(16) We, therefore, hold that the three respondents are not guilty of the offence of the contempt of Court and the rule against them is discharged.

S. S. Sandhawalia, J.—I agree.

A. S. Bains, J.—I also agree.

N. K. S.

FULL BENCH

Before S. S. Sandhawalia, C.J., P. C. Jain and M. R. Sharma, JJ.

ANAND PARKASH,—*Petitioner.*

versus

BHARAT BHUSHAN RAI and another,—*Respondents.*

Civil Revision No. 1878 *of* 1978.

June 3, 1981.

Code of Civil Procedure (V of 1908)—Sections 35-B and 148—Party to a suit granted adjournment subject to payment of costs—Such party refusing to pay costs on the adjourned date of hearing but waiving the right to take the step for which adjournment was granted—Refusal to pay costs—Court—Whether bound to disallow prosecution of the suit or the defence—Power under section 148—Whether could still be exercised.

Held, (per majority S. S. Sandhawalia, C.J. and P. C. Jain, J ; M. R. Sharma, J. contra.) that a bare scrutiny of the provisions of section 35-B of the Code of Civil Procedure, 1908 would show that the legislature has made its intention absolutely clear and beyond the pale of any doubt that the provisions are mandatory in nature and any non-compliance with the same would result in penal consequences as envisaged therein. 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. The Court would not go into the question whether the party who sought adjournment has or has not been guilty of delaying the suit or that

it was not useful for the party to lead evidence or that the adjournment sought was unnecessary. However, in cases where 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 defaulting party if a strong case is made out for the exercise of such jurisdiction. (Paras 10 and 14).

Hakmi and others vs. *Pitamber and others,* 1978, P.L.R. 256,

Manak Chand vs. *Suresh Chand Jain,* 1979, P.L.J. 332,

Nikka Singh and another vs. *Puran Singh and others,* 1979 P.L.J. 535,

Manjit Singh vs. *State Bank of India* 1980, Current Law Journal (Civil) 361. OVERRULED.

Held (per M. R. Sharma, J. contra) that section 35-B of the Code is directory in nature but even then it would not be proper for the courts to ignore this provision. If an objection is raised at the appropriate time, the court will be under an obligation to act in accordance with the letter of law unless the defaulting litigant makes out a strong case for a different course being adopted.

(Para 31).

Case referred by a Single Bench consisting of Hon'ble the Acting Chief Justice Prem Chand Jain on 12th February, 1980 *to a Division Bench consisting of Hon'ble Mr. Prem Chand Jain and Hon'ble Mr. Justice Harbans Lal for the opinion of an important question law involved in the case. The Division Bench referred the case to a Full Bench constituting of Hon'ble the Chief Justice Mr. S. S. Sandhawalia, Hon'ble Mr. Justice Prem Chand Jain and Hon'ble Mr. Justice M. R. Sharma on 10th September,* 1980. *The Full Bench finally decided the case on 3rd June,* 1981.

Petition under section 115 *C.P.C. for revision of the order of the Court of Shri P. L. Ahuja, Sub-Judge IIIrd Class Karnal, dated the 6th September,* 1978 *disallowing the defendant for further prosecute his application dated 27th July,* 1977 *and prayer of the plaintiff for striking out the defence in the main suit is dismissed and allowing the plaintiff to be recalled to appear as witness in the proceedings of the application dated 27th July,* 1977 *and leaving the parties to bear their own costs.*

V. K. Jain, Advocate, *for the Petitioner.*

C. B. Goel, Advocate, *for the Respondents.*

Prem Chand Jain, J.

(1) I have gone through the judgment of my learned brother M. R. Sharma, J. and with utmost respect to my learned brother I find myself unable to agree with the view taken by him.

(2) The facts which necessitated the reference of the question to be decided by the Full Bench may briefly be stated thus:

(3) Anand Parkash petitioner filed a suit for the recovery of Rs. 4,000 against Bharat Bhushan Rai and another, defendants. Before the evidence of the plaintiff could be recorded. an application was filed on behalf of the defendants to the effect that Smt. Dhanvantri Devi, defendant No. 2, had died and as her legal representatives were not brought on the record, the suit had abated. The plaintiff admitted the factum of the death of Smt. Dhanvantri Devi but disputed the date of death as given by the defendants, with the result that the parties were directed to lead evidence about the date of the death of Smt. Dhanvantri Devi. After some evidence was led, the case was adjourned for recording the remaining evidence of the parties, to August 23, 1978, on which date an adjournment was prayed for on behalf of the defendants on the ground that their counsel had gone out of station. The prayer for adjournment was granted by the Court subject to the payment of Rs. 35 as costs and the case was adjourned to August 30, 1973, for the evidence of the parties. On August 30, 1978, the defendants stated that they did not wish to pay the costs as they were not wanting to lead any evidence. On this an application was filed by the plaintiff under Order 18, rule 17, read with sections 151 and 35-B of the Code of Civil Procedure (hereinafter referred to as the Code) to the effect that the defendants had refused to pay the costs of Rs. 35 intentionally in order to delay the proceedings in the suit and that the defendants were debarred from prosecuting their defence any further. The other prayer made under Order 18 rule 17 of the Code with which we are not concerned in this petition was that the plaintiff be allowed to be recalled as a witness. The application was opposed on behalf of the defendants. The learned Subordinate Judge, on considering the entire matter, came to the conclusion that as the defendants had failed to pay the costs, they could not be allowed to further prosecute their application dated July 27, 1977. The plea of the plaintiff that

