

# Chapter 13

## Shifting Sands and Pyrrhic Victories – The Case of India

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### 13.1 Introduction

Court fees have always been a controversial subject in India. Prior to the advent of British rule, the concept of court fees was unknown. Court fees were first levied in the eighteenth century by regulations applicable in the then provinces of Madras, Bengal and Bombay, since which time they have become an important feature of the administration of civil justice in India. The Bengal regulation, in particular, recorded in its preamble that the justification for the imposition of court fees was that it would discourage frivolous litigation. It is interesting to note that Lord Macaulay (the first Law Member in the British Governor-General's Council) considered this statement indefensible and described it as the “most eminently absurd preamble that was ever drawn.”<sup>1</sup> Subject to his caveat, court fees were conceived, in the eighteenth century as restraints on frivolous litigation, but have been increasingly regarded by the States, in whose power it lies to legislate on them, as sources of revenue. Court fees are levied on the value of the subject matter in dispute, and are thus called “ad valorem” fees.

India has since had a long line of legislative and judicial thought behind the principle that access to justice should not be hindered by an excessive levy of court fees, keeping in mind constitutional dictates as well as

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<sup>1</sup> Quoted in the 128th Report of the Law Commission of India on the Costs of Litigation in India (1988) available at <http://lawcommissionofindia.nic.in/101-169/Report128.pdf>.

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the principle that it is the duty of the state to provide a system of justice administration<sup>2</sup> whose costs should be met out of general appropriations (taxpayer funding) and not through the levy of court fees alone. In fact, when the question was referred to the Law Commission of India as to whether court fees should be enhanced to discourage frivolous and vexatious litigation, that Commission vehemently argued against such a move, listing legislative and judicial reasons as to why such a measure “cannot, and has never been accepted as a reason in the last 150 years.”<sup>3</sup>

### 13.2 The Framework of Court Fee Rules – Both Central and State

The Indian Constitution of 1950 divides all legislative competences into three lists: first, subjects that the Central Government, through the Union Parliament can legislate upon for the whole country; second, subjects that each state of the Union can legislate upon; and third, subjects upon which both the Union and the States enjoy concurrent competences. Court fees (except at the Supreme Court level) are a subject that the Constitution exclusively empowers the various states to regulate. Therefore, any discussion of cost and fee allocation needs to keep in mind that there are a plethora of different rules operating in India – the pre-Independence and pre-Constitution central “Suits Valuation Act, 1870” remains in force but several states have opted out of its application, exercising their constitutional competence to enact their own rules for valuation of suits. Court fees may therefore be governed by either the Suits Valuation Act of 1870, or specific enactments in force in particular states, or a combination thereof (if a State has chosen to apply the Suits Valuation Act after making desired amendments.)

The fact that states have discretion in fixing court fees has led the Supreme Court of India to observe that there are vast differences in the scales of court fees charged in the different states of the country (in some cases it can be as high as 10% of the value of the suit) and has called for standardizing them.<sup>4</sup> The Law Commission submitted its 220th Report in

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<sup>2</sup> Since any analysis of cost and fee allocation is intrinsically tied in with the structure of the Indian judiciary, it is worth taking a quick moment to understand the hierarchy of the Indian courts. India has a quasi-federal structure with 29 States further sub-divided into about 601 administrative Districts. The Judicial system however has a unified structure, with the Supreme Court, the High Courts and the lower Courts comprising a single Judiciary. Each District has a District Court, and each State, a High Court. Each State has its own laws constituting Courts subordinate to the District Courts.

<sup>3</sup> *Supra*, note 2.

<sup>4</sup> See *Secretary to Government of Madras v.P. R. Sriramulu* (1996) 1 SCC 345.

2009, recommending that the Government fix the maximum fees that may be charged in subordinate courts.<sup>5</sup> The Government has not yet taken steps to do so.

### 13.3 Shifting Sands

In response to the General Reporter's question "to shift or not to shift", this section will look at the legislative provisions dealing with the award of costs and fees, and the implementation of such provisions by India's courts.

