

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment Reserved on: 29.09.2016

Judgment delivered on: 14.02.2017

+ **FAO (OS) 173/2016**

BIKRAMJIT AHLUWALIA

..... Appellant

versus

AVNIJA AHLUWALIA (MINOR) THR NEXT FRIEND

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Z.U.Khan with Mr Sanjay Sharma.

For the Respondent : Mr Manav Gupta with Mr Sahil Garg and Ms Ridhi Munjal

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. Bikramjit Ahluwalia, appellant/defendant no.1, has challenged the order dated 21.04.2016 passed in I.A No. 1360/2012 in CS (OS) No. 2202/2011 whereby the application preferred by him under Order VII rule 11 CPC for rejection of the plaint of the minor plaintiff (Avnija Ahluwalia through her mother) has been rejected. Though the challenge, initially, was against the entire order whereby the application for rejection of plaint was dismissed with actual costs; the

actual cost being what had been incurred by the plaintiff from the date of filing of the application under Order VII Rule 11 CPC till the date of its dismissal, but finding no fault with the order dismissing the prayer for rejecting the plaint, a limited notice to the respondent was issued on the question of imposition of “actual cost”.

2. The appellant/defendant No.1 is the grandfather of the minor plaintiff and he, by the aforesaid application under Order VII Rule 11 CPC, sought to deny/refute the assertion of the plaintiff that an HUF was created by the father of the appellant around the year 1968.

3. It would be relevant here in this context to state that the suit by the minor plaintiff had been filed for partition, declaration with respect to joint family properties purchased from the nucleus of joint family funds being suit properties (detailed in the Schedule A to the plaint) and rendition of accounts of the joint family businesses (detailed in Schedule B to the plaint).

4. The appellant states that since there was no pleading about the father of appellant having any ancestral property prior to the creation of the HUF in 1968, no cause of action could be shown and therefore the plaint was liable to be rejected.

5. The learned Single Judge after examining various paragraphs of the plaint viz. 1, 2, 14, 15, 15A to 15E, 15G, 15 H and 16, came to the conclusion that even though the averments in the plaint are vague but the pleadings do make out that HUF was created by the father of the appellant and the Income Tax returns also reflected the HUF business and other properties. However, the Learned Single Judge appears to have been peeved by the fact that the suit was filed in the year 2011 and despite there being no caveat against appearance and filing of written statement, no written statement was filed by the appellant/defendant till the date of disposal of the application under Order VII Rule 11 CPC. Taking into account the fact the plaintiff is a minor who had preferred the suit in forma pauperis whereas the defendants were rich persons, application under Order VII Rule 11 CPC was dismissed but with “actual costs”.

6. What is in controversy now and what we have been called upon to decide is whether actual costs could have been ordered by the learned single Judge in the absence of any corresponding provision in the Delhi High Court Rules and whether resort could be had to Section

151 of the CPC for imposing actual costs on the appellant/defendant No.1.

7. The contention of the petitioner is that the issue with regard to imposition of the actual costs has been conclusively decided by Supreme court in **Sanjeev Kr. Jain v. Raghubir Saran Charitable Trust & Ors**, 2012 (1) SCC 455 wherein it has been held that if the law does not permit award of actual costs, the Courts cannot award such actual costs and that the observation of the Supreme Court in favour of award of actual realistic costs in **Salem Advocate Bar Association (2) v. Union of India** (2005) 6 SCC 344 only meant that the relevant rules should be amended to provide for actual realistic costs. Since there is no provision for award of actual costs at present, such award of costs will have to be within the parameters/limitations prescribed by Section 35 of the Code of Civil Procedure, 1908.

8. The learned counsel for the appellant submitted that though Section 35 of CPC is open worded but the restrictions are imposed by the rules made by the High Court. The Delhi High Court Rules permits costs to be awarded only as per the schedule and therefore

only the actual expenditure incurred by a party could be awarded as costs and not actual realistic costs.

9. It was also indirectly submitted that asking the plaintiff/respondent to file an affidavit regarding the costs incurred in litigating over an application filed under Order VII Rule 11, would have the effect of preventing a party from approaching the Court for necessary reliefs. Seen generally, such fear of being saddled with excessive cost (actual realistic cost) would lessen the desire of the parties to approach the Court for cherished reliefs, thereby impinging upon the accessibility of the legal system, which, in long run, would have deleterious impact on the system.

