



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 24.03.2025

Pronounced on: 01.07.2025

+ CS(COMM) 1222/2018

COMMUNICATION COMPONENTS ANTENNA INC.

.....Plaintiff

Through: Mr.Ankit Jain, Sr.Adv. with
Mr.Mohit Goel, Mr.Sidhant
Goel, Mr.Deepankar Mishra,
Mr.Aditya Goel, Mr.Aditya
Chauhan, Advs.

versus

ACE TECHNOLOGIES CORP. AND ORS.Defendants

Through: Mr.Shubham Kaushik, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

NAVIN CHAWLA, J

I.A.13482/2019

Preface

1. This application has been listed before us to answer the reference made by the learned Single Judge of this Court *vide* its Order dated 10.01.2023 (hereinafter referred to as “order of the reference”) passed in the captioned Suit/application.

2. The relevant extracts from the order of the reference, which would also indicate the question of law to be determined by this Bench, is as under:-

“1. The present application has been filed on behalf of the defendants under Order XXV Rule 1(1) of the Civil Procedure Code,



1908 (CPC) seeking a direction to the plaintiff to deposit a security of Rs. 8,00,00,000/- with this Court.

8. There is no dispute that in terms of the main provision of Rule 1(1) of Order XXV of the CPC, the Court has a discretion for directing the plaintiff to deposit security for costs in view of the use of the word 'may'. However, the proviso to Order XXV Rule 1(1) has been the subject matter of various judgments passed by the Coordinate Benches of this Court.

14. From the discussion above, there appears to be a clear inconsistency in the views expressed by different Coordinate Benches of this Court. On one hand, in Kiran Shoes (supra) and S.A. Brothers (supra), it has been observed that the proviso to Order XXV Rule 1(1) of the CPC is mandatory in nature. On the other hand, it has been observed in Millennium & Copthorne (supra) and Alberto Culver USA (supra) that the provisions of Order XXV Rule 1(1) of the CPC are not mandatory in nature and the Court has a discretion.

15. Counsels for both the sides agree that in view of divergent opinions expressed by different Benches of this Court and as a matter of judicial propriety, the present matter may be referred to a larger Bench of this Court, so that an authoritative judgment may be passed by the Court on the interpretation of Order XXV Rule 1(1) of the CPC.

16. Accordingly, the following questions are referred to a larger Bench of this Court:

(i) Whether it is mandatory for the court to direct the plaintiff residing outside India and not possessing any sufficient immovable property within India, to



furnish a security in terms of Order XXV Rule 1(1) of the CPC for payment of costs incurred or likely to be incurred by the defendant or whether the Court can exercise discretion in this regard?
(ii) Whether the proviso to Order XXV Rule 1(1) of the CPC is only applicable in respect of the suits relating to immovable property?

17. Let the matter be placed before Hon'ble the Chief Justice for constitution of a Larger Bench/Division Bench for consideration of the interpretation of Order XXV Rule 1(1) of the CPC."

(Emphasis Supplied)

3. From a reading of the above, it would be apparent that the learned Single Judge of this Court was of the opinion that there is a conflict of view expressed by the Coordinate Benches in *S.A. Brothers & Co. v. John Bartholomow & Sons Ltd.*, 2000 SCC OnLine Del 854, and *Kiran Shoes Manufacturers v. Welcome Shoes Pvt. Ltd.*, 2017 SCC OnLine Del 6590, on one hand, and in *Alberto-Culver USA Inc. v. Nexus Health & Home Care (P) Ltd.*, 2009 SCC OnLine Del 2818, and *Millennium & Copthorne International Limited v. Aryans Plaza Services Private Limited*, 2018 SCC OnLine Del 8260, on the other hand.

Submission of the learned senior counsel for the plaintiff:

4. The learned senior counsel for the plaintiff submits that as far as the costs in a suit before this Court is concerned, they are governed by the Delhi High Court (Original Side) Rules, 2018 (hereinafter referred to as the 'DHC Rules'). He submits that Rule 1(i) in Chapter XXIII of the DHC Rules provides that it is only where the Court considers that



any party is abusing the process of the Court or is in any manner proceeding in a dilatory, vexatious or *mala fide* manner or is abusing the process of the Court, that the Court shall require the delinquent party to make deposit/upfront payment of such costs as the Court deems appropriate. He submits that the DHC Rules, having been framed in exercise of the powers under Section 129 of the Code of Civil Procedure, 1908 (in short, 'CPC'), would prevail over the CPC. In support, he places reliance on the Judgment of the Supreme Court in ***Iridium India Telecom Ltd. v. Motorola Inc.***, (2005) 2 SCC 145.

