said date that the further prosecution of the suit or the defence is made conditional on the payment or tender of costs. The twin object or purpose, therefore, appears to be to avoid procrastination or delay by

the parties in the already tardy pace of civil proceedings and to impose a heavy sanction for any noncompliance with the order to pay costs. As was observed in Anand Parkash's case (supra) such orders are in essence in terrorem, so that the unscrupulous litigant may not indulge in dilatory tactics. It calls for pointed notice that even here the result is not automatic and as held by Full Bench a discretion still remains with the trial Judge under Section 148 of the Civil Procedure Code to exercise his power in favour of the defaulting party. Therefore, if on the date next following the date of the order of payment of costs the issue is not raised by either of the parties or taken notice of by the Court, it cannot be said that thereafter on all or any subsequent date the same can be resuscitated or that Section 35B would continue to apply with all its rigour thereafter as well. Indeed it seems inevitable that if on the crucial date fixed for the payment of costs the question is not raised at all then impliedly a waiver of the right arising in favour of the party entitled to costs would necessarily follow. Therefore, on subsequent dates it would not be open to the parties to reopen the issue at their will and seek the barring of the further prosecution of the suit or the defence under Section 35B afresh. It is axiomatic that the law is for the vigilant and not for those who blissfully sleep over their rights.

7. Again it seems to be manifest that an order for the payment of costs is plainly one in favour of the individual litigant. Under Section 35B such an order is in terms made for re-imbuing the other party in respect of the expenses incurred by him in attending the Court on that date and is thus compensatory in nature. The failure to pay these costs results in the arising of a valuable right in the opposite party to bar the prosecution of the suit or the defence, as the case may be. Now on general principles even, it is plain that a person in whose favour such a right accrues may waive the same. Obviously it would be untenable to hold that a party must be compelled to exercise a right vested in him. Therefore it would follow that if such a right can be waived

expressly, then equally it may be so done impliedly or at least deemed to be so in the eye of law. In the context of section 35B if on the date next following the date of the order of the payment of costs, the issue is not raised by either of the parties or taken notice of by the Court, and the case is allowed to proceed further, it would follow that the party having the right to bar the further prosecution of the suit or the defence has waived its right. Thereafter, it would not be possible to again exercise the ghost of the stringent provisions of Section 35 B at any and every subsequent date.

- - - - -
- - - - -

9. The question involved is equally capable of being viewed from another angle. Section 35B clearly raises a valuable right in favour of the party entitled to costs when default in payment thereof is made on the date next following. Consequently, when on this crucial date, the right to bar the further prosecution of the suit or its defence (as the case may be) is neither pressed nor exercised by the party having the same and it allows the trial to proceed, then it would be obviously unconscionable to permit the exercise of the said right on the later and subsequent dates. Having expressly or impliedly allowed the suit to proceed, despite the clear provisions of Section 35B the party in whose favour a right had accrued, would be estopped on subsequent dates from re-opening the issues afresh.

10. In fairness to the learned counsel for the petitioner I must notice that the core of his stand was that once a default in the payment of costs on the adjourned date takes place within the meaning of Section 35B then irrespective of the issue being raised or not on that date the proceedings subsequent thereto would become wholly non-est. The learned counsel had to go to the logical length of arguing that even when a suit had been dragged on for years it would still be open for the party to raise and equally obligatory for the Court to stop the further prosecution of the suit or the defence even upto

*the stage of the pronouncement of the judgment if it could be established that the costs were not paid on the date fixed. Mr. L.K. Sood, learned counsel for the intervener, was equally pushed to the extreme stand of contending that even on appeal or in a second appeal as well (where no such objection was raised at the trial stage at all), it would be obligatory to apply Section 35B in its full rigour, the moment it was raised and established that there had been a failure or omission to pay the costs on the ordered date. Reliance was placed on **Manohar Lal v. Mahesh Chand etc., 1983 P.L.R. (Short Note) 1**, and **Civil Revision No. 106 of 1982 (Sat Pal v. Banarsi Dass and others) decided on 25th May, 1982.***

11. I regret my inability to subscribe to what appears to me as an extreme and somewhat doctrinaire stand raised on behalf of the petitioner and the intervener. Indeed the aforesaid argument, carried to its logical lengths, exposes its fallaciousness. I have already opined and independently held that Section 35B is open to no such construction. However even if two constructions were possible (assuming entirely for the sake of argument) one must avoid the one which leads to the afore-noticed anomalous, if not absurd results. It seems both illogical and inequitable that on all subsequent dates in a suit, which may have dragged on for years or even in the later appellate or revisional stages, the ghost of barring the further prosecution of the suit or defence can be exercised at any stage later.

