

some other suitable case as I have already declined to interfere in my revisional jurisdiction.

6. For the reasons recorded above, I dismiss this revision petition and direct the parties through their counsel to appear before the trial Court on 18th August, 1980, for further proceedings in the suit. No order as to costs.

S.C.K.

Before B. S. Dhillon and M. R. Sharma, JJ.

MANJIT SINGH,—Petitioner.

versus

STATE BANK OF INDIA,—Respondent.

Civil Revision No. 2515 of 1979.

July 15, 1980.

Code of Civil Procedure (V of 1908)—Sections 35-B and 115—Plaintiff allowed time to file replication on payment of costs—Costs not paid on the day replication is filed—Court allowing payment of costs on the next date of hearing—Non-payment of costs at the time of filing of the replication—Whether makes it obligatory for the Court to dismiss the suit—Order giving time for payment of costs challenged in revision—High Court—Whether to interfere in such circumstances.

Held, that it is no doubt true that the language employed in section 35-B of the Code of Civil Procedure, 1908, 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. Where the Court allows the payment of costs on the next date of hearing, it implies that the rights of the defendant were duly safeguarded. No injustice muchless manifest injustice has been caused to the plaintiff because of such an order. The parties are virtually at per and the case shall be heard and decided on merits. In a situation like this, the High Court seldom interferes under Section 115 of the Code, for the law is well settled that even if the order passed by the Court is technically incorrect, the High Court does not interfere on the revisional side if the order does not result in miscarriage of justice. (Paras 2 and 3).

Manjit Singh v. State Bank of India (M. R. Sharma, J.)

Petition under Section 115 C.P.C. for the revision of the order of Shri H. P. Handa, Sub-Judge 1st Class. Ludhiana, dated 3rd November, 1979 accepting the replication and ordering that the costs be paid on the next date of hearing.

V. P. Sarda, Advocate for the Petitioner.

R. K. Chhibbar, Advocate for the Respondent.

JUDGMENT

M. R. Sharma, J. (Oral)

(1) The respondent filed a suit for recovery of some money against the petitioner. It appears that the respondent was allowed time to file replication on payment of costs. On the date when the replication was filed, the costs were not paid. The learned trial Judge, however, accepted the replication and ordered that the costs be paid on the next date of hearing. This order passed by the learned Subordinate Judge has been challenged by the petitioner on the ground that since the adjournment granted for filing the replication was conditional on payment of costs and the costs had not been paid on the date when the replication was filed, the suit filed by the respondent should have been dismissed. In support of this contention, the learned counsel for the petitioner relies upon the language employed in section 35-B of the Code of Civil Procedure, the relevant portion of which reads 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.”

(2) 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. By way of analogy, we might refer to Order 11, Rule 21, Civil Procedure Code, wherein also the word “shall” has been used. The material portion of it 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,

The provision came up for interpretation before the Supreme Court in *M/s. Babbar Sewing Machine Co. v. Tirlok Nath Mahajan* (1). It was held:—

“The principle governing the court’s exercise of its discretion under O. 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

(3) Furthermore, as noticed earlier, the learned trial Judge allowed the payment of costs on the next date of hearing which implies that the rights of the petitioner were duly safeguarded. No injustice much less manifest injustice has been caused to the

(1) A.I.R. 1978 S.C. 1436.

Har Narain v. Ram Lal and others (S. S. Sandhawalia, C.J.)

petitioner because of the impugned order. The parties are virtually at par and the case shall be heard and decided on merits. In a situation like this, this Court seldom interferes under section 115, Code of Civil Procedure, for, the law is well settled that even if the order passed by the learned Court below is technically incorrect, the High Court does not interfere on the revisional side, if the order does not result in miscarriage of justice.

(4) For reasons aforementioned, we find no merit in this petition and dismiss the same with no order as to costs. The parties to appear before the learned trial Court on July 28, 1980.

Bhopinder Singh Dhillon, J.—I agree.

N. K. S.

Before S. S. Sandhawalia C.J. and S. S. Kang, J.

HAR NARAIN,—Appellant

versus

RAM LAL and others,—Respondents.

Letters Patent Appeal No. 223 of 1977

July 16, 1980.

Constitution of India 1950—Article 16—Ticket checking staff of the Railways having different channels of promotion—Railway Board evolving uniform policy classifying service into two categories—Employees recruited prior to the decision given the last option to choose their line of promotion while those recruited thereafter to follow the combined channel of promotion—Such classification—Whether violative of Article 16—Railway employee recruited prior to the policy decision exercising option for promotion for a certain channel—Such employee—Whether could be allowed to go back on his option and opt for another line of promotion—Instructions clarifying the policy decision—Whether could be violative as regards the rights of a particular individual.

Held, that the policy decision of the Railway Board settled a long drawn out dispute and therefore provided the water-shed for cutting the Gordian knot of complications which had arisen with regard to the actual application of the channels of promotion. It was, therefore, provided that the persons who joined service prior