

(1955) 05 CAL CK 0025
In the Calcutta High Court
Case No : Exn. Case No. 18 of 1951

Malchand and Others

APPELLANT

Vs

Puranmull and Others

RESPONDENT

Date of Decision : 27-05-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 1

Citation : AIR 1956 Cal 228

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : M.G. Poddar, for the Appellant; S.N. Bose, for the Respondent

Final Decision : Allowed

Judgement

P.B. Mukharji, J.—This is an application on behalf of Taxing Officer disallowing the costs of 36 attendances in a Chamber Summons as between party and party. These costs have been disallowed on the ground that they are costs of adjournments. Although the amount involved in the taxation is small, the point raised on this application is of considerable importance to the profession.

2. The Registrar as Taxing Officer who up-held the Assistant Taxing Officer's decision disallowing these costs, guided himself by an administrative direction which he has quoted in his order. That administrative direction has been challenged before me as having been obtained not in accordance with Rule 13 of Chapter 36 Original Side Rules relating to taxation which provides:

"The Taxing Officer shall keep a book, in which he shall from time to time enter in writing a statement of any doubts or difficulties which in the course of taxation may have arisen as to the interpretation or construction of any of the Rules of the Court or the table of fees, and on which it may be desirable that the opinion of the Court should be ascertained, and shall submit the same at convenient opportunities to the senior Judge in Chambers and obtain his decision upon the point in question".

The administrative direction relied on by the Taxing Officer was not taken in accordance with this rule. Officers in charge of taxation should acquaint themselves carefully with the Rules of the Original Side of this Court and the need for them to act according to such rules cannot be overemphasised in the interest of good administration.

3. The question of taxation in this case arose out of an application for execution which was a Chamber Summons. The Chamber Summons was adjourned by consent of parties on 36 different occasions. On 3-12-1953 this application for execution on Tabular Statement in Chamber Summons was dismissed with costs. The said order has been drawn up, signed, completed and filed and the material portions regarding costs of that application are in the following terms:

"And it is further ordered that the said applicant do pay to the defendants therein costs of and incidental to this application to be taxed by the Taxing Officer of this application for the employment of an Advocate".

4. The main contention on behalf of the applicant is that these costs of adjournment should not have been disallowed by the Taxing Officers as between party and party because such costs were not costs of adjournment but costs of attendance as provided under Item No. 17 of Rule 91 of Chapter 36, Original Side Rules. The Taxing Officer relied on Rule 35 of Chapter 36 providing,

"No costs of any adjournment or postponement shall be allowed except such as are rendered necessary in consequence of such adjournment". Until recently the prevailing practice has always as costs for attendance have been allowed as between party and party when by an administrative direction interpreting Rule 35 of Chapter XXXVI the practice was changed. Following that administrative direction and interpreting Rule 35 in the light of such administrative direction, the Taxing Officer disallowed these costs in the present case. It is necessary to add here that these costs as costs for attendance have been allowed as between Attorney and client.

5. The point in my view in this case apart from the administrative direction and its effect, can be disposed of on the interpretation of the order dismissing the application for execution. That order of the Court dismissed the application, with costs of and "incidental to" the application. The question, therefore, should be approached in my judgment whether such costs of adjournment were costs incidental to the application.

An application is taken out and then if the parties consent to a certain number of adjournments, then costs, whatever those costs may be whether between Attorney and client or between party and party, are certainly in my view costs "incidental to " the application. The propriety or necessity of the adjournments, and their number does not arise in such a case because both the parties having consented to the adjournments it is not open to either to contend that such adjournments or any of them was either unnecessary or improper.

6. The order of 3-12-1953 directed the applicant to pay not only the costs of the application but all costs incidental to that application and such costs were directed "to be taxed by the Taxing Officer of this Court".

The effect of that express order is that the applicant is to pay these costs. In other words, this was not a cost as between Attorney and client but cost as between party and party. That was the clear and unequivocal order of the Court. That is the only interpretation possible of such an explicit order when one party is directed to pay the costs of and incidental to the application to the other party.

