

Assa Nand v. Harish Kumar and others (J. V. Gupta, J.)

appeal by the learned Appellate Authority on the question of personal necessity, can be legally sustained or not. On this aspect, again, we had heard the learned counsel at great length and find that on consideration of the entire material on the record, it had been found as a fact that the landlady required the premises *bona fide* for her personal requirement. M. Goyal learned counsel for the petitioner, could not persuade us, on the basis of the evidence available on record, to take a contrary view. The reasons given in the order of the learned Appellate Authority are quite weighty and we have no hesitation in affirming the same.

(10) No other point was urged.

(11) For the reasons recorded above, this petition fails and is dismissed, but in the circumstances of the case, we make no order as to costs. The petitioner is granted one month's time to vacate the premises and handover its possession to the landlady.

Surinder Singh, J.—I agree.

N. K. S.

Before J. V. Gupta, J.

ASSA NAND,—*Petitioner.*

versus

HARISH KUMAR AND OTHERS,—*Respondents.*

Civil Revision No. 968 of 1982.

July 16, 1982.

Code of Civil Procedure (V of 1908)—Sections 35-B, 115(2) and Order XX Rule 6-A—Costs imposed on the plaintiff for seeking an adjournment—Costs not paid on the adjourned date and the proceedings allowed to continue—Application by the defendant for the dismissal of the suit long after the date on which the costs were required to be paid—Such application—Whether competent—Order allowing such application and dismissing the suit—Whether revisable under section 115—Such order—Whether falls within the ambit of 'any case which has been decided'.

Held, that an order allowing an application and dismissing the suit on the ground of non-payment of costs would clearly fall

within the ambit of the phrase 'any case which has been decided' and irrespective of the decree that may have been passed, a revision against such an order would be competent. Moreover, the Explanation added to section 115 of the Code of Civil Procedure, 1908 by the Amendment Act of 1976 provides that the expression 'any case which has been decided' will include any order made in the course of a suit or other proceeding. The order passed on such an application is an order made in the course of a suit and, therefore, clearly falls within this expression. In such a situation, it becomes immaterial that as a consequence thereof, the suit itself stands dismissed by the trial Court.

(Para 5).

Held, that Section 35-B of the Code *inter alia* provides that if on any date fixed the case is adjourned on payment of costs, the payment of such costs shall be a condition precedent to the further prosecution of the suit by the plaintiff where the plaintiff was ordered to pay such costs. Thus, it will be reasonable to conclude that in a case where the costs imposed are not paid on that very date when the costs are to be paid, the attention of the Court should be drawn so that further prosecution of the suit may take place only if necessary compliance has been made. If no such step is taken by the party who intends to invoke the provisions of section 35-B of the Code and remains silent and allows the Court to proceed with the suit, he cannot be allowed to agitate the alleged non-payment, if any, after that date. In such a situation, the provisions of Section 35-B of the Code are not at all attracted.

(Para 6).

Petition under Section 115 C.P.C. for revision of the order of the Court of Shri R. C. Bansal, Sub Judge 1st Class, Karnal, dated 24th March, 1982 dismissing the suit of the plaintiff and leaving the parties to bear their own costs.

M. R. Khanna, Advocate, for the Petitioner.

Shri S. K. Goyal, Advocate, for the Respondent.

JUDGMENT

J. V. Gupta, J.

(1) This revision petition is directed against the order of the trial Court, dated March 24, 1982, whereby it accepted the application filed on behalf of the defendant-respondents for the dismissal of the suit on the ground of non-payment of costs for adjournment. Consequently, the suit of the plaintiff was dismissed.

2. The petitioner filed a suit for a declaration and permanent injunction against the defendants-respondents in the year 1979. On

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February 6, 1981, no evidence of the plaintiff was present and an adjournment was requested which was allowed subject to the payment of costs of Rs. 30. The case was to come up thereafter for plaintiff's evidence on March 26, 1981. The order of the trial Court dated March 26, 1981, reads,—

“Present : Shri S. K. Sehgal, Advocate, counsel for the plaintiff;

Shri Hari Kishan, defendant (in person).

No evidence of the plaintiff is present, Summons received back unserved. A date is requested. Not opposed. To come up for defendant evidence on 16th May, 1981 on P.F. As requested one set of summons be given *dasti*.”

The case remained pending and various dates were fixed from time to time. It was on March 6, 1982, i.e., after about a year, that the respondents moved the application for the dismissal of the suit on the ground of non-payment of the costs on March 26, 1981.

3. Notice of this application was given to the plaintiff, who filed his reply thereto on March 9, 1982. It was pleaded therein that the costs imposed on him on February 6, 1981, had been paid to the defendants' counsel on March 26, 1981, but due to inadvertance, it was not mentioned in the interim order, dated March 26, 1981 that the costs had been paid to the defendants' counsel. It has also been further stated that had the costs of Rs. 30 imposed on him on February 6, 1981, not been paid to the defendants' counsel on March 26, 1981, the defendants would not have allowed him to lead evidence and would have brought to the notice of the Court the non-payment of the costs. It is also relevant to note that meanwhile, the defendants said counsel had died. The trial Court after hearing the learned counsel for the parties, came to the conclusion that the costs for the adjournment had not been paid because had it been paid, it would have been mentioned in the order, dated March 26, 1981. Thus, in view of the provisions of section 35-B of the Code of Civil Procedure (hereinafter called the Code), and the decision of this Court in *Anand Parkash v. Bharat Bhushan Rai and another* (1), the application filed on behalf of the defendants was accepted. As a result, the suit of the plaintiff was dismissed. The concluding

(1) A.I.R. 1981 Punjab and Haryana 269 (F.B.).

paragraph of the order, under revision reads,—

“Since the costs of adjournment have not been paid and keeping in view section 35-B of the Code of Civil Procedure, read with Full Bench authority of our own Hon’ble High Court, the application of the defendants is liable to be accepted and, therefore, the suit of the plaintiff is liable to be dismissed. I, therefore, accept the application of the defendants. Consequently, the suit of the plaintiff is also dismissed. However, in view of the peculiar circumstances of the case, parties are left to bear their own costs. File be consigned to the record room.”

