

1934

Present : Dalton and Driberg JJ.

TISSERA *et al.* v. RAMASWAMY CHETTIAR.

APPLICATION TO REVISE BILL OF COSTS IN D. C. CHILAW, 8,880.

Costs—Taxation of costs in appeal—Attendance of proctor on counsel—Attendance of proctor in Court of Appeal—Fees for more than two counsel—Proportion of fee as between senior and junior counsel.

In the taxation of a bill of costs incurred in the Supreme Court in appeal, the charge allowed to a proctor for attending on counsel for advice on the case is limited to one attendance. The charge allowed for attendance in the Court of Appeal is similarly limited to one.

The mere fact that an argument has taken two days or more is no ground for allowing more than one consultation with counsel to be charged. No charge is allowed for written instructions given to counsel.

As a general rule, fees should not be allowed for more than two counsel, the proportion of fee as between senior and junior counsel being one half.

APPPLICATION to revise the taxation by the Registrar of the Supreme Court of a bill of costs.

E. F. N. Gratiaen, for plaintiff.

S. W. Jayasuriya (with him *Kottegoda*), for defendants.

Cur. adv. vult.

July 9, 1934. DALTON J.—

These two applications have been made to revise the taxation by the Registrar of this Court of the bill of the successful appellants (defendants in the action) in the Court of Appeal. The plaintiff appeals against the allowance of certain items by the taxing officer, the defendants appeal against certain items in the bill which have been disallowed by him.

It appears that there were three actions in the District Court, Nos. 8,811, 8,812, and 8,880. They were heard together and seem to have taken some time to conclude, the record being a voluminous one. Three appeals (S. C. Nos. 28, 29, and 30) followed therein to this Court. The appeal in S. C. No. 28 (D. C. No. 8,811) was then heard, it being agreed that the appeals in the other two cases should abide the result in S. C. No. 28. In that appeal the District Judge's order was set aside, and the case remitted to him, the appellants (defendants) being declared entitled to the costs of the appeal. The hearing of the appeal took ten days, April 3, 4, 5, 7, 10, 11, and 12 and May 15, 16, and 17, 1933. The appellants then presented a bill in respect of their costs in the appeal, amounting to the sum of Rs. 3,166.25. This bill the taxing officer allowed in the sum of Rs. 885.50, disallowing items in the sum of Rs. 2,280.75 in all.

It will be convenient first to deal with the appeal of the plaintiff, except in so far as both appeals refer to the same items in the bill. Plaintiff's appeal applies to four heads of charges that have been allowed by the taxing officer.

The first head deals with attendances of proctor on counsel and attendances of the proctor in Court. Five attendances on counsel are charged for prior to the hearing of the appeal, and 18 on counsel after the appeal was listed for hearing. These 23 attendances are charged at Rs. 10 each, amounting to Rs. 230. In addition, 10 attendances of the proctor in Court are also charged at Rs. 10 each. The taxing officer allowed only one attendance on counsel, i.e., for attendance prior to the listing of the appeal. He points out that the item in the tariff, under which this charge comes, is as follows:—"Instructing advocate to make or oppose any special motion, or for advice on appellants' or respondent's case." There does not appear to have been any special motion, and hence the charge comes under the latter part, for advice on appellants' case, for which the tariff provides a single fee. One charge of Rs. 10 only was allowed. The defendants appealed from this conclusion, urging that the 23 attendances should be allowed, but counsel's argument was based rather upon the weight of the case than on the provisions of the tariff. He failed to show the taxing officer was wrong in this instance.

The taxing officer, however, allowed 10 attendances of the proctor in Court, one for every day on which the appeal was heard, Rs. 100 in all, and the plaintiff appeals from this allowance. There appears to be no means of checking whether the proctor did in fact attend the Court on those ten days, no official note being made of such attendance, but the plaintiff objects that the tariff provides for only one attendance in Court, assuming of course that he in fact did attend Court. I think the Supreme Court tariff is clear on this point, it is different from the District Court tariff, which provides for attending Court, either with or without advocate if the case is adjourned, postponed, or struck off. There are no such provisions in the Supreme Court tariff, and counsel for defendants failed to satisfy me that the items as allowed come within the terms of the tariff. The item of Rs. 100 allowed for attendances in Court must therefore be reduced to Rs. 10, one attendance in Court being allowed.

The second head of charges objected to by plaintiff relates to consultation fees for senior counsel. The defendants have charged in their Bill

for 23 consultations at Rs. 31.50 each. The taxing officer allowed 10 consultations, taxing the sum of Rs. 409.50 off this item. The plaintiff appeals, urging that as a general rule one consultation alone should be allowed. The defendants appeal, urging that the 23 consultations charged should stand.

The question of consultation fees has already been the matter of decision by this Court (*Adaikappa Chettiar v. Thos Cook & Son*¹). There a question arose whether the taxing officer was empowered under the tariff to allow a fee for a second consultation. It was held that on special application being made he could do so, if he thought fit. Defendants' counsel seeks to justify 23 consultations, but has failed to advance any ground that supports such a charge. There is some little reason for thinking that this extraordinary charge for consultations is an attempt to increase counsel's brief fee as a result of the decision in the case I have referred to. The Court there pointed out the necessity for a revision of the tariff, but any attempt to increase the brief fee must be by proper methods, and not as appears to have been done in this bill. Defendants' appeal in respect of this item must fail. To return to plaintiff's appeal against the 10 consultations allowed, it seems that the taxing officer has in fact exercised no discretion at all. The reasons he gives are as follows:—"The argument took ten days. The appellant (defendants) therefore is not entitled to charge for more than 10 consultations, i.e., for one consultation before each day of argument. I accordingly allow Rs. 315, i.e., at the rate of Rs. 31.50 a day for ten days, and disallow Rs. 409.50."

