FULL BENCH

Before S. S. Sandhawalia, C.J., P. C. Jain & S. C. Mittal, JJ.

PREM SAGAR AND OTHERS,—*Petitioners.*

versus

PHUL CHAND AND OTHERS,—*Respondents.*

Civil Revision No. 2886 *of* 1981.

August 1, 1983.

Code of Civil Procedure (V of 1980)—Section 35-B—Costs imposed on a party—Party defaulting in payment of costs on the date fixed therefor—Question of costs not raised on the said date—Can such question be raised on subsequent date or dates.

Held, that a perusal of section 35-B of the Code makes it obvious 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. As was observed in Anand Parkash's case (supra) such orders 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 as held by the Full Bench a discretion still remains with the trial Judge under section 148 of the Civil Procedure Code to exercise his power in favour of the defaulting party. Therefore, if on the date next following the date of the order of payment of costs the issue 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 35-B would continue to apply with all its rigour thereafter as well. Indeed it seems inevitable that if on the crucial date fixed for the 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 re-open the issue at their will and seek the barring of the further prosecution of the suit or the defence under section 35-B afresh. It is axiomatic that the law is for the vigilant and not for those who blissfully sleep over their rights.

(Para 6).

Prem Sagar and others *v.* Phul Chand and others
(S. S. Sandhawalia, C.J.)

Case referred by a Single Bench consisting of the Hon'ble Mr. Justice Rajendra Nath Mittal on 8th September, 1982 to the Full Bench for the decision of an important question of law involved in this case. The Full Bench consisting of the Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice Prem Chand Jain and the Hon'ble Mr. Justice S. C. Mital finally decided the case on 1st August, 1983.

Petition under section 115 CPC for the revision of the order of the court of Shri Behari Lal, Sr. Sub-Judge, Ludhiana, dated the 9th November, 1981 dismissing the application.

V. P. Sarda, Advocate, *for the petitioner.*

L. K. Sood, Advocate, *as intervenor.*

Gopal Mahajan, Advocate, *for respondent Nos. 2 and 3.*

JUDGMENT

S. S. Sandhawalia, C.J.

(1) Whether the party defaulting in the payment of costs on the date fixed therefor (whereon the question is not at all raised) can on the subsequent date or dates be barred from further prosecuting the suit or its defence, as the case may be,—is the significant question which falls for adjudication in this reference, as a corollary to the ratio of the Full Bench in *Anand Parkash* v. *Bharat Bhushan Rai and another* (1) in the context of section 35-B of the Civil Procedure Code.

(2) Prem Sagar petitioner had preferred an application in the trial Court for obtaining a succession certificate regarding the assets of one Sant Ram, deceased. Therein, 11th of September, 1981 was fixed for filing of a written reply by the respondents. This having not been done, a prayer for adjournment for filing the written reply was granted by the Court subject to the payment of costs of Rs. 20 on the next following date, the 25th of September, 1981. On the said date, reply to the application was allowed to be filed and the question of the payment of costs was not even remotely raised by either side and the case was adjourned to the 10th of October, 1981. On the said date, the petitioner filed an application purporting to be under section 35-B of the Civil Procedure Code that the

(1) AIR 1981 Pb. & Hary. 269.

respondents be barred from prosecuting their defence. Notice of the said application was issued to the respondents and the case was adjourned to the 23rd of October, 1981. In the reply to the aforesaid application, the respondents pleaded that due to some misunderstanding, they were not even aware about the order of payment of costs and were always ready and willing to pay the same and further filed an application praying for extension of the period for payment of the costs. Further the costs were tendered on that very day but were not accepted by the other party. By order, dated the 9th of November, 1982, the trial Court rejected the application under section 35-B of the Civil Procedure Code holding that the respondents had never wilfully refused the payment of costs.

(3) The petitioner then preferred the present civil revision which originally came up before R. N. Mittal, J. Noticing the significance of the ancillary question arising in the wake of the Full Bench judgment in *Anand Parkash's case* (supra) and also some conflict of judicial opinion thereon the matter was referred for consideration by a larger bench, and that is how it is before us.

(4) Inevitably one must first turn to the Full Bench judgment in *Anand Parkarsh's case* (supra). The threshold question is whether its true ratio either expressly or by direct analogy covers the precise question before us. To my mind it seems manifest that the question before the Full Bench in *Anand Parkash's case* was plainly distinct and different. As is evident even from the opening formulation of the minority view of *Sharma, J.*, the issue therein was whether the provisions of Section 35-B of the Code were mandatory or directory and he in terms answered to the effect that the provisions were directory in nature. Similarly, Jain, J., who had prepared the majority judgment (with which I concurred, had precisely framed the question before the Full Bench in the following terms:—

> "On the respective contentions of the learned counsel for the parties the question that needs determination is whether it is mandatory on the Court to disallow prosecution of the suit or the defence as the case may be, any further, in the event of the party failing to pay the costs on the date next following the date of the order imposing costs?"

