

(1960) 09 MP CK 0027

In the Madhya Pradesh High Court

Case No : Civil Revision No. 284 of 1960

Rikhiram Bhagwandas

APPELLANT

Vs

Ramlal and Others

RESPONDENT

Date of Decision : 22-09-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 9 Rule 13, Order 9 Rule 9, 115, 35

Citation : AIR 1961 MP 169 : (1961) JLJ 931

Hon'ble Judges : P.K. Tare, J

Bench : Single Bench

Advocate : A.P. Sen, for the Appellant; H.L. Khaskalam, for the Respondent

Final Decision : Partly Allowed

Judgement

P.K. Tare, J.—This revision u/s 115, of the CPC is by the plaintiff against the order, dated 5-5-1960, passed by Shri R.S. Agarwala, District Judge, Durg at Rajnandgaon, in Civil Appeal No. 6-B of 1959, arising out of the decree, dated 12-2-1959, passed by Shri N.M. Jinsiwale, Civil Judge, Class I, Rajnandgoan, in Civil Suit No. 31-B of 1957.

2. The non-applicants filed a suit for damages for breach of contract, claiming an amount of Rs. 2300/- towards the same. They were to act as commission agents of the applicant. The applicant alleged that he had instructed the non-applicants to purchase grain and they had done it as per contract, dated 13-5-1957. The applicant had also confirmed the order by his telegram, dated 13-5-1957. The non-applicants had also made a counter claim, alleging that the applicant was guilty of a breach. The learned Judge of the trial Court decreed the plaintiff's claim in full and dismissed the defendants' counter claim, holding the latter to be guilty of a breach.

3. Against the decree of the trial Court, the defendants filed an appeal before the first appellate Court, which is still pending. During the pendency of the appeal,

the plaintiff filed an application," dated, 6-4-1960 for permission to amend the plaint. The plaintiff sought to introduce an amendment, saying that on or about 8-5-1957, he had instructed the defendants to purchase the gram dal. The offer was accepted by the defendants on 9-5-1957. The contract was settled through telephonic communications on 9-5-1959.

4. While considering the amendment application of the plaintiff, the learned District Judge passed the order, which is sought to be revised by the plaintiff. The learned Judge allowed the amendment application subject to the plaintiff paying an amount of Rs. 200/- as costs of amendment to the defendants. In addition, the plaintiff was directed to pay Rs. 392/- to the defendants. The reasons assigned for imposing the said costs were that it was necessary to compensate defendants for costs of witnesses that they had to summon and also for inconvenience that they had to suffer for attending several hearings in the trial Court. As regards the other costs, the learned District Judge directed that they will abide the result of the suit. The payment of the said costs was made a condition precedent to the further proceedings.

5. The learned District Judge further directed that on payment of the said costs, the plaint shall be amended. After the amendment of the plaint it would be necessary for the defendants to meet the case now to be put forward by the plaintiff. Therefore, it will be necessary to set aside the decree and remand the case for retrial from the stage of pleadings. On the amendment being made the case shall be sent back to the trial Court for fresh trial according to law.

6. From the directions given by the learned District Judge, it is clear that the reason why those heavy amendment costs were saddled was that the plaintiff had introduced an amendment, which would necessitate a fresh trial. Therefore, as the learned Judge apprehended that a remand of the case for fresh trial would be necessary, the amount of Rs. 200/- was imposed as costs, which included the expenses for summoning of witnesses, as also amendment costs. Although the two items are not separately apportioned, the amount of Rs. 200/- is inclusive of both the items.

Similarly, the amount of Rs. 392/- had been saddled as amendment costs on the plaintiff, as a retrial would be necessary in the opinion of the learned District Judge. At this stage, it may be significant to note that the appeal is still pending before the first appellate Court. It has not yet been disposed of. The observations regarding the need of a remand for fresh trial have been made in anticipation. It is not that the learned District Judge has made up his mind to pass an order of remand.

The case has not yet been remitted to the trial Court for a fresh trial. It is still open to the plaintiff not to effect an amendment. But, in case he does it, the learned appellate Judge will, according to his opinion, be required to consider the question of remand. It is, therefore, clear that the said heavy costs for permission to amend the plaint have been imposed in anticipation of a possible

remand that may be necessitated on account of the amendment.

7. Such an order, as has been passed by the learned appellate Judge is not, in my opinion, warranted by the provisions of Order 6, Rule 17 of the Civil Procedure Code, which is as follows:

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

It is true that the Court always has the discretion to impose such terms, as may be just. It is also conceivable that in suitable cases imposition of heavy amendment costs may be necessary. The consideration that a remand for fresh trial may be necessary in view of the amendment would certainly constitute a ground for imposition of heavy amendment costs. But, such an order would be justified when the Court is allowing the amendment and at the same time remanding the case for a fresh trial. It would, however, not be justified in anticipation of a possible remand, which may or may not be necessitated.

In that event, the costs on account of the remand cannot be imposed as amendment costs. The same can, however, be imposed when the Court actually passes an order of remand for the purpose of a fresh trial. Had the learned District Judge come to the conclusion that a remand was necessary and then imposed the said costs, the action would have been perfectly justified and this Court would not interfere with the discretion of the learned Judge. But, such heavy amendment costs would not at all be justified, if they are awarded on account of a possible remand that may or may not be necessitated. However, I would not like to make any observations in that behalf, as I think that it is not necessary to fetter the discretion of the learned District Judge in that behalf.

