
(1986) 03 SHI CK 0013
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 205 of 1985

Rai Singh Roshan Lal Negi and Others	APPELLANT
Vs	
Surjit Bawa and Others	RESPONDENT

Date of Decision : 06-03-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 35, Order 41 Rule 35(3), Order 9 Rule 7, 35, 35A

Citation : (1986) ShimLC 187

Hon'ble Judges : P.D. Desai, C.J

Bench : Single Bench

Advocate : Praneet Gupta and Devinder Gupta, for the Appellant; Kailash Chand, for the Respondent

Judgement

P.D. Desai, C.J.—The Petitioners are the Plaintiffs and the Respondents are the Defendants in a suit instituted for recovery of a sum of Rs. 31,280. On September, 21, 1981, the Trial Court passed an order closing the evidence of the Petitioners and dismissing the suit for want of evidence. The appeal preferred by the Petitioners against the said decision succeeded but the Additional District Judge (Special-I), Simla, who decided the appeal, saddled the Petitioners with costs assessed at Rs. 1,000 on the ground that on account of a lapse on the part of the Petitioners, the Respondents had been put to inconvenience. The present revision application is directed against that part of the decision of the Appellate Court which awarded costs in the sum of Rs. 1,000 and the submission is that the Court had no jurisdiction to award such penal costs on the facts and in the circumstances of the case.

2. Section 35 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code"), insofar as it is relevant for the purposes of the present case, provides that 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.

3. Section 35B, which is inserted by the CPC (Amendment) Act, 1976, insofar as it is relevant for the present purposes, reads as under:

35B. (1) If, on any date fixed for the hearing of a suit or for taking any step therein, a party to the suit:

(a) fails to take the step which he was required by or under this Code to take on that date,

Or

(b) obtains an adjournment for taking such step or for producing evidence or on any other ground,

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

(a) the suit by the Plaintiff, where the Plaintiff was ordered to pay such costs,

(b) the defence by the Defendant, where the Defendant was ordered to pay such costs.

4. Order XLI, Rule 35 of the Code deals with the drawing of the decree in appeal. Sub-rule (3) of the said Rule provides that the decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

Before coming to grips with the question in issue against the aforesaid statutory background and in light of the facts and circumstance of the case, reference may be made to the object underlying the provisions relating to awarding of costs to a litigant. Under the common law in England, party and party costs were treated not as a complete indemnity but in the character of an indemnity. In *Gundry v. Sainsbury* (1910) 1 KB 645, Cozens-Hardy M.R. Quoted with approval the following observations by Bramwell B. in *Harold v. Smith* (1860) 5 H & N 381 at 385:

Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.

Fletcher Moulton, L.J., concurring with the Master of the Rolls, observed in that

case:

...I think the passage which the Master of the Rolls quoted from the judgment of Bramwell B. is sound law and is decisive of this case.... The principle that party and party costs are only an indemnity - an imperfect indemnity, it is true, but never more than an indemnity - is so deeply rooted in our law that the proviso is put in for the purpose of preventing the earlier part of Section 5 from ever giving rise to a case in which costs could be made a profit.

5. In *The Firm of N. Peddanna Ogeti Balayya and Others Vs. Katta V. Srinivasayya Setti Sons*, the Supreme Court referred to the decision in *Gundry* case, (supra) and observed that the principle of English law was that party and party costs are only an indemnity - an imperfect indemnity it is true-but never more than indemnity and that consequently the successful party should not be allowed to make any profit out of the order for costs made in his favour and that there was no doubt as to the soundness of the principle upon which the said rule was based and no doubt also that the said rule should be applied to the Supreme Court, there being no specific provision on that point in the rules of the Court.

6. In *Manindra Chandra Nandy and Others Vs. Aswini Kumar Acharyya*, a Division Bench of the Calcutta High Court was concerned with the question whether costs on a special scale should be granted in that case. While dealing with the said, question, Mookerjee, Actg. Chief Justice, made the following observations in relation to the principle underlying the award of costs:

We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. We are now far removed from the days when "the Plaintiff who failed was punished in amercement pro falsoclamore, and the Defendant, where the judgment was against him, in miserecordia cum expensis litis for his unjust detention of the Plaintiff's right. The theory on which costs are now awarded to the Plaintiff is that default of the Defendant made it necessary to sue him, and to a Defendant is that the Plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expenses of successfully vindicating his rights in Court and consequently the party to blame pays costs to the party without fault.