the defence of the defendants be struck off, was negatived. It is, as earlier observed, against that order of the learned Subordinate Judge that the present revision petition has been filed.

(4) The aforesaid petition came up for hearing before me on February 12, 1981. Considering that the point involved in the petition was of considerable importance, I thought it proper that the matter deserved to be decided by a larger Bench. Consequently, vide my order dated February 12, 1980. I directed that the petition be heard by a Division Bench. When the matter came up for hearing before the Division Bench, arguments were heard at length and judgment was reserved. Before the judgment could be pronounced a Division Bench judgment of this Court in *Manjit Singh* v. *State Bank of India* (1), came to my notice, which had taken a contrary view to the one that was being taken by the Bench with the result that the case was referred to be decided by a larger Bench. That is how we are seized of the matter.

(5) The contention of Mr. Jain, learned counsel for the petitioner before the Division Bench, as well as before us was that the provisions of section 35-B of the Code are mandatory and that in the event of non-payment of costs on the date next following the date of the order imposing costs it was peremtory on the Court to debar a party from further prosecuting the suit or the defence as the case may be. On the facts of the case it was submitted by the learned counsel that on the request of the defendants the case was adjourned to enable them to lead evidence on payment of Rs. 35 as costs, that the costs were, not paid intentionally on the next date of hearing and that the order of the learned Subordinate Judge in disallowing the prosecution of the application only was patently illegal and without jurisdiction and as a default was committed in payment of costs, the Court was left with no option but to debar the defendants from prosecuting their defence any further.

(6) On the other hand, what was sought to be argued by the learned counsel for the defendants was that the provisions of Section 35-B were directory and that in the event of non-payment of costs on the next date of hearing the Court was not bound to

(1) 1980 C.L.J. (Civil) 361.

debar a party from prosecuting the suit or the defence as the case may be. It was also submitted by the learned counsel that in the instant case there was absolutely no intention on the part of the defendants to delay the proceedings in the suit; that an adjournment was sought by the defendants on the ground that their counsel had gone out of station; that on the next date of hearing the defendants found that it was not necessary for them to lead any evidence with regard to the date of death of Smt. Dhanvantri Devi and that in this situation, the learned Subordinate Judge was justified in disallowing the defendants from prosecuting the application only. It was further submitted by the learned counsel that on these facts there could hardly be any justification for invoking the provisions of Section 35-B of the Code for the purpose of disallowing the defendants from prosecuting their defence any further.

In order to effectively deal with the matter, it would be appropriate to notice the provisions of section 35-B of the Code, which read 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.

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the person by whom such costs are payable and the order so drawn up shall be executable against such persons."

Section 35-B was introduced in the statute in the year 1976 by the Code of Civil Procedure (Amendment) Act, 1976 (Act No. 104 of 1976). The object of enacting this provision, as is evident from the aims and objects appears to be to curb the delaying tactics of the litigating parties, to ensure speedy disposal of the case and to dissuade the unscrupulous litigants from obtaining unnecessary adjournments. An analytical study of Section 35-B goes to show that when on any date fixed for the hearing of the suit or for taking any step therein, a party to the suit fails to take the step which he is required by or under the Code to take on that date, or obtains an adjournment for taking such step or for producing evidence or on any other ground, than the Court may in its discretion and on the grounds to be recorded impose compensatory costs on the party seeking adjournment, which 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 the suit by the plaintiff or the defence by the defendant. It has further been provided under sub-section (2) that such costs if not paid shall not be included in the costs awarded in the decree passed in the suit, and that such costs shall be recoverable by executing the order which shall separately be drawn up indicating the amount of such costs and the

names and addresses of the persons by whom such costs are payable.

(7) 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 ?

(8) In order to get a correct answer it has to be seen as to what was the intention of the legislature in enacting this provision. There can be no gainsaying as it is a well established proposition of law that by mere use of word 'shall' a statutory provision would not be rendered mandatory and that for determining the real character of the Section the Court has to ascertain the intention of the legislature by carefully considering the scope of the entire statute. In other words, mere use of the word 'shall' in a section does not necessarily make it mandatory.

