

(1960) 10 PAT CK 0006
In the Patna High Court
Case No : Civil Revision No. 357 of 1959

Nandlal Tanti and Others

APPELLANT

Vs

Jagdeo Singh and Others

RESPONDENT

Date of Decision : 18-10-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 122, 125, 151, 152, 35

Citation : AIR 1962 Patna 36

Hon'ble Judges : Raj Kishore Prasad, J

Bench : Single Bench

Advocate : Sidheshwar Prasad Singh, for the Appellant; R.S. Sinha and Madan Mohan Prasad for No. II, for the Respondent

Final Decision : Dismissed

Judgement

Raj Kishore Prasad, J.—This application, in revision by the defendant, is against an order of the Court below, rejecting their application for amendment of its decree, u/s 152 of the Code of Civil Procedure.

2. Two points were pressed in support of the Rule: (1) that the court Below wrongly held that it had no jurisdiction to make the amendment in its decree, passed on appeal, because the judgment and decree of the first court were affirmed; and (2) that some costs had been improperly included in the decree of the first Court, which had wrongly been affirmed, on appeal, by the Court below.

3. In order to appreciate the points, it is necessary to state the relevant facts, having bearing on these questions.

4. The plaintiffs opposite party brought a suit, for recovery of arrears of rent, against the petitioners defendants. One of the defences, raised by the defendants was that the rent claimed area was incorrect. To prove their case, the petitioners filed certain rent receipts, alleged to have been granted, on behalf of the plaintiffs, and, written by one Baidyanath Singh, father of plaintiffs 3 and 4. On the application of the plaintiffs, the disputed rent receipt along with the

admitted signature of Baidyanath Singh, were sent for comparison to Mr. Dixit, Government Hand Writing Expert. The cost of this expert was met by the plaintiffs, When the report was received, it was unfavourable to the plaintiffs, and, therefore, they prayed that the disputed rent receipts, along with the document bearing the admitted signature of Baidyanath Singh, be sent to another expert, Mr. Hanif. Mr. Hanif submitted a report in favour of the plaintiffs, and, later, he was examined in Court, and, his report was exhibited. His cost also was met by the plaintiffs. Mr. Dixit, however was not examined by the plaintiffs, nor, his report was got exhibited in the suit. Ultimately, the plaintiffs succeeded, and, their suit was decreed with costs.

5. In the decree prepared by the first Court, however, the costs incurred on these two experts were also included, along with other costs of the suit.

6. An appeal against the said judgment and decree was carried by the petitioners to the Court of appeal below, but, there also, they were unsuccessful, and, their appeal was dismissed with costs, and, the judgment and decree of the first Court was affirmed.

7. It further appears that in the memorandum of appeal to the Court of appeal below, a ground --ground No. 11--was taken that the decree prepared by the first Court was wrong. This ground, however, was not pressed at the time of the hearing of the appeal.

8. The defendants, thereafter, made an application to the first Court for amendment of the decree, u/s 152 of the Code of Civil Procedure, on the grounds (1) that the cost of Mr. Dixit, who was not examined in the suit, and, whose report was not exhibited, should not have been included in the decree; (2) that the cost of Mr. Hanif, as entered in the decree, was wrong, and, that it should be less; and (3) that the cost of affidavits and typing charges also in excess of what was actually spent by the plaintiffs.

9. The first Court dismissed this application, by an order dated the 29th of January, 1959, on the ground that, as the judgment of that court had been affirmed on appeal, and had therefore, merged in the decree of the appellate court, it was appellate court which could entertain this application for amendment of the decree.

10. Accordingly, thereafter, the defendants made an application to the Court of appeal below for amendment of the appellate decree on the above grounds. This application has been rejected by the learned Subordinate Judge, by an order dated the 25th of May, 1959, on the ground that he had no jurisdiction now to make the amendment in the decree, because, the decree of the first Court was affirmed, and, the ground taken, that the decree was wrong, was not pressed in appeal, and, as such, the result of this was that "even the items of costs wrongly allowed by the trial Court" were affirmed. The learned Subordinate Judge, however, on merits, accepted the case of the petitioners in part.

