ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

MANILAL LALLUBHAI *v.* THE BHARAT SPINNING AND WEAVING CO. LTD.*

1935
September 10

Practice—Costs—Taxation—Two defendants engaging same attorney—Party and party costs—Costs of separate appearance—Principles governing such cases—Decision of Taxing Master—Interference by Court with such decision.

An award was made against a firm for about Rs. 50,000. In proceedings taken in execution of that award two persons were sought to be adjudicated as partners of that firm. It was decided by the Appeal Court that those persons were not partners and the decree-holder was directed to pay their costs. These two persons had retained the same firm of attorneys for the conduct of their defence. Separate counsel were instructed for each of those two. On taxation of their bill of costs, the Taxing Master allowed, *inter alia*, separate sets of costs in respect of the separate appearances. On appeal against that decision:

Held, that defendants appearing by the same attorney can normally have only one set of costs; but if their interests are diverse and they are represented by separate counsel the fees paid to such separate counsel will be allowed in the attorney's bill of costs. The test in such cases is whether there is a reasonable probability of there being a substantial difference in the two defences:

Gorakhram v. *Pirozshah (No. 1)*,[1] followed.

The fact that the defendants had signed two separate warrants in favour of attorneys is a matter for consideration in decidingw hether their interests are identical, but by itself that fact is not conclusive of the question. The real test is to ascertain whether before the trial commenced there was a reasonable probability of a substantial difference in the defences.

Prima facie, each person alleged to be a partner or to have held himself out as a partner has a right to defend himself separately.

A certain amount of latitude has to be allowed to solicitors in considering, before the commencement of proceedings, whether there is a reasonable probability of the defences of two persons retaining them in the same matter turning out different or not.

In respect of costs the Taxing Master has to use his discretion, and the Court does not lightly interfere with that discretion except in extreme cases where there has been gross abuse or serious mistake or when he has acted on a wrong principle or applied an altogether wrong consideration.

TAXATION of costs.

The Bharat Spinning and Weaving Co., Ltd., had certain disputes with the firm of Mulchand Pranjiwandas. These

*O. C. J. Appeal No. 51 of 1932 : Award No. 106 of 1931.
[1] (1932) 57 Bom. 570 at p. 579.

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disputes were referred to arbitration and on February 12, 1931, an award was made in favour of the Mills for about Rs. 50,000. On July 21, 1931, the Mills took out a chamber summons to execute the award, *inter alia*, against Manilal Lallubhai and Madhavlal Lallubhai, on the ground that they were partners in that firm.

On July 27, 1931, Manilal Lallubhai was served with that chamber summons. He engaged Messrs. Khandwalla and Chhotalal as his attorneys and signed a warrant in their favour on the same day. The attorneys filed their appearance in Court on July 29, 1931, and prepared his affidavit on that very day and furnished it to the attorneys of the Mills. Madhavlal Lallubhai went to the same attorneys on July 30, 1931, and signed a warrant in their favour and they filed their appearance in Court and sent a copy of his affidavit to the attorneys of the Mills that very day.

The summons was adjourned into Court for the trial of the following issues :—

(1) Whether Manilal Lallubhai and/or Madhavlal Lallubhai were partners in the firm of Mulchand Pranjiwandas at the date of the accrual of the cause of action ?

(2) Whether the said persons or either of them held themselves out as partners in the firm of Mulchand Pranjiwandas ?

The issues were tried before Kania J. At the hearing the attorneys for the alleged partners instructed two different counsel, one for each of them.

After a lengthy trial Kania J. held that both Manilal and Madhavlal were partners in the firm of Mulchand Pranjiwandas.

Both of them appealed. The appeal was allowed by Beaumont C. J. and Rangnekar J. (see 58 Bom. 162). Before the Appeal Court both the alleged partners appeared jointly by two counsel. While allowing the appeal,

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the Appeal Court passed the following order as to the costs :—

" That the Respondents do pay to the Appellants their costs of this appeal and of the said Chamber Summons dated 21st July 1931 including the costs of the trial of the issues before the Court below and of the said order dated the 8th September 1932 when taxed and noted in the margin thereof. And this Court doth certify that this was a fit case for engagement of two Counsel in appeal."

The decision of the Appeal Court was upheld by the Privy Council : see 37 Bom. L. R. 826.

Messrs. Khandwalla and Chhotalal, the attorneys for Manilal and Madhavlal, lodged their bill of costs for taxation. They prepared one bill, in which they showed the costs of Manilal and Madhavlal in separate columns.

