

Were the question not *res judicata* for the purposes of the execution of the amended decree we should have been inclined to refer to the Full Bench the question of the correctness of the ruling in *Sundara v. Subbanna*(1).

We must dismiss the appeal, but under the circumstances we will make no order as to costs in this Court.

CHATHAPPAN
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ORIGINAL CIVIL,

Before Mr. Justice Wilkinson.

AZIMULLA SAHEB (PLAINTIFF),

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT).*

1892.
March 16.

Costs of Government Solicitor—Taxation of, against unsuccessful litigant.

The Government Solicitor, who receives a monthly salary as such, receives no further payment from Government in respect of any costs of litigation to which Government is a party, except "out fees" or actual payments made by him on behalf of Government, and pays no fees when he instructs the Advocate-General; but, under his arrangement with Government, he is entitled to retain the costs decreed to Government, if recovered, and he then pays to the Advocate-General the fees of counsel allowed by the taxing officer :

Held, that when a suit against Government is dismissed with costs, costs should be taxed in the usual way, and the taxing officer cannot enquire into the arrangement as to remuneration of its law officers by Government.

APPLICATION for review of the taxation of the defendant's costs in reference to certain items which had been allowed by the taxing officer in civil suit No. 128 of 1891. That was a suit brought by the plaintiff against the Secretary of State for India in Council in which a decree had been passed whereby it was dismissed with costs. The items in question related to the fees of the Advocate-General who appeared, and the costs of the Government Solicitor who acted for the Secretary of State.

Mr. Norton for the plaintiff.

The principle which we contend for is this :—That where Government is represented by the Government Solicitor, Government is entitled to recover no costs in case the other side is unsuccessful,

(1) I.L.R., 9 Mad., 354.

* Civil Suit No. 128 of 1891.

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except in respect of such sums as are actually paid by the Government Solicitor.

We admit that, as regards any sums actually paid by the Government Solicitor on behalf of Government and, as regards any liabilities incurred by Government to their solicitor in the matter of the suit, Government would have a right on taxation to recover them from the plaintiff, upon the footing that the Solicitor might sue Government to recover them. But in respect of costs which do not come under either of these heads, there can be no taxation or recovery of costs in any suit where Government is a successful party. There is a contract made between Government and the Government Solicitor to pay the latter so much a month, litigation or no litigation, to keep his services at the disposal of Government, and to do all their work. Government further undertaking to pay him any sums actually expended by him as out-fees. The Advocate-General is in a position precisely similar to that of the Government Solicitor. He is bound to undertake and conduct in the City of Madras all civil litigation, in which he may be required to appear on behalf of Government. The fees are not paid to either unless and until the Government succeed, and then they are not paid by Government. It is only after costs are recovered from the unsuccessful party that fees are received by the law officers of Government. The principle involved and which governs the awarding of costs, I submit is this—costs are not given by way of penalty as against an unsuccessful party nor by way of *bonus* to the successful party. Costs are the actual amount of loss in money computed according to the rules of taxation, to which the successful party has been put by his opponent, and nothing more or less. The test then in this case is—what is the exact sum of money which represents the loss of the defendant? If this is the right view it is illegal that Government should recover from the plaintiff sums of money, practically by way of fine, which they have never paid and are not bound to pay to the Government Solicitor or the Advocate-General.

It must be remembered that the Government law officers are not retained in a case. The salary given them is not a retaining fee, but payment for the work to be done by them. If it were paid merely for the purpose of retaining them, it would be another matter. The Government Solicitor cannot turn round and say to the unsuccessful plaintiff “I am going now to charge you, not

“ upon the contract as it really exists as between the Government and myself, but upon some supposititious contract which does not exist, but which puts the Government and me, for the purposes of this suit, upon the footing of client and attorney.”

What fractional part of the time that he is bound to give to Government, does the Government Solicitor's work in any particular case represent? I contend that the Government Solicitor can in no case recover any sum other than that which represents a payment, which Government are bound to recoup. *Re Gedye*(1), *Gambrell v. Earl Falmouth*(2), *Barnes v. Attwood*(3). The test is clearly laid down in *Harroll v. Smith*(4), viz., that the actual pecuniary disadvantage to which the person who has been successful has been put is that which determines the question of the relationship between solicitor and client. Thus in the case of a contract between a vakil and his client for the payment of a specified amount, a decree for costs would carry no more than such fixed sum, even though the costs allowable exceed it in amount. The Statute 18 and 19 Vic., c. 90, provided for the recovery of its costs by Government, and that the money recovered should be paid into the Exchequer; it was not made a present of to the solicitor, but went into the Consolidated Fund, out of which the Crown officers are paid.