The answer to this question was rendered in the following terms by the majority:—

> "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 defence, 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 under Section 148 of the Code in favour of the defauting party if a strong case is made out for the exercise of such jurisdiction."

It would thus be plain from the above that the aforesaid ratio would not at all be attracted to the precise quesion now before us. Indeed it has been so held categorically by J. V. Gupta, J. in *Smt. Lachhmi and others* v. *Nirmal and others* (2), as under:—

> ".....As a matter of fact, this was never the point before the Full Bench in the aforementioned case (*Anand Parkash's case*), nor it was ever agitated before it therein. Therefore, the application of the ratio of the above-mentioned Full Bench decision of this Court to such circumstances as in the present case, is misconceived and unwarranted."

It must, therefore, be held that the question whether on a date or dates subsequent to the one expressly fixed for the payment of costs (and on which date the issue of costs is neither raised nor decided), the claim for barring the further prosecution of the suit or the defence can still be pressed against the defaulting party was neither expressly nor even remotely before the Full Bench in *Anand Parkash's case.*

(5) Binding precedent being thus out of the way, one must proceed to analyse the question on principle. To clear the decks

(2) CR 836 of 1982 decided on 5th August, 1982.

for the examination of the issue it is necessary first to clarify the legal consequences which would flow from an order passed in conformity with the provisions of Section 35-B. It was sought to be argued as an inflexible proposition that in the event of clear-cut default in the payment of costs there was no option for the Court but to either dismiss the suit or strike out the defence as a whole, as the case may be. I regret my inability to read the provisions of Section 35-B in this light. On its plain language what is mandated is that the further prosecution of the suit or of the defence is made a condition precedent on the payment of the costs ordered and in the event of default the same would be barred. The emphasis inevitably must be on the word 'further' and it should not be denuded of all meaning. It is well settled that the legislature in its wisdom does not use the words in a statute which may be wholly redundant and, therefore, any construction which renders a phrase or a word otiose is not to be easily acceded to. Therefore, the word 'further' in Section 35-B would enjoin that on the date next following the date of the order of the Court to pay costs, the defaulting party thereto would not be allowed to take any furher step or produce evidence in the prosecution of its case whether as a plaintiff or as a defendant. This, however, would not mean that whatever is already on the record before that date would also be wiped off as either *non-est* or non-existent. A procedural provision, stringently penal in nature, as Section 35-B, undoubtedly has necessarily to be construed strictly. To give it such a wide amplitude so as to make the dismissal of the suit incumbent in the case of the plaintiff default in the payment of costs or to strike off the whole defence in the case of the defenant is neither called for on the specific language of Section 35-B nor on the princples of sound construction. On an overall view of the whole section, the resultant effect of the default on the date next following the date of the order of payment of costs (the issue having been expressly raised) would be that thereafter the defaulting party can no longer be permitted to add anything to its case. The same consequently would have to be decided on the limited material and evidence existing on the record in favour of such a party. The section does not in terms prescribe that either the suit must be dismissed or that the defence be struck down as a whole.

(6) Adverting back to the language of Section 35-B as also to the ratio of *Anand Parkash's case* (supra) it would be obvious therefrom 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. As was observed in *Anand Parkash's case* (supra) such orders are in essence *in terrorem*, so that the unscrupulous litigant may not indulge in dialatory tactics. It calls for pointed notice that even here the result is not automatic and as held by the Full Bench a discretion still remains with the trial Judge under Section 148 of the Civil Procedure Code to exercise his power in favour of the defaulting party. Therefore, if on the date next following the date of the order of payment of costs the issue 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 35-B would continue to apply with all its rigour thereafter as well. Indeed it seems inevitable that if on the crucial date fixed for the 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 re-open the issue at their will and seek the barring of the further prosecution of the suit or the defence under Section 35-B afresh. It is axiomatic that the law is for the vigilant and not for those who blissfully sleep over their rights.

(7) Again it seems to be manifest that an order for the payment of costs is plainly one in favour of the individual litigant. Under Section 35-B such an order is in the terms made for reimbursing the other party in respect of the expenses incurred by him in attending the Court on that date and is thus compensatory in nature. The failure to pay these costs results in the arising of a valuable right in the opposite party to bar the prosecution of the suit or the defence, as the case may be. Now on general principles even, it is plain that a person in whose favour such a right accrues may waive the same. Obviously it would be untenable to hold that a party must be compelled to exercise a right vested in him. Therefore it would follow that if such a right can be waived expressly, then equally it may be so done impliedly or at least deemed to be so in the eye of law. In the context of Section 35-B if on the date next

following the date of the order of the payment of costs, the issue is not raised by either of the parties or taken notice of by the Court, and the case is allowed to proceed further, it would follow that the party having the right to bar the further prosecution of the suit or the defence has waived its right. Thereafter it would not be possible to again exercise the ghost of the stringent provisions of Section 35-B at any and every subsequent date.