The Taxing Master allowed separate costs. The material portion of the reasons that he gave in support of his ruling is as follows :—

" The question to consider is whether the employment of two sets of Counsel was a reasonably necessary and proper expense and this will depend on the facts of the case and the contentions of the parties. In support of his objections, the attorney for the respondents in the appeal submits ' that the appellants had instructed the same set of attorneys and their interests were identical and no separate work was done by Counsel engaged on behalf of the 2nd appellant. His Counsel adopted the entire examination and cross-examination of the 1st appellant's Counsel as appears from the Appeal Paper Book, without a word more of his own. He also adopted almost all the authorities cited by the last appellant's Counsel in the Lower Court. He need not have appeared at all.' * * * *

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The attorney for the appellants replies that counsel for the 2nd appellant argued his own clients' case and that the issues themselves show the divergence of interest between the two appellants.

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In this matter it is necessary to refer to the further particulars of holding out as partner by Manilal Lallubhai and Madhavlal Lallubhai. In some cases it is Manilal Lallubhai with some other party or parties who made the representation; in another case, it is Manilal Lallubhai and Madhavlal Lallubhai, in another, Manilal and/or Madhavlal Lallubhai, in one case, it is Madhavlal Lallubhai alone The final Judgment dated 8th September 1932 also differentiates between the two appellants.

On a consideration of the whole matter, I had found as follows :

(1) The retainers on behalf of the two alleged partners, Manilal Lallubhai and Madhavlal Lallubhai, are separate and not joint.

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(2) There were sufficient reasonable grounds for the attorneys to think that there would be a divergence between the defences and the interests of the two alleged partners at the trial on material points.

(3) That it would have been extremely awkward for Counsel, when the cases of the two alleged partners were different, to throw himself, first into the defence of the one partner and afterwards into that of the other, although there may not have been any material incompatability between them.

(4) That the amounts at stake were very large, the alleged partners being sought to be made liable for over Rs. 50,000 each.

* * * * * *

It is very important to appreciate what the difficulty of the attorney was before the hearing and not after the case had been heard and Judgment delivered. If the attorney had himself enquired of the appellants as to the briefing of counsel under these circumstances, each one would have insisted on being separately represented. One may state that the question of the extra costs incurred by briefing separate counsel (and this is only 8 G. Ms.) was far from the mind of the attorney when he delivered the briefs. The spectre of one or other of his clients being held liable for a sum of Rs. 50,000 was large enough to dwarf all other considerations. In cases of this nature, the Taxing Master cannot and should not weigh matters in a golden scale but allow the attorney some latitude in the exercise of his discretion and I therefore think that the appellants were justified in coming before the Court of first instance by separate Counsel."

Feeling aggrieved by this order the attorneys for the mills on August 29, 1935, took out a chamber summons for an order :—

"(a) that the objections of the respondents dated 9th April 1934 to the taxation of the Bill of costs of the appellants herein may be allowed ;

(b) that the appellants herein be ordered to pay the costs of and incidental to this summons and the order to be made thereon and also of the said objections filed by the respondents herein before the Taxing Master."

The summons was heard by B. J. Wadia J.

Dr. J. S. Khergamwala, for the respondents.

J. H. Vakeel, for the appellants.

B. J. WADIA J. This is a chamber summons taken out by the Bharat Spinning and Weaving Company, Limited, who were the respondents in Appeal No. 51 of 1932, for an order that their objections dated April 9, 1934, to the taxation of the bill of costs of the appellants may be allowed, and the appellants ordered to pay their costs of

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and incidental to this summons and also of the objections filed by them before the Taxing Master. The bill of costs was lodged for taxation by the appellants' attorneys, Messrs. Khandwalla and Chhotalal, on September 15, 1933, and the taxation was completed on or about March 22, 1934. Thereafter the respondents filed their objections, and a warrant to review the taxation was issued in the ordinary course. After hearing the attorneys of the parties the Taxing Master gave his judgment on August 15, 1934, a copy of which is annexed to his certificate dated August 17, 1934.

