# FUNDING THE WAY OUT OF THE CIVIL COST CONUNDRUM: ENSURING ACCESS TO JUSTICE

*- Kunal Gupta**

**ABSTRACT**

*Access to justice is an indispensable right of the citizens of India; however, Sections 35 and 35A of the Civil Procedure Code, 1908 (hereinafter 'CPC') cast a shadow over this right. These provisions that deal with the civil costs to be provided to the losing party have now become virtually infructuous. Last amended in 1976, the amount of compensation has remained unchanged and the maximum compensation that can be awarded against a vexatious suit is Rs. 3000, which is highly inadequate to make good the costs incurred by the party unfairly brought to court. Consequently, many indigent people are hesitant to come to court as the legal costs incurred by them would not be compensated, and thus are forced to compromise. This gravely affects their right to access justice. This paper analyses the objective behind the rule of costs and contrasts it with the same in the USA. It also dwells on the inherent power of the courts to grant costs and whether such power can be exercised in a manner that is consistent with the CPC. The paper suggests a creative and practical solution to provide access to justice to all via cost mechanism. The author envisages the creation of a unique self-sustaining fund that would come to the rescue of the indigent people.*

**Keywords:** Costs, Section-35A, Juhi Chawla, Civil Procedure Code, Loser Pays, Compensatory Costs

## INTRODUCTION

> *"I have found in my experience that there is one panacea which heals every sore in litigation and that is cost."*[1]

Recently, the Delhi High Court imposed a humungous fine on actress Juhi Chawla, on its original side, under the CPC[2] when the latter filed a suit against the rollout of 5G services by the Union government. The Delhi High Court was well within its jurisdiction to allow/dismiss the suit; however, imposing exemplary costs is outside the sphere of law as it disregarded precedents and some of the provisions of the CPC itself.

The aim of this paper is not to point out the infirmities in the decision of the Delhi High Court, instead, the aim is to highlight the reasoning of the High Court while making this decision. Section 35A of the CPC allows for a maximum of Rs. 3000 to be awarded as costs for a vexatious or a frivolous suit. So, did the court have any viable option within the four corners of law to impose a higher fine? Certainly not. Additionally, this case highlights a lacuna in the law regarding costs as Rs. 3,000 is a meagresum and does not serve as an effective deterrent for frivolous suits.

* Student, National Law School of India University, Bangalore

1 *Copper v Smith* (1884) 26 CD 700 (Bowen J).

There have been numerous decisions of the Hon'ble Supreme Court highlighting how unsatisfactory the existing system is, with respect to levying costs in civil matters.[3] Currently, the provisions of the CPC, do not serve as a deterrent against vexatious and frivolous litigation, and therefore, the parties resort to time-buying tactics without there being adequate punishment for their actions.[4]To deal with the high pendency of cases and to restructure the civil justice system, it is essential to have a robust system of levying costs on the wrongdoer. Therefore, there is a pressing need to re-examine Section 35 and 35A of the CPC which deal with costs and compensatory costs respectively.

**SCOPE**

This paper aims to critically analyse the system of costs in India (loser pays) with that of the one in the USA (American Rule). The analysis is done keeping in mind various objectives that the costs seek to achieve i.e., access to justice, preventing frivolous litigation, and congestion in courts. The paper further highlights how grossly inadequate the Indian system of costs is and proves that the existing provisions in CPC are infructuous. This forces courts to invoke their inherent powers to impose costs which often lead to an arbitrary exercise of power. In light of this, the paper also suggests practical changes in the law regarding costs to make justice more accessible.

**LOSER PAYS: INDIAN RULE OF COSTS**

The principle on which the CPC works is *"costs follow the event."*[5] It means the loser pays the cost of the litigation to the winning party. This principle is so sacrosanct that specific reasons must be stated while drifting away from the principle. However, courts seldom give reasons while they dispose of cases by saying either, *"parties bear own costs"* or *"no order as to costs"*.[6]

India has adopted the system of costs by taking inspiration from the English model. Since awarding of costs is inherently a discretionary matter, certain factors are considered while determining it. One of them is whether it was reasonable for the losing party to raise, contest or pursue a particular issue/allegation.[7] This is something that needs to be reinforced in India more often.

The theory for justifying the imposition of costs has two prongs to it. One, the wrong-doing committed by the defendant makes it necessary for the plaintiff to file a suit. Second, the plaintiff sues the defendant without a just cause. It is contingent on the person being awarded the cost to win the case. Thus, costs are an indemnification to

2 Nishant Khatri and Hari Mudgal, 'Did the Delhi High Court Have Jurisdiction under CPC to Impose Costs of Rs 20 Lakh In Juhi Chawla's Suit?' (*Bar and Bench*,8 June 2021)<www.barandbench.com/columns/delhi-high-court-jurisdiction-cpc-costs-rs-20-lakh-juhi-chawla> accessed 3 August 2021.