(8) That the principle of waiver may validly be attracted in this context is supported by high authority. In *Lachoo Mal* v. *Radhya Shyam* (3) their Lordships held that the benefits under Section 1-A of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, can be validly waived by the landlord in the following words:—

> "* * *. In our judgment S. 1-A was meant for the benefit of owners of buildings which were under erection or were constructed after January 1, 1951. If a particular owner did not wish to avail of the benefit of that section there was no bar created by it in the way of his waiving or giving up or abandoning the advantage or the benefit contemplated by the section. No question of policy much less public policy, was involved and such a benefit or advantage could always be waived."

(9) The question involved is equally capable of being viewed from another angle. Section 35-B clearly raises a valuable right in favour of the party entitled to costs when default in payment thereof is made on the date next following. Consequently, when on this crucial date, the right to bar the further prosecution of the suit or its defence (as the case may be) is neither pressed nor exercised by the party having the same and it allows the trial to proceed, then it would be obviously unconscionable to permit the exercise of the said right on the later and subsequent dates. Having expressly or impliedly allowed the suit to proceed, despite the clear provisions of Section 35-B the party in whose favour a right had accrued, would be estopped on subsequent dates from re-opening the issues afresh.

(10) In fairness to the learned counsel for the petitioner I must notice that the core of his stand was that once a default in the

(3) AIR 1971 S. C. 2213.

payment of costs on the adjourned date takes place within the meaning of Section 35-B then irrespective of the issue being raised or not on that date the proceedings subsequent thereto would become wholly *non-est*. The learned counsel had to go to the logical length of arguing that even when a suit had been dragged on for years it would still be open for the party to raise and equally obligatory for the Court to stop the further prosecution of the suit or the defence even upto the stage of the pronouncement of the judgment if it could be established that the costs were not paid on the date fixed. Mr. L. K. Sood, learned counsel for the intervener, was equally pushed to the extreme stand of contending that even on appeal or in a second appeal as well (where no such objection was raised at the trial stage at all), it would be obligatory to apply Section 35-B in its full rigour, the moment it was raised and established that there had been a failure or omission to pay the costs on the ordered date. Reliance was placed on *Manohar Lal* v. *Mahesh Chand etc.* (4) and *Sat Pal* v. *Banarsi Dass and others* (5).

(11) I regret my inability to subscribe to what appears to me as an extreme and somwhat doctrainnaire stand raised on behalf of the petitioner and the intervener. Indeed the aforesaid argument, carried to its logical lengths, exposes its fallaciousness. I have already opined and independently held that Section 35-B is open to no such construction. However, even if two constructions were possible (assuming entirely for the sake of argument) one must avoid the one which leads to the aforenoticed anamolous, if not absurd results. It seems both illogical and inequitable that on all subsequent dates in a suit, which may have dragged on for years or even in the later appellate or revisional stages, the ghost of barring the further prosecution of the suit or defence can be exercised at any stage later.

(12) The view I am inclined to take is buttressed by the massive weight of precedent within this Court, even subsequent to the judgment in *Anand Parkash's case* (supra). Therein it has been consistently held that the ratio thereof did not cover the question arising before us and further that the rigour of Section 35-B was not attracted to the subsequent date or dates, once the issue was not raised at all on the crucial date next following the date of the

(4) 1983 P. L. R. (Short note)1.
(5) CR 106 of 1982 decided on 25th May, 1982.

order of payment of costs. See (Smt. Lachhmi *v.* Nirmal and others) (supra) (*Assa Nand* v. *Harish Kumar and others*) (6) (*Dharam Pal Nanda and others* v. *Smt. Prem Nanda and others*) (7) and (*Smt. Balwant Kaur* v. *Smt Harbans Kaur*) (8).

(13) However, a slightly discordant note has been struck in (*Manohar Lal* v. *Mahesh Chand and others*) (supra). Therein the trial Court had directed the payment of costs on the 13th of January, 1982 on which date the issue seems to have not been raised at all and the costs were not paid. The trial was allowed to proceed and later on the 4th of June, 1982 the costs were tendered but were refused by the opposite party. It was thereafter that an application was made that the defaulting party should be debarred from prosecuting its case which was rejected by the trial Court. This was reversed in revision. It is obvious from the perusal of the short judgment that the matter was not adequately canvassed before the learned Single Judge and it seems to have been assumed that the ratio of *Anand Parkash's case* (supra) governed the issue. As already shown above, that is not the case. Equally the sharp distinction between the date next following the date of the order imposing costs and all other subsequent dates seems to have been altogether missed. For the detailed reasons recorded earlier, it has to be held with respect that *Manohar Lal's case* (supra) does not lay down the law correctly and is hereby overruled.

