ORIGINAL CIVIL.

Before Mr. Justice Bayley (Acting Chief Justice) and Mr. Justice Farran.

1892. *July* 20.

RANCHORDA'S VITHALDA'S, (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'I KA'SI AND OTHERS, (ORIGINAL DEFENDANTS 2 TO 5), RESPONDENTS.*

Costs—Right of appeal—Civil Procedure Code, Secs. 220, 540 *and* 568—*Discretion of lower Court—Misapprehension of fact and law.*

Where the original Court has made an erroneous order for costs under a misapprehension of fact and law, an appeal lies from such order under the Civil Procedure Code, although the appellant complains of nothing else but the order for costs so erroneously made.

APPEAL from a decree by Parsons, J. The second defendant was the wife of the first defendant, the third and fourth defendants were their sons, and the fifth defendant was the widow of a deceased son.

The plaint alleged that the plaintiff had agreed with the first defendant to buy from him a certain house situate in the Bhuleshwar Road for the price of Rs. 42,500; that the whole of the purchase-money, save Rs. 7,500, had been paid to the first defendant; that by an order made on the petition of the first defendant, he had been authorized to sell the said house to the plaintiff, and for that purpose the first defendant had been, by the same order, appointed guardian of the third and fourth defendants who were then minors, and the sum of Rs. 7,500 out of the purchase-money had been ordered to be deposited with the Accountant General for the benefit of the said infants, which the plaintiff had always been, and still was, willing to do; that the first and the second defendants had executed the conveyance of the said property to the plaintiff on their own account, but that the first defendant refused to do so as guardian of his infant sons; that the third defendant was now no longer a minor, and had refused to execute the conveyance for himself; that all five defendants continued to reside in the said house without paying any rent for so doing, and refused to go out; and prayed, *inter alia*, (*a*) that it might be declared that the third, fourth and fifth defendants had no claim to, or interest in,

* Suit No. 77 of 1891; Appeal No. 734.

the said house, and (*b*) that all five defendants might be decreed to deliver up possession of the said house to the plaintiff.

The first defendant, and the second, third and fourth defendants filed separate written statements, and were separately represented by counsel. The fifth defendant took no part in the case. Defendants 2, 3 and 4 claimed a direct interest in the house in question under the will of the original owner, and denied the authority of the first defendant to affect their interest in the said property, and contended that they were wrongly made parties to this suit.

Separate issues were raised for the two sets of defendants. For the second, third and fourth defendants the following issues, *inter alia*, were raised:—

(1) Whether the plaintiff is entitled to possession of the house from these defendants?

(2) Whether the third and fourth defendants have any, and what, interest in the house in question?

(3) Whether the sum of Rs. 7,500 sufficiently satisfies that interest?

The learned Judge passed a decree for the plaintiff, declaring that the second, third, fourth and fifth defendants had no interest in the property, ordering the sum of Rs. 7,500 to be forthwith lodged with the Accountant General under the terms of the order in that respect previously made, and ordering all five defendants forthwith to deliver up possession of the said house to the plaintiff. As respects costs, the learned Judge ordered the first defendant to pay the plaintiff his costs of the suit, and ordered the plaintiff to pay the costs of the second, third, fourth and fifth defendants.

Latham, Advocate General, counsel for the plaintiff, strenuously objected to the latter part of the order as to costs, arguing that as the plaintiff had succeeded in getting what he prayed for as against the second group of defendants, he should be allowed his costs as against them. He contended that the Court had no power to order the plaintiff, who had succeeded, to pay the costs of these defendants, as they were proved to have been entirely in the wrong.

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The learned Judge, however, adhered to the order as already made, and gave the following reasons for this part of the order:—

"Defendants three to five were unnecessarily joined in the suit, as they did not execute the conveyance, and a decree against defendant No. 1 was quite sufficient for plaintiff's purposes in this suit. These defendants do not appear to have denied plaintiff's title prior to the suit, and they probably would not have contested a decree against the first defendant. Moreover, the plaintiff was in default in not having deposited the notes (for Rs. 7,500) as he promised to do, nor did he instruct Mr. Bháishankar (the receiver) to pay the money (a sum of Rs. 8,000) proved to be due to the second defendant. He even contended in this suit that nothing was to be paid to the second defendant."

The plaintiff appealed from this latter part of the order for costs as regards the second, third, fourth and fifth defendants.

In the memorandum of appeal the grounds of appeal were thus set forth:—

1st. That the above-named respondents having claimed to have interests in the property, the subject of the said suit, and having appeared by advocate to assert such interests and to resist the plaintiff's claim thereto, and the said learned Judge having passed judgment for the plaintiff, and having decided that the said respondents had no interest therein, the learned Judge erred, and his decision was contrary to principle, in ordering the plaintiff to pay the costs of the said respondents.