5. He further submits that the Proviso to Order XXV Rule 1(1) of the CPC is not a separate or independent provision. By not incorporating it in the DHC Rules or even in Section 35 of the CPC, as amended by the Commercial Courts Act, 2015 (in short, 'the CC Act'), the said Proviso would not be applicable any further in commercial disputes of specified nature, like the present suit, and even generally where the DHC Rules apply. In support, he places reliance on the Judgments of Supreme Court in ***P. Sambamurthy & Ors. v. State of A.P. & Anr.***, (1987) 1 SCC 362; ***Dwarka Prasad v. Dwarka Das Saraf***, (1976) 1 SCC 128; and ***Forum for People's Collective Efforts & Anr. v. State of W.B. Anr.***, (2021) 8 SCC 599.

6. He further submits that the Proviso to Order XXV Rule 1(1) of the CPC, in any case, does not make it mandatory for the Court to pass an order granting security of costs in all matters. The only mandatory nature of the provision is that the Court must pass an order, as provided in the main provision of Order XXV Rule 1(1) of the CPC,



of either granting or rejecting the security of costs. The mandatory nature of the proviso does not prevent the Court from refusing to direct the plaintiff to secure the costs of the defendant, in case the facts so require. In the alternative, he submits that merely because the Proviso uses the word ‘*shall*’, would not make it mandatory for the Court to pass an order demanding security for costs from the plaintiff. There being no consequence of such an order not being passed, the word ‘*shall*’ will, in fact, have to be read as ‘*may*’, making it directory in nature. In support, he places reliance on the Judgment of Supreme Court in ***Shailesh Dhairyawan v. Mohan Balkrishna Lulla***, (2016) 3 SCC 619.

7. He submits that, even otherwise, to consider the said provision as mandatory, can defeat the ends of justice rather than furthering the objective of the enactment. The same, therefore, has to be read as directory. In support, he places reliance on the Judgments of Supreme Court in ***Delhi Transport Corpn. v. D.T.C. Mazdoor Congress & Ors.***, 1991 Supp (1) SCC 600, and ***Deewan Singh & Ors. v. Rajendra Pd. Ardevi & Ors.***, (2007) 10 SCC 528.

8. Placing reliance on Article 3 and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the ‘TRIPS Agreement’), he submits that India being a signatory of the same, has assured that it would accord to the national of the other member State the same treatment as it accords to its own national with respect to protection of Intellectual Property Rights. He submits that, therefore, if it is not mandatory for an Indian party to



secure the costs of the defendant while enforcing its Intellectual Property Rights, it would equally not be mandatory for a foreign party to secure such costs. He submits that, therefore, the Proviso to Order XXV Rule 1(1) of the CPC has to be read down to be in accordance with the obligations under the TRIPS Agreement.

9. He submits that even assuming that the above submissions do not find favour with this Court, the Court in exercise of its powers under Proviso to Order XXV Rule 1(1) of the CPC can determine the just costs, which the plaintiff may need to secure in the facts of a given case. These costs can be totally nominal and need not be an actual determination of costs that the defendant is likely to incur in defending such a suit. He submits that while exercising its powers, the Court would take into account the *prima facie* merit of the claim made by the plaintiff in the suit. In support, he places reliance on the Judgments in *S.A. Brothers* (supra); *Kiran Shoes Manufacturers* (supra); and, *Revlon Inc. & Ors. v. Kemco Chemicals & Ors.*, 1987 SCC OnLine Cal 39.

10. He submits that the Proviso to Order XXV Rule 1(1) of the CPC is applicable only where the suit is filed for a claim on an immovable property. In support, he places reliance on the Judgment in *Millennium & Copthorne International Limited* (supra).

Submission of the learned counsel for the defendants:

11. On the other hand, the learned counsel for the defendants, placing reliance on the Judgments of *Revlon Inc.* (supra), *Hearst Corporation v. Dalal Street Communications Ltd.*, 1995 SCC OnLine



Cal 231, and ***Gotham Entertainment Group LLC & Ors. v. Diamond Comics (P) Ltd.***, 2009 SCC OnLine Del 4383, submits that a bare reading of the Proviso to Order XXV Rule 1(1) of the CPC would indicate that it is mandatory for the court to direct the plaintiff, who has no property in India, to secure the costs of the defendant. He submits that this is the entire purpose of the Proviso and any interpretation to the contrary would, in fact, defeat the said provision.

12. Placing reliance on the Judgments of Supreme Court in ***Hiralal Rattanlal v. State of U.P. & Anr.***, (1973) 1 SCC 216, and ***S. Sundaram Pillai & Ors. v. V.R. Pattabiraman & Ors.***, (1985) 1 SCC 591, he submits that the purpose of the Proviso is to take out a part of the main Section for special treatment. He submits that, therefore, while Order XXV Rule 1(1) of the CPC, in the main provision vests a discretion in the Court to direct the plaintiff to secure the cost of the defendant, the Proviso makes it mandatory for the Court to so direct. Any other interpretation of the Proviso would, therefore, defeat its purpose.

13. He submits that the Proviso being expressed in a negative language, it is ordinarily regarded as mandatory in nature. In support, he places reliance on the Judgment of Supreme Court in ***Vijay Narayan Thatte & Ors. v. State of Maharashtra & Ors.***, (2009) 9 SCC 92.

