
(1872) 06 CAL CK 0006

Calcutta High Court

Case No: None

P.

APPELLANT

Vs

P.

RESPONDENT

Date of Decision: June 17, 1872

Judgement

Macpherson, J.

Supposing the application to be regularly Made (i e., by the petitioner moving to withdraw the suit, and that the respondent do pay her costs), should act as the Judge Ordinary did in Cooper v. Cooper 3 Sw. & Tr., 302. That case is Very similar in many respects to the present; and I see no reason to doubt that the petitioner"s costs might, as the case proceeded have been taxed de dis in diem if the petitioner had to applied. It is said that the facts appearing on the pleadings and affidavits which have been filed are snob as show great negligence, amounting to want of ordinary care, if not to something more, on the part of the petitioner"s attorney And it is argued that the case is groundless, and that, under the circumstances, the respondent ought in no circumstances to be made to pay the "petitioner"s costs; but without going into evidence,--the same evidence almost as would be necessary if the case went on to a regular hearing,--I cannot adjudicate upon the question of the truth or falsehood of the various allegations of the parties. It is true that the respondent says that the petitioner has committed bigamy and that be seems to have substantial grounds for so saying. But it is not proved that she has done so; and the respondent does not profess to intend to proceed to prove it The petitioner in her petition, which is verified, states that the was legally married to the respondent, and there is no doubt that she did go through the marriage ceremony with him. That being so, and in the absence of any indication that the petitioner"s attorney had any knowledge of her being already the wife of another man, or that there was any reason why he should suspect her of having committed bigamy, I cannot say that I think Mr. Fink was guilty of negligence, so far as the question of bigamy is concerned, in making no special inquiries on that point before he filed the petition. There being no suggestion to the contrary. I do not wonder that he rested satisfied with her statement, true in fact, that she had been married recently to the respondent.

2. There is no doubt that the petitioner comes before the Court under exceptionally discreditable circumstances as regards her antecedents, taking her story as she herself tells it in her written statement; and it is possible, not to say probable, that, if the matter had gone on to a hearing, the respondent would not have been ordered to pay her costs. But the parties have chosen to return to cohabitation, and so prevent the further progress of the suit. That being so, and looking at all the circumstances, I think that the attorney is entitled to an order that his costs when taxed be paid by the respondent.

3. But the respondent will not have to pay the costs of this application, which in form is entirely irregular and wrong. Mr. Fink in his affidavit states that, on the 15th of March, the petitioner obtained a rule against the respondent to show cause why an attachment should not issue for non-compliance with an order which had been made, that he should deposit in Court Rs. 1,500 to meet the petitioner's costs; that immediately thereafter the Court ordered the issue of a commission to England to take evidence as to the bigamy, and that, pending the return of the commission, the respondent should give security for the probable amount of the petitioner's costs, with liberty to the petitioner to apply for the deposit of those costs on the return of the commission from England; that no further proceedings were taken; and that on the 28th March he (Mr. Fink) was informed that the petitioner had gone back to live with the respondent, and that the suit was amicably settled. Mr. Fink then states that on the 10th of April the petitioner called on him and instructed him to withdraw the suit saying that the respondent would pay all her costs; that he accordingly prepared a petition in terms of these instructions, and sent it to the respondent's attorneys for their consent, but they returned the same on the 24th April, and refused to consent.

4. On this state of facts, Mr. Fink, on the 29th May, issued a notice to his own client the petitioner in the suit, to the respondent and to the respondent's attorneys, to the effect that he will apply in chambers for an order that the suit be dismissed or withdrawn, and that the respondent do pay him, as the attorney on the record for the petitioner, the amount of her costs when taxed. Mr. Fink was quite wrong in coming to the Court in this manner, asking for an order as against his own client. He ought either to have made an application to the Court in the terms of the instructions received from the petitioner on April 10th or, if for any reason he thought he could no longer act on those instructions, he should have again communicated with his client and have ascertained expressly her intentions and wishes. After having ascertained her wishes, he might then have made such application to the Court as was necessary. Coming in, however, as he does on his own account, and adversely to both parties, no order for the withdrawal or other final disposal of the suit can be made, and the parties will have to come again before the Court and be put to further expense before the suit can be finally disposed of; whereas, if the matter had been moved in proper form, the suit might have been finally concluded now.

5. Therefore, although I shall order the petitioner's costs to be taxed and to be paid by the respondent to her attorney [he being substantially entitled to such an order], her attorney must personally bear his own costs of this application. The petitioner's costs will

be taxed on scale No. 2.