Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.8610 OF 2011
[Arising out of SLP(C) No.6285 of 2010]

Sanjeev Kumar Jain .....Appellant

Versus

Raghubir Saran Charitable Trust & Ors. .....Respondents

O R D E R

R.V. Raveendran, J.

Notice had been issued limited to the question whether a sum of ` 45,28,000/- could be awarded as costs in an appeal against a vacating temporary injunction in an injunction suit. Leave is granted in regard to that aspect only.

2. The appellant is a tenant under the respondents in regard to a first floor unit bearing No.E-67, Connaught Place, New Delhi. He was also a tenant under the respondents in respect of a mezzanine floor unit bearing No.E-11 of the said building situated below the first floor tenement. When

he was a tenant of both these portions, the respondents granted permission on 4.7.1986 to the appellant to put up an internal staircase connecting the mezzanine floor with the first floor. The respondents initiated proceedings for eviction of the appellant in regard to mezzanine floor unit and obtained vacant possession thereof. Even after vacating the mezzanine floor unit, the appellant claimed a right to use the staircase which had been constructed in the mezzanine floor unit to reach the first floor unit. In that behalf, he filed a suit for permanent injunction to restrain the respondents from obstructing him from using the said staircase to reach the first floor unit. Interim protection was given in favour of appellant on 30.12.2003. The said interim order was vacated on 8.11.2004. Feeling aggrieved, the appellant filed an appeal. The appeal was pending for nearly six years. During the final hearing of the appeal, the Division Bench appears to have suggested to the parties that as the dispute was purely a commercial dispute, the party succeeding in the appeal should be entitled to the litigation expenses from the party who did not succeed. Both counsel, agreed to the said proposal in principle and the court made the following order on 21.12.2009:

> "Arguments heard. Order reserved.
>
> Learned counsel for the parties should give to the Court Master, statement of the total litigation expenses incurred in this appeal only, within two days."

In pursuance of it, the parties filed memos indicating the respective

expenses incurred in the appeal. The appellant filed a memo dated 22.12.2009 stating that `25,50,000/- was incurred as advocates' fees in the appeal. The respondents filed an affidavit dated 23.12.2009 stating that `45,28,000/- was spent as advocates' fees in regard to the appeal. By the impugned judgment dated 20.1.2010, the Division Bench of the High Court, dismissed the appeal by the appellant. Taking note of the said memos regarding fees, the High Court awarded to the respondents `45,28,000/- as costs in respect of the appeal to be paid by the appellant within six months. The appellant has challenged the said order both on merits and costs. But leave is restricted only to the question of costs.

3. The only question for consideration is the legality and validity of the order of the High Court directing the appellant to pay costs of `45,28,000/- to the respondents.

4. The appellant contended that award of such costs by the High Court was erroneous and contrary to law. The respondents drew our attention to para 20 of the order of the High Court in which it has been observed that the learned counsel for the parties had agreed for the suggestion of the Court for litigation costs being payable to the succeeding party by the losing party. The respondents contended that the award of actual costs incurred in the appeal was by consent of parties; and the same being a consent order, there

was no question of the matter being challenged by the appellant.

5. On a careful consideration, we find that the impugned order, including the portion regarding costs, was not a consent order. During hearing on merits, the division bench indicated that the losing party should pay the 'litigation expenses' relating to the appeal. This is nothing but a reiteration of what is stated in law, namely section 35 of the Code of Civil Procedure. The counsel naturally agreed for the suggestion. But there was no consent for `45,28,000/- being determined or being awarded as costs. There was no assessment of the costs by the Taxing Officer of the High Court. We may therefore examine whether the award of such costs is contrary to law.

Relevant provisions of the Code

6. Section 35 of the Code of Civil Procedure, 1908, (for short 'the Code') relates to costs and is extracted below:

> "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."

6.1) Section 35A relates to compensatory costs in respect of false or vexatious claims and is extracted below:

"35A. Compensatory costs in respect of false or vexatious claims or defenses (1) If any suit or other proceedings including an execution proceedings but excluding an appeal or a revision any party objects to the claim of 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 object or by the party by whom such claim or defence has been put forward, of cost 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 it 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 Cause 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 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."

6.2) Section 35B relates to costs for causing delay and is extracted below :

"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."

