

Vernekar Industries Vs. Starit Engineering Co. Pvt. Ltd.

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Court : Mumbai

Decided On : Nov-13-1984

Reported in : AIR1985Bom253; 1985(2)BomCR119; 1985MhLJ34

Judge : B.A. Masodkar, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 35A, 35B and 35B(2)

Appeal No. : Civil Revn. Appln. No. 608 of 1983

Appellant : Vernekar Industries

Respondent : Starit Engineering Co. Pvt. Ltd.

Advocate for Pet/Ap. : R.S. Tripathi, Adv.

Judgement :

ORDER

1. This revision is directed against the order rejecting notice of motion taken out by the defendants for inclusion of costs of Rs. 500/- in the bill of costs of notice of motion taken out and dismissed upon failure of the plaintiffs whose suit was dismissed in default.

2. The plaintiffs had filed the suit for recovery of a sum Rs. 10,500/-. That suit was dismissed on October 7, 1981 for default of the plaintiffs. The plaintiffs took out notice of motion No. 1822 of 1982 for setting aside the dismissal and restoration of

suit. That motion was made absolute by an order of July, 14, 1982, which quantified a sum of Rs. 500/- as costs being 'throw away costs' and also separately the costs of notice of motion payable within four weeks. Upon such payment of costs the suit was directed to be restored. The order further stated that in default of payment of such costs, notice of motion to stand dismissed with costs. Plaintiffs did not abide by the condition. In the bill of costs of the motion a sum of Rs. 500/- was not included and motion was dismissed. Therefore, the defendants took out the present notice of motion. By the impugned order Court rejected the same.

3. Mr. Tripathi relies on the provisions of S. 35B Civil P.C. 1908, (hereinafter referred to as 'as Code') inserted by Amending Act No. 104 of 1976 in the Code. Sub-section (2) of that provision permits the costs which are not paid to be included in the costs awarded in the bill of costs in the suit. Mr. Tripathi submitted that a sum of Rs. 500 /- should have been included in the bill of costs upon dismissal of the suit.

4. Firstly, the submission of Mr. Tripathi raises a question of construction of the order that was made in notice of motion No. 1822 of 1982. If the order be clear and the matter being in the jurisdiction of the Court to make such an order, reliance on S. 35B of the Code would hardly further the submission of the learned Counsel. Secondly, the submission raises a question of finding out an applicative field of S. 35B of the Code itself.

5. As far as the law on costs is concerned, the statutory object in making express provision like the one available in S. 35, of which S. 35B of the Code is a corollary, is to secure to the litigant the expenses incurred by him in the prosecution of the matter and not to punish the party against whom the costs are awarded nor to enable a given party to make a gain or profit out of the litigation by having costs. The statute regarding costs provides a sort of indemnity as against the expenses to which a litigant is put. Ordinarily, what the Court orders as payable as costs decides the entitlement of the party to receive the said sum meant to meet the expenses incurred by such a party in the litigation. This position apart from being clear also appears to be settled by precedents. (See Firm of N. Peddanna v.

K.V.S.S. Sons : AIR 1954 SC26 ; Manindra Chandra v. Aswini Kumar, AIR 1921 Cal 185 ; Gajadhar v. Ambika Prasad

6. What was the provided for by the earlier order? That order was on July 14, 1982, on a fair reading does not admit any doubt that the costs of Rs. 500/- were treated as thrown-away costs or special costs payable as a condition precedent only in the event the suit was to be restored and the notice of motion was to be acted upon leading to such a result of restoration of the suit. Such special costs could be awarded so as to cover the expenses that might have been incurred had the suit were to revive. That order itself in the alternative provided that in case of default in payment of these costs, the notice of motion was to stand dismissed with costs. In other words, when the notice of motion was treated to be dismissed by reason of the operative order, upon such dismissal the order as to costs would not take in the sum of Rs. 500/- which was described as the thrown-away costs. It is not in dispute that the suit itself was not restored because of the default to obey the order and thus the notice of motion stood dismissed with costs. A bare reading of the order itself, in the light of the principles on the basis of which costs are awarded, would show that Mr. Tripathi is nor right in asking for the inclusion of Rs. 500/- in the bill even after the notice of motion has been directed to stand dismissed. In that event he would be entitled to ask for only the costs of notice of motion. Right and entitlement to costs in such cases can only be worked out on the basis of the order and not otherwise.

