(1914) 03 MAD CK 0041

Madras High Court

Case No: None

V.V. Srinivasa Aiyangar (Receiver)		APPELLANT
	Vs	
V. Cunniappa Chetty and Others		RESPONDENT

Date of Decision: March 31, 1914

Acts Referred:

- Letters Patent Act, 1865 - Section 12

Citation: AIR 1914 Mad 88 : 24 Ind. Cas. 895 : (1914) 26 MLJ 567

Hon'ble Judges: Sankaran Nair, J

Bench: Division Bench

Judgement

Sankaran Nair, J.
A preliminary objection is taken as to the jurisdiction of this Court. It is first objected that the 3rd defendant does not

live or carry on business in Madras and therefore the suit so far as he is concerned should be dismissed. Evidence has been taken on this point and

I am of opinion that the suit is properly brought against the 3rd defendant. The evidence shows that he comes here to sell his casuarina trees and

whenever he has any business to transact in Madras with reference to those trees he comes to Madras. Suits have been brought here against him

and he has been arrested on warrants issued against him in Madras. I accordingly overrule the objection so far as the 3rd defendant is concerned.

2. The more difficult question that remains is whether the suit is one for land within the meaning of those words as used in Section 12 of the Madras

Letters Patent. The suit is brought for the recovery of damages for trees cut and removed by the defendants. They are said to be trees in a

plantation situated outside the limits of the ordinary original civil jurisdiction of this Court and the plaintiff"s case is that this plantation wherein the

trees stood is vested in him. The jurisdiction of this Court has to be determined on the facts alleged in the plaint. Now it is true no doubt that no

relief with reference to the land is claimed, the only relief claimed being the recovery of a certain sum of money. But the plaintiff cannot obtain that

relief without proving his title to the land sand an averment made in the plaint that the land belongs to him is necessary. If the title to the land is

denied, then, of course, evidence has to be given to prove his title. If it is admitted by the defendants, then it is unnecessary to decide the question

of title ; but in any subsequent suit between the parties the question of title to this land cannot be raised again. Either, therefore, by express decision

or by implication the title to the land has to be declared in this suit and the matter becomes res judicata. Now, it appears to me that where on the

allegation in the plaint the title to a land has to be determined either expressly or by implication so as to preclude it from being raised in any

subsequent suit, the suit is one for land within the meaning of the words in Section 12 of the Letters Patent. Mr. Ramasami Aiyar relied upon the

decision of this Court in Marappa Mudali v. S.T. McCarthy ILR (1881) M. 192 and upon the decision in Pattangowda v. Nilkant Lal Deshpande

ILR (1913) B. 675 in which it was decided that when a suit is brought in a Small Cause Court for the recovery of a certain sum of money and the

plaintiff has to prove his title to any land in that suit then the title to the land comes only incidentally before the court and the Small Cause Court is

not divested of its jurisdiction to try that suit. That may be so. But the ground of these decisions is that the title to the land will not be res judicata in

any subsequent litigation between the parties and when the title will not be res judicata between the parties it cannot be said that the question of title

is properly before the court for determination. I am therefore of opinion that the suit is one for land, and it is conceded that if the suit is one for land

it will not lie in this Court. I accordingly dismiss the suit. As the 3rd defendant''s plea is disallowed. I make no order as to his costs. The plaintiff will

pay the costs of defendants 1 and 2.

3. Mr. Tirunarayanachariyar applies for a certificate for counsel''s fee. Mr. Ramsami Aiyar opposes this on the ground that no counsel''s fee can be

taxed in any case where he is instructed by a Vakil. Mr. Chamier supports him. The question has been argued earnestly for one entire day. I shall

therefore give my reasons for my conclusion.

4. When a party is declared entitled to his costs, he is prima facie entitled to receive all the reasonable costs incurred by him in the conduct of the

suit. The fee that he might have paid to a Counsel, Attorney or Vakil is included in his costs ; but such fees, of course, should not be unreasonable.

5. The rule for taxation of costs therefore provides that when a party instructs an attorney, the attorney''s fees are to be taxed according to the

scales in Appendix IV of the Original Side Rules. As an attorney cannot plead, it is necessary for him to instruct a counsel, and therefore it is only

right that a party should get the attorney''s fees as well as the fees which were paid to counsel by the attorney on his behalf, and as it is the attorney

who pays the counsel whom he instructs, counsel''s fee is included in his bill of costs. But as it is necessary for an attorney only to instruct one

counsel in the conduct of the case, if he instructs also another counsel, then he is not entitled to get that fee as a matter of right. It is open to the

Taxing officer not to allow it. It is also open to him to say under Rule 29 of the High Court Fees Rules that it was necessary and proper that a

second counsel should be engaged in the case ; then he can allow the second counsel''s fee. Of course, the Judge can always certify for such

counsel''s fee.