6.3) Order XXA of the Code provides for costs being awarded in regard to the following six items enumerated in Rule 1:

"1. Provisions relating to certain items.- Without prejudice to the generality of the provisions of this Code relating to cots, 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 courts; 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 of Order XXA provides that award of costs under this Rule shall be in accordance with such rules as the High Court may make in this behalf.

Decisions dealing with costs

7. Sections 35 and 35A have been considered recently by this Court in *Salem Advocates Bar Association v. Union of India* [2005 (6) SCC 344], *Ashok Kumar Mittal* Vs. *Ram Kumar Gupta & Anr.* [2009 (2) SCC 656] and *Vinod Seth* Vs. *Devender Bajaj & Anr.* [2010 (8) SCC 1]. Before referring to them, we may refer to the principle underlying award of costs stated in *Manindra Chandra Nandi vs. Aswini Kumar Acharjya* [ILR (1921) 48 Ca. 427] :

> "….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. * * * The theory on which costs are now awarded to a 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 expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorized to allow such special allowances, not to inflict a penalty on the un-successful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases."

7.1) In *Salem Advocates Bar Association,* this Court held:

> "Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal

> costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages filing of frivolous suits. It also leads to taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the Court in its discretion may direct otherwise by recording reasons thereof. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental cost besides the payment of the court fee, lawyer's fee, typing and other cost in relation to the litigation. It is for 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."

7.2) In *Ashok Kumar Mittal,* this Court pointed out that present system of levying meagre costs in civil matters (or no costs in some matters), is wholly unsatisfactory and does not act as a deterrent to vexatious or luxury litigation borne out of ego or greed, or resorted to as a 'buying-time' tactic and that a more realistic approach relating to costs may be the need of the hour. This Court had also observed that the question whether we should adopt suitably, the western models of awarding actual and more realistic costs is a matter that requires to be debated and that should engage the attention of Law Commission of India. This Court also observed:

> "One view has been that the provisions of Sections 35 and 35A CPC do not in any way affect the wide discretion vested in by High Court in exercise of its inherent power to award costs in the interests of justice in appropriate civil cases. The more sound view however is that though award of costs is within the discretion of the court, it is subject to such conditions and limitations as may be prescribed and subject to the provisions of any law for the time being in force; and 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 Code. Further, the provisions of Section 35A seems to suggest that even where a suit or litigation is vexatious, the outer limit of exemplary

costs that can be awarded in addition to regular costs, shall not exceed Rs. 3000/-. It is also to be noted that huge costs of the order of Rs. Fifty thousand or Rs. One lakh, are normally awarded only in writ proceedings and public interest litigations, and not in civil litigation to which Sections 35 and 35A are applicable. The principles and practices relating to levy of costs in administrative law matters cannot be imported mechanically in relation to civil litigation governed by the Code."

7.3) In *Vinod Seth,* this Court observed as under:

"48. The provision for costs is intended to achieve the following goals:

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bonafide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.

At present these goals are sought to be achieved mainly by sections 35,35A and 35B read with the relevant civil rules of practice relating to taxing of costs.

49. Section 35 of the Code vests the discretion to award costs in the courts. It provides that normally the costs should follow the event and court shall have full power to determine by whom or out of what property, and to what extent such costs are to be paid. Most of the costs taxing rules,

including the rules in force in Delhi provide each party should file a bill of cost immediately after the judgment is delivered setting out: (a) the court fee paid; (b) process fee spent; (c) expenses of witnesses; (d) advocate's fee; and (e) such other amount as may be allowable under the rules or as may be directed by the court as costs. We are informed that in Delhi, the advocate's fee in regard to suits the value of which exceeds Rs.5 lakhs is : Rs.14,500/- plus 1% of the amount in excess of Rs.5 lakhs subject to a ceiling of Rs.50,000/-. The prevalent view among litigants and members of the bar is that the costs provided for in the Code and awarded by courts neither compensate nor indemnify the litigant fully in regard to the expenses incurred by him.

50. The English Civil Procedure Rules provide that a court in deciding what order, if any, to make in exercising its discretion about costs should have regard to the following circumstances:

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment made into court or admissible offer to settle made by a party which is drawn to the courts attention.

'Conduct of the parties' that should be taken note by the court includes:

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

Similar provisions, with appropriate modifications may enable proper and more realistic costs being awarded.