(9) In the earlier part of the judgment, I have detailed the object of the enactment of this provision. For finding out the intention of the Legislature, an analysis of the provision itself would be of great help. A bare reading of the Section goes to show that the awarding of the costs to the aggrieved party has been left to the discretion of the Court as is evident by the use of the word 'may' in the Section, but once that discretion has been exercised and costs have not been paid on the next date of hearing, then regarding, the taking of consequential action, the word 'shall' has been used.

(10) It was contended by Mr. Goel, learned counsel for the respondent, that though word 'shall' has been used in the Section but by user of that word the power of the Court for granting more time for paying the costs is not taken away. I am afraid, I am unable to agree with the contention of the learned counsel for the respondent. There might have been some merit in the contention of Mr. Goel if the word 'shall' had been used alone, as in that event the judgments cited for the proposition that mere use of word 'shall' may not make a statute mandatory, would have been of some

relevance. But in the instant case, a bare scrutiny of the provisions of Section 35-B would show that the Legislature has made its intention absolutely clear and beyond the pale of any doubt, that the provisions are mandatory in nature and any non-compliance with the same would result in penal consequences as envisaged therein. When the provisions of Section 35-B are analysed we find that the Legislature was not satisfied by using the word 'shall' only and this word 'shall' in the Section is qualified by the words 'condition precedent'. Where a statute declares that doing of a particular thing shall be a condition precedent then obviously the intention is to make it a peremtory mandate. A condition precedent is a condition which must be performed. If the Legislature had not intended to make the provisions of the Section mandatory, then it was not at all necessary for the Legislature to have qualified the word 'shall' by using words 'condition precedent'. The Legislature has made its intention absolutely clear by using the words shall be a condition precedent' that the provisions of this section are mandatory in nature and that any non-compliance of these provisions would be fatal. To me, the words 'condition precedent' qualifying the word 'shall' appear to be the clincher for interpreting the provisions of Section 35-B as mandatory. As has been observed earlier the costs are ordered to be paid to compensate the other party who for no fault of his has to undergo inconvenience and incur expenses. If an adjournment is sought and the same is granted on payment of costs, then on the next date of hearing the party who sought adjournment is bound to pay the costs. In my view, on the plain language of the section, the Court is only required to see whether the costs have been paid or not and if a party does not pay the costs, then the only course open to the Court is to disallow the prosecution of the suit or the defence any further. The Court would not go into the question whether the party who sought adjournment has or has not been guilty of delaying the suit or that it was not useful for the party to lead evidence or that the adjournment sought was unnecessary. When a party seeks adjournment, he pays the costs for his own folly or mistake, which results into inconvenience and unnecessary harassment to the other side. He does not do so as an act of benevolence. Moreover, a litigant is expected to show full respect to the orders of the Court. He cannot be permitted to ignore them or flout them with impunity. In case he opts to disregard the orders of the Court and fails to pay the costs, then he must suffer penal

consequences. The duty of paying costs is on the party who has been ordered to pay the costs. The Court or the party who has to receive costs, is not obliged to remind the delinquent party to perform its duty. The whole purpose of enacting this provision would be frustrated if the same is held to be directory. It may again be emphasised that the Courts are not required to find out as to what was the intention of the party in obtaining adjournment as the moment an adjournment is obtained on the date on which a suit is fixed for hearing or for taking any step therein, then the same results in the delay of the decision of the suit. One of the essential requirements for attracting the applicability of this provision is that the date has to be when a suit is fixed for hearing or for taking any step therein. If the date is only for depositing of process fee or for doing some such act; then it cannot be said that the suit was fixed for hearing or for taking any step therein. When once the ingredients of the section are proved, then no other extraneous consideration would be taken into account by the Courts.

(11) At this stage, I may also refer to the provisions of sub-section (2) of section 35-B of the Code, which provide for the recovery of the amount of costs independently on the basis of the order to be separately drawn up. Again from this provision, I find support for the view which I have taken above. The Legislature was not satisfied merely with the bar put on the prosecution of the suit or the defence, as the case may be, but also provided for realisation of the amount of costs independently on the basis of the separate order to be drawn up for that purpose. This provision, in my view, further shows as to how sacrosanct and binding the order of costs is intended to be treated by the Legislature.

(12) Further, as is clear from the judgment of my learned brother, even before the enactment of section 35-B, the law as it stood earlier was that even when an adjournment had been granted on payment of costs the action regarding the disposal of the suit or the striking off the defence in the event of the non-payment of costs, was not considered proper, unless the awarding of costs had been made a condition precedent for the grant of adjournment. If this was the state of law as interpreted by the Courts earlier, then now by enaction Section 35-B the Legislature has done nothing else but incorporated expressly that law in the statute.

