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AWARD OF COSTS TO THIRD PARTIES-LEGALITY?

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A tendency to pass orders which are not in accordance with the provisions of law has set in even in respect of the orders passed by the Courts. A large number of discretionary orders are passed by the Judges of the High Court in the writ petitions and the lawyers are now not in a position to predict the orders that could be passed in the cases before the Court. This trend is seeping into Civil Cases also where the provisions of law are very clear and unambiguous. A stark example is seen in the award of costs as a condition for allowing certain petitions filed under Section 5 of the Limitation Act for condonation of delay in taking certain steps before the Court within the time allowed by law, petitions for setting aside *ex parte* orders or decrees, petitions for setting aside dismissal orders for default and even for granting adjournment of the cases. Instead of awarding costs to the opposite party which is adversely affected by such delay, the Judges are often directing the petitioners to pay the costs to Legal Services Authority. Now, yet a new practice is developing in the Andhra Pradesh High Court in ordering the payment of costs to the Chief Justice's Defence Fund. There appears to be no legal provision or even sanctity for the High Court to make such orders which in effect is to compel the parties to the litigation to make contributions to such funds and the amounts to be contributed according to the fancy of the Judges passing such orders.

So far as the Civil Procedure Code is concerned, the provisions regarding the

award of costs by the Courts are contained in Section 35, Section 35-A and Section 35-B. They read as follows:

Section 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, the cost 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.

Section 35-A: Compensatory costs in respect of false or vexatious claims or defences:

(1) If in any suit or other proceedings including an execution proceeding but excluding an appeal or a revision, any party objects to the claim or defence or the ground that the claim or defence on any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court if it so thinks

fit, may after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation.

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

Provided that where pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Causes Courts Act, 1887, 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, or 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 the two hundred and fifty rupees and not exceeding those limits by more than hundred rupees :

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

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

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

Section 35-B 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 any 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.

The above provisions make it abundantly clear that the award of costs is to compensate the party to the litigation which has suffered inconvenience and incurred expenses to conduct the litigation. Under Order 9 Rule 9 and Order 9 Rule 13 the Court is given the power to set aside the orders of dismissal and *ex parte* decrees respectively as between the parties to the suits. The terms of the provisions do not admit of any interpretation that in Civil Cases before the High Court the High Court could direct a party to the litigation to pay costs to any fund of the choice of the Court. Yet, the learned Judges of the High Court are passing such orders not contemplated by legal provisions and the lawyers are submitting to such orders not being able to challenge them. The inconvenience suffered by the lawyers and litigant public in complying with such orders is much more than payment of the amount ordered by the Court because the payment has to be made by obtaining a demand draft from a Schedule Bank, take the demand draft to the legal services Authority and obtain a receipt from the said Authority and then file it in the Court in proof of the compliance of the order of the Honourable Court.

So far as the costs that the High Court could award in writ petitions, the procedure is governed by the Writ Rules made by the Andhra Pradesh High Court under Article 225 of the Constitution of India to regulate the proceedings under Article 226 of the Constitution of India.

Rules 22 and 23(a) of the Writ Rules read as follows:-

22(a) In all proceedings to which these Rules apply, the Court may make such order as to costs and security as it may consider just and necessary.

(b) In all petitions and appeals made under Articles 226 and 227 of the Constitution of India, and all appeals arising therefrom under Clause 15 of Letters Patent the Court shall fix such fees as it considers to be just and proper and irrespective of whether the petition or appeal, as the case may be, is allowed, dismissed or disposed of.

(c) Notwithstanding anything contained in sub-rule (b) where the Court is of the opinion that any party to the proceedings or any other person or authority has made averments false to his knowledge or deliberately suppressed material facts or mis-represented or indulged in vexatious proceedings, it may award such amount of exemplary costs as it may deem fit in the circumstances of the case, in addition to the costs that may be awarded under clause (b).

23 (a) A party to whom costs have been awarded in a Writ Petition or a Writ Appeal or an application therein may obtain an order of the Court for transmission for the purpose of execution of the order of costs to the Court of the District Munsif or to the Court of the Subordinate Judge in the State in whose jurisdiction the party against whom the order is to be executed ordinarily resides, or carries on business or has property which can be attached.

The above provisions in the Writ Rules framed by the Andhra Pradesh High Court make it clear that the costs are to be ordered to be paid by the Court only to a party to the litigation.

When the statutory provisions and the rules are clear as to whom the costs are to be ordered to be paid, what is the jurisdiction for the Courts to order payment of costs to the Legal Services Authority or to Defence Fund or to some other fund of the Court's Choice?

There is a provision in the Legal Services Authority Act for the Legal Services Authority to establish State Legal Aid Fund. Section 16(1) of the Legal Services Authorities Act, 1987 reads thus:-

(1) A State Authority shall establish a fund to be called the State Legal Aid Fund and there shall be credited thereto:-

- (a) all sums of money paid to it or any grant made by the Central Authority for the purposes of this Act;
- (b) any grants or donations that may be made to the State Authority by the State Government or by any person for the purposes of this Act;
- (c) any other amount received by the State Authority under the orders of any Court or from any other source.