51. As Section 35 of the Code does not impose any ceiling the desired object can be achieved by the following:

(i) courts levying costs, following the result, in all cases (non-levy of costs should be supported by reasons); and

(ii) appropriate amendment to Civil Rules of Practice relating to taxation of costs, to make it more realistic in commercial litigation.

> 52. The provision relating to compensatory costs (Section 35A of the Code) in respect of false or vexatious claims or defences has become virtually infructuous and ineffective, on account of inflation. Under the said section, award of compensatory costs in false and vexatious litigation, is subject to a ceiling of Rs.3,000/-. This requires a realistic revision keeping in view, the observations in Salem Advocates Bar Association (supra). Section 35B providing for costs for causing delay is seldom invoked. It should be regularly employed, to reduce delay.
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> 53. The lack of appropriate provisions relating to costs has resulted in a steady increase in malicious, vexatious, false, frivolous and speculative suits, apart from rendering Section 89 of the Code ineffective. Any attempt to reduce the pendency or encourage alternative dispute resolution processes or to streamline the civil justice system will fail in the absence of appropriate provisions relating to costs. There is therefore an urgent need for the legislature and the Law Commission of India to re-visit the provisions relating to costs and compensatory costs contained in Section 35 and 35A of the Code."

8. 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 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.

9. Chapter 11 Part C of the Delhi High Court Rules ('Rules' for short) deals with award of costs in civil suits. Chapter XXIII 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 Rule 2 Chapter 5 but *not exceeding the scale*

prescribed in the schedule to Chapter XXIII. 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. 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.

10. 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 Advocates Bar Association*. 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 "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 Advocates Bar Association* enabled it to award "actual" costs. 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/."

We are afraid that the respondents and the High Court have misread the observations of this Court in *Salem Advocates Bar Association*. 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. 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 Advocates Bar Association* 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 Advocates Bar Association* is therefore of no assistance to justify the award of such costs. The Rules permit costs to the 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.

11. There is one more aspect which requires serious consideration. What is the meaning of the words '*actual realistic costs'* assuming that costs could be awarded on such basis? Whether it can be said that ` 45,28,000/- said to have been incurred (made up of ` 29,73,000/- paid to Mr. S, Senior Advocate, ` 14,41,000/- paid to Mr. G, Senior Advocate, ` 85,500/- paid to Mr. M, Advocate, ` 16,750/- paid to Mr. V, Advocate and ` 11,750/- incurred as miscellaneous expenses) was the 'actual realistic cost' of an appeal against an interim order in a suit for injunction? The actual *realistic* cost should have a correlation to costs which are realistic and practical. It

cannot obviously refer to fanciful and whimsical expenditure by parties who have the luxury of engaging a battery of high-charging lawyers. If the logic adopted by the High Court is to be accepted, then the losing party should pay the costs, not with reference to the subject matter of the suit, but with reference to the fee paying capacity of the other side. Let us take the example of a suit for recovery of ` One lakh. If a rich plaintiff wants to put forth his case most effectively, engages a counsel who charges ` One lakh per hearing and the matter involves 30 hearings, should the defendant be made to pay costs of ` 30 lakhs, in a suit for recovery of ` One lakh merely because it is a commercial dispute? In a matter relating to temporary injunction, merely because the court adjourns the matter several times and one side engages a counsel by paying more than a lakh per hearing, should the other side be made to bear such costs? The costs memo filed by the respondents show that ` 45,28,000/- was paid to four counsel? If a rich litigant engages four counsel instead of one, should the defendant pay the fee of four counsel? If a party engages five senior Advocates and five ordinary counsel because he is capable, should the losing party pay the fees of all these counsel? The appeal came up on several occasions, but the final hearing of the appeal was only on a few days and other days were mere appearances. Should the losing party pay for such appearances? If respondents had engaged two senior counsel who charged ` Two lakhs per appearance, should the other side be made liable to pay ` 1.5 crore as costs?

Even if actual costs have to be awarded, it should be *realistic* which means what a "normal" advocate in a "normal" case of such nature would charge normally in such a case. Mechanically ordering the losing party to pay costs of ` 45,28,000/- in an appeal against grant of a temporary injunction in a pending suit for permanent injunction was unwarranted and contrary to law. It cannot be sustained.

