

SUPREME COURT OF INDIA

Manohar Singh

Vs.

D. S. Sharma

C.A.No.7554-7555 of 2009

(R.V.Raveendran and G S Singhvi JJ.)

13.11.2009

JUDGMENT

R.V.Raveendran J:

1. Leave granted. Heard learned counsel.

2. The appellant filed a suit for damages against his erstwhile employer - National Thermal Power Corporation Ltd. ('NTPC' for short, second respondent herein) and its then General Manager in the District Court, Delhi. After conclusion of Plaintiff's evidence, the defendants' evidence was commenced. On 6.1.2004 the suit was listed for further evidence of defendants. One S. Joseph, (DW 2), whose affidavit had been filed by way of an examination-in-chief, was present in court for being cross-examined by the plaintiff. The plaintiff requested for an adjournment on the ground that his counsel was busy elsewhere. The case was therefore adjourned to the next day (7.1.2004). Again, plaintiff sought time on the ground that his counsel was otherwise busy. When the court asked the plaintiff to cross-examine the said witness, as he had earlier cross-examined DW-1 without the assistance of a counsel, plaintiff refused to do so. The witness had come all the way from Durgapur for giving evidence. The court therefore adjourned the matter to 9.2.2004, subject to payment of costs of Rs.5000 by the plaintiff. On 9.2.2004 also, S. Joseph (DW-2) was present, but the plaintiff sought an adjournment on the ground that he wanted to move an application for transfer of the suit. The request for adjournment was opposed on the ground that the witness had come from Durgapur by air. The suit was however adjourned to 9.3.2004. On 9.3.2004, plaintiff submitted that he had already moved an application for transfer (alleging that he had lost faith in the Presiding Officer). The suit was adjourned to 7.4.2004. The suit was thereafter adjourned to 20.7.2004, 31.8.2004, 5.10.2004, 10.11.2004, 17.1.2005, 23.2.2005, and 7.4.2005 on the ground that the transfer application filed by the plaintiff was pending before the District Judge.

3. On 24.3.2005, the transfer petition filed by the plaintiff was allowed and his suit was withdrawn from the file of Shri O.P. Gupta, Addl. District Judge and assigned to the file of another Additional District Judge, with a direction to the parties to appear on 1.4.2005. On

that day, the new trial Judge directed the plaintiff to deposit Rs.5,000 towards the travel expenses of DW-2 before he could cross-examine DW2. The matter was adjourned to 27.4.2005. On 27.4.2005, the plaintiff filed an application for waiver of costs. That application was dismissed and the case was posted to 27.7.2005 for further evidence. On 27.7.2005, the plaintiff failed to deposit the costs. The court recorded that costs were not paid in spite of repeated opportunities. Relying upon Section 35B of the *Code of Civil Procedure* (for short 'the CPC'), the trial court dismissed the suit for failure to pay the costs in spite of several opportunities. The said dismissal order dated 27.7.2005 was challenged by way of a revision before the Delhi High Court. The High Court dismissed the appeal by order dated 21.5.2007. It upheld the decision of the trial court holding that the provisions of section 35B were mandatory and if the costs levied were not paid "the only course open to the court is to disallow the prosecution of the suit" and, that meant the dismissal of the suit. Appellant's petition for review was dismissed on 7.9.2007. The orders dated 21.5.2007 and 7.9.2007 are challenged in these appeals by special leave.

4. The appellants contended that having regard to the provisions of section 35B of CPC, if costs levied on plaintiff are not paid, the court can only stop further prosecution of the suit by the plaintiff. It is submitted that section 35B does not confer power to dismiss the suit for non- payment of costs. Learned counsel for the second respondent, on the other hand, supported the judgment of the trial court, as affirmed by the High Court.

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 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.

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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 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. 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 issue. 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 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 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.

10. 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 DW2 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 plaintiff-appellant 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 DW2.”