There were disputes between the company and the firm of Mulchand Pranjiwandas in respect of certain dealings in piecegoods which were referred to arbitration. The arbitrators made and published their award under which the firm was held liable to pay a sum of Rs. 45,000 odd to the company. The award was duly filed in Court. The company thereafter called upon four persons as being partners in the firm of Mulchand Pranjiwandas to pay the amount. Two of these four are the appellants. They contended that they were not partners in the firm, and denied liability. The company thereupon took out a chamber summons dated July 21, 1931, foi leave to execute the award made against the fiim against the four persons including the appellants. The appellants showed cause, and the summons was adjourned into Court for trial of the issues arising on the summons. Two issues were raised at the trial, viz., (1) whether Manilal Lallubhai and/or Madhavlal Lallubhai were partners in the firm of Mulchand Pranjiwandas at the date of the accrual of the cause of action, and (2) whether the said persons or either of them held themselves out as partners in the firm of Mulchand Pranjiwandas. Certain particulars of the holding out were furnished by the company. An order was made for further and better particulars which were subsequently furnished. At the trial the two appellants

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were represented by two different counsel, one for each appellant, though both were instructed by the same firm of solicitors, viz., Messrs. Khandwalla and Chhotalal. Kania J. held after a lengthy trial that the appellants were partners in the firm or had held themselves out as such. The appellants appealed, and the appeal was allowed. The company who were respondents were ordered to pay to the appellants their costs of the appeal and of the chamber summons dated July 21, 1931, including the costs of trial of the issues in the Court below and of the order dated September 8, 1932, when taxed. The Appeal Court also certified that it was a fit case for the engagement of two counsel in appeal. Two counsel had been briefed for the appellants jointly on the hearing of the appeal.

In lodging their bill of costs for taxation, the attorneys for the appellants brought in the bill in two columns for the 1st and the 2nd appellant separately, and the Taxing Master has allowed two sets of costs to the 1st and the 2nd appellant separately in respect of the hearing on the trial of the issues, though they are not identically the same set of costs in respect of various items. The respondents contend that the Taxing Master exceeded the order of the Appeal Court in taxing the bill, as the Appeal Court allowed the costs of the trial of the issues before Kania J., but did not expressly order separate sets of costs for the two appellants. The respondents further contend that the appellants were not entitled to the costs of separate counsel on the chamber summons without an express order of the Court, and that the costs separately incurred on behalf of the 2nd appellant in the Court below should not be allowed between party and party on the ground that they were incurred merely at the desire of the party, viz., the 2nd appellant Madhavlal Lallubhai, and need not have been incurred at all. It is further contended that the interests of the two appellants were identical, and no separate work was done by counsel who appeared for the 2nd appellant

at the trial of the issues. The appellants' counsel contends that there are really two bills of costs and not one. I do not think it can be correctly said that there are two separate bills of costs for the two appellants. There is only one bill as is stated in the chamber summons, but the bill is divided into two parts on behalf of the two appellants. It is also not correct to say that this is a double set of costs, one for Manilal Lallubhai, the 1st appellant, and another identically the same for Madhavlal Lallubhai, the 2nd appellant. It was pointed out that in many cases the items in the bill have been divided into halves between the two appellants. Some items have been allowed separately to the two appellants when they could not be divided into halves. The separate items in the bill are not in dispute before me on this chamber summons. They have been pointed out by the one party or the other merely in support of their contentions. To take for instance the main item in respect of instruction charges, the attorneys for the appellants put down the figure of Rs. 3,750 for each of the two appellants separately. The Taxing Master has allowed Rs. 2,750 for instruction charges on behalf of the 1st appellant and Rs. 1,250 on behalf of the other. I take it to be the usual practice of his office that before the item for instruction charges is settled by him he looks at the brief given to counsel at the hearing, and goes through the observations and instructions to counsel contained in the brief.

The important point for consideration is one of the principle of taxation on which the bill has been taxed. The Taxing Master had to decide whether the appellants were justified not only in briefing two counsel for the two appellants separately at the hearing of the issues before Kania J., but in incurring separate sets of costs in respect of various items mentioned in the bill for each of the two appellants. I have already stated that with regard to the costs of the hearing in the Court below, the only order made

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by the Appeal Court was that the respondents should pay the appellants' costs of the appeal. It was therefore argued that the Appeal Court had impliedly disallowed separate sets of costs for the two appellants. I do not think that that conclusion necessarily follows. Kania J. could not have dealt with the point of separate sets of costs, because he held in favour of the respondents, and ordered the appellants to pay their costs. The Appeal Court must have been well aware that counsel had appeared separately for the two appellants in the Court below, but it is common ground that neither the appellants nor the respondents argued before the Appeal Court whether two sets of costs should be allowed or only one. The Taxing Master therefore had to consider on principle whether the facts and circumstances of this case and the contentions of the parties made it a reasonably necessary expense for the employment of counsel for the two appellants separately, and also for incurring separate sets of costs for the two appellants from the time the warrant was signed by each in favour of the attorneys, or whether it was an unusual or extraordinary expense.

