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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 22nd March, 2023*

+ C.R.P. 210/2022 & CM APPL. 55101/2022

MRS. DEEPALI AGGARWAL Petitioner
Through: Ms. Charu Ambwani,
Advocate.
versus

SHRI VARUN GUPTA AND ANR. Respondents
Through: Mr. Tushar Sharma, Advocate
for R-1.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. Present revision petition lays a challenge to an order dated 27.08.2022, whereby the Trial Court has dismissed the suit of the Petitioner herein for non-payment of cost imposed vide an earlier order dated 28.11.2018. Petitioner herein is the Plaintiff before the Trial Court and Respondents are the Defendants. Parties are hereinafter referred to by their litigating status before this Court.

2. Necessary and relevant facts are that on account of a marital discord between the Petitioner and her husband who is Respondent No. 1 herein, on 05.09.2015, Petitioner filed a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 before the concerned Metropolitan Magistrate and the same is pending consideration. On 25.07.2016, Petitioner also filed a suit being CS DJ 79089/2016 for declaration and permanent injunction with respect to the suit property being Flat No. 106, Pocket-B-6, Sector-4, Rohini, Delhi-110085. Written statement was filed by the Respondents and issues were framed on 11.10.2017 and on the same date, the matter

was adjourned to 07.02.2018, directing the Petitioner to file evidence by way of affidavit. On 07.02.2018, adjournment was sought on behalf of the Petitioner on ground that the counsel was held up in another Court. At request, one more opportunity was granted for Plaintiff's evidence listing the matter on 28.05.2018. Petitioner filed her evidence by way of affidavit on 28.05.2018 and the matter was adjourned to 08.08.2018, on which date adjournment was again sought by the Petitioner as her counsel was not available. Last and final opportunity was granted by the Trial Court for completing Petitioner's evidence on 28.11.2018, failing which the evidence was liable to be closed. On 28.11.2018, no witness was present on behalf of the Petitioner and adjournment was sought by her father on the ground that she was unwell and medical prescription was filed. The Trial Court granted one more opportunity for evidence, subject to cost of Rs.3,000/-. Subsequently, an application was filed by the Petitioner for waiver of cost and another adjournment was sought by the Petitioner, which was granted by the Trial Court, however, subject to additional cost of Rs.10,000/-.

3. Since the counsel for the Petitioner was not appearing on the dates fixed before the Court, Petitioner changed her counsel, however, on 27.08.2022, the Trial Court dismissed the suit on the ground that the costs imposed on the earlier dates were unpaid and Petitioner had not complied even with the direction of supplying copy of the affidavit in evidence to the Respondents. The suit was dismissed by the Trial Court invoking the provisions of Section 35-B CPC.

4. Learned counsel for the Petitioner contends that Trial Court has wrongly dismissed the suit on account of non-payment of costs or non-supply of copy of the affidavit to the Respondents. The impugned order is against the provisions of Section 35-B CPC, as also the

judgment of the Supreme Court in *Manohar Singh v. D.S. Sharma and Another*, (2010) 1 SCC 53. It is submitted that if the costs were not paid by the Petitioner, at best the Trial Court could have forfeited the right of the Petitioner to prosecute the case but could not have dismissed it. It is also the submission of the Petitioner that there is a matrimonial dispute between the parties and maintenance applications have been filed by the Petitioner, wherein execution petitions are also pending. Petitioner is unable to meet her daily needs and has no means of livelihood and was therefore, unable to pay the cost and had moved an application for waiver. Petitioner had taken steps to engage a lawyer, who for some reasons or the other remained engaged in other matters and was unable to appear in the case. Petitioner cannot be blamed for non-appearance of the counsel and had also taken steps to change the counsel. Counsel for the Petitioner candidly submits that since Petitioner had failed to pay the costs imposed by the Trial Court on two occasions and adjournments were sought on account of non-appearance of the counsel, Petitioner is willing to suffer the consequences which ensue as a fall out under the provisions of Section 35-B CPC and would not insist on leading Petitioner's evidence. It is, however, asserted that the suit be restored and matter be remanded back to the Trial Court with a direction to the Court to proceed from the stage of Respondents' evidence, giving opportunity to the Petitioner to cross-examine their witnesses and argue the matter finally.

5. Learned counsel for Respondent No. 1 takes a preliminary objection to the maintainability of the present petition and submits that since the suit has been dismissed, the remedy available to the Petitioner was to file an appeal. On merits it is submitted that several opportunities were granted to the Petitioner to lead evidence, but she

failed to do so. The Trial Court accommodated the Petitioner on several dates but when the Petitioner failed to lead evidence and pay the costs imposed on two occasions, the suit was rightly dismissed by the Trial Court and no infirmity can be found with the impugned order.