3 *Ashok Kumar Mittal v Ram Kumar Gupta* (2009) 2 SCC 656.

4 ibid.

5 Civil Procedure Code 1908, s 35(2).

6 Law Commission of India, *Costs in Civil Litigation* (Report No 420, 2012) para 24.

7 Hardinge Stanley Giffard Halsbury, *Halsbury's Laws of England* (10th vol, 4th edn, Lexis Nexis 2006) 17.

compensate the winning party for the expenses incurred to successfully vindicate its rights in any court.[8]

Levying costs in civil matters primarily has triple goals. First, to ensure a reasonable and realistic cost to restore the status quo ante of the successful party. Second, to curb the filing of frivolous and false suits. Third, to discourage unnecessary and repeated adjournments.[9]

Indian law on costs in CPC is covered primarily under Sections 35 and 35A. *Prima facie*, it does look like Section 35 makes provision for reasonable costs since it makes no restriction on the same and does not introduce any ceiling on the quantum of costs. However, the section starts with, *"subject to such conditions and limitations as may be prescribed, and to the provisions of law for the time being in force"*,[10]implying that the courts are subject to other provisions of CPC as well as the High Court Rules. Thus, Section 35 is undoubtedly hit by Section 35A which provides an upper limit of Rs. 3,000 on the compensatory costs that can be awarded in instances of frivolous litigation.

Order XXA of CPC also deals with costs and enumerates items that could be included while computing costs. These include the legal fee, expenditure on printing or typing pleadings, expenses in producing witnesses, etc. The list of items under Rule 1 of Order XXA is inclusive and not exclusive, as reflected in the phrase *"the Court may award costs in respect of"*.[11]Moreover, the CPC is not an exhaustive code on costs. Even the High Courts can formulate rules to ensure the smooth functioning of civil courts in their territorial jurisdiction. The Delhi and the Karnataka High Courts have formulated rules in this regard.

**RS. 3,000: COMPENSATION TOO MUCH?**

The inability to provide actual costs in India at present has a serious fallout that fails to provide justice to the parties. Often, one of the parties fails to bear the expenses of litigation and causes delay. In such a scenario, the party is forced to surrender the suit and agree to a settlement because they know that they would not be able to recover actual costs from the other party.[12] The grave matter of concern is that an increase in the frequency of such instances will lead citizens to lose faith in the civil justice system of India.

There are two opposing views when it comes to resolving the conflict as regards costs.[13]*One*, the High Courts and the Supreme Court have inherent power to do justice by awarding appropriate costs and this wide discretion is unaffected by Sections 35 and 35A of CPC. The *other* is that the discretion of courts is subjected to the limitations

8 *Vinod Seth v Devinder Bajaj* (2010) 8 SCC 1.
9 Report No 420 (n 179) para 2.
10 Civil Procedure Code 1908, s 35(1).
11 Civil Procedure Code 1908, order XXA.
12 Report No 420 (n 179) para 3.17.
13 *Ashok* (n 176).

and conditions under the CPC, viz. Sections 35 and 35A. Given the current situation, it's Hobson's choice for India to choose either of them. The reason against the first option is the huge probability of misuse of wide discretionary power in an arbitrary manner, while the second one is not a good option considering the outdated and myopic nature of the CPC which does not grant enough discretion and places a cap on Rs. 3000 for a compensatory cost under Section35A of the CPC.

**AN INSTANCE OF ARBITRARY EXERCISE OF POWER**

There have been instances when courts assume that they have wide discretion and thus impose exorbitant costs. For instance, once, the High Court had awarded a sum of Rs. 45 lacs at the dismissal of an appeal to compensate for the 'actual costs' incurred, including the advocate's fee.[14] Though done in good faith by awarding realistic costs, it brutally transcended the barriers of law. Later, the Supreme Court set aside the decision regarding cost and instead awarded merely Rs. 3000 as costs to the respondents.[15] If we take a step back from the rules and orders of CPC, with due respect, this decision of the Supreme Court can be said to be unfair as it fails to fulfil the aim for which costs are imposed. An amount of Rs. 3000 would do nothing to bring back the status quo of the party which incurred lacs of money to defend himself against a vexatious lawsuit. The Supreme Court reasoned that courts must function within the four walls of the law in force, which is a wake-up call that the law needs amendments.