The principle of taxation on which costs of briefing separate counsel are allowed is laid down in the Guide to Costs by Porter and Wortham, 13th Edn., at p. 920, as follows :—

"Defendants appearing by the same solicitor, however numerous or diverse they or their interests may be, can have but one bill of costs; but this will not limit their representation in Court. If their interests are diverse, separate counsel may appear in Court, and their charges will be allowed."

The test in such cases is, as was pointed out by me in an earlier judgment in *Gorakhram* v. *Pirozshah* (*No.* 1),[1] whether there is a reasonable probability of there being a substantial difference in the two defences. In my opinion the same test should also apply in considering whether the attorneys were justified in incurring separate sets of costs in respect

[1] (1932) 57 Bom. 570 at p. 579.

of various items for the two appellants, not altogether separate sets of costs, one identical with the other, but separate in respect of various items wherever necessary. The test really is whether the interests of the parties were identical, or whether before the hearing commenced there was a reasonable probability of the defences being substantially different. Counsel for the appellants argued that there was no justification even for the appearance of the two appellants by separate counsel in the Court below, for the record showed that the cross-examination of the witnesses, the arguments advanced, and the authorities or almost all the authorities cited on behalf of appellant No. 1 were adopted by counsel who appeared for appellant No. 2. He also said that the 2nd appellant was examined as a witness on behalf of appellant No. 1 which showed how identical their interests were. He further argued that at the utmost the Court should only allow the appellants the costs of the briefing charges for the two counsel but not a separate set of costs in respect of the items allowed by the Taxing Master.

The Taxing Master in his judgment has stated that the retainers signed by the two alleged partners, Manilal and Madhavlal, in favour of the attorneys are separate. They did not sign one joint retainer. That is certainly a matter for consideration in determining whether the interests of the two parties who signed two separate retainers were identical, but it does not necessarily follow from the fact that two retainers were separately signed that the interests of the two parties cannot be identical. Otherwise it might be said that even parties who were really in the same interest should be entitled to separate sets of costs, if only they went on separate days to the same attorneys and signed separate retainers. I do not think that the judgment of the Taxing Master is based solely on that consideration. The test which he applied was to ascertain whether before the trial commenced there was a reasonable

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probability of a substantial difference in the defences. I do not agree with the respondents' counsel that the only test of the identity of interests is to consider what actually happened at the trial at every stage of the proceedings. The question is whether the attorneys were justified from the commencement in having a reasonable apprehension that the cases of their two clients were not identically the same. It was argued that in that case they should have kept one client and sent away the other to a different firm of attorneys, but I do not think that there was such a conflict of interest as to necessitate appearance by separate sets of attorneys. They were not claiming anything one against the other. They were interested in fighting the respondents, but in the fight various considerations might have to be urged on behalf of the one which might not have to be urged on behalf of the other. What is a reasonable apprehension cannot be strictly defined, and the following observations made by the Master of the Rolls in *Greedy* v. *Lavender*[1] are pertinent in this connection (pp. 419-20) :—

> "Parties in the same interest ought to join in their defence ; but it is found almost impossible to lay down any rule to punish parties who do not join in their defence. The protection of the suitor is in the discretion and honour of Counsel and solicitors. There are such shades of difference—such nice distinctions, that the Court can seldom come to a satisfactory conclusion. When the point has been brought before me, I have experienced great difficulty in punishing persons for not joining somebody else in their defence."

Keeping this difficulty in mind, I would say that all that the Taxing Master has to see is that the parties have not unnecessarily augmented costs by each filing a separate appearance.

It was pointed out that except for the difference in the name of the two appellants there were identically the same affidavits on the chamber summons. That is not conclusive, because if the two appellants signed retainers separately in favour of the same attorneys, and one affidavit is sent to the opposite side before the other, it may well be

[1] (1848) 11 Beav. 417.