2nd. That the above-named respondents having been proved to be in possession of the property in dispute in the suit, and having appeared by advocate to resist the plaintiff's claim to possession thereof, and the said learned Judge having passed judgment for the plaintiff and having ordered the said respondents to deliver up to the plaintiff possession of the said property, the said learned Judge erred, and his judgment was contrary to principle, in ordering the plaintiff to pay the costs of the said respondents.

3rd. That the said learned Judge erred, and his judgment was contrary to principle, in holding that because the above-named respondents had no interest in the property, the subject of the suit, they were, therefore, not necessary or proper parties to the suit brought by the plaintiff to obtain possession thereof.

Lang (Acting Advocate General) and *Inverarity* for the appellants.

Jardine and *Vicáji* for the respondents.

Inverarity:—This is simply an appeal for costs. There is, in the first place, a right of appeal in the case of an order for costs which forms part of a decree under the Code of Civil Procedure. Section 540 provides for an appeal from any part of an original decree. The order for the respondents' costs here is contained in a decree, and is part of it, and under section 220 may be executed as if it were a decree for money. That section (220) no doubt confers on the Court full power to award costs, but the proviso to it specifically enacts that, if the costs of any application or suit shall not follow the event, the Court shall state its reasons in writing. This requirement as to the statement of reasons is for purposes of appeal in case, and when, that right is exercised. In one case the Privy Council describe an order as "most extraordinary" where a successful respondent was ordered to pay appellants' costs; they say "A case has been cited from Borradaile's Reports, in which the Court appears, in an action under very peculiar circumstances, to have given a most extraordinary decision. First of all in deciding that the defendants should pay the costs to a plaintiff who did not succeed, and then, when that failing, plaintiff appealed, in two stages, to other Courts, and failed also in appeal, in giving the costs in like manner against the respondents, who in all three of the proceedings had succeeded. This is rather too strong a case, their Lordships think, to be cited as an authority; and there appears to have been no objection made by the parties, no appeal from the decision of the Court below as to costs, and, therefore, the point never having been raised, cannot be cited as an authority"[1].

(1) *Mussumat Kemee Bace* v. *Luchmundás Narrain Dás*, 5 W. R. at p. 60, P.C.

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There is no appeal for costs under the English Judicature Acts except with the leave of the Court obtained under section 49, unless a question of principle is involved. I submit the law here is different.

Secondly, an appeal for costs will be entertained if a question of principle is involved. The English cases are numerous: see Morgan and Wurtzburg's Costs, p. 160; see also *The Secretary of State* v. *Marjum Hosein Khan*(1); *Bunwari Lall* v. *Chowdhry Drup Nath Singh*(2); *Moshingan* v. *Mozari Sajad*(3). In this case the order is unsustainable on principle. The Court has awarded costs, because it has considered the wife and children of the first defendant unnecessary parties to the suit. But they were in actual occupation, and claimed an interest in the house, and a decree in ejectment has been made against them. Without their being parties there could have been no decree for possession of the whole house. In *Corporation of Rochester* v. *Lee*(4), the plaintiff ultimately succeeded on the whole of his claim, and was held entitled, on appeal, to some costs disallowed in the lower Court.

On what possible principle can a successful plaintiff in ejectment be ordered to pay defendants' costs? The defendants denied our title in their written statement and issues, and fought to the last. I ask leave to put in, if necessary, the correspondence before suit to show that these defendants had denied our title before suit. This was not put in in the lower Court, as we could not anticipate this extraordinary decision as to costs.

Jardine and *Vicáji*, *contra*:—The third and fourth defendants were no parties to the conveyance, nor was there any proof that defendants two to five ever denied plaintiff's title before suit. The plaintiff, therefore, was not justified in making them parties. Even if they were proper and necessary parties, the appellant was not wholly successful in his suit against them. He prayed for an unqualified decree for possession, and the Court passed only a qualified decree in his favour. The plaintiff alleged that he had paid to the first defendant the balance of the purchase-

(1) I. L. R., 11 Calc., 359.
(2) I. L. R., 12 Calc., 179.
(3) I. L. R., 12 Calc., 271.
(4) 2 DeG. M. & G., 427.

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money, whereas the Court found that he had not paid Rs. 8,000, part of such balance, and directed the same to be paid by the plaintiff. The respondents were also gainers by a special direction in the decree requiring the appellant to deposit Rs. 7,500 with the Accountant General. For these and other reasons the Court of first instance in the exercise of its discretion under section 220 of the Code of Civil Procedure awarded costs to the respondents, and there is no violation of any principle involved in such an exercise of that discretion—*Keshavrâv K. Joshi* v. *Bhavânji Bâbâji*(1).

There is no Indian decision in which an appeal for costs, pure and simple, has been allowed. That seems to show that no such appeal lies.

Lang (Acting Advocate General) in reply:—The well-established general rule is that the successful party ought to get his costs. The respondents did not succeed on any of the issues that they raised. The chief ground on which they were awarded costs was that they were not necessary parties, which was wrongly decided, and is appealed against. It would be discretionary to deprive the plaintiff of his costs if he had not wholly succeeded; but it is no exercise of discretion to make him pay, notwithstanding his success, the unsuccessful party's costs.