12. Though this takes care of the actual dispute between the parties, it is also necessary to refer to the larger question of costs in civil suits. For this purpose, during the hearing, this Court requested Dr. Arun Mohan, learned senior counsel to assist as an Amicus Curiae in the matter. In pursuance of it, Dr. Arun Mohan collected and made available considerable material with reference to practices relating to levy of costs in several other jurisdictions. We find that the schemes/processes for assessment of costs in some of the western countries may not be appropriate with reference to Indian conditions. The process of taxation of costs has developed into a detailed and complex procedure in developed countries and instances are not wanting where the costs awarded has been more than the amount involved in the litigation itself. Having regard to Indian conditions, it is not possible or practical to spend the amount of time that is required for determination of 'actual costs' as done in those countries, when we do not have time even to

dispose of cases on merits. If the Courts have to set apart the time required for the elaborate procedure of assessment of costs, it may even lead to an increase in the pendency of cases. Therefore, we requested Dr. Arun Mohan to suggest ways and means of simplifying costs procedures to suit Indian conditions so that appropriate suggestions could be made to the Government. He has put forth several suggestions. Law Commission of India has also intervened and made several valuable suggestions. Notices were issued to the High Courts to ascertain the Rules and procedures in force in regard to costs. For convenience, we will refer to Delhi High Court Rules as the present matter arises from Delhi.

Strict enforcement of Section 35(2) of the Code

13. The discretion vested in the courts in the matter of award of costs is subject to two conditions, as is evident from section 35 of the Code:

(i) The discretion of the court is subject to such conditions and limitations as may be prescribed and to the provisions of law for he time being in force (vide sub-section (1)]

(ii) Where the court does not direct that costs shall follow the event, it shall state the reasons in writing [vide sub-section (2)].

The mandate of sub-section (2) of Section 35 of the Code that "where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing" is seldom followed in practice by courts. Many courts either do not make any order as to costs or direct the parties to bear their

respective costs without assigning or recording the reasons for giving such exemption from costs. Unless the Courts develop the practice of awarding costs in accordance with Section 35 (that is, costs following the event) and also give reasons where costs are not awarded, the object of the provision for costs would be defeated. Prosecution and defence of cases is a time consuming and costly process. A plaintiff/petition/ appellant who is driven to the court, by the illegal acts of the defendant/respondent, or denial of a right to which he is entitled, if he succeeds, to be reimbursed of his expenses in accordance with law. Similarly a defendant/respondent who is dragged to court unnecessarily or vexatiously, if he succeeds, should be reimbursed of his expenses in accordance with law. Further, it is also well recognised that levy of costs and compensatory costs is one of the effective ways of curbing false or vexatious litigations.

Section 35A of the Code – Exemplary costs.

14. Section 35A refers to compensatory costs in respect of false or vexatious claims or defenses. The maximum amount that could be levied as compensatory costs for false and vexatious claims used to be ` 1,000/-. In the year 1977, this was amended and increased to ` 3,000/-. At present, the maximum that can be awarded as compensatory costs in regard to false and vexatious claims is ` 3,000/-. Unless the compensatory costs is brought to a realistic level, the present provision authorizing levy of an absurdly small

sum by present day standards may, instead of discouraging such litigation, encourage false and vexatious claims. At present Courts have virtually given up awarding any compensatory costs as award of such a small sum of ` 3,000/- would not make much difference. We are of the view that the ceiling in regard to compensatory costs should be at least `1,00,000/-.

15. We may also note that the description of the costs awardable under Section 35A "as compensatory costs" gives an indication that is restitutive rather than punitive. The costs awarded for false or vexatious claims should be punitive and not merely compensatory. In fact, compensatory costs is something that is contemplated in Section 35B and Section 35 itself. Therefore, the Legislature may consider award of 'punitive costs' under section 35A.

Court fees

16. Though there is a general impression that the court fee regarding litigation is high, in fact, it is not so. Except in the case of few categories of suits (that is money suits, specific performance suits etc., and appeals therefrom), where court fee is *ad volerem*, in majority of the suits/petitions and appeals arising therefrom, the court fee is a fixed nominal fee. The fixed fees that are payable, prescribed decades ago have not undergone a change and in many cases, the fixed fee is not worth the cost of collection thereof.

There is therefore a need for a periodical revision of fixed court fees, that is payable in regard to suits/petitions/appeals filed in civil courts, High Court, Tribunals and Supreme Court. For example, in Supreme Court, the maximum court fee payable is only ` 250/-, whether it is a suit or special leave petition or appeal.

