

1957      *Present*: H. N. G. Fernando, J., and T. S. Fernando, J.

S. SUBRAMANIAM, Appellant, and K. THANGAVADIVELU *et al.*,  
Respondents

*S. C. (Inty.) 138—D. C. Point Pedro, 5,294*

*Partition action—Deposit of preliminary survey fees—Power of Court to alter date fixed for such deposit—Partition Act, No. 16 of 1951, ss. 8, 10 (1).*

Where, in a partition action, a date is fixed for preliminary survey fees to be deposited by the plaintiff, section 10 (1) of the Partition Act does not preclude the Court, in an appropriate case, from subsequently allowing a longer period for the deposit, provided that the alteration of the date is made prior to the expiration of the time originally fixed.

**A**PPEAL from an order of the District Court, Point Pedro.

*C. Chellappah*, for the 5th defendant appellant.

*S. Sharvananda*, for the plaintiff respondent.

*Cur. adv. vult.*

April 12, 1957. H. N. G. FERNANDO, J.—

This case involves what might be an important question of procedure under the new Partition Act (No. 16 of 1951), if it is decided in favour of the appellant. The plaint was accepted on 13th January, 1956, by the District Judge, who then ordered Rs. 75 for preliminary survey fees to be

deposited by the plaintiff on 22nd February, 1956. On the latter date, the Judge ordered the fees to be deposited on 29th February, 1956, by which date the fees were actually deposited. Summons then issued on the defendants, and one of them, the present appellant, filed proxy and moved that the action be dismissed on the ground of the failure of the plaintiff to deposit the fees on the date originally fixed, that is on the 22nd February, 1956. This motion was refused by the District Judge and the present appeal is against his order of refusal.

Section 8 of the Act required the Court to fix a date on or before which the preliminary survey fees shall be deposited, and section 10 (1) provides as follows :—

“ 10 (1) Where the plaintiff in a partition action fails to deposit, on or before the date fixed for the purpose, such estimated costs of the preliminary survey as are determined by the court under section 8, the court shall dismiss such action. ”

The argument for the appellant is that the provisions of section 10 (1) are peremptory, and that the Court is bound to dismiss the action if the fees are not deposited on or before the date fixed in the original order under section 8. The appellant also points to section 9, in which, *by contrast*, the Court has express power to extend the time for the payment of *balance* survey fees.

I do not disagree with the argument that failure to deposit the preliminary survey fees within the time fixed by the Court by order under section 8 will involve a dismissal of the action; indeed the Court would be bound to enter an order of dismissal *ex mero motu* in the event of such a failure, because the clear intention is that a partition action cannot be proceeded with unless there is a preliminary survey, the cost of which must in the first instance be defrayed by the plaintiff. But the question is whether the fixation of a date is so “final” an order that the Court thereafter lacks the discretion to extend the time originally allowed.

It is important to note that the order under section 8 (b) is one made *ex parte*, and that the defendants will not even be brought into the action by issue of summons until the fees are deposited. The proceedings, therefore, are at a stage during which only the Court and the plaintiff are concerned, *and no other person*. In the present case, the Court had ordered the survey fees to be deposited “for 22nd February”, and it was open to the plaintiff to deposit the fees during office hours on that day. But before the close of office hours, the Court, presumably upon an application made in that behalf, in effect “amended” its original order by specifying 29th February as the date on or before which the fees should be deposited. In principle, the case is no different from one in which the Court alters its original order under section 8 (b) *on the day after it is made*, in order to allow a longer period for the deposit of the fees. Considering that the date is originally fixed in its discretion, and that only the Court and the plaintiff are concerned at this stage of the proceedings, the alteration of the time originally fixed, if that alteration is made before the expiration of that time, is merely tantamount to an original fixation of the later date. The very fact that section 10 (1) penalizes a plaintiff by

rendering abortive the expenditure incurred by him in having a plaint filed, lends support to the view that the Legislature did not intend in section 8 (b) to curtail the discretion of the Court, in appropriate cases, to grant extensions of time prior to the expiration of the time originally allowed. We do not have in this appeal to decide the question whether the Court has a discretion to extend the time for the deposit of the fees after the date originally fixed, but the reasons which I have given in this judgment should not be construed to be an answer in the negative to that question.

The appeal is dismissed with costs.

T. S. FERNANDO, J.—I agree.

*Appeal dismissed.*

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