14. He submits that reliance of the plaintiff on Rule 1(1) of Chapter XXIII of the DHC Rules and/or Section 35 of the CPC, as applicable to a commercial dispute of a specific value, is unfounded, inasmuch as



these provisions do not detract from the mandatory nature of the Proviso to Order XXV Rule 1(1) of the CPC. These provisions are distinct and in no manner in conflict with the mandate of the Proviso to Order XXV Rule 1(1) of the CPC.

15. He submits that the question of interpreting a provision by applying the general rules of interpretation can arise only where there is some ambiguity in the provision itself. Where the provision is clear and unambiguous, rules of interpretation cannot be applied to create ambiguity in the same. In support, he places reliance on the Judgments of Supreme Court in *R.S. Nayak v. A.R. Antulay*, (1984) 2 SCC 183, *Grasim Industries Ltd. v. Collector of Customs*, (2002) 4 SCC 297, and *Shiv Shakti Coop. Housing Society v. Swaraj Developers & Ors.*, (2003) 6 SCC 659.

16. He submits that as far as the reliance of the plaintiff on TRIPS Agreement is concerned, the Government in discharge of its obligations under the same, has carried out necessary amendments in the laws relating to Intellectual Property Rights. No such amendment, however, has been made as far as the Proviso to Order XXV Rule 1(1) of the CPC is concerned. The same clearly shows that the obligations under the TRIPS Agreement have no relevance as far as the mandate under the said provision is concerned.

Analysis and findings:

17. To answer the reference, we would first quote Order XXV of the CPC hereinbelow:-

“1. When security for costs may be required from plaintiff—



(1) At any stage of a suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff, for reasons to be recorded, to give within the time fixed by it security for the payment of all costs incurred and likely to be incurred by any defendant:

Provided that such an order shall be made in all cases in which it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are, residing out of India and that such plaintiff does not possess or that no one of such plaintiffs possesses any sufficient immovable property within India other than the property in suit.

(2) Whoever leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India within the meaning of the proviso to sub-rule (1).

2. Effect of failure to furnish security.—

(1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security; costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.”

18. From a reading of the above provision, it would be apparent that



the intent of the legislature is to curb vexatious litigation and to protect the defendant, who would be forced to defend such a litigation by incurring costs. The protection granted to the defendant is in form of security for costs from the plaintiff, where the court either finds that the Suit is *prima facie* vexatious with the plaintiff not having a real chance to succeed, or where the plaintiff is residing out of India and does not possess any sufficient immovable property within India other than the property in the Suit. Rule (2) of Order XXV of the CPC further states that where the plaintiff, on being so directed, fails to furnish the security for costs of the defendant, the Suit, unless the plaintiff is permitted to withdraw the same, shall be dismissed.

Repugnancy with the DHC Rules

19. We shall now first consider if the provisions of the DHC Rules have had any effect on the mandate of Order XXV of the CPC, especially the Proviso to Rule 1(1) thereof. The learned senior counsel for the plaintiff has asserted that in view of the Rule 1(i) in Chapter XXIII of the DHC Rules, Order XXV Rule 1 of the CPC ceases to apply.

20. We would first quote Rule 1 of Chapter XXIII of the DHC Rules:-

**“CHAPTER XXIII
COSTS & TAXATION OF COSTS
1. Power of Court/ Registrar General/
Registrar to impose cost.-
(i) If the Court considers any party abusing the
process of Court or in any manner considered
dilatory, vexatious, mala fide and abuse of
process by them, the Court shall require the**



delinquent party to make deposit / payment upfront, in the manner directed by Court of such costs as the Court deems appropriate, before proceeding further in the matter. For the purpose of this Chapter, the expression “Court” shall mean and include the Court, the Registrar General and the Registrar, as the case may be.

(ii) In addition to exercise of powers under Rule 1(i) above, the Court may impose suitable costs upon any party at any stage of the proceedings, including at the stage of filing any interlocutory application; framing of issues; determining order and conduct of recording evidence etc., if it considers imposition of such costs just, necessary and proper, according to the proceedings in the matter.

(iii) While determining costs, the Court may also take into consideration factors, such as, inconvenience caused to parties/ witnesses/ other persons connected with the proceedings; previous conduct of parties; the stage at which the offending conduct is committed by the delinquent party; the probability and likelihood of success of vexatious efforts of the delinquent party; the relevancy of number and nature of witnesses; questions (including depositions by way of examination-in-chief) put to the witnesses and such other conduct as the Court considers inappropriate.

(iv) Failure of the said party in making payment/ deposit of costs may result in all consequences provided in the Code for defaults and adverse orders being passed against the said party, as the Court deems appropriate and proper, besides enabling the other party to file execution proceedings against the delinquent party for recovery of said costs.”

