

**ARIYASENA  
v.  
GUNATILAKE**

COURT OF APPEAL,  
PALAKIDNAR, J., and SENANAYAKE, J.,  
C. A. No. 1092/88 – D. C. COLOMBO No. 14067/P,  
SEPTEMBER 19, 1990.

*Partition-Pro-rata costs – Appraised value – Section 57(1) and (2) of the Partition Law.*

The plaintiff respondent instituted this partition action in the District Court of Colombo which was concluded without any contest. Thereafter the court ordered the parties to pay the *pro-rata* costs. The bill of costs was tendered to court and to the 15th Defendant. The Petitioner's *pro-rata* costs were fixed at Rs. 5,615.10. The plaintiff-respondent obtained writ to recover the said costs. The 15th Defendant-petitioner moved the District Court by petition and affidavit to amend the *Pro-rata* costs and this was refused by the learned District Judge on 26.9.1988. The 15th Defendant-petitioner moved by way of revision to revise the said order and submitted that the costs should be based on the valuation placed by the plaintiff in his pleadings.

**Held :**

As no revenue is involved in a partition action expressly because all pleadings and documents are exempted from stamp duty the value placed in the pleadings has no effect on the recoverable costs. In terms of the provisions of Section 57(1)(a) to (c) costs should be determined in accordance with the rates set out in the Fourth Schedule of the Law and this would be on the appraised value of the lot.

The subject matter has been appraised by the Commissioner at the final partition and at that stage there appeared to be no objection regarding the correctness and veracity of the valuation. It is belated to attack the appraisal now and the *pro-rata* costs have to be borne by the parties in terms of Section 57(2) of the Partition Law.

**Cases referred to :**

- (1) *Martin v. Lucy Lourensz* 1 *Browne's Rep* 226
- (2) *Jayasinghe v. De Silva* 6 C W R. 263
- (3) *Juan Appu v. Pelo Appu* 19 NLR 272
- (4) *Somasundaram v. Manickam* 49 NLR 300, 302  
*Somasundaram v. Manickam* (4) followed.

APPLICATION in revision of the order of the District Judge of Colombo.

*D R. P. Goonetilleke* for 15th defendant-petitioner.

*R K S. Suresh Chandra* for 7th Respondent.

*Cur. adv. vult*

October 26, 1990

**SENANAYAKE, J.**

The Plaintiff-Respondent instituted this partition action in the District Court of Colombo which was concluded without any contest. There after the court ordered the parties to pay the *pro rata* costs.

The bill of costs was tendered to court and this 15th Defendant-Petitioner's *pro rata* costs were fixed at Rs. 5,615.10. The Plaintiff-Respondent obtained writ to recover the said costs. The 15th Defendant-Petitioner moved the District Court by petition and affidavit to amend the *pro rata* costs and this was refused by the learned District Judge on 28.09.1988.

The 15th Defendant-Petitioner moves by way of revision to revise the impugned order of 28.09.1988.

Learned Counsel for the Petitioner submitted that there was no contest in the partition action and the 15th Defendant-Petitioner had been allotted a small portion of the land. Therefore he submitted that grave injustice would be caused to the 15th Defendant in that he would be deprived of the partitioned lot as this would be sold to recover the *pro rata* costs. He submitted that the value given to the entire land in the plaint was Rs. 50,000. Therefore costs should be based on that valuation placed by the plaintiff.

I am unable to accept the said submission. Section 74 of the Partition Law, No. 21 of 1977 envisages that pleadings and process and all documents filed or produced in a partition action under this law shall be exempted from stamp duty and according to Section 74 (2) all Partition deeds shall be exempted from stamp duty.

Therefore the value placed on the plaint has no bearing on revenue. The value so placed would facilitate court in making an order calling on the plaintiff to deposit an estimated amount in terms of Section 8 of the Partition Law for the preliminary survey and in terms of Section 9 to determine the actual cost of such survey in accordance with the rates set out in the first schedule of the said law.

The court in terms of the provisions of Section 29 will specify the party who should deposit the costs of commission for partition this being determined according to the rates set out in the third schedule of the law.

In terms of the Section 32 the Commissioner is duty bound to give the appraised value of each lot and any improvements there on and details of computation of such value substantially in the form set out in the second Schedule to the said law.

The appraised value of each lot includes not only the value of the land of each party but also the value of improvements.

