APPELLATE CIVIL.

Before Mr. Justice Curgenven.

1934, March 9.

VASA PANCHAKSHARI (DEAD) AND SEVEN OTHERS (PETITIONERS—PLAINTIFFS AND NIL), APPELLANTS,

v.

MANEM VENKATARATNAM (FIRST RESPONDENT-FIRST DEFENDANT), RESPONDENT.*

Practice—Costs—Trustee sued as such—Appeal by, unsuccessful—Costs of—Personal liability of trustee for—Rule as to—Applicability of, to dharmakartha of a temple sued as such.

Dharmakarthas of a temple, who were sued as such and against whom the suit was decreed in the Courts below, filed a second appeal which was dismissed by a decree providing that "the appellants do pay to the respondents 1 to 4 Rs. 76 for their costs in opposing this second appeal."

Held that the dharmakarthas were personally liable for the costs awarded by the decree, especially as their second appeal was against the concurrent decisions of the Courts below upon a question of fact and their conduct in filing a second appeal in such a case could not be justified as being in the interests of the institution which they represented.

APPEAL against the decree of the Court of the Subordinate Judge of Narsapur in Appeal Suit No. 17 of 1930 preferred against the order of the Court of the District Munsif of Narsapur in Execution Application No. 180 of 1929 in Original Suit No. 582 of 1927.

P. Somasundaram for appellants.

R. Rajagopala Ayyangar for *V. Govindarajachari* for respondent.

JUDGMENT.

The appellants are some of the plaintiffs in a suit filed by the weavers of Narsapur against the

*Appeal against Appellate Order No. 49 of 1931.

two dharmakarthas of a local temple in respect of a certain right claimed with regard to the location of their weaving appliances. The plaintiffs won their cause in the trial, in the first appeal, and in the second appeal before this Court, it being held that they had a customary right to set up their looms at the places objected to by the defendants. The second appeal was accordingly dismissed, the decree providing that

"the appellants do pay to the respondents 1 to 4 Rs. 76 for their costs in opposing this second appeal."

In order to enforce this decree the plaintiffs took out execution personally against the defendants by applying for their arrest. The learned District Munsif disallowed the application on the ground that the suit was against the defendants as dharmakarthas and that the applicants in execution could recover their costs only against them as dharmakarthas, the capacity in which they were sued, and against the properties of the temple in their hands. An appeal against this order to the Subordinate Judge of Narsapur failed, it being held there too that because the suit was against the dharmakarthas as such and not in their individual capacities they could not be made personally liable for costs, which could only be recovered from the property of the temple in their hands.

The objection made in this appeal is that the Courts below have read into the decree something which is not stated therein, namely, that the costs are to be recovered only from the estate which the dharmakarthas administer. It is argued that the direction to the defendants to pay the costs amounts to a personal decree against them to that effect, which may be enforced by the arrest of

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their persons. I have been referred to a case of this Court in which a Bench has considered a matter of this kind with reference to an Official Receiver in insolvency, *Balakrishna Menon* v. *Uma*(1). The learned Judges first proceed to consider the specific position of an Official Receiver and point out that under English law special rules exist governing the liability of the trustee in bankruptcy with regard to costs incurred by him in litigation and further that upon this point there are no special rules in this Presidency. The practice in this High Court and in the Calcutta High Court, even on the Insolvency Side, appears to be to hold the Official Assignee in the first instance personally liable for costs. In any case the English rules appear to relate only to proceedings in bankruptcy and in the case of an ordinary action a simple order for costs against the trustee has the usual meaning of such an order against any litigant, who may be made personally liable in the first instance though he may eventually recover the amount so expended by a claim upon the estate. One of the English cases referred to in that decision is *Pitts* v. *La Fontaine*(2). I think that from that decision may be clearly derived the principle that in an ordinary litigation a person in the position of a trustee in bankruptcy who has a decree passed against him for costs, such as the decree in the present suit, must ordinarily be held personally liable. After quoting a decree in similar terms in that case their Lordships observe :

"Nothing can be clearer upon the face of the order than that it is an order in the usual form against the respondent personally to pay those costs."

(1) (1928) I.L.R. 52 Mad. 263. (2) (1880) 6 App. Cas. 482.

And reference is made to the observations of MELLISH L.J. in *Ex parte Angerstein. In re Angerstein*(1) :

> "In an action at law a trustee in bankruptcy would be liable in the same way as any other plaintiff. In a case where a trustee makes an application, the success of which is doubtful, he ought, before making it, to get from the creditors an indemnity against the costs if he knows that there are no assets out of which they can be paid."

Accordingly the proper course, it is said, to be observed is that, when it is intended to qualify the ordinary liability of the trustee in bankruptcy to pay costs, such qualification should be expressly mentioned in the order. In the present case accordingly I can see no ground for holding that the decree is otherwise than an unambiguous direction to the defendants to pay costs, which means that they are personally liable for those costs.

That view is without special reference to the circumstances in which these costs of second appeal were incurred. The plaintiffs succeeded in the first Court in establishing their customary right. The defendants took the matter on appeal and were defeated. Notwithstanding the concurrent decisions of those two Courts upon a question which apparently was one of fact they persisted in filing a second appeal which met with the same inevitable fate. It seems hard to justify such conduct as being in the interests of the institution which they represented, and that appears to be an additional ground, if any be required, for the view that the learned Judges who decided the second appeal did not contemplate that the costs should come out of the temple

(1) (1874) L.R. 9 Ch. A. 479.

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funds. Here again there is authority from English cases for holding that in such circumstances a trustee would not be justified in pressing or opposing claims which have already once been decided by a Court. In *Westminster Corporation* v. *St. George, Hanover Square*(1) this point was specifically dealt with. The argument addressed to the Court was this, that a trustee who appeals does so at his own risk as to costs, because he is only interested so far as he wants protection and he is completely protected by the decision of the Court of first instance, and this was the view taken by the Court of Appeal. COZENS-HARDY M.R. observed :

> "If a trustee appeals to the Court of Appeal against a decision in the Court below and the appeal is unsuccessful, I feel no doubt that under ordinary circumstances the trustee as appellant is in no better position than another appellant, and under ordinary circumstances if the appeal fails, it fails with what we so frequently describe as the usual consequences."

The same opinion is expressed by FLETCHER MOULTON L.J. In another case, *Ex parte Russell. In re Butterworth*(2), the principle again received recognition. That was a case where the trustees had failed in the County Court. They succeeded in appeal to the Chief Judge but failed when a further appeal was carried to the Court of Appeal. The direction was that they should pay the costs incurred in the two higher Courts, on the ground that they should have remained content with the decision of the County Court.

Against arguments thus supported the respondent has attempted to show that a temple dharmakartha is a mere manager and thus in some position different from a trustee with regard

(1) [1909] 1 Ch. 592, 614. (2) (1882) 19 Ch. D. 588.

to liability for costs. I am unable to appreciate upon what principle in a case of this kind any such discrimination can be made, because dharmakarthas are not the managers of an estate which is in the ownership of any person in a position to exercise control over it or them. It appears to me that the general principles discussed above must apply to dharmakarthas as much as to ordinary trustees and other persons suing or sued in a representative capacity. Accordingly the orders of the Courts below cannot I think be supported and I allow the civil miscellaneous second appeal and set them aside and direct the District Munsif to restore Execution Petition No. 180 of 1929 and dispose of it in the light of the above observations. The appellants will have their costs incurred here and in the Courts below.

A.S.V.