We begin with another pre-Independence and pre-Constitution statute, the Code of Civil Procedure, 1908.<sup>6</sup> Under this Code, and subject to such conditions and limitations as may be prescribed, "*the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid.*"<sup>7</sup> The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers. It is expected that the wide discretion granted in the Code to courts to award costs should be exercised on legal principles, including those of reason and justice, and not capriciously.

Importantly, the Code also mandates that "*Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.*"<sup>8</sup> The expression "costs [to] follow the event" indicates that the Code presumes cost-shifting from the winner to the loser, and expects that this rule be followed except where the court feels that there are reasons not to so shift. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good reason for not awarding costs to him.

In theory then, India appears to fall in the first category of the General Reporter's tripartite categorization of countries (major shifters). However, the practice of Indian courts, as discussed below, would suggest that India does not appear to "be serious about it" (to borrow another phrase of the General Reporter's), denying her a seat in the first category.

The provisions of the Code set out above are honoured more in the breach than in the observance. Courts do not cost-shift routinely, leading the Supreme Court to observe in one case that

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<sup>5</sup> Available at <http://lawcommissionofindia.nic.in/reports/report220.pdf>.

<sup>6</sup> The Code consolidates the law relating to the procedures to be followed by the civil judiciary, and it is a central statute. Available at <http://www.legalhelpindia.com/bareacts/THE%20CODE%20OF%20CIVIL%20PROCEDURE,%201908.doc>.

<sup>7</sup> Section 35, Code of Civil Procedure.

<sup>8</sup> Section 35(2), Code of Civil Procedure.

*many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded on the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs, despite the language of S. 35(2) of the Code. Such a practice also encourages the filing of frivolous suits or taking up of frivolous defences. Further wherever costs are awarded, ordinarily the same are not realistic and are nominal. 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 thereof. 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 cost beside 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.*<sup>9</sup>

As empowered by the Code of Civil Procedure,<sup>10</sup> (and exhorted by the Supreme Court) the High Courts of various States have made rules regulating their own procedure and the procedure of civil courts subject to their superintendence. These rules also deal with the various fees involved in litigation (apart from the court fee itself) including schedules of attorney's fees. Two important state jurisdictions that this article looks at show no deviation from the Code's general prescription that costs should follow the event, as shown below.

Looking first at the example of Karnataka,<sup>11</sup> the High Court of that state has framed the Karnataka Civil Rules of Practice, 1967 (the "Karnataka Rules"), which provide that "*unless the Court otherwise ordered, the costs of a party in any proceeding, shall mandatorily include*" [...] a list of 14 different types of costs, ranging from the fees paid by the party on his pleadings and other relevant documents to his witness fees, expenses incurred in giving required notices, as well as on typing up his pleadings, among others.<sup>12</sup> Also included are advocates' fees, as computed according to the prescribed rules, and subject to the caps specified, in original suits, in regular appeals, in small cause suits, in execution cases, in execution appeals, and in other proceedings such as land acquisition, motor accident claims, insolvency, rent control, and other proceedings<sup>13</sup>: a minimum of Rs. 100 – 200 (USD 2.5 to USD 5) to a maximum of Rs. 1000 – 5000 (USD 22.5 to USD 112) (assuming a conversion of 1 USD = 45 INR); obviously, there are

<sup>9</sup> Salem Advocate Bar Association v. Union of India AIR 2005 SC 3353, quoted in Mulla, The Code of Civil Procedure, 17th Edition (2007), (hereinafter, "Mulla") at p. 614 (emphasis added).

<sup>10</sup> Section 122, the Code of Civil Procedure.

<sup>11</sup> A prosperous state in the Southern peninsula, and one of the most developed in India. Home to its capital city, Bangalore, which has achieved fame as India's Silicon Valley.

<sup>12</sup> Chapter XIII, Rule 99 of the Karnataka Rules.

