[FULL BENCH.] *Oct. 14, 1910*

Present : The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wood Renton, and Mr. Justice Grenier.

THE GOVERNMENT AGENT, UVA, *v.* BANDA *et al.*

D. C., Badulla, 2,403.

Land Acquisition Ordinance, 1876—Reference to Court—Rival claimants —District Court has power to order claimants to pay the costs of reference to Government Agent—Appeal as to costs—Civil Procedure Code, s. 209 et seq.

Where a reference to the District Court is made by a Government Agent under the last clause of section 11 of "The Land Acquisition Ordinance, 1876," in consequence merely of a dispute between two rival claimants as to the title to land, there being no dispute as to the amount of compensation, the District Court has power to order that the Government Agent shall be paid his costs of the reference out of the fund in Court or by either or both of the contesting parties.

Under section 209 *et seq.* of the Civil Procedure Code it would be competent for a Court to order even a successful party to pay costs which had been rendered necessary by his own conduct. The Supreme Court would not interfere in appeal with the exercise of the discretion of a District Judge in making an order as to costs, unless it is clear that a manifest injustice has been caused by its exercise.

THE facts are set out in the judgment of Hutchinson C.J. This case was referred to a Full Bench by Hutchinson C.J. and Middleton J.

Bartholomeusz, for the appellant.—The Government Agent is not entitled to get his costs of the reference; *Green v. Romanis*[1] is a case on all fours with the present, and is a direct authority in favour of the appellant. Section 29 of "The Land Acquisition Ordinance, 1876," says in what cases the Government Agent may get his costs; the Government Agent cannot get costs in any other case. [WOOD RENTON J.—Ordinance No. 9 of 1908 repeals that section.] Section 2 of Ordinance No. 9 of 1908 practically re-enacts section 29 of the Ordinance of 1876. [HUTCHINSON C.J.—Is not the Government Agent in the position of a stake holder? May not a Court give a stake holder who brings an interpleader action his costs?] The principles that apply to interpleader actions would not apply to proceedings under the Land Acquisition Ordinance, which must be

[1] *(1882) 5 S. C. C. 1.*

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governed by the provisions of that Ordinance. [HUTCHINSON C.J.—Section 633 of the Civil Procedure Code would justify an order giving the Government Agent costs out of the fund.] The Government Agent precipitates the dispute between the claimants by acquiring the land compulsorily. He ought to bear his costs; it is manifestly unjust that the claimants should pay the cost of the Government Agent. In *In re Fisher*[1] Lord Justice Kay said: "If we look at the reason of the thing, it is very hard upon a landowner that his land should be taken from him compulsorily and the money paid into Court, and that when the money is paid out he should have to pay the costs of it himself." [WOOD RENTON J.—The chief question is whether the District Court has the power to make such an order as the present.] The Supreme Court has already held that the Court has not the power to make this order. [HUTCHINSON C.J.—The practice has been against the appellant, in spite of *Green v. Romanis*.] Counsel also referred to *Cripp's Law of Compensation (3rd ed.), p. 287.*

Van Langenberg, Acting S.-G., for respondent, not called upon.

Cur. adv. vult.

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The Crown took a small piece of land under the powers conferred by "The Land Acquisition Ordinannce, 1876"; and the Government Agent, finding that there were two claimants of the land, each of whom claimed the whole of it, agreed with them, under section 10, as to the amount of compensation to be allowed, and then, under section 34, referred the dispute to the District Court. The District Court decreed that the present appellant was entitled to the whole of the compensation, with costs from the other claimant, and ordered the claimants to pay the Government Agent his costs of the action (*i.e.*, of the reference to the District Court). This is an appeal by the successful claimant against the order for payment of the Government Agent's costs. The reason given by the District Judge for making the appellant as well as the other claimant liable for the Government Agent's costs was that the appellant "had not sufficiently exercised his rights, and that, if they had been more actively kept alive, such a contest would have been impossible."

In order to succeed the appellant must show either that the Court had no power to make the order, or that it went on some wrong principle, or else that the matter is covered by authority. Having regard to section 32 of the Ordinance and the enactments as to costs in chapter XXI. of the Civil Procedure Code, it cannot be maintained that the Court had no power; and, whether the reason given by

[1] *(1894) 1 Ch. 450, 453.*

the learned Judge is satisfactory or not, there is no wrong principle enunciated. The only question is, whether the matter is covered by authority; and the appellant says that there is an authority exactly in point (*Green v. Ramanis Appu*[1]), in which Clarence J., delivering the judgment of himself and Dias J., held in a case just the same as this that the Government Agent ought not to be made to pay any costs of the reference to the District Court, and ought not to get any. The Court said that the Government Agent " brings the disputants into the Court, and need do no more; we do not think that he ought to receive any costs for doing that much. ..... To give the Government Agent any such costs would be quite counter to any analogy to be drawn from the administration of similar matters under the English Land Clauses Consolidation Act."