that the affidavits are almost identically the same. It was further pointed out that only one counsel appeared on the chamber summons, that there was one summons for particulars, that there was one appeal between the two appellants, that at the hearing before Kania J. one counsel did all the work, and the other had to do little if at all. This is an argument which cuts both ways; it shows that wherever possible, extra costs have been saved and not incurred. On the other hand it was also pointed out by the counsel for the appellants that Mr. M. S. Vakil who appeared for appellant No. 2 in the Court below did argue his client's case, and that he did ask questions of his own client over and above the questions that were asked by Mr. Lalji on behalf of appellant No. 1. The issues that were raised, which I have referred to before, also show that there was some divergence of interest between the two appellants. There is a divergence of interest appearing also from the further and better particulars of the holding out which were furnished by the respondents. In some cases it is the 1st appellant with some other party or parties who made the representation; in other cases it is both the appellants, or appellant No. 1 and/or the appellant No. 2, or the appellant No. 2 alone. The judgment of Kania J. also differentiates between the cases of the two appellants. In my opinion *prima facie* each person alleged to be a partner or to have held himself out as a partner has a right to defend himself separately. No doubt the two appellants are brothers, but could it be said that one brother was entirely safe and justified in entrusting his defence to the counsel for the other? Could it also be said that there was no reasonable probability that one might be held to be liable, whereas the other might have had judgment pronounced in his favour? Counsel for the respondents argued that one counsel could have done the work for both, and that it often happened that where one counsel appeared for two parties only one was held liable and the other was

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not. That does happen in some cases, but where there is a reasonable probability from the commencement of the trial of a difference in the two defences, it is also probable that a situation may arise when it may be embarrassing for the same counsel to throw himself first into the defence of the one client and afterwards into that of the other, although there may not be any material incompatibility between them. That was pointed out by Sargant J. in *A. G. Spalding* v. *A. W. Gamage, Limited.*(1) There are cases in which it has been held that parties are not entitled to sever, but each case must depend upon its own facts and circumstances. It is provided by Rule 546 (*i*) of our High Court Rules that

> "No costs are to be allowed on taxation which do not appear to the Taxing Officer to have been necessary or proper for the attainment of justice or defending the rights of the party or which appear to the Taxing Officer to have been incurred through overcaution, negligence, or mistake, or merely at the desire of the party."

It has been held that this rule applies to taxation between party and party: *Parashuram Shamdasani* v. *Tata Industrial Bank, Ltd.*(2) In my opinion the costs incurred on behalf of the two appellants separately were proper for defending the rights of either of them.

I agree with the Taxing Master that a certain amount of latitude has to be allowed to the solicitors in considering before the commencement of the proceedings whether there is a reasonable probability of the defences being different or not. I do not think a solicitor can always foretell exactly how the case will shape as it proceeds, especially when there is the chance of a long hearing. Moreover, I have already stated that there is not in this case a double set of costs in the sense that the costs incurred on behalf of one appellant are identically the same as the costs incurred on behalf of the other. I have not gone into the items separately, as no particular item is objected to. The question is one of principle, and in the principle which

(1) [1914] 2 Ch. 405, at pp. 409-10.

(2) (1925) 50 Bom. 69 at p. 76.

the Taxing Master has adopted I think he was substantially correct. In respect of the items of costs the Taxing Master has to use his discretion, and the Court does not lightly interfere with that discretion except in extreme cases where there has been gross abuse or serious mistake or when he has acted on a wrong principle or applied an altogether wrong consideration.

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In the result the summons must be dismissed with costs. Counsel certified. Costs to be taxed.

Attorneys for appellants : Messrs. *Khandwalla & Chhotalal.*

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

Summons dismissed.

B. K. D.

APPELLATE CIVIL.

Before Mr. Justice Divatia.

1935 *September* 5

VITHAL TUKARAM KULKARNI (ORIGINAL PLAINTIFF IN SUIT NO. 1138 OF 1927 AND DEFENDANT NO. 9 IN SUIT NO. 47 OF 1929), APPELLANT *v.* BALU BAPU GUDE AND OTHERS (HEIR OF ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 7 IN SUIT NO. 47 OF 1929 AND DEFENDANTS NOS. 2 TO 8 IN SUIT NO. 1138 OF 1927), RESPONDENTS.*

Hindu Law—Widow—Marriage in approved form—Stridhan property—Succession—Brother and sister take in equal share.

If a Hindu widow married in an approved form dies without leaving any issue or any heir in her husband's family, her stridhan property (other than sulka) will be divided in equal shares between her brother and sister.

SECOND APPEALS against the decision of C. C. Hulkoti, District Judge of Sholapur, confirming the decrees passed by G. V. Vaidya, Subordinate Judge of Barsi.

Suits to recover possession.

The property in suit originally belonged to one Anna Dhondiba. His two sisters, Haribai and Kashibai, succeeded

* Consolidated Second Appeals Nos. 945 and 946 of 1931.