(13) However, it may be made clear that in case the act of non-payment of costs is not intentional and a wilful attempt to disregard the order of the Court, then the Court may not impose the extreme penalty on a delinquent. That I wish to say is that if a party is prevented from making payment of the costs for the reasons beyond his control and a request is made for extension of time for making payment, then the Court may exercise its discretion and allow more time to the delinquent to make the payment of costs and the extreme penalty as provided in the section may not be imposed on the date on which costs are to be paid. There can be no doubt that orders passed under Section 35-B are procedural though they assume peremptory nature in view of the intention of the Legislature. Such orders are in essence in terrorem so that the unscrupulous litigents may not indulge in dilatory tactics. They do not, however, completely estop a Court from taking note of events and circumstances which have happened before the payment is to be made.

(14) Cases are not wanting in which the Courts have moulded their practice to meet a situation over which a party has had no control and for that purpose, the Court has ample power under section 148 of the Code which reads as under :—

> "Where any period is fixed or granted by the Court for doing of any act prescribed or allowed by this Code, the Court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

As a result of the aforesaid discussion, I hold 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, in cases, where 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 defaulting party if a strong case is made out for the exercise of such jurisdiction.

(15) In all fairness to Mr. C. B. Goel, learned counsel for the respondents, I may mention the three Single Bench judgments of this Court in *Shrimati Hakmi and others* v. *Pitamber and others* (2) *Manak Chand* v. *Suresh Chand Jain* (3) *and Nikka Singh and another* v. *Puran Singh and others* (4) to which our attention was drawn by the learned counsel in support of his contention and also the Division Bench case in *Manjit Singh* v. *State Bank of India* (supra), which had come to the notice of the Bench. I do not propose to deal with these cases individually as in view of my finding on the legal question, with respect, I am unable to agree with the approach adopted and the view taken in all those cases, and the same are overruled.

(16) Having answered the point of law, I now advert to the facts of the case in hand. As the point involved is very short, no useful purpose would be served in sending back the case to the Division Bench for decision on merits.

(17) The admitted facts of the case are that an adjournment was sought for leading evidence on the application that was filed with a prayer that as Smt. Dhanvantri Devi, defendant No. 2, had died, the suit had abated. The application was contested. As the date of death of Smt. Dhanvantri Devi was disputed the parties were allowed to lead evidence. The defendants led some evidence and for the remaining evidence, the case was adjourned to 23rd of August, 1978. On this date, evidence was not led and an adjournment was sought on the ground that the counsel had gone out of station. The adjournment was granted on payment of Rs. 35 as costs and the case was adjourned to 30th of August, 1978, for the evidence of the parties on which date instead of paying the costs and leading evidence the counsel for the defendants gave statement that he did not want to pay the costs as he had not to lead any evidence. In view of this statement, an application was filed under section 35-B of the Code praying that the defendants be debarred from prosecuting the defence any further. The learned trial Court allowed the application only to the extent that the prosecution of the application was debarred. The order of the trial Court has been challenged through this revision petition.

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(2) 1978 P.L.R. 256.

(3) 1979 P.L.J. 332.

(4) 1979 P.L.J. 535.

(18) There can be no gainsaying that adjournment was sought for leading evidence on the application which was a step taken in the suit. The learned Sub-Judge acted illegally and with material irregularity in disallowing the prosecution of the application only. The act of the defendants in refusing to pay the costs was contumacious. On the admitted facts straightaway a case for taking penal action against the defendants had been made out. The trial Court acted illegally and with material irregularity in debarring the defendants from prosecuting the application only. The impugned order of the trial Court cannot legally be sustained.

(19) Consequently, I allow this revision petition, set aside the order of the trial Court dated 6th September, 1978 and hold that as the costs were not paid by the defendants, they are debarred from prosecuting their defence any further. In the circumstances of the case, I make no order as to costs. The parties through their counsel are directed to appear before the trial Court on 20th July, 1981.

M. R. Sharma, J.

(20) The facts of the case are given in the elaborate order of reference prepared by my learned brother P. C. Jain, J and I need not repeat them all over again. The short question which this Full Bench is called upon to decide is whether the provisions of section 35-B of the Code of Civil Procedure (hereinafter referred to as the Code) are mandatory, and if so, to what extent.

