

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

E.F.A NO. 12 OF 2018

Edwin Coe LLP

Vs

Naseim Ahmed Sarfraz

APPELLANT BY: M/s Hamid Nawaz, Munawar Akhtar and
Fahad Abid, Advocates.

RESPONDENT BY: M/s Raja Muqsit Nawaz Khan, Ajam Naz
Malik and Hazrat Younas, Advocates.

DATE OF HEARING: 17.11.2021.

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BABAR SATTAR, J.- The appellant has impugned order dated 12.07.2018 passed by the learned District and Sessions Judge, East, Islamabad pursuant to which during execution proceedings a cost of Rs.100,000/- has been granted to the appellant under section 35 of the Civil Procedure Code, 1908 ("**CPC**").

2. The learned counsel for the appellant contended that the Court was under an obligation to award the actual costs of litigation to the successful party. That the appellant had produced details of fees charged by the counsel as well as other ancillary and incidental expenses incurred during the execution proceedings and instead of taking into account the actual claim for costs, an arbitrary amount of Rs.100,000/- was awarded through the impugned order.

3. Learned counsel for the respondent submitted that he had filed cross-objections in the appeal under Order XLI Rule 22 of CPC.

He took the Court through the history of the dispute between the parties and essentially made submissions objecting to the execution of the foreign judgment and decree, and challenged the decretal amount as determined by the learned executing court while enforcing the judgment and decree of the High Court of London dated 11.02.2008.

4. Learned counsel for the appellant submitted in rebuttal that the cross-objections were not maintainable as the impugned order had been challenged by the appellant to the extent of costs of litigation awarded to the appellant and the said order was not a decree for purposes of section 2 of CPC and consequently no cross-objections could be filed under Order XLI Rule 22 of CPC. He submitted that the impugned order was an order under section 47 of CPC, an appeal against which was provided under section 104(ff) of CPC, which is why the appeal was maintainable. However, neither Order XLI nor Order XLIII of CPC were applicable or created any allowance for the respondent to file cross-objections. He further submitted that the respondent continued to abuse the process of the court by repeatedly initiating and asserting defences which were frivolous. And that due to such behavior, the parties had agitated the issue of execution of the foreign decree issued by the High Court of London all the way up to the august Supreme Court, and there had been multiple actions that had been brought before this Court as well. He submitted that cross-objections that had been filed were a verbatim copy of averments made by the respondent in Civil Revision No. 494 of 2019 challenging the order of the executing court dated 01.11.2019, which was dismissed by this Court by order

dated 24.12.2019. However, despite such dismissal, the respondent had once again agitated the same arguments through cross-objections filed in the instant appeal.

5. The dispute between the parties appears to be simple enough involving the execution of a judgment and decree issued by the High Court in London dated 11.02.2008. Yet the history of litigation in Pakistan in relation to the execution of the said judgment and decree is long and checkered. The dispute arose between the appellant and the respondent when the respondent failed to pay the appellant for representing him in bankruptcy proceedings before the London High Court. The appellant succeeded in establishing the respondent's liability to pay and a judgment and decree were passed in favour of the appellant and against the respondent on 11.02.2008. The appellant sought execution of this foreign judgment under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The respondent filed his objection petition on 05.04.2011. The objections were dismissed and the execution petition was allowed on 07.07.2012. The order of the executing court was challenged before this Court in EFA No. 07 of 2012 on 10.09.2012. This appeal was dismissed on 27.06.2013. The respondent then filed civil petition for leave to appeal before the august Supreme Court (CPLA No. 2169 of 2013). This was dismissed for being time barred. The respondent continued to raise challenges during the execution proceedings and various petitions were filed before this Court. Meanwhile, by orders dated 05.05.2018 and 12.07.2018, the learned executing court held that the respondent was liable to pay the appellant GBP 95,235.93. The said orders were

never challenged by the respondent. The appellant, however, challenged the award of litigation costs to the appellant by the learned executing court which is subject matter of the present appeal.