6. I have heard the learned counsels for the parties and examined their contentions.

7. Insofar as the preliminary objection raised by Respondent No. 1 with regard to the maintainability of the civil revision petition is concerned, the same merits rejection, in view of the judgment of the Supreme Court in *Manohar Singh (supra)*. In the said case, Plaintiff had filed a suit for damages for defamation against the Defendants. The case was listed for cross-examination of DW-2 on 07.01.2004 on which date, at the request of the Plaintiff, adjournment was granted to cross-examine the witness subject to payment of costs. Since cost was not paid on 01.04.2005, it was directed that upon deposit of the cost, witness shall be cross-examined on 27.04.2005. Again cost was not deposited by the Plaintiff and the matter was adjourned to 27.07.2005, on which date after noting the provisions of Section 35-B CPC and failure of the Plaintiff to pay the costs, the suit was dismissed. Plaintiff challenged the dismissal of the suit before this Court in a Civil Revision and this Court upheld the order of the Trial Court, dismissing the Civil Revision petition. The matter was carried in appeal by the Plaintiff to the Supreme Court. By a judgment dated 13.11.2009, the Supreme Court allowed the appeal setting aside the orders of this Court and the Trial Court and restored the suit, subject to certain conditions. In this view of the matter, Civil Revision petition is maintainable against the impugned order and the matter now needs to be examined on merits.

8. The neat legal nodus that arises for consideration before this Court is whether the provisions of Section 35-B CPC are mandatory inasmuch as non-compliance of a condition precedent imposed by the Court would result in the penal consequence of dismissal of the suit. In my view, this issue is no longer *res integra* and is covered by the judgment of the Supreme Court in ***Manohar Singh (supra)***. As noted above, in the said case the Trial Court had dismissed the suit for non-payment of costs imposed on account of adjournments sought by the Plaintiff for cross-examination of defence witness DW-2 invoking provisions of Section 35-B CPC. Plaintiff challenged the order in CRP No. 6/2006 before this Court. After extracting the provisions of Section 35-B CPC, this Court held that a bare scrutiny of provisions of Section 35-B CPC would show that Legislature has made its intention absolutely clear and beyond the pale of doubt that the provisions are mandatory and any non-compliance would result in penal consequences envisaged therein and the revision petition was dismissed.

9. The contention of the Appellant before the Supreme Court was that having regard to the provisions of Section 35-B CPC, if costs levied on the Plaintiff are not paid, Court can only stop further prosecution of the suit and the Section does not confer power to dismiss the suit. Testing the correctness of the orders of this Court and the Trial Court, in light of the provisions of Section 35-B CPC, the Supreme Court has held as follows:-

“7. Section 35-B CPC deals with costs for causing delay. Relevant portion of the said section is extracted below:

“35-B. 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.”

Section 35-B 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.

8. *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 the plaintiff, or that the defence should be struck off and the 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, the 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 the 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 35-B contemplates or requires dismissal of the suit as an automatic consequence of non-payment of costs by the plaintiff.*

9. *We may also refer to an incidental issue. When Section 35-B 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 in extending the time for such payment, in exercise of its general power to extend time under Section 148 CPC. Having regard to the scheme and object of Section 35-B, 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 35-B were itself levied for causing delay.

10. We may also refer to the provisions of Rule 1 of Order 17 CPC 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 suit.

(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 or 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 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 the 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.

11. A conspectus of the above provisions clearly demonstrates that under the scheme of CPC, 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.

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13. In view of the above, we allow these appeals, set aside the judgments of the High Court and the trial court, restore the suit to its file, subject to the following:

(i) The right of the plaintiff to cross-examine DW 2 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 the appellant-plaintiff tenders the costs with an appropriate application under Section 148 CPC, 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 DW 2."

10. From a reading of the judgment of the Supreme Court it is clear that a suit cannot be dismissed for non-payment of costs. At best, non-payment can result in forfeiture of a right to further prosecute the suit or defence as the case may be and as held by the Supreme Court if the costs levied for seeking an adjournment to lead evidence are not paid, the appropriate cost is to close the evidence of the defaulting side and prohibit further prosecution of the suit or defence, as the case may be. In view of this, the contention raised by Respondent No. 1 even on merits of the issue arising before this Court deserves to be rejected.

11. Accordingly, the impugned order dated 27.08.2022 is set aside and the suit is restored to its original number. Counsel for Petitioner has fairly conceded that she would not insist on leading Petitioner's evidence and the matter may proceed further from the stage of leading defence evidence.

12. Accordingly, the Trial Court shall proceed to record Defendants' evidence and needless to state Petitioner will be permitted to cross-examine and address final arguments before the suit is disposed of.

13. Revision petition along with pending application is allowed and disposed of in the aforesaid terms with costs of Rs.5,000/- to be paid by the Petitioner in favour of Delhi High Court Bar Clerks' Association.

MARCH 22, 2023/shivam

JYOTI SINGH, J