This decision was before the date of the Civil Procedure Code, which empowers and directs the Court which decides an action to decide also which party is to pay the costs of the action. Clarence J. makes no reference to any enactment or rule which was then in force as to costs; but he does not decide the matter on the ground that the District Court had no power to make the order, but on the ground that it was not fair that the Government Agent should get any costs; that is an appeal against an order as to costs, which the District Court had jurisdiction to make, was allowed on the ground that the District Court had exercised its discretion wrongly. The reference to the Land Clauses Act is not quite convincing; for under that Act an association of private persons takes a man's land for its own private benefit, and it might be thought reasonable that it should pay him the value of the land in full without any deduction; whereas this is a case of a public officer empowered and required by the Legislature to take land for the public benefit, and it may be thought (I do not say that it is the right view, but at least it is a possible view) that he has the price of the land in his hands, ready and willing to pay it to the true owner, and is merely in the position of a stake holder or trustee, and that, where his conduct has been quite correct, he ought to recover from the owner or out of the fund (in accordance with section 633) the costs which he properly incurs in getting a decision as to who is entitled to the fund. The Legislature has not said anything in the Ordinance of 1876 as to the costs of such a proceeding as this, beyond the general enactment in section 32 that the proceedings shall be subject to the rules provided for in ordinary civil suits. In ordinary civil suits the District Court has to decide, under chapter XXI. of the Code (which was not in existence at the time of the decision in *5 S.C.C.*), who is to pay the costs; and section 633 enacts that a stake holder, where his interpleader action is properly instituted, may have his costs provided for by a charge on the fund or in some other effectual way. My present opinion is that the Code now empowers the District Court

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to make such an order as was made in this case, and that the decision in *5 S. C. C.* ought not now to be followed. But I think that the matter is of sufficient importance to be argued before a Full Court.

If it should be held that the Government Agent is entitled to his costs, his costs will not be all those which he has actually incurred, but those which the District Court or its taxing officer allows. I should not allow an appeal to this Court unless some principle were involved; and I should not consider that any principle was involved merely because the costs of the Government Agent's appearance by a proctor were allowed or disallowed.

HUTCHINSON C.J.—

Having heard this case argued before a Full Court, I remain of the same opinion as before: that the District Court has power to order that the Government Agent in such a case as this shall be paid his costs of the reference to the Court out of the fund, or by either or both of the contesting parties; and that the question whether the costs of his appearance in person or by a proctor at the inquiry in Court is a matter for the taxing officer of the Court, or the Judge, to decide.

WOOD RENTON J.—

This is an appeal by the second of two claimants for a sum awarded by the Government Agent of Uva for the acquisition of certain property under Ordinance No. 3 of 1876, against an order by the learned District Judge of Badulla decreeing both claimants liable for the Government Agent's costs. There was no dispute as to the amount of the compensation tendered by the Government Agent, and the case was referred to Court in consequence merely of a dispute between the claimants as to the apportionment of the sum awarded. The contentions of the second claimant-appellant were upheld by the learned District Judge, who decreed him entitled to the amount of the acquisition, with costs from the first claimant. There is no appeal by the first claimant against that order, and, as I have said, the only point that we have to decide is whether it was competent for the learned District Judge to order the appellant, who is a successful claimant, to pay the costs of the Government Agent. The appellant's counsel endeavoured to induce us to enter upon a consideration of the different heads of costs which the Government Agent might claim. He contended, for example, that, even if the costs of the reference might properly be awarded, it would be improper to allow any costs of appearance on behalf of the Government Agent at the trial of the dispute between the claimants in the District Court. I do not think, however, that we are called upon at present to deal with such points. The Government Agent's costs have not yet been taxed, and it will be open to the appellant to raise any objection that he thinks proper to the inclusion of any

particular item in the bill of costs before the taxing officer. We have at present merely to decide whether such an order as is here appealed from cannot legally be made. Section 32 of Ordinance No. 3 of 1876 provides that proceedings taken under the Ordinance in any District Court shall be subject, so far as the same can be made applicable, to the rules, practice, and procedure in force for the time being in ordinary civil suits. There can be no doubt but that, under section 209 and following of the civil Procedure Code, it would be competent for a Court to order even a successful party to pay costs which had been rendered necessary by his own conduct—the ground on which the District Judge has relied in the present case—and also that the Supreme Court would not interfere with the exercise of that discretion in appeal, unless it was clear that a manifest injustice had been caused by its exercise. There are no materials in the present case which would justify us in holding that the order under appeal is unjust, and apart from authority or any *cursus curiæ* to the contrary, the District Judge's order, in my opinion, should be upheld. The only authority cited to us was a decision of Clarence and Dias JJ. in the case of *Green v. Romanis Appu*,[1] in which it was held that in such cases as the present the Government is not entitled to pay or to receive the costs of the reference. I do not think that the practice of the English Courts in regard to land acquisition cases on this point furnishes a safe rule for our guidance in dealing with the acquisition by Government of land for public purposes. There is a wide difference between the compulsory acquisition of land by private bodies for their own purposes and profit, and the compulsory acquisition of land by Government for the benefit of the public. In the absence of any evidence showing that there has been a strong *cursus curiæ* in support of the rule laid down in *Green v. Romanis Appu*,[1] I do not think that it ought to be followed. No such evidence has been adduced, and I therefore agree to the order proposed by His Lordship the Chief Justice.

GRENIER J.—

This is an appal from an order as to costs in a case under "The Land Acquisition Ordinance of 1876." The District Judge had undoubtedly jurisdiction to make the order condemning the unsuccessful claimants to pay the Government Agent's costs, and I do not think that the order was manifestly wrong or unjust, in which case alone this Court has interfered. As far as I know, the case of *Green v. Romanis Appu*,[1] in which it was held that the Government Agent ought not to receive any costs, as he simply brings the disputants into Court and need do no more, has not been followed. It seems to me that there is no reason why the Government Agent should not be paid his costs out of the fund in Court,

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because in making the reference to Court he has to engage the services of the Crown Proctor and of Crown Counsel in order to have the necessary papers prepared and presented to Court. The practice in the District Court of Colombo, as well as in the District Court of Galle, as I have been informed by the Secretary of the former Court, is to pay the Government Agent's costs out of the fund in Court, and allow the successful claimant to recover the amount so paid from the unsuccessful party. I agree to the order proposed by His Lordship the Chief Justice.

Appeal dismissed.