

(1989) 03 DEL CK 0067

In the Delhi High Court

Case No : Suit No. 422 of 1984 and Interim Application No. 5423 of 1988

Arvind Construction Co. and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-03-1989

Acts Referred:

Citation : (1989) 38 DLT 129

Hon'ble Judges : S.N. Sapra, J

Bench : Single Bench

Advocate : S.C. Gupta, L.R. Goel and Vikramjit Sen, for the Appellant;

Judgement

S.N. Sapra, J.

(1) By the present application, being I.A. No. 5423/88. defendants have prayed to the Court to recall its order, passed on August 8 1988 and permit them to defend the suit on such terms, as may be appropriate and just.

(2) plaintiffs filed a suit against defendants for permanent injunction and recovery of excess freight.

(3) Defendants were duly served. Vide order dated April 2,1986, defendants were proceeded ex parte.

(4) Defendants filed an application, being I.A. No. 243 of 1987, under Order 9, Rule 7 read with Section 151 of CPC for setting aside the order dated April 2, 1986.

(5) Vide order dated October 6, 1987, the ex parte proceedings were set aside, subject to defendants paying Rs. 500.00 as costs.

(6) Thereafter, the matter was listed before the Deputy Registrar on various dates, but defendants failed to pay the costs of Rs. 500.00 to plaintiffs.

(7) As no steps were taken by defendants for the payment of the costs, so vide order dated August 8, 1988, this Court struck off the defense of defendants. .

(8) In the present application, it is alleged that counsel for defendants informed defendants about the order vide his letter dated October 12, 1987. Defendants had issued instructions for the payment of costs as per letter dated November 9, 1987. On November 11, 1987, no one was present in the Court on account of strike. Then, the case was listed on February I, 1988 on which date the Presiding Officer, was on leave. On March 16, 1988, none was present again on account of strike.

(9) It is further alleged that another reminder was sent by counsel to defendants, vide his letter dated July 15, 1988. In reply thereto, defendants informed the counsel by their letter dated July 27, 1988 that a cheque dated December 8, 1987 was sent vide Registry No. 2833 dated December 18, 1987. Thereafter, the counsel informed defendants that the cheque had not been received, hence a fresh cheque be made out in terms of the letter dated July 30, 1988. According to defendants, the efforts were constantly being made for arranging the payment of costs. Failure to pay costs was due to events beyond the control of defendants.

(10) The allegations made in the application, have been controverted by plaintiffs in their reply.

(11) The main objection is that u/s 35B of Civil Procedure Code, payment of costs, on the next date following the date of such order, is a condition precedent to the further prosecution of the defense by defendants. Admittedly, defendants did not pay the costs on November 11, 1987, the date fixed before the Deputy Registrar, for admission and denial of the documents. Hence, the present application is not maintainable. On merits, plaintiffs have alleged that the reasons stated in the application, do not constitute the events beyond the control of the defendants to make payment of the costs.

(12) The first question, involved in the present case, is whether the application for recalling the order dated August 8, 1988, is maintainable or not.

(13) Mr. S.C. Gupta, learned counsel for plaintiffs, has urged that a bare perusal of the provisions, as contained in Section 35B of the CPC shows that the Legislature made its intention absolutely clear. These provisions are mandatory in nature and non-compliance with the same would result in penal consequences. He has laid emphasis on the word "shall", as appearing before the words "be a condition precedent to the further prosecution ". Mr. Gupta has relied upon a judgment of the Pull Bench of Punjab and Haryana High Court in case Anand Parkash Vs. Bharat Bhushan Rai and Another, .

(14) Mr. Vikramjit Sen, learned counsel for defendants, has urged that this Court has inherent powers u/s 151 read with Section 148 of the CPC to recall the order and extend the time for making the payment of costs. He has placed reliance on a judgment in case Municipal Committee Kharkhoda Tehsil and District Sonapat through its Administrator v. Bhim Singh, Vol. Xci (1987-1) Plr, 435.

(15) It is necessary to reproduce the provisions, as contained in Sections 35B, 148 and 151 of CPC :

"35B. Costs for causing delay-(1) 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 and 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 defense by the defendant, where the defendant was ordered to pay such costs. Explanation :-Where separate defenses 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 defense 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 indicating 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".

148. Enlargement of time-where any period is fixed or granted by the Court for the 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. 151. Saving of inherent powers of Court- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court".

(16) The Full Bench of Punjab & Haryana High Court in Anand Parkash (supra), by majority, held :

"CASES are not wanting in Which the Courts have molded their practice to meet a situation over which a party has had no control and for that purpose, the Court has ample power u/s 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 through the period originally fixed or granted may have expired". 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 defense, 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 u/s 148 of the Code in favor of the defaulting party if a strong case is made out for exercise of such jurisdiction. 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 defense, 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 u/s 148 of the Code in favor of the defaulting party if a strong case is made out for the exercise of such jurisdiction".

(17) In *Municipal Committee Kharkhoda*, (supra) Mr. Justice G.C. Mittal interpreted the provisions of Sections 35B, 151 and 148 of the Civil procedure Code. Mr. Justice Mittal also referred to the judgment in case *Anand Parkash* (supra), of the Full Bench and observed as under :

"Sometimes it may not be possible to furnish the Explanation for the default on the date fixed. To illustrate ; if a party is coming to the Court with the costs and in the way meets with an accident and instead of landing in the court it lands in the hospital, there may not be sufficient time to furnish these facts before the Court and by the time the facts are brought to the notice of the court, it may be late and the court may have struck off the defense for nonpayment of costs. Therefore, by and large the application may be moved after the event and the Court will have to decide on the given facts of the case whether a case for extension of time or for recalling the order has been made out or not. Accordingly, I am of the view that the court below has failed to exercise its jurisdiction in not considering the application for extension of time on merits."