6. While not challenging orders dated 05.05.2018 and 12.07.2018, the respondent filed Civil Revision No. 494/2019 challenging a subsequent order dated 01.11.2019 passed by the learned executing court. Through this petition the respondent raised objections to the foreign judgment and decree as well as to the decretal amount as ascertained by the learned executing court. This Court dismissed the petition by order dated 24.12.2019 and held the following:

"It is an admitted position that the aforementioned two orders were not assailed by the petitioner and have, therefore, attained finality. It is obvious from the above reproduced portion of order, dated 12.07.2018 that calculations were made with the consent of the parties. The petitioner belatedly filed an application and his prayer amounted to indirectly reopening the earlier orders, dated 15.05.2018 and 12.07.2018. The learned counsel for the petitioner, despite his able assistance, could not satisfy this Court that the impugned order, dated 01.11.2019 suffers from any legal infirmity or that the learned Executing Court has misread or non read the record. It appears that the application was filed by the petitioner merely to delay execution of the decree."

7. Cross-objections in the instant appeal were purportedly filed under Order XLI Rule 22 of CPC, which states the following:

22. Upon hearing respondent may object to decree as if he had preferred separate appeal. (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the

decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

(2) Form of objection and provisions applicable thereto.

Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection, so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

8. Given that the order impugned before this Court in the instant appeal is not a decree, no cross-objections could be filed against such order under Order XLI Rule 22 of CPC. However, the grounds taken by the respondent in the form of cross-objections had already been agitated before this Court in Civil Revision No. 494/2019, which petition was dismissed by this court while it observed that the respondent was in fact aggrieved by orders dated 15.05.2018 and 12.07.2018, which had not been challenged by the respondent and had attained finality and no collateral challenge could be brought against such orders by impugning the order of the

executing court dated 01.11.2019. The respondent then without disclosing the facts regarding the dismissal of C.R No. 494/2019, once again filed cross-objections through C.M No. 05/2021 in the instant appeal yet again raising all conceivable objections to the execution of the foreign judgment and decree as well as the decretal amount as ascertained by the learned executing court. As held in the judgment dismissing C.R 494/2019, the order dated 12.07.2018 had attained finality to the extent of the respondent, never having been challenged, and objections against the said order that set out the decretal amount payable by the respondent could not be raised ad nauseam in one proceeding after another. The conduct of the respondent amounts to abuse of the process of the court, who has made averments of a vexatious nature for purposes of section 35-B of CPC. If such conduct were allowed it would rob legal proceedings and decisions of the finality that attaches to them after the aggrieved party has utilized its right of appeal or has elected not to exercise such right. The cross-objections are thus dismissed for not being maintainable, with special cost in the amount of Rs.200,000/- under section 35-B of CPC, for being vexatious, for taxing court's time over multiple hearings, and requiring the court to once again take cognizance of the 15-year old litigation history between the parties and issues that had been put to bed in the foreign judgment and decree being executed and in the decisions adjudicating challenges to the execution of the foreign judgment and decree.

9. The appellant's claim is that costs of litigation awarded by the executing court is in disregard of provisions of section 35 of CPC as amended and restated through the Cost of Litigation Act, 2017

("Act"). Sections 35 and 35-B of CPC, as enacted by the Act, are relevant for our present purposes and read as follows:

35. Costs.- (1) *Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force,-*

(i) a party to any proceedings shall, before the announcement of final order, judgment or decree, file in the prescribed Form, details of actual costs of litigation, including but not limited to court fee, stamp fee, fee paid to counsel and all other ancillary or incidental expenses thereto;

(ii) the Court shall award the actual costs of litigation under clause (i) to the successful party with markup not exceeding the prescribed limit per annum, as notified by the State Bank of Pakistan, at the time of passing the order, judgment or decree;

(iii) the costs other than those mentioned in clause (i) shall be in the discretion of the Court; and

(iv) the Court shall have full power to determine out of what property such costs are to be paid and recovered and to give all necessary directions for the purposes aforesaid.

(2) The fact that the Court has no jurisdiction in respect of the proceedings shall be no bar to the exercise of such powers under this section.

