ORIGINAL CIVIL.

Before Mr. Justice Rangnekar.

1929
March 5.

LANGLEY *v.* D'ARCY.*

Costs—Taxation—Principles governing review of taxation—Witness—Travelling allowance—Subsistence allowance.

A Court will not generally interfere with the order of taxation to be reviewed on a question that depends on the discretion of the Master, as for instance, where the objection is to the amount. However, where a principle is involved, the Court is always entitled to interfere and entertain a review.

Hill v. *Peel*,[1] followed.

A witness, who resides abroad, is entitled to the expenses of being brought before the Court to give evidence and also to the subsistence money due during the period of detention. The same principle applies to the case of a party whose evidence is reasonably necessary and material for the purpose of his case and on his behalf.

Howes v. *Barber*[2]; *Potter* v. *Rankin*[3]; *Lonergan* v. *The Royal Exchange Assurance*[4]; *Dowdell* v. *Australian Royal Mail Company*[5]; *Calvert* v. *The Scinde Railway Co.*[6] and *Ansett* v. *Marshall*.[7] followed.

REVIEW of taxation.

Suit to recover damages for defamation.

The defendant, who was a trainer of race-horses, wrote to the Secretary of the Western India Turf Club Ltd. on March 12, 1926, that he was anxious to finish his dispute with Messrs. Langley and Askaran, a firm in which the plaintiff was a partner, as he "wanted to leave India in the very near future." In another letter which he also wrote about the same time to the Secretary of the Western India Turf Club Ltd., the defendant also expressed his intention to give up training horses in India and to set up as a trainer in some other place.

The plaint was filed on March 26, 1926, and the defendant was served with the writ of summons on the same date.

*O. C. J. Appeal No. 30 of 1927 : Suit No. 802 of 1926.

(1) (1870) L. R. 5 C. P. 172 at p. 180.
(2) (1852) 18 Q. B. 588.
(3) (1870) L. R. 5 C. P. 518.
(4) (1831) 7 Bing. 725.
(5) (1854) 3 E. & B. 902.
(6) (1865) 18 C. B. N. S. 306.
(7) (1853) 22 L. J. Q. B. 118.

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The defendant filed his written statement in May 1926, and shortly thereafter left for Australia after winding up his affairs in India. In October 1926 he was informed by his attorneys that the suit was likely to reach hearing in January 1927 and thereupon he came to Bombay from Australia in December 1926. At the suggestion of the plaintiff's solicitors a consent order was taken by the parties on November 26, 1926, fixing the hearing of the suit on January 24, 1927.

The suit came on for hearing before Mr. Justice Kemp on February 21, 1927. The defendant was examined as a witness on his behalf and was in the witness box for four days. At the termination of the suit, the plaintiff was, *inter alia*, ordered to pay the defendant's costs.

On the defendant filing his bill of costs, it was contended before the Taxing Master on behalf of the plaintiff, that the plaintiff could not be charged with the amount claimed by the defendant, as expenses for his journey from and to Australia, and for boarding and lodging during the period of his stay in Bombay in connection with the suit.

The Taxing Master upheld the plaintiff's objection to this item. The defendant applied for a review of the taxation.

Coltman, for the plaintiff.

Mulla, for the defendant.

RANGNEKAR, J.:—This is an application to review the taxation of the defendant-respondent's costs. The first five items objected to, are, in my opinion, items in regard to which there is no principle involved. It is well established that a Court or a Judge will not in general interfere with the order of taxation to be reviewed on a question that depends on the discretion of the Master, as, for instance, where the objection is to

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the amount. As stated in *Hill* v. *Peel*[1] where a principle is involved, the Court will always interfere and entertain a review, but where it is a question of whether the Master exercised his discretion properly or it is only a question as to the amount to be allowed, the Court is generally unwilling to interfere with the judgment of its officer whose peculiar province it is to investigate and to judge of such matter, unless there are very strong grounds to show that the officer is wrong in the judgment which he has formed. In my opinion, no such case is made out as regards these items and as to these the application for review must fail.