17. A time has come when at least in certain type of litigations, like commercial litigations, the costs should be commensurate with the time spent by the courts. Arbitration matters, company matters, tax matters, for example, may involve huge amounts. There is no reason why a nominal fixed fee should be collected in regard to such cases. While we are not advocating an ad valorem fee with reference to value in such matters, at least the fixed fee should be sufficiently high to have some kind of quid-pro-quo to the cost involved. Be that as it may.

Award of Realistic Costs

18. In *Salem Advocates Bar Association,* this Court suggested to the High Courts that they should examine the Model Case Flow Management Rules and consider making rules in terms of it, with or without modification so that a step forward is taken to provide to the litigating public a fair, speedy and inexpensive justice. The relevant rules therein relating to costs are extracted below:

> "Re: Trial Courts
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> So far as awarding of costs at the time of judgment is concerned, awarding of costs must be treated generally as mandatory in as much as the liberal attitude of the Courts in directing the parties to bear their own costs had led parties to file a number of frivolous cases in the Courts or to raise frivolous and unnecessary issues. Costs should invariably follow the event. Where a party succeeds ultimately on one issue or point but loses on number of other issues or points which were unnecessarily raised, costs must be appropriately apportioned. Special reasons must be assigned if costs are not being awarded. Costs should be assessed according to rules in force. If any of the parties has unreasonably protracted the proceedings, the Judge should consider exercising discretion to impose exemplary costs after taking into account the expense incurred for the purpose of attendance on the adjourned dates.
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> Re: Appellate Courts
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> Awarding of costs must be treated generally as mandatory in as much as it is the liberal attitude if the Courts in not awarding costs that has led to frivolous points being raised in appeals or frivolous appeals being filed in the courts. Costs should invariably follow the event and reasons must be assigned by the appellate Court for not awarding costs. If any of the parties have unreasonably protracted the proceedings, the Judge shall have the discretion to impose exemplary costs after taking into account the costs that may have been imposed at the time of adjournments."

19. The costs in regard to a litigation include (a) the court fee and process fee; (b) the advocate's fee; (c) expenses of witnesses; and (d) other expenses allowable under the Rules. We have already referred to the need to revise and streamline the court fee. Equally urgent is the need to revise the advocate's fee provided in the Schedule to the Rules, most of which are outdated and have no correlation with the prevailing rates of fees. In regard to money suits, specific performance suits and other suits where *ad valorem* court fee is payable, the Advocate's fee is also usually *ad valorem.* We are more concerned with the other matters, which constitute the majority of the

litigation, where fixed Advocates' fees are prescribed. In Delhi in regard to any proceedings (other than suits where the *ad valorem* court fee is payable), the maximum fee that could be awarded is stated to be ` 2000 and for appeals of the scale if that is payable to original suits.

20. The Supreme Court Rules (Second Schedule) prescribes a fee of `2400/- for leading counsel and `1200/- for Associate Advocate in regard to defended appeals and suits or writ petitions. For special leave petitions, it is `800/- for leading counsel and `400/- for Advocate-on-Record. It is of some interest to note that the fee paid to amicus curiae in criminal appeals in Supreme Court and to the Legal Aid counsel appointed by Supreme Court Legal Services Committee is much higher than the above scale of fees. There is need to provide for awarding realistic advocates' fee by amending the relevant rules periodically. This Court, of course, in several cases has directed payment of realistic costs. But this Court could do so, either because of the discretion vested under the Supreme Court Rules, 1966 or having regard to Article 142 of the Constitution under which this Court has the power to make such orders as are necessary to do complete justice between the parties.

21. A serious fallout of not levying actual realistic costs should be noted. A litigant, who starts the litigation, after sometime, being unable to bear the

delay and mounting costs, gives up and surrenders to the other side or agrees to settlement which is something akin to creditor who is not able to recover the debt, writing off the debt. This happens when the costs keep mounting and he realizes that even if he succeeds he will not get the actual costs. If this happens frequently, the citizens will lose confidence in the civil justice system. When a civil litigant is denied effective relief in Courts, he tries to take his grievances to 'extra judicial' enforcers (that is goons, musclemen, underworld) for enforcing his claims/right thereby criminalising the civil society. This has serious repercussions on the institution of democracy.