<sup>13</sup> Rule 100 of the Karnataka Rules.

really small amounts. It is worth noting that in the state of Maharashtra,<sup>14</sup> the fees payable to advocates at the Bombay High Court (Original Side) are higher than those provided for in Karnataka.<sup>15</sup>

The Rules of the Delhi High Court<sup>16</sup> also state the general rule that “*costs follow the event of the action; that is the costs of the successful party are to be paid by the party who is unsuccessful*”. They proceed to set out detailed scenarios when costs may, and when they shall, be disallowed by the court, always, for reasons to be recorded.<sup>17</sup>

Despite such clear statutory language, both Karnataka’s and Delhi’s courts follow the example of courts in the rest of the country in that they do not shift costs, although exhorted by their governing rules to do so.

Another statutory provision requiring mention is one designed to discourage frivolous litigation, i.e., S. 35A of the Code of Civil Procedure, a provision that deals with compensatory costs in respect of false or vexatious claims or defenses.<sup>18</sup> While the intention of this section is no doubt laudable, its deterrent value is almost completely nullified by the limit placed on such compensatory costs – effectively, three thousand Indian rupees (roughly \$67). This is not a sum that will deter much frivolous or vexatious litigation.<sup>19</sup>

Apart from this provision, in India, costs cannot be imposed as a penalty beyond the costs of the suit.<sup>20</sup> Punitive costs, therefore, in the sense in which it is understood in other jurisdictions, is not permitted. Certain other kinds of fees, such as success or contingency fees are also not allowed in India, as the Bar Council of India’s Standards of Professional Conduct and

<sup>14</sup> Situated on India’s western seaboard, and home to India’s financial and business capital, Mumbai.

<sup>15</sup> See Rule 606 of Chapter XXXI (Taxation and Advocates’ Fee) of the Bombay High Court (Original Side) Rules, Available at <http://bombayhighcourt.nic.in/libweb/BHCRULESGUIDELINES.htm>.

<sup>16</sup> Available at <http://delhihighcourt.nic.in/rules/Vol.1/Part1Chapter11.html>.

<sup>17</sup> See Rules 1 – 4 of Part C (Award of Costs in Civil Suits) of Chapter 11, *ibid*.

<sup>18</sup> It provides that “*If any suit or other proceedings including an execution proceedings but excluding an appeal or a revision any party objects to the claim of 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.*”

<sup>19</sup> Section 35(2) provides that “*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.*”

<sup>20</sup> Mulla, at p. 600.

Etiquette which prescribes an advocate's duty to his or her clients, prohibits the stipulation of fees contingent on the results of litigation; or any agreement to share the proceeds of litigation. Advocates cannot buy, traffic in, stipulate for or agree to receive any share or interest in any actionable claim.

### **13.4 Special Issues – Legal Aid**

The Indian Constitution mandates that the State “secure that the operation of the legal system promotes justice on a basis of equal opportunity, and shall in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disability.” Accordingly, India has enacted the Legal Services Authorities Act, 1987 (brought into force 1995) and constituted the National Legal Services Authority as well as State Legal Services Authorities.

The mode of providing legal aid varies from state to state, as well as from one practice area to the next. In Karnataka, legal aid is delivered, *inter alia*, to the following categories of persons: members of a scheduled caste or tribe, women, children, trafficked persons, victims of natural or industrial disasters, ethnic violence, caste atrocities, and any person whose income is below Rupees 50,000 per annum (a little over USD 1,000). The legal aid system is funded by the government, and administered by the relevant high court of each state. There is however a general dearth of good, competent lawyers in the legal aid system, since it is not as lucrative as private practice.

### **13.5 Conclusion**

India presents a paradoxical picture: the legislative intent seems clear that costs, including reasonable attorney fees, should be awarded to the winning party as a matter of course, but practice in the Indian courts is otherwise. In addition, there seems to be a tug-of-war between the executive and the legislature on the one hand and the judiciary and Law Commission of India on the other regarding the lens through which costs are to be viewed – as a source of revenue for the state or a token fee which does not seek to cover the state's outlay on justice administration. There is, though, a definite commitment to give meaning to the “access to justice” principle, in terms of *inter alia*, the provisions for legal aid that have been discussed as well as through exceptions from court fees for indigent persons.