The Advocate-General (Hon. Mr. *Spring Branson*) *contra*.

The High Court rules relating to vakils' costs, apply only to pleaders and vakils and not to attorneys. It would be impossible for an attorney to give such a certificate as is required of a vakil. A vakil is not paid for each bit of work done by him, and where he undertakes to accept from his client a smaller sum than would ordinarily be allowed on taxation he can only recover the amount for which he contracted.

In *re Gedye*(1) there was contract with a solicitor, and as between the attorney and client the remuneration of the former was necessarily governed by that contract.

In *Gambrell v. Earl Falmouth*(2) again, there was a contract. In that case a contract was entered into with one and the same attorney and in relation to one transaction by two clients, the parties thereto, and the Court held, in reviewing the taxation, that the attorney being but one, there was but one contract and one

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(1) 23 Beav., 347. (2) 5 Ad. & E., 403. (3) 5 C.B., 164. (4) 6 Jurist, N.S., 254.

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set of costs. In *Barnes v. Attwood*(1) there was a fraud upon the taxing master who was misled thereby. With regard to *Harrold v. Smith*(2), it is necessary to remember that it was held for some time that where the Crown was a party it neither paid costs nor received them, but this view of the rights and liabilities of the Crown in the matter of costs changed, and the Courts held that costs could be recovered by the Crown in the same way as by private individuals. See also *Attorney-General v. Corporation of London*(3). It is said that costs are not a penalty. But the giving of costs is entirely in the discretion of the Court. Even where a plaintiff is successful he may be deprived of his costs. What is that but a penalty?

As to the arrangement between Government and their law officers, see Morgan and Wurtzburg, p. 417. In *Raymond v. Lakeman*(4) the taxing master allowed the company their solicitors' costs, notwithstanding that those solicitors were employed by them on a fixed salary. On review of taxation the Master of the Rolls held that the defendant could not have the benefit of the arrangement between the company and its standing solicitors. In the cases cited on behalf of the plaintiff here, the contest was between attorney and client. The client may successfully set up a contract controlling and limiting his liability to pay his solicitor's costs, but it is not open to his opponent to set up such contract when costs are taxed under the decree awarding them. In England the Statute 18 and 19 Vic., c. 90, declares that costs payable to the Crown shall, when recovered, be paid into the Consolidated Fund. Here, in India, Government choose to allow their law officers to receive, in addition to a salary which is in the nature of a retaining fee, the costs ordinarily allowed to solicitor and counsel. When the Accountant-General in 1877 demanded that all costs awarded to Government and recovered should be paid into the Treasury, it was pointed out by the Government Solicitor that that was not the practice, but that, on the other hand, it was a recognised thing, sanctioned by the Supreme Government, that the fees marked by the Government Solicitor on the brief of the Advocate-General and the costs of the Government Solicitor should be retained by those officers.

(1) 5 C.B., 164.

(3) 19 L.J., N.S., Ch., 314.

(2) 6 Jurist, N.S., 254.

(4) 34 Beav., 584.

In the Proceedings of Government, dated 18th December 1877, No. 2945, paragraph 2, it is stated that "it was not the intention of Government in G.O., dated 20th October 1877, No. 2553, to deny the claim of their law officers to their fees in any suit where costs are awarded to the Government against the opposite parties and are recovered. The contrary practice is distinctly sanctioned in the orders of Government of India quoted in the letter already referred to and is shown by two letters handed in by him to prevail both at Calcutta and Bombay."

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Whether the Government have to pay any fees whatever to their law officers or not is a matter which does not concern the other side. The plaintiff has no right to set up or the taxing officer to enquire into any arrangement between Government and their law officers relating to fees. Section 256 of the Civil Procedure Code says "all costs incurred." "Incurred" and "expended" are not synonymous terms. The contention that the costs of the Advocate-General and the Government Solicitor have not been "incurred" by Government is based on the erroneous assumption that the party liable to pay costs can enquire into, and take advantage of the arrangement existing between Government and their law officers.

