

Present: De Sampayo J.

1916.

CROOS *v.* PUNCHA *et al.*

254—C. R. Negombo, 21,890.

Costs—Two sets of defendants—Same proctor retained—Separate proxies—Action dismissed with costs against one set and judgment entered against the other set—Taxation of bill.

Two sets of defendants retained the same firm of proctors, but gave them separate proxies and filed separate answers. One set (A) disputed plaintiff's title to the land and claimed it themselves and justified their possession. The other set (B) disclaimed title and denied ouster. The decree gave judgment for the plaintiff against set A, and dismissed the case against set B with costs.

The Commissioner decided, on a review of taxation, that set B was only entitled to recover half the costs.

Held, in appeal, that the full amount of the proctor's fees should be allowed.

THE facts appear from the judgment.

J. S. Jayewardene, for 3rd, 4th, and 8th defendants, appellants.—The defences of the two sets of defendants are distinct and separate. The proxies as well as the answers are separate. The fact that the same firm of proctors was retained makes no difference to the appellants' right to get their full costs. The test is the liability to the proctor. The case of *Wijesuriya v. Mepi Nona*¹ is exactly in point. The learned Commissioner has erred in following the case of *Abdul Rahiman v. Amerasekera*,² which is clearly distinguishable. The taxation by the chief clerk is correct.

P. M. Jayewardene, for plaintiff, respondents.—Although there were two sets of defendants throughout the case they acted jointly. They retained the same proctors, and their defences were not entirely independent of each other. Counsel relied on *Abdul Rahiman v. Amerasekera*.²

September 5, 1916. DE SAMPAYO J.—

This is an appeal from an order in review of taxation of costs. The decree gave judgment for the plaintiff against the 1st, 2nd, and 6th defendants, and dismissed the case against the 3rd, 4th, and 8th defendants, appellants, with costs. These two sets of

¹ (1912) 15 N. L. R. 158.

² (1911) 14 N. L. R. 226

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defendants retained the same firm of proctors, but gave them separate proxies and filed separate answers. The 1st, 2nd, and 6th defendants disputed the plaintiff's title to the portion of land, of which the plaintiff was alleged to have been dispossessed by the defendants, and claimed it themselves, and justified their possession. The 3rd, 4th, and 8th defendants disclaimed title and denied the ouster. It will thus be seen that the defences of the two sets of defendants were distinct and separate, though the same proctors appeared at the trial and conducted the case for them without any distinction. A bill of costs was submitted by the proctors on behalf of the 3rd, 4th, and 8th defendants charging items for proctors' fees, stamps on subpoenas to witnesses, and their batta. The bill was taxed by the chief clerk as submitted, but the plaintiff applied to Court to review the taxation. The Commissioner, who was not the same as the Commissioner who tried the case and entered the decree, held that as, in his opinion, the two sets of defendants "acted jointly in their defence, and did not support their defences entirely independent of each other," only half the costs could be taxed on the bill of costs in question. The words I have quoted from his judgment are not an accurate description of the position of the defendants. If they were, the Commissioner who entered the decree might have had good reason to allow the 3rd, 4th, and 8th defendants only half the costs of the action. But he did not do so, and the only point now is as to the carrying out of his actual order for costs. The decision in *Abdul Rahiman v. Amerasekera*,¹ which the Commissioner purported to follow, has therefore no relevancy. The case more in point is *Wijesuriya v. Mepi Nona*,² which the Commissioner thought did not apply. If he had examined that case closely he would have found that the facts were practically similar to those of this case. That was a partition action. The 1st to 7th defendants appeared by a proctor and claimed a particular lot for themselves, while the 16th defendant, appearing by the same proctor, claimed a planter's interest, and also supported the 1st to 7th defendants' defence. The Supreme Court considered that the defence of one set of defendants was entirely independent of the other, "though" (to quote from Middleton J.'s judgment) "it happened to be the same." Wood Renton J. emphasized the fact that two separate proxies were given, and said "They did not retain him (the proctor) jointly, nor were they in any sense acting jointly in their defence." The result was that the 1st to 7th defendants, who had obtained an order for costs of the action against the plaintiff, were allowed to tax all such costs as were payable by them to their proctor, quite apart from what the 16th defendant might have to pay the proctor. This decision is therefore an authority, which, I think, the Commissioner ought to have followed. In this case no question is raised that the amount shown in the bill as proctors' fees

¹ (1911) 14 N. L. R. 226.² (1912) 15 N. L. R. 158.

is not payable by the 3rd, 4th, and 8th defendants to the proctors, and therefore I think the full amount should have been allowed on taxation, and not half of it only.

The proctors in the Court below were content to take half the stamp costs and batta, and the revised taxation in that respect will stand. But the order as to proctors' fees is set aside, and the chief clerk's original taxation as regards those fees is restored. The 3rd, 4th, and 8th defendants, appellants, will have the costs of their appeal.

Varied.

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