21. A reading of the above provision would show that it is aimed to empower the Court to direct a party abusing its process or in any



manner proceeding in a dilatory, vexatious, *mala fide* manner, to make upfront deposit/payment of such costs as the Court deems appropriate. In addition, the Court may impose suitable costs upon any party at any stage of the proceedings, if it considers imposition of such costs just, necessary and proper, according to the nature of proceedings in the matter. While determining the costs, the Court may also take into consideration factors, such as, inconvenience caused to parties, witnesses, and other persons connected with the proceedings, previous conduct of the parties, the stage at which the offending conduct is committed by the delinquent party, the probability and likelihood of success of vexatious efforts of the delinquent party, the relevance of number and nature of witnesses etc.. Rule 2 of Chapter XXIII of the DHC Rules further empowers the Court to award costs in addition to those provided in Rule 1, after taking into account factors such as the actual fees paid to the advocates/senior advocates, actual expenses for publication, citation, etc..

22. A reading of the above provision would show that it operates in a totally different field when compared to Order XXV of the CPC. In fact, Chapter XXIII of the DHC Rules is more akin to Sections 35, 35A, and 35B of the CPC. While Order XXV of the CPC is aimed at securing recovery of costs that a defendant may incur in defending a vexatious Suit, Rule 1 of Chapter XXIII of the DHC Rules is aimed at addressing specific instances of perceived misconduct by a party to the Suit in relation to the proceedings of the Suit. Therefore, there is no repugnancy between Order XXV Rule 1(1) of the CPC and Rule



1(i) of Chapter XXII of the DHC Rules.

23. Section 129 of the CPC, therefore, cannot be pressed into service by the plaintiff to contend that Rule 1 of Order XXV of the CPC no longer applies to this Court in view of the Rule 1(i) of Chapter XXIII of the DHC Rules. In ***Iridium India Telecomm Limited*** (supra), the Supreme Court was considering whether the amended provision of Order VIII Rule 1 of the CPC would not apply to the suits on the Original Side of the High Court of Bombay and whether such suits would continue to be governed by the High Court Original Side Rules. The said judgment, therefore, can have no application to the facts of the present case.

24. The learned senior counsel for the plaintiff has further contended that the Proviso is not a separate or independent enactment, and since the High Court has not cautiously incorporated a similar provision in the DHC Rules, the same would cease to operate. While we shall, in later part of our Judgment, consider the effect of a Proviso, however, at this stage itself, we may again reiterate that it is only in cases of repugnancy between the DHC Rules and the CPC, that the DHC Rules shall prevail over the CPC. In absence of any repugnancy, the provisions of the CPC and DHC Rules co-exist and continue to govern the Original Side jurisdiction of this Court.

Section 35 of the CPC as substituted by the CC Act

25. Similarly, Section 35 substituted into the CPC by way of the CC Act, also has no effect as far as the powers and the duty cast on a Court under Order XXV Rule 1 of the CPC are concerned. In fact, it is



interesting to note here that Order XXV of the CPC has neither been deleted nor amended by the CC Act, meaning thereby, it remained operative and continues to apply to Commercial Suits of a specified value, notwithstanding the substitution of Section 35 of the CPC.

26. In this regard, sub-Section (1) of Section 16 of the CC Act is relevant and is reproduced hereinbelow:-

“Section 16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes.

(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.

(2) The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

(3) Where any provision of any Rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 1908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.”

27. A reading of the above provision would show that the provisions of the CPC, as amended by the CC Act, shall be applicable in the trial of a suit in respect of a commercial dispute of a Specified Value. As there is no amendment made to Order XXV of the CPC by



the CC Act, the same shall apply, in its original form, to such Suits.

Interpretation of Order XXV of the CPC

28. Now this brings us to the interpretation of Rule 1 of Order XXV of the CPC.

29. A reading of the said provision would show that while the sub-Rule 1 of Rule 1 of Order XXV of the CPC vests a discretion in the Court, either on its own motion or on an application of any defendant, however, for reasons to be recorded, to direct the plaintiff to give, within the time fixed by it, security for the payment of all costs incurred and likely to be incurred by any defendant, the Proviso thereto casts a duty on the Court to make such an order in a Suit in which it appears to the Court that a sole plaintiff is or where there are more plaintiff than one, that all the plaintiffs are, residing out of India and do not possess any sufficient immovable property within India, other than the property in suit.

30. The difference between the discretion vested in sub-Rule 1 of Rule 1 of Order XXV of the CPC in the main provision, is signified by the use of the word ‘*may*’, while the duty cast on the Court in the Proviso thereto is signified by the use of the word ‘*shall*’.

31. The use of the word ‘*shall*’ raises a presumption that a particular provision is imperative. Such presumption may be rebutted by other considerations, such as object and scope of the enactment and the consequences following from such construction. Keeping in view the object of the Proviso to Order XXV Rule 1(1) of the CPC,



reference to the judgment of the Supreme Court in ***Vijay Dhanuka & Ors. v. Najima Mantaj & Ors.***, (2014) 14 SCC 638, would be most appropriate, wherein, while interpreting Section 202 of the Code of Criminal Procedure, 1973, the Supreme Court explained the effect of use of the word “shall” in the provision, as under:-

“12..... The word “shall” is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word “shall” in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression “shall” and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate.”

