Present: Pereira J. and De Sampayo A.J. 1913.

SILVA *v.* BABUHAMY.

46—D. C. Galle, 9,918.

Costs—Partition action brought in lower class—Land sold at six times the declared value—Motion by plaintiff to tax costs in the higher class—Stamps.

Plaintiff in a partition action valued the land at Rs. 4,500. The defendants tacitly accepted this valuation. The land was sold under a decree for sale and realized a sum of Rs. 26,280. Plaintiff then moved to furnish the additional stamp duty required for a case of that value and to tax costs according to that class.

Held, that the costs should be taxed in the class in which the action was instituted and decided.

DE SAMPAYO A.J.—To tax costs now as in a case of a higher class would be to give him expenses to which he has not been put, and allow him in effect to make an extra profit out of the litigation ..... It will be time enough to consider (the motion as to stamps), if some one representing the public revenue moves in the matter upon proper evidence that the case was originally undervalued. The Attorney-General may even sue for the recovery of the deficiency of stamps.

THE facts appear from the judgment.

A. St. V. Jayewardene, for appellants.

H. J. C. Pereira (with him *Canekeratne*), for respondent.

Cur. adv. vult.

June 10, 1913. DE SAMPAYO A.J.—

This is an action instituted by the plaintiff-respondent in December, 1909, for the partition of a land which the plaintiff in his plaint valued at Rs. 4,500. The defendants tacitly accepted this valuation, and the case was proceeded with on that footing. On September 9, 1910, the Court entered a decree for the partition of the land, which was subsequently varied into a decree for sale, and ordered the costs to be paid *pro rata*. The Commissioner appointed to carry out the sale submitted a report, in which he appraised the land at Rs. 9,450. The land was ultimately sold in November, 1911, and realized a sum of Rs. 26,280.

In view of the price for which the land was so sold, the plaintiff on November 12, 1912, moved " to furnish the additional stamp duty required for a case of that value and to tax costs according to that class." The Court allowed this motion *ex parte*. Thereupon

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the appellants, who were some of the defendants in the case, moved that this order be vacated and a date be fixed for inquiry. On the day appointed on inquiry was made into the value of the land, except that the appellants put in an extract from the kachcheri records showing the official valuation for assessment purposes to be Rs. 4,750. The Court, however, in view of the partition commissioner's appraisement and the price realized at the sale, held that the case belonged to the over Rs. 10,000 class, and by its order of February 3, 1913, disallowed the appellants' motion with costs.

The question is whether the order of November 12, 1912, allowing the plaintiff's motion is correct. I shall first deal with the matter of taxation of costs. From the view I take of the case, it is not necessary to consider whether the price realized at the sale should be taken as the test of the true value of the land at the time when the action was brought, or whether there is sufficient material in the case to show that the valuation given by the plaintiff in his plaint is wholly wrong. The question is: Should the plaintiff be allowed to go behind his own estimate of the value of the subject-matter of the action so as to enable him to tax costs in a higher class? He had a large interest in the land in comparison with most of the defendants; he as plaintiff had the conduct of the case, and would necessarily have more items of costs to charge than the others; and he also had separate orders for costs against some defendants in respect of certain special contests. It is therefore to his advantage if the costs are taxed in the higher class, and unless the law is clearly in his favour, I do not think he ought to benefit by the litigation in that way. Now, what are costs? They are the sum of money which the Court orders "an unsuccessful litigant to pay to his opponent to compensate the latter for the expense to which he has been put by the litigation" (*The Encyclopædia of Laws, vol. IV., p. 42*). "The expenses to which parties are put in the prosecution and defence of actions are commonly called costs" (*Marshall's Judgments 70*). Now, this action was commenced, proceeded with, and concluded on the basis of the value of the land being Rs. 4,500, and presumably the plaintiff has already incurred all the necessary expenses of the actual litigation. To tax costs now as in a case of a higher class would be to give him expenses to which he has not been put, and to allow him in effect to make an extra profit out of the litigation. This is all the more to be deprecated in partition cases which are really brought in the common interest of all the co-owners. The District Judge has referred to certain cases, from which he has concluded that it is the practice of the District Court of Galle in similar circumstances to allow costs to be taxed in the higher scale. If there is such a practice, I think it is a bad and unauthorized practice. No decision of this Court has been cited to us, and I know of none, which has recognized the practice of taxing costs in a higher class than that in which the action is brought.

There are undoubtedly cases in which, where the plaintiff has over-valued his claim, this Court has laid down the rule that in general he should be given costs only in the class in which he obtains judgment, and may even be mulcted in the difference between the two scales of costs for putting the other party to unnecessary expenses. The converse of this, however, does not appear to be just or in accordance with principle. Counsel for plaintiff referred to section 46 of the Civil Procedure Code, which provides for the rejection of a plaint on its presentment to Court where the relief sought is undervalued; and also to *Silva v. Fernando*,[1] in which, in the course of an action, the plaintiff was ordered to supply deficiency of stamps where the claim was for damages, but where the case had not been valued with reference to the land itself, the title to which was in dispute. But these references do not furnish any authority for saying that, where the case had not been duly raised to a higher class, a party has the right at the end to tax costs as if it had been, and as if he had on that account been obliged to incur extra expense. What authority there is appears rather to be the other way. For in *Appuhamy v. Corea*,[2] where the facts were almost parallel to those of this case, and where the plaintiff sought to appeal to the Privy Council by verifying by affidavit the true value of the subject of the action, Bonser C.J. refused leave to appeal, remarking, " Both the parties have proceeded upon the footing that the subject-matter of this action did not exceed Rs. 5,000 ..... In my opinion it is not competent for either of the parties now to turn round and say that the value of the property is greater than that which it has been stated by the plaintiff in the proceedings to be." Similarly, I think it is not competent for the plaintiff to go behind his own valuation of the land for the mere purpose of taxing his costs in a higher class.

As regards stamps, the proceedings in a partition action being exempted from stamp duty, the reference in the plaintiff's motion to additional stamp duty can only be to the schedule stamps on processes. The inclusion of it in his motion is only incidental to the substantial application as to taxation of costs. It will be time enough to consider it if some one representing the public revenue moves in the matter, upon proper evidence that the case was originally undervalued. The Attorney-General may even sue for the recovery of the deficiency of stamps, if any. *Attorney-General v. Kanappa Chetty*.[3]

In my opinion the appeal should be allowed, and the orders of November 12, 1912, and February 3, 1913, should be set aside, with costs in both Courts.

PEREIRA J.—I. agree.

Set aside.

[1] *(1908) 11 N. L. R. 375.*

[2] *(1900) 1 Br. 185.*

[3] *(1908) 3 A. C. R. 118.*