7. Even apart from such construction of the order, reliance placed by Mr. Tripathi on S. 35B of the Code is hardly of any assistance to him for the inclusion of such thrown-away costs without there being any express order to include such costs even when the notice of motion was dismissed. That would be reading something more in the order with the aid of S. 35B of the Code, an impermissible exercise. The provisions of S. 35B of the Code operate upon the costs whom delays are occasioned in the hearing of the suit itself. Sub-section (1) of S. 35B of the Code would not, ordinarily, apply to the type of the proceedings such as notice of motion taken out for mere restoration of the suit itself. It is possible to enlarge upon the word 'suit' as the same is not defined by S. 2 of the Code, but by contrast the language of S. 35A read with section 35B of the Code, it should be obvious that

section 35B is less wider than section 35A of the Code. Section 35A of the code permits imposition of compensatory costs 'in any suit or other proceedings' while S. 35B of the Code concern itself with 'the hearing of a suit or for taking any step therein'. Thus, S. 35B of the Code has a restrictive operative field than S. 35A which uses the words 'any suit or other proceedings'.

8. Furthermore Cls. (a) and (b) of sub-s. (1) of S. 35B of the Code also show in what contingencies the orders with regard to payment of costs can be made. On the date fixed for hearing of the suit if the party commits a default in that regard, or obtains an adjournment as contemplated by these clauses, the Court can provide for costs which will be reasonably sufficient to reimburse a party in respect of the expenses incurred by such a party in attending the Court on the given date and further empowers the Court that such payment of costs can be directed to be made on the next date of such order as a condition precedent to the prosecution of the suit, if the costs were saddled on the plaintiff or of the defence if the costs were saddled on the defendant. All this shows that the Court is empowered to make an order with regard to costs when the hearing of the suit is being adjourned by reason of the default of the party or at the behest of the party and on his application. The costs so directed are permitted to be made a condition precedent for further prosecution of the suit or the defence. This may lead to a result in the event such order is not obeyed or either the cause of the plaintiff being dismissed for want of prosecution or the defence being struck off. Notwithstanding these possible consequences which inferentially arise and flow from the language of the section sub-s (2) of S. 35B of the Code provides a machinery to recover the amount of costs. In the first part it enacts that the costs so paid would form part of the eventual decree, and if such costs were not paid, a separate order in that respect was required to be drawn indicating the amount of such costs and the names and addresses of the persons by whom the same are payable. Such an order would be executable against such persons. The entire scheme of amended S. 35B is thus restrictive in character, in that it applies when the orders of the type contemplated by sub-s (1) of S. 35B of the Code are made in a pending suit of which hearing is postponed and the costs, in spite of the order, are not paid and are required to be recovered by drawing an executable order by reason of sub-s (2) of S. 35B of the Code. Surely this shows that the provisions are not of universal

application. On the contrary these are specifies of the statue. Not by reason of S. 36 but by reason sub-s (2) of S. 35B of the Code, the order drawn up indicating the amount of the costs and the names and addresses of the persons by whom such costs are payable has been made executable against the persons named in the order.

9. The position of law being thus clear, the order if made in a suit, under sub-s 91) of S. 35B of the Code would be an enforceable order by taking out an execution. Surely, this would not apply to the type of costs like the ones described as special or 'thrown-away costs' , which were to be paid when suit is ordinarily, provided so as to cover the contingencies involving expenditure on the part of the opposite side and are liquidated sums and do not thereby represent the actual costs or the expenses that the party has been put to while defending the motion or its prosecution. The special or 'thrown-away costs' had thus a reference to the dismissed suit and not to the motion nor to the costs thereof. If the suit itself is not restored, nor its hearing is delayed, one fails to see how the provisions of S. 35B of the Code could be attracted so as to compel the Court to draw an order in terms of sub-s (2) of S. 35B of the Code. The applicative field of S. 35B of the Code being limited in operation and the order in question being clear, this revision is devoid of substance. Rule discharged with no order as to costs.

10. Rule discharged.