32. In ***Deewan Singh*** (supra), while reiterating that the expression ‘shall’ ordinarily implies the imperative character of the law, it was held that where a power is conferred upon a public authority coupled with discretion, even the word ‘may’, which denotes discretion, should be construed to mean a command. In the present case, there is a duty cast on the court to secure the defendant against the costs likely to be incurred by the defendant in defending a Suit filed by a plaintiff having no immoveable property in India other than the property in the Suit. This duty, therefore, makes the passing of an order under Proviso to Order XXV Rule 1(1) of the CPC, mandatory.



33. Therefore, on a reading of the above provisions, that is, sub-Rule 1 of Rule 1 of Order XXV of the CPC and its Proviso, it is apparent that the Proviso is couched in a mandatory form and leaves no discretion with the Court not to demand security for costs, likely to be suffered by the defendant, from the plaintiff in case a plaintiff not residing in India does not possess any sufficient immovable property other than the property in the Suit, within India.

34. Though, the learned senior counsel for the plaintiff has sought to contend that in spite of the use of the word ‘*shall*’ in the Proviso, the Proviso should to be construed to be discretionary by applying the doctrine of purposive interpretation and to do away with absurdity, which in the submission of the learned senior counsel for the plaintiff shall be caused in the given economic reality of trans-border business, we do not find any force in the same. The golden rule of interpretation is that if the provision is unambiguous and clear, literal meaning should be given to it. Reference in this regard may be had to **R.S. Nayak** (supra), **Grasim** (supra) and **Shiv Shakti** (supra).

35. The submission of the leaned senior counsel for the plaintiff that with the opening of the economy and trans-border business, the strict application of the Proviso would lead to hardship, cannot be a ground to do away with the literal interpretation of the provision. Reference in this regard may be had to the Judgment of Constitutional Bench of the Supreme Court in **CIT v. Keshab Chandra Mandal**, 1950 SCC 205, whereby it was held as under:

“27.There is an argument based on hardship or inconvenience. Hardship or



inconvenience cannot alter the meaning of the language employed by the legislature if such meaning is clear on the face of the statute or the rules.....”

36. Relying on the Judgment of the Supreme Court in **Keshab Chandra Mandal** (supra), the Supreme Court in **Rohitash Kumar & Ors. v. Om Prakash Sharma & Ors.**, (2013) 11 SCC 451, reiterated the said principle of interpretation by holding as under:

“23. There may be a statutory provision, which causes great hardship or inconvenience to either the party concerned, or to an individual, but the court has no choice but to enforce it in full rigour. It is a well-settled principle of interpretation that hardship or inconvenience caused cannot be used as a basis to alter the meaning of the language employed by the legislature, if such meaning is clear upon a bare perusal of the statute. If the language is plain and hence allows only one meaning, the same has to be given effect to, even if it causes hardship or possible injustice. [Vide CIT (Ag) v. Keshab Chandra Mandal [1950 SCC 205 : AIR 1950 SC 265] and D.D. Joshi v. Union of India [(1983) 2 SCC 235 : 1983 SCC (L&S) 321 : AIR 1983 SC 420].]

24. In Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661] (SCC p. 685, para 43) it was observed by a Constitution Bench of this Court that, if there is any hardship, it is for the legislature to amend the law, and that the court cannot be called upon to discard the cardinal rule of interpretation for the purpose of mitigating such hardship. If the language of an Act is sufficiently clear, the court has to give effect to it, however inequitable or unjust the result may be. The words, “dura lex sed lex” which mean “the law is hard but it is the law” may be used to sum up the situation. Therefore, even if a statutory provision



causes hardship to some people, it is not for the court to amend the law. A legal enactment must be interpreted in its plain and literal sense, as that is the first principle of interpretation.

(Emphasis Supplied)

37. Even otherwise, the Proviso is intended to protect an Indian party, who may be faced with a vexatious litigation by a foreign party and may remain unprotected even for recovery of costs and damages for such vexatious litigation in absence of the plaintiff not possessing sufficient immovable property in India other than the property in the Suit. It is not for this Court to, therefore, make a comparative assessment of hardship of the plaintiff and the defendant, in order to place an interpretation on the provision. This is a function left to the legislature.