7. *The Managing Director, Tourism Development Corporation, H.P. and Anr. v. Smt. Halya Devi and Ors.* ILR 1981 HP 545, bears a close parallel to the present case. In that case, the Trial Court directed ex parte proceeding being taken against two separate sets of Defendants in view of their absence on the day on the which suit was fixed for orders. On separate applications having been made by the two sets of Defendants for setting aside the order relating to ex parte proceedings, counsel appearing on behalf of the Plaintiff as well as on behalf of

the two sets of Defendants agreed to an order for setting aside the ex parte order being made on the condition of award of "heavy costs" to the Plaintiff. In view of the statement made in the aforesaid terms on behalf of the different parties, the Trial Court passed an order setting aside the order relating to the Defendants being proceeded against ex parte on the Plaintiff's paying to each set of Defendants costs in the sum of Rs. 1,000. One set of Defendants preferred a revision application against the order awarding costs as aforesaid. V.D. Misra, C.J., who heard the revision application, set aside the said order and reduced the amount of costs awarded against the Defendants to Rs. 100 only. The pertinent observations made by the learned Chief Justice in support of his decision are extracted hereinbelow:

...That leads me to the question as to what the word "costs" means. As I understand, the concept of awarding costs is to compensate a person for the expenses which he has incurred in the litigation. The object is merely to compensate a party and not to enable it to make a profit. See: *The Firm of N. Peddanna Ogeti Balayya and Others Vs. Katta V. Srinivasayya Setti Sons*, It is not meant to penalise the party in default. It is only Section 35A which empowers the courts take deterrent action against a party in default. It is only Section 35A which empowers the courts to take deterrent action against a party in default by awarding compensatory costs. See: *T. Arivandandam Vs. T.V. Satyapal and Another*, In other words, the purpose of awarding compensatory costs is something more than the expenses which a party has incurred.

My attention has been drawn to Mukherjee's *Law Laxicon*, Second Edition, Vol. I, page 395, where the meaning of the term "costs" has been given thus:

The term "costs" in the literal sense is limited to statutory allowances to reimburse him for expenses incurred in defending or prosecuting the proceedings. Costs are, therefore, meant to be given to a successful party to mitigate to a greater or lesser extent, the necessary expenses incurred in the conduct of litigation.

The word "costs" has been defined in the *American Jurisprudence*, Second Edition, Volume XX, page 5, as under:

Costs are statutory allowance to a party to an action for his expenses incurred in the action. They are in the nature of incidental damages allowance to the successful party in indemnify him against the expenses of asserting his rights in Court, when the necessity for so doing was caused by the other's breach of legal duty, otherwise defined, costs are the sums prescribed by law as charges for the services enumerated in the fee bill. They have reference only to the parties and the amounts paid by them, and only those expenditures which are by statute taxable and to be included in the judgment fall within the term "costs".

...as long as the costs awarded are reasonable, they will remain within the definition of the word "costs". But whenever the costs are so high that they shock the conscience of the court, they have to be treated as punitive

irrespective of the fact that they have been termed as costs. When does such a situation arise? It will depend on the facts and circumstances of each case and neither it is possible nor desirable to lay down any hard and fast rules. If the facts clearly show that the amount awarded as "costs" is indeed in the nature of fine or punishment, the use of the word "costs" will not protect the amount awarded. It is true that the discretion given to the trial Courts is not to be lightly interfered with simply on the ground that if the matter was before this Court it would have taken another view. But where a subordinate court acts without jurisdiction or with material irregularity or exercises discretion arbitrarily, then this Court has jurisdiction to interfere with the order passed by the court.... I cannot accept the contention of the learned Counsel for the Respondents that a court is entitled to award costs without any limit since it is in the discretion of the trial Court depending on the subjective approach of the trial Judge and as no limitation has been placed by Rule 7 of Order 9. It is true that a discretion has been given to the court. But this discretion has to be exercised according to well laid judicial principles and not capriciously or whimsically.... To me it appears a glaring instance where the learned Senior Sub Judge has failed to exercise his discretion judiciously. He decided to penalise the Petitioners though calling the penalty as "costs". The Plaintiffs have indeed made a profit out of it.... The demand of "heavy costs" and the consent of the Petitioners to pay "heavy costs" does not by any stretch of imagination authorise the court to award the amount which on the face of it appears to be punitive. I have, therefore, no hesitation in concluding that the amount ordered as "costs" against the Petitioners was nothing but a penalty which the court had no jurisdiction to order.