The sixth item of objection is as to the disallowance by the Taxing Master of the amount claimed as expenses of the defendant's journey from and to Australia and boarding and lodging during the period of his stay in Bombay in connection with this suit.

[His Lordship then stated the facts and proceeded :] The first point to consider is whether, as the defendant says, he is a resident of Australia. Mr. Coltman contends that there is no evidence to show that he is a resident of Australia or any evidence to show that he has a home and family in Australia. In his affidavit dated February 7, 1927, made for the purpose of applying to have the suit expedited, the defendant stated that he was a resident of Australia and he had left Bombay in or about May 1926 after winding up all his affairs in India. That statement remains uncontradicted and unchallenged. In his examination he stated that his father was a breeder and a racing man and President of Albony Racing Club, Australia, and that he was connected with his father's stables in Australia until he came to India in 1914. In his cross-examination, he swore that he had property in Australia. Mr. Coltman

[1] (1870) L. R. 5 C. P. 172 at p. 180.

relies upon the admission that when he was examined in 1923 in connection with his insolvency proceedings he had stated that he had no property in Australia. But that was at the time when he was examined in 1923. I cannot, therefore, accept the contention that the defendant is not a resident of Australia. Then it appears that he left this country immediately after he filed his cross-objections in Appeal No. 30 of 1927 and admittedly has not returned to India since then.

The next question is: Did the defendant come back to Bombay in December in order to give evidence in his case, or, as contended by Mr. Coltman, to superintend the conduct of the suit? Mr. Coltman relies upon the statement of the defendant in his affidavit of February 7, where he says that he came back to Bombay in December for the purpose of the suit. Mr. Coltman further contends that the evidence in this case was documentary, and the oral evidence of the defendant was not necessary for his case. He argues that a party is not entitled to get the expenses of subsistence as a witness if in fact he attended as a party.

This was a suit for damages for defamation. The plaintiff's case was that the defendant in a letter written by him to the stewards of the Turf Club had falsely stated that the plaintiff had given him instructions such as prevented the defendant from winning with the majority of the plaintiff's horses at Poona races. The plaintiff complained that the letter was defamatory. The defendant's case *inter alia* was that the statements in the letter were true in substance and in fact. The plaintiff's case rested on certain innuendoes which were denied by the defendant in his written statement. In paragraph 11 of the written statement the defendant stated in support of his plea of justification that the plaintiff had given him clear and definite instructions regarding training and running of each of the several

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horses. These instructions, according to the defendant, were orally given, were supplemented, and were confirmed by the plaintiff in the correspondence which passed between him whilst he was in England and the defendant. Then the defendant sets out the instructions which were according to him given by the plaintiff in detail. The defendant gave evidence as to these instructions and deposed to what the plaintiff had told him from time to time and how the plaintiff told him that he was to win with some horses only at Poona. Then in his evidence he explained the meaning and what he understood by the expressions used by the plaintiff in his letters. Thus, for instance, as to horse Oriental the expression used by the plaintiff was " I do not want it to come to light on us " which the defendant explained to mean that " the horse was not to win and not to be exposed." Another instance is as to the words " Then stop " which the defendant explained as meaning " keep him in the second division." I am only mentioning these two instances to show that it was necessary for the defendant to come into the box to explain the expressions which but for such explanation would be unintelligible to any outsider. He was cross-examined in detail as to the oral instructions and as to the meaning which he put on several technical expressions used in the correspondence by the plaintiff. I am, therefore, satisfied that the defendant's evidence was material and entirely necessary for the purpose of his case.

As I have stated the defence was justification and in my opinion it was necessary for the defendant to stay in Bombay to give evidence in support of the plea. The expression " for the purpose of the suit " in the affidavit of February 7 does not, in my opinion, necessarily mean to supervise the conduct of the suit and is quite consistent with the defendant's case that he had come here in order to give evidence on his behalf. Therefore,

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the defendant was a resident in Australia. This suit was filed against him for damages and he was served the same day. He had stayed in Bombay where his written statement was filed and then left for his native place. The suit was not likely to reach hearing for some time. He came to know in October that the suit was likely to be heard early and came back to Bombay for the purpose of the suit. Then finding that the suit would not be heard soon he applied to the Court with the consent of the other side for expediting it. This was a serious case against him and if he had not defended he would have been liable to pay heavy damages and his career ruined. The defamation with which he was charged depended upon innuendoes. His defence was justification and depended on his evidence as to what his instructions were, oral as well as documentary. This latter required oral evidence to explain but for which they were unintelligible. In the end the plaintiff was awarded Re. 1 as damages against which the plaintiff appealed and the defendant filed cross-objections. Immediately after his filing the cross-objections he went back to Australia and has never returned here since then.