Thus, both the approaches elucidated above do not fulfil the aims and objectives of the said provisions. However, the second approach that subjects the discretion of even the higher courts to the provisions in the CPC may be considered better if there is a check on the judiciary's powers to avoid the arbitrary exercise of power. To make it effective, the relevant provisions of CPC must be amended and a realistic value instead of Rs. 3000 must be put in place.[16]

**INHERENT POWERS OF INDIAN COURTS TO AWARD COSTS: AN OVERREACH**

There are provisions in the Constitution of India, 1950, and the CPC regarding the inherent power to do justice which could also be interpreted to surpass the legislative guidelines in CPC as regards costs.

The Supreme Court has found a way out of the rigmarole of Section 35A by using its inherent power to do justice under Article 142 of the Constitution of India. By Article 142, the Supreme Court awards civil costs way more than the upper limit as prescribed in Section 35A. For instance, in *Indirect Tax Practitioners Association v. R.K. Jain*, the Supreme Court imposed costs of Rs. 2,00,000.[17] In *Shiv Kumar Sharma v.*

14 *Sanjeev Kumar Jain v Raghubir Charitable Trust* JT 2011 (12) SC 435.
15 ibid.
16 Report No 420 (n 179).
17 *Indirect Tax Practitioners Association v R K Jain* 2010 (8) SCC 281.

*Santosh Kumari*, the Supreme Court directed Rs. 50,000 be paid by appellants to the respondents.[18]

The High Courts also have an inherent power under Section 151 of the CPC which can be exercised in the interest of justice; however, it must not be exercised in derogation of the statutory provisions in the CPC. This wide discretion is a cause of concern as it is a double-edged sword. Where, on the one hand, it could be used to grant justice; on the other hand, it can also be used arbitrarily while disregarding the existing laws. Therefore, it would be better if an express provision is added limiting the inherent power of High Courts with respect to costs and making it subject to an amended Section 35A (the nature of the suggested amendment is in the following segments of this paper).

**AMERICAN RULE: FAR FROM PERFECT**

The American rule of costs states that each party to a suit must pay their respective attorney's fee irrespective of who wins the suit. The legal fee would not be compensated by way of costs after the decision in the suit. There exist two prominent schools of thought with regards to imposing costs on the losing party in a civil suit. One of them is the English principle of 'loser pays' which is the most prevalent. Another school of thought is the one followed in the United States of America popularly known as the 'American Rule'. The American rule is far from perfect as regards awarding costs. But could it be a possible substitution for the 'loser pay' rule followed in India?

The American Rule seems to exist in the absence any theoretical reasoning.[19] This omission also highlights the absurdity of the rule; a person who is run down on a street wrongfully is allowed to recover the medical expenses but not the ones incurred on an advocate. Thus, pointing to the inability to restore the status quo as a large part of the costs in litigation consists of the attorney's fee itself.[20]

There is a possibility of the American Rule leading to more congestion in courts by not discouraging vexatious claims/defences.[21] Since a lion's share of the costs of the losing party is paid to an attorney, it might not be enough incentive for a reasonably well-off party to discontinue the frivolous litigation, leading to congestion in courts. The American rule as regards access to justice denies the attorney's fee that was spent in response to a vexatious claim to the successful party.

Access to justice is an essential aim that every legal system must seek to achieve and this is one of the reasons why costs are imposed on the losing party. It is a parameter

18 *Shiv Kumar Sharma v Santosh Kumari* 2007 (8) SCC 600.
19 Federal Rules of Civil Procedure 1938, r 54.
20 James R Maxeiner, 'Cost and Fee Allocation in Civil Procedure' (2010) 58 The American Journal of Comparative Law <www.jstor.org/stable/20744539> accessed 2 August 2021.
21 Howard Greenberger, 'The Cost of Justice: An American Problem, an English Solution' (1964) 9(3) Villanova LR <https://digitalcommons.law.villanova.edu/vlr/vol9/iss3/2> accessed 6 August 2021.

to judge a fee-shifting rule. Theoretically in the USA, everyone is equal but practically there exists a huge economic divide. Without an external system of costs to ensure equality in the courtroom, the have-nots would be at a conspicuous disadvantage. Those without substantial resources would not be able to spend as much as the opposing party and that is likely to impact the outcome of the controversy.[22] If the party who is in the right, has confidence in the civil justice system that it would be 'made whole' by way of compensation, it would be in a better position to fight the vexatious lawsuit. It would also be in a better place to deal with delays and would additionally have bargaining power in case the situation demands an out-of-court settlement.

