

June 26, 1911

Present : Lascelles C.J. and Middleton J.

ABDUL RAHIMAN v. AMERASEKERA *et al.*

152—D. C. Galle, 10,069.

*Costs—Two defendants filing answer by the same proctor—Action dismissed against one defendant—Successful defendant entitled to half costs of defence.*

Where plaintiff sued two defendants who appeared by the same proctor, and where judgment was entered for the plaintiff with costs against one of the defendants, and the action was dismissed against the other defendant,—

*Held*, that the successful defendant was entitled to recover from the plaintiff half the costs of the defence.

**I**N this case plaintiff sued to recover damages from the two defendants, who he alleged had allowed a fire which they set to their chena to spread to plaintiff's cinnamon land. Both defendants retained the same proctor (who filed separate answers) and advocate for the trial.

<sup>1</sup> (1889-90) 9 S. C. C. 42.

<sup>2</sup> (1861) *Ram.* 1860-62, 83.

<sup>3</sup> (1862) *Ram.* 1860-62, 144.

The learned District Judge (B. Constantine, Esq.) gave judgment for the plaintiff against the first defendant with costs, and dismissed the action against the second defendant, and made the following order as to costs :—

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He has had no separate trial costs, but will receive from plaintiff his costs of filing answer.

The plaintiff appealed, on the facts, against the dismissal of the action against the second defendant, and the second defendant gave notice of a cross appeal under section 772 of the Civil Procedure Code against the order as to costs.

*Bawa* (with him *Balasingham*), for the plaintiff, appellant.

*H. A. Jayewardene*, for the second defendant, respondent.

(Plaintiff's appeal, which was solely on the facts, was dismissed.)

*H. A. Jayewardene*, for the second defendant, appellant.—The order as to costs is wrong on principle. Where two defendants appear by the same solicitor and only one defendant succeeds, the successful defendant is entitled to half the total costs of the defence. *Beaumont v. Senior and Bull*.<sup>1</sup>

*Balasingham* (with him *Bawa*), for the plaintiff, respondent.—The question of costs is one which is pre-eminently within the discretion of the District Judge. A successful party is not, as of right, in law, entitled to his costs. In the present case the learned District Judge has awarded the second defendant some costs. The appeal is only one as to the *quantum* of costs. The Supreme Court has consistently declined to interfere with the discretion of the lower courts on the question of costs, unless a manifest injustice has been caused by its exercise. The plaintiff had good reasons for suing the second defendant. Counsel cited *Government Agent, Uva, v. Banda*.<sup>2</sup>

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..... The second defendant's counsel has, however, given notice of a cross appeal with regard to the costs of the action. In the Court below he was successful. The action against him was dismissed. But the District Judge has only allowed him the costs of filing answer, and against this order, with regard to the costs, he now appeals. I have no doubt that if the principle which is ordinarily applicable in cases of this kind had been brought to the notice of the District Judge, his order as to the second defendant's costs would have been different. The rule prevalent in England is as follows : Where several defendants retain the same solicitor, each of them can only be charged with his proportion of the

<sup>1</sup> (1903) 1 K. B. 282.

<sup>2</sup> (1910) 13 N. L. R. 341.

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general costs of proceedings taken on behalf of all ; so that one of two defendants who employ the same solicitor can, if he alone succeeds, recover, in the absence of agreement, only half the total costs of the defence. This is the rule stated in the case of *Beaumont v. Senior and Bull*<sup>1</sup>. It is a rule based on equity and fair dealing, and I see no reason why it should not be applied in the present case. I would, therefore, vary the order of the District Judge by directing the second defendant to receive from the plaintiff half the costs of the defence of the action.

MIDDLETON J.—

I agree. It is contended here for the respondent that this Court will not interfere with the exercise of the discretion of the District Judge in making an order as to costs, unless it is clear that a manifest injustice has been caused by its exercise. That, no doubt, is the rule that this Court has consistently followed. But in the present case it seems that the defendants had one proctor, and would be jointly liable to that proctor in the absence of any express agreement for the costs of the action. On the principle that a successful defendant is entitled to recover from the plaintiff the costs which he has incurred for defending the action. I think that the successful defendant here is not quite treated justly in only receiving the costs of his answer, but should recover from the plaintiff half the costs that he has incurred in defending the action. If authority is required for these propositions, it may be found *In re Colquhoun* ;<sup>2</sup> *Cain v. Adams* ;<sup>3</sup> *Starling v. Cozens* ;<sup>4</sup> *Government Agent, Uva, v. Banda* ;<sup>5</sup> and *Beaumont v. Senior and Bull*,<sup>1</sup> which has been relied upon by counsel for respondent.

I agree to the order proposed by my Lord.

*Order as to costs varied.*

<sup>1</sup> (1903) 1 K. B. 282.

<sup>2</sup> (1854) D. M. & G. 35.

<sup>3</sup> (1836) 5 L. J. (K. B.) 252.

<sup>4</sup> (1835) 2 C. M. & R. 445.

<sup>5</sup> (1910) 13 N. L. R. 3.