What then is the position? Under Order 65, rule 27, Reg. 9, of the Rules of the Supreme Court, it is provided that :—

"As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses, are to be allowed."

The result of the authorities is that the expenses of the attendance of a party at the trial in order to give evidence on his own behalf may be allowed if the evidence was material and necessary. It is a well established rule that a witness who is detained in England for the purpose of giving evidence at the trial is entitled to be paid the expenses of such detention. This is

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called subsistence money. The amount to be allowed and the period during which subsistence money is to be paid are matters for the discretion of the Master. Thus, for instance, in *Howes* v. *Barber*,[1] the head-note says :—

"If a party to a cause be examined on his own behalf under stat. 14 & 15 Vict. c. 99, s. 2., the Master may allow, in taxation, for his maintenance during the time of his detention for the purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's opinion, was material and necessary, and if he attended for the purpose of being examined as a witness and not merely to superintend the cause."

Lord Campbell C. J. says as follows (p. 591) :—

"We are of opinion that the Master's taxation of costs in this case was proper. No doubt, the practice of allowing costs to the successful party in respect of his having been a witness for himself may lead to inconvenient consequences; but we do not think we can lay down a rule that such costs can never be allowed. The party is now by law admitted as a witness; he may be a material and necessary witness: and his attendance may not only obtain justice for himself, but may lessen the expense which would otherwise fall upon the opposite party, by obviating the necessity for requiring the attendance of other witnesses, or for issuing a commission to examine witnesses abroad.

"The reasonable expenses to which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of a just demand, or to seek redress for an injury, should be thrown on the wrong doer. Again, if an unfounded action is brought, and the evidence of the party improperly sued is necessary for his defence, he is not indemnified if his own expenses as a witness are not allowed to him.

"Here the plaintiff, the captain of a ship, had a demand against the owner for wages; and this he could make out only by his own evidence, or by sending out a commission to a distant country. Remaining in *England* for the purpose of being examined at the trial, the Master has made him the like allowance for maintenance from the service of the writ till the day of trial which would have been made to a third person as a witness under similar circumstances. *Berry* v. *Pratt*[2] and other decisions shew that to a third person so remaining in this country as a witness such an allowance would be proper: and, the Legislature having been pleased to permit the parties to be examined in their own behalf, we cannot say that the expense of the successful party who has been so necessarily examined should not fall upon the party who, resisting a legal demand, or making an unlawful one, has caused this necessity."

In *Potter* v. *Rankin*,[3] where a captain of a ship was detained in England for a period of eighteen months, viz., from the issuing of the writ until the trial of the

(1) (1852) 18 Q. B. 588.
(2) (1823) 1 B. & C. 276.
(3) (1870) L. R. 5 C. P. 518.

action upon a policy of insurance, the Court refused to interfere with the decision of the Master who had allowed subsistence money at the rate of ten shillings a day during that period. The conduct of the captain was impugned and it was therefore admitted that his personal attendance at the trial was necessary. In an earlier case, *Lonergan* v. *The Royal Exchange Assurance*,[1] the Court ordered the Prothonotary to review his taxation where he had refused to make any allowance for the loss of time and the expenses of the captain of a vessel of his voyage to England from Havannah, his detention in England and return. Such expenses will certainly be allowed where the detention of the witnesses deprived him of the means of subsistence, provided that his evidence was material and that in order to give it the detention was necessary. That is the principle of the decision in *Dowdell* v. *Australian Royal Mail Company*.[2]

