

Present : De Sampayo and Porter JJ.

1922.

SILVA *et al.* v. SILVA *et al.*

53—D. C. Kalutara, 8,587.

*Commission to surveyor to fix boundary—Parties ordered to pay surveyors' fees—Fees not deposited in Court by plaintiffs for over one year—Action dismissed—Dismissal wrong—Partition action.*

In January, 1921, the parties to a partition action were ordered to issue a joint commission to two surveyors to fix the boundary, and to report to enable the Court to do so, and it was arranged, that each party should contribute towards the payment of the surveyors' fees. In January, 1922, the defendants deposited in Court their share of the fees, and the Court ordered the plaintiffs to deposit the fees on March 17. Plaintiffs not having deposited their shares on that date, the Court dismissed the action.

*Held*, that the order of dismissal was wrong. There is nothing in the law empowering the Court to dismiss an action for non-payment of costs.

*H. V. Perera*, for plaintiffs, appellants.

*Soertsz* (with him *W. Chas. de Silva*), for fourth and fifth defendants, respondents.

July 13, 1922. DE SAMPAYO J.—

I do not think the order of the District Judge dismissing the action can be supported. This was a partition action, and at the very commencement the Court ordered that a survey should be made of the land, the subject of the partition. A commission to a surveyor was duly issued, and a plan was filed on August 20, 1919. Then came in certain parties who have since been numbered the fourth and fifth defendants, who complained that in making the survey a portion of their land had been included, and they moved to be added as parties. They were accordingly added, and the Court ordered, in connection with that intervention, that the intervenients should get a survey made showing the encroachments complained of. A commission was then issued for that purpose, and a plan was filed on July 23, 1920. Then on July 20, 1920 as

1922.  
 DE SAMPAYO  
 J.  
 Silva v. Silva

the plaintiffs did not admit the correctness of the new plan, they suggested that a commission should be issued to another surveyor, one Mr. Scharenguivel, to make a new survey. That was allowed, and Mr. Scharenguivel filed his plan on October 15, 1920. One would have thought that there was a sufficient number of plans made to elucidate any questions which arose in the case, but on January 28, 1921, the plaintiffs and the added defendants were ordered to issue a joint commission to the two previous surveyors to fix the boundary, or to report to enable the Court to do so, and it was arranged that each party should contribute towards the payment of the surveyors' fees, and the matter stood over for some time. Then on January 31, 1922, the fourth and fifth defendants deposited in Court a certain sum which they estimated was their share of the Commissioner's fees, but the other party, the plaintiffs by that time had not deposited the fees, and the Court ordered the plaintiffs to deposit the fees on March 17. Then on March 17, it was noted that the plaintiffs had not deposited the costs; and their proctor started that his clients had not come, and apparently intimated that he was not in a position to deposit the money on that date. Then the Court made this entry: "Plaintiff has had time since January, 1921—over a year. I cannot give any further time. Plaintiffs' action is dismissed with costs." From this order the plaintiffs have appealed. The order is supported somewhat half-heartedly by the counsel for the defendants. I think, as I have stated at the beginning, the order cannot be supported at all. In the first place, the Court had not ordered that the payment of the plaintiffs' share of the Commissioner's costs was the condition of the plaintiffs being allowed to go on with the case. Even if that condition had been imposed, the ruling of this Court in a recent case will prevent any such exercise of jurisdiction, as there is no provision in the law empowering the Court to dismiss an action for the non-payment of costs. The fact of the matter appears to me to be that the District Judge was very hasty in disposing of the case in this way, and had not taken sufficient notice of the fact that the Court had already numerous plans which should have been sufficient to enable the Court to try the case with full knowledge of the situation. I think the order appealed from should be set aside, and the case remitted to the District Court to proceed on with it in due course. The plaintiffs will no doubt deposit their share of the Commissioner's fees in connection with the new survey without delay. I do not think any order as to the costs of the appeal need be made.

PORTER J.—I agree.

*Set aside.*