(18) Order IX of CPC deals with the appearance of parties and consequences of non-appearance. Where a suit is dismissed under Rules 2 and 3 of Order IX of Civil Procedure Code, plaintiff may subject to the law of limitation, bring a fresh suit, or he may apply for an order to set the dismissal aside, if he satisfies the court that there was sufficient cause for such failure.

(19) When the defendant is proceeded ex parte under Rule 6, then under Rule 7 of Order IX defendant may get the ex parte proceedings set aside after showing good cause for his previous non-appearance. Similarly if the suit is decreed ex parte, the defaulting party can file an application under Rule 13 to set aside the decree. No doubt, in respect of Section 35B C.P.C. no specific provision has been made thereby permitting the defaulting party to move an application; So Section 151 of CPC will be attracted and if the Court is satisfied that there was a sufficient cause turn the defaulting party for not paying the costs on the date fixed, the Court under its inherent jurisdiction, can recall the order and u/s 148 of the Civil Procedure Code, enlarge the time for making the payment. Even the

Full Bench in case Anand Prakash (supra) held that where the costs were not paid as a result of the circumstances beyond the control of the defaulting party, then, the Court would be well within its jurisdiction to exercise its power u/s 148 of CPC in favor of the defaulting party, if a strong case was made out for exercise of such jurisdiction.

(20) I hold that the Court has the power to enlarge the time for payment of the costs, if the other conditions are satisfied. The Court can also exercise its inherent jurisdiction u/s 151 of CPC to meet the ends of justice. I am in respectful agreement with the findings of Mr. Justice G.C. Mittal:

(21) I, Therefore, hold that an application for recalling the order passed u/s 35B of CPC is maintainable u/s 151 read with Section 148 of CPC and if, the Court is satisfied, it has power to recall the order striking out defense and grant more time for payment of costs.

(22) Now, it is to be seen whether defendants have been able to show that the costs could not be paid on account of the circumstances beyond their control.

(23) In the application, it is alleged that counsel for defendants informed defendants about the order vide his letter dated October 12, 1987. In the application, it is mentioned that the copy of the letter is Annexure A. It is further alleged that defendants had issued instructions for the payment of costs as per letter dated November 11, 1987.

(24) According to the applicants, another reminder was sent by counsel to defendants vide his letter dated July 15, 1988. It is stated that this is annexure C. In reply, defendants informed their counsel vide letter dated July 27, 1988 that a cheque dated Decmber8,1987wassent vide registry No. 2833 dated December 18, 1987. Counsel for defendants informed defendants that this cheque was not received and hence a fresh cheque be made in terms of letter dated July 30, 1988. Thereafter, according to applicant, efforts were being made for arranging the payment of costs. Failure to pay the costs was due to the events beyond the control of defendants.

(25) In the application, defendants have alleged that copies of the letters have been annexed. It is a matter of great regret that none of the documents was annexed in spite of the fact that this was so stated in the application. In the application, defendants have alleged that the efforts were constantly being made for arranging the payment of costs, and failure to pay costs was due to the events beyond the control of defendants.

(26) Defendants were proceeded ex parte vide order dated April 2, 1986. Upon application, being I.A. No. 243/87, filed by defendants under Order 9, Rule 7 of Civil Procedure Code, ex parte proceedings were set aside vide order dated October 6,1987. The present application is signed by counsel for defendants. An affidavit in support of the application has been filed by clerk of the counsel. In other words, no official of the Union of India, has filed any affidavit in support of

the application. In his affidavit, Mr.Badoni, who is a clerk of learned counsel for defendants, stated that the contents of the application for recalling the order, are true to information based on records. The question is which record. The clerk is not aware about the records of the Government. Applicant failed to file copies of any of the letters, as alleged in the application, though in the application, it is alleged that the same are annexed. From the application, it appears that counsel for defendants informed defendants, vide his letter dated October 12,1987, Defendants issued instructions for the payment of these costs vide letter dated November 9, 1987. Copy of this letter has not been annexed, though in the application, it is mentioned as Annexure B. The case was listed before the Deputy Registrar on various dates, but no costs were paid. After letter dated October 12, 1987, the other letter, according to the applicant, is dated July 15, 1988, written by counsel to defendants for costs. In between, there is no correspondence between the counsel and defendants. It is alleged, defendants informed the counsel by letter dated July 27, 1988, that a cheque dated December 8, 1987 had been sent vide registry No. 2833 dated December 18, 1987. Copies of these letters have not been filed, though, it is alleged, that these are annexures C & D respectively. Thereafter, the counsel informed the defendants that he had not received the cheque, hence a fresh cheque be issued in terms of letter dated July 30, 1988. No copy of such letter has been filed. I appreciate that there are difficulties in a Government Department to arrange for the payment of costs and it takes a considerable time for arranging the payment. But to explain the delay, an affidavit should have been filed by an official concerned of the defendants, and in support of the application. Instead, an affidavit of the clerk of a counsel has been filed, who is not aware of any of the happenings in the Government. When the case was listed before Court on August 8. 1988, even then, the costs were not offered for payment to the other side. I might have extended the time for payment of costs, if an affidavit in support of the application had been filed by a responsible officer of the defendants. Even the applicants have failed to file any of the documents in support of the application.

(27) Under the circumstances, no case has been made out that the costs were not paid due to the events beyond the control of the defendants I. A. No. 5423/88 is dismissed.