35B. Special costs.-(1) *if in any proceedings, the Court finds that any averment made by any party is false or vexatious to the knowledge of such party, the Court shall award special costs to the opposite party against whom such averment has been made.*

(2) The amount of any special costs awarded under sub-section (1) shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

10. Litigation is an adversarial dispute resolution mechanism that produces winners and losers. It is an expensive undertaking. The legislative intent behind the Cost of Litigation Act, 2017, was to introduce a system whereby the losing party pays the cost of the winning party by indemnifying such winning party to the extent of actual costs, including direct and incidental costs, incurred in proceedings before the court. Thus, the losing party bears not only its own costs incurred during the proceedings but also those of the successful party. The purposes of making allowance for cost awards are manifold: to indemnify the successful party; to encourage settlements preempting the need to engage in and/or continue litigation; to deter frivolous actions, pleas and defences once litigation becomes inevitable; to discourage unnecessary applications and arguments that unduly prolong the litigation and consume the time and resources of the court system; and to incentive reasonable behavior by litigating parties in relation to the dispute and in the conduct of proceedings before the court. The costs award is therefore also meant to be a tool in the hands of the court to dissuade parties from misconducting themselves, to prevent the abuse of the process of the court and to ensure efficient use of court's time and resources in public interest. In other words, the intent of the Cost of Litigation Act is to deter and penalize unreasonable behavior in initiating and conducting litigation.

11. The words used in section 35(1) of CPC are of a mandatory nature. Section 35(1)(i) of CPC states that a party to the proceedings "shall" file details of cost of litigation". Section 35(1)(ii) of CPC similarly states that "the Court shall award the actual cost of

litigation” to the successful party. Under section 35(1) of CPC, the grant of costs is a mandatory requirement of law and it has not been left to the discretion of the court to determine whether or not a successful party is to be indemnified for costs incurred in proceedings before it. The court is, therefore, required to grant costs under section 35(1)(ii) of CPC, which provision stands a contradiction to section 35(1)(iii) and section 35-B of CPC, wherein the grant of costs have been left to the discretion of the court. Under section 35(1)(i) and (ii) of CPC the court is not vested with discretion whether or not to grant costs, but only with the power to pass judgment regarding what constitutes the actual costs that ought to be awarded. Understanding this distinction between where a statute vests discretion in the court and where it grants a power to pass judgment is imperative. Under section 35(1)(ii) of CPC read together with section 151, the power to grant an award comes with limited discretion to declare what it deems to be “the actual costs of litigation”, in view of the statements filed by parties to the proceedings under section 35(1)(i). We will consider the principles guiding this limited discretion later in this opinion.

12. The test in determining whether the provisions of a statute are mandatory or directory are fairly well-settled.

(i) In **Syed Zia Haider Rizvi and others versus Deputy Commissioner of Wealth Tax, Lahore and others (2011 SCMR 420)** it was held by the august Supreme Court that, “[t]here is no absolute test by which it may be determined whether a statute is mandatory or

directory, the primary rule is to ascertain the Legislative intent as revealed by an examination of the whole Act."

(ii) In **Province of Punjab vs. Javed Iqbal (2021 SCMR 328)** it was held by the apex court that, "[i]n order to determine whether the aforesaid proviso is directory or mandatory, the duty of the court is to try to unravel the real intention of the legislature. The ultimate test is the intent of the legislature and not the language in which the intent is clothed. The object and purpose of enacting the provision provide a strong and clear indicator for ascertaining such intent of the legislature. The intention of the legislature must govern and this is to be ascertained not only from the phraseology of the provision but also by considering its nature, its object, and the consequences which would follow from construing it one way or the other. This exercise entails careful examination of the scheme of the Act in order to discover the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding. One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, the court would

say that that provision must be complied with and that it is obligatory in its character."