In *Calvert* v. *The Scinde Railway Co.*[3] the plaintiff, an engineer in the defendants' employ in India, brought an action against them for wrongful dismissal, and a verdict was taken by consent for £200, a quarter's salary, and £150 for his expenses in coming to England, the Court refused to review the Master, who on taxation had allowed the plaintiff £450 for subsistence in England while awaiting for the trial which the defendants had delayed, and £150 for expenses to enable the plaintiff to return to India. It will be seen that this is a much stronger case than the one before me. In this case the plaintiff was not a resident of England and had filed his action in England. Again the plaintiff stayed in England, for the purpose of giving evidence at the trial, for about a year and a half. A very large sum for subsistence money for that period and a further sum for

[1] (1831) 7 Bing. 725.
[2] (1854) 3 E. & B. 902.
[3] (1865) 18 C. B. N. S. 306.

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his voyage back to Lahore was allowed by the Master. Erle C. J. stated that, although it was necessary to exercise great caution in order to prevent a party residing abroad, who chose to bring an action in England, from putting his opponent to such heavy expenses as those allowed by the Master, still, the Court came to the conclusion that the allowance which had been made in that case was within the principle of law which was applicable to that suit.

The case of *Howes* v. *Barber*[1] was followed in *Ansett* v. *Marshall*.[2] In that case the plaintiff engaged a passage to Australia in the defendants' vessel, but being turned out of it, and the ship having sailed without him, he sued the defendants for not carrying him according to their contract. The plaintiff could have had another passage in the course of a few days, but he remained until the trial of the cause, several months, and gave evidence in his own favour. A verdict was found for him. On a motion to review the Master's taxation of costs, it was held that if the plaintiff was detained *bona fide* for the purpose of giving evidence in the cause, and it was proper to call him as a witness at the trial, he ought to be allowed the expense of his maintenance while so remaining in his country as costs against the defendants although he was not a sea-faring man. In giving judgment Crompton J. pointed out in that case that it was for the Master to consider, on the whole matter, whether the plaintiff was *bona fide* detained for the purpose of giving evidence in the cause, and whether he was a proper witness to be kept. The learned Judge said that he did not mean whether he was absolutely necessary, but whether it was reasonable that he should be so detained.

In my opinion, therefore, a witness, who resides abroad, is entitled to the expenses of being brought here

(1) (1852) 18 Q. B. 588. (2) (1853) 22 L. J. Q. B. 118.

to give evidence and also to subsistence money during the period of detention, and the same principle applies to the case of a party whose evidence is reasonably necessary and material for the purpose of his case and on his own behalf. It is true, as pointed out in some of the cases, that the question as to how far attendance of a witness was necessary and material is one for the Master to decide. But that discretion must be exercised in a fair and reasonable way according to the usual and established practice and allowance in respect of such matters. Otherwise, the Court or a Judge will interfere and review the discretion of the Master who has not so exercised it. If the Court is satisfied that the Master has so exercised his discretion as to produce injustice or thrown an unreasonable burden on a party, I think the Court is always disposed to interfere. In this case, as I have said, the defendant is a foreigner and had got his clearance from the Turf Club. Even if he had continued here it is clear that he would have been unable to earn his subsistence. In the absence of any evidence, the presumption would be that he had to go away from Bombay in order to find subsistence, and therefore if the evidence of the defendant was necessary and material for the purpose of his case, I think he was entitled to his expenses including his subsistence money. The Taxing Master has disallowed such expenses on the ground that it was not "essential" that the defendant should go into the witness box. If by that he means that the evidence was not material or necessary, I am unable to agree. He then proceeds on two grounds: firstly, on what he had learnt himself from inquiries as to the habits of trainers and jockeys in general, and, secondly, that the oral evidence of the defendant was not necessary. Mr. Coltman does not support the first ground, and wisely. In my opinion the propriety of a