No further question, whether such costs are costs of adjournment or costs of attendance, arises. Having regard to the specific order of the Court dated 3-12-1953 the Taxing Officer was clearly wrong in disallowing these costs as between party and party.

7. I find it difficult to see how in a Chamber Summons which is pending before a Court or Judge, there can be an adjournment without attendance. Every adjournment in such cases involves attendance because the consent "fiat" has to be made out and endorsed by the Court's officer. The reason is clear.

The application on summons asks the parties to attend before the Judge in Chambers and if it is subsequently adjourned on the date when it is made returnable, the Court officer has to endorse the consent signatures of the respective attorneys for the adjournment. It is necessary to bear in mind that essential fact on the Original Side while dealing with such matters. The attendance is obligatory. Rule 9 of Chapter 6, Original Side Rules relating to Chamber Business makes the following mandatory provision:

"Where a matter in respect of which a summons is issued, is not disposed of upon the return of the summons, the parties shall attend from time to time without further summons, at such time or times as may be appointed for the consideration or further consideration of the matter".

If a party is compelled to attend under this Rule 9 Chapter VI, then I do not see how such costs of attendance can be limited only to attorney and his own client and not cover the costs as between party and party. What Rule 9 Chapter VI requires is that "the parties shall attend".

8. Rule 91 of Chapter 36, Original Side Rules sets out certain fees with the opening words "Except as otherwise specially provided in these rules the following fees shall be allowed to attorneys". In the different items mentioned thereunder, Item No. 17 states under the head "Attendances" as follows:

"Every attendance before the Court or Judge or an officer of the Court, not otherwise provided for (at the discretion of the Taxing Officer)". It gives the nominal sum of Rs. 2/8/- to Rs. 5/- against this item. Item 18 similarly provides for every other application and for every attendance there. It is, therefore, plain that the Attorney is entitled to the scheduled fee for attendance before a Judge in Chamber under this rule giving a discretion to the Taxing Officer.

It will be indefensible limitation to so interpret this Rule 91 as to confine the fees of such attendance only as between attorney and client in face of the clear provision of Rule 94 which expressly refers to Rule 91 and when Rule 91 opens with the words "except as otherwise specially provided in these Rules". Items 17 and 18 are specific provisions allowing attendance charges. There is no specific provision disallowing attendance charges. At this stage reference to Rule 94 is necessary.

9. Now Rule 94 of Chapter 36 of the Original Side Rules relating to taxation expressly says that the fees mentioned in Rule 91, whose items Nos. 17 and 18 I have already referred to, are the rates to be allowed upon taxation as between attorney and client or as between party and party and it is expressly left to the discretion of the Taxing Officer in every case to decide whether the fee under Rule 91 should be allowed as between party and party or as between attorney and client. Rule 94 states as follows:

"The fees mentioned in Rules 91 and 93 are the rates to be allowed upon taxation as between attorney & client or as between party & party built will be for the Taxing Officer in every case to decide whether the particular business charged for, or monies advanced, are to be allowed as between party and party, or as between attorney and client".

10. Now, if items 17 and 18 of Rule 91 were always to be read as costs intended to be allowed only as between an attorney and his own client, and not as between party and party, then such an interpretation will be plainly inconsistent with Rule 94 which says that it will be the duty of the Taxing Officer in every case to decide whether he should allow any fees mentioned under Rule 91 as between party and party or as between attorney and client.

There can therefore be no general interpretation whose effect is always to exclude party and party costs in any relevant item under Rule 91 where the question of costs as between party and party may arise. Every such case must be decided on its own individual merits by the Taxing Officer under Rule 94.

Indeed the principle of leaving to the discretion of the Taxing Officer to decide whether attendance charges should be allowed as between party and party or as between attorney and client is well recognised in Taxation Rules. Rule 97 Items 4, 5 and 6 expressly allows attendance charges as between attorney and client and even there by Rule 98 it is explicitly provided that the Taxing Officer may in his discretion allow such attendance charges as between party and party.