(iii) In **Province of Punjab vs. Murree Brewery Company Limited** (2021 SCMR 305) it was held by the apex court that, "[t]he test to determine whether a provision is directory or mandatory is by ascertaining the legislative intent behind the same. The general rule expounded by this Court is that the usage of the word 'shall' generally carries the connotation that a provision is mandatory in nature. However, other factors such as the object and purpose of the statute and inclusion of penal consequences in cases of non-compliance also serve as an instructive guide in deducing the nature of the provision."

13. The legislative intent behind the Cost of Litigation Act, 2017, has been enumerated above. The word used in section 35(1)(i) directing the parties to legal proceedings to file their cost statements is "shall", which is also the word used in section 35(1)(ii) while directing the court to award such costs. The use of the word "shall" is a manifestation of the intent of the legislature. The Cost of Litigation Act, 2017, creates a statutory right in favor of a winning party to be indemnified. By declaring such right, the legislature has given it mandatory effect coupled with mandatory language directing the court to uphold the same. Denying the winning party costs would be tantamount to denial of a statutory right to it (except in limited circumstances where the conduct of the successful party is such that it becomes liable to pay costs either under section 35(1)(iii) or section 35-B of CPC, as explained further down in this

opinion). The object and purpose of the Cost of Litigation Act, 2017, is also to promote public interest rooted in timely adjudication of genuine disputes and mitigation of frivolous litigation. Thus, in view of the test for mandatory provisions, as laid down by the apex court, the award of cost of litigation under section 35(1)(ii) of CPC qualifies as a mandatory provision.

14. Section 35(1)(i) of CPC states that details of actual costs of litigation are to be filed in such form as prescribed. The fact that the form and certain other details mentioned in the sub-sections of section 35 have not yet been prescribed, does not render section 35 nugatory. The effect of not enacting regulations when the power to do so was delegated by the legislature came before the august Supreme Court in **M.U.A. Khan v. Rana M. Sultan and another** (PLD 1974 SC 228), wherein the following was held:

"It is universally recognized that as regulatory statutes have to deal with a variety of situations and subjects, it is not possible for the Legislature itself to make detailed regulations concerning them, and, therefore, the Legislature delegates its power to specified or designated authorities to make such detailed regulations, consistent with the statute, for carrying out the purposes of the parent legislation. The power so conferred is generally in the nature of an enabling provision, intended to further the object of the statute, and not to obstruct and stultify the same. As a consequence, the failure or omission of the designated authority to frame the necessary rules and regulations, in exercise of the power conferred on it by the Legislature, cannot be construed as having the effect or rendering the statute nugatory and unworkable. Such an eventuality could arise only if the Legislature indicates an intention to this effect in clear and unmistakable terms."

Likewise, in **Syed Mahmood Akhtar Naqvi Vs. Federation of Pakistan (PLD 2013 Supreme Court 195)** it was held that, *“appointments, removals and promotions must be made in accordance with the law and the rules made thereunder; where no such law or rule exists and the matter has been left to discretion, such discretion must be exercised in a structured, transparent and reasonable manner and in the public interest.”* Thus, till such time that there is no prescription regarding the matters to be prescribed under section 35 of CPC, the discretion created by the legislature, to be regulated through rules, must be exercised in a structured, transparent and reasonable manner.

15. The absence of prescription of the form in which the cost of litigation statement is to be filed does not suspend the requirement to award costs. Parties to a proceeding can file their cost of litigation statements to include the following:

(i) The title of the matter, the case reference for the proceedings in relation to which costs are being filed and the name of the party’s counsel, his bar registration credentials and the number of years he has been in the practice of law as a licensed attorney.

(ii) The lump-sum fee charged by the counsel for the proceedings if the fee is payable on lump-sum basis, or the per-hearing fee charged by counsel, or the hourly rate charged by the counsel and numbers of hours consumed in relation to the proceedings in question, as the case may be;

(iii) Incidental expenses incurred in relation to the proceedings, including expenses incurred in copying of documents and filing of the memoranda and pleadings;

(iv) Expenses incurred in procuring the report or testimony of any expert, required for such proceedings;

(v) Expenses incurred in relation to production of witnesses and documentary evidence;

(vi) Travel expenses incurred by the party to attend court proceedings, whether by itself or its attorney;

(vii) Fees paid for service of notices;

(viii) Cost incurred in acquiring copies of court orders and pleadings of other parties;

(ix) Court fee;

(x) Stamp fee;

(xi) Any other incidental expense directly related to the proceedings before the court.