10. On the contrary, the learned advocate appearing for the respondent, by taking reference of the two Division Bench judgments of this Court in **Harish Relan v. Kaushal Kumari Relan, 2016 II AD (Delhi) 571** and **Kusum Kumria & Ors. v. Pharma Venture (I) Pvt. Ltd & Anr, 2015 (153) DRJ 1 (DB)**, which decisions take note of **Sanjeev Kumar Jain (Supra)**, submitted that if the Delhi High Court Rules have not been amended so far for providing actual realistic

costs, the same could be awarded by taking resort to Section 151 of the CPC for preventing the abuse of process of the Court.

11. In order to appreciate as to what is the position of law with regard to imposition of costs, it would be necessary to refer to some of the relevant provisions viz. Sections 35, 35A, 35 B and Rules 1 and 2 Order 20A of Code of Civil Procedure, 1908.

Section 35- Costs- 1) Subject to such conditions and limitations as may be prescribed, and to the provisions of 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 costs shall not follow the event, the Court shall state its reasons in writing.

35A. Compensatory costs in respect of false or vexatious claims or defences.- (1) If in any suit or other proceeding, including an execution proceeding but excluding an appeal or a revision, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if it so thinks fit, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding three thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any court exercising the jurisdiction of a Court of Small Causes under the provincial Small Causes Courts Act, 1887 (9 of 1887), or under a corresponding law in force in any part of India to which the said Act does not extend and not being a court constituted under such Act or law, are less than two hundred and fifty rupees, the High Court may empower such court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided further, that the High Court may limit the amount which any court or class of courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

35B. Costs for causing delay. - (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.

Explanation.-Where separate defences have been raised by the defendants or groups of defendants, payment of such costs shall be a condition precedent to the further prosecution of the defence by such defendants or groups of defendants as have been ordered by the Court to pay such costs.

(2) The costs, ordered to be paid under sub-section (1) shall not, if paid, be included in the costs awarded in the decree passed in the suit; but, if such costs are not paid, a separate order shall be drawn up indicating the amount of such costs and the names and addresses of the persons by whom such costs are payable and the order so drawn up shall be executable against such persons.]

Rule 1 of order 20A. Provision relating to certain items.-

Without prejudice to the generality of the provisions of this Code relating to costs, the Court may award costs in respect of,-

(a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit ;

(b) expenditure incurred on any notice which, though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit;

(c) expenditure incurred on the typing, writing or printing of pleadings filed by any party;

(d) charges paid by a party for inspection of the records of the Court for the purposes of the suit;

(e) expenditure incurred by a party for producing witnesses, even though not summoned through Court and

(f) in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal.

Rule 2. Costs to be awarded in accordance with the rules made by High Court.-The award of costs under this rule shall be in accordance with such rules as the High Court may make in that behalf.”

12. Chapter 11 Part C of the Delhi High Court Rules (the ‘Rules’ for short) deals with the award of costs in civil suits. Chapter 23 of the said Rules deals with taxation of costs. Rule 1 relates to appointment of taxing officer whereas Rule 6 stipulates that advocate’s fee should be taxed on the basis of certificate filed under Chapter 5 Rule 2 but not exceeding the scale prescribed in Schedule II Chapter 23.

13. The Supreme Court in *Salem Advocate Bar Association (2) v. Union of India*, (2005) 6 SCC 344; *Ashok Kumar Mittal v. Ram Kumar Gupta*, (2009) 2 SCC 656 and *Vinod Seth v. Devinder Bajaj*, (2010) 8 SCC 1 espoused theories and the principles on which the costs ought to be and can be awarded. The usual refrain in all such decisions referred to above is that the law and litigation is normally being used as a play field by unscrupulous litigants which can only be proscribed by imposition of heavy costs: at least realistic and not nominal. The judgments referred to above do take note of the fact that Section 35 (2) CPC provides for costs to follow the event which renders it implicit that costs have to be real costs but reasonable and

including the cost of time spent by the successful party apart from court fees, lawyers fee and other actuals and awarding of meagre/ nominal costs, instead of providing deterrence for vexatious litigation, emboldens luxurious litigation of ego, greed and falsehood. But the Supreme Court, at the same time, has with clarity explained that it was for the High Courts to examine the aforesaid aspects and if necessary, make requisite rules/regulations so as to provide appropriate guidelines for imposition of cost.