8. It is clear from the order passed by the learned District Judge that he has merely made observations regarding the possible remand that may be necessitated. He has not yet made up his mind whether a remand is necessary. Therefore, he has kept the appeal pending before him. The question of remand will arise only after the plaintiff amends his plaint and the defendants make consequential amendments in their written statement. Under such circumstances, I am of opinion that the learned District Judge ought to have imposed amendment costs, as are permissible under Order 6 Rule 17, C.P.C., which provides that the Court has the power to impose all just conditions.

I may further observe that the imposition of the present heavy amendment costs would certainly be justified, if the same were imposed as a condition precedent to a remand of the case for the purpose of a fresh trial. But, the same cannot, in my opinion, be justified in anticipation of a possible remand, which may or may not be necessitated. From that point of view, the order of the learned Judge would amount to a material irregularity in the exercise of his jurisdiction, revisable u/s 115(c) of the Civil Procedure Code.

9. The learned counsel for the non-applicants urged that the order impugned does not amount to a case decided within the meaning of Section 115 of the Civil Procedure Code. I am unable to accept the said contention in view of the Full Bench decision of this Court in AIR 1948 258 (Nagpur) , wherein the learned Judges have laid down that an order refusing or allowing amendment would be a case decided within the meaning of Section 115 of the Civil Procedure Code. It is true that there is a contrary view taken by the other High Courts. But I am bound by the reported Full Bench decision of this Court. Therefore, it is not necessary for me to consider the contrary view.

10. Moreover, the learned District Judge has committed a procedural error in the exercise of his jurisdiction by purporting to impose amendment costs, so as to include costs of the trial of the suit, as also the costs of the appeal in anticipation of a remand order, which may or may not come to be passed. Such an error would certainly be revisable u/s 115(c) of the CPC in terms of the dictum laid down by their Lordships of the Supreme Court in Keshardeo Chamaria v. Radha Kissen Chamaria AIR 1955 SC 23. That was also the view taken by the Full Bench of this Court in AIR 1948 258 (Nagpur) : AIR 1948 258 (Nagpur) , which stands affirmed by the ruling of their Lordships of the Supreme Court in Keshardeo Chamria Vs. Radha Kissen Chamria and Others, ,

11. Therefore, it is clear that the Order sought to be revised cannot be sustained, as it has been passed by committing a material irregularity in exercise of jurisdiction. I may say that by making any observations, I am not fettering the discretion of the learned District Judge to consider the case for a remand. In this connection I might invite attention of the learned Judge to a Division Bench case of this Court in AIR 1940 349 (Nagpur) , which lays down that the Court would always have inherent power to remand a case for a fresh trial even though Order 41, Rule 23 of the CPC may not in terms apply to a particular case.

The learned District Judge may consider the question of a remand after the pleadings are amended. But, however, at this stage, the first appellate Court has no power to impose any costs that may be necessitated on account of a remand. Of course such costs can be imposed, if the learned appellate Judge actually passes an order of remand. In that event it would certainly be open to him to direct that all costs incurred till then shall be borne by the plaintiff irrespective of the ultimate result of the suit after remand.

12. The learned counsel for the non-applicants urged that no revision would He against an order relating to amendment costs alone. It was pointed out that the order allowing amendment was in favour of the applicant, and that he was challenging that part of the order, which related to costs alone. Therefore, it was urged that this Court ought not to entertain a revision in the matter of costs only.

13. It is true that this Court does not entertain an appeal in the matter of mere costs. But, all the same, this Court would have power to entertain an appeal against costs, where a wrong principle has been adopted by the Court below. On

some occasions such an interference has been made in an appeal relating to costs alone. *Drake Bookman, Judicial Commissioner, in. Meghraj v. Johnson* 11 Nag LR 189: (AIR 1915 Nag 65), interfered with the direction of the Small Cause Court in the matter of costs on the ground that a question of principle was involved,, In AIR 1933 40 (Nagpur) , Macnair J.C., observed that the appellate Court would be justified in interfering with the order relating to costs, only if some question of principle was involved.

14. Thy same principle, in my opinion, would be applicable to a civil revision. So far as the costs to be awarded u/s 35 of the CPC are concerned, they are always in the discretion of the Court, delivering the judgment. But, there are certain judicial principles on the basis of which the Court is expected to act ordinarily, as laid down by the section, costs abide the result of the lis. If there is to be any variation from that, the Court has to give reasons for departing. Similarly, it might be said that amendment costs arc in the nature of solatium to be given to the opposite side. But, the amendment costs have to be allowed as amendment costs and the determination of such costs cannot be based on any irrelevant considerations, such as, an anticipatory possible remand that the Court might envisage.

There can, therefore, be no doubt that if a wrong principle has been adopted by the Court below in the matter of awarding costs either u/s 35 of the CPC or under Order 6, Rule 17 or Order 9, Rule 9 or Order 9, Rule 13, of the CPC or any other provision, the appellate or the revisional Court would be entitled to interfere, as that would be a procedural irregularity in the exercise of jurisdiction falling u/s 115(c) of the Civil Procedure Code. Therefore. I am of opinion that an interference is called for in the present case, as the learned appellate Judge adopted an altogether wrong principle in the matter of awarding amendment costs.

15. Therefore, I set aside the order of the District Judge relating to imposition of amendment costs. Further, it is necessary to direct the learned appellate Judge to pass a fresh order imposing amendment costs, as he considers suitable, without including the remand costs. I would leave that question for decision by the learned appellate Judge and would not like to exercise discretion for the first time in the present revision. That is a matter exclusively within the jurisdiction of the first appellate Court.

16. As a result, this revision succeeds partly and is allowed. The order impugned relating to amendment costs is set aside and the learned appellate Judge is directed to pass a fresh order. The order so far as it relates to allowing the amendment application is upheld. As the non-applicants were in no way to blame for the order that came to be passed, I would direct that there shall be no order as to costs of the present revision.