

(2002) 10 MP CK 0043

In the Madhya Pradesh High Court

Case No : Civil Revision No. 226 of 2000

Narayan Rao (dead) through L.Rs. Girish Narayan Rao and
Others

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 11-10-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 148, 35B

Citation : (2003) 1 MPHT 90 : (2002) 1 MPLJ 28

Hon'ble Judges : S.P. Khare, J

Bench : Single Bench

**Advocate : Ravish Agarwal and P. Verma, for the Appellant; Kiran Mehta, Panel
Lawyer for Respondent Nos. 1 to 3 and A.D. Deoras, for the Respondent**

Final Decision : Allowed

Judgement

S.P. Khare, J.

This is a revision by the plaintiffs against the order by which "further proceedings in the suit have been terminated" purporting to act u/s 35B, CPC.

The plaintiffs had instituted Civil Suit No. 14-A of 1986 on 2-8-1986 for declaration and permanent injunction. After framing of issues some evidence was recorded. That suit was fixed for the plaintiffs' remaining evidence on 29-8-1992. On that date the plaintiffs submitted an application for adjournment and that was allowed subject to payment of Rs. 150/- as costs. No date was specified upto which this cost was to be paid. The case was adjourned to 9-10-1992. On that date the plaintiffs' five witnesses were present Their names are noted in the order-sheet. Their evidence could not recorded as the Court was busy in another case. The witnesses were bound over for the next date i.e., 1-12-1992 but they did not appear and therefore bailable warrants were ordered to be issued against them. The case was fixed on 11-1-1993. On this date the witnesses were absent. The plaintiffs submitted an application under Order 6

Rule 17, CPC for amendment in the plaint on that date. The case was adjourned for its reply. It was recorded that the costs of Rs. 150/-imposed on 29-8-1992 have not been paid and the case will proceed further on payment of this amount. On 31-3-1993 the plaintiffs' Counsel expressed inability to pay the costs as plaintiff Narain Rao who was aged about 85 years was not present in the Court. It was stated on behalf of the defendant Nos. 4 to 7 that the suit "should be dismissed". The Court fixed the case on 16-4-1993 for hearing the learned Counsel for the parties on that point. The plaintiffs' Counsel offered to pay the costs on that date but the defendants' Counsel refused to accept it on the ground that the case was not fixed on that date for payment of costs. On 17-4-1993 the suit was dismissed with the note "further proceedings are terminated".

Section 35B(1), CPC introduced by the CPC (Amendment) Act, 1976 is as under:--

"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."

It is argued on behalf of the petitioners that by order dated 29-8-1992, the costs were imposed but no time limit for payment of costs was fixed and therefore, the costs could be paid subsequently. It is pointed out that the case was fixed on 9-10-1992 and on 1-12-1992 but on those dates no grievance was made by the defendant Nos, 4 to 7 that the suit should not proceed further as the costs have not been paid. It is further pointed out that by order dated 11-1-1993 the Court further gave an opportunity to pay the costs and on 16-4-1993 the costs were offered to the Counsel for these defendants but he declined to accept the same. It is contended that the plaintiffs had complied with the order by offering the costs to the defendant Nos. 4 to 7 and therefore, the proceedings could not be terminated. It is also argued that there was sufficient evidence to decide the case on merits and therefore the Trial Court could not proceed to dismiss the suit.

On the other hand it is argued that it was the duty of the plaintiffs to pay the costs "on the date next following the date" on which the order imposing the costs was passed and this was a condition precedent to the further prosecution of the suit and as the plaintiffs did not comply with that condition and their Counsel expressed his inability to pay the costs on 31-3-1993, the impugned order is correct.

This Court is of the opinion that the impugned order cannot be sustained and it must be set aside. It is true that the payment of costs was a condition precedent to the "further prosecution of the suit" as provided in Section 35B, CPC, but the costs could be paid on a subsequent date also. The defendant Nos. 4 to 7 did not raise the question regarding payment of costs on 9-10-1992 and 1-12-1992 and there was no further progress of the suit on those dates. On 11-1-1993 the Trial Court observed that further proceedings could go on only if the costs are paid. On 16-4-1993 the costs were offered to the defendants' Counsel but he refused to accept the same. This was sufficient compliance with the order dated 29-8-1992 by which costs were imposed. It is noteworthy that there was no "further prosecution of the suit" until 16-4-1993. The bar imposed u/s 35B, CPC is "further prosecution of the suit" without payment of costs. The time for payment of costs could be extended by the Trial Court and that was done by the order dated 11-1-1993. It is true that on 31-3-1993 the plaintiffs' Counsel expressed his inability to pay the costs as plaintiff Narayan Rao was absent on that date. Even on 31-3-1993 there was no progress or "further prosecution" of the suit. The case was being adjourned on other grounds. The costs were offered on 1-6-4-1993 and on that date the Counsel for the defendant Nos. 4 to 7 refused to accept the costs and therefore, there could be further prosecution of the suit and the question of payment or non-payment of costs lost its significance.