14. In *Ashok Kumar Mittal* (supra), the Supreme Court emphasized that there could be a view that provisions of Sections 35 and 35A of CPC do not put any fetters on the wide discretion vested in the High Court in exercise of its inherent powers to award costs in the interest of justice in appropriate cases but a much more sounder view is that such imposition of cost ought to be subject to such conditions and limitations which may be prescribed and subject to such laws which are in force. The Supreme Court in the aforesaid case further went on to state that there is no question of exercising of inherent powers contrary to the specific provisions of the Code. Under Section 35A which deals with vexatious litigation and exemplary costs, the outer

limit has been fixed. Heavier costs are normally awarded in writ proceedings and PILs and not in civil litigation where Section 35 and Section 35A of the Code of Civil Procedure, 1908 are applicable. The principles which are followed in administrative law matters, the Supreme Court reiterated, cannot be mechanically brought in the realm of civil litigation.

15. In Sanjeev Kumar Jain (Supra), the Supreme Court has clearly laid down as follows:-

16. Though Section 35 does not impose a ceiling on the costs that could be levied and gives discretion to the Court in the matter, it should be noted that Section 35 starts with the words “subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force”. Therefore, if there are any conditions or limitations prescribed in the Code or in any rules, the Court, obviously, cannot ignore them in awarding costs.

17. Chapter 11 Part C of the Delhi High Court Rules (“the Rules”, for short) deals with award of costs in civil suits. Chapter 23 of the said Rules deals with taxation of costs. Rule 1 relates to appointment of Taxing Officer. Rule 6 provides that advocate's fee should be taxed on the basis of a certificate filed under Chapter 5 Rule 2 but *not exceeding the scale prescribed in the Schedule* to Chapter 23. Therefore, the Court could not have awarded costs exceeding the scale that was prescribed in the Schedule to the Rules. Doing so would be contrary to the Rules. If it was contrary to the Rules, it was also contrary to Section 35 also which makes it subject to the conditions and limitations as may be prescribed and the provisions of law for the time being in force. Therefore, we are of the view that merely by

seeking a consent of the parties to award litigation expenses as costs, the High Court could not have adopted the procedure of awarding what it assumed to be the “actual costs” nor could it proceed to award a sum of Rs 45,28,000 as costs in an appeal relating to an interim order in a civil suit.

18. While we would like to encourage award of realistic costs, that should be in accordance with law. If the law does not permit award of actual costs, obviously courts cannot award actual costs. When this Court observed that it is in favour of award of actual realistic costs, it means that the relevant Rules should be amended to provide for actual realistic costs. As the law presently stands, there is no provision for award of “actual costs” and the award of costs will have to be within the limitation prescribed by Section 35.

19. The learned counsel for the respondents submitted that in awarding actual costs, the High Court was merely following the decision of a three-Judge Bench of this Court in *Salem Advocate Bar Assn. (2)*. He drew our attention to para 37 of the said decision (which is extracted in the judgment of the High Court), in particular, the observation that: (SCC p. 369)

“37. ... costs have to be actual reasonable costs including the cost of time spent by the successful party, the transportation and lodging, if any, and any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation.

The High Court has also assumed that the above observations of this Court in *Salem Advocate Bar Assn. (2)* enabled it to award “actual” costs.

20. The High Court has opened its order with the following words:

“The importance of this decision lies not in any substantial question of law having been decided—indeed, no question of law was urged before us, only issues touching upon facts. The importance lies in the nature of

the dispute between the parties, which is a purely commercial dispute in which litigation expenses have touched the sky. In our opinion, the only way in which a successful litigant can be compensated financially is by awarding actual costs incurred by him in the litigation. The Supreme Court has recommended this course of action and we think the time has come to give more than serious weight and respect to the views of the Supreme Court. We have endeavoured to do just that in this appeal by awarding to the respondents the actual litigation expenses incurred by them, which is a staggering Rs 45,00,000.”

21. We are afraid that the respondents and the High Court have misread the observations of this Court in *Salem Advocate Bar Assn. (2)*. All that this Court stated was that the *actual reasonable cost* has to be provided for in the rules by appropriate amendment. In fact, the very next sentence in para 37 of the decision of this Court is that the High Courts should examine these aspects and wherever necessary, make requisite rules, regulations or practice directions. What has been observed by this Court about *actual realistic costs* is an observation requiring the High Courts to amend their rules and regulations to provide for actual realistic costs, where they are not so provided.

