SEDOHAMI *v.* MAHOMADU ALI.

D. C., Matara, 997.

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Partition Ordinance, 1863—Preliminary decree—Plan of the land sought to be partitioned—Plan to be filed with the plaint.

The preliminary decree in a partition suit should determine the limits and extent of the land sought to be partitioned or sold, with the same care and precision as it adjudicates on the individual interest of the parties to that suit. As such a decree has been held to be one *in rem* binding on all persons whomsoever, it is of the utmost importance that the extent and limits of the common land should be adjudged in the preliminary decree as well as the shares of the claiming co-owners.

In an action for partition the plaintiff should append to his plaint a plan or sketch of the land sought to be partitioned, and should lead such proof of the metes and bounds of the land as will enable the Court to adjudicate on that part of the case.

The persons to whom the Commission issues should know precisely what the land is which he has to partition according to the instructions of his Commission.

Section 8 of the Ordinance No. 10 of 1863 provides indeed that the Commissioner shall file with his return a survey of the property in which a survey shall have been directed by the Court. But this can only refer to cases where the sketch or plan, which the plaintiffs should file with their plaint, is of too rough a character to rest a judgment upon. It is useless to call in aid a survey after an adjudication on the shares of the respective parties.

THE plaintiffs alleged they were owners of certain shares, in common, of a field called Gonawittawala *alias* Dalugoda-wila, situate at Ettalanadugalla, and that this field was bounded on the east by Kamanalageralagekumbura, south by Kepu-ela or river, west by Kepu-ela or Odege-ella, north by Demalatuppahi-wila. The defendants were parties to a partition suit (in which

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present third plaintiff was a party defendant) relating to a field described in the libel as Demalatuppahigewila of eight amunams in extent, situate at Ettalanadugala, and bounded on the east by Dalugodawila *alias* Rammalaralagerella, west by Hinlipuella and Udawattakumbura, north by Gassarawila and Mahamestrigewila, south by the river and Hinpanwila.

The preliminary decree in that suit adjudged the parties to be entitled to the land Demalatuppahigewila in the shares set forth thereunder, and ordered a partition of it unless the co-owners preferred a sale. There was no judgment as to the extent or limits of the land which was so ordered to be partitioned.

This decree of partition was followed by the issue of a Commission to some person to execute the partition. Return was made to the Commission, and with it a survey showing the land and the scheme for carrying out the decree.

This survey included, it was alleged, the field mentioned in the present plaint. To prevent that field being caught up in the final decree of the partition suit plaintiffs intervened in the partition proceedings, and were so far successful that the Judge postponed the final decree to enable the plaintiffs to institute an action to determine whether the plaintiffs herein or the parties in the partition suit were entitled to the Gonawittawala *alias* Dalugodawila, or, in other words, whether that field belonged exclusively to the plaintiffs or formed part of the land described as Demalatuppahiwila in the partition suit. The field now in dispute was that which lay between the river and the dotted line indicated in the plan.

No evidence was called in this case. It was decided on a question of law, viz., whether the plaintiffs were barred by the preliminary decree of partition in the former suit from bringing the present action.

The District Judge ruled that the plaintiffs were barred by the preliminary decree in the partition suit; that the land to which it declared the parties to be entitled was the land named Demalatuppahigewila in the plaint; and that therefore it embraced the land so named and described in the plaint; that the description of the land in the plaint made the river the southern boundary of the partition land, but the plaintiffs in this action gave the river as the southern boundary of their field; hence the land in the partition decree *ex facie* included the field in this.

The plaintiff appealed.

Dornhorst, for plaintiff, appellant.

Wendt, for respondent.

Cur. adv. vult.

7th February, 1896. WITHERS, J. (after reciting the facts as above given), said:— 1896. *February 7.*

The District Judge, in this state of facts, relies on the judgment in *1 S. C. C., p. 19*, which says that the preliminary decree in a partition suit is a decree *in rem*, *i.e.*, one binding on the whole world. That being so, any one whose land has been included in a partition decree has no way of recovering the land. He can only sue for damages against any of the parties to the partition, by whose act of commission or omission he has been prejudiced. If I took the same view of the particular partition decree as the District Judge has taken, I should feel bound to support his judgment of dismissal; but I find myself unable to do so. In my opinion what I have called the preliminary decree in a partition suit should determine the limits and extent of the land sought to be partitioned or sold, with the same care and precision as it adjudicates on the individual interest of the parties to that suit. As such a decree has been held *1 S. C. C., p. 19* to be one *in rem* binding on all persons whomsoever, it is of the utmost importance that the extent and limits of the common land should be adjudged in the preliminary decree as well as the shares of the claiming co-owners.

The plaintiffs in a partition suit should append a plan or sketch to their plaint, and should lead such proof of the metes and bounds of the land as will enable the Court to adjudicate on that part of the case.

The person to whom the commission issues should know precisely what the land is which he has to partition according to the instructions of his commission.

No doubt the 8th section of the Ordinance No. 10 of 1863 provides that the Commissioner shall file with his return a survey of the property, in which a survey shall have been directed by the Court.

But this I take it can only refer to cases where the sketch or plan, which the plaintiffs should file with their plaint, is of too rough a character to rest a judgment upon.

It is putting the horse behind the cart to call in aid a survey after an adjudication on the shares of the respective parties.

In this very case the Commissioner has expressed the extent of the land delineated in his survey by terms of English measurement, *i.e.*, 22 acres 1 rood 8.81 perches. Is this less or more than, or equal to, the extent expressed in the plaint in terms of native measurement, *i.e.*, 8 amunams? That has not been determined. In my opinion the preliminary decree in the partition suit No. 35,788 is not one binding on third parties for want of adjudication on the essential point of metes and bounds.

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Unfortunately, the plaint in the present action is defective in omitting to give the metes of the field claimed by the plaintiffs as their own separate property, and as lying outside the land called Demalatuppahigewila, in the partition suit, and to afford an adequate description of the property by reference to a sufficient sketch, map, or plan, as required by the 41st section of the Civil Procedure Code.

However, the plan exhibited at page 41 may be taken as a sufficient one for the purpose of this trial, and it will be for the plaintiffs to prove what, if any land, but not more than that claimed, to the north of the river therein delineated, belongs to them exclusively under the name of Gonawittawala *alias* Dolugodawila. That is the issue to be tried. To such extent, if any, as they may succeed, they will have judgment, and to that extent the land in the partition suit will have to be reduced, the decree therein being informed for that purpose accordingly.

I think that the judgment in appeal should be set aside and the case remitted for the trial of the issue above indicated. The appellants will have their cost in appeal.

We are not hereby violating any principle in any of the cases cited to us in argument, *e.g.*, *1 S. C. C. 19*, *7 S. C. C. 125*. Rather, we are vindicating the principle of the judgment of Clarence and Dias, J.J., in the Galle case reported on in *8 S. C. C. 50*.

LAWRIE, J.—

As I retain the opinion I expressed in D. C., Galle, 47,431, reported in *7 S. C. C. 125*, I agree in giving this judgment. I think it is in accord with much I said then. I am glad that my brother is of opinion that the judgment now given does not violate the principles which guided the majority of the Court, Fleming A.C.J., and Dias, J.