21. In spite of the elaborate provisions contained in the Code, the civil cases pending before the trial Courts are not being disposed of as expeditiously as it desirable. The causes for these delays are of course many, which need not be detailed here. It suffices to mention that the matter received the attention of the Law Commission, which made an elaborate inquiry into the matter and submitted its report to the Government of India with the recommendation that the Code of Civil Procedure 1908 be thoroughly overhauled and re-enacted. The said report contained a recommendation that a new section, namely section 35-B be added to the Code to make provision for costs being awarded to the aggrieved party for the delays in the prosecution of the suit caused by its opponent. The deliberations made by the Commission as a result of the suggestions received by it, make the position self evident. The relevant portion of the report pertaining to this section reads as under :—

"Section 35-*B* (*New*) (*Costs for delay occasioned by party*).

1-D.83. It often happens that a party, though successful in the event, has been responsible for undue delay in respect

of particular stages of litigation. It is but fair that such delay should be taken into account while awarding costs. In order to elicit opinion on the subject, we had put a question in the Questionnaire as follows:—

"1. Would you favour the insertion of a provision to the effect that the court, shall, while passing an order for costs, make the party responsible for delay with reference to any step in the litigation, pay the cost proportionate to that delay, whatever may be the ultimate event of the suit."

1-D.84. This question has led to a sharp difference of opinion. The replies received could be classified into three broad categories namely, (i) those favouring the suggested amendment, (ii) those opposed to it, and (iii) those accepting it in a modified form, e.g. Those which would leave the matter to the discretion of the court rather than insert a mandatory provision.

1-D.85. Opinion is almost equally divided between the first two categories, only a few replies favouring an amendment with a modification. Those who are in favour of the amendment posted in the question, regard it as a desirable one in order to check dilatory tactics. It has been stated that solvent parties often resort to that dilatory tactics to cripple the opposite party, or a party with a bad case tries to delay the matter. It has further been pointed out that a good slice of litigation is aimed at delaying the relief to which the opposite party is entitled. One of the replies adds that the payment of costs of adjournment should be made a condition precedent to the taking of the next step in the litigation i.e. the step for the purpose of which the adjournment has been granted to the party against whom the costs are awarded.

1.D.86. The replies which are opposed to the suggested provision base their opposition on a variety of grounds, for example, it has been stated that such a porvision would be unworkable and would create confusion, and much time will be spent in assessing who was responsible for a

particular delay. It is also stated that since adjournments are granted by a judicial order, it would not be correct to make a mandatory provision of the nature contemplated. One of the replies adds that the court has, even now, a power to award costs where the delay is due to frivolous application or due to a deliberate omission or negligence in the prosecution of the action. Lastly, it has been suggested that such a provision will not reduce delay. Delay, it is stated, is caused by applications for adjournment or applications for time to file affidavits and the like etc. and these applications are dealt with by the court and separately provided for.

1-D.87. Some of the replies favour a modified amendment which would, while drawing the attention of the court to the need to consider this aspect, leave the matter to the discretion of the Court.

1-D.88. The above general difference of opinion is reflected in the replies received from the High Courts. Thus, some High Courts favour the suggested amendment, some are opposed to it, while in some of the High Courts, there is a difference of opinion among the individual judges of that High Court.

1-D.89. We have taken into consideration the opinions expressed. We have come to the conclusion that while it may not be wise to have a rigid provision, it would be useful to give a discretion to the court to take into account such delay. This should at least have the utility of focussing attention on this aspect.

Recommendation :

1-D.90. Accordingly we recommend that the following section should be inserted in the Code—

"35-B. The Court may, while passing an order for costs, make the party responsible for delay with reference to any step in the litigation, pay the costs proportionate to

that delay, whatever may be the ultimate event of the suit."

However, after the legislative process, the section emerged in the following form :—

"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.

Explanation.—Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1), shall not, if paid, be included in the costs awarded in the decree passed in the suit, but, if such costs are not paid, a separate

order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons."

A reading of this section shows that whereas the award of costs to the aggrieved party has been left to the discretion of the court by the use of the word "may" in the section, but regarding the consequential action to be taken by the court on the next date of hearing when the costs are not paid the word "shall" has been used. Mr. Jain, the learned counsel for the petitioner, has vehemently argued that because of the use of the words "shall be a condition precedent", this section should be held to be mandatory in character. It was also argued that the words employed in sub-section (2) of section 35B of the Code also support this conclusion, inasmuch as the cost of adjournment are not to be included in the costs awarded in the decree, because such costs follow the event. On the other hand, a separate order has to be drawn up indicating the amount of such costs so that the aggrieved party can realise them regardless of the result of the suit.

22. Whether the use of the word "shall" necessarily renders a statutory provision mandatory or not, came up for consideration before the Supreme Court of India in *State of Uttar Pradesh and others* v. *Babu Ram Upadhya,* (5), wherein the Court held:—

"…. For ascertaining the real intention of the Legislature the Court may consider *inter alia,* the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial

(5) AIR 1961 S.C. 751.

consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

It is needless to emphasise that even though the word "shall" has been employed in a particular section of a statute, yet for determining the real character of the section, the Court has to ascertain the intention of the Legislature by carefully considering the scope of the entire statute. In other words, the use of the word "shall" in a section does not necessarily make it mandatory.

