

(1981) 11 SHI CK 0005

In the High Court Of Himachal Pradesh

Case No : Civil Revision Petition No. 141 of 1981

The Managing Director, Tourism Development Corporation
and Another

APPELLANT

Vs

Smt. Halya Devi and Others

RESPONDENT

Date of Decision : 05-11-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 1, Order 6 Rule 17, Order 9 Rule 7,
Order 9 Rule 8, 115
Constitution of India, 1950 — Article 227

Citation : (1982) ShimLC 79

Hon'ble Judges : Vyas Dev Misra, C.J

Bench : Single Bench

Advocate : Kultar Chand Rana, for the Appellant; L.S. Panta, D.A.G. and M.C. Mandhotra, for the Respondent

Final Decision : Allowed

Judgement

Vyas Dev Misra, C.J.—This revision is directed against the order of Shri R.L. Sharma, Senior Sub-Judge, Kulu, awarding Rs. 1,000 as costs against the present Petitioners while setting aside the ex parte proceedings.

2. The relevant facts are these. Smt. Halya Devi (referred to as the Plaintiff) brought a declaratory suit against the present Petitioners and others (referred to as the Defendants) asking for a declaration in respect of her rights of enjoyment of air and light etc. and for restraining the Defendants from putting up a building interfering with her rights. This suit was dismissed on 3rd March, 1980 in default of appearance of the Plaintiff under Order 9 Rule 8 of the Code of Civil Procedure. The Plaintiff made an application on 7th March, 1980 for restoration of the suit. During the proceedings for restoration the Defendant requested for an adjournment on 15th September, 1980 and this adjournment was allowed on payment of Rs. 30 as costs. However, on the next date of hearing Defendants absented themselves and their evidence was closed. Another date was fixed for

arguments when the suit was directed to be restored. It was also directed that the suit file be put up on 2-1-1981. The order sheet reveals that on 2-1-1981 the Plaintiff was present in person and the Government Pleader was present for Defendants 1, 4, and 5 but no one was present on behalf of the present Petitioners-Defendants. The suit was directed to be re-registered and put up for orders on 7-1-1981. On that date only the Plaintiff was present and so the court directed ex parte proceedings against all the Defendants. The case was adjourned to 6-4-1981. On 6-4-1981 the present Petitioners-Defendants made an application for setting aside ex parte proceeding. On the subsequent date even the Government Pleader made an application for setting aside the ex parte proceedings against the Defendants Nos. 1, 4, and 5.

3. The record of the proceedings further reveals that on 4th July, 1981 the counsel for all the Defendants as well as for the Plaintiff were present. Shri C.D. Dogra, counsel for the Plaintiff, made the following statement:

I have no objection if ex parte proceedings against the Defendants are set aside provided the Plaintiff is compensated by heavy costs.

Statement of Shri K.S. Rana, counsel for Defendants 2 and 3 reads:

I have no objection for awarding heavy costs in the event of setting aside ex parte proceedings dated 25-11-80 against Defendants 2 and 3.

Statement of Government Pleader for Defendants 1, 4, and 5 reads:

I have no objection is awarding heavy costs against the Defendants in the event of setting aside ex parte proceedings against Defendants 1, 4, and 5 dated 7-1-81.

On the basis of the aforementioned statements, the learned Senior Sub-Judge passed the following order:

In view of the above statements of the parties' counsel, ex parte proceedings dated 25-11-80 are set aside against Defendants 2 and 3 on payment of Rs. 1000 as costs. Similarly ex parte proceedings dated 7-1-81 are set aside against Defendants 1, 4, and 5 subject to payment of Rs. 1000 as costs.

For w/statements on 15-7-81.

4. The grievance of the Petitioners is that though they were entitled to a fresh notice after the case was restored and re-registered, no such notice was given to them and they were directed to be proceeded against ex parte. It is contended that the costs awarded against the Petitioners are in fact punitive which the trial court had no jurisdiction to award. It is pointed out that the learned Senior Sub-Judge amounts to awarding Rs. 2,000 as costs against the Defendants for setting aside the order of the Defendants being proceeded ex-parte. Mr. Mandhotra, learned Counsel for Respondent No. 1, contends that this Court has no jurisdiction to exercise its revisional power u/s 115 of the Code of Civil Procedure. He submits that awarding costs is the sole function of the trial court

and it depends upon the subjective approach of that court with which this Court cannot interfere. It is also submitted that whereas under Order 17 Rule 1 costs have been limited to what are "occasioned by the adjournment", no such limit has been placed by Rule 7 of Order 9. It is farther submitted that whereas under Order 6 Rule 17 the legislature has used the words "on such terms as may be just", and even this limitation has not been placed in Order 9 Rule 7. Mr. Mandhotra also contends that u/s 115 this Court has no jurisdiction since no revision is maintainable.