Mr. Norton.—Section 256 of the Civil Procedure Code lays down the very test for which I contend—namely "all costs incurred." I say that the Government are not liable to their law officers for costs of attorney and counsel, therefore, as to such costs Government has "incurred" no liability, and consequently cannot recover anything. Has the Government Solicitor incurred any professional liability to pay the Advocate-General? If he paid that officer counsel's fees, could he recover them from Government? Could he maintain a suit against Government for the recovery of his own costs if not paid by Government?

WILKINSON, J.—This is an application to review the taxation of the defendant's bill of costs in the above suit, to set aside the allocation of the taxing officer, and to lay down the mode in which and the principle on which the bill should be taxed.

The suit was one by a private individual against the Secretary of State. At the first hearing the Secretary of State was represented by the Advocate-General instructed by the Government Solicitor, and the suit was dismissed, the plaintiff being ordered to pay the costs of the Secretary of State.

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The taxing officer's notes show that before him the plaintiff objected to defendant's bill of costs on the ground that defendant had incurred no costs, "unless for the time of their officers" (whatever that may mean). The Government Solicitor replied that the taxing officer was not at liberty to go behind the order to tax, that costs were given as a penalty, and that it had for more than thirty years been the invariable practice of the Court to tax Government bills of costs in the same way as other bills of costs. The taxing officer accepted the plea of the Government Solicitor and taxed the costs as between party and party.

Mr. Norton appears for the plaintiff and argues that as Government pay the Government Solicitor a fixed monthly salary to do its legal work, the Secretary of State, the defendant in this case, cannot be said to have incurred any costs: that as the Government Solicitor cannot recover from the Government the items mentioned in the bill of costs, Government cannot recover them from the plaintiff, and that the principle upon which the Court ought to proceed in fixing costs is to ascertain what was the actual damnification caused to the successful party and to award to him the sum which he is actually out of pocket. Mr. Norton's argument proceeds on the assumption that the plaintiff is entitled to the benefit of any arrangement entered into by the Government with the solicitor, whose services the Government see fit to retain by the payment of a monthly salary. I do not think that he is. The principle applicable in cases like the present appears to be that laid down in the case relied on by the Advocate-General—*Raymond v. Lakeman*(1). In that case the taxing master allowed a company which employed standing solicitors at a fixed salary such costs as the company *would be bound to pay* to their solicitors. It was argued before the Court that as the standing solicitors were paid a fixed salary, the company had no right to charge the unsuccessful party more than their own standing solicitors could have charged them. The Master of the Rolls maintained the order of the taxing master, holding that the unsuccessful party could not have the benefit of any private arrangement between the solicitor and the company as to costs. The case appears to me on all fours with the present case. The unsuccessful party, the plaintiff, has been ordered to pay to the defendant the costs

(1) 34 Beav., 584.

incurred by him. The defendant asserts that costs have been incurred by the employment of a solicitor to receive the summons, to instruct counsel, put in written statement, &c. It is not denied that the costs, which the present defendant claims to recover from the plaintiff, are such as any other defendant must have incurred in defending the suit and would be bound to pay to his solicitor. But it is argued that unless the Government Solicitor proves that he can recover the costs from Government, Government cannot recover them from plaintiff. This is entirely beside the question, which is one between plaintiff and defendant, not one between plaintiff and the Government Solicitor as Mr. Norton suggests. The plaintiff has no right to assume that the defendant has not expended those sums, nor is he entitled to call upon the defendant to prove the nature of the contract between him and his solicitor. The case of *Barnes v. Attwood*(1) is not really in point, as there the taxing officer had been induced by false affidavits to allow a larger sum as expenses to commissioners than had actually been paid. It is true that Mr. Norton's whole argument proceeded on the assumption that the bill of costs put in by the defendant in this case represents absolutely fictitious transactions as between the Government Solicitor and the Government. But it is unnecessary to consider that question. The only question is, has the defendant incurred any, and if so, what costs? The answer is, the defendant has employed a solicitor, who has done certain acts and is entitled to charge for his time and work, and the defendant is liable to remunerate the solicitor. Whether Government chooses to do by a fixed salary and whether the costs if recovered go to the Government Treasury or into the solicitor's pocket, is not a matter into which the taxing officer is competent to enquire.

The petition must be dismissed with costs.

Branson & Branson—Attorneys for plaintiff.

Barclay—Government Solicitor.

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(1) 5 C. B., 164.