

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1924.
January 28.
RUSTOMJEE HEERJEEBHOY (ORIGINAL DEFENDANT No. 1), APPELLANT *v.*
COWASJEE DADABHOY AND OTHERS (ORIGINAL PLAINTIFF AND DEFEND-
ANTS NOS. 2 AND 3), RESPONDENTS^o.

Costs—Separate set of costs when allowed—Practice.

An order or judgment in a suit, when more than one party appears as defendant or respondent, directing payment of the defendant's or respondent's costs by the plaintiff or appellant does not necessarily mean that each defendant or respondent appearing is entitled to his costs from the losing party. When such parties appear separately, an application for separate set of costs must be made at the time when the judgment is delivered if separate costs are to be allowed on the decree.

ORIGINATING SUMMONS.

By a deed of trust, dated the 6th June 1919, the plaintiff, defendants Nos. 1 to 3 and others were appointed trustees. By a clause in the said deed power was given to one of the trustees to nominate in his place his son-in-law, Dinsha D. Romer, if he so willed. In fact he did so nominate the said Romer. Thereafter the plaintiff called upon all the trustees to effect the change. Nothing was done whereupon the plaintiff took out an originating summons making the remaining trustees defendants. Two of them appeared at the hearing by separate counsel. The Judge (Mulla J.) in determining the summons directed that defendant No. 1 should bear his own costs and that the costs of defendant No. 3 should come out of the estate.

Against this decision defendant No. 1 appealed making the plaintiff and defendants Nos. 2 and 3, respondents, who although represented by one firm of attorneys appeared at the hearing by separate counsel. The appeal was dismissed with costs.

On the drawing up of the appellate decree a question arose as to whether the respondents should be allowed separate sets of costs. The appellant having objected, the matter was referred to the Court of appeal for speaking to the minutes of the decree.

M. C. Setalvad, for the appellant.

Kanga, Advocate-General, for the respondents Nos. 1 and 3.

MACLEOD, C. J.—This was an originating summons filed by one trustee against his co-trustees for the determination of the following question :—

“Whether the defendants should not be ordered to execute a deed of appointment appointing Dinshaw, D. Romer as a trustee of the premises mentioned in the deed of declaration, dated the 6th June 1919, referred to in the plaint in place and stead of Cowasjee Maneckjee Rustomjee deceased.”

At the hearing of the summons the 2nd defendant was absent, while counsel appeared for the plaintiff the 1st and 3rd defendants respectively.

The answer to the question was that the defendants were bound to execute a deed of appointment. The costs of plaintiff and third defendant as between attorney and client were to come out of trust funds, and the 1st defendant was directed to bear his own costs.

From that judgment the 1st defendant appealed. He made the plaintiff and the 2nd and 3rd defendants respondents. At the hearing of the appeal the 2nd defendant was absent, while separate counsel appeared for the plaintiff and the 3rd defendant. The appeal was dismissed with costs.

No application was made to the Court at that time to ascertain whether separate sets of costs were allowed

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to the plaintiff-respondent and the 3rd defendant-respondent. The draft decree was drawn up. The 1st and the 3rd respondents appeared by one set of attorneys, and in the draft it was directed that the appellant should pay the costs of the 1st and the 3rd respondents of the appeal. The appellant objected and altered the draft, so that it contained a direction that the appellant should only pay one set of costs to the respondents.

In consequence of that dispute, the suit has been set down before us for speaking to the minutes of the decree. We have been told by the counsel for the respondents that it has been the practice on the Original Side of this Court to construe an order or decree in a suit where more than one party appears as defendant or respondent, directing payment of the defendants' or respondents' costs by the plaintiff or appellant, as meaning that each defendant or respondent appearing is entitled to his costs from the losing party. I and my learned brother are not aware of such a practice, and no authority has been cited before us in which such a practice has been confirmed by a decision of this Court. We think that when such parties appear separately, then an application should be made at the time when judgment is delivered in their favour with costs, for separate sets of costs. That is the invariable practice on the Appellate Side, and unless such an application is made an order like the one which has been made in this appeal must be taken as meaning that the losing party should only pay one set of costs to be divided amongst the successful parties. In any event it is certain that if the respondents had applied for separate sets of costs, we would not have allowed them. There was no necessity whatever for separate appearances on behalf of the plaintiff and the 3rd defendant. Therefore, the decree will be settled as altered by the appellant.

No order for costs.

Attorneys for appellant: Messrs. *Wadia, Gandhi & Co.*

Attorneys for respondents: Messrs. *Merwanji, Kola & Co.*

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Order accordingly.

V. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Crump.*

KESHAV VITHAL OLTIKAR (ORIGINAL PLAINTIFF). APPLICANT v. HARI
RAMKRISHNA OLTIKAR (ORIGINAL DEFENDANT), OPPONENT^o.

1923.

December 7.

Partition suit—Co-defendants—Costs of suit—Contribution.

When in a partition suit all the defendants equally contest the suit and are directed to pay the plaintiff's costs, if one defendant pays the costs, he is entitled to contribution from his other co-defendants, unless facts are proved which are sufficient to defeat the equity.

Shakul Kameed Alim Sahib v. Syed Ebrahim Sahib⁽¹⁾, relied on.

CIVIL extraordinary application against the decree passed by J. B. Phanse, Subordinate Judge at Roha.

Suit for contribution.

One Krishnaji Mahadev Ghate filed Suit No. 841 of 1916 for possession by partition of his one-sixth share in certain property against the petitioner Keshav and three brothers, Hari, Narayan and Janardan. The suit was decreed with costs against all the defendants.

In execution of the decree, Krishnaji recovered all the costs from the defendant Keshav.

^o Civil Application No. 66 of 1923 under Extraordinary Jurisdiction (with Applications Nos. 65 and 67 of 1923).

⁽¹⁾ (1902) 26 Mad. 373.