1912.

Present: Middleton J. and Wood Renton J.

WIJESURIYA *v.* MEPI NONA *et al.*

200—D. C. Galle, 8,919.

Costs—Order as to costs made against plaintiff in favour of one of two defendants—Extent of plaintiff's liability to pay costs.

Where an order as to costs is made against the plaintiff in favour of one of two defendants, the criterion of the liability of the plaintiff to the defendant in whose favour the order for costs is made is the liability of the defendant himself to his proctor.

If two defendants supporting a similar defence employ one proctor, and have no agreement as to how the costs are to be borne, each of the defendants is liable to their proctor for half the costs of the defence, and that would be the amount which the plaintiff would have to pay the successful defendant. If, however, the two defendants are supporting their defences entirely independent of each other, though each has employed the same proctor, the liability of each to the proctor may be distinct and separate.

THE facts appear sufficiently from the judgment of Middleton J.

Bawa, K.C., for the appellants.—The case relied on by the District Judge (*Abdul Rahiman v. Amerasekera*[1]) does not apply to the facts of this case. In that case the defendants jointly retained one proctor. Here the sixteenth defendant retained the proctor who had been retained for the appellants to fight an entirely different case. It is an accident that the same proctor was retained; but the case for the sixteenth defendant is entirely different from the case for the appellants.

Wadsworth, for the respondent.—The same proctor was retained by all the defendants. The proctor cannot recover the full costs from each of the defendants. The appellants cannot, therefore, get from the plaintiff more than the amount they are liable to pay their proctor.

Bawa, K.C., in reply.

Cur. adv. vult.

February 5, 1912. MIDDLETON J.—

In this case the first to seventh defendants-appellants were sued by the plaintiff for a partition of land, the appellants objecting to the inclusion in the partition of a lot marked B. The appellants were represented by a proctor, who was subsequently retained for the sixteenth defendant, who had been added as a party. The Court dismissed the action, and ordered the plaintiff to pay the costs of the first to seventh defendants, and the sixteenth defendant to pay the costs of the plaintiff for May 29 and 30, 1911. Upon taxation of costs, the plaintiff objected, on the authority of *Abdul Rahiman v. Amerasekera*,[1] that first to seventh defendants were only entitled to tax half their costs against them, and the District Judge upheld this view, against which the first to seventh defendants appealed.

The principle laid down in *Beaumont v. Senior*,[2] upon which the decision in *Abdul Rahiman v. Amerasekera*[1] is founded, is that a successful defendant is entitled to recover from the plaintiff the costs he has incurred in defending the action, and that those costs must depend on the liability of the defendants to their proctor.

If two defendants supporting a similar defence employ one proctor, and have no agreement as to how the costs are to be borne, I think, on the authority of the case cited, that each of the defendants is liable to their proctor for half the costs of the defence, and that would be the amount which the plaintiff would have to pay the successful defendant. If, however, two defendants are supporting their defences entirely independent of each other, it seems to me that though each has employed the same proctor, the liability of each to the proctor may be distinct and separable.

[1] (1911) 14 *N. L. R.* 226.

[2] (1903) 1 *K. B.* 282.

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MIDDLETON J.

Wijesuriya v. Mepi Nona

Here the sixteenth defendant, though he supported the first to seventh defendants defence, yet got himself added on the ground that he had a planter's interest. The District Judge's order was that where the proctor and advocate appeared for the first to seventh defendants solely, the full costs of their appearance were to be paid by the plaintiff, but if they appeared for all the defendants, then the plaintiff was to pay only half the fees. This does not seem to me to be in accordance with the ruling of this Court in *Abdul Rahiman v. Amerasekera.*[1]

The criterion of liability to the defendants in whose favour the order for costs is made is the liability of the defendants themselves to their proctors.

The first to seventh defendants, whose defence was put forward entirely independent of the sixteenth defendant, though it happened to be the same, would be liable to their proctors quite separate from the sixteenth defendant, and to this extent they are liable to their proctors for taxed costs, and would be liable to claim such costs on taxation against the plaintiff.

I would therefore vary the order of the District Judge by directing that the first to seventh defendants be entitled to be paid by the plaintiff all such costs as are properly payable by the first to seventh defendants to their proctor and advocate in defending the action, quite apart from the retainer by the sixteenth defendant of the same legal advisers.

The appellants will have the costs of the appeal and of the proceedings upon taxation and review in the District Court.

WOOD RENTON J.—

The question at issue in this case is whether the learned District Judge has rightly applied the principle laid down by the Supreme Court in the case of *Abdul Rahiman v. Amerasekera,*[1] following the case of *Beaumont v. Senior,*[2] to the circumstances of the present case. In those cases two sets of defendants jointly retained, and were jointly represented by, the same proctors and solicitors respectively for the purpose of the trial. It was held that where judgment was given in favour of one defendant and against the other, the successful defendant was, in the absence of any agreement between him and his co-defendant as to how their costs were to be borne *inter se,* entitled to recover from the plaintiff half the costs of the defence.

In my opinion that principle has no application to a case like the present, where, although the appellants and the added defendant were in fact represented at the trial by the same proctor, they did not retain him jointly, nor were they in any sense acting jointly in their defence. I agree to the order proposed by my brother Middleton.

Varied.

[1] *(1911) 14 N. L. R. 226.*

[2] *(1903) 1 K. B. 282.*