Pawan Advertising Vs State Of Maharashtra & Ors

Court: Bombay High Court

Date of Decision: Nov. 14, 2024

Acts Referred: Constitution of India, 1950 â€" Article 226, 227
Code of Civil Procedure, 1908 â€" Section 35, 35A

Hon'ble Judges: A.S. Chandurkar, J

Bench: Single Bench

Advocate: Minal Chandnani, Urusah M. I., S. P. Kamble, Kavita N. Solunke

Final Decision: Dismissed

Judgement

Ã, A.S. Chandurkar, J

1. This opinion seeks to resolve the difference that has arisen between the HonÃ¢â‚¬â„¢ble Judges constituting the Division Bench that heard Writ Petition

No.10220 of 2024 on the quantum of costs to be imposed on the petitioner. In the said writ petition, an order dated 11th July 2024 passed by the

Mumbai Metropolitan Regional Development Authority- MMRDA rejecting the application made by the petitioner for retention of hoardings installed

by it was under challenge. By its order dated 24th July 2024, the Division Bench proceeded to dismiss the writ petition after recording a finding that

the hoardings installed by the petitioner exceeded the permissible limits as laid down in the statutory guidelines. There was a consensus between the

learned Judges that the writ petition was liable to be dismissed with exemplary costs. However, there was a disagreement between them as regards

the quantum of costs. HonÃ¢â‚¬â„¢ble M. S. Sonak, J was of the view that imposition of costs of Rs.5,00,000/- would be appropriate. However,

HonÃ¢â‚¬â„¢ble Kamal Khata, J was of the view that the costs to be imposed could not be insignificant or trivial. Costs ought to be imposed so as to act

as a genuine deterrent. He was of the view that costs of Rs.25,00,000/- ought to be imposed.

In view of the difference of opinion as regards the quantum of costs to be imposed, the writ petition has been placed before this Court in accordance

with the provisions of Chapter-I Rule 7 of the Bombay High Court Appellate Side Rules, 1960 to resolve this difference.

2. Ms. Minal Chandnani, the learned counsel appearing for the petitioner at the outset submitted that the order dated 24th July 2024 passed in the writ

petition was the subject matter of challenge before the Supreme Court in SLP (C) No.20943/2024.

The said Special Leave Petition however came to be dismissed on 13th September, 2024. It is thus only the difference of opinion with regard to the

quantum of costs that is required to be adjudicated in the present reference. It was submitted that the facts of the present case did not indicate that the

imposition of exemplary costs was warranted. The petitioner had approached the Grampanchayat for seeking permission for erecting the hoardings

and after receiving its permission had errected the said hoardings. It was however found by the Division Bench that the permission of the MMRDA,

which was the Competent Authority, had not been obtained and instead permission from the Grampanchayat had been sought. There were no

malafides in the action of the petitioner and hence imposition of exemplary costs of Rs.25,00,000/- was not at all warranted. The observations made in

paragraphs 19 and 23 of the order dated 24th July 2024 were unwarranted in the facts of the present case inasmuch as no fraud was played by the

petitioner by obtaining permission from the Grampanchayat. It was the first instance when the petitioner had approached this Court and therefore, it

could not be said that the petitioner was a habitual law-breaker so as to invite an order for payment of exemplary costs. Drawing attention to the order

passed by the said Division Bench in Writ Petition No.8657 of 2024 (Yash Raj Multimedia Pvt. Ltd. & Anr. Vs. State of Maharashtra & Ors.)

decided on 21st August 2024, it was submitted that even in the said case, the petitioner had approached the Grampanchayat for grant of permission to

put up an hoarding. The Division Bench dismissed the writ petition but did not impose any costs whatsoever. It was therefore submitted that imposition

of exemplary costs of Rs.25,00,000/- on the petitioner was unwarranted.

To substantiate her contentions in this regard, the learned counsel relied on the decisions in Ashok Kumar Mittal Vs. Ram Kumar Gupta and

Another, (2009) 2 SCC 656, Vinod Seth Vs. Devinder Bajaj and Another, (2010) 8 SCC 1, Sanjeev Kumar Jain Vs. Raghubir Saran Charitable

Trust and Others, (2012) 1 SCC 455 and Maria Margarida Sequeira Fernandes and Others Vs. Erasmo Jack De Sequeira (dead) through

LRS. (2012) 5 SCC 370. Reliance was also placed on the recommendations of the 240th Report of the Law Commission of India on the subject

Ã¢â‚¬Å“Costs in Civil LitigationÃ¢â‚¬. On the basis of aforesaid submissions, it was urged that exemplary costs of Rs.25,00,000/- as imposed did not warrant

acceptance.