(14) Again the somewhat wide ranging observations in (*Sat Pal* v. *Banarsi Dass and others*) (supra) call for notice and have to be constricted and limited within the ratio now being laid in this Full Bench. The facts in *Sat Pal's case* were somewhat involved and do not need recapitulation in detail beyond the fact that the issue of the default in the payment of costs and the recall of the order of their payment were raised on the same date of the 12th of December, 1981. The learned Judge, however, made passing observations that the party receiving the costs was not at all obliged to remind the delinquent party to perform its duty and further that the words 'on the next date following the date of such order' would be applicable to such a date and every subsequent date or dates to which the proceedings may be adjourned thereafter. To my mind, these observations were not wholly necessary for the decision of

(6) CR 968 of 1982 decided on 16th August, 1982.

(7) CR 1307 of 1982 decided on 3rd June, 1982.

(8) CR 1574 of 1982 decided on 23rd August, 1982.

the case because admittedly the objection had been raised on the 12th of December, 1981 itself (on which the costs were to be paid) and therefore are in the nature of an *obiter dicta.* However, carried to their logical length, these observations would be contrary to the conclusion that I have arrived at in the earlier part of the judgment and to this limited extent they are not good law.

(15) Reference must necessarily be made also to *Sri Kasi Biswanath Dev* v. *Paramanand Routrai and others,* (9) wherein a dissent has been expressed with the view of the Full Bench in *Anand Parkash's case.* It would appear that in *Kasi Biswanath Dev's case,* the default in the payment of costs was made on the 16th of September, 1981. On that date the issue was not even remotely raised and the trial proceeded from day to day on innumerable dates and it was only on the 30th of September, 1981 that the application under Section 35-B of the Civil Procedure Code was moved. Though plainly, the application therein was moved long after the date fixed for the payment of costs, it was nevertheless assumed that the ratio in *Anand Parkash's case* (supra) was applicable to the situation and in that context a dissent has been expressed in the *Kasi Bishwanath Dev's case* (supra). As I have already shown above, in the aforesaid situation the ratio of *Anand Parkash's case* (supra) would not at all be attracted and the case was clearly distinguishable.

(16) To conclude, both on principle and precedent, as also on the language of Section 35-B, the answer to the question posed at the very outset is rendered in the nagative. It is held that the party defaulting in the payment of costs on the date fixed for the payment thereof (on which date this issue is not at all raised) cannot on subsequent date or dates be barred afresh from further prosecuting the suit or the defence, as the case may be.

(17) Applying the above, it necessarily follows that this revision petition must fail on the common ground that on 25th September, 1981, which was the date fixed for the payment of costs, the issue of their payment was raised at all and the reply to the application was duly received and the case was allowed to proceed for consideration thereof on 10th October, 1981. It was only on the latter date that the matter was sought to be raked up afresh by

(9) AIR 1982 Orissa 80.

putting in an application which stands rejected by the trial Court. On the following date the costs were tendered but refused and in reply it was explained that due to some misunderstanding the respondents were not aware of the order of costs and were always ready for the payment of the same. The trial Court rightly rejected the application and in revisional jurisdiction we find not the least justification to interfere with it. The revision petition is hereby dismissed with no order as to costs.

Prem Chand Jain, J.—I agree.

S. C. Mital, J—I agree

S. C. K.

FULL BENCH

Before S. S. Sandhawalia, C.J., S. C. Mital & D. S. Tewatia, JJ.

STATE OF PUNJAB,—*Appellant.*

versus

LT. COL. GURDIAL SINGH AND ANOTHER,—*Respondents.*

Letters Patent Appeal No. 2 *of* 1979.

August 3, 1983.

Land Acquisition Act (*I of* 1894)—*Section* 9(3)—*Special notice—Service of—One of the persons interested not served—Omission to serve* bona fide—*Whether award of Collector vitiated.*

Held, that the special notice under section 9(3) of the Act is only a reflection or a copy of the public notice issued under sub-section (1). Consequently, the special notices are merely an additional or ancillary mode of service to the primary provision of public notice, the contents whereof are provided for and prescribed in sub-section (1) and (2). Section 9(3) provides for service on persons known or believe to be interested and obviously there is no, and indeed cannot be, any mandate to serve persons who are neither known nor believed to be so by the Collector, though in actual fact they may be directly and primarily interested in the compensation. Consequently, in such a situation, despite the absence of service of a special notice on such persons, including even the actual owners, the proceedings would not be violative of Section 9(3) and therefore, plainly valid. However, this is not to be mis-understood as implying that the provisions of section 9(3) are to be honoured in breach.