11. In support of his first contention, that the Court below had jurisdiction to amend the decree, Mr. Sidheshwar Prasad Singh, relied on a Bench decision of the Calcutta High Court, in Hemanta Kumar Ghose and Others Vs. Rajendra Mondal and Others, ; a Bench decision of the Allahabad High Court, in Kr. Bhagwant Singh Vs. Bhao Singh and Another, and, a Bench decision of this Court in Col. Maharajadhiraj Sir Kameshwar Singh Vs. Nebilal Mistri, .

12. In the Allahabad case, it was held that, when a judgment awards costs to a party, it implies costs deemed to be such according to rules, and, as such, if a decree includes costs not legally taxable, it cannot be said to be in accordance with the judgment. In that case, it was found that costs were taxed improperly in contravention of the Allahabad High Court Rules.

13. In the Calcutta case, while enumerating the cases in which a decree can be amended, it was held that, where the judgment awards costs to a party, it implies costs allowed by the rules, and, if the decree includes costs, which are not permissible under the rules, the decree is not in accordance with the judgment, and, does not correctly state what the court intended, and, therefore, it is the duty of the court to correct it so as to make it in conformity with the judgment.

14. In the Patna case, while considering the scope and effect of Section 35 of the Code of Civil Procedure, it was laid down that a very wide discretion is given to the court u/s 35 in the matter of costs, and, that discretion extends not only to the question, which party should bear the costs of a suit or proceeding, or, in what proportion, but also in many instances, to the question, whether a particular item should be allowed as costs of the party, and, if so, for what sum, and, that this was clearly recognised by the General Rules and circular orders of the Patna High Court, Civil, (I) Part 5 , Chapter 1.

15. On the question of "costs" the material section is Section 35, of the Code of Civil Procedure, (hereinafter referred to as the Code), which is to the following effect:--

"35(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 and 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 cost shall not follow the event, the court shall state its reasons in writing. *****"

16. From Section 35 of the Code, quoted above, and the above discussed authorities, as also from Mulla's and AIR's commentaries on Section 35 of the Code of Civil Procedure, and, AIR's commentaries on sec. 7 of the Court Fees

Act, the true scope and effect of Section 35 and the law on this question of "costs" may be re-stated thus:

The object of Section 35 in awarding costs to a litigant is to secure to him the expenses incurred by him in the litigation, and not to enable him to make anything, in the way of gain or profit, over and above the expenses for maintaining or defending the action.

The expression "costs of and incident to all suits" occurring in Section 35(1), includes, not only costs of suits, but also costs of applications in suits. As to costs of applications, the court may make an order directing either party to pay the costs of the other, or, it may make no order as to costs, or it may reserve costs or make costs, costs in the cause. This expression, therefore, means all costs incurred in the suit. The general order for costs of the suit, however, does not displace a specific order for costs made on an application.

The costs of suits and applications are thus in the discretion of the court, No doubt, the award of costs is entirely in the discretion of the court, but, subject, however, "to such conditions and limitations as may be prescribed, and to the provisions or any law for the time being in force." "Prescribed", used in Section 35(1), has been defined, in Section E (16) of the Code, as meaning "prescribed by rules" and "rules" u/s 2(18) of the Code, means "rules and forms contained in the first schedule or made u/s 122 or Section 125" of the Code.

17. Thus, a very wide discretion is given to the courts, u/s 35 of the Code, in the matter of costs, and, that discretion extends, not only to the question, which party should bear the costs of a suit, or proceeding, or, in what proportion but also in many instances, to the question, whether a particular item should be allowed as costs of a party, and, if so, for what sum. This is clearly recognised also by the General Rules and Circular Orders of the Patna High Court, (Civil), Volume I, 1954, Part V Chapter I, page 176, which deals with "Fees and costs".

18. The general rule, however, is that costs shall follow the event. This means that the successful party is entitled to costs, unless the court, for good reasons, otherwise orders, for example, when he is guilty of misconduct, or, there is some good cause for not awarding costs to him. This is clear from Sub-section (2) to Section 35, of the Code, which provides that where the court directs that any costs shall not follow the event, the court shall state its reasons in writing.