3. Ms. Kavita Solunke, learned counsel appearing for the MMRDA on the other hand supported the imposition of exemplary costs of Rs. 25,00,000/-.

Referring to the observations made by the Division Bench in its order dated 24th July 2024, it was submitted that firstly, there was no question of

obtaining any permission from the Grampanchayat as it was the MMRDA which was the Competent Authority to grant permission for erection of

hoardings. On the strength of the permission granted by the Grampanchayat, the petitioner proceeded to erect the hoardings which far exceeded the

permissible limits. It was further pointed out that the Division Bench had recorded a finding that the petitioner had made false statements in the writ

petition and that it had also suppressed correct facts. The writ petition was dismissed for suppression and misstatement of correct facts. Since the

petitioner had made commercial gains from such conduct, the Division Bench was of the view that exemplary costs ought to be imposed. It was

submitted that costs of Rs.25,00,000/- had been rightly imposed in view of the seriousness of the situation and with a view that such costs would act as

a genuine deterrent. In the facts of the case, the amount of costs of Rs.5,00,000/- as imposed was on a lower side and the view imposing costs of

Rs.25,00,000/- on the petitioner ought to be upheld.

To substantiate her contentions, the learned counsel placed reliance on the decisions in S.P. Chengalvaraya Naidu (dead) by LRS. Vs. Jagannath

(dead) by LRS. & Others (1994) 1 SCC 1, Dattaraj Nathuji Thaware Vs. State of Maharashtra and Others AIR 2005 SC 540 and Dnyandeo

Sabaji Naik and Anr. Vs. Pradnya Prakash Khadekar and Ors AIR OnLine 2017 SC 515.

4. I have heard the learned counsel for the parties and I have thereafter given thoughtful consideration to the respective submissions. The point of

difference that seeks resolution is restricted only to the quantum of costs to be imposed upon the petitioner upon dismissal of the writ petition preferred

by it.

As stated above, in the writ petition preferred by the petitioner an order passed by the MMRDA dated 11th July 2024 rejecting the petitionerÃ¢â‚¬â„¢s

application for retention of hoardings erected by it was under challenge. While finding no merit in the challenge raised by the petitioner, the Division

Bench was of the view that the petitioner erected the said hoardings after obtaining permission of the Grampanchayat which was not the Competent

Authority. Permission of the MMRDA was required to be obtained which was not done. It was found that the hoardings erected by the petitioner

exceeded the permissible limits as indicated in the statutory guidelines. It was noted that false statements had been made by the petitioner in the writ

petition and that correct facts had also been suppressed therein. Thus after finding that there was no merit in the challenge raised by the petitioner, the

Division Bench was of the view that the writ petition was liable to be dismissed for suppression and misstatement of correct facts. By such conduct,

the petitioner had made commercial gains. There was also a consensus on imposition of exemplary costs on the petitioner while dismissing the writ

petition. The order dismissing the writ petition has now attained finality with rejection of the Special Leave Petition preferred by the petitioner.

5. Since both the learned Judges constituting the Division Bench were of the view that the petitioner was liable to pay exemplary costs, it is only the

difference in the quantum of such exemplary costs to be paid that requires resolution. While doing so, it would be necessary to refer to certain relevant

aspects. The writ petition as filed was by invoking Article 226 of the Constitution of India. In this regard, it is necessary to refer to Chapter XVII of

the Rules of 1960. The said Chapter concerns the filing of writ petitions under Articles 226 and 227 of the Constitution of India. Rule 16 of Chapter

XVII confers discretion on the Court in the matter of imposition of costs in a writ petition. It is thus clear that the amount of costs to be imposed on a

party is within the discretion of the Court entertaining the writ petition. It is needless to state that exercise of such discretion has to be guided by a

judicious approach. The manner in which such discretion has been exercised is expected to be reflected in the order imposing costs or same could also

be discerned from the material on record.

