
(1982) 11 P&H CK 0064
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 2347 of 1982

M/s Allahabad Law Journal Co. Ltd.

APPELLANT

Vs

Punjab School Edu Board, Chandigarh

RESPONDENT

Date of Decision : 10-11-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35B

Citation : (1982) 11 P&H CK 0064

Hon'ble Judges : Gokal Chand Mital, J

Bench : Single Bench

Advocate : H.L. Sarin, with Mr. M.L. Sarin and Mr. R.L. Sarin, for the Appellant;
I.K. Mehta, for the Respondent

Judgement

Gokal Chand Mital, J.—On 31-8-1979 the Punjab School Education Board filed a suit for the recovery of Rs. 4, 52, 43, 86 against M/s. Allahabad Law Journal Company as the price of the paper which was supplied by the plaintiff to the defendant, for printing Science Text Books for school students. The plaintiff had imported this paper through Unicef. It is alleged that the defendant did not print the Text Books, and misutilised the -paper supplied to them and consequently the suit for the recovery of the price of the paper was filed. By order dated 30-8-1982, the trial Court accepted, the application of the plaintiff filed u/s 35-B of the CPC (hereinafter referred to as the Code) and closed the defence of the defendant because the defendant did not tender or pay the costs of Rs. 15/- which were imposed on 15-4 1982 while granting adjournment to the defendant to produce its evidence. The defendant has come to this Court against the aforesaid order in revision u/s 115 of the Code

2. The plaintiff's counsel has produced before me true copies of the orders of, trial Court right from 31-8-1979 till 11-9-1982. First advertng to the matter which relates to the impugned order, what I find is that on 25- 2-1982 the plaintiff closed its evidence and 15-4-1982 was fixed as the first date for defendant's evidence. The defendant neither put in a list of witnesses nor the list

of documents nor summoned witnesses for 15-4-1982. When the case was taken up on 15-4-1982, the defendant filed an application under Order 18, Rules 2 and 17 of the Code for a direction to recall the plaintiff's solitary witness Ashok Nirdosh, whose Statement was recorded as P.W. 1, for cross-examination on the plea that when his statement was recorded the counsel for the defendant could not appear and, therefore, he was not cross-examined. The Court took notice of the filing of that application and fixed 1-5-1982 for filing the reply. After passing the aforesaid order, the following lines were also written:--

The defendant has also filed list of witnesses and documents. However, the defendant is burdened with costs of Rs. 15/- for not producing the evidence today.

It deserves mention that while adjourning the case to 1-5-1982, the Court did not direct as to on what date the defendant was to produce its evidence. The Order of 1-5-1982 is as follows:--

Reply to application filed. For arguments on the application, case to come up on 20-5-1982.

On 20-5-1982, the counsel for the defendant was not present for arguing the application and adjournment was prayed for the Court passed the following order:--

In the interest of justice, the case is adjourned to 3-6-1982 for arguments subject to payment of Rs. 20/- as costs. No further adjournment would be given for arguments.

On 3-6-1982, costs of Rs. 20/- were paid which were duly accepted by the counsel for the plaintiff. Before the application filed by the defendant could be argued, the plaintiff filed an application u/s 35-B of the Code for striking off the defence of the defendant because the costs of Rs. 15/-, which were imposed by order dated 15-4-1982, were not paid. The case was adjourned to 14-6-1982 for reply to that application and for arguments. Ultimately the reply was filed on adjourned hearing and the matter was heard and the defence was struck off by the impugned order.

3. A reading of the aforesaid facts clearly goes to show that the costs of Rs. 15/- were imposed on the defendant on 15-4-1982 for not producing evidence on that date. Firstly, no other date was fixed for the defendant to produce its evidence and whenever the date would have been fixed, before examining the witness, the defendant could have tendered Rs. 15/- as costs, and in that event, it could not be denied the opportunity to examine its witness after payment of costs of Rs. 15/-. Secondly, if it was to be taken that the costs had to be tendered on the next hearing, then it was 1-5-1982, which was the next date of hearing, and if the defendant did not tender the costs on that date, the Court should have proceeded to strike off the defence u/s 35-B of the Code on 1-5-1982, but this was not done. This course was again not followed on 20-5-1982 and it was only

on 3-6-1982 that an application for striking off the defence u/s 35-B of the Code was filed when costs of Rs. 20/-, which were imposed on the previous hearing, were paid. The question which, therefore, arises for consideration is whether on these facts it can be said that section 35-B of the Code was attracted.