Aggrieved against the same, the plaintiff has come up in revision to this Court.

4. A preliminary objection has been raised on behalf of the respondents that the revision petition is not maintainable because the impugned order was an appealable one and as such, in view of sub-section (2) to section 115 of the Code, this Court shall not vary or reverse any decree or order, against which an appeal lies either to this Court or to any other Court subordinate thereto, in the exercise of the revisional jurisdiction. According to the learned counsel, the impugned order of the trial Court amounts to a decree in view of the provisions of Order XX rule 6-A of the Code and hence the only remedy of the plaintiff was to file an appeal against the said order of the trial Court. In support of this contention, the learned counsel placed reliance on *Atma Ram v. Punjab Financial Corporation and others* (2). On the other hand, the learned counsel for the petitioner, contended that the impugned order is a composite one as it disposed of the application filed on behalf of the defendants as a consequence of which the plaintiff’s suit was dismissed. The present revision petition has been filed against the order of the trial Court, accepting the application filed on behalf of the defendants for dismissal of the plaintiff’s suit and, therefore, the provisions of sub-section (2) of section 115 of the Code are not attracted to this case. In support of this contention, the learned counsel relied upon *Major S. S. Khanna v. F. J. Dhillon* (3), and *Siri Krishan Bhardwaj v. Manohar Lal Gupta and another*, (4).

(2) 1968 Punjab Law Reporter 167.

(3) A.I.R. 1964 S.C. 497.

(4) A.I.R. 1977 Delhi 226.

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5. After hearing the learned counsel for the parties on the preliminary objection, I am of the considered opinion that there is no force in the said objection. In somewhat similar circumstances, it has been held by the Delhi High Court in *Siri Krishan Bhardwaj's case* (supra) that if the impugned order is one which falls within the ambit of the phrase 'any case which has been decided, it would be revisable. An order under Order XXXVII rule 2(2) (in that case) refusing to grant leave to defendant to appear and defend suit under Order XXXVII was held to be of far-reaching consequence which would clearly fall within the ambit of the phrase 'any case which has been decided' for as far as the defendant was concerned, the controversy had really come to an end. Irrespective of the decree that has been passed, a revision against such an order was held to be competent. Moreover, the Explanation added to section 115 of the Code,—*vide* Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) provides that the expression, 'any case which has been decided' will include any order made, in the course of a suit or other proceeding. In view of the same, the order passed by the trial Court on the application filed by the defendants, is an order made in the course of the suit and, therefore, clearly falls within the expression 'any case which has been decided'. In such a situation, it becomes immaterial that as a consequence thereof, the plaintiff's suit itself has been dismissed by the trial Court by the impugned order.

6. Now coming to the merits of the revision petition, it is strange that the application on account of the alleged non-payment of costs of Rs. 30 imposed on the plaintiff on February 6, 1981, was filed after about a year, i.e., on March 6, 1982. The application filed after such a long time by itself deserved dismissal. The mere fact that the payment of costs was not recorded in the interim order dated March 26, 1981, was itself not sufficient to come to the conclusion that the costs had not been paid by the plaintiff to the defendants. Admittedly, the defendants' counsel, to whom the costs were alleged to have been paid, was no more alive. Taking into consideration all the facts and circumstances of this case, I am of the considered opinion "that the provisions of section 35-B of the Code were not at all attracted. Section 35-B of the Code *inter alia* provides that if on any date fixed the case is adjourned on payment of costs, the payment of such costs shall be a condition precedent to the further prosecution of the suit by the plaintiff where the plaintiff was ordered to pay such costs. Thus, it will be reasonable to

conclude that in a case where the costs imposed are not paid, on that very date when the costs are to be paid, the attention of the Court should be drawn so that further prosecution of the suit may take place only if necessary compliance has been made. If no such step is taken by the party who intends to invoke the provisions of section 35-B of the Code, and remain silent and allows the court to proceed with the suit he cannot be allowed to agitate the alleged non-payment, if any, after that date. In such a situation, the provisions of section 35-B of the Code are not at all attracted. The whole approach of the trial Court in this respect is wrong and illegal as it has acted illegally and with material irregularity in the exercise of its jurisdiction. The Full Bench decision of this Court in *Anand Parkash's case* (supra), has been wrongly interpreted by the trial Court. Moreover it has been clearly laid down in that case that in the event of the party failing to pay the costs on the date fixed following the date of the order imposing the costs, it is mandatory for the Court to disallow the prosecution of the suit. It means, as stated earlier, that on the next date when the costs are to be paid, necessary order, if any,, under section 35-B of the Code, should be passed by the trial Court.

7. As a result of the above discussion, this revision petition succeeds and is allowed. The impugned order is set aside with costs. Costs assessed at Rs. 200. The parties through their counsel, have been directed to appear in the trial Court on the 10th August, 1982. The trial Court will further proceed with the suit in accordance with law. The records of the case be sent back forthwith.

N K. S.

Before M. M. Punchhi, J.

JAGIR SINGH,—Petitioner.

versus

GRAM PANCHAYAT, VILLAGE RAIPUR KALAN AND
OTHERS,—Respondents.

Criminal Revision No. 674 of 1980.

July 22, 1982.

*Code of Criminal Procedure (II of 1974)—Section 345—The
Punjab Gram Panchayat Act (IV of 1953)—Section 79—Gram*