

Before Hon'ble R. S. Mongia, J

HARBIR SINGH,—Petitioner

*versus*

LAL SINGH,—Respondent

Civil Revision No. 22 of 95

May 8th, 1995

*Code of Civil Procedure, 1908—Ss. 35B, 115—Application made to lead additional evidence in suit—Application allowed on payment of costs—Costs accepted but under protest—Acceptance of such costs even under protest precludes party from challenging order 'n revision.*

*Held that, there is no merit in this revision petition. The Division Bench Judgment of this Court in Amar Singh's case does support the contention of the learned counsel for the respondent that even if costs are accepted under protest the party is precluded from challenging the order like the one in the present case. The reasoning given by the Division Bench is that either the costs should be accepted or not accepted at all but it cannot be that the costs are accepted under protest. Accepting the costs, according to the Division Bench amounts to accepting the order as correct and merely mentioning that the same are being accepted under protest does not affect the correctness of the order and the party is precluded from challenging the same.*

(Para 6)

Kuldip Sanwal, Advocate, for the petitioner.

S. N. Chopra, Advocate, for the respondent.

#### JUDGMENT

*R. S. Mongia, J. (Oral)*

(1) The appellate court,—*vide* order dated 14th November, 1994 allowed the plaintiff to lead additional evidence on payment of Rs. 600 as costs. This order has been impugned in the present revision petition by the defendant in the suit.

(2) On notice of motion having been issued Shri S. N. Chopra, Advocate has put in appearance on behalf of the respondent (plaintiff in the suit).

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(3) Learned counsel for the respondent (plaintiff in the suit) has brought to my notice an order dated 14th November, 1994 which was passed by the Appellate Court after impugned order was passed :—  
“Present : Counsel for parties.

Detailed order announced. Application of plaintiff Under Order 41 R. 27 allowed. Costs paid and accepted under protest. Respondent reserves his right to file revision. For additional evidence of plaintiff on 2nd December, 1994”.

(4) Learned counsel for the respondent (plaintiff) further states that on 2nd December, 1994 Dewan K. S. Puri, Handwriting Expert had been produced on behalf of the plaintiff and his examination-in-chief was recorded but his cross examination was deferred to 15th December, 1994 on the request of the counsel for the defendant as he was not feeling well.

(5) Learned counsel for the respondent argued that the order allowing additional evidence was conditional order subject to payment of Rs. 600 as costs. The defendant's counsel having accepted the costs, the defendant is precluded from challenging the impugned order on the principle of estoppel. According to him, it does not matter even if the costs are accepted under protest. In support of his arguments he has relied on Division Bench judgment of this Court reported as *Amar Singh v. Perhlah and others* (1). Learned counsel for the petitioner on the other hand relied upon a Supreme Court judgment in *Bijendra Nath Srivastava (dead) through L.Rs. v. Mayank Srivastava and others* (2), and contended that even if costs are accepted party is not precluded from challenging the order like the one which has been challenged in the present case.

(6) After hearing learned counsel for the parties I find that there is no merit in this revision petition. The Division Bench Judgment of this Court in *Amar Singh's case* (supra) does support the contention of the learned counsel for the respondent that even if costs are accepted under protest the party is precluded from challenging the order like the one in the present case. The reasoning given by the Division Bench is that either the costs should be accepted or not accepted at all but it cannot be that the costs are accepted

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(1) A.I.R. 1989 P. & H. 229.

(2) A.I.R. 1994 S.C. 2562.

under protest. Accepting the costs, according to the Division Bench amounts to accepting the order as correct and merely mentioning that the same are being accepted under protest does not affect the correctness of the order and the party is precluded from challenging the same. So far as the judgment of the Supreme Court (Supra) referred to by the learned counsel for the petitioner is concerned, it may be observed that the Supreme Court made a distinction between a conditional order allowing amendment or allowing additional evidence on payment of costs and an order where simply costs are awarded on allowing an application for amendment or additional evidence. In that case the impugned order by which the amendment had been allowed was in the following terms :—

“Thus for the aforesaid reasons the amendment is to be allowed on Rs. 50 as costs.”

(7) This order was interpreted to mean that it was not a conditional order allowing amendment subject to payment of costs. The order meant that costs were being awarded on allowing the application. Under these circumstances it was held that the acceptance of costs would not debar the aggrieved party to challenge the order allowing amendment as principle of estoppel would not apply. Otherwise the Supreme Court held that if the order is a conditional order and the costs are accepted, then the party is precluded from challenging the validity of the order.

(8) For the foregoing reasons, I do not find any merit in this Revision Petition which is hereby dismissed.

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*J.S.T.*

*Before Hon'ble V. K. Jhanji, J.*

PRITAM SINGH AND OTHERS,—*Petitioners.*

*versus*

STATE OF PUNJAB AND OTHERS,—*Respondents.*

*Civil Writ Petition No. 3348 of 95*

12th May, 1995.

*Constitution of India 1950—Arts. 226/227—Punjab Municipal Act 1922—S. 22—Removal of President or Vice-President by 2/3rd of members of committee—Expression 2/3rd members of Committee does not exclude associate members.*