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finding based on an inquiry made outside the proceedings, is, to say the least, open to grave doubt. The Master has to base his findings on the evidence before him. He may examine witnesses if he likes. But I think that it is wrong to arrive at a general conclusion on something which is not based on evidence. As to the second ground, I am quite clear, in my mind, considering the pleadings, the nature of the case, and particularly the evidence, that the evidence of the defendant was absolutely necessary and material to his case. No reasons are given by the Taxing Master as to why he considered that the evidence of the defendant was not "essential." The authorities clearly show that what the Court has to consider in the circumstances of the case was whether it was reasonable for the defendant to go into the witness-box in support of his case. The Taxing Master has brushed aside the decisions to which his attention seems to have been drawn on the ground that in those cases the question was of an oral arrangement or oral contract, etc. I do not think that any case has stated that it is only when there is a question of oral contract or arrangement being proved that a party's evidence is essential, otherwise he can allow a case to proceed by relying on the documentary evidence and he need not offer himself as a witness. But even supposing that that is the true principle, the facts in this case fall within that principle. For here also the defendant's case depended on the oral instructions given from time to time by the plaintiff which went in support of his plea of justification in which he ultimately succeeded, and also for the purpose of explaining the meaning of such instructions given in letters written by the plaintiff.

There is a third ground taken in the Taxing Master's judgment, and that is, that the defendant might have applied for expediting the suit or getting a date

peremptorily fixed for hearing or for getting himself examined *de bene esse*. In *Howes* v. *Barber*[1] the contention was that the party could have offered himself as a witness under an order made to the effect that the parties should be at liberty to examine any witness before issues were joined. The Court did not even take any notice of the argument and the contention was rejected. No case has gone the length of saying that a party is bound to take any of the steps referred to by the Taxing Master before he is entitled to claim expenses of subsistence and detention as costs. In this particular case, much depended on the evidence before the Judge who heard the case and the credibility which had to be attached to such evidence. In point of fact, the evidence shows that the defendant made an attempt to expedite the suit. In *M'Alpine* v. *Poles*[2] the Master allowed the plaintiff expenses of witnesses brought from abroad. It was urged that they might have been examined on interrogatories. But Lord Lyndhurst C. B. said (p. 796) :—

"It is frequently very desirable that a party should be able to have his witnesses examined *viva voce*. It appears to us, that the allowance of such witnesses is still a matter in the discretion of the Master, in each particular instance, just as it was before the late act."

And after conference with the Judges of the other Courts, he said (p. 796) :—

"They agree with us in the opinion which we have formed, that the act of Parliament makes no difference in this respect. We think that the matter is in the discretion of the Master, subject to be reviewed by the Court; and we think, that, in this particular instance, that discretion was properly exercised. . ."

Then it is argued that the travelling expenses should not be allowed. In this case, the defendant wanted to leave for Australia about the end of March, and the plaintiff took steps to prevent him from doing so. That is apparent from the haste with which the writ of summons was served on the defendant. In England the law is that a witness is entitled to be reimbursed the

[1] (1852) 18 Q. B. 588.

[2] (1833) 1 Cro. & M. 795.

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sums which have been reasonably and actually paid as travelling expenses, such as going to, staying, and returning home, from the place of trial. The only test is whether the expenses were reasonably incurred. Our own rule is contained in Order XVI, rule 2, Civil Procedure Code. I do not see, therefore, why the travelling expenses should not be allowed in this case.

The seventh objection contains six items amounting together to Rs. 82. The costs in question were incurred by the defendant in obtaining a certified copy of the judgment delivered by the trial Judge with a view to file an appeal. These have been disallowed on the ground that they become useless. I do not agree. It is true that the appeal in the case was filed by the plaintiff. But the defendant did intend to file an appeal against the decision of the learned trial Judge, and that is clear from the fact that as soon as the appeal was filed he filed cross-objections. If, therefore, in order to file an appeal, he obtains a certified copy of the judgment and in the meanwhile the opposite party files an appeal I do not see why these costs should not be allowed. I think that the Taxing Master is wrong in disallowing these items.

The eighth and ninth objections are not pressed and seem to me to involve a question of mere quantum and have been properly considered by the Taxing Master.

In the result, the review must, therefore, be allowed as to sixth and seventh objections, and the case sent back to the Taxing Master to re-tax the items contained in those objections.

Attorneys for plaintiff: Messrs. *Crawford, Bayley & Co.*

Attorneys for defendant: Messrs. *Captain & Vaidya.*

Review allowed.

B. K. D.