The relevant Section that deals with recoverable costs is Section 57 (1) which reads as follows : "In any partition action the following costs shall, unless the court otherwise directs, be borne by parties to the action in the proportion of their respective rights to the land to which the action relates :

- (a) The cost of execution of the commission for preliminary survey and the costs of the execution of the commission for partition or sale ;
- (b) The costs of execution of any commission issued to the Surveyor-General in terms of Section 78, Sub-section (3) ;
- (c) The costs of deeds and other documents to prove common title ;
- (d) The cost of the proclamation in terms of Section 5, Sub-section 3 ;

- (e) Other costs of instituting and prosecuting the action which would be determined in accordance with the rates set out in the fourth Schedule to the law."

According to Section 57 (Sub-section 2) refers to the costs in terms of Section 57 (Sub-section 1) "as recoverable costs, and the proportionate share there of to be borne by each of the parties shall be known as *pro rata* costs of that party and the amount shall be recoverable in the same action from that party by the party who has incurred the recoverable costs.

The Roman Dutch law rule on the point as stated by Voet X. 11. 17 in his title "*familiae erciscundae*" is the expenses if any incurred in connection with the division are shared jointly by all the co-heirs (*Idque communibus omnium coheredum impensis si quae propter divisionem faciendae sint*). Whether they have all willingly consented to the division or one of them has sued the others who were willing for division, seeing that such expenses ought all to be looked upon as quite as necessary as those which have been incurred in the advertisement of the property and generally in the furtherance of the sale or upon the making of and inventory, which expenses as *ipso jure* diminishing the amount of inheritance must be deducted therefrom.

In *Martin v. Lucy Lourensz*<sup>(1)</sup> Browne, J., observed at page 227, "All costs necessary to the carrying through of a non contentious suit for partition to final degree are to be borne by the parties *pro rata* according to there share".

In *Jayasinghe v. De Silva*<sup>(2)</sup> Ennis A.C.J. ; observed at page 264, "This is an appeal from an order for costs in a partition action. The costs have been divided by adding up the value of the soil and plantation falling to each party and dividing the total costs proportionately. The first contention for the Appellant was that under Section 10 of the Partition Ordinance the costs should be divided according to the shares of the parties to the land. This does not appear to be in accordance with the terms of Section 10 which prescribed that the costs shall be proportionate to the shares in the property and the property is not limited to the land only. There may be some other interest such as a share in the plantation or quarries or some other outside interest and to divide the costs according to the proportion of the co-owners' shares in the property all interest, must be taken into consideration and contribute, towards the costs."

In *Juan Appu v. Pelo Appu*<sup>(3)</sup> Woodrenton, C.J., observed at page 273 "But the procedure in partition actions, has been assimilated in practice to a great extent to our civil procedure and the case of *Martin v. Lourensz* a decision of two judges shows beyond all doubt that the *cursus curiae* has risen in regard to the costs, in partition action that we have no right to ignore namely that apart from incidental contention, the costs, of the suit should be borne by the co-owners *pro rata*."

Regarding the submission of the learned counsel that the value of the property according to the plaint was Rs. 50,000 and therefore the taxation should be on this basis. This submission is not tenable in view of the judgment in *Somasundaram v. Manickam*<sup>(4)</sup> 49 N.L.R. page 300 where Basnayake, J., observed at page 302. "The value contemplated by the legislature is in our opinion the actual value the property would fetch if sold in open market and not the artificial value claimed by the parties in their pleadings".

It is my view that as no revenue is involved in a partition action expressly because all pleadings and documents are exempted from stamp duty, the value placed in the pleadings has no effect on the recoverable costs. In terms of the provisions of Section 57(1)(a) to (e) costs should be determined in accordance with the rates set out in the fourth schedule of the law and this would be on the appraised value of the lot.

The fourth schedule clearly contemplate that costs on a subject matter of the value between Rs. 50,000 and 100,000 would be Rs. 2,500 and on every additional Rs. 50,000 or part there of the costs would be Rs. 500 additional for each unit of Rs. 50,000.

The subject matter has been appraised by the commissioner at the final partition and at that stage there appeared to be no objection regarding the correctness and veracity of the valuation. It is belated to attack the appraisal now and the *pro rata* costs have to be borne by the parties in terms of Section 57(2) of the partition law.

In view of the above reasons I dismiss the petition without costs.

**K. PALAKIDNAR, J.** – I agree.

*Application dismissed.*