

JULY 22. The learned advocate for the appellant now puts in an application for setting aside the abatement after excuse of the delay. It appears that the respondent died on December 11, 1939, and this application, which was filed on July 18, 1940, is beyond time by four months and eleven days. The learned advocate who appears is unable to suggest any satisfactory ground for excusing the delay, and we therefore think it unnecessary to issue a rule. The appeal having abated, the result is that in this case the order of the lower Court must stand. Under the circumstances we make no order as to costs.

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KARUNNISSA

Broomfield J.

*Orders accordingly.*

Y. V. D.

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## APPELLATE CIVIL.

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*Before Sir John Beaumont, Chief Justice, and Mr. Justice Wassooder.*

SHRIDHAR BALKRISHNA AGASHE AND OTHERS (ORIGINAL DEFENDANTS NOS. 1, 2, 5 AND 7), APPELLANTS v. THE POONA CITY MUNICIPALITY BY ITS PRESIDENT MR. KESHAV NARAYAN SHIROLE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

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*July 5*

*Costs—Sets of costs—Several defendants—Mofussil Court—“Suit dismissed with costs”, meaning of—Whether defendants entitled to get separate set of costs—Appellate Side practice.*

In a suit against several defendants an order “suit dismissed with costs” made by a mofussil Court as well as by the High Court on the Appellate Side is to be construed to mean that the plaintiff or appellant is to pay the taxed costs of all the defendants or respondents in separate sets.

*Mariyaya Chanviraya v. Shantirappa Danappa*,<sup>(1)</sup> followed.

*Rustomjee Heerjeebhoy v. Cowasjee Dadabhoy*,<sup>(2)</sup> disapproved.

\* First Appeal No. 198 of 1939.

<sup>(1)</sup> [1939] Bom. 478.

<sup>(2)</sup> (1924) 48 Bom. 348.

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APPEAL against the decision of S. T. Ranade, Joint First Class Subordinate Judge at Poona.

Costs.

The Poona City Municipality filed a suit against six different defendants in the First Class Subordinate Judge's Court at Poona. The suit was decided on a preliminary point that it was premature. The Court's order was "suit dismissed with costs".

On April 12, 1938, the application was made to the Court by the plaintiff that all the defendants should be allowed one set of costs and accordingly produced into Court the sum of Rs. 220-1-0 to be paid to all the defendants.

The Subordinate Judge, following the decision in *Rustomjee Heerjeebhoy v. Cowasjee Dadabhoy*,<sup>(1)</sup> held that when an order is "suit dismissed with costs" it is for the defendants to apply for an order requesting that separate costs should be allowed and that being not so done in this case, the payment made by the plaintiff was sufficient under the circumstances. He, therefore, ordered that no case was made for allowing separate sets of costs and dismissed the application.

Against this order the defendants appealed to the High Court.

*S. G. Patwardhan*, for the appellants.

*K. V. Joshi*, for the respondents.

BEAUMONT C. J. This appeal raises a question of practical importance, namely: What is meant by an order of a mofussil Court which dismisses the suit with costs, there being more than one defendant appearing separately? Do the defendants get separate sets of costs, or is there to be only one set of costs between all the defendants?

<sup>(1)</sup> (1924) 48 Bom. 348.

The order, "suit dismissed with costs", was made on October 30, 1937, by Mr. D. S. Gupte, the then Joint First Class Subordinate Judge of Poona. On April 12, 1938, the plaintiff applied to Mr. Ranade, the successor of Mr. Gupte, to allow only one set of costs between the defendants, and the learned Judge held that only one set of costs should be allowed. In my opinion the order of the learned Judge, and the argument for the respondents on this appeal, confuse two quite distinct questions. First, what order ought the trial Judge to have made, and, secondly, what order did he in fact make?

The first question does not arise on this appeal, though it is the only matter discussed in the lower Court. The trial Court made an order which has not been appealed from, and all this Court can do is to construe the order. I would only observe upon the first question that costs are always in the discretion of the Court, and, though my own practice in appeals has generally been, following the rule which prevails in England, to allow each respondent his costs on the broad principle that a person, who is brought before the Court, wrongly as it turns out, is entitled to defend himself in his own way and by the employment of such advocate as he thinks fit, still many cases arise in which the Court may think that it was unreasonable for the defendants or respondents to have appeared separately, and that only one set of costs should be allowed.

Upon the second question the exact point was decided by this Court in *Mariyaya Chanviraya v. Shantirappa Danappa*,<sup>(1)</sup> where it was held that the expression "suit dismissed with costs" in a decree means that the plaintiff is to pay the costs of the defendants, and that if there are more defendants than one who appear separately, all the

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defendants are entitled to their costs separately under such an order. Mr. Joshi for the respondents contends that that decision ran counter to the practice which had been established in *Rustomjee Heerjeebhoy v. Cowasjee Dadabhoy*<sup>(1)</sup> (which was referred to in the judgment in *Mariyaya Chanviraya v. Shantirappa Danappa, supra*), and that the order of the trial Judge should be construed in the light of that practice and should be held to mean that only one set of costs was allowed.

In England, and on the Original Side of this Court, such a question does not generally arise in practice, because the orders of the Court are drawn up in a formal manner. If the Judge says "suit dismissed with costs", the order does not contain those exact words, but directs that the plaintiff do pay to the defendants their costs to be taxed. The Prothonotary tells me that if on the Original Side the Judge says "suit dismissed with costs", the order is drawn up so as to give the defendants their separate taxed costs. But in the mofussil and on the Appellate Side of this Court, the order of the Court is frequently expressed in the terms "suit (or appeal) dismissed with costs", and in my opinion such an order can only mean that the plaintiff or appellant is to pay all the defendants' or respondents' costs as taxed, and not merely part of them.

In *Rustomjee Heerjeebhoy v. Cowasjee Dadabhoy*,<sup>(1)</sup> Sir Norman Macleod, who delivered the judgment of the Court, refers to the Original Side practice, and says (p. 350):

"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,

<sup>(1)</sup> (1924) 48 Bom. 348.

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 that case the actual order was an order of the appellate Court dismissing the appeal with costs, and I must confess that I have a difficulty in seeing the principle on which the learned Chief Justice proceeded. It can hardly be suggested that an order dismissing an appeal with costs has one meaning on the Appellate Side and another meaning on the Original Side, or in other Courts. The order of this Court is a document of record and may fall to be construed by the Privy Council, or by other Courts in this country. It is obvious that in such a case it would not be open to give evidence of a practice on the Appellate Side of this Court to use language in other than its normal sense. Nor can there be a rule regulating the construction of orders. The most, I think, the Court could do, by way of rule, would be to provide that where a Judge or an Appellate Bench uses the expression "suit or appeal dismissed with costs", that should be interpreted in the office to mean that only one set of costs is allowed between the defendants or respondents, and directing the office to draw up orders on that basis. At present there is no such rule, and the order appealed from merely dismisses the suit with costs. We can only construe those words in their natural and proper sense, that is to say, that the plaintiff must pay the costs of all the defendants.

That being so, the appeal will be allowed with costs.

*Appeal allowed.*

J. G. R.

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