

(1983) 11 P&H CK 0081

High Court Of Punjab And Haryana At Chandigarh**Case No:** Civil Revision No. 112 of 1983

Munshi

APPELLANT

Vs

Ram Kishan

RESPONDENT

Date of Decision: Nov. 29, 1983**Citation:** (1985) PLJ 32 : (1985) RRR 592**Hon'ble Judges:** S.S.Kang, J**Advocate:** S.N. Singh, Advocate, R.K. Malik, Advocate., Advocates for appearing Parties

Judgement

S.S. Kang, J.(Oral)

1. Ram Kishan filed a suit for declaration that he was in possession of the house in dispute. He also moved an application under Rules 1 and 2 of Order 39 of the Code of Civil Procedure (for short "the Code") for an ad interim stay. A notice of this application was given to the defendant and the case was adjourned to October 20, 1982 for filing reply to the stay application. The defendant did not file the reply and sought an adjournment. The learned trial Judge granted this request and adjourned the case to October 28, 1982 for filing the reply to the abovementioned stay application subject to payment of Rs 15/ as costs.

2. The learned trial Judge had proceeded on leave on October 28, 1982 and the case was adjourned to November 8, 1982. Both the parties appeared in the Court on October 28, 1982 and noted the orders adjourning the case to November 8, 1982 on that day. The learned trial Judge heard the arguments on the stay application and framed the issues in the main case and adjourned the case to November 10, 1982 for further proceedings. It may be mentioned here that neither the plaintiffrespondent demanded the costs nor the defendant petitioner offered to pay them. It seems that this matter was not taken note of even by the learned trial Judge. So no question regarding payment of costs was raised on November 8, 1982 when the case was adjourned to the next date for hearing. Some time later on that day, that is, November 8, 1982, the plaintiff filed an application under section 35B of the Code for barring the defendant from prosecuting his defence because he had

failed to pay the costs.

3. The petitioner/defendant contested this application. However, the learned trial Judge found merit in the same and allowed it. He struck off the defence of the defendant. Aggrieved, the defendant has filed this revision petition under section 115 of the Code.

4. Mr. R.K. Malik, learned counsel for the petitioner has argued that the provisions of section 35B of the Code are of penal nature. They should be construed strictly. Laws of procedure are meant to advance the interests of justice and not to thwart them. On 28.10.1982, the case was adjourned to November 8, 1982. Proceedings were taken by that Court on that date and issues were framed in the main case. Arguments were heard in the application out of which these proceedings arise and the case was adjourned to the next date. Neither the plaintiff demanded the costs nor the defendant offered the same. The Court also did not pass any order regarding the issue. Of course, later in the day an application striking off the defence of the defendant was made by the plaintiff.

5. For the purpose of section 35B the date next following the date of filing the reply shall be the date on which the case is adjourned by the Court for adjudication. This date will mean the time when the case is taken up and the Court applies its mind thereto and the case is adjourned to the next date for the trial of that case. Once no issue regarding costs is raised till the time when the Court takes up the case or had passed the order and the case is adjourned for a future date then it will be taken that the party in whose favour the order of costs had been made had waived the right to request the Court to direct the opposite party in the case of the plaintiff not to prosecute the case, in the case of the defendant not to defend the case, as the case may be, since the matter of nonpayment of the costs was not taken up on November 8, 1982. In this view of mine, I am fortified by the observations of my Lord the Chief Justice who wrote an opinion on behalf of the Bench in *Prem Sagar and others v. Phul Chand and others*, AIR 1983 Pb. & Har. 385 : 1983(2) R.C.R.(Rent) 405 : 1984 R.R.R. 576(F.B.) to the following effect :

"In the context of section 35B if on or after 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 defence has waived its right. Thereafter it would not be possible to again exercise the ghost of the stringent provisions of section 35B at any time and every subsequent date."

6. The learned trial Judge has acted with material irregularity in the exercise of its jurisdiction by striking off the defence of the defendant.

7. As a result I allow this revision petition and quash the orders dated December 20, 1982.

8. The parties through their respective counsel are directed to appear in the Court of the learned trial Judge on 20th December, 1983. There shall be no order as to costs.