38. In *Dwarka Prasad* (supra), the Supreme Court held that as a general principle, a Proviso cannot expand or limit the principal provision, however, sometimes a Proviso is engrafted by an apprehensive draftsman to remove a possible doubt, to make matters plain, and to light up the ambiguous edges. A Proviso must be limited to the subject matter of the enacting clause and must *prima facie* be read and considered in relation to the principal matter to which it is a proviso and not as a separate or independent enactment. The whole Section must be read, inclusive of the Proviso, in such a manner, that they mutually throw light on each other and result in harmonious constructions. We may quote from the judgment as under:-

“18. We may mention in fairness to Counsel that the following, among other decisions,



were cited at the Bar bearing on the uses of provisos in statutes: *CIT v. Indo-Mercantile Bank Ltd.*; *Ram Narain Sons Ltd. v. Asstt. CST*; *Thompson v. Dibdin*; *Rex v. Dibdin and Tahsildar Singh v. State of U.P.*. The law is trite. A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment. “Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context” (*Thompson v. Dibdin*, 1912 AC 533). **If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.**

“The proper course is to apply the broad general Rule of construction which is that a section or enactment must be construed as a whole, each portion throwing light if need be on the rest.

The true principle undoubtedly is, that the sound interpretation and meaning of the statute, on a view of the enacting clause, saving clause, and proviso, taken and construed together is to prevail. (Maxwell on Interpretation of Statutes, 10th Edn., p. 162)”

(Emphasis Supplied)

39. In *S. Sundaram Pillai* (supra), the purpose which a Proviso



may render, was explained as under:-

“43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly and manifestly well established. To sum up, a proviso may serve four different purposes:

(1) qualifying or excepting certain provisions from the main enactment:

(2) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable:

(3) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and

(4) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision.”

40. In the present case, a reading of Rule 1(1) of Order XXV of the CPC along with its Proviso leaves no manner of doubt that while it is discretion of a Court in a general suit to seek security for the costs likely to be incurred by a defendant in the suit, from the plaintiff, it is mandatory for the Court to seek such security where the plaintiff resides out of India and does not possess sufficient immovable property within India other than the property in suit.

41. The Proviso being mandatory in nature has also been the consistent interpretation placed by the Courts, and regard may be had to Judgments in ***S.A. Brothers and Co.*** (supra), ***Gotham Entertainment Group*** (supra), ***Kiran Shoes Manufacturer*** (supra), and ***Millennium & Copthorne International Limited*** (supra), as far as this Court is concerned; ***Revelon Inc.*** (supra), and ***Hearst***



Corporation (supra), of the Calcutta High Court; and *Alpha Oil International v. m.t. Chem Lily*, 2014 SCC OnLine Bom 4838, and *FAL Shipping Co. Ltd. v. Kassiope Maritime Co. Ltd.*, (2014) 5 Bom CR 566, of the Bombay High Court.

42. The only inconsistent view taken to the above, is in *New Machine Co. Ltd. v. S.B. Air Controls (P) Ltd.*, 2009 SCC OnLine Del 335, and *Alberto-Culver USA Inc.* (supra) (which are of the same learned Single Judge of this Court). In these judgments, however, neither the earlier view of this Court in *S.A. Brothers* (supra) was considered, nor was the Proviso to Order XXV Rule 1(1) of the CPC appreciated. In fact, another learned Single Judge of this Court in *Kiran Shoes Manufacturer* (supra), therefore, had observed that the Judgment in *Alberto-Culver USA Inc.* (supra), may not be laying down the correct law, by observing as under:-

“13. The decision of this court in Alberto-Culver USA Inc (supra) does not address the language of the proviso to Order XXV Rule 1 of the CPC; apparently, the decision turns on the language of the main provision itself. Undisputedly, it is not mandatory to direct that the plaintiff provide security for costs in each and every case. On the contrary, the court is required to record reasons in writing if the court feels that such an order is necessary. However, the proviso is couched in affirmative terms. It is applicable only in cases where the plaintiff(s) are overseas entities and do not possess sufficient immovable assets in India. If these two conditions are satisfied then the defendant would have to be secured for the costs that it may incur. This is also the view expressed by the Coordinate Bench of this court in S.A. Brothers and Co. v. John Bartholomew & Son Ltd. : 2000 (88) DLT 425.



The said decision was also not noticed by this court in Alberto-Culver USA Inc (supra)."

Nature of Suit

43. Having held that passing of an order for security of costs under Proviso to Order XXV Rule 1(1) of the CPC, is mandatory, we shall now consider the nature of the Suits to which the Proviso applies.

44. The learned senior counsel for the plaintiff has submitted that even assuming that it is mandatory for a Court to demand security for costs in terms of the Proviso to Rule 1(1) of Order XXV of the CPC, such security is to be demanded only where a suit relates to an immovable property. In support of this submission, he has placed reliance on the Judgment of this Court in ***Millennium & Copthorne International Limited*** (supra).