The fact that there is a provision for the legal services Authority to receive any amount under the orders of any Court can hardly be interpreted to clothe the Court with the power of awarding costs to be paid to the third parties and direct a party to the litigation to pay the costs according to the fancy of the Judges to the legal Services Authority.

In an article written by the well known Journalist Mr. *Kuldip Nayar* entitled "More than the written law - This is a Court of What ?" published in the Indian Express dated 17th August, 1999. Mr. *Nayar* said "I am not talking about judicial activism which in certain cases has gone to a ridiculous extent. Even ordinary functioning of the executive is sought to be supervised. I am referring to the tendency to interfere. The unpalatable truth is that the Court, for quite some years, has been acting unpredictably. There is insufficient respect for the written law and decisions tend to be based upon the personal predilections of Judges".

To cite an example as to the manner in which the Courts are passing orders in this respect and the justification for the above comment of Mr. *Kuldip Nayar*, I am extracting hereunder the complete order dated 29-7-1999 of an Honourable single Judge of the Andhra Pradesh High Court in Writ Petition No.9537 of 1999 passed at the admission stage":-

"The writ petition is frivolous one. The petitioner's family is running a radio-repair shop for the last 40 years in Adilabad town. Opposite to this shop, respondents 6 to 9 are running small business of selling various essential commodities. Alleging that the petitioner is allergic to red chillies, he made lot of complaints to the police-respondents 3 to 5 to take steps to prevent the respondents 6 to 9 from selling red chillies. As there is no action on the part of police, he approached this Court stating that the inaction on the part of respondents 3 to 5 is unconstitutional.

A citizen has a right under Article 19(1) (g) of Constitution of India to engage himself in business, profession, avocation or occupation. It is not the petitioner's complaint that the respondents 6 to 9 are engaged in any business which is not authorised by law. Individual perceptions and sensitivities to certain occupations and avocations by other citizens cannot be a ground to approach this Court under Article 226 of the Constitution of India.

Further, the respondents 6 to 9 have not committed any cognizable offence to attract the provisions of Code of Criminal Procedure for registering a crime. At the outset, this Court observed that this case is a frivolous one. Therefore the writ petition is dismissed at the admission stage with costs quantified at Rs.2,000/- (Rupees two thousand only) to be paid by the petitioner to the Andhra Pradesh State Legal Services Authority within a period of two weeks from today. The

receipt of payment of costs shall be produced before the Deputy Superintendent of Police, Adilabad, fourth respondent herein. On the failure of petitioner to produce the receipt by Andhra Pradesh State Legal Services Authority, the fourth respondent shall take steps to see that the petitioner's shop is closed from where he is running the radio-repairing business."

It is difficult to understand why the petitioner should be mulcted with costs of Rs.2,000/- to be paid to the Legal Services Authority when the writ petition was dismissed at the admission stage. At a time when even the lawyers are not in a position to reasonably predict the orders that could be passed in writ petitions, should the litigants be penalised by ordering them to pay costs to the Legal Services Authority on the ground that the petition is frivolous? Further, why should the Deputy Superintendent of Police undertake the task of closing the shop of the petitioner on the failure of the petitioner to pay the costs to the Legal Services Authority? It is no part of his duty to undertake this task nor is it a mode contemplated under law for coercing a litigant to pay the costs awarded by the Court.

Even if the Courts interpret Section 16(c) of the Legal Services Authorities Act as the power given to the Court to order payment of costs to the Legal Services Authority, what is the justification for the Courts to order payment of costs to Chief Justice's Defence Fund or to some other fund? While discussing this issue, a friend of mine remarked that at this rate a day may not be far off when the Judges could order payment of costs to the Retired Judges Welfare Fund or Judicial Officers Benefit Fund if such funds are to be set up, for after all such funds also would contribute to further the cause of justice since it is very necessary to keep the Judges comfortable and contented.

In an article entitled "Judicial Accountability" published in Indian Advocate (Volume XXVIII 1998) Mr. P.P. Rao, Senior Advocate of the Supreme Court of India referring to Judicial activism observed that "If Judicial activism means exercise of judicial power in an effective manner so as to provide relief to the people by issuing appropriate directions to the Executive, there can be no difficulty". Since the advent of Public Interest Litigation the superior judiciary is in a position to provide relief to large sections of people by a single order. However, if the Court exercises powers of administration and Legislation in the name of judicial activism, it will be difficult to defend. Then the Court would be tilting the balance of power structure provided in the Constitution, however well meaning the Judge's concern for the people may be. The temptation to transgress Constitutional limitations is difficult to resist at a time when the remaining two wings of the State are on a weak wicket".

In the case reported in AIR 1997 SC 1005 the learned Judge of the Supreme Court ordered payment of costs of Rs.20,000/- to the Supreme Court Legal Aid Services Committee. The comment that the powers of the High Court is very wide under Article 226 of the Constitution of India and the sky is the only limit for the exercise of the power is often made by several Judges from the Bench. Perhaps, it is for this reason that several unconventional and arbitrary orders are being passed by the Superior Courts and the phrases 'Judicial autocracy' and 'Judicial tyranny' have crept into the vocabulary of the lawyers and litigant public. One can only hope that the Judges would also strictly follow the legal provisions and resist the temptation to pass unconventional orders beyond the legal provisions and compete with one another to make a big contribution to the various funds.