11. I am of the opinion that Rule 35 of Chapter XXXVI of the Original Side Rules relating to taxation has been misapplied and misinterpreted by the Taxing Officer. That Rule provides:

"No costs of any adjournment or postponement shall be allowed, except such as are rendered necessary in consequence of such adjournment".

12. The context in which Rule 35 appears and its juxtaposition do not indicate

that it was intended to apply to the case of such Chamber Summons which attracted the operation of other relevant Rules. In my opinion, Rule 35 excludes costs of adjournment unless such costs are the necessary sequel of that adjournment.

That is the plain meaning of the Rule. But if the costs of adjournment are the same as costs of attendance then if costs of attendance are allowed by any specific Rule, then the allowance for attendance cannot be denied under the cover that it was a case of adjournment.

"Generalia Specialibus non derogant". If there is a specific Rule specifically allowing costs of attendance, then the general Rule disallowing costs of adjournment cannot be permitted to encroach upon the allowance for attendance. The reason for holding the view is that otherwise it will be impossible to reconcile the Rule enjoining attendance of parties on adjourned Chamber Summons under Rule 9 of Chapter VI, the Rule giving the attorneys right to charge fees for every attendance under items 17 and 19 and finally, Rule 94 of Chapter XXXVI asking the Taxing Officer to decide in every case whether such costs of attendance should be allowed as between attorney and client or as between party and party.

I have already explained that every adjournment or postponement of a Chamber Summons *ex-hypothesi* includes attendance because a Chamber Summons cannot be adjourned without attendance under Rule 9 of Chapter VI. The Exception contained in Rule 35 is the window which throws a good deal of light of interpretation on that Rule and I shall presently show that costs of attendance come within the Exception. The Exception allows even there costs where such costs are rendered necessary in consequence of such adjournment or postponement.

For instance, where a witness has arrived and the matter is adjourned, then there the costs of recalling the witness on a different date or the costs of procuring attendance on the day which were thrown away, are allowed. Again for instance, where documents are produced from public records and the matter is adjourned, then the costs of procuring those documents will be costs consequent upon the adjournment and will therefore be allowed. Such are the costs contemplated in Rule 35 of Chapter XXXVI which are permissible although the matter is adjourned or postponed.

In other words, Rule 35 relates to costs of adjournment or postponement but not to costs of attendance. It will appear from the illustrative examples already given, that there may be many costs incurred other than costs of attendance when a matter is adjourned or postponed, and it is those costs which are disallowed under Rule 35. For instance the costs of the hearing unless otherwise specially ordered by the Court will always be disallowed under Rule 35 when a matter is adjourned or postponed. That will mean neither Counsel nor Attorney will be allowed fee for hearing of the day on which the matter is adjourned.

In my judgment, the true interpretation of Rule 35 of Chapter XXXVI is that such were the costs that were intended to be covered by that Rule. Rule 35, in my opinion, does not exclude costs of attendance of Attorneys which are otherwise expressly allowed under specific different and explicit Rules on attendance, because then such costs of attendance become costs "rendered necessary in consequence of such adjournment" within the meaning of the very exception of Rule 35.

13. In conclusion, it is necessary to emphasise here in the present case that the order dated 3-12-1953 dismissing the Chamber Summons made a clear- order for costs to be paid by one party to the other. Such costs were not as between Attorney and client but were directed to be paid by the order itself by the attendance to the defendants.

In the present case, therefore, .the Taxing Officer had no option under that express order but to allow such costs as costs for attendance as between party and party. In doing otherwise he misapplied and wrongly invoked Rule 35. I am, therefore, of the opinion that both the Assistant Taxing Officer and the Taxing Officer misguided themselves and overlooked the express order of this Court. I set aside the decision of the Taxing Officer and direct these costs to be taxed as costs of attendance and allowed as between party and party as directed by the order of 3-12-1953. There will be no order as to costs of this application.