1951 *Present :* **Gratiaen J. and Gunasekara J.**

SENEVIRATNE *et al.*, Appellants, *and* ASSISTANT GOVERNMENT AGENT, COLOMBO, Respondent

S. C. 120—D. C. Negombo, 15,412

Land Acquisition Ordinance (Cap. 203)—Proceedings thereunder transferred to Board of Review—Costs recoverable up to date of transfer—Land Acquisition Act, No. 9 of 1950, s. 61—Applicability of scale of charges payable under Schedule to Civil Procedure Code.

Certain proceedings under the Land Acquisition Ordinance which were pending in a District Court were transferred to the Board of Review in terms of section 61 of the Land Acquisition Act, No. 9 of 1950. The Court, when making the order of transfer, directed the Crown " to pay the cost incurred by the defendants in retaining Counsel for . . . . two trial dates " and declared the defendants " entitled to the fees paid by them to the counsel engaged for these dates of trial ". No appeal was preferred against the order of the District Court.

Held, that the defendants were entitled to claim the costs actually incurred, as opposed to costs payable only in accordance with the scale of charges prescribed by the Civil Procedure Code.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, K.C., with *H. W. Tambiah* and *Mackenzie Pereira*, for the defendants appellants.

M. Tiruchelvam, Crown Counsel, for the plaintiff respondent.

Cur. adv. vult.

February 14, 1951. GRATIAEN J.—

On August 12, 1949, the respondent, who is the Assistant Government Agent of the Colombo District, Western Province, filed a libel of reference under the Land Acquisition Ordinance (Chapter 203) in regard to a dispute which had arisen between himself and the appellants as to the sum payable to them as compensation for the compulsory acquisition by the Crown of certain immovable property owned by them. The amount in dispute was fairly considerable. The trial of the action was fixed for May 16 and 17, 1950.

In the meantime, on March 9, 1950, the Land Acquisition Act, No. 9 of 1950, came into operation whereby, *inter alia*, the Land Acquisition Ordinance was repealed. The respondent thereupon made an application on May 10, 1950, in terms of section 61 of the new Act, asking that the matter in dispute in the pending action be referred to the Board of Review (constituted under that Act) for determination. It is conceded that an application of this nature was open to either party to a pending action, and that the respondent's application was properly granted by the learned District Judge on May 24, 1950.

The present appeal is concerned with the interpretation of that part of the learned Judge's order which, in granting the respondent's application for a transfer, awarded to the appellants the costs incurred by them

in the preparation of their case in connection with the trial of the abortive action in the District Court. The relevant part of the order reads as follows:—

> " The Crown argued that the defendants will not be entitled to any costs incurred by them. This case has been specially fixed for two days and the Crown had notice of the two dates of trial and application to take this matter away from the Court was made on May 10, 1950, and it may be presumed that counsel appearing for the defendants would have been retained much earlier than that date. In my opinion it would be reasonable to order the Crown to pay the cost incurred by the defendants in retaining counsel for these two trial dates.
>
> Defendants would be entitled to the fees paid by them to the counsel engaged by them for these dates of trial.
>
> The costs as stated by me earlier would be taxed by this Court and the Crown will be liable to pay that amount to the defendants ".

In pursuance of this order the appellants' proctor submitted to the Secretary of the Court a bill of costs for Rs. 1,470 representing the fees paid to counsel who had been engaged to appear for them on the trial dates, namely, May 16 and 17, 1950. It is not denied that this expenditure was in fact incurred nor was it suggested that the amount of the fees paid to counsel was unreasonable or excessive. Nevertheless, the sum claimed by the appellants as costs was reduced by the Secretary to Rs. 204.75. The matter was referred to the decision of the learned District Judge who on July 24, 1950, upheld the Secretary's taxation on the ground that the Secretary was justified in taxing the fees according to the scale of charges payable under the Schedule to the Civil Procedure Code.

The question arising on this appeal turns solely on the interpretation of the order for costs made by the learned Judge on May 24, 1940, in favour of the appellants. Whether or not that order was properly made cannot now be canvassed, as no appeal questioning its validity has been preferred to this Court by either of the parties. No useful purpose would therefore be served by addressing ourselves at this stage to Mr. Tiruchelvam's argument that the language of section 61 of the new Act confers no power on the District Judge to make any order for costs in favour of either party. The learned Judge did *in fact* and in terms of an order which has not been challenged by an appeal filed within the prescribed period, direct the Crown " to pay *the cost incurred* by the defendants in retaining counsel for . . . . two trial dates " and declared the defendants " entitled to the *fees paid by them* " (i.e., by their proctor on their behalf) " to the counsel engaged for these dates of trial ". I doubt very much if clearer language could be employed in making an award of *the costs actually incurred* as opposed to an award of costs payable only in accordance with an antiquated scale of charges prescribed by the Civil Procedure Code. Mr. Tiruchelvam has argued that the later part of the learned Judge's order directing that the costs awarded to the appellants should " be taxed by this Court " has the effect of limiting the meaning of the unambiguous words which I have already quoted. I do not agree. To my mind, no inconsistency is inherent

between the earlier part of the order and the words on which Mr. Tiruchelvam relies. The order for " taxation " merely requires that the taxing officer should satisfy himself that the amount claimed under the bill of costs represented the sum actually expended in retaining counsel for the trial.

I would set aside the order appealed from and direct that the Crown should pay to the appellants the sum of Rs. 1,470 in terms of the learned District Judge's order dated July 24, 1950. The appellants are also entitled to their costs of this appeal as taxed in accordance with the scale of charges applicable under the Civil Procedure Code.

GUNASEKARA J.—I agree.

Appeal allowed.