4. A Full Bench of this Court in *Anand Parkash v. Bharat Bhushan Rai* (1981) 83 P.L.R. 555 has held that section, 35 B of the Code is mandatory. In a latest and short judgment dated 30-8-1982, the Supreme Court has also held in *Petition for Special Leave to Appeal (Civil) No. 3325 of 1982 Smt. Indra Devi v. Shamlal S.L. P. (Civil) No. 3325 of 1982* that section 35-B of the Code is not directory because they disagreed with a learned Single Judge of this Court who took the view that section 35-B of the Code is directory. In spite of disagreeing with the learned Single Judge of this Court, the Supreme Court refused to interfere with the order of the trial Court dismissing application u/s 35 B of the Code on the ground that the petitioner who was in SLP before the Supreme Court, did not raise the objection u/s 35-B of the Code at the opportune time, i.e., on the following hearing, but took objection thereafter and they ruled that he had waived the condition precedent and consequently the SLP was dismissed. The entire order of the Supreme Court is in the following terms:--

We do not agree with the view taken by the learned Single Judge that the provisions of Section 35-B C.P.C. are directory. We do not want to interfere inasmuch as from the subsequent conduct of the petitioner, it is clear that he has waived the condition precedent. SLP is dismissed.

Following the above dictum, I hold that the plaintiff had waived the objection and, therefore, on the 3rd hearing such an objection could not have been allowed to be raised.

5. It was then argued by Sh. I.K. Mehta, Advocate, appearing for the plaintiff, that a reading of orders right from the date the defendant was served, up-to date, would show that the defendant has been applying all possible dilatory tactics and most of the adjournments were obtained because they had engaged a counsel from Delhi who was not available on all dates of hearing. He further urges that if the defendant has engaged a counsel from Delhi, he must appear on all hearings and if he does not appear, then the Court should not have lightly adjourned the hearing as is clear from the history of the orders passed by the trial Court. He further states that there are more than one local counsel engaged by the defendant and, therefore, a direction be issued to the trial Court not to adjourn the hearing of the case for any outside counsel and the Court could proceed to decide the case without any adjournment for want of counsel and to decide the same at the earliest as this case is already three years old case on a perusal of the orders of the trial Court right from the beginning till date. I find that Sh. Mehta is right in making his submission. I also find that the trial Court was treating the application filed by the defendant under Order 18, Rules 2 and 17 of the Code for recalling the plaintiff's witness for cross-examination, rather lightly which could have been disposed of within a couple of days and should not

have been kept pending from 15-4-1982 till 3-6-1982 even if the plaintiff filed an application u/s 35-B of the Code, the defendant's application could have been disposed of on 3-6-1982 and then the application of the plaintiff could be adjourned for the reply of the defendant.

6. Accordingly, while setting aside the impugned order of the trial Court and dismissing the application of the plaintiff for striking off the defence of the defendant, a direction is issued to the trial Court to decide the application of the defendant under Order 18, Rules 2 and 17 of the Code forthwith on 30-11-1982 (this date has been fixed at the suggestion of the counsel for the defendant) and the trial Court shall not grant any adjournment on that date. The order on that application may be pronounced on that date or on the following date of hearing.

A further direction is issued to the trial Court to direct the defendant to have its evidence produced in Court in a couple of hearings and whenever the trial Court finds that the defendant is trying to delay the matter or is avoiding service of summons on its witnessess, the trial Court straight way should proceed to issueailable warrants to the witnesses and this course shall be adopted even if the defendant does not press for it In case the defendant does not want the issue ofailable warrants then the trial Court will decline to summon those witnesses and those witnesses will be treated as given up.

7. It is further made clear that no adjournment shall be granted to the defendant for the reason that its counsel from Delhi has not been able to attend the hearing The evidence can be recorded in the presence of the local counsel as well as for this matter, the defendant must take appropriate steps. However, for arguments, one firm date will be given by the trial Court which may suit the defendant including its Delhi counsel and if the counsel from Delhi is not able to attend the hearing for arguments, the Court shall hear the arguments and no adjournment shall be granted to any of the two sides.

8. This revision petition stands disposed of accordingly with no orders as to costs. The parties, through their counsel, are directed to appear before the trial Court on 30-11-1982.