

1958 Present : Gunasekara, J., and Sañsoni, J.

S. P. J. PERERA, Appellant, and H. MARTIN and another, Respondents

S. C. 537—D. C. Gampaha, 4,135/P

Partition action—Order for costs—Recoverability of costs of execution—Civil Procedure Code, ss. 208, 209—Partition Act No. 16 of 1951, ss. 10 (3), 18 (3) (g), 65, 77, 79.

In an action instituted under the Partition Act, No. 16 of 1951, it is competent for the Court to order that the costs of execution of an order for the payment of costs made in the final decree should be recovered from the judgment-debtor.

The provisions of sections 208 and 209 of the Civil Procedure Code relating to the recovery of costs of execution are applicable to proceedings under the Partition Act.

APPEAL from a judgment of the District Court, Gampaha.

Sir Lalita Rajapakse, Q.C., with *H. Rodrigo* and *V. C. Gunatilaka*,
for the plaintiff-appellant.

No appearance for the respondents.

Cur. adv. vult.

June 18, 1958. GUNASEKARA, J.—

This appeal arises out of an action under the Partition Act, No. 16 of 1951, and the question for decision is whether a district court has power to order that the costs of execution of an order for the payment of costs made in such an action should be recovered from the execution-debtor.

The final decree, which was entered on the 23rd March 1956, ordered some of the defendants to pay to the plaintiff, who is the appellant, Rs. 52-50 as the costs of a contest and ordered "that the parties do pay to the plaintiff his other costs, as contemplated by the Partition Act, No. 16 of 1951, pro rata". According to a scheme of distribution that was approved by the learned district judge on the 6th August 1956, a sum of Rs. 85-17 was payable by the 14th defendant, who is the 1st respondent, and a sum of Rs. 10-01 by the 15th defendant, who is the 2nd respondent, as "pro rata costs". By an application dated the 21st May 1957, and minuted in the record on the 25th May, the appellant's proctor asked for the issue of a writ, after notice to the respondents, for the recovery of these sums as well as the costs of execution, which he estimated at Rs. 77-50 and which he asked should be taxed. On the 27th May 1957 the learned judge minuted an order directing the issue of a notice on the respondents "in respect of recovery of pro rata costs only" and observing that there was "no provision in the new Partition Act (No. 16 of 1951) to claim prospective costs". The appellant's proctor thereupon asked that he be granted an opportunity of supporting his application and that the order made on the 27th May be vacated and an order made in terms of his application. The learned judge heard him in support of the application and made order on the 25th September 1957 holding that costs of execution "cannot be taxed and are not recoverable under the provisions of the Partition Act". The appellant seeks to have this order set aside and an order made vacating the order of the 27th May 1957 and directing the issue of a notice on the respondents as asked for in his application dated the 21st May 1957.

It is enacted by section 65 of the Partition Act that

"Costs shall ordinarily be borne by the person who incurs the costs except in cases where it is expressly provided by this Act that any costs or proportion of costs shall be borne, or may be ordered by the court to be borne, by some other person."

Express provisions such as are contemplated in the exception are contained in other sections of the Act, but they all relate to costs of the action and not to costs of execution. This is the ground of the district judge's view that costs of execution cannot be recovered.

According to this view, any costs that have not been paid by a party who has been ordered to pay them may be recovered by the person to whom they are payable only if the latter is willing to recover them at his own expense, even though that expense may exceed the amount sought to be recovered. This would be the position of a party to an action in whose favour an order for costs has been made; or of a surveyor in whose favour an order has been made under section 10 (3) of the Act for the recovery of a sum due to him as costs of a survey; or of the Crown where an order has been made under section 18 (3) (b) for the recovery of costs due to the Surveyor-General.

Such a view of the law, which can result in manifest injustice, is not reached if the provisions of the Civil Procedure Code relating to the recovery of costs of execution are applicable to proceedings under the Partition Act. Section 209 of the Civil Procedure Code empowers a court to award to a party the costs of any application under the Code, and in terms of section 208 costs include the expenses necessarily incurred by a party in enforcing a decree passed in an action.

It is enacted by section 77 of the Partition Act that the provisions of the Civil Procedure Code relating to the execution of writs shall apply in relation to the execution of writs in a partition action; and by section 79 that

“In any matter or question of procedure not provided for in this Act, the procedure laid down in the Civil Procedure Code in a like matter or question shall be followed by the court, if such procedure is not inconsistent with the provisions of this Act.”

The learned district judge holds that “this is not a matter or question of procedure but a matter of substantive law” and that he has “not got the power to make use of the sections of the Civil Procedure Code which enact substantive law”.

With all respect to the learned judge, it seems to me that provisions which empower a court to order that the cost of enforcing a decree should be borne by the judgment-debtor would be provisions relating to the execution of writs and to procedure. I am therefore of opinion that sections 77 and 79 of the Partition Act have the effect of empowering a court to order the recovery of the costs of execution from the judgment-debtor.

The appeal must be allowed with costs in this court and the court below.

SANSONI, J.—I agree.

Appeal allowed.