

1955

Present : Basnayake, A.C.J., and Pulle, J.

K. MELIS *et al.*, Appellants, and K. ADONISA *et al.*, Respondents

S. C. 82—D. C. (Inty.) Gampaha, 1844/L

Issues—Belated application to add certain issues—Award of costs—Civil Procedure Code, s. 146.

The Court is not entitled to penalise a party in costs for suggesting belatedly an issue which arises on the pleadings.

APPPEAL from an order of the District Court, Gampaha.

H. W. Jayewardene, Q.C., with *F. W. Obeyesekere*, for the 1 (a) to 1 (f) Defendant-Appellants and the 2nd Defendant-Appellant.

A. L. Jayasuriya, with *S. M. H. de Silva*, for the Plaintiff-Respondents.

July 7, 1955. BASNAYAKE, A.C.J.—

This is an interlocutory appeal from an order dated the 7th October 1952 ordering the defendants 1 (a) to 1 (f) to pay the plaintiffs as costs of the day 10 guineas. The order complained of was made in these circumstances. Mr. Obeyesekere, Counsel for the defendants 1 (a) to 1 (f), suggested five additional issues, the original issues having been framed earlier. Mr. Perera for the plaintiffs objected to two of the issues, marked 9 and 10, as they did not arise on the answer. After argument of Counsel, the learned Judge allowed the issues to which objection was taken and Counsel for the plaintiffs asked for costs. The learned District Judge granted the application for costs, and ordered the defendants 1 (a) to 1 (f) to pay the plaintiffs 10 guineas.

We do not think that this is a case in which costs should have been ordered as the learned trial Judge accepted the issues which were objected to on the footing that they arose on the pleadings, for he did not order the answer of the defendants be amended. Under section 146 of the Civil Procedure Code, if the parties are not agreed as to the questions of fact or of law to be decided, it is the duty of the Judge "upon the allegations made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary, (to) ascertain upon what material propositions of fact or of law the parties are at variance" and to proceed to record the issues on which the right decision of the case appears to the Court to depend. It would appear from the provisions of the Code cited above that the entire duty of ascertaining upon what material proposition of fact or of law the parties are at variance is placed on the judge. He should not therefore penalise a party for suggesting an issue, belatedly though it be, which arises on the pleadings.

We think that the defendants have been wrongly penalised in costs.

We set aside the order. The appellants are entitled to their costs of this appeal.

PULLE, J.—I agree.

Order set aside.