22. We therefore, suggest that the Rules be amended to provide for 'actual realistic costs'. The object is to streamline the award of costs and simplify the process of assessment, while making the cost 'actual and realistic'. While ascertainment of actuals in necessary in regard to expenditure incurred (as for example travel expenses of witnesses, cost of obtaining certified copies etc.) in so far as advocates' fee is concerned, the emphasis should be on 'realistic' rather than 'actual'. The courts are not concerned with the number of lawyers engaged or the high rate of day fee paid to them. For the present, the Advocate fee should be a realistic normal single fee.

Costs in Arbitration matters

23. We have referred to the effect of absence of provisions for award of actual costs, on civil litigation. At the other end of the spectrum is an area where award of actual but unrealistic costs and delay in disposal is affecting the credibility of an alternative dispute resolution process. We are referring to arbitration proceedings where usually huge costs are awarded (with reference to actual unregulated fees of Arbitrators and Advocates).

24. Clause (a) of section 31(8) of Arbitration and Conciliation At, 1996 ('Act' for short) deals with costs. It provides that unless otherwise agreed by the parties, the *costs of an arbitration* shall be fixed by the arbitral tribunal. The explanation to sub-section (8) of section 31 makes it clear that 'costs' means *reasonable* costs relating to (i) the fees and expenses of the arbitrators and witnesses, (ii) legal fees and expenses, (iii) any administration fees of the institution supervising the arbitration, and (iv) any other expenses incurred in connection with the arbitral proceedings and the arbitral award. Clause (b) of section 31(8) of the Act provides that unless otherwise agreed by parties, the arbitral tribunal shall specify (i) the party entitled to costs, (ii) the party who shall pay the costs, (iii) the amount of costs or method of determining the amount, and (iv) the manner in which the costs shall be paid. This shows that what is awardable is not 'actual'

expenditure but ‘reasonable’ costs.

25. Arbitrators can be appointed by the parties directly without the intervention of the court, or by an Institution specified in the arbitration agreement. Where there is no consensus in regard to appointment of arbitrator/s, or if the specified institution fails to perform its functions, the party who seeks arbitration can file an application under section 11 of the Act for appointment of arbitrators. Section 11 speaks of Chief Justice or his Designate ‘appointing’ an arbitrator. The word ‘appoint’ means not only nominating or designating the person who will act as an arbitrator, but is wide enough to include the stipulating the terms on which he is appointed. For example when we refer to an employer issuing a letter of appointment, it not only refers to the actual act of appointment, but includes the stipulation of the terms subject to which such appointment is made. The word ‘appoint’ in section 11 of the Act, therefore refers not only to the actual designation or nomination as an arbitrator, but includes specifying the terms and conditions, which the Chief Justice or Designate may lay down on the facts and circumstances of the case. Whenever the Chief Justice or his Designate appoint arbitrator/s, it will be open to him to stipulate the fees payable to the arbitrator/s, after hearing the parties and if necessary after ascertaining the fee structure from the prospective Arbitrator/s. This will avoid the embarrassment of parties having to negotiate with the Arbitrators, the fee

payable to them, after their appointment.

26. This Court in *Union of India v. Singh Builders Syndicate* – 2009 (4) SCC 523, dealt with the complaints about the arbitration cost in India:

> "20. Another aspect referred to by the appellant, however requires serious consideration. When the arbitration is by a Tribunal consisting of serving officers, the cost of arbitration is very low. On the other hand, the cost of arbitration can be high if the Arbitral Tribunal consists of retired Judge/s.
>
> 21. When a retired Judge is appointed as Arbitrator in place of serving officers, the government is forced to bear the high cost of Arbitration by way of private arbitrator's fee even though it had not consented for the appointment of such non-technical non-serving persons as Arbitrator/s. There is no doubt a prevalent opinion that the cost of arbitration becomes very high in many cases where retired Judge/s are Arbitrators. The large number of sittings and charging of very high fees per sitting, with several add-ons, without any ceiling, have many a time resulted in the cost of arbitration approaching or even exceeding the amount involved in the dispute or the amount of the award.
>
> *22. When an arbitrator is appointed by a court without indicating fees, either both parties or at least one party is at a disadvantage. Firstly, the parties feel constrained to agree to whatever fees is suggested by the Arbitrator, even if it is high or beyond their capacity. Secondly, if a high fee is claimed by the Arbitrator and one party agrees to pay such fee, the other party, who is unable to afford such fee or reluctant to pay such high fee, is put to an embarrassing position. He will not be in a position to express his reservation or objection to the high fee, owing to an apprehension that refusal by him to agree for the fee suggested by the arbitrator, may prejudice his case or create a bias in favour of the other party who readily agreed to pay the high fee.*
>
> 23. It is necessary to find an urgent solution for this problem to save arbitration from the arbitration cost. Institutional arbitration has provided a solution as the Arbitrators' fees is not fixed by the Arbitrators themselves on case to case basis, but is governed by a uniform rate prescribed by the institution under whose aegis the Arbitration is held. *Another solution is for the court to fix the fees at the time of appointing the arbitrator, with the consent of parties, if necessary in consultation with the arbitrator concerned.* Third is for the retired Judges offering to serve as Arbitrators, to indicate their fee structure to the Registry of the respective High Court so that the parties will have the choice of selecting an Arbitrator whose fees are in their `range' having regard to the stakes involved.

