1934 *Present :* **Macdonell C.J. and Garvin S.P.J.**

ARUNASALAM CHETTIAR *v.* ARUNASALAM CHETTIAR.

153—D. C. (Inty.) Colombo, 51,666.

Costs—Plaintiff's claim admitted and sum of money deposited in settlement—Costs of action—Discretion of trial Judge—Material for exercise of discretion—Civil Procedure Code, s. 413.

Where, after an action has been filed, the defendant brings into a Court a sum of money in settlement of the claim and the plaintiff accepts the amount, he should move the Court in terms of section 413 of the Civil Procedure Code and obtain judgment accordingly.

The discretion vested in a trial Judge to deprive a successful party of his costs can be exercised only where there is sufficient material for making such an order.

APPEAL from an order of the District Judge of Colombo.

Hayley, K.C. (with him *N. Nadarajah* and *Wikramanayake*), for plaintiff appellant.

H. V. Perera (with him *Chelvanayagam*), for defendant, respondent.

Cur. adv. vult.

February 16, 1934. MACDONELL C.J.—

In this case Ramasamy Chettiar had died in December, 1932, owing at the time of his death Rs. 3,600 to the plaintiff who also is a Chetty. The defendant was the paid servant of the deceased Ramasamy, and after his death seems to have managed his estate on behalf of the widow and children resident in India. The defendant applied for letters of administration to the estate of Ramasamy Chettiar at a date which is not given but which must have been within a very few days of his death. He went to the plaintiff and on December 7 paid him interest on the Rs. 3,600 due from the deceased, but said that he could not then pay the whole debt. The plaintiff thereupon demanded interest at 12 per cent. on this Rs. 3,600 to which the defendant did not agree. The finding of the learned trial Judge was that there was no agreement to pay 12 per cent. nor any custom between Chetties, as these parties were, of paying that rate on such a loan, but only a custom of paying a rate 1 anna less than the current rate of interest whatever that might be, but the learned Judge did not find what that current rate was. There is a certain amount of evidence to show that the defendant at this time was acting as executor *de son tort* of the estate of the deceased Ramasamy Chettiar. His payment of interest to the plaintiff on December 7 coupled with the statement that he had recovered this amount, evidently from a debtor of the deceased Chetty, is evidence in that direction. There is also evidence that he was paying out what was due from the deceased's estate, which piece of evidence I cannot find to have been cross-examined with a view to showing that it was based on heresay. He must have got orders *nisi* and absolute for his letters of administration by January 31, 1933, at the latest, for by then he had paid the stamp duty on those letters and could have obtained them at any time thenceforward. In a letter to the plaintiff of January 23, P2, he states: "On payment of the estate duty

payment to the creditors will be attended to", evidently by himself. This evidence, and indeed his whole conduct in the matter, tends to show that he was acting as executor *de son tort* of the estate of the deceased Ramasamy Chettiar, and there is no evidence anywhere to the contrary.

On January 20, 1933, the plaintiff by P1 made demand on the defendant for payment of this Rs. 3,600 with interest at 12 per cent. from December 7, threatening action if it were not paid. On January 23 by P2 the defendant replied stating that the interest on the Rs. 3,600 was 1 anna less than the "new ruling monthly rates of interest" and not 12 per cent. as stated in plaintiff's letter, and denied that he was liable as executor *de son tort*, adding the sentence about creditors being attended to, which has just been quoted above. The plaintiff replied the same day, January 23, by P3 reiterating his demand for interest at 12 per cent. and for payment of the principal Rs. 3,600. He also added that unless the sum was paid immediately action would be instituted. The defendant did not reply to this letter or do anything and, as has been stated, could have obtained his letters as administrator at any time on and after January 31; presumably he could also have paid the debt demanded. On February 9, plaintiff having waited over a fortnight since his last letter to defendant, P 3, filed action claiming the Rs. 3,600 and Rs. 68.40 as interest. The defendant did nothing at all until March 13 when he seems to have paid into Court the sum of Rs. 3,653.83 or Rs. 14.57 less than the plaintiff claimed, and on March 14, his Proctors wrote to the plaintiff's Proctor P4 stating that he had brought this sum to the credit of the case against him "in full settlement of the amount due to plaintiff and wish to enquire from you whether your client is agreeable to accept the said amount in full settlement in order that I may decide whether I should file answer in the case or not". The plaintiff's Proctor replied next day, March 15, by P5 a letter headed "without prejudice", in which he stated "I am prepared to accept this amount provided you pay the costs of the action. You will note that if you had paid the amount when I sent you the letter of demand I would not have filed action. As you by your letter dated January 23, 1933, indefinitely postponed payment my client was compelled to file this action. Under the circumstances I hope you will persuade your client to pay the costs and settle the matter finally". The parties seem to have appeared in Court the same day, March 15, the journal entry of which is as follows: "Proxy and answer filed. Trial on July 14, 1933. Plaintiff is willing to accept the amount deposited in full satisfaction of the claim only. Issue order of payment for Rs. 3,500". Now one may notice that at this point the plaintiff made a slip. He was taking the money in full satisfaction, and he got an order to have nearly all of it paid out to him, and he ought to have acted under section 413 of the Code and presented to the Court a statement that he accepted the amount as satisfaction in full of his claim embodying the same in a motion for judgment, whereupon the Court should have passed judgment accordingly and directed by whom the costs of each party were to be paid. He did not do this and the omission was a technical failure on his side. The defendant's answer, however, does in a round-about way raise the very point which the plaintiff ought to have raised under section