The cost of litigation statement can be filed by a party at the beginning of the proceedings on a proposed basis. A final statement updating the actual costs as incurred can be filed upon culmination of the proceedings, prior to the announcement of the final order, judgment or decree in such proceedings. The final cost of litigation statement must be supported by proof of payment of the attorney's fee by the party in relation to the proceedings and invoices for other costs as mentioned in the line items identified above. Any party may file a one-page response to the cost of litigation statement filed by the contesting party to contend why the costs as proposed to be recovered by such party are not proportionate or reasonable in view of the subject matter of the proceedings, its complexity and the legal work involved. Any party may seek to address brief arguments on its proposed cost or the reasonability or lack of proportionality of costs claimed by the contesting party in the proceedings, to avail its right to due process guaranteed under Article 10-A of the Constitution. A court ought to require the parties

to file their cost of litigation statements under section 35(1)(i) of CPC if they fail to do so. Even in the event that the parties do not file their cost of litigation statements, a court ought to grant cost of litigation as determined by it on an objective basis, as the award of such costs has been declared to be the right of the winning party, which must be upheld by the court, and such award is also in public interest to help prevent and discourage frivolous litigation.

16. Through the Cost of Litigation Act, 2017, the legislature has made Islamabad a loser-pay-all jurisdiction. There are some common law jurisdictions that permit award of costs on partial indemnity basis. There are some jurisdictions that allow substantial indemnification of the winning party. And still others that allow complete indemnification, as has been done for Islamabad by section 35(1)(ii) of CPC.

17. The language of section 35 reflects that costs are to be determined and awarded for every step of the proceedings that produce a final order, judgment or decree. It must be clarified that the cost is for the benefit of the party to the proceedings and not the counsel for the party. It is thus the actual cost reasonably incurred by the party that becomes the barometer for determining the actual cost of litigation as opposed to any costs claimed to have been charged by the counsel for such party. The object of the law is to indemnify the party after it has been declared successful by the court as opposed to encourage the counsel for the party to work on contingency basis to recover costs for his own benefit or otherwise incentive attorneys to encourage litigation with the hope of recovering fees. The intent behind the Cost of Litigation Act, 2017,

as aforementioned, is to discourage litigation, encourage settlements, and reasonable behavior on part of all parties involved where litigation seems inevitable, and not to incentivize either a party or its counsel to reap undue benefit from initiating or prolonging litigation.

18. The Pakistan Legal Practitioners and Bar Councils Rules, 1976, provide guidance to attorneys in relation to their conduct with clients, especially in the context of charging fees. The relevant rules are reproduced here:

145. *An Advocate shall not acquire an interest adverse to a client in the property or interest involved in the case.*

146. *An Advocate shall not accept employment adverse to a client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client provided that an advocate, who has not been formally engaged by a person and accepted a retainer nor received any fees for such engagement is not precluded from accepting employment adverse to the interest of such person.*

154. *In fixing fees, Advocates should avoid charges which over-estimate their advice and services as well as those which undervalue them. A client's ability to pay cannot justify charge in excess of the value of the service, though his property may justify a lesser charge, or even none at all. The reasonable requests of a brother advocate, should also receive special and kind consideration. In respect of widows and orphans of an Advocate, all Advocates shall assist them free of charge.*

In determining the amount of fee it is proper to consider; (i) the time and labour required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the case; (ii) whether the acceptance of employment in a particular case will preclude the Advocate's appearance for others in cases likely to arise out of the transaction, about which there is a

reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in a particular case; (iii) the customary charges of the Bar for similar service; (iv) the amount involved in the controversy and the benefits resulting to the client from the services; (v) the contingency or the certainty of the compensation, and (vi) the character of the employment, whether casual or for an established and constant client. Of these considerations, none in itself is the controlling factor. These are mere guidelines in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money making trade.

