

1942

*Present : Wijeyewardene J.***SIRISENA v. MOHOTTIAPPUHAMY.**

179—C. R. Kegalla, 14,409.

Obligation in solidum—Payment of taxed costs by one of two parties—Action for contribution.

Where the appellant and the respondent were substituted in an action as heirs of a deceased plaintiff and where subsequently they moved to withdraw the action, which was dismissed with costs as against them,—

Held, that the appellant who paid the entire sum, on a writ against them for taxed costs, was entitled to recover a half share from the respondent.

¹ 4 C. A. C. 87.² 25 N. L. R. 433.

Cyril E. S. Perera, for plaintiff, appellant.

C. S. Barr-Kumarakulasingham, for defendant, respondent.

A PPEAL from a judgment of the Commissioner of Requests, Kegalla.
Cur. adv. vult.

November 27, 1942. WIJEYWARDENE J.—

One Sediris Appuhamy filed D. C. Kegalla 591 for declaration of title to a land. On the ground that Sediris Appuhamy failed to take any step to prosecute the action for one year, the District Judge made an order *ex mero motu* abating the action. The proctor for the defendant in that case applied to Court shortly afterwards that an order be made dismissing the action with costs and the Court ordered notice of the application to be given to Sediris Appuhamy. It was then discovered that Sediris Appuhamy was dead. Thereupon, the defendant's proctor moved for notice on the present appellant and respondent, the sons and heirs of Sediris Appuhamy, to show cause why they should not be substituted as plaintiffs in place of Sediris Appuhamy and why the Court should not make an order dismissing the action with costs. The appellant and the respondent consented to be substituted as plaintiffs and took steps to get the order of abatement set aside. The parties, thereupon, came to an agreement. In pursuance of that agreement, the appellant, acting on behalf of himself and the respondent, paid the defendant in that action Rs. 25 as costs incurred by him in certain incidental proceedings, and the order of abatement was vacated and the case restored to the roll of pending cases. Sometime afterwards the substituted plaintiffs moved to withdraw the action and the District Judge entered a consent decree dismissing the action with costs. The defendant in that action took out a writ for the recovery of this taxed costs and the appellant paid Rs. 275.44 in full satisfaction of the writ.

The present action was then filed by the appellant to recover from the respondent a half share of Rs. 25 and Rs. 275.44 paid by him as costs in D. C. Kegalla 591. The respondent filed answer denying his liability. The Commissioner of Requests held that the appellant was entitled to a half share of Rs. 25 as the appellant and the respondent were personally liable on their agreement to pay that sum to the defendant in D. C. Kegalla, 591. He rejected the appellant's claim for a half share of Rs. 275.44, as he thought that neither the appellant nor the respondent was personally liable to pay the taxed costs in D. C. Kegalla, 591, and that the decree could have been executed only against the estate of Sediris Appuhamy. He held, therefore, that the appellant's payment of Rs. 275.44 was not in discharge of any legal liability incurred by the respondent.

The facts stated by me show that the appellant and the respondent agreed to be substituted as plaintiffs in D. C. Kegalla, 591, and that, until they decided to withdraw the action, they ratified and adopted the position taken up by Sediris Appuhamy. Therefore, they would have become personally liable for costs as the parties on the record, *Nonohamy v. Babun Appu*¹. Even an executor or administrator who brings an action is personally liable to pay the costs of the successful defendant

¹ 14 N. L. R. 462.

unless the Court orders otherwise, and, in the absence of such an order, the estate of the deceased person cannot be seized and sold in execution of the decree for costs, *Usoof Joonoos v. Abdul Kudoos*¹. Now the decree entered in D. C. Kegalla, 591, contains no order by the Court that the costs should be paid by the estate of Sederis Appuhamy and therefore under that decree the appellant and the respondent were personally liable to pay the costs. That liability was an obligation *in solidum*, *Peria Caruppen Chetty v. Mohamadu*². The appellant who paid the entire sum is, therefore, entitled to recover a half share from the respondent (*Van der Linden* 1.14.9).

I set aside the decree appealed against and direct decree to be entered in favour of the appellant for Rs. 150.22 with legal interest from the date of this action and for costs here and in the lower Court.

Appeal allowed.
