1916.

Present : Wood Renton C.J. and De Sampayo J.

JUAN APPU *v.* PELO APPU *et al.*

372—D. C. Negombo, 11,183.

Partition action—Costs to be borne pro ratâ—*Necessity for speedy legislation on the subject of costs in partition actions.*

In a partition action all the costs—other than those involved in contentions between particular parties—should ordinarily be borne by the parties *pro ratâ*. But if the circumstances are such that it is reasonable to order each party to bear his own costs, or to make any other equitable order, it is within the power of the Court to do so, instead of ordering costs of partition *pro ratâ*.

Observations as to the necessity for legislation on the subject of costs in partition cases.

APPEAL from a judgment of the District Judge of Negombo (M. S. Shresta, Esq.). The facts are set out in the judgment.

H. J. C. Pereira (with him *Balasingham*), for plaintiff, appellant.—The settled practice of the Courts is to order that costs in partition cases should be borne *pro rata* by the co-owners—except as to contentions between particular parties. See *Martin v. Lourensz*.[1] The law in England at the present time is to the same effect.

Counsel referred to *Cannon v. Johnson*;[2] *Agar v. Fairfax*.[3]

E. G. P. Jayatilleke, for added defendants, respondents, associated himself with the appellants.

Cur. adv. vult.

October 23, 1916. Wood Renton C.J.—

This appeal raises an important question of practice under the Partition Ordinance, 1863,[4] viz., whether in an action under that enactment all the costs—other than those involved in contentions between particular parties—should be borne by the co-owners *pro ratâ*, or whether it is open to the Court to leave each side to pay its own costs of action, distributing *pro ratâ* only the costs of the survey plan and the commission. The learned District Judge has adopted the latter alternative, and has given his reasons for doing so in an elaborate memorandum appended to his formal decision in the case. The ruling of the District Judge on the point under consideration does not turn in any way upon the special circumstances with which he had here to deal. He holds in effect that the

[1] *(1900) 1 Br. 225.*
[2] *(1870) 11 Eq. 90.*
[3] *(1810) 17 Ves. 533.*
[4] *No. 10 of 1863.*

omission from the Partition Ordinance, 1863,[1] of any reference to costs, save the costs of the survey of partition, which, by virtue of section 10, may be distributed *pro ratâ* among the co-owners, shows that the intention of the Legislature was that this mode of distributing costs should go no further, and that for the rest each party should pay his own expenditure incurred in a litigation entered upon entirely for his own convenience. If the matter were *res integra*, there would be much to be said for this position. The Partition Ordinance, 1863,[1] enacts its own procedure. It does not provide that the rules governing for the time being the conduct of ordinary litigation are to be applicable to partition suits, which, as we all know, have special features of their own, *e.g.*, each party is a plaintiff in the sense that he has to establish his own title, and partition actions cannot be referred to arbitration. If we had to define the practice under the Ordinance for the first time, it would not be unreasonable to follow the old English rule, before section 10 of the Partition Act, 1868,[2] conferred on the Courts jurisdiction over the costs in partition suits, and to provide (see *Agar v. Fairfax*[3]) that no costs should be given prior to the hearing, and that the costs of issuing, executing, and confirming the commission should be borne by the parties in proportion to the value of their respective interests. But the procedure in partition actions has been assimilated in practice to a great extent to our ordinary civil procedure, and the case of *Martin v. Lourensz*,[4] a decision of two Judges, shows beyond all doubt that a *cursus curiæ* has risen in regard to the costs in partition actions which we have no right to ignore, namely, that, apart from incidental contentions, the costs of suit should be borne by the co-owners *pro ratâ*. I feel constrained, although with reluctance, to set aside the order from which this appeal is brought, and to direct that the costs of all the parties, including those of the respondents, on whose behalf a statement of objections was filed, should be borne *pro ratâ*. I would make no order as to the costs of this appeal, which has been necessitated by the act of the Court itself.

