

1931

*Present: Maartensz A.J.*AMBALAVANAR *v.* WANDURAGALA.196—*C. R. Kurunegala, 4,947.*

Lien—Sum deposited for respondent's cost with his proctor—Dismissal of appeal—Costs paid direct to client—Right of proctor to retain deposit.

The appellant in an action deposited with the respondent's proctor a sum of money as security for the payment of respondent's costs of appeal.

When the appeal was dismissed, the appellant paid the costs direct to the respondent and sued the proctor for recovery of the money,—

Held, that the proctor had no lien on the money deposited with him for the recovery of the costs due to him from his client.

A PPEAL from a judgment of the Commissioner of Requests, Kurunegala.

Hayley, K.C. (with him *Peri Sundaram*), for plaintiff, appellant.

H. V. Perera (with him *Weerasuria*), for defendant, respondent.

July 16, 1931. MAARTENSZ A.J.—

This appeal raises, so far as I am aware, an entirely new point with regard to a proctor's lien for his costs.

It arises on the following facts which are not in dispute.

The plaintiff, Mr. Ambalavanar, was the defendant-appellant in case No. 11,885 of the District Court of Kurunegala, and deposited with the defendant, Mr. Wanduragala, who was the proctor for the respondent, Marthelis, Rs. 200 as security for the respondent's costs of appeal.

The appeal was dismissed and Mr. Ambalavanar alleging that he had paid and settled the costs due to Marthelis, including the costs of appeal, brought this action to recover the sum of Rs. 200.

Mr. Wanduragala in his answer pleaded (1) that the payment to the respondent was fraudulent and collusive, made with the object of depriving him of his costs, (2) that his costs were a first charge on the sum of Rs. 200 and that any settlement with Marthelis should have included the sum of Rs. 200 in his hands, (3) that Marthelis was a necessary party to the action.

The action was tried on the following issues:—

- (1) Can the defendant deduct any sum of money out of the amount deposited with him by plaintiff as security for costs of appeal on account of costs due to him from his client, Marthelis Appu?
- (2) Did defendant hold the said sum of Rs. 200 for and on behalf of his client?
- (3) Has the defendant any lien over the sum of Rs. 200 or any portion of the said sum as it was not costs recovered by the defendant as proctor by his own exertion?
- (4) Has the plaintiff paid to Marthelis Appu the costs in full due to Marthelis Appu (plaintiff in case No. 11,895)?

On the fourth issue the learned Commissioner held in the affirmative as payment to the respondent had been certified in case No. 11,895.

I agree with him that the first and third issues practically raise the same question, that is, whether the defendant has a lien over the sum of Rs. 200 for the payment of the costs due to him from Marthelis. These issues were answered in the affirmative, so was the second issue. There can be no question that the defendant received the sum of Rs. 200 as agent of this client, Marthelis.

At the trial the defendant said that on accounts being gone into with Marthelis a sum of Rs. 124.75 was found to be due to him, the defendant, and that later he filed a bill which was taxed. The taxed bill was not produced nor was a statement filed by the defendant of the items which made up the sum of Rs. 124.75.

The learned Commissioner, however, accepted the defendant's statement as to what was due to him and with the defendant's consent gave plaintiff judgment for the balance of Rs. 25.25. From this order the plaintiff appeals.

The learned Commissioner in the course of his judgment held that the payment to the respondent was a surreptitious and collusive act between the plaintiff and the respondent to deprive the defendant of the costs due to him from the respondent. It was contended that this finding cannot be supported as the question whether the payment was fraudulent and collusive did not arise under the issues tried. I must uphold this contention for the reason urged by the appellant. If the respondent desired to raise this question he should have had an issue framed for that purpose.

Under the issues tried the appellant was not called upon to meet the averment of fraud and collusion in the answer and did not give evidence. It is quite possible, however, that he would have given evidence if there was an issue as to whether the payment was fraudulent and collusive.

In the absence of a finding that the payment was fraudulent and collusive the plaintiff's settlement with the respondent direct cannot be impeached, as was held in the case of *Vaitelingam v. Gunesequera*¹.