413, namely, who was to pay the costs, for his prayer asks that " the plaintiff be ordered to pay the defendant's costs or in the alternative that his action be dismissed with costs ".

The parties did actually go to trial on July 14, 1933, and issues were framed asking whether the plaint disclosed a cause of action, what was the rate of interest agreed upon between the parties, did defendant intermeddle in the estate of the deceased, and, if he did not, could plaintiff maintain the action. There was also an issue asking whether plaintiff was entitled to costs even though the money had been brought into Court.

It is unfortunate that time and money had to be wasted over this question of costs which up to March 15 must have been quite a small sum. But the defendant was urgent that he should not be compelled to pay costs, and it was argued that the action was unnecessary and had been brought simply to worry him. The learned Judge in his judgment holds in rather ambiguous language that there was this desire on the part of the plaintiff to worry defendant, but admits that there is no absolute proof of this on the evidence. If there is no proof of it on the evidence then the allegation of desire to worry the defendant fails, but the learned Judge in his judgment went further and held that the defendant had not acted as executor *de son tort* " but merely acted as the paid servant of the family of whose head he had been attorney when Ramasamy Chettiar was alive. He was no wrong-doer intermeddling with the estate ". In passing, I think all parties have been misled by the word '*tort*'. To be executor *de son tort* does not necessarily imply that you have done anything morally wrong, it simply means that you have been acting as executor of an estate without a legal right to that position and that having so acted you are liable as if you had been executor with a legal right to that position. I have indicated earlier in this judgment that the evidence clearly points to the defendant having acted as executor *de son tort* and if so the finding of the learned Judge to the contrary must be set aside as contrary to that evidence, and also as based upon a misapprehension of the law relating to that class of executor.

If so, the position is this. The defendant by his payment on March 13 of the full amount less Rs. 14.57 admitted that the plaintiff's claim save for a minute fraction was well founded. The plaintiff had waited more than a fortnight since his second letter of January 23, P3, before he filed action, the department thereafter waited nearly 5 weeks before he did anything. He then paid money into Court admitting, as I have said, that the plaintiff's claim save for a small fraction was correct. It really seems to me on these facts that he has brought the litigation on himself by his delay, and if so, I think the plaintiff should be entitled to his costs. The plaintiff did make a technical slip in not asking for judgment in terms of section 413 on March 15, when he accepted the money in full settlement, but the defendant's conduct in filing answer, and later in requiring issues to be framed, really though not in name, was an application for an order under that very section. This, I think, cures the slip which the plaintiff had made.

It was urged upon us that costs are a matter in the discretion of the trial Judge and that with that discretion we must not interfere. Costs are in the discretion of the trial Judge, but only when the judgment from

which the order as to costs flows is admitted to be correct. Or putting it another way, there is a discretion to deprive a successful party of his costs when there exists material for the exercise of that discretion. But the material must exist in fact, otherwise there is no ground for the exercise of the discretion. Now the material put forward here as ground for the exercise of the discretion is in the first place that the defendant did not intermeddle with the estate of the deceased Ramasamy, or make himself executor *de son tort* thereof. With all respect, the evidence is against this, as a correct application of the law would have shown. Another ground put forward is that defendant did not agree to pay 12 per cent. But there is no finding as to what the rate should have been, and the defendant by his payment into Court admitted a very large part of the claim. Another ground put forward is that the plaintiff was the party to blame for the litigation. Again the facts are against this. The defendant who beyond question was executor *de son tort* delayed unreasonably in coming to a settlement and has himself to blame that he ever had to come into Court at all. Now these are the grounds assigned as being material for the exercise of discretion as to costs, but unfortunately I am compelled to hold that those grounds do not exist, that the finding that they do exist is erroneous. If so, then the material for the exercise of discretion does not exist either. If the order below as to costs must be set aside, this is not because the Court here is interfering with and discretion vested in the Court of trial, but because the judgment of the Court of trial, which is the *sine qua non* of such discretion, must itself be set aside. Remove the foundation and you remove the superstructure also.

For the above reasons I think this appeal should be allowed with costs, the decree below set aside and a decree substituted therefor giving the plaintiff formal judgment under section 413 for Rs. 3,653.83 and costs.

GARVIN S.P.J.—I agree.

Appeal allowed.