

(1978) 06 KL CK 0007
In the High Court Of Kerala
Case No : C.R.P. No. 4865 of 1976

Maniankutty and Others

APPELLANT

Vs

Venkiteswaran

RESPONDENT

Date of Decision : 21-06-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 13(1), Order 9 Rule 9, 35

Citation : (1978) 06 KL CK 0007

Hon'ble Judges : K.K. Narendran, J

Bench : Single Bench

Advocate : Party in Person, for the Appellant; T.L. Viswanatha Iyer and P.S. Narayanan, for the Respondent

Final Decision : Allowed

Judgement

Narendran, J.—Costs are in the discretion of the Court. So, in disposing of a case the Court has to take a decision on the question of costs also. As costs of and incident to all suits shall be in the discretion of the Court it has the power to determine by whom or out of what property and to what extent such costs are to be paid. The question that arises for consideration is whether there is any justification in awarding costs to the State in allowing a petition to set aside ex parte filed under Order IX, Rule 13 of the Code of Civil Procedure, 1908.

2. The Additional Munsiff, Palghat allowed certain applications under Order IX, Rule 9 and Order IX, Rule 13 of the CPC on payment of costs not only to the opposite party but to the State also which was not a party to the proceedings. Such orders were passed in as many as 32 cases. This was brought to the notice of the High Court and a decision was taken on the administrative side to take up the matter in suo motu revision in one case. The order on I.A. No. 3685 of 1975 in O.S. No 284 of 1975 from which the suo motu revision was taken, reads:

Heard. This application will be allowed only on payment of costs Rs. 15 to the Plaintiff and also the sum of Rs. 15 as costs to the State to be paid on or before

9th April 1976. If the payments are not paid on or before 9th April 1976 this application will stand dismissed with costs. Call on 10/4.

The suit was filed by a partnership against one Maniyankutty for damages for use and occupation of a rice mill and its machinery. Admittedly the State was not a party in the suit. Maniyankutty was declared ex parte and to set aside the ex parte order Maniyankutty filed the above I.A. under Order IX, Rule 13 of the Code of Civil Procedure.

3. Section 35 of the Code of Civil Procedure, 1908 reads:

35. Costs. -- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

Order IX, Rule 13(1) of the Code reads:

13. Setting aside decree ex parte against Defendant. -- (1) In any case in which a decree is passed ex parte against a Defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding the suit. (Provisos are omitted).

Of course, costs are in the discretion of the court which decides the case. But in the exercise of its discretion the fundamental aspects of the matter should not be lost sight of. Primarily, costs are in the nature of incidental damages granted to a successful party to make good his expenses for contesting his case before court. It is a statutory allowance to a party to a suit. It is a sum prescribed by law as charges incurred by a party to a case. u/s 35 of the Code the discretion of the Court is very wide. But it goes without saying that it is a judicial discretion which has to be exercised without forgetting the legal principles involved. It cannot be said that the Court has no power to award costs against persons who are not parties to the suit in exceptional circumstances. In that case, they should be given an opportunity of being heard. But, however fertile one's imagination may be, it is not easy to conceive that costs can be awarded to one who is not a party to the suit. At the most, the discretion is to determine "by whom" and not "to whom" costs are to be paid. Above all these, what is the exceptional circumstance in this case for awarding costs to the State which is not a party to

the suit. Under Order IX, Rule 13 of the code a Defendant can get an ex parte decree against him set aside if he satisfies the court that he was prevented by any sufficient cause from appearing in court on the day when the case was taken up and he was declared ex parte. The court can mulct him with costs as the rule empowers the court. But why should the court award costs to the State also. The words "upon such terms as to costs, payment into court or otherwise as it thinks fit" cannot empower the court to direct to pay costs to the State which was not a party to the suit. The direction to pay costs to the State is not only perverse but it is also one without jurisdiction. Hence the direction to pay costs to the State is set aside.

4. Instances are not few where courts have passed perverse orders in the matter of costs. A High Court's order awarding costs against a court was interfered with by the Supreme Court in Lakshmi Narain v. First Additional District Judge AIR 1961 S.C. 489.

5. In the result, the Revision is allowed. I.A. No. 3685 of 1975 will stand allowed on payment of costs Rs. 15 to the Plaintiff in O.S. No. 284 of 1975. The Petitioner in the I.A. will have a month's time from today for payment of costs if it is yet to be paid. There will be no order as to costs in the revision.