

APPELLATE CIVIL.

Before Mr. Justice Spencer and Mr. Justice Krishnan.

DONTA FEDDA CHENCHAYYA (SECOND DEFENDANT),
APPELLANT

1919,
August 8,
and 13.

v.

MALLAM BALAYYA AND ANOTHER (EXECUTORS OF PLAINTIFFS'
ESTATE), RESPONDENTS.*

*Civil Procedure Code (Act V of 1908), sec. 35, O. XXII—Abatement of suit—
Dismissal of suit—Costs against estate of plaintiff, whether can be awarded
to defendant—Pleader's fee—Only one-half to be allowed.*

If on the death of a sole plaintiff the right to sue does not survive and the suit is dismissed in consequence, the Court has power under section 35, Civil Procedure Code, to make an order granting the costs of the defendants out of the estate of the deceased.

If the suit abates after the framing of issues, only one-half of the pleader's fee should be awarded.

SECOND APPEAL against the decree of J. W. HUGHES, the District Judge of Cuddapah, in Appeal Suit No. 261 of 1917, preferred against the decree of M. VENKATARAMAYYA, the District Munsif of Proddatūr, in Original Suit No. 721 of 1916.

Plaintiff brought a suit for maintenance and died after issues had been framed in the suit but before it came on for trial. The suit abated as the right to sue did not survive. The District Munsif passed an order in these terms:—"The suit abates and the defendants shall recover their costs from the estate of the deceased plaintiff." The District Munsif relied on Order XXII, rule 3, clause (2) of the Civil Procedure Code, and on the rulings in *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib* (1) and *Josiam Tiruvengadachariar v. Sawmi Iyengar* (2).

The executors of the deceased plaintiff preferred an appeal to the District Court against the order awarding costs to the defendants out of the estate of the deceased plaintiff. The learned District Judge reversed the order awarding costs to the

* Second Appeal No. 1801 of 1918.

(1) (1904) I.L.R., 27 Mad., 588.

(2) (1911) I.L.R., 34 Mad., 76.

defendants, holding that it was not open to the Court to award costs to the defendants when the suit abated and the right to sue did not survive on the plaintiff's death. The defendant preferred a second appeal as well as a civil revision petition to the High Court against the order of the District Judge.

M. O. Parthasarathi Ayyangar and *M. O. Tirumala Achariyar* for the appellant.

C. V. Subrahmanya Ayyar for the respondents.

JUDGMENT.

KRISHNAN, J.—In this second appeal and the civil revision petition two questions have been raised for our decision, namely, (1) whether when a suit abates on account of the death of a sole plaintiff the right to sue not surviving, and it is dismissed in consequence, the Court has power to make an order granting defendant's costs out of the estate of the deceased and (2) when such an order is made by the District Munsif an appeal lies against it to the District Judge at the instance of the deceased's legal representatives.

On the first question the learned District Judge held that the Court had no such power. No doubt, as pointed out by him the case before us is not one to which Order XXII, rule 3 of the Code of Civil Procedure, applies, for that order does not seem to refer to a case where the right to sue does not survive on the death of the sole plaintiff. Sub-rule (2) of rule 3 which in terms authorizes the Court to grant costs to the defendant against the estate of the deceased plaintiff applies only where no application is made within time under sub-rule (1) for adding the legal representative of the deceased as a party and not to a case where no such application can be made at all. There is no reference in the whole of Order XXII to a case where on the death of a sole plaintiff the right to sue does not survive. Order XXII therefore cannot be relied on to support the order as to costs in the case before us. This was conceded by the learned Advocate for the appellant.

He relies however on section 35 of the Code itself. Under that section, the "costs of and incident to all suits" are in the discretion of the Court, and the Court is given full power to decide by whom and out of what property and to what extent such costs are to be paid. This power exists even where the

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Court has no jurisdiction over a particular suit. The language of the section is clearly wide enough to cover the present case. It is however argued that we should limit the scope of that section to cases where both parties are on the record, as otherwise the provision as to costs in Order XXII, rule 3, clause (2) will be rendered redundant. I do not think the redundancy pointed out is a proper ground for cutting down the scope of the section when there is nothing in its language to justify such limitation. As no separate suit lies between parties to a suit to recover the costs as damages, it stands to reason that a Court should have wide powers in awarding costs, in all matters brought before it by parties, and we should not therefore limit its powers unless it is clear that the legislature meant to do so in any particular case. I am not therefore prepared to limit the scope of section 35 by any implication derivable from the existence of the provision as to costs in Order XXII, rule 3, clause (2). So far as I am aware the power to grant costs against the estate in cases like the present has never been challenged and the practice has been to grant costs in suitable cases. One such example at any rate has been brought to our notice from the Law Reports. See *Sakyahani Ingle Rao Sahib v. Bhavani Bozi Sahib*(1). It is true the failure of the suit when plaintiff dies without the right to sue surviving cannot be attributed to any default on the part of the plaintiff or of his legal representative. But on the other hand there may be no reason whatever for mulcting defendants in costs by making them bear their own costs. The question has to be judged in each case as to what would be the proper order as to costs and the Court must exercise a careful discretion in making its order. But to hold that the Court has no power to deal with costs in such a case in any circumstances will prevent the Court from granting costs to the defendant even in a case where it is clear to it that the plaintiff's suit is a vexatious and baseless one, the trial having advanced far enough, before the plaintiff's death to draw such an inference.

Being of opinion that the Court has a discretion to award costs to a defendant even in a case where a suit abates on the

(1) (1904) I.L.R., 27 Mad., 588.

cause of action not surviving the death of a plaintiff, I consider the decree of the learned District Judge based entirely on his view that no such discretion exists must be set aside.

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It was urged by the respondent's vakil that the District Munsif did not himself exercise any discretion in this case and that if he did it was not a proper one. It is clear from his judgment that though he thought he had power under Order XXII, rule 3, clause (2), to make the order as to costs, he did exercise a discretion in the matter; that rule also makes it discretionary for the Court to pass such an order. I do not think there is any valid ground for interfering with his discretion in this case. But it has been brought to our notice that in calculating the defendant's costs he has been awarded pleader's fee in full, as if the case had been tried and disposed of. It seems to me this case should be treated for the purpose of calculating pleader's fee as similar to one dismissed for default of prosecution after framing of issues. Only one-half of the full fee should have been awarded under the rules. With this modification the order of the Munsif as to cost must be confirmed.

In the view I am taking it is unnecessary to express an opinion on the second question raised by the learned Advocate for the appellant. I would allow the second appeal and set aside the decree of the District Judge, and restore that of the Munsif with the modification above stated and allow the appellant his costs in the lower Appellate Court and in the second appeal in this Court, from the estate of the deceased Subbamma as the respondents acted as executors of her estate in appealing to the District Court and in supporting the District Judge's decree in this Court. The civil revision petition is dismissed with costs.

SPENCER, J.—I agree.

SPENCER, J.

K.B.