The aforementioned rules remind one of the oft-repeated quote attributed to Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." In view of provisions of the Cost of Litigation Act, 2017, that has made Islamabad a loser-pay-all jurisdiction, it is the responsibility of an attorney to bring to the attention of his client the risk of financial exposure in lieu of cost of litigation involved while appraising the merits of the case.

19. While granting costs under section 35 of CPC, the court would need to determine that the actual costs of litigation claimed are reasonable and the cost award is fair to the successful party as well as to the losing party. In determining the quantum of cost of litigation award, the legislative intent behind the Cost of Litigation Act, 2017, would need to be borne in mind by the court. In this regard the principle of proportionality ought to remain a guiding

consideration. The court must consider whether the costs incurred were justified in the circumstances of the case. The cost claimed and awarded must be fair and reasonable taking into account the complexity of the matter, the time that ought to have been expended by a reasonable and conscientious attorney (including the human resources of a law firm that were required to be employed in relation to the matter), the experience of the attorney and a reasonable fee that a litigant would pay to such attorney without knowing whether or not such fee would be recoverable, given that the outcome in a litigation can never be predicted with absolute certainty. In a case involving recovery of damages or a monetary claim, for example, no reasonable litigant could be expected to spend more in litigation costs than the amount expected to be recovered. And if a party did, the indemnification of such amount would not be reasonable and fair in the absence of exceptional circumstances. In complex commercial disputes the amount of litigation costs, primarily due to attorney fees, that would be in the contemplation of both the winning and the losing parties would be much higher than that in a dispute between individuals, say, for example, in a succession or guardianship matter.

20. There is need for a court to exercise its judgment while awarding costs under section 35(1)(ii) of CPC instead of simply allowing the costs claimed by the winning party under section 35(1)(i) of CPC, because on the one hand is the statutory right of the winning party to be indemnified and on the other is the constitutional right of public-at-large to have access to justice. The Cost of Litigation Act, 2017, has created a statutory right for the

successful party to legal proceedings to recover its actual litigation cost. But such right cannot be given effect such that it acts as a bar to the right of ordinary citizens to access justice. Thus, in granting costs while applying the principles of proportionality and reasonableness, the court must use, on an objective basis, the ordinary prudence of a litigating party as the measure to determine what costs such litigant would be willing to incur in the proceedings in question. The matter of settlement of fees between a litigant and his counsel is a matter to be settled amongst them bilaterally. But it cannot be assumed that the legislature intended provisions of the Cost of Litigation Act, 2017, to function in a manner that engagement of an expensive counsel by one party would become a factor dissuading another party from asserting a right or pursuing a claim that otherwise has merit. One of the objects of rule of law is to create legal equality in a world that is devoid of social and financial equality. The Cost of Litigation Act, 2017, cannot therefore be seen as tool in the hands of litigating parties with means to deter indigent litigants. A litigating party can therefore agree to pay any fee to its counsel in relation to a legal proceeding. The court would however determine on an objective basis what amount a reasonable and prudent litigant would agree to pay to counsel in view of the subject matter of the proceeding, the stakes of the party as well as the complexity of legal issues involved. Let us however state with clarity that it is not for the court to sit in judgment over the legal fees paid by a party to its counsel, so long as such fees are within the zone of reasonableness and their award does not carry the risk of functioning as a barrier deterring public-at-large from accessing justice. Thus, where the attorney fees paid by a party under section

35(1)(i) of CPC fall within the zone of reasonableness, the court will not second-guess such amount and grant the same. However, in the event that it comes to the conclusion that (i) a prudent litigant would not be willing to pay the fee claimed in view of the facts and circumstances of the proceedings, and (ii) if paid, such fee would function as a barrier to accessing justice, the court would determine the proportion of the counsel's fee that ought to be indemnified to the winning party on an objective basis while making the cost of litigation award under section 35(1)(ii) of CPC.

