1955 *Present :* de Silva, J., and Fernando, J.

RAJASEKERAM, Appellant, *and* RAJARATNAM, Respondent

*S. C. 220—D. C. Pt. Pedro, 4,323*

*Costs—Adjournment of hearing of a case—Power of Court to order payment of "incurred costs"—Civil Procedure Code, ss. 143, 214.*

When a Judge, acting under section 143 of the Civil Procedure Code, grants an adjournment of the hearing of a case, he may order the party, at whose request the adjournment is granted, to pay "incurred costs". But when he makes such an order he should state his estimate of the "incurred costs" and the grounds on which he bases that estimate.

APPEAL from a judgment of the District Court, Point Pedro.

*S. Nadesan, Q.C.*, with *C. Renganathan*, for the defendant appellant.

*H. V. Perera, Q.C.*, with *T. Arulanandan*, for the plaintiff respondent.

*Cur. adv. vult.*

July 21, 1955. DE SILVA, J.—

The plaintiff instituted this action on July 28th, 1952, against his brother, the defendant, for a declaration that he was the owner of 2/3 share of the business carried on under the name of "S. Veeragaththippillai & Sons" at Jaffna and of the assets and goodwill thereof and for an order for an accounting. In the plaint the subject matter of the action was valued at Rs. 600,000. The defendant in his answer denied the claim of the plaintiff and set up various defences. The case first came up for trial on 25.6.'53 when issues were framed and adopted. Thereafter the hearing was continued on 6.11.'53 and adjourned for the 11th and 12th January, 1954. On 11.1.'54 in the course of cross-examining the plaintiff the Counsel for the defendant sought to add three new issues to the fifty issues which had been adopted earlier. The Counsel for the plaintiff objected to the three new issues and the learned District

Judge made order rejecting them. Thereupon the defendant's Counsel moved to amend the answer to enable him to raise the three issues in question. The plaintiff's Counsel objected to that application also, on the ground that it was an attempt to keep his client away from the business. The learned District Judge, however, allowed the application to amend the answer but ordered the defendant to pay to the plaintiff the "incurred costs" of that day and the following day. Later, on the suggestion of the Counsel for the plaintiff, the three issues in question were adopted without the amendment of pleadings in order to obviate delay. But the order for costs however already made was retained. Further hearing was refixed for 15th and 16th March, 1954. This appeal is by the defendant against the order for costs referred to above. The order appealed from was obviously made under Section 143 of the Civil Procedure Code (herein after referred to as the Code). The Sub-Section 1 of that Section empowers the Court to adjourn the hearing of the action on the application of either party if sufficient cause is shown. Subsection 2 of the same Section enacts "in all such cases the Court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment." Mr. Nadesan conceded that the Court in granting an adjournment of the hearing, is entitled to order the party at whose request the adjournment is granted, to pay costs as taxed by the Court or to pay a specified amount fixed by it as costs. He however argued that there is no provision in the Code which empowers the Court to order a party to pay the "incurred costs". Provision is made in Section 214 to tax bills of costs. According to that Section a bill of costs in a District Court has to be taxed by the Secretary, according to the rates specified in the Second Schedule. Mr. Nadesan in support of this argument submitted that there was no provision in the Code to tax bills in respect of "incurred costs". But I do not think that there is any insurmountable difficulty in the matter of taxing such bills. Section 214 itself can be availed of for that purpose, subject to one variation, the variation being the substitution of the costs actually incurred in place of the rates specified in the Second Schedule. Of course, the party who is to receive "incurred costs" would be entitled to recover such costs only in respect of items taxable under that Schedule. In other words he would be entitled to get the bill taxed in terms of the Second Schedule, but free from the restrictions set out therein in regard to the amounts permitted under it. Such amounts will be limited to the sums actually incurred.

The awarding of costs is a matter in the discretion of the Judge. But that discretion must be exercised judicially. The Judge is not entitled to make an order in a vague or arbitrary manner. But he should be guided by rules of reason and justice—*Sunderam v. Gonsalves* [1]. In *Yapa v. Don Davith* [2] Hearne J. stated, "It is true that a Court of Appeal does not ordinarily interfere with the discretion exercised by a Court of trial as to costs but where it is clear that a Court of trial has exercised no discretion at all and has arbitrarily given costs against the party who succeeded on the issues before the Court, it would be contrary to all principles of justice if it did not interfere". As observed by

[1] *(1948) 51 N. L. R. 15.* [2] *(1937) 10 C. L. W. 25.*

Basnayake J. in *Sunderam v. Gonsalves* (supra) the interference should not be restricted to the instance referred to by Hearne J. if it is evident that the Judge has not exercised his discretion at all or if he has used it arbitrarily. There are various factors to be taken into consideration in fixing the amount of costs when the hearing of a case is adjourned on the application of a party. One such factor is the amount involved in the litigation, and another is the extra expenditure that is incurred by the other party as a result of the postponement. The Judge is also entitled to take into consideration the stage of the case at which the postponement is granted, in fixing the costs. But in no case should a Judge enhance the amount of costs for the reason that the party who is condemned to pay the same is in affluent circumstances. In this case the learned District Judge in making the order for costs has made the observation "the defendant is not a poor person." That is indeed an unfortunate remark to have been made. The fact that the defendant was not a poor person appears to have influenced the Judge in ordering him to pay unusually heavy costs. Although I would not go so far as to say that a Judge in no circumstances should order a party to pay "incurred costs" I would however venture to observe that such an order is an undesirable one and should be made only in cases where the Judge is in a position to form a fairly accurate estimate of the "incurred costs". Where he makes such an order the record also should show that he had material before him to arrive at the estimate of "incurred costs". Otherwise it would not be possible for this Court to ascertain whether or not the Judge had exercised his discretion judicially. In this case it is not possible to gather from the Judge's record even a very rough idea of the amount of costs incurred by the plaintiff and which the defendant was ordered to pay. If the Judge had no means of knowing what the plaintiff had spent it cannot be said that he used his discretion judicially in ordering the defendant to pay the "incurred costs". The learned District Judge should have stated in his order his estimate of the "incurred costs" and the grounds on which he based that estimate before he made the order. In these circumstances I am not satisfied that the Judge used his discretion judicially. If the learned District Judge felt that an order for taxed costs in favour of the plaintiff was inadequate it would have been desirable if he fixed a specified amount as costs after consulting the Counsel for both parties. The order to pay "incurred costs" is set aside. The plaintiff however is entitled to an order for costs. I would fix the costs at Rs. 1000. There will be no costs of this appeal.

FERNANDO, J.—I agree.

*Order varied.*