- - - - -
- - - - -

16. To conclude, both on principle and precedent, as also on the language of Section 35B, the answer to the question posed at the very outset is rendered in the negative. It is held that the party defaulting in the payment of costs on the date fixed for the payment thereof (on which date this issue is not at all raised) cannot on subsequent date or dates be barred afresh from further prosecuting the suit or the defence, as the case may be.

17. Applying the above, it necessarily follows that this revision petition must fail on the common ground that on 25th September, 1981, which was the date fixed for the payment of costs, the issue of their payment was not raised at all and the reply to the application was duly received and the case was allowed to proceed for consideration thereof on 10th October, 1981. It was only on the latter date that the matter was sought to be raked up afresh by putting in an application which stands rejected by the trial Court. On the following date the costs were tendered but refused and in reply it was explained that due to some misunderstanding the respondents were not aware of the order of costs and were always ready for the payment of the same. The trial Court rightly rejected the application and in revisional jurisdiction we find not the least justification to interfere with it. The revision petition is hereby dismissed with no order as to costs.”

15. Adverting to the facts of the present case, admittedly the written statement was filed by the petitioners-defendants. After the filing of the written statement, the application for issuance of directions to the petitioners-defendants to produce certain documents was moved. The order dated 08.09.2017 (Annexure P-4) shows that some costs were imposed which were duly paid. However, since an adjournment had been prayed for, the same was granted and the case was fixed for 13.10.2017, for filing of reply to the application subject to payment of costs of ₹200/-. On 13.10.2017, however, neither costs were paid nor the reply was filed. The trial Court, observing that many opportunities had been granted to the petitioners-defendants for filing of the reply to the application, struck off the defence. Issues were framed and the case was fixed for evidence of the respondent-plaintiff. The evidence of the respondent-plaintiff continued till 30.01.2019. On this date, the respondent-plaintiff closed his evidence and the case was fixed for arguments. Now it has to be seen as to whether the trial Court

was justified in doing so or not.

16. A perusal of the impugned order shows that many opportunities were availed by the petitioners-defendants to file reply to the application. Ideally, in case of non-supply of documents, the provisions of Order 8 Rule 1 A would come into force and the petitioners-defendants would not be permitted to produce the said documents in evidence. However, the question which would then arise would be as to what would be the effect of non-payment of costs as envisaged under Section 35 B CPC. In the considered opinion of this Court, here the judgment of the Hon'ble Full Bench in the case of ***Shri Anand Parkash Vs. Shri Bharat Bhushan Rai and another (supra)***, would come into the picture and as per the ratio laid down by the Hon'ble Full Bench, the defence of the petitioners-defendants would be liable to be struck off on account of non-payment of costs. Though, the penalty for non-payments of costs imposed on account of non-filing of a reply to an application, despite the fact that written statement had been filed, seems to be too drastic but it has to be imposed in view of the ratio laid down by the Hon'ble Full Bench. The Hon'ble Full Bench in the case of ***Prem Sagar Vs. Phul Chand (supra)*** would not come to the aid of the petitioners-defendants because on the date on which costs were not paid i.e. 13.10.2017, defence was struck off.

17. Merely because issues had been framed and onus of certain issues had been put on the petitioners-defendants would not also come to the aid of the petitioners-defendants because once the written statement had been filed, issues had to be framed and the respondent-plaintiff had to be called upon to prove his case. The petitioners-defendants should have challenged the order at that point of time. In the considered opinion of this Court, even the review application was belated and, therefore, challenge to the order dated 13.10.2017 by way of the present revision petition is also belated. Be that as it may, in view of the categoric decision of the Hon'ble Full Bench in the case of ***Shri Anand Parkash***

Vs. Shri Bharat Bhushan Rai and another (supra), no fault can be found with the order dated 13.10.2017 passed by the trial Court.

In view of the above, I do not find any merit in the present revision petition and the same is accordingly dismissed.

13.09.2023

Prince Chawla

(VIKRAM AGGARWAL)
JUDGE

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No