(23) The rule laid down in *Babu Ram Upadhya's case* (supra) is of general application, but even while interpreting some of the provisions of the Code of Civil Procedure in many cases wherein the word "shall" had been used, the Courts have held that such provisions were directory in nature.

(24) In *M/s. Babbar Sewing Machine Co.* v. *Tirlok Nath Mahajan*, (6), the Supreme Court had the occasion to consider Order 11 Rule 21 of the Old Code, which reads as under :—

"Where any party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly."

After making an elaborate discussion of the case law on the point, the Court held—

"The principle governing the court's exercise of its discretion under 0.XI R 21, as already stated, is that it is only when the default is wilful and as a last resort that the court should dismiss the suit or strike out the defence, when the party is guilty of such contumacious conduct or there is a wilful attempt to disregard the order of the court that the trial of the suit is arrested."

(6) AIR 1978 S.C. 1436.

I might also add at this place that the consequences for not complying with an order of the Court issued under Order 11 Rule 21 are exactly the same as are envisaged by section 35B of the present Code, which is under consideration. In this situation, I see no reason why the principle of "contumacy" enunciated by the highest Court of the land be also not imported in this section.

5. Another precedent which can be of some help is *The Amritsar Improvement Trust* v. *Smt. Ishri Devi,* (7), wherein the Full Bench was called upon to consider Order 18 Rule 3A of the Code, which also made a departure from the earlier provisions of the Code. This provision reads as under :—

> "Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage."

In spite of the use of the word "shall" the Full Bench held that the provision was directory in character. Speaking for the Bench, Sandhawalia, C.J. observed:—

> "9. Keeping the aforesaid canon of construction with regard to procedural laws in mind we may now go back to the language of Rule 3-A. A bare reference thereto would make it manifest that the Legislature has undoubtedly laid down the rule that a party appearing as his own witness must so appear before any other witness on his behalf has been examined. However, in equally express terms one exception to the said rule has also been provided by the Legislature itself. This is that with the permission of the Court a party for sufficient cause may be allowed to appear even at a stage subsequent to the examination of one or all of his witnesses. It, therefore, deserves highlighting that the rule requiring a party to step into the witness-box first is not an inflexible one and can be relaxed with the permission of the Court. What

(7) 1979 R.L.R. 307.

> however is significant to note herein is that language of the statute does not in any way prescribe the precise time at which the permission to appear later is to be secured. It does not say that this must necessarily be in the very first instance before any witness has been examined on his behalf. One may, therefore, say that the statute is silent as to the stage at which the permission is to be secured. Nor can it be said that by necessary intendment the Legislature has laid down that the said permission must be sought at the very inception of the evidence and not later. Indeed, when broadly construed, the intention of the Legislature appears to be that the normal and the ordinary rule prescribed now is that the party appearing as his own witnes should do so before any of his witnesses. However, the rule is not an inflexible or a sacrosanct one and may be expressly deviated from with the permission of the Court based on adequate reasons. No specific stage being prescribed or fixed by the statute for securing such permission, a party may perhaps as a matter of abundant caution apply at the stage of commencing his evidence and get the necessary permission and equally, if a sufficient ground is made out, he may secure the same at a later stage."

It is no doubt true that in coming to this conclusion the learned Chief Justice took note of the words "unless the Court, for reasons to be recorded, permits him to appear as his own witness at a later stage", but the absence of these words in the section under consideration hardly makes any material difference. Clause (b) of section 35-B provides that the Court may, for reasons to be recorded, make an order requiring a party to pay costs. This implies that the questions whether an adjournment should be granted on payment of costs or without costs and if it is granted on payment of costs, their quantum are left to the discretion of the Court. The only requirement of law is that if the costs are awarded, then they should be commensurate with the expenses incurred by the opposite party in attending the Court on that day. A Court which has the jurisdiction to pass a discretionary order also possesses the power to modify it in order to meet the hardship accruing to a party. The statute does not lay down that if the costs are not paid, that would have the automatic effect of the dismissal of

the suit of the plaintiff or the striking out of the defence of the defendant. Even for that purpose, the Court has to pass an order. In other words the right of the party to proceed with the case in contradistinction with its right to pray to the Court to allow him to proceed with the case above has been taken away.