19. Where, however, the judgment awards costs to a party, it implies costs allowed by the rules, and, costs deemed to be such according to rules. If the decree includes costs, which are not permissible under the rules, and, as such, not legally taxable, the decree is not in accordance with the judgment and, it does not correctly state what the court intended, and, in such a case, it would be the duty of the court to correct it, so as to make it in conformity with the judgment.

20. It is the duty of the court to prepare its decree in accordance with its

judgment, and, if there is any variance between the two, it must correct the decree so as to make it in conformity with the judgment. The duty primarily rests with the court, and not with any interested party to apply to that court for amendment of the decree, and therefore, the plea of laches, or, the plea that no objection was raised at the time of the preparation of the decree, in spite of notice thereof having been given, is not available against such an application.

21. But the only cases, in which a decree, or order, after it is drawn up and signed, can be amended by the Court, which passed it, are:

(1) u/s 152 of the Code, where there has been a clerical or arithmetical mistake, or, an error arising from any accidental slip, or, omission; and,

(2) Under its inherent powers, u/s 151 of the Code, where the Court itself finds its decree or, order, as drawn up, does not correctly state what the Court actually decided, and, intended to decide, provided the amendment can be made without injustice, or, in terms which preclude injustice.

22. It is settled that an appeal lies for costs, only when the costs are awarded by a "decree", if the order as to costs involves a matter of principle. An appeal from a direction as to costs, contained in a decree, will, therefore, lie, but only where there has been no real exercise of discretion in making the order as to costs, or, where the exercise of discretion is not judicial, that is, not based on sound and well-established legal principles; in other words, where the direction as to costs involves a matter of principle; or, where the order as to costs proceeds upon a misapprehension of fact or law.

23. Ordinarily, court-fees are not payable upon costs entered in the decree, against which an appeal is presented. The reason is that such costs cannot be said to be a subject in dispute in the appeal. Once an appeal is preferred, the costs even in the lower court are in the discretion of the appellate Court, which can mould them according to its view of the merits of the dispute, the conduct of the parties, etc. Under Rule 35 (3), of Order 41, of the Code, the appellate Court is required, while passing a decree, to give Suitable directions as regards costs in the lower Court also. But where, apart from, and, independently of, any other relief, which an appellant seeks in an appeal from a decree, he seeks distinct relief on the ground that, by the decree under appeal, the costs of the parties have not been properly assessed, or, apportioned, the value of such distinct relief has to be reckoned as part of the subject-matter in dispute for the purposes of Article 1 of the First Schedule of the Court Fees Act, and court-fee has to be paid on such costs.

24. Where, therefore, the appellant appeals against the decree in a suit on merits, and, also challenges the order of costs independently, then the value of the subject-matter in dispute in appeal is the total amount, consisting of the value of the subject-matter in the suit and, the amount of costs challenged: AIR 1940 182 (Oudh) .

25. Therefore, if there is an appeal against the direction as to costs, and, the appeal is dismissed; or, an appeal is preferred both against the substantive portion of the decree and the order as to costs, and, both are dismissed, then certainly the items of costs, which were the subject-matter of the appeal, cannot be subsequently challenged by an application for amendment of the decree of the appellate Court. Where, however, there is no such specific appeal against the direction as to costs, and, no distinct and independent relief claimed in respect thereof, or, where the particular items of costs, which are challenged as being contrary to well-established principles of law and rules, are not specifically challenged on appeal and made specific and independent grounds of appeal, but on an appeal against the substantive decree itself, only a general ground, that the decree prepared by the trial court is wrong, is taken, along with other grounds on the merits of the appeal against the decree of the first Court itself, and, that ground is not pressed, and, the appeal is dismissed, and, the judgment and decree of the first Court are affirmed on appeal, then, in such a case, the appellate Court will have jurisdiction to amend its decree for costs, if it is satisfied that the decree of the first Court included costs which were not permissible under the law, and, for that reason, its own decree, which followed the decree of the first Court, included improperly taxed costs, and, therefore, it also does not correctly represent what the Court intended.

26. In the light of the above principles, let us now examine the facts of the present case, in order to decide if the Court below rightly held that it had not jurisdiction to amend its decree because it was a decree of affirmance, whereby the decree for costs of the first Court was also affirmed.

