

1903.
July 3
and 6.

MUDALIHAM I v. PUNCHIRALA

C.R., Kurunegala, 10,512.

Costs—Action on mortgage bond—Order of Court as to costs of second and third defendants and costs of the second set of added parties.

Where the first defendant was sued on his mortgage bond and the second and third defendants were joined as parties in possession of the land mortgaged under a conveyance made by the first defendant subsequent to his mortgage, and certain persons came into the suit as added defendants denying the right of the mortgagor to mortgage to the plaintiff the said land, and the plaintiff thereupon moved for leave to withdraw his prayer for the mortgage decree, as he did not wish to enter on a contest as to title,

Held, that the plaintiff was liable to pay the costs of the second and third defendants, but not the costs of the added defendants, because they came in irregularly.

In a hypothecary action it is irregular to raise questions of title.

ACTION upon a mortgage bond. Certain persons came into the suit as added parties denying the right of the mortgagor to mortgage to the plaintiff the lands which formed the subject of the mortgage. Thereupon the plaintiffs moved for leave to withdraw their prayer for the mortgage decree. The two sets of added parties moved for costs incurred by them in asserting their claim. The plaintiff objected to paying their costs on the ground that they had come too prematurely into Court, and that they should have waited till seizure and execution and then have pressed their claim.

The Commissioner's order was as follows:—"The only question for me is that of costs claimed by the added parties. Persons who voluntarily come in as claimants of land hypothecated to a plaintiff suing for his mortgage debt do so at their own risk, for there is no reason why the debt should not be paid by the defendant without execution or sale of the mortgaged property. I hold therefore that the first set of added parties are not entitled to their costs. The plaintiff did not consent to their being joined, but the plaintiff did consent to Mr. Gunawardene's clients being joined, and for that reason the plaintiff ought to pay their costs.

"I give leave to withdraw the prayer for the mortgage decree, the plaintiff paying the costs of the defendants and of Mr. Gunawardene's clients."

The plaintiffs appealed. The case was argued on 3rd July, 1903.

E. W. Jayawardene, for appellant.

H. A. Jayawardene, for added defendants, respondents.

Batuwantudawe, for second and third defendants, respondents.

6th July, 1903. GRENIER, A.J.—

1903.
July 3
and 6.

This is an appeal from an order as to costs. No appeal lies as of right from such an order, and I was therefore asked to exercise the powers of revision which this Court has. But before I do so I must be satisfied that the order has worked a clear injustice, or that it has violated some principle which ought to regulate the liability to pay costs.

There are two sets of added parties in this case and three original defendants. The plaintiffs' action was on a mortgage bond executed by the first defendant in their favour. The second and third defendants were joined by the plaintiffs, as they claimed and were in possession of the land mortgaged to the plaintiff by the first defendant by right of a deed of transfer executed subsequently to the mortgage. The first set of added defendants, who voluntarily came in as claimants of the land mortgaged to plaintiffs, were ordered to pay their own costs, and they are evidently satisfied with the order. The plaintiffs were ordered to pay the costs of the second and third defendants and those of the second set of added parties in the following circumstances:—On the day of trial the plaintiffs' proctor asked for a money decree only, as he did not wish to enter on a contest as to title. By this action on his part he clearly made his clients liable for costs to the second and third defendants who were brought in by the plaintiffs, and who had filed answer and were presumably ready for trial. I cannot see any grounds to disturb the order of the Commissioner whereby the plaintiffs were to pay the second and third defendants' costs.

Then, as regards the costs of the second set of added parties, much depends upon the circumstances under which these parties came into the case. It was said, and so found, by the Commissioner that plaintiffs consented to their being joined. They are not, therefore, in the position of the first set of added parties who came in voluntarily. On reference to the motion paper dated the 3rd February, 1903, I find that the plaintiffs' proctor endorsed on it his consent to the statement of claim of the second set of added parties being admitted into the record. But this was hardly an act for which the plaintiffs should be held liable to the extent to which the Commissioner has held them liable in the matter of costs. In the first place, I think that both sets of added parties should not have been allowed to come into the case in the way they did and raise questions of title which were more appropriate to an action *rei vindicatio* than to a hypothecary action like the present one. If the plaintiffs had brought them in alleging that they were in possession of the mortgaged property, and were

1903.
July 3
and 6.
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GRENIER,
A.J.

therefore necessary parties, the case would have been different then. If they were the real owners of the land and in possession, no decree in this action could affect them. The second set of added parties, however, have managed to find a place in the record, but I do not think it right or equitable that the plaintiffs should pay their costs. They came in irregularly, and they must go out without mulcting anybody in costs. They were not brought in by plaintiffs, and I do not think that the consent given by the plaintiffs' proctor, which, at the best, was an informal one, can be construed into an act pledging his clients to the payment of their costs in the event, which was not then thought of, of the prayer for a mortgage decree being withdrawn. In these circumstances it would, in my opinion, be unjust to condemn the plaintiffs in the costs of the second set of added defendants, and I would accordingly, in revision, set aside that part of the order dealing with those costs.