45. We would first quote the reasoning given by the learned Single Judge in ***Millennium & Copthorne International Limited*** (supra) for reaching a conclusion that a Proviso applies only to a suit for an immovable property, as under:-

"43. A literal reading of Order XXV Rule 1 and its proviso does initially indicate that while the sub-Rule, by use of the word 'may', vests a discretion in the Court whether to order the plaintiff to give security for payment of costs or not, the proviso thereto, by use of the word 'shall', does not leave the Court with any discretion where the conditions in which the proviso applies are attracted. However, what none of the judgments aforesaid appear to notice, is that while sub-Rule (1) refers to 'a suit', whatsoever may be the claim therein, the proviso thereto refers to 'all cases in which the plaintiff is residing out of India and does not possess any sufficient immovable property



within India other than the property in suit'. Such language of the proviso conveys no other meaning than, that the same applies to cases subject matter whereof is immovable property. Though the word 'property' in the expression 'property in suit' is not qualified by the word 'immovable' but the word 'immovable' is found to have been used just prior thereto and the only interpretation can be that the expression 'property in suit' also refers to immovable property in suit. Thus, the proviso applies only to cases subject matter whereof is immovable property and not to cases subject matter whereof is not immovable property. Admittedly, the subject matter of the present suit is trade marks which though generally are referred to as 'intellectual property' but are certainly not immovable property. The fact that the trade marks in the present case are used in the context of immovable property also does not make the present suit as concerning any immovable property."

46. We tend to agree with the above observation of the learned Single Judge. The Proviso uses the words "*plaintiffs possess any sufficient immovable property within India **other than** the property in suit*". The use of the word '*other than*' clearly signifies that other than the immovable property involved in the suit, the plaintiff does not possess any immovable property in India. Therefore, for the Proviso to come into operation, the suit must be in relation to a claim on an immovable property.

Quantum of Costs

47. The learned senior counsel for the plaintiff has further contended that even if the Proviso to Rule 1 (1) of Order XXV of the CPC is held to be mandatory for a Court to pass an order seeking security for costs, there is still discretion vested in Court on the



quantum of such costs. We agree with this interpretation.

48. Sections 35, 35A, and Section 35B of the CPC governs the regime of costs. They are reproduced hereinunder:-

“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 costs of an 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.”

“35A. 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 on the ground that the claim or defence or 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 object or by the party by whom such claim or defence has been put forward, of cost 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 its pecuniary jurisdiction, whichever amount is



less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887 (9 of 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, are 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 two hundred and fifty rupees and not exceeding those limits by more than one 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.”

“35B. 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 an 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 defendant 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 subsection (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."

49. Similarly, Section 35 of the CPC, as applicable to the commercial disputes of a specified value, reads as under:-

"35. Costs—

(1) In relation to any commercial dispute, the Court, notwithstanding anything contained in any other law for the time being in force or Rule, has the discretion to determine:

- (a) whether costs are payable by one party to another;*
- (b) the quantum of those costs; and*
- (c) when they are to be paid.*

Explanation.-- For the purpose of clause (a), the expression costs shall mean reasonable



costs relating to--

(i) the fees and expenses of the witnesses incurred;

(ii) legal fees and expenses incurred;

(iii) any other expenses incurred in connection with the proceedings.

(2) If the Court decides to make an order for payment of costs, the general rule is that the unsuccessful party shall be ordered to pay the costs of the successful party:

Provided that the Court may make an order deviating from the general rule for reasons to be recorded in writing."

50. In ***Vinod Seth v. Devinder Bajaj***, (2010) 8 SCC 1, while analysing Order XXV Rule 1 of the CPC, the Supreme Court emphasised on the ambit and scope of the said provision and has held that the same does not empower the Court to demand security of damages from the plaintiff. The Court also explained the governing of the imposition of costs, as under:-

"25. Order 25 Rule 1 of the Code provides that at any stage of a suit, the court may either on its own motion or on the application of any defendant order the plaintiff for reasons to be recorded, to give security for the payment of all costs incurred or likely to be incurred by the defendant.

26. But the Code nowhere authorises or empowers the court to issue a direction to a plaintiff to file an undertaking to pay damages to the defendant in the event of being unsuccessful in the suit. The Code also does not contain any provision to assess the damages payable by a plaintiff to the defendant, when the plaintiff's suit is still pending, without any application by the defendant, and without a finding of any breach or wrongful act and without an inquiry into the quantum of damages. There is also no contract



between the parties which requires the appellant to furnish such undertaking. None of the provisions of either the TP Act or the Specific Relief Act or any other substantive law enables the court to issue such an interim direction to a plaintiff to furnish an undertaking to pay damages. In the absence of an enabling provision in the contract or in the Code or in any substantive laws a court trying a civil suit, has no power or jurisdiction to direct the plaintiff, to file an affidavit undertaking to pay any specified sum to the defendant, by way of damages, if the plaintiff does not succeed in the suit. In short, law does not contemplate a plaintiff indemnifying a defendant for all or any losses sustained by the defendant on account of the litigation, by giving an undertaking at the time of filing a suit or before trial, to pay damages to the defendants in the event of not succeeding in the case.

45. Before concluding, it is necessary to notice the reason why the High Court was trying to find some way to protect the interests of the defendants, when it felt that they were being harassed by the plaintiff. It made the impugned order because it felt that in the absence of stringent and effective provision for costs, on the dismissal of the suit, it would not be able to compensate the defendants for the losses/hardship suffered by them, by imposing costs. If there was an effective provision for levy of realistic costs against the losing party, with reference to the conduct of such party, the High Court, in all probability would not have ventured upon the procedure it adopted. This draws attention to the absence of an effective provision for costs which has led to mushrooming of vexatious, frivolous and speculative civil litigation.