On the other hand, some authors defend the American Rule as well. Mr. Vargo observes that courts are overcrowded not because of fewer costs being awarded in civil matters, but due to the inundation of criminal cases and slow disposal.[23]

**SUGGESTIONS: FUND-ING THE WAY OUT**

It would not be an overstatement to call section 35A 'virtually infructuous'.[24] It deals with the award of compensatory costs and has become ineffective primarily because of inflation, taking the time value of money into account. Merely increasing the amount would not be enough to provide access to justice or to discourage frivolous litigation. Therefore, this paper proposes a solution to ensure that the indigent parties are not discouraged from filing a legitimate lawsuit just because of the fear of paying costs.

There is a ceiling of Rs. 3000 which can be imposed in case of vexatious litigation. A constant realistic amendment is needed in the amount every 10 years and especially now since the amount has remained unchanged since 1976. As a trivia, even the revision in 1976 took place after half a century from Rs. 1000 in 1922 to Rs. 3000 in 1976. Inflation has shot up by 2500% from 1976 which would mean the equivalent of Rs. 3000 then would be approximately Rs. 70,000.[25] However, even the said amount would not be enough given how costly the advocates' fees are in today's day and age. Rather, setting the ceiling at Rs. 1,50,000 would help tremendously in reducing frivolous litigation and would adequately compensate the successful party as well. The objective of setting the cap at a higher amount is to give a much-needed limited discretion to the courts as well and providing an avenue for the higher courts to not resort to inherent powers to provide reasonable compensation. By keeping it at merely Rs. 70,000 (the amount corrected to inflation), we run the risk of excluding

22 John F Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 The American University LR 1568-1636 <https://digitalcommons.wcl.american.edu/cgi/ viewcontent.cgi?article=1586&context=aulr> accessed 1 August 2021.
23 ibid.
24 Vasu Aggarwal, 'Creating Access Through Creative Costs in India' (2020) 15 NUALS LJ 67.
25 'Value of 1976 Indian Rupees Today' (*Inflation calculator*) <www.inflationtool.com/indian-rupee/1976-to-present-value> accessed 6 August 2021.

many middle-class people who win frivolous civil suits by spending quite a lot in lawyer's fees and other expenses. The suggested amount of Rs. 1,50,000 is merely indicative that there is a need for a higher amount in law to be more inclusive.

## ADDRESSING CONCERNS ARISING FROM THE SUGGESTED SOLUTION

After the said amendment, there is a possibility that the indigent plaintiffs hesitate to file even legitimate suits as this would involve paying a huge sum of money in case they lose, thus hampering access to justice. While Order 33 of the CPC allows for the exemption of court fees for plaintiffs who are considered as indigent by the court, this does not extend to the penalty imposed by under Section 35. This would make citizens lose their trust in the civil justice system which is not a desirable outcome. To rectify this, the creation of a 'fund' to pool the money, of which the successful party would be paid a reasonable amount on behalf of the indigent party. The remarkable thing about this fund is that it would be self-sustainable and independent of the government's grants. It would receive 5-10% of the amount awarded as cost in usual civil cases. The actual percentage (between 5 and 10) would be decided by the judge which would give them the much-needed discretion to allow payment that is reasonable. *For instance*, if A loses to B in a suit and B is awarded Rs. 80,000, then 10% i.e., Rs. 8,000 would be transferred to the fund. An amount from this pool of money would be redirected when an indigent person needs to pay the amount in some other case.

## CONCLUSION

In this paper, the author critically analysed the system of costs in India (*loser pays*) with that of the one in the USA (*American Rule*). The analysis was done keeping in mind the various goals which the costs seek to achieve i.e., preventing frivolous litigation and congestion in courts and access to justice. The paper highlighted how grossly inadequate the Indian system of costs is and how the existing provisions in CPC are infructuous.

In light of this, the paper suggested two practical changes in the law as regards costs to make justice more accessible. *One*, amending Section 35A to raise the ceiling of costs to Rs. 1,50,000 instead of the existing Rs. 3000. *Second*, creating a fund by redirecting 5-10% of the costs in every cost transaction and using it when an indigent person is on the losing side of the legal battle.

There is an inherent contradiction in the system of costs. If access to justice is given priority (by compensating people for the costs they incurred), then it runs the risk of discouraging people to file suits even in legitimate cases. However, on the other hand, if the losing party is not adequately made whole by way of costs, then there is a risk of frivolous litigation to harass the other party. Since it is impractical to solely go ahead with one of the above approaches, a middle path must be adopted in the Indian system of costs. The above mentioned suggestions adequately provide for this by balancing the vices and virtues of two contradictory theories.