BAYLEY, C. J:—This is an appeal from the lower Court's order as to costs, on the ground that it has been made contrary to principle. The suit was instituted by the plaintiff for possession of a house he had purchased from the first defendant for the price of Rs. 42,000. The first defendant executed the conveyance, but did not give possession. He was residing in the house with the other defendants, members of his family, who are respondents in appeal, and the latter claimed an independent interest in the house under a will made in their favour by the original owner, and declined to give up possession. The respondents put in a separate written statement of their own, and appeared by separate counsel. At the hearing, all the issues raised for them by their counsel were decided unfavourably to them, and a decree for possession was passed against

(1) 8 Bom. H. C. Rep. (A. C. J.), 142.

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them, the decree at the same time declaring that they had no interest in the house. As to their costs the Court ordered the plaintiff to pay them, and recorded its reasons for so doing as follows:—[His Lordship then read the reasons as set out above, and continued.] The reason, in substance, is that the respondents were unnecessary parties to the suit, and should not have been joined.

It is clear that the Court was in error in holding that the respondents were unnecessarily made parties to the suit. They were actually in possession, and, therefore, were properly made defendants. There is, we think, therefore, no doubt that the Court made the order complained of under a misapprehension of fact and law as to who were, or were not, necessary and proper parties to the suit brought by the plaintiff.

That being the case, an appeal, we think, lies under sections 220 and 540 of the Civil Procedure Code against an order for costs so erroneously made, whether there is, strictly speaking, any principle involved in such an appeal or not. In England, similar appeals for costs have been allowed both before and after the passing of the Judicature Acts. The Courts have reversed the order for costs before those Acts in *Owen* v. *Griffith* (1); *Angell* v. *Davis*(2); *Palmer* v. *Walesby*(3); and *Norton* v. *Cooper* (4); and since those Acts in *In re Gilbert*; *Gilbert* v. *Hudlestone*(5); *Johnstone* v. *Cox*(6); *Harris* v. *Petherick*(7); *Willmott* v. *Barber*(8); and *The Monkseaton*(9). The principle to be deduced from these decisions is that appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any misapprehension of facts, or violation of any established principle, or where there has been no real exercise of discretion at all. There being in this case a clear misapprehension of fact and law, we think the order must be reversed, and, instead of that part thereof which directs the plaintiff to pay the costs of the defendants, we order that each party do pay his and their own

(1) 1 Ves., 249.
(2) 4 My. & Cr., 360.
(3) L. R., 3 Ch. App., 732.
(4) 5 DeG. M. & G., 728.
(5) 28 Ch. D., 549.
(6) 19 Ch. D., 17.
(7) 4 Q. B. D., 611.
(8) 17 Ch. D., 772.
(9) 14 P. D., 51.

costs. The appellants' costs of appeal to be paid by the respondents.

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Decree varied.

Appellants' solicitors:—Messrs. *Little, Smith, Frere and Nicholson.*

Respondents' solicitors:—Messrs *Mulji and Rághávji.*

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Before Mr. Justice Farran.

NIMBA'JI TULSIRA'M AND ANOTHER, PLAINTIFFS, *v.* VÁDIA VENKATI AND OTHERS, DEFENDANTS.*

1892. *September 24.*

Execution—Civil Procedure Code (Act XIV of 1882), Sec. 295—Rateable distribution of sale-proceeds—Same judgment-debtors—Separate and joint judgment-debtors—Marshalling of assets between decree-holders—Holder of decree of Small Cause Court—Transfer of decree to High Court necessary.

The plaintiffs in this suit obtained a decree against all three defendants A, B and C. In execution of this decree they attached two sets of securities, (i) municipal bonds, the joint property of B and C; and (ii) Government loan notes, the property of C alone. These were sold by the Sheriff, but before they were so sold, the holders of decrees in two other High Court suits came in and applied to the High Court for execution of their decrees, which decrees were against C alone. These last-mentioned decree-holders now claimed to participate rateably with the plaintiffs in this suit in the realized proceeds of both the above-mentioned securities. The plaintiff in this suit contended that such decree-holders having decrees only against C, were not claiming against "the same judgment-debtors" as themselves within the meaning of section 295 of the Civil Procedure Code (XIV of 1882).

Held, that as regards the proceeds of the Government loan notes, the sole property of C, the plaintiffs' decree and the other two decrees were all decrees "against the same judgment-debtor," and that, therefore, as regards that fund, all three sets of decree-holders were equally entitled and must share therein rateably.

Held, further, that as regards the other fund, the proceeds of the property of B and C, only the plaintiffs in this suit were entitled thereto, since the other decree-holders had no decrees against B and C, and, therefore, not "against the same judgment-debtors" as was the decree of the plaintiffs.

Held, further, that the plaintiffs having two funds to proceed against, whilst the other decree-holders had but one of these two, the equitable principle of marshalling should be applied, and the plaintiffs required to satisfy themselves as

Suit No. 685 of 1890.