

IN THE HIGH COURT AT CALCUTTA

Civil Revisional Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

CO 1171 of 2025

Sipra Roy & Anr.

Versus

Sandhya Roy Choudhury

For the petitioner : Mr. Tapas Kumar Manna
Ms. Anindita Majumder

For the opposite party : Mr. A. Chakrabarty

Heard on : 16.07.2025 and 17.07.2025

Judgement on : July 17, 2025

Hiranmay Bhattacharyya, J.:

1. This application under Article 227 of the Constitution of India is at the instance of the defendant and is directed against orders dated January 28, 2025 and February 11, 2025, both passed by the learned Judge, 4th Court, Presidency Small Causes Court at Calcutta in Ejectment Suit No. 281 of 2006.

2. By the order dated January 28, 2025, the order being no. 98 dated December 21, 2024 was recalled only to the extent of closing of the cross-examination of PW-1 by the defendant and a date was fixed for payment of cost and cross-examination of PW-1.

3. By the order dated February 11, 2025 the cross-examination of PW-1 was closed due to non-payment of cost by the defendant and a date was fixed for argument.

4. Learned advocate appearing for the petitioner submits that on December 21, 2024, a prayer for adjournment was made by the defendant and the learned trial judge closed the cross-examination of PW-1 by the said order. He further submits that cross-examination could not be made as the learned advocate was not available and the learned trial judge, though allowed the prayer for cross-examination of PW-1, imposed a heavy cost as a condition precedent to allow the petitioner to cross-examination the PW-1. Learned advocate appearing for the petitioner submits that the costs contemplated under the provisions of Section 35B of the Civil Procedure Code, should not be penal in nature and in support of such contention he places reliance upon a decision of the Hon'ble Delhi High Court in the case of ***M/s. Progressive Constructions Ltd. -Vs.- M/s. Sharma Associates and Contractors Pvt. Ltd. & Anr., reported at (2001) AIR (Delhi) 494*** and the decision of the Hon'ble

Supreme Court in the case of ***Monohar Singh –Vs.- D. S. Sharma & Ors., reported in AIR 2010 SC 508***. He, therefore, submits that the learned trial judge ought not to have imposed the cost as the prayer for adjournment was made on the ground of unavailability of the learned advocate.

5. Learned advocate appearing for the opposite party seriously disputes the submission made by the learned advocate appearing for the petitioner. He submits that the petitioner is trying to delay the hearing of the suit which is a suit for eviction under Section 6 of the West Bengal Premises Tenancy Act. He further submits that the defence of the petitioner against delivery of possession has already been struck off. He submits that on March 10, 2025, the petitioner refused to advance any argument and for which the argument of the defendants was closed by an order dated March 10, 2025.

6. Heard the learned advocates for the respective parties and perused the materials placed.

7. Record reveals that April 18, 2023 was fixed for peremptory hearing and on that date PW-1 was examined on dock in full and cross-examined in part and his evidence was deferred. Thereafter several dates were fixed for further cross-examination of PW-1. It appears from the record that on September 10, 2024 the defendant prayed for adjournment and such prayer was allowed. It

further appears from the record that on May 7, 2024, the petitioner filed an application under Section 151 of the Civil Procedure Code read with Section 213 of the Indian Succession Act, which stood rejected by an order dated November 7, 2024 and by the said order, December 21, 2024 was fixed for cross-examination of PW-1. On December 21, 2024, the defendant filed an application praying for adjournment on the ground that they intend to move the Hon'ble High Court against an order passed by the learned trial judge but have not been able to proceed on the ground of illness of the defendant no. 2. However, the learned trial judge recorded that though an application for adjournment was filed, none appeared and moved such petition. The learned trial judge accordingly closed the cross-examination of PW-1 by the order dated February 21, 2024.

8. Thereafter, the petitioner filed an application praying for recalling of the order dated February 21, 2024. The learned trial judge after considering the fact that the defendant even after getting sufficient time did not cross-examine the PW-1 till December 21, 2024, allowed the application dated January 7, 2025 with cost of Rs. 3,000/- to be paid to the plaintiff/opposite party herein.

