1944 *Present:* **Soertsz and Wijeyewardene JJ.**

FERNANDO, Appellant *and* PERERA, Respondent.

169—D. C. Chilaw, 11,785.

Costs—Order for costs in the class of action—Amount awarded in lower class—Jurisdiction of District Court—Powers of Supreme Court.

An order for costs in the class in which an action is instituted may be made when the amount actually awarded to the plaintiff is one in a lower class.

It is desirable that a trial Judge should state his reasons for such an order. On his failure to do so, it is open to the Court of Appeal to examine the merits of the order.

APPEAL from a judgment of the District Judge of Chilaw.

L. A. Rajapakse, for substituted defendant, appellant.

J. Fernando Pulle, for the plaintiff, respondent.

Cur. adv. vult.

May 12, 1944. SOERTSZ J.—

The short but not unimportant point that arises on the only submission made to us on behalf of the appellant is whether an order for costs in the class in which an action is instituted is justified when the sum actually awarded to the plaintiff is a sum in a lower class.

Counsel for the appellant did not contend, and I do not think he could have contended successfully, that costs must invariably be awarded in the class in which the sum actually found for a plaintiff occurs. But he did submit that an order for costs in the original class, accompanying an award for a sum in a lower class, ought to be set aside in a case such as the one before us in which the Trial Judge has given no reasons for allowing costs in the higher class.

The submission appears to me to be too wide. It is undoubtedly extremely desirable that a Trial Judge should state his reasons for such an order, but his failure to do so cannot result in the manner suggested for the appellant. It would surely be open to an appeal Court to examine the merits of the order.

The question then is how that matter should be examined. Over a hundred years ago this Court answered a similar question submitted to it by a District Judge thus: " The general rule is that costs are awarded in the class in which judgment is given unless special circumstances appear to take the case out of the rule ". *Austin's Reports 1833-1852, page 5.*

If, for instance, a party is found to have unduly exaggerated his claim, our law reports show that in appropriate cases, not only has he been awarded costs in the class in which he obtained judgment, but also that he has been ordered to pay the difference in costs to the other party. *Goonesekera v. Senaratne*[1], *Meera Saibo v. Omer Lebbe*[2]. *Mohamado Lebbe v. Veerappa Chetty*[3], *De Silva v. Babunhamy*[4].

But this question whether a claim has been unduly exaggerated or not is not susceptible of easy answer in every kind of case. It is a difficult question in a case such as this where the plaintiff is suing for damages for malicious prosecution. The Trial Judge found, and found correctly, that the defendant acted maliciously in preferring a charge as serious as that of housebreaking and robbery against his son-in-law, the defendant, with whom he had fallen out and yet he has seen fit to reduce the damages claimed,—the modest sum of Rs. 1,000 to Rs. 300. This appears to me have been done quite arbitrarily.

Every element that the Judge appears to have considered in fixing damages is an element not of mitigation but of aggrevation. In this connection, I would only refer to two English cases:—*Hewlett v. Cruchley*[5] and *Leith v. Pope* cited in *Mayne on damages p. 588.* In the former case an Attorney charged his clerk for felony after taking legal advice, but without a full disclosure of the facts to his advisers. The clerk was discharged and sued for damages and obtained a verdict for £2,000. Upon a plea in appeal that the damages awarded were excessive Mansifield C.J. observed " Could any one say that any rational man of character would for £2,000 put himself in this situation? If not, the damages are not excessive ". In the latter case where the plaintiff was arrested and indicted for felony out of mere revenge and without a shadow of pretence—and that is the case here too—£10,000 was allowed. But we, here, seem to be able to bear the misfortunes of others with great fortitude, and so liberty, reputation, and life itself are counted cheap. It seems to me that when the plaintiff established that the defendant had acted maliciously in preferring the serious charges he made against him, he substantially won his case. The question of damages was a subsidiary question with which the Court was concerned *ex debito jutitiae*, in order to make good to the plaintiff, as far as money could make good, the loss or diminution of good name and prestige he must inevitably

[1] *5 N. L. R. 242.*
[2] *4 N. L. R. 319.*
[3] *Cur. L. R. 137.*
[4] *1 S. C. D. 1.*
[5] *5 Taunt. 277.*

have suffered. The principal underlying the question of costs in these cases was stated by Sargeant C.J. in the case of *Ganashan v. Moroba*[1] as follows:—" Costs should follow the event. What is the event? It is obviously this, that the plaintiff has succeeded in proving his allegation. He has established his case although, no doubt, he has not got the precise form of relief he desired . . . . he alleges that he has suffered an injury from the defendant and he comes to the Court for redress. He has proved the injury. He has proved that he is entitled to some relief, and that being so, I cannot see why he should be refused his costs because, in the opinion of the Court, the extent of the injury proved may be sufficiently redressed by giving him damages rather than an injunction. It is to be observed that the defendant throughout has denied that the plaintiff has suffered any injury and has thus compelled him to prove his case. "

The case before us is even stronger. The plaintiff proved malice and that of the worst type, as actuating the defendant, and in regard to damages, can it reasonably be said that a man exaggerates who rates his good name and fame at Rs. 1,000, however humble a man he may be?

In my opinion, we would be adding insult to injury were we to accede to the request of the appellant.

I would dismiss the appeal with costs.

WIJEYEWARDENE J.—

The plaintiff claimed Rs. 1,000 as damages. The District Judge assessed the damages at Rs. 300 and gave judgment " for plaintiff for Rs. 300 and costs of this action. " There has been no appeal by the plaintiff on the ground that the sum awarded to him is inadequate. I think, therefore, that in considering the question of costs we must proceed on the footing that the amount decreed to the plaintiff as damages is the amount that could have been claimed justly and reasonably by the plaintiff. Now under the decree of the District Court the plaintiff would get his costs in the Rs. 1,000 class in spite of the reduction of his claim to Rs. 300. This would be against the general rule of practice that costs should be given in the class in which judgment is given. Of course, it was open to the District Judge to give the costs in the higher class, if he thought that the circumstances of the case justified such an order. He has, however, given no reasons for departing from the general rule, if he, in fact intended to make such a departure. I find it difficult to believe that he gave his mind at all to this question or made his order giving " the costs of the action " after due consideration. Nor am I able to infer from the judgment that in fixing the damages at Rs. 300 the District Judge has been influenced by the consideration that he was going to give the plaintiff costs in a higher class. These difficulties have given rise to some doubts in my mind as to the correctness of the order as to costs made by the District Judge. However, as my brother has no doubts whatever on this point, I agree to the order proposed by him.

Appeal dismissed.

1 *18 Bom. 474.*