21. Sections 35 and 35-B of CPC contemplate award of costs by the court in relation to proceedings which are pending before such court at the time of passing final order, judgment or decree. Our litigation system provides for an appellate mechanism and ordinarily includes at least three adjudicatory tiers through which a dispute passes before the decision in relation to it attaining finality. Thus, it is for the relevant court before which legal proceedings continue at each of these tiers to award litigation costs at the culmination of such proceedings. The Cost of Litigation Act, 2017, contemplates each court awarding costs in relation to proceedings before it as opposed to litigation costs being cumulated and awarded by the highest adjudicatory forum. The award of litigation costs, other than being a right to indemnity created for the benefit of the winning party, is a case management tool for each court before which proceedings are pending. The court that is managing the proceedings in relation to which litigation costs are being incurred is best placed to subject them to objective scrutiny while passing judgment on the reasonableness of the conduct of litigating parties.

Thus, a claim for cost of litigation under section 35 of CPC can neither include costs that were not incurred in relation to court proceedings (for example in relation to contract negotiations and preparation of transactional documents for the breach of which one of the parties initiates proceedings), nor costs that were incurred in proceedings pending before another court or at another tier in the adjudicatory process.

22. Under section 35(1)(iii) of CPC, the court may award any cost incurred in relation to the proceedings but not within the contemplation of section 35(1)(i) for CPC. While awarding costs, the court can take into account facts including, *inter alia*, a party's refusal to accept a reasonable settlement offer that would have preempted the need for litigation, a party's refusal to engage with amicable and/or alternate dispute resolution proposals, including such conduct on part of successful party. Under section 35-B of CPC, the court may grant costs against any party for making a false averment or exhibiting vexatious behavior, that entangles the court in irrelevant controversies or is aimed as part of a litigation strategy to drag out and delay the proceedings. In other words, the court while awarding costs would be loath to encourage unreasonable behavior leading to litigation or vexatious behavior prolonging litigation or abuse of the process of the court tying up the time and resources of the court system in unnecessary litigation, resulting in overloading the justice system and causing delay in the adjudication of genuine disputes.

23. In view of the legislative intent behind the Cost of litigation Act, 2017, as enumerated above, as well as the language of section

35 of CPC, this Court finds that the learned District Court has not determined the actual cost of litigation incurred by the appellant in the execution proceedings pending before it. The cost award in the amount of Rs.100,000/- is neither the actual cost incurred as claimed by the appellant nor is supported by any reasoning as to how such amount was calculated or what part of the cost claim was disallowed by the court and why. Consequently, the impugned order to the extent of award of costs to the appellant is set-aside.

24. This Court has perused the costs claimed by the appellant through the duly constituted attorney on behalf of the appellant, who is also a partner in the firm that has represented the appellant in the execution proceedings. It has been clarified earlier in this opinion that the award of costs is for the benefit of the party to legal proceedings and not its counsel. Such award must be based on the actual costs incurred by the party to the proceedings and not on the basis of invoices raised by the counsel to a party. The appellant is directed to place before the learned District Court evidence of fees disbursed by the appellant and received by the firm representing the appellant, which would constitute the actual cost in lieu of attorney fees incurred by the appellant. As has been clarified, for purposes of section 35 of CPC, costs are to be determined at each stage involving legal proceedings and ought to be granted by the court before which such proceedings are pending. Consequently, the learned District Court is only to determine the actual costs of litigation incurred by the appellant in relation to execution proceedings pending before the learned District Court and not the

costs incurred in relation to proceedings before another court, such as this Court or the august Supreme Court.

25. In view of above, the instant appeal is **allowed** and the impugned order dated 12.07.2018 is set-aside to the extent of grant of costs to the appellant. The matter to the extent of determining the costs award under section 35(1)(ii) of CPC is remanded to the learned District Court. The parties are directed to appear before the learned District Court on 15.02.2022. The appellant will file its cost of litigation statement under section 35(1) of CPC in view of the guidance provided in para 15 above together with receipts and evidence of disbursement of legal fees by the appellant to its counsel in Pakistan and receipts of other direct and ancillary costs claimed. The learned District Court shall pass a reasoned order for purposes of section 35(1)(ii) of CPC, after affording the parties an opportunity to be heard in relation to the actual costs incurred in the execution proceedings before the learned District Court.

