

Prakash Narain Vs. Additional District Judge and ors.

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Court : Allahabad

Decided On : Oct-28-1980

Reported in : AIR1981All120

Judge : K.M. Dayal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 35B

Appeal No. : Civil Misc. Writ No. 8984 of 1979

Appellant : Prakash Narain

Respondent : Additional District Judge and ors.

Advocate for Def. : Standing Counsel and ;A.N. Bhargava, Adv.

Advocate for Pet/Ap. : V.P. Goel, Adv.

Disposition : Petition allowed

Judgement :

ORDER

K.M. Dayal, J.

1. The present petition has been filed by the defendant in a suit for partition. The defendant, after filing his written statement, it appears, delayed the suit from time to time by seeking adjournments or amendments in the pleadings or otherwise. On

three days the adjournment or amendment was allowed on payment of costs. On 10th January 1974 Rs. 10/- were awarded as costs. On 25th May 1977 again Rs. 10/- were awarded as costs and on 21-7-1977 Rs. 20/- was awarded as costs. These costs were awarded by orders without specifying any period under which they were to be paid as is clear from paragraph 4 of the writ petition. On 2nd June 1979 an application was made by the plaintiff-respondent for striking off the defence of the petitioner under Section 35-B of the C. P. C. as he had failed to pay the cost.

2. The trial court rejected the application by order dated 2-1-1979 (Annexure 3 to the writ petition). A revision was filed by the respondent and the VI Addl. District Judge, Bijnor allowed the revision and ordered the defence of the petitioner to be struck off for non-payment of the costs mentioned above.

3. It is not disputed that in the orders for payment of costs no period was fixed. The learned counsel for the respondent, however, argued that under Section 35-B the time is fixed for payment of costs as the next following date of the order. He relies on the following:

'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 next date following the date of such order, shall be a condition precedent to further prosecution of-

(a)

(b) The defence by the defendant, where the defendant was ordered to pay such costs.'

Sub-section (2) provides that if the costs are not paid, a separate order shall be drawn which will be executable against the persons, against whom costs have been awarded. There are two mistakes in the judgment of the lower revisional court. The first mistake is that the non-payment of the costs could only result in not

permitting further prosecution of the case but it could not result in the striking out of the defence or the dismissal of the suit secondly that if the costs are to be paid by the next date that condition has to be recorded in the order itself. The learned counsel for the respondent argued that it was not necessary to record any period and the next date is the date fixed by the aforesaid provision. A plain reading of the provision merely shows that the adjournment should be granted on a condition that the costs were to be paid on the next date, if no such condition was imposed by the court such a condition cannot be read in the order itself. The order of the court below that failure of the defendant to make payment of the cost in question disabled him from prosecuting his defence any further cannot be sustained. The order could be that the defendant could not enter into his defence unless the costs were paid. The provisions of Section 35-B do not debar the defendant from prosecuting the case for ever as the defence is not struck off but is merely suspended.

4. In the result, the present petition has to be allowed. The order in revision dated 30th August 1979 passed in Civil Revision No. 3 of 1979 Kailash Narain v. Prakash Narain is quashed. The trial court is directed to prepare an order for realisation of the costs which may be executed against the defendant. The defendant may be permitted to take part in the proceedings in case he pays the costs or deposits the costs in court In view of the fact that the suit is pending since long, the case may be decided as expeditiously as possible. The parties are directed to bear their own costs.

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