I desire, however, to express the opinion that the question of the costs in partition proceedings deserves the serious and early attention of the Legislature. In the course of the past few years I have inspected the records of practically every Court of original civil jurisdiction in the Colony. I have no doubt but that there are numerous partition cases in which the costs of action and of the appeals, from which partition suits are seldom exempt, have not only far exceeded the value of the common land, but could not be met by the parties without resort being had to other lands as well. It is not for this Court to prescribe the mode in which this evil should be remedied, whether by the adoption of the old English

[1] *No. 10 of 1863.*
[2] *31 and 32 Vict., c. 40.*
[3] *(1810) 17 Ves. 533.*
[4] *(1900) 1 Br. 225.*

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rule that there should be no costs prior to the hearing, or by the Courts of first instance being invested with ample powers to deal with all questions of costs according to their discretion, or by a fixed scale of costs being prescribed. But that a remedy is urgently needed is beyond all dispute. I have recently called attention in another case to the abuses that arise from the facility, at present enjoyed by any cantankerous litigant, of intervening in a partition suit in its last stages and thereby delaying and enhancing the costliness of these proceedings. But the whole question of the costs in partition actions is worthy of, and indeed requires, immediate consideration.

DE SAMPAYO J.—

The uniform practice in our Courts, of which I can myself speak from my experience at the Bar, has been to regard " costs of partition " as meaning the costs of the action of all the parties other than those of contentious matters, and, of course, other than the charges of the Commissioner, for which statutory provision is made in section 10 of the Partition Ordinance. The practice, however mischievous, is too well established for us to interfere with it now. It appears likewise to be recognized by the Legislature, which, by section 6 of the Ordinance No. 10 of 1897, provides that " all bills of costs, whether between party and party or between proctor and client, " shall be taxed according to the rates therein mentioned. I therefore agree that the order of the District Judge in this case, and in some of the other cases which have come before us at the same time, cannot be supported on the specific ground stated by him. But although, if the Court allows costs of partition to be paid *pro ratâ*, the order should be interpreted in the above sense, I wish to make it clear that it is not obligatory on the Court to make such an order in every case. If the circumstances are such that it is reasonable to order each party to bear his own costs, or to make any other equitable order, it is within the power of the Court, and it is surely right, to do so, instead of ordering costs of partition to be *pro ratâ*. In this way the absurdity of separate appearances and separate answers, when they are unnecessary, to which the District Judge refers, may also be met. The appeal in this case only succeeds because the District Judge practically proceeded upon his view of the law in this matter, and not upon the particular circumstances of the case. It is otherwise in 361—D. C. Negombo, 11,272, the appeal in which, therefore, should be dismissed. I, however, think it fair to add that the judgment of the District Judge of Negombo is a laudable attempt to deal with an existing evil. The Partition Ordinance is intended to provide a summary means of putting an end to common ownership of land with all its attendant inconveniences, and this object has been further attempted to be advanced by a subsequent Ordinance, which exempts partition proceedings from stamp duty.

But in numerous cases all this beneficial legislation has been wholly defeated by the incubus of costs. This mischief has been aggravated by improper taxation of bills of costs without sufficient regard being paid by the taxing officer to the actual costs of partition as distinguished from costs of contention. In this connection I should like to say that a practice has grown up in some of our Courts, when a sale is ordered, to appoint an auctioneer as well a as Commissioner, and to allow a commission to both. This should be avoided equally with the practice of appointing Court officers as Commissioners, especially where they are taxing officers also. The following remarks of the District Judge are by no means without justification. After alluding to the temptation to increase costs, he says, " As a matter of fact, this has been the case in this Court, with the result that bills of costs have been swelled by absolutely needless charges, such as retention sometimes of advocates, even when there is no contest; and there have been cases when, in execution for *pro ratâ* costs against a co-owner, not only the share allotted to him in the partition case, but other landed property of his as well has been sold off. There have been cases where at the close of the partition proceedings no land or any part of its value has been left to the co-owners, the proceeds of its sale having gone entirely to pay the costs of the action. " I have myself had records before me showing that these results are not uncommon. In a petition recently presented to me in chambers in a case of that kind, the petitioner tersely, but quite justly, complains that the partition case instituted by him and some of his co-owners " seems to be a path opened by themselves for their own ruination. " In my opinion this matter of costs in partition cases is wholly discreditable to the administration of justice, and I entirely associate myself with the observations of the Chief Justice as to the necessity of speedy legislation to remedy this intolerable evil.

I agree that the appeal should be allowed, but without costs.

Appeal allowed.