In that case the defendant paid the plaintiff his costs. The plaintiff's proctor subsequently issued writ for the recovery of his costs and had a land of the defendant sold in execution.

¹ (1878) 1 S. C. C. p. 71.

On the defendant's objection to confirmation of the sale, it was held (1) "that when a plaintiff gets judgment with costs against a defendant, although the plaintiff thereby acquires a right to be paid his costs by his defendant, yet, as between the plaintiff and the plaintiff's proctor, the costs earned by the plaintiff's proctor are a debt due to him by the plaintiff and not by the defendant."

(2) "That a defendant against whom a judgment has been pronounced with costs has a perfect right to pay the amount of debt and costs to the plaintiff behind the back of the plaintiff's proctor, unless the plaintiff's proctor has given him notice not to do so."

Phear C.J. further held that "the judgment in the present case having been actually satisfied by the defendant's previous payment, the Fiscal could not, by purporting to sell the defendant's property upon a writ subsequently issued, make pass the title to the property."

The only question left for decision is whether the defendant's lien was extinguished by the payment to the respondent.

In support of his contention that it was extinguished the appellant's counsel referred me to the case of *Turner v. Letts*¹ and *Bell v. Taylor*², in which it was held that a solicitor's right of lien was exercisable against the clients, and *In re Harold Wilde v. Walford*³, where it was held that a solicitor has no higher right than his client.

The defendant's reply to this contention was two-fold. First, there was in fact no money in the hands of the defendant as it had been appropriated in payment of costs as soon as the plaintiff's appeal in case No. 11,885 was dismissed. Secondly, that a payment by the plaintiff to the respondent behind the defendant's back did not extinguish the lien.

In support of the first contention it was argued that as soon as the appeal was dismissed the money in defendant's hands ceased to be a mere security in the defendant's hands for the payment of the costs of appeal and became a payment of those costs and that the payment to Marthelis was an overpayment which should be recovered from him.

I am unable to gree with this argument. The sum of Rs. 200 was deposited as security for the costs of appeal and remained as such until those costs were taxed and the amount due as costs ascertained. It cannot be appropriated by defendant's decision to do so to other costs, if any, due from his client to himself, even if those costs had been ascertained by a taxed bill or bill accepted as correct by Marthelis.

But neither the appeal nor the other costs were ascertained when Marthelis was paid and this action filed, and there could not be an appropriation in settlement of an unascertained amount.

I must uphold the appellant's objection that the plea of appropriation cannot be raised in appeal as it was not raised in the Court below. This is not a mere technical objection. The defendant has not said in his evidence that he appropriated the amount in settlement of costs due to him, nor did he either in the issues or his answer raise the plea that the money had been appropriated in settlement of what was due to Marthelis.

The respondent's second contention that the defendant's right of lien is still in force cannot be sustained as at the time the action was filed nothing was due from the plaintiff to Marthelis.

¹ (1855) 24 L. J. Ch. 638.

² (1836) 8 Simon 216.

³ (1884) 53 L. J. Ch. 505.

The lien which the defendant seeks to enforce in this case is the lien to which a solicitor is entitled at Common law. This lien can be exercised against the client only, and it attaches to the property only to the extent of the client's interests therein. The solicitor has no higher right than his client. (*Halsbury's Law of England, Vol. 26, p. 821, s. 1343.*)

If the money in respect of which the lien is claimed is already in the solicitor's hands he may retain thereout the amount of his costs and pay over the balance to the client. (*Ibid. s. 1344.*) This rule must be read subject to the rules in section 1343 and if the client is not entitled to the money in the solicitor's hand he cannot claim a lien over it.

Applying these principles to the present case, as soon as Marthelis was paid he ceased to have an interest in the sum of Rs. 200 in the hands of the defendant and, in the absence of proof that the settlement was fraudulent and collusive, made with the object of depriving the defendant of his costs, the defendant's lien was extinguished.

I would, therefore, allow the appeal and enter judgment for plaintiff as prayed with costs in both Courts.

Appeal allowed.