9. The learned trial judge by the order dated January 28, 2025 recalled the order dated December 21, 2025 only to the extent of closing of the cross-examination of PW-1 by the defendants. A date for cross-examination of the PW-1 and for payment of cost was fixed on

February 11, 2025. However, on February 11, 2025, the learned advocate appearing for the petitioner submitted that the petitioner will not pay the amount of cost and he would prefer to go before the appellate forum against the order passed by the learned trial judge.

10. The learned trial judge after recording that the order dated January 28, 2025 was a conditional one, closed the cross-examination of PW-1 due to non-payment of cost by the defendant. By the said order, March 10, 2025 was fixed for argument.

11. On March 10, 2025, the petitioner was asked to advance his argument but the learned advocate for the defendant/petitioner herein expressed that he will not argue the suit as he sought for adjournment and, accordingly, the learned trial judge closed the argument of the defendant. On March 10, 2025, the plaintiff was heard in part.

12. The Hon'ble Supreme Court in ***Manohar Singh (supra)*** after taking note of the provisions of Section 35B of the Civil Procedure Code and Order 17 Rule 1 of the Civil Procedure Code, held that non-payment of costs results in forfeiture of the right to further prosecute the suit or defence, as the case may be. It was further held that award of cost is an alternative available to the court, instead of dispensing with the cross-examination and closing the evidence of the witness. If the cost levied for seeking an adjournment to cross-

examine a witness is 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.

13. However, the Hon'ble Supreme Court observed that failure to pay cost could not have resulted in dismissal of the suit. The Hon'ble Supreme Court held thus:

"5. Section 35B of CPC deals with costs for causing delay. Relevant portion of the said section extracted below:

"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 re-corded, 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.

xxxxxxxxx "

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 plain-tiff. 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 is-sue. 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 of Order XVII of 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 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 re-corded 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 an-other 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.

(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 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.

9. In this case, the plaintiff has harassed the defendants and its witness by seeking repeated adjournments. In view of it, plaintiff's right to cross-examine DW2 stands forfeited. However, as costs

were levied, but were not paid, the court should have closed the evidence of DW2, permitted the defendants to produce any further evidence (without any right to plaintiff to cross-examine such witnesses) and then ought to have proceeded to dispose of the suit on merits by considering the material available and hearing the arguments of defendant. The court could not have dismissed the suit.”

14. Thus the Hon’ble Supreme Court held that non-payment of cost levied would result in forfeiting the right of a party to cross-examine the witness of the adversary. The said decision cannot come to the aid of the petitioner but the same supports the case of the opposite party.

15. In ***M/s. Progressive Constructions Ltd. (supra)*** it was held that as long as the costs awarded are reasonable, they will remain within the definition of the word ‘costs’ but whenever the costs are so high that they shocked the conscience of the court, they have to be treated as punitive irrespective of the fact that they have been termed as costs.

16. There is no dispute that the costs contemplated under Section 35B of the Civil Procedure Code is not punitive in nature. The learned trial judge after considering the conduct of the petitioner imposed a cost of Rs. 3,000/- only for allowing the petitioner to cross-examine the PW-1. This court does not find that imposition of the cost by the learned trial judge as a condition to cross-examine the PW-1, to be an unreasonable one warranting interference under Article 227 of the Constitution of India.

17. However, considering the fact that cross-examination is a valuable right, this court is inclined to grant a last opportunity to the petitioner herein to apply before the learned trial judge for extension of time to deposit the cost. If the petitioner herein tenders the costs with an appropriate application praying for extension of time for payment of such cost, the learned trial judge is requested to consider such application in accordance with law. It is, however, made clear that in the event the learned trial judge exercises its discretion to extend the time for payment of such cost and the petitioner does not comply with such direction, the petitioner shall not be allowed to cross-examine the PW-1 and the learned trial judge shall proceed with the suit in accordance with law.

18. For the reasons as aforesaid, CO 1171 of 2025 stands dismissed with liberty as aforesaid.

(Hiranmay Bhattacharyya, J.)

AD 4

S. Banerjee
AR (Ct.)