In *Anand Parkash Vs. Bharat Bhushan Rai and Another*, it has been held that the provision in Section 35B, CPC is mandatory and not directory. It has been held that in the event of a party failing to pay 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. In this case it has been further held that the time for payment of costs could be extended u/s 148, CPC.

Again in a subsequent Full Bench decision of the same High Court in *Prem Sagar and Others Vs. Phul Chand and Others*, (FB), it has been held that: "if on the date next following the date of the order of payment of costs the issue as to payment of costs 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 is inevitable that if on the crucial date fixed for the payment of costs, i.e., the date next following the date of order of 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 u/s 35B afresh. It is axiomatic that the law is for the vigilant and not for those who blissfully sleep over their rights. It would be obvious from the language of Section 35B that the crucial date on which the statute focusses 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 non-compliance with the order to pay costs. Orders contemplated u/s 35B 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 a discretion still remains with the Trial Judge u/s 148 to exercise his power in favour of the defaulting party",

In *Kasi Biswanath v. Pramananda Routrai*, AIR 1982 Orissa 80, it has been held that Section 35B is admittedly a procedural provision. Undoubtedly, it was introduced into the statute with a view to controlling the conduct of parties in litigations. The language of Section 35B indicates that it is directory. If the provision is taken to be mandatory it will take away the Court's right to exercise its discretion in the interest of justice. The cause of justice is paramount and a procedural law cannot be raised to the pedestal of being such a mandatory provision as would take away the Court's right in a given case to exercise its discretion in the interests of justice.

Similarly, in *Union of India v. Ram Niwas*, AIR 1984 Rajasthan 42, it has been held that Section 35B nowhere provides that the Court would not be competent to adjourn the case without payment of costs. What is forbidden is further prosecution of the suit or further prosecution of the defence. If, ultimately costs are paid, which have been imposed on earlier dates, then only, further prosecution of the suit or further prosecution of the defence by the defendant could be possible.

Again in *Surendra Mohan v. Khetrinath*, AIR 1988 Gauhati 74, it has been observed that intention behind awarding of costs being to avoid delay in disposal of suits, this purpose has not much to do with the condition that the costs must be paid on the date next following the date of imposition of the costs. The awarding of costs has no doubt relevance with the object of expediting the trial so that unnecessary adjournments are not sought for. But then the condition that it must be paid on the date next following the imposition of costs has not much to do with the underlying idea of avoiding delay. It would not, therefore, be acting against the intention of the legislature to regard the actual payment of the costs as being directory in nature instead of being mandatory. In *Raj Kishore Gupta v. Shanti Devi*, AIR 1989 Patna 21, it has been held that the provision in

Section 35B is directory and not mandatory and the Court has power to extent the period for payment of costs, if sufficient cause is shown.

The question whether the provision in Section 35B, CPC is directory or mandatory is not of much significance. In those cases where it has been held to be mandatory, its mandatory character has been sought to be relaxed by resorting to Section 148, CPC under which the Court has power to enlarge the time. The language employed in Section 35B is that the payment of such costs on the date next following the date of such order, shall be a condition precedent to the further prosecution of the suit by the plaintiff, where the plaintiff was ordered to pay such costs or the defence by the defendant, where the defendant was ordered to pay such costs. It is clear from this language that the payment of costs is a condition precedent to the further prosecution of the suit and the time for payment of such costs can always be extended by the Court exercising its judicial discretion. There would be further prosecution of the suit on payment of the costs. If the costs are offered and the other side refuses to accept the payment of costs, the bar to the further prosecution of the suit would disappear.

In the present case, the plaintiffs have offered to pay the costs to the defendant Nos. 4 to 7 on 16-4-1993 and they refused to accept the same. Therefore, the Trial Court was in error in dismissing the suit on 17-4-1993 for non-payment of costs.

In the result this revision is allowed. The impugned order dated 17-4-1993 is set aside and the suit is restored. The Trial Court is directed to proceed further to decide the suit after recording the evidence of both the sides.