

1932

Present: Dalton and Driberg JJ.

RAPIEL v. PEIRIS.

181—D. C. Kalutara, 11,398.

Partition—Compensation for equalizing value of lots—First charge on lot—Sale of lot for costs—Preferential claim.

Where in a partition decree the Court ordered compensation to be paid for equalizing the value of the lots partitioned.

Held, that the compensation due from an allotment was a first charge on it and that, on the sale of an allotment for costs, the claim for compensation was entitled to preference.

¹ 33 N. L. R. 58.

A PPEAL from an order of the District Judge of Kalutara.

Ranawake (with him *Wickramanayake*), for appellant.

Rajapakse, for respondent.

June 27, 1932. DALTON J.—

The appeal arises out of a partition action, appellant being the plaintiff and respondent the thirteenth defendant. Certain lots were decreed by the final decree to the plaintiff, third, tenth, eleventh, and twelfth defendants, and thirteenth defendant amongst others. It was further ordered and decreed that "in equalizing and apportioning the valuation of the foregoing lots", *inter alia* the tenth, eleventh, and twelfth defendants pay Rs. 12.91 each to the thirteenth defendant, and the third defendant do pay Rs. 436.11 to the thirteenth defendant. Lots C and D had been allotted to the third defendant, and lot A 2 to the tenth, eleventh, and twelfth defendants. Writ was issued by the thirteenth defendant for the recovery of *pro rata* costs, and lots C and A 2 were seized and sold. Lot C realized Rs. 505 and lot A 2 Rs. 27. The total realized, less certain fees and expenses, amounting in all to Rs. 519.86 was deposited in Court.

Plaintiff's bill of costs was taxed at Rs. 435.63, and he sought to recover this against the second, third, eighth, and thirteenth defendants by seizure of the same property. The thirteenth defendant, however, subsequently paid the *pro rata* costs due from him to the plaintiff. Plaintiff, however, seeks to have the *pro rata* costs still due to him satisfied out of the proceeds of the sale of lot C and A 2, claiming concurrence with the thirteenth defendant. The thirteenth defendant claims that the amount awarded him as compensation is a first charge on that sum. After hearing the parties the trial Judge held that the thirteenth defendant is entitled to have his compensation paid out as a first charge on the lots, and thereafter plaintiff is entitled to concurrence for his *pro rata* costs, if there is any amount remaining after payment of the compensation. From that decision plaintiff appeals.

Counsel have been unable to refer to any previous decision of the Courts on this point, although one would have thought it must have arisen in practice on previous occasions.

The payments of compensation ordered in the decree are for the purpose of equalizing and apportioning the valuation of the lots dealt with in the decree. So far as the lots decreed to the various parties are concerned, the decree is conclusive evidence of title in the persons to whom they are allotted as against the whole world. Where in the same decree it is further provided that compensation be paid for the purpose of equalizing and apportioning the valuation of the respective lots so dealt with, it seems most inequitable that a person to whom that compensation is decreed should not rank before another party, who has no claim other than costs against the person ordered to pay compensation in respect of lots decreed to him.

In dealing with the question of the partition of property held in common *Van Leeuwen (Censura Forensis, Pt. I., bk. IV., Chap. XXVII., s. 5)* points out that compensation is paid "in order that equality may be observed in

everything". A obtains a piece of land, and B obtains compensation where necessary in the form of money for the purpose of equalizing the partition. The compensation awarded is in fact the interest or part of the interest of the person to whom it is awarded in the land being partitioned.

The same idea is found in English cases on the same subject. Where land cannot conveniently be divided equally in practice, the land is divided up unequally, the party taking the lesser share receiving a rent or some other satisfaction by way of owelty of partition (*Story v. Johnson*¹). The object of the partition is equitably to adjust the rights of all parties interested in the subject of the partition, and money ordered to be paid for owelty of partition is one of the means by which that object is carried into execution. The object of the partition is that each may enjoy in severalty (*Lister v. Lister*²). In *Rowe v. Gray*³ where the Court decreed a sale instead of a partition, it was pointed out by Hall V.C. that if a partition was directed instead of a sale, it could not be effected without some payment being made for equality of partition, but under the circumstances there he could not see where the money was to come from, in the case of an infant. An order for the payment of a sum of money could have been made, but where apparently the Court is not satisfied its order can be carried out, it will not make an order for payment of compensation. Its duty is to adjust the rights of all parties equitably. The payment if ordered is one of the terms or conditions of the partition.

If plaintiff were to succeed in his claim here, the purpose for which the payment of compensation was ordered would clearly be defeated. In my opinion the thirteenth defendant is entitled to have the amount of compensation decreed to him paid out of the sum in Court, before the plaintiff's claim. The learned Judge in the lower Court was correct in so holding, and the appeal must therefore be dismissed with costs.

DRIEBERG J.—

I agree that the sum which the third defendant was decreed to pay to the thirteenth defendant to equalize the partition is a first charge on the lots assigned to the third defendant and that the plaintiff is not entitled to claim, on his writ for costs, concurrence with the thirteenth defendant in the proceeds of sale of lot C.

The thirteenth defendant's right to this sum is one which arises from the decree for partition: by the decree he was allotted a divided portion of the land and a sum to be paid by the third defendant which, with the lots assigned to him, secured an equal division as between them. The thirteenth defendant's right to the lot assigned to him is good and conclusive against all persons whomsoever, and there is no reason why his right to the sum allotted to him to equalize the division should be any less. This being so, it appears to me that the Court in giving the thirteenth defendant a right of preference over these proceeds is doing no more than giving effect to its decree.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

¹ 1 Y. & C. 539.

² 3 Y. & C. 540.

³ (1877) 5 Ch. D. 263.