27. The trial court decreed the suit with costs. The expression "suit decreed with costs" in a decree means that the defendant is to Pay the costs of the plaintiff. The defendants, therefore, were liable to pay all the costs incurred by the plaintiffs in the action. The appeal against that decree was dismissed with costs, and, therefore, the decree of the first Court merged in the appellate decree, and, as such, the appellate Court only had jurisdiction to amend the decree of the first Court, and, consequently, of its own Court, which followed the decree of the first Court. Admittedly, there was no specific appeal against the decree for costs, because, only a general ground, that the decree prepared by the trial Court is wrong, was taken. Such a ground could not be considered to amount to an appeal either against the Order as to costs, or, against any specific items of costs, because, in such a case, the amount of costs challenged has to be separately valued, and, it is to be treated as part of the subject-matter in dispute, and, court-fee has to be paid on the amount of costs challenged, otherwise the question of costs of the first Court will depend on the result of the appeal itself. Here, no such thing was admittedly done. In such circumstances, in my opinion, the appellate Court cannot be said to have no jurisdiction, even if a case is made out, to amend its decree.

28. On the facts of the present case, therefore, I bold, in disagreement with the

Court below, that it had jurisdiction to amend its decree, if, of course, a case for amendment was made out.

29. The next question, which then fails to be decided, is, were the costs, which were included in the decree of the first Court, and, later also included in the appellate decree of the Court below, improperly taxed?

30. Mr. Singh, very frankly, conceded that he was unable to support his contention that the costs had been improperly taxed, or, that the costs, complained of, were allowed contrary to any rule or law in force. In this view, therefore, it cannot be said that the decree of the Court below was wrong, because, it followed the decree of the first Court, which included any item of cost which had been improperly taxed.

31. Mr. Singh, however, contended that this Court should, on equitable grounds, in exercise of its inherent powers, interfere with the order under revision, and, direct an amendment of the decree of the Court below, because, it is unfair and most inequitable to allow a party the cost of an expert, though incurred by him, when the expert has not been examined as a witness, nor, his report has been got exhibited by the party, by calling that expert as a witness.

32. The first difficulty in accepting this contention is that I cannot, at this stage, sit in appeal on the two original judgments of the Courts below, which have become final, and, say now that the costs, admittedly incurred by the plaintiffs on the two experts, as also other costs, had wrongly been allowed to the plaintiffs. The question of costs, u/s 35 of the Code, was entirely a matter within the discretion of the first Court, and, if it so desired, and, if its attention would have been drawn, it could have passed an order, as contended for, that the cost of Mr. Dixit, to which alone now Mr. Singh has confined his main ground of attack, should not be payable by the defendants. But no such step was taken. Whatever costs were incurred by the plaintiffs were allowed, and, the plaintiffs' suit was decreed with costs and, therefore, they were entitled to all the costs of the suit and applications therein, incurred by them. Even when the matter was taken in appeal, the question, that costs had been wrongly included in the decree of the first Court, was not appealed against, and, agitated, with the result that the judgment and decree of the first Court were affirmed. In these circumstances, when it has not been established that the costs incorporated in the decree of the first Court had been improperly taxed or included, the onus to prove which was on the defendants, I do not think any relief can be given to the petitioners.

33. The second difficulty in the way of the petitioners is that equity is not on the side of the petitioners, as they think. They filed fabricated rent receipts, due to which the plaintiffs, in order to defend their action, were driven to the necessity of taking steps to show that the rent receipts relied upon by the petitioners in the rent suit, were forged, and, in doing so, they had to incur heavy costs on Mr. Dixit. The petitioners, having failed in the suit, cannot now plead equity in their

favour. If heavy costs were incurred by the plaintiffs on Mr. Dixit, it was due to the defendants themselves. They alone were responsible for the same. If they had not filed forged rent receipts to defeat the claim of the plaintiffs, they would not have been saddled with this cost of Mr. Dixit. They, therefore, in equity also must bear this burden. On this ground also, therefore, the contention of the petitioners fails.

34. I would, accordingly, discharge the rule, and, dismiss the application; but, in the circumstances of the case, there will be no order for costs.