46. The principle underlying levy of costs was explained in Manindra Chandra Nandi v. Aswini Kumar Acharjya [ILR (1921) 48 Cal



427] thus: (ILR pp. 440-41)

“... We must remember that whatever the origin of costs might have been, they are now awarded, not as a punishment of the defeated party but as a recompense to the successful party for the expenses to which he had been subjected, or, as Lord Coke puts it, for whatever appears to the Court to be the legal expenses incurred by the party in prosecuting his suit or his defence. ... The theory on which costs are now awarded to a plaintiff is that default of the defendant made it necessary to sue him, and to a defendant is that the plaintiff sued him without cause; costs are thus in the nature of incidental damages allowed to indemnify a party against the expense of successfully vindicating his rights in court and consequently the party to blame pays costs to the party without fault. These principles apply, not merely in the award of costs, but also in the award of extra allowance or special costs. Courts are authorised to allow such special allowances, not to inflict a penalty on the unsuccessful party, but to indemnify the successful litigant for actual expenses necessarily or reasonably incurred in what are designated as important cases or difficult and extraordinary cases.”

47. *In Salem Advocate Bar Assn. (II) v. Union of India [(2005) 6 SCC 344] this Court after noticing that the award of costs is in the discretion of the court and that there is no upper limit in respect of the costs awardable under Section 35 of the Code, observed thus: (SCC pp. 369-70, para 37)*

“37. Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a



large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow."

48. *The provision for costs is intended to achieve the following goals:*

(a) It should act as a deterrent to vexatious, frivolous and speculative litigations or defences. The spectre of being made liable to pay actual costs should be such, as to make every litigant think twice before putting forth a vexatious, frivolous or speculative claim or defence.

(b) Costs should ensure that the provisions of the Code, the Evidence Act and other laws governing procedure are scrupulously and strictly complied with and that parties do not adopt delaying tactics or mislead the court.

(c) Costs should provide adequate indemnity to the successful litigant for the expenditure incurred by him for the litigation. This necessitates the award of



actual costs of litigation as contrasted from nominal or fixed or unrealistic costs.

(d) The provision for costs should be an incentive for each litigant to adopt alternative dispute resolution (ADR) processes and arrive at a settlement before the trial commences in most of the cases. In many other jurisdictions, in view of the existence of appropriate and adequate provisions for costs, the litigants are persuaded to settle nearly 90% of the civil suits before they come up to trial.

(e) The provisions relating to costs should not however obstruct access to courts and justice. Under no circumstances the costs should be a deterrent, to a citizen with a genuine or bona fide claim, or to any person belonging to the weaker sections whose rights have been affected, from approaching the courts.”

51. A reading of the above provisions would show that it is at the discretion of the Court to award costs and also the quantum thereof, depending on the facts of each case and keeping in view the above principles enunciated by the Supreme Court. Therefore, while exercising its power and duty under the Proviso to Rule 1(1) of Order XXV of the CPC, the Court necessarily has to be vested with an equivalent discretion to determine, based on the facts of the case before it, as to the quantum of the security for costs that needs to be given by the plaintiff. For purposes of determining the quantum of security for costs, the Court will be guided by the principles as laid down by the above provisions of the CPC and the CC Act, as the case may be.

52. In *S.A. Brothers* (supra), the discretion of the Court *qua* the



quantum of the costs was duly recognized, and we agree with the same.

Effect of TRIPS Agreement

53. This now brings us to the submission of the learned senior counsel for the plaintiff on the effect of the TRIPS Agreement on the interpretation to be placed to the Proviso to Rule 1(1) of Order XXV of the CPC.

54. As we have already held that the said Proviso applies only to a suit in relation to an immovable property, we need not dwell further into this issue.

Conclusion and findings

55. In view of the above, the reference is answered as under:-

- a) Where the plaintiff is not a resident of India and does not possess any sufficient immovable property within India, other than the property in suit, it is mandatory for the Court to pass an order directing the plaintiff to give security for the payment of all costs incurred or likely to be incurred by any defendant;
- b) The Proviso to Rule 1(1) of Order XXV of the CPC is applicable only in respect to the suits relating to immovable property;
- c) While it is mandatory for the Court to pass an order directing the plaintiff to give security for the payment of costs where Proviso to Rule 1(1) of Order XXV of the CPC applies, the



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quantum of such costs is at the discretion of the Court, which it must exercise depending on the facts of each case.

56. Answering the reference in the above terms, we direct that, subject to the orders of Hon'ble the Chief Justice, the application be now listed before the Roster Bench on the next date fixed in the suit.

NAVIN CHAWLA, J

SHALINDER KAUR, J

JULY 01, 2025/rv/VS