(25) The party who declines to pay the costs, of course, does not in a sense obey the order passed by the Court, but if the Court itself condone this default or allows a party to obey the order on a subsequent date, it cannot be said that the party concerned has flouted the order of the Court. In this context, the controversy raised before the Law Commission assumes some importance. I am not for a moment suggesting that the views expressed before it, or the final recommendation made by it to the Government are binding on a Court of law. All that I want to emphasise is that this report gives an insight to the working of the mind of those who made the recommendation to the Legislature. In Part No. 1-D, '89, extracted above, the Commission itself was of the view that it would not be wise to make a rigid provision. It noticed that it would be useful to give a discretion to the Court to take into account such delay for passing an order which is just and proper in the circumstances of the case.

(26) I am also aware of the fact that the legislature did not accept the draft of the section as proposed by the Law Commission, inasmuch as, there was no mention in the draft that the payment of costs shall be a condition precedent to the further prosecution of the case. In order to understand the importance of these words, I shall have to examine the state of law as it existed when the Code of Civil Procedure, 1908 (hereinafter referred to as the Old Code) held the field.

(27) Order 17 Rule 1 of the Old Code gives a wide discretion to the Courts to grant time to any of the parties and to adjourn the hearing of the case from time to time on payment of costs or otherwise.

(28) In *Venku Chattiar and others* v. *Doraisami Chettiar and others*, (8), a Division Bench of that Court took the view that unless

(8) A.I.R. 1921 Madras 403.

the payment of costs was made a condition precedent to the adjournment, it was not open to the Court to strike off the defence of the defendant, who declined to pay costs and then to proceed *ex parte*. The rule laid down in this case was considered by a learned Judge of the Allahabad High Court in *East India Railway Company* v. *Jit Mal Kallo Mal*, (9). Therein the adjournment had been granted on payment of costs with the express stipulation that such a payment should be regarded as a condition precedent for the grant of the adjournment. The learned Judge held that in that situation, it was open to the Court to strike off the defence of the defendant and to proceed *ex parte*.

(29) A similar question came up for consideration before a learned Judge of this Court in *M/s. Ram Chand & Sons* v. *Shri Kanhaya Lal Bhargava and another* (10). In that case an application was filed by the plaintiff-respondents under Order 11 Rule 21 read with Order 29 Rule 3 of the Old Code. It was prayed therein that one Jugal Kishore, permanent Director of the Company should appear in Court and in case he failed to do so the defence of the defendant should be struck off. The Court issued notice of this application to the opposite side and ordered that the permanent Director be present before the Court on the date fixed in the case. In spite of many adjournments for the presence of the said person, he failed to make an appearance in Court. The Court came to the conclusion that the permanent Director was deliberately giving a go-bye to the orders of the Court by not appearing in person. It, therefore, ordered that the defence of the defendants be struck off. The matter was then brought up before the High Court on the revisional side. The learned Judge deciding the revision observed :—

> "...... Thus there was no element of surprise in the order passed by the learned Judge and even on the two opportunities provided on 16th of March and 1st of April, 1965, the petitioner company did not care to put in Jugal Kishore. Even now when I put it to the counsel for the petitioner that Jugal Kishore may be produced on an early date before the Court below, he demurred on the

(9) A.I.R. 1925 Allahabad 280.
(10) 1966 C.L.J. 69.

> ground that it was not within the power of the company to compel its director to appear in Court. In the circumstances, I am of the opinion that the Court resorted to the measure in dealing with the situation with which it was confronted ......"

It is quite apparent that the extreme action was taken in this case because the default of the defendant was considered to be contumacious and wilful. Similar views were expressed by the Nagpur High Court in *Manaklal Bhimraj Mahesri* v. *Mt. Phulabhai widow of Bhimraj Mahesri and another* (11) and by the Madras High Court in *Popule Kesavayya* v. *Popula Venkoyamma* (12). In short the earlier state of law was that even when an adjournment had been granted on payment of costs, the action regarding the dismissal of the suit of the striking off the defence in the event of the non-payment of costs was not considered proper unless the award of costs had been made a condition precedent for the grant of adjournment. The Legislature was aware of this state of law and by incorporating in the section under consideration the words that the payment of costs shall be considered a condition precedent, it merely took a small step forward in the sense that even when the Court had not expressed such a condition in its order granting an adjournment, it had to be read therein as a matter of law. In all other respects the law remains unchanged. Just as under the old Code the Court itself had to pass an order regarding the dismissal of the suit or the striking off the defence, the same thing had to be done even now under the new Code. As observed earlier, if the Legislature had any intention of making a complete departure from the earlier state of law, it could have easily laid down that non-payment of costs would have the automatic effect of either the dismissal of the suit or of the striking off the defence.