6. In the matter of exercise of discretion, useful reference can be made to the observations in paragraphs 9 to 12 of the decision in National

Insurance Co. Ltd Vs. Keshav Bahadur and Others (2004) 2 SCC 370. The said observations read as under:-

9. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge

critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of

judgment; a science or understanding to discern between falsity and the truth, between wrong and right, between shadow and substance, between equity and

colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the

discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not

humour. It is to be not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the

discharge of his office ought to confine himself. (Per Lord Halsbury, L.C., in Sharpe v. Wakefield). Also see S.G. Jaisinghani v. Union of India.

10. The word ""discretion"" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly,

unthinking or haste; evidently, therefore, a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant

circumspection and care; therefore where the legislature concedes discretion it also imposes a heavy responsibility.

The discretion of a judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In

the best it is oftentimes caprice; in the worst it is every vice, folly, and passion to which human nature is liable,"" said Lord Camden, L.C.J., in Hindson and Kersey.

11. If a certain latitude or liberty is accorded by statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on

matters brought before him, it is judicial discretion. It limits and regulates the exercise of the discretion, and prevents it from being wholly absolute, capricious, or

exempt from review.

12. Such discretion is usually given on matters of procedure or punishment, or costs of administration rather than with reference to vested substantive rights. The

matters which should regulate the exercise of discretion have been stated by eminent judges in somewhat different forms of words but with substantial identity.

When a statute gives a judge a discretion, what is meant is a judicial discretion, regulated according to the known rules of law, and not the mere whim or caprice

of the person to whom it is given on the assumption that he is discreet (per Willes, J. in Lee v. Bude Rly. Co. and in Morgan v. Morgan).

7. Another facet that is required to be borne in mind is the nature of remedy that has been availed. Such remedy could either be a public law remedy

when jurisdiction of a constitutional Court is sought to be invoked while another remedy is one before the Civil Court invoking the provisions of the

Code of Civil Procedure, 1908 (for short, Ã¢â‚¬Ëœthe CodeÃ¢â‚¬â„¢). The mode and manner of imposition of costs when public remedy is availed would be

different from the imposition of costs by invoking the provisions of Section 35 or Section 35A of the Code. The nature of costs could either be

compensatory or punitive in nature or the costs could be one in cause. In the present reference, it is only the quantum of exemplary costs that is

required to be examined.

8. At this stage, it is necessary to make a reference to the observations in Paragraphs 5 and 6 of the judgment of the Supreme Court in Satyapal

Singh Vs. Union of India and Another SLP (C) No.32928/2009 decided on 23rd November 2009.

Ã¢â‚¬Å“5. Exemplary costs are levied where a claim is found to be false or vexatious or where a party is found to be guilty of misrepresentation, fraud or suppression

of facts. In the absence of any such finding, it will be improper to punish a litigant with exemplary costs. When the appellate court did not choose to levy any costs

while dismissing the appeal filed by the petitioner after nine years of pendency with interim stay, the High Court, while dismissing the writ petition at preliminary

hearing, ought not to have levied exemplary costs with reference to the period of pendency before the Appellate Court. We do not find any ground on which the

exemplary costs of Rs. 50,000/- could be sustained. Levy of exemplary costs on ordinary litigants, as punishment for merely for approaching courts and securing

an interim order, when there was no fraud, misrepresentation or suppression is unwarranted. In fact, it will be bad precedent.

Even if any costs are to be levied on a petitioner, for any default or delaying tactics, where the respondents have entered appearance, costs should be ordered to

be paid to the respondents, who were the affected parties on account of the litigation. There is no justification for levying costs of Rs.50,000/- on the petitioner

payable to the High Court Legal Service Committee. There is also no justification for directing the State Government to act as the collecting agent for the costs

payable to the Legal Services Committee. Directing a government servant, an ordinary employee, to pay Rs. 50,000/- as costs within one month and further

directing the use of coercive process for recovery of costs as arrears of land revenue was unwarranted. The levy of such exemplary costs in favour of the High

Court Legal Services Committee, is not a healthy practice.

6. The costs may be justifiably made payable to the High Court Legal Services Committee or other Legal Services Authorities, where before the other side is served

or represented, the court wants to penalise a petitioner for lapses/omissions/delays, as for example, where the petitioner fails to pay the process fee for service of

respondents, or fails to cure defects or comply with office objections, or where there is delay in refiling of petitions. Once the other side is represented, the costs

levied by reason of any attempt by a party to delay the proceedings, should normally be for the benefit of the other party who has suffered due to such conduct.