8. These decisions affirm the principle of common law in England governing the taxing of party and party costs. The principle is that costs are awarded, not as punishment to the defeated party, nor as a bonus to the party which receives them, but as a recompense to the successful party in order to indemnify him, though not completely, for legal expenses to which he has been subjected in prosecuting his suit or his defence. As Buckley L.J. pointed out in *Gundry's case* (supra), a successful party would be entitled to come to the Court and say:

This is a matter in respect of which I am entitled to get costs because I have been put to expense, and the law as administered in this Court allows me in that state of things to be indemnified by the Defendant to the extent of party and party costs.

These principles have now received legislative recognition in Section 35B which provides for award of costs for causing delay in the progress of a suit. If, on any day fixed for the hearing of a suit or for taking any step therein, a party to the suit: (a) fails to take the step which he was required by or under the Code to take on that date, or (b) obtains an adjournment for taking such step or for producing evidence or on any other ground, the Court is thereunder empowered, for reasons to be recorded to 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. In the matter of award of costs in their discretion, the Courts have to be guided by the judicial dicta and the legislative prescription aforementioned.

9. In the present case, the evidence on the side of the Petitioners was ordered to be closed and consequently the suit was dismissed for want of evidence since they had failed to produce their evidence on the day fixed for said purpose. An application for adjournment made on their behalf for adducing evidence on another day was simultaneously rejected by the Trial Court. The Appellate Court held that the Trial Court had acted in "hot-haste" and without application of "judicial mind" and "judicial discretion". While setting aside the order under appeal, however, the Appellate Court awarded costs in the sum of Rs. 1,000 on the ground that it cannot be lost sight of that by some lapse on the part of the Plaintiffs, the Defendants had been put to inconvenience,

10. Now, there is no manner of doubt that on the facts and in the circumstances of the case, the order awarding costs in the sum of Rs. 1,000 has been passed by the Appellate Court without due appreciation of the principles governing the exercise of discretion in that regard. When the trial Court passed the order impugned in the appeal, which was found by the Appellate Court to have been passed in hot-haste and without application of the Judicial mind, the suit was still at the stage of leading of the evidence on the side of the Petitioners (Plaintiffs) and only the counsel for the parties were present before the Trial Court on the day in question. In the Appellate Court also, only the counsel for the parties were present as per the record. There is no material on the record to show that the expenses incurred by the Respondents justified the award of costs in the sum of Rs. 1,000. In the absence of any material establishing that a sum as high as Rs. 1,000 was required to be awarded by way of costs to reimburse the Respondents in respect of the expenses incurred by them in attending the Trial Court as well as the Appellate Court on the days in question, it is not unreasonable to infer that the Appellate Court awarded the said sum by way of costs as a punishment to the Petitioners and as a bonus to the Respondents overlooking the principle that costs had to be awarded to indemnify the Respondents, though not completely, for the legal expenses to which they have been subjected. The exercise of discretion by the Appellate Court in the matter of award of costs is thus basically vitiated and the order passed in the exercise of discretion exercised accordingly must be regarded as having been made in excess of jurisdiction and also as occasioning a failure of justice.

11. In light of the foregoing discussion, the impugned decision, insofar as it awards costs in the sum of Rs. 1,000 is quashed and set aside. The Respondents are held entitled to costs in the sum of Rs. 100 per each est.

12. Rule made absolute accordingly with no order to costs.