(30) The afore-mentioned considerations apart, if the problem is considered in the light of the observations of their Lordships of the Supreme Court in *Babu Ram Upadhya's case* (supra), the same conclusion would follow. One of the principles laid down in this case, as noticed earlier, is that in order to see whether in

(11) A.I.R. 1939 Nagpur 213.
(12) A.I.R. 1954 Madras 267.

spite of use of the word "shall" a provision contained in a statute was mandatory or not, the Court had to decide that by considering all the provisions of the statute as a whole. It cannot be disputed that the Court being procedural in nature has to subserve the ends of justice, instead of thwarting them. It is in public interest that as far as possible the controversy raised by the parties should be decided on merits, for, the Courts of law do not necessarily give a position of prominence to the idea of enforcement of discipline as against the administration of justice. In *Manaklal Bhimraj Mahesri's case* (supra) a Division Bench of the Nagpur High Court, of which Vivian Bose, J. (as the learned Judge then was) a member, it was observed :—

> "...... It may be laid down as a certain proposition which hardly admits of exceptions that Courts should not lightly dispose of litigation without going into the merits. It is also equally plain that Courts are bound in certain circumstances to dismiss cases for default."

If this provision is held to be mandatory and after it has been violated the suit is decided on merits by the trial Court, normally speaking the proceedings after the stage when this provision is violated, should be regarded as nonest. But section 99 of the Code expressly lays down that a decree should not be reversed or modified for error or irregularity not affecting the merits or jurisdiction. Thus if this provision is clothed with a mandatory character, the resultant situation is likely to come into conflict with section 99 of the Code. Even otherwise, there is abundant authority to the effect that if an error in procedure is committed during the trial of a case, it should be disregarded unless, of course, some manifest injustice has accrued to a party. As far as investigational matters are concerned the Courts attach much less importance to them than they do to the merits of the controversy. There are many provisions in the code regarding the production of documents, the striking of issues etc. which are couched in mandatory form and yet their violation is not considered to be of much consequence by the appellate Courts if the decision rendered in the case is otherwise just.

(31) But this does not mean that the command of statute even if it be directory in nature should be ignored by Courts of law even

if an objection is raised at the appropriate stage. If an adjournment is granted on payment of costs, the Court shall be under an obligation to see that its order is enforced on the next date of hearing. If the costs are not paid on that hearing, normally speaking, no further adjournment should be granted unless the defaulting litigant makes out a strong case for that course being adopted. It would be futile to visualise all the contingencies in which inspite of an award of casts and their non-payment, a request for further adjournment might be acceded to. All that I wish to emphasise is that the request for adjournment should be acceded to if it appears to be bona fide and arises out of circumstances which are beyond the control of the defaulting litigant. If a person comes prepared to pay costs of adjournment and his pocket is picked on the way, it would certainly be legitimate for the Court to grant him further time for payment of costs. Similarly if an adjournment is granted in the course of an ancillary proceeding and the defaulting litigant is able to put forth a plausible case regarding his inability to pay the costs, the Court might resort to provisions of sub-section (2) of section 35-B of the Code and allow him to proceed with the main case, especially when large stakes from the point of view of a poverty stricken litigant are involved. In my considered opinion the matter should be left to the discretion of the trial Judge who should decide it in the light of the note of caution struck by the Law Commission which ultimately found statutory recommendation in the form of the impugned section. If the discretion is exercised by the trial Court in a reasonable manner, the superior Court should not lightly interfere with it because that is the policy of the Legislature, manifested in sections 99 and 115 of the Code of Civil Procedure. Guided by these considerations, I observed as under as a member of the Division Bench in *Manjit Singh* v. *State Bank of India* (supra) :—

> "It is no doubt true that the language employed is pre-emptory in nature but the use of the word 'shall' does not necessarily indicate that a Court which is seized of the case has no discretion in the matter. It has to take into consideration the degree of the default, the nature and the stage of the proceedings for passing the appropriate order."

As a result of the foregoing discussion, I am of the view that :—

(a) the provision is directory in nature ; but

(b) even then it would not be proper for the Courts to ignore this provision. If an objection is raised at the appropriate time, the Court will be under an obligation to act in accordance with the letter of the law unless the defaulting litigant makes out a strong case for a different course being adopted.

The case shall now be placed before the D. B. for decision.

S. S. Sandhawalia, C.J.

(32) I have the privilege of perusing the detailed and lucid judgments recorded by my learned brothers Jain and Sharma, JJ. With greatest deference to the view expressed by Sharma, J., I agree with Jain, J.

ORDER OF THE COURT

(33) 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 defaulting party if a strong case is made out for the exercise of such jurisdiction.

(34) The revision petition is allowed and the order of the trial Court dated 6th September, 1978, is set aside and the defendants are debarred from prosecuting the defence any further. In the circumstances of the case the parties to bear their own costs.

(35) The parties through their learned counsel have been directed to appear before the trial Court on 20th July, 1981.

N. K. S.

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