

ISMAIL v. SILVA.

D. C. Galle, 5,532.

1904.

February 8.

*Partition suit—Application of one of the parties to re-open preliminary decree—
Laches of applicant—Security for costs incurred by other parties to action
—Discretion of Court to make order as to costs.*

In a partition suit, a party applying to re-open the preliminary decree, on the ground of there being a mistake as to the share assigned to him, may be called upon to give security for the costs incurred by the other parties, if he has delayed to ascertain his proper share and to apprise the Court in time of the mistake.

THIS was an application by one of the parties to a partition suit to re-open a preliminary decree made on the 18th September, 1900, on the ground that the applicant was not aware of the extent of the share assigned to him. His motion was made on the 18th November, 1902. He claimed one-eighth share, and alleged that till the surveyor came to partition the land late in 1902 he did not know that he had been assigned only one thirty-sixth.

The District Judge (Mr. G. A. Baumgartner) found that the applicant, who was the second defendant in the case, appeared on the 19th September, 1899, and again at the trial on the 12th September, 1900; that though he was without professional

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assistance, he was guilty of great laches in not taking the trouble on receipt of summons to ascertain what was assigned to him and in not filing answer setting forth his claim; that it must be admitted that the Court misunderstood the rights of the second defendant; that in view of wrong information given to the Court upon which it signed a preliminary decree, the Court was bound to re-open the decree in order to admit of inquiry into the true claim of the second defendant as decided by the Supreme Court in D. C., Galle, 5,043 *2 Browne*, 320. But the Court held that as the second defendant might have taken his objection by way of appeal from the decree of 18th September, 1900, or at some earlier date before the expense of partitioning the land had been incurred, it felt bound to impose the condition that he should give security for Rs. 200 as costs of the other parties to the action, and to order that, in the event of his failing to furnish such security within three weeks from the date of the present order (8th July, 1903), the preliminary decree should not be re-opened.

The second defendant appealed.

The case came on for argument on 27th August, 1903, and 2nd February, 1904, before Layard, C.J., Moncreiff, J., and Wendt, J.

H. J. C. Pereira, for second defendant, appellant.

Cur. adv. vult.

8th February, 1904. MONCREIFF, J.—

I think that no good result would be obtained by interfering with the order appealed from. The appellant did mention, when in the box, that he claimed one-eighth of the land. But he apparently acquiesced in what was done, and although the preliminary decree was made on 18th September, 1900, he did not move to re-open it until 18th November, 1902.

It is true that, so long as he has the power to do so, the Judge should not refuse to remedy a mistake of this description; but I do not understand that he is called upon to try a case over and over again, because parties are ignorant, careless, or indifferent, without making them pay the fair price of the luxury. There are a number of other parties in this partition suit. If each of them in succession applied to re-open the preliminary decree, the proceedings will never end. The remedy of a mistake may be allowed if called for in time, the party responsible for the mistake being punished in costs for his laches.

I do not find that the Judge exceeded his powers in requiring security for costs, nor do I think that his order inflicts any injustice on the appellant.

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J.

I think that the appeal should be dismissed, and that the appellant should pay the costs of it.

LAYARD, C.J.—I agree.

WENDT, J.—So do I.