22. We have noticed that Section 35 does not impose a restriction on actual realistic costs. Such restriction is generally imposed by the rules made by the High Court. The observation in *Salem Advocate Bar Assn. (2)* is a direction to amend the rules so as to provide for actual realistic costs and not to ignore the existing rules. The decision in *Salem Advocate Bar Assn. (2)* is therefore of no assistance to justify the award of such costs. The Rules permit costs to be awarded only as per the Schedule. Therefore, as the Rules presently stand whatever may be the “actual” expenditure incurred by a party, what could be awarded as costs is what is provided in the Rules.”

16. Thus what actually has been decided in Sanjeev Kumar Jain (Supra) is that in the absence of any rules regarding assessment of actual realistic costs, only the actual expenditure incurred by a party, in consonance with the rules of the Delhi High Court can be awarded as costs. The compensatory cost under Section 35A of CPC, even if low and not even restitutive, let alone punitive, has to be followed and the limitation prescribed under the Section cannot be breached in the absence of any change in the corresponding rules. Thus in Sanjeev Kumar Jain (Supra), though the Supreme Court suggested that the rules be amended for providing actual realistic costs but taking note of the fact that the rules have not yet been changed, set aside the cost imposed by the High Court and limited it to cost of the appeal before the High Court along with Rs.3000/- which was in conformity with the relevant provisions of CPC and the Delhi High Court Rules.

17. In Harish Relan (Supra), a Division Bench of this Court after referring to various paragraphs from the judgment delivered in Sanjeev Kumar Jain (Supra) held as follows in paragraphs 82 and 86:-

“82.We find that the Supreme Court while mandating that the costs imposed should be actual, realistic, reasonable and proper, has at the same time cautioned that the jurisdiction to award costs must be exercised in consonance with the

statutory provisions and the applicable rules. This was for the first time noted in para 37 of Salem Advocate Bar Association wherein after expounding on the nature of costs as noted above, the Supreme Court mandated that the “the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.

86. It is therefore settled law, that though award of costs is within the discretion of the court, it is subject to such conditions and limitations as may be prescribed by the Code of Civil Procedure and subject to provisions of the Rules framed by the High Court. It is trite that where the issue is governed and regulated by Sections 35 and 35A of the Code, there is no question of exercising inherent power contrary to the specific provisions of the court.”

18. But while dealing with the residuary/inherent powers under Section 151 of the CPC for the purposes of imposing higher costs held at para 99 as follows:-

“99. It is trite that an order imposing reasonable and realistic costs is necessary to do the right and undo the wrong by an unscrupulous litigant in the course of administration of justice. This court, constituted for the purpose of doing justice, must be deemed to possess the power to pass an order necessary to prevent the abuse of the process of the court in exercise of its appellate jurisdiction under the Delhi High Court Act and the Code of Civil Procedure. Such order would include an order for full restitution in the nature of realistic costs as mentioned by the several authoritative and binding precedents in addition to the compensatory or punitive costs for false or vexatious claims contemplated in Section 35A or 35B of the Code.”

19. Similar view has been expressed by the same Division Bench in Kusum Kumria & Ors.(Supra).

20. In view of the Supreme Court decisions referred to above and, in particular, Sanjeev Kumar Jain (supra), we are afraid, the above observation of the Division Bench can only be taken as the desire of the Bench to award costs on realistic and actual terms as it would only be in consonance with the need of hour and the requirement of curbing unnecessary litigation. As pointed by the Supreme Court in Sanjeev Kumar Jain (supra), unless the rules of the High Court are amended to provide for actual costs, the same cannot be awarded and an order as to costs would have to comply with the Code of Civil Procedure read with the relevant rules of the High Court.

21. Thus we are left with no option but to set aside such part of para 9 of the impugned order wherein the learned Single Judge has saddled the appellant with actual costs, to be computed on the basis of an affidavit on behalf of the plaintiff about the expenses incurred from the time of filing of Order VII Rule 11 application till its dismissal. The cost which would be awarded to the plaintiff and would be paid by the appellant would be a figure which would be computed by the

learned single Judge in accordance with the relevant provisions of the Code of Civil Procedure and the Delhi High Court Rules. For the aforesaid purpose the case would be placed, in the first instance, before the learned single Judge on 21.02.2017.

22. The appeal is disposed of in terms of what has been stated above.

CM 21931/2016

1. In view of the appeal having been disposed of, the application has become infructuous.
2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

FEBRUARY 14, 2017/k