Only where both the parties are at fault, costs may be ordered to be paid to Legal Services Authority. At all events,the power to levy exemplary costs, it is needless

to say, should be used sparingly to advance justice. It should not be threatening and oppressive.Ã¢â‚¬â€‹

9. In the decisions relied upon by the learned counsel for the petitioner, the imposition of costs was in the context of the provisions of Sections 35 and

35A of the Code. The said decisions would therefore not be very relevant in the present context as exemplary costs have been imposed while

exercising jurisdiction under Article 226 of the Constitution. Similarly, the 240th Report of the Law Commission of India contains recommendations for

legislative amendments in the Code. The ratio of the decisions relied upon by the learned counsel for the MMRDA has been taken into consideration.

10. In the order passed by HonÃ¢â‚¬â„¢ble M.S. Sonak, J, it has been indicated that the petitioner had suppressed correct facts and had made false

statements while invoking the extraordinary and equitable jurisdiction of the Court so as to snatch an interim order. It is on this basis that the amount of

Rs.5,00,000/- was determined as exemplary costs. On the other hand, as per the order passed by the HonÃ¢â‚¬â„¢ble Kamal Khata, J the exemplary costs

to be imposed ought to be a significant fraction of the investment involved thereby impacting the rate of return of investment and rendering any non-

compliance economically prohibitive. It was observed that erecting a 40 feet by 40 feet hoarding would cost not more than Rs. 15,00,000/- while

advertising fees could range from a few thousand to several lakhs per day. It is for this reason and with a view to convey the seriousness of the

situation and to set an example of genuine deterrence, costs of Rs.25,00,000/-were imposed.

11. In my view, if the basis for determining the amount of exemplary costs is the illegal gain or benefit derived by a party, relevant material in the form

of the amount invested, expenses incurred for undertaking such work and the profits earned in the interregnum would be relevant. If such material is

available on record, the task of the Court in determining the amount of exemplary costs would become easier. However, if the aforesaid relevant

material which could form the basis for determining the quantum of exemplary costs is not available on record, it would be necessary to call for such

material from the parties so as to enable the Court to undertake a reasonable determination of the quantum of exemplary costs. This could be done

either by calling upon the parties to place on record relevant material as regards the amount invested in undertaking such activity, expenses incurred

and the probable gains from such activity. This material would facilitate determination of a realistic amount of exemplary costs. Such exercise would

also serve a dual purpose. Firstly, the party on whom such exemplary costs are sought to be imposed would have an opportunity to place before the

Court relevant figures which in turn would enable the Court to determine the amount of exemplary costs to be imposed. This would also satisfy the

requirement of natural justice inasmuch as imposition of exemplary costs definitely visits such party with civil consequences. Secondly, in a challenge

to an order imposing exemplary costs, the Court examining such challenge would be in a better position to gather the basis for imposition of exemplary

costs as well as the manner or the yardstick on the basis of which the quantum of exemplary costs has been determined. Ultimately, the imposition of

exemplary costs is an exercise undertaken in discretion and hence such such exercise ought to satisfy the basic tenets of fair play and justice.

12. In the present case, there was no such material available on record that could indicate the probable amount of investment made by the petitioner in

the erection of the hoardings, the expenses incurred in doing so as well as the advertising fees paid for the same. Paragraph 20 of the order dated 24th

July 2024 indicates that these aspects have been considered not on a factual basis but on the basis of probable figures which the Court considered in

its perspective. There is absence of relevant material to indicate the approximate expenditure undertaken by the petitioner as well as the probable gain

in that regard. With respect, the basis on which the figure of Rs.25,00,000/- as exemplary costs was determined cannot be gathered from the order

dated 24th July 2024. Hence, in my view imposition of exemplary costs of Rs.5,00,000/- on account of suppression of correct facts and false

statements made in the writ petition by HonÃ¢â‚¬â„¢ble M. S. Sonak, J. appears to be reasonable and appropriate.

13. The reference is accordingly answered by opining that the facts of the present case warrant imposition of exemplary costs of Rs.5,00,000/- as per

HonÃ¢â‚¬â„¢ble M. S. Sonak, J. The writ petition be now placed before the Division Bench in accordance with Rule 7 of Chapter-I of the Bombay High

Court Appellate Side Rules, 1960.