

In the High Court of Judicature for Rajasthan  
at Jai pur Bench Jai pur

S. B. Civil Writ Petition No. 1272/2012

Indian Medical Trust-Petitioner  
vs  
Civil Judge (JD) cum Judl. Magistrate 1st  
Class, Jai pur and another-Respondents

Date of Judgment : 31. 1. 2012

HON'BLE MS. JUSTICE BELA M. TRI VEDI

Mr. Mahendra Shah, for the petitioner

By the Court:

1. Heard Mr. Mahendra Shah Learned counsel for the petitioner.
2. By way of the present petition under Article 227 of the Constitution of India, the petitioner has challenged the legality and validity of orders dated 5. 11. 2011 and 4. 1. 2012 respectively passed by the trial court.
2. It appears that in the suit filed by the petitioner-plaintiff against the respondent No. 2-defendant, the trial court had passed conditional order dated 18. 7. 2011, permitting the respondent-defendant to lead evidence and cross examine the witness examined by the plaintiff, on the defendant making payment of cost of Rs. 1, 000/-. It

further appears that despite the said opportunity granted to the respondent-defendant, the defendant neither paid the cost nor proceeded further with the trial. Therefore, the court had, vide order dated 3.8.2011, drawn the ex-parte proceedings. Thereafter on 27.8.2011, the respondent-defendant moved an application for setting aside the said order dated 3.8.2011. The trial court allowed the said application vide order dated 27.9.2011 on the condition of payment of cost of Rs. 100/-. However, the defendant did not deposit even the said amount of Rs. 100/-. Since one witness Shri Bhagwan Sahay was already examined by the defendant earlier in January, 2011 and was cross-examined partly by the plaintiff, the further cross examination of the said witness was fixed on 5.11.2011. On 5.11.2011, the plaintiff refused to cross examine the said witness on the ground that the defendant had not complied with the earlier orders passed by the court for the payment of cost. The trial court, therefore, vide order dated 5.11.2011 took note of non-compliance of the order at the instance of defendant and directed that the

defendant shall not take part in the further proceedings of the suit. Since the plaintiff did not want to cross examine the witness, who was present in the court, the evidence of the defendant was also closed vide the said order. The plaintiff thereafter submitted an application under section 151 of CPC for discarding the evidence of the said witness Bhagwan Sahay. The said application came to be dismissed with cost of Rs. 200/- by the trial court vide order dated 4. 1. 2012. Being aggrieved by the said orders dated 5. 11. 2011 and 4. 1. 2012, the petitioner has preferred the present petition.

3. It has been submitted by learned counsel for the petitioner that the defendant having not complied with the earlier orders passed by the court for the payment of cost, the entire evidence of the said witness was required to be discarded and that unless the cost was deposited, the defendant should not have been permitted to participate in the further proceedings.
4. The submissions made by learned counsel for the petitioner cannot be countenanced for the simple reason that the orders passed by

the trial court are discretionary in nature. As per the settled legal position, the supervisory jurisdiction under Article 227 of the Constitution of India should be exercised sparingly and in such cases where there is apparent error entailing gross injustice.

So far as the facts and circumstances of the present case are concerned, it is true that the respondent-defendant should have deposited the cost as directed by the court, and non deposit should be viewed very seriously. The trial court in the instant case has already directed the defendant by order dated 5.11.2011 not to take part in the further proceeding of the suit. As such, there is no provision in the CPC to discard the entire evidence of the witness which has already come on record and more particularly when he was partly examined also. From the impugned order dated 5.11.2011 it appears that though the witness of the defendant was present for further cross examination, the learned counsel for the plaintiff refused to cross examine him. Therefore, this court does not find any grave error in the impugned orders passed by the trial court.

1. As regards the submission made by Learned counsel for the petitioner that the petitioner-plaintiff is ready to deposit cost as directed by the trial court vide order dated 4.1.2012, it is directed that it will be open for the petitioner to make an application before the trial court for permitting the plaintiff to further cross-examine the witness Bhagwan Sahay, on his depositing the cost of Rs. 200/- as directed by the court vide order dated 4.1.2012. On such application being made and on making payment of cost of Rs. 200/-, the plaintiff shall be permitted to cross examine the said witness.

2. With the aforesaid observations, the present petition stands dismissed.

(BELA M. TRIVEDI) J.

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All corrections made in the judgment/order have been incorporated in the judgment/order being emailed.

Om Prakash  
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