The fact that an argument may last two or more days of itself in no way supports the position taken up that more than one consultation was necessary. The mere fact that the hearing of the appeal took more than one day is no reason for having consultations day by day (see *In re Anglo-Austrian Printing & Publishing Union*²). Counsel has, in my opinion, shown no sufficient ground why even a second consultation was necessary after the first day. There is a general reference to the unusual length of the case and of the evidence, but I can find nothing there to support a charge for a second consultation. The usual practice in England is that the costs of one consultation between senior and junior counsel are allowed as between party and party, and I see no reason in local conditions why that practice should not be followed here. (*Annual Practice 1934*, p. 1497; *Halsbury's Laws of England (2nd ed.)*, Vol. II., p. 550; and see also *Hill v. Peel*³). I have therefore come to the conclusion that the taxing officer was wrong in allowing 10 consultations as he did. As I have pointed out, he exercised no discretion at all in the matter. The plaintiff's appeal in respect of this item must therefore be allowed, and in place of the sum of Rs. 315, one consultation fee will be allowed at Rs. 31.50.

The third head of charges objected to by plaintiff relates to consultation fees for second counsel. As in the case of senior counsel, defendants have charged for 23 consultations and the taxing officer has allowed 10 at Rs. 21, allowing a sum of Rs. 215 in respect of this item. There is an error of Rs. 5 in his calculation. The reasons I have already given for

¹ 35 N. L. R. 20.

² (1894) 2 Ch. at p. 627.

³ L. R. 5 C. P. at p. 182.

dismissing defendants' appeal in respect of the second head already dealt with and for allowing plaintiff's appeal apply in the case of this third head also, and I hold accordingly. In place therefore of the sum of Rs. 215 allowed by the taxing officer, one consultation will be allowed at Rs. 21.

The fourth and last item against which plaintiff appeals is the sum of Rs. 24 charged in the bill for stamps on bill of costs. The taxing officer has allowed this item to stand. More than one-sixth of the amount of the bill having been disallowed, under the provisions of section 216 of the Code, the taxing officer disallowed the costs of taxation, but he has not included the stamps on the bill as part of those costs. It has already been held in *Adaikappa Chettiar v. Thos. Cook & Son (supra)* that the stamps on the bill are part of the expenses of taxation. Defendants' counsel agrees that the taxing officer was wrong in allowing this item to stand, and plaintiff's appeal in respect of it will be allowed. The item of Rs. 24 in the bill is therefore disallowed.

I come now to defendants' appeal, some particulars of which I have already dealt with.

The third, fourth, fifth, and sixth items in their bill, drawing briefs for advocates, copies, copies of pleadings, evidence, documents, &c., have been disallowed by the taxing officer. By the term "brief", counsel states, he refers to counsel's written instructions. The term is, however, generally somewhat loosely applied in Ceylon, in the Court of Appeal at any rate, to the copy of the proceedings in the lower Court obtained from the Registry for the use of counsel on the appeal. The taxing officer points out that all necessary copies for the parties are made in the Registry, the only charge allowed being in practice the stamp duty paid on the typewritten copies so obtained. It is of course the duty of the proctor concerned to point out to the Registrar what portions of the proceedings or documents he requires for the appeal. The taxing officer has disallowed the large sums charged under these heads in defendant's bill, amounting in all to Rs. 1,155, allowing only the stamp duty on the typewritten copies made in the Registry. Counsel has not satisfied me that he was wrong in doing so, or that the charges made in respect of these items in the bill were in any way justified.

The defendants then urged that the taxing officer was wrong in allowing two counsel only. They charged in fact for four counsel in their bill, but I understand counsel did not seriously urge they were entitled to do so. He did urge, however, that three should have been allowed owing to the case being such a heavy one. He referred us to the decision in *Kirkwood v. Webster*¹ where Fry J. disagreed with the taxing officer and allowed the costs of the third counsel. He of course states his reasons why he did so. The bill in question there was, however, in respect of the costs in the original Court. On this point it is pointed out in *Halsbury's Laws of England, Vol. II., p. 552*, that on the hearing of a case in the House of Lords or Court of Appeal, in the absence of special circumstances, the costs of a third counsel are usually disallowed. In the *Annual Practice 1934, p. 1496*, the general rule is that no more than two counsel should be allowed except in a case of special complication, and it is added,

¹ (1878) 9 Ch. D. 239.

perhaps wisely, that length must not be treated as equivalent to complication. The taxing officer in his reasons for allowing two counsel only points out that it has been the practice in the Registry for years not to allow fees for more than two counsel. Allowing that there may on rare occasions be exceptions to that rule of practice, Mr. Jayasuriya has not satisfied me that the case in question was one in which, so far as the Court of Appeal was concerned, "it was essentially necessary for the purpose of doing justice that three counsel should be employed", nor do I see any reason for interfering with the taxing officer's discretion that has been exercised here.

The last question raised was as to the proportion that senior counsel's brief fee should bear to that allowed to junior counsel. The rate allowed is half, but counsel urged it should be two-thirds. The rate allowed is, I think, in conformity with the usual practice in these Courts, and I see no reasons to disagree with the taxing officer on this point.

In the result the appeal of the plaintiff will be allowed to the extent I have denoted and the appeal of the defendants dismissed.

The plaintiff will be entitled to the costs in respect of his appeal and to such further costs (if any) as the appeal of the defendants has caused to him.

DRIEBERG J.—I agree.

Application allowed.