> 24. What is found to be objectionable is parties being forced to go to an arbitrator appointed by the court and then being forced to agree for a fee fixed by such Arbitrator. It is unfortunate that delays, high cost, frequent and sometimes unwarranted judicial interruptions at different stages are seriously hampering the growth of arbitration as an effective dispute resolution process. Delay and high cost are two areas where the Arbitrators by self regulation can bring about marked improvement."
>
> (emphasis supplied)

27. There is a general feeling among consumers of arbitration (parties settling disputes by arbitration) that ad-hoc arbitrations in India - either international or domestic, are time consuming and disproportionately expensive. Frequent complaints are made about two sessions in a day being treated as two hearings for purpose of charging fee; or about a sessions for two hours being treated as full sessions for purposes of fee; or about non-productive sittings being treated as fully chargeable hearings. It is pointed out that if there is an arbitral tribunal with three arbitrators and if the arbitrators are from different cities and the arbitrations are to be held and the Arbitrators are accommodated in five star hotels, the cost per hearing, (Arbitrator's fee, lawyer's fee, cost of travel, cost of accommodation etc.) may easily run into Rupees One Million to One and half Million per sitting. Where the stakes are very high, that kind of expenditure is not commented upon. But if the number of hearings become too many, the cost factor and efficiency/effectiveness factor is commented. That is why this Court in *Singh Builders Syndicate* observed that the arbitration will have to be saved from the arbitration cost.

28. Though what is stated above about arbitrations in India, may appear rather harsh, or as an universalisation of stray aberrations, we have ventured to refer to these aspects in the interest of ensuring that arbitration survives in India as an effective alternative forum for disputes resolution in India. Examples are not wanting where arbitrations are being shifted to neighbouring Singapore, Kuala Lumpur etc., on the ground that more professionalized or institutionalized arbitrations, which get concluded expeditiously at a lesser cost, are available there. The remedy for healthy development of arbitration in India is to disclose the fees structure *before* the appointment of Arbitrators so that any party who is unwilling to bear such expenses can express his unwillingness. Another remedy is Institutional Arbitration where the Arbitrator's fee is pre-fixed. The third is for each High Court to have a scale of Arbitrator's fee suitably calibrated with reference to the amount involved in the dispute. This will also avoid different designates prescribing different fee structures. By these methods, there may be a reasonable check on the fees and the cost of arbitration, thereby making arbitration, both national and international, attractive to the litigant public. *Reasonableness and certainty* about total costs are the key to the development of arbitration. Be that as it may.

Conclusion

29. In view of the above, the order dated 20.1.2010 of the High Court, to the extent it levies costs of ` 45,28,000/- on the appellant is set aside and in its place it is directed that the appellant shall pay the costs of the appeal before the High Court as per Rules plus ` 3000/- as exemplary costs to the respondents.

30. We suggest appropriate changes in the provisions relating to costs contained as per paras 14 to 29 above to the Law Commission of India, the Parliament and the respective High Courts for making appropriate changes.

31. As the respondents have succeeded before the High Court and award of such costs was not at the instance of the respondents, we do not award any costs in this appeal.

32. We place on record our appreciation for the assistance rendered by Dr. Arun Mohan, Amicus Curiae and Mr. A. Mariarputham, learned senior counsel appearing for Law Commission of India.

_____J.
(R.V. Raveendran)

_____J.
(A. K. Patnaik)

New Delhi;

October 12, 2011.