5. I will first take up the point of maintainability of the present revision. Before revisional powers can be exercised it has to be shown by the Petitioner that the subordinate court has: (a) exercised a jurisdiction not vested in it by law, or, (b) has failed to exercise a jurisdiction so vested, or, (c) has acted in the exercise of its jurisdiction illegally or with material irregularity. The Petitioner has further to show that if the order had been made in favour of the Petitioner it would finally dispose of the suit or other proceedings, or the impugned order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made. Of course, it is also the duty of the Petitioner to show that it is "a case which has been decided" by a subordinate court in which no appeal lies. Explanation which has been added to Section 115 widens the concept of "any case which has been decided" by laying down that this expression "includes any order made, or any order deciding an issue, in the course of a suit or other proceedings."

6. Order awarding costs is an order made in the course of a suit and is thus covered by the explanation which has been added to Section 115. But then the question is whether the court has exercised jurisdiction vested in it or it has acted without jurisdiction. 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 it 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 to take deterrent action against a party in default by awarding compensatory costs See *T. Arivandandam Vs. T.V. Satyapal and Another*, . The very heading of this section shows that the amount, which can be awarded under this section, relates to compensatory costs in respect of false or vexatious claims or defences. In other words, the purpose of awarding compensatory costs is something more than the expenses which a party has incurred.

7. My attention has been drawn to Mukherjee's Law Lexicon, 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

litigate 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 to 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".

8. In the CPC the word "costs" has been used at various places, including Order 9 Rule 7 which reads:

Where the court has adjourned the hearing of the suit ex parte, and the Defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Under Order 17 Rule 1 the adjournments can be granted on the request of a party and the court "may make such order as it thinks fit with respect to the costs occasioned by the adjournment." Under Order 6 Rule 17 the amendments of the pleadings may be allowed "on such terms as may be just". To me it appears that in spite of the difference in phraseology the whole concept is to ensure that the party in default pays such amount as the court considers sufficient to compensate the opposite party in terms of money for the expenses which he has incurred. Under Order 17 Rule 1 since only an adjournment is asked for, a direction has been given to achieve the same purpose by laying down that the opposite party should be compensated with the costs which has been occasioned by the adjournment. In other words, the monetary loss which the other party has suffered because of the adjournment granted. The loss may be because of the fees paid to the lawyer for that date or the expenses incurred for the presence of his witnesses.

9. When the word "costs" is used in Order 9 Rule 7, the court is not bound to award the costs but it has a discretion either to award the costs or refuse to do so or pass any such order which may be just in the circumstances of the case. However, 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.

10. The amount awarded is sought to be justified by the learned Counsel for the Plaintiff on the ground that the counsel for the Defendants in the trial court had agreed to pay heavy costs demanded by the counsel for the Plaintiff. Let me analyse the situation. The Defendants made an application to have the ex parte order set aside and they had to show good cause for their previous non-appearance. When the counsel for the Plaintiffs did not oppose the application what he conceded was that the Petitioners had indeed a good cause for non-appearance. He did ask for heavy costs to which the learned Counsel for the Petitioners agreed but the latter never agreed to pay punitive costs.

11. The words "heavy", "light" and "nominal" costs have been used in various judicial pronouncements. It has to be remembered that the law does not recognise any such words. The only word used by the statute is "costs". It appear that whenever a higher amount is awarded it is treated as "heavy" and whenever a lower amount is awarded it is termed as "light" or "nominal". These are all comparative terms. 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. I need not discuss the decisions cited by Mr. Rana since they relate to the costs of adjournments under Order 17 Rule 1. These are *Mohammad Baksh v. Shahu and Ors.* AIR 1942 Lah 162, *Timber Private Ltd. v. Chandu Lal* AIR 1964 J&K 28 , *Smt. Ram Piyari Vs. Lala Ram Narain and Others*, *Sharafat Husain v. Shakil Ahmed* AIR 1953 MP 6 and *Jadavbai Narayandas Vs. Shrikisan*, However, one thing is clear from these judgments that wherever costs were high these were treated as punitive and it was held that the court had acted without jurisdiction while awarding such punitive costs.

12. I have not been shown by the learned Counsel for the Respondents that they could reasonably be said to have suffered a loss of, or had incurred expenses amounting to Rs. 2,000 between the date when the ex parte order was made and the date when the application for setting aside the ex parte order was made. Indeed the record shows only the presence of the counsel of the parties in the suit on these dates of hearing. 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. It is expected of judicial officers that they do not lose their judicial balance while performing their duties and are not led away by irrelevant considerations which do not find a place on record while passing an order. If there was any relevant fact justifying such an amount as "costs", it should have found a place in the order. 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. I must exercise my revisional jurisdiction to set aside this part of the order. I would have used my jurisdiction under Article 227 of the Constitution if I had found any difficulty in exercising my powers u/s 115 of the Code of Civil Procedure.

13. I, therefore, accept the revision and reduce the amount of costs awarded against the Petitioners-Defendants to Rs. 100 only.