26. Section 35 of CPC requires parties to any proceedings to file details of actual costs of litigation incurred in relation to such proceedings before the passage of the final order, judgment or decree. In relation to the proceedings before this Court, neither party has filed its cost of litigation statement. In view of the fact that the question involving adjudication before this court related to the unreasoned manner in which the award for costs was made by the learned District Court, which did not involve any intricate proposition of law, this Court finds it appropriate to grant costs in the amount of Rs.200,000/- payable by the respondent to the appellant. This cost is separate from and in addition to the cost

imposed on the respondent in the amount of Rs.200,000/- under section 35-B for filing vexatious averments in the form of cross-objections. The respondent will therefore pay an amount of Rs.400,000/- to the appellant within a period of thirty days and the learned counsel for the respondent will file a certificate confirming that the order as to costs has been complied with. Such certificate will be filed with the Deputy Registrar (Judicial) of this Court.

27. The office is directed to share a copy of this judgment with the learned Member Inspection Team (MIT) so that it can be shared with the learned judges of the District Courts, in order to ensure that mandatory provisions of the Cost of Litigation Act, 2017, are given effect by each court at the end of the proceedings at the time of announcement of the final order, judgment or decree upon culmination of such proceedings.

28. For purposes of guidance, the scope of section 35(1)(i), (ii) and (iii) and section 35-B of CPC, as enumerated in the judgment, can be summarized as follows:

1. *The award of actual cost of litigation under section 35(1)(ii) of CPC is a mandatory requirement to uphold the right of the winning party to be indemnified.*
2. *For filing of the cost of litigation statement under section 35(1)(i) of CPC guidance can be sought from para 15 above, till such time that a form for such purpose is prescribed.*
3. *The cost of litigation statement ought to be filed on a proposed basis upon commencement of the proceedings and supplemented by a final statement at the culmination of the proceedings, reflecting actual cost incurred together with receipts and proof of payment of fee to counsel.*

4. *The right to recover actual cost of litigation in a proceeding before a court belongs to the party and not to the party's attorney.*
5. *The court ought to award the actual cost of the litigation reasonably incurred in view of the subject matter and legal work involved in the proceedings, when undertaken by a conscientious attorney of like experience.*
6. *The court ought not sit in judgment over the attorney fee when such fee, as paid by a party, falls within the zone of reasonability and ought to have been in the contemplation of the litigating parties in view of the nature of the litigation. But the court would allow partial indemnity of the attorney's fee if the actual fee were (i) found to be unreasonable and disproportionate to the work involved, and (ii) result in creating a possible barrier for public-at-large to accessing the justice system.*
7. *A court ought to require the parties to file their cost of litigation statements as mandated by section 35(1)(i) of CPC, but non-filing of such statement ought not be a ground for not awarding cost of litigation as reasonably and objectively determined by the court to be payable to the winning party.*
8. *Any party may seek to address brief arguments before the court on its proposed cost or the reasonability or lack of proportionality of the costs claimed by a contesting party, and it is for the parties themselves to avail such opportunity prior to the conclusion of the proceedings to benefit from their Article 10A rights as guaranteed by the Constitution.*
9. *Other than creating a statutory right for the winning party to recover actual cost of litigation in legal proceedings, the object of the Cost of Litigation Act, 2017, is to discourage litigation, encourage settlements, prevent abuse of court process through false and vexatious claims, pleas, prayers and arguments, and encourage reasonable behavior on part of the parties prior to and during the proceedings. To realize such public purpose, a court ought to use its power*

under sections 35(1)(iii) and 35-B of CPC to penalize dishonesty, falsity and vexatious behavior.

10. *The costs provided for under section 35 of CPC are limited to costs in relation to proceedings before the court awarding such costs.*

(BABAR SATTAR)
JUDGE

Announced in the open Court on 02.02.2022.

JUDGE

Approved for reporting.

Saeed.