6. Where a party appears by a Vakil, Vakil''s fees are fixed by Order VI, Rule 63 of the High Court Fees Rules, and the amount of such fee is

calculated where practicable according to the value of the suit and the amount fixed by the scale of fees framed under the Legal Practitioners'' Act,

1879, For the same reason that a second counsel''s fee is not always allowed, it is only reasonable that when counsel appears instructed by a Vakil

the counsel''s fee should not be allowed as a matter of course. A Vakil can conduct the case alone. He can act and appear and plead, and

therefore there is no necessity for him to engage a counsel. He can do the work which an attorney and counsel together can do when a party

appears by an attorney. But those reasons which influence the Court or the Taxing officer to certify for second counsel''s fee would seem to be

also applicable to cases in which a Vakil instructs a Counsel. They would seem to apply with greater force, as it might be said that cases which

required a second counsel would a fortiori seem to require a counsel when a party instructs a vakil instead of an attorney. This principle is followed

in Rule 533 of the Original Side Rule''s which allows the Taxing Officer to allow counsel''s fee in respect of his attendance at Chambers or at the

first hearing of a suit when the Judge certifies that the case is a proper case for his attendance. The rule is not limited to cases in which the

Advocate appears instructed by an attorney.

7. It was then argued before me that a party is not entitled to claim as part of his costs, fee paid by him to counsel whom he instructs directly

without the intervention of an attorney or whom a Vakil instructs, because the rules about payment of fees when a party appears by an attorney go

to show that a party can claim the fee paid to counsel only when the counsel appears instructed by an attorney ; and the rules about payment of

costs when a counsel-appears instructed by a Vakil go to show that no counsel''s fee can be allowed. The argument is that in attorney''s cases

when costs are awarded under Rule 191 they must be inserted in the decree followed by the words ""when taxed and noted in the margin thereof,

and taxation of costs can only take place as provided by Order IV which requires an attorney to present his, bill of costs in which the fee paid to

counsel must be entered. There is no provision relating to payment of counsel"s, fee, and it is argued, therefore, that it is only in cases in which an

attorney may be able to present his bill of costs, and therefore cases in which an attorney appears that counsel"s fee can be awarded to the

successful party. In my opinion, those who. put forward these arguments forget that rules for taxation of costs only prescribe the procedure for

recover of costs and the conditions subject to which they might be recovered. The right to recover costs, and fees as part of costs, exists apart

from the rules for taxation of costs. They cannot be intended or read to get rid of the right the existence of which is a pre-requisite to the taxation

rules coming into operation. Moreover, they were framed at a time when it was not the practice for Counsel to appear instructed by a party or

Vakil. The rules, therefore, had not such cases in contemplation ; and the rules which were framed to provide for payment of costs when a counsel

appears instructed by an Attorney cannot be construed to impose a restriction even indirectly by disallowance of fees upon counsel appearing

Instructed by a party or a vakil--a matter which was never contemplated by those rules. Again on the question whether any rules can fetter a judge

in his judgment, I express no opinion ; but it certainly cannot be done by implication, and in express terms his power to award costs as prayed for

is not taken away.

8. Coming to the rules, it may be pointed out the argument that a party represented by Caunsel should not get the fees that he might have paid to

him included in his costs, on the face of it, would seem to be unreasonable. It has been held by Mr. Justice Wallis, and I agree with his conclusion,

that it is open to a counsel to appear instructed by his client; and" if that is so, it appears to me that he is entitled to get as part of the costs awarded

to him the fee that he has paid to his counsel. Otherwise, it would amount to the virtual prohibition of a party engaging a Counsel and the courts will

undoubtedly struggle against a construction of the rules which has that result.

9. Now taking the rule about attorney''s bill of costs, Rule 191 states that the procedure therein prescribed should be followed '' unless otherwise

ordered by the Court;'' and an order certifying for counsel''s fee is such an order if it is inconsistent with that rule. Rule 63 about Vakil''s fee states

clearly that it applies to fees "" to be allowed to the Vakils."" Reading it with the Rules 30 to 40 of the Appellate Side Rules, I have no doubt that it

only means that a Vakil cannot claim anything more for appearing, acting or pleading up to the date of the decree. It may also be pointed out that if

Rule 41 of the Appellate Side Rules applies it can only operate when ad valorem fees are paid and the argument to help the plaintiff in this case

must cover other cases. Liberally construed, it would prevent higher costs being awarded when a party is represented by counsel and attorney.

10. If I am right in my interpretation of Rule 533, that also is against this view, as counsel may appear instructed by a Vakil who may claim as part

of the costs the fee paid to the counsel. It was contended that this rule must be read subject to Rule 191 and Order IV ; but in my opinion all these

rules have to be read together and they certainly are not to be strained to include cases which were not in the contemplation of those who framed

the rules.

11. I am therefore of opinion that when counsel is instructed by the party in person the latter is entitled to claim as part of the costs decreed to him,

the reasonable fee paid to his counsel, and when he is instructed by a Vakil the Taxing Officer or Judge may certify for his fee.

12. Certified accordingly.