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Present : Schneider J. and Jayewardene A.J.

JAYASEKERA *v.* PERERA *et al.*

32—D. C. Colombo, 8,485.

Partition—Land referred to in final decree different to land referred to in plaint, and in respect of which parties proved title—Decree " given as hereinbefore provided "—Is decree binding on persons not parties to decree ?—Partition Ordinance, 1863.

Where the land referred to in the plaint in a partition action and the land in respect of which the parties proved their title and obtained an interlocutory decree was not the land depicted in the survey plan referred to in the final decree, the final decree cannot be regarded as a decree " given as hereinbefore provided " in section 9 of the Partition Ordinance, 1863, and does not bind any person except parties to that decree.

Jayewardene v. Weeresekere [1] followed.

[1] *(1917) 4 C. W. R. 406.*

THE facts are set out in the judgment.

E. J. Samarawickreme (with him *Charles de Silva*), for appellants.

H. V. Perera (with him *Weerasuriya*) for respondent.

August 5, 1924. JAYEWARDENE A.J.—

If the facts alleged in this case are true, they disclose a novel abuse of the Partition Ordinance. The defendants say that the plaintiff and a friend who began a suit for the partition of a land B have emerged from the action as the owners in divided shares of an entirely different land M. Such, in fact, seems to be the claim of the plaintiff. The plaintiff was the owner of a land called Batadombagahawatta. He sold a half share of it to one Don Martenis Seneviratne on September 28, 1918. Within two weeks of the transfer, Seneviratne instituted partition action No. 51,432 for the partition of the land between himself and his vendor, the present plaintiff. In the plaint the land was described with the following boundaries: North by the field of Arnelis Perera, East by Pallemullakumbura, South by the garden of Niunhella Appuhamy, West by the garden of Dehangoda Kotalawelage Mangris and others, and said to be 7 acres 1 rood and 25 perches, and a plan by Mr. Frida, a licensed surveyor, dated June 18, 1916, further identifying the land, was filed with the plaint.

The title of the parties was proved, and an interlocutory decree was duly entered declaring Seneviratne entitled to a half share and the present plaintiff to the other half, and directing a partition of the land described in the plaint and in Mr. Frida's plan. A commission was issued to Mr. S. Ratnam, also a licensed surveyor, to partition the land described in that decree.

When the commissioner went to the spot, the parties pointed out to him a land, the boundaries of which did not exactly tally with those of the land described in the commission. The configuration of the land differed from that in Mr. Frida's plan, and there was a difference in the extent.

He made a preliminary survey, and sent a report to Court with a tracing of his survey. In the report he said:—

> " The parties pointed out the land to me, and I found that the description of the northern, eastern, and western boundaries as given in the plan filed of record tally more or less with the boundaries as I found them on the land. The southern boundary given in the plan is described as " garden of Niunhella Appuhamy " and others. The southern boundary of the land is really an owita or low land belonging to Anthony Appuhamy and others.

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" The plan in the record does not agree in configuration with the land in question, nor does it answer the compass. The extent given in the plan is 7.1.25, but upon survey I find the extent to be only 5A. 0R. 2P. The boundaries to the land are well defined, and cannot in any way mislead the surveyor."

" Under these circumstances I have not been able to execute the commission without further directions from the Court. I submit a tracing of my survey."

Notice of this report was given to the plaintiff's proctor, and a few days later the Court made the following order:—

" The surveyor present states that the land is within well-defined boundaries. He is ordered to file a scheme of partition and report of the land within such boundaries."

It is unfortunate that the Court took no further steps on the commissioner's report, for, if it had, the attempt to commit the fraud, which the present defendants say has been committed, would have been nipped in the bud. The commissioner, whose conduct in the matter deserves commendation, was thus compelled to survey and partition the land pointed out to him (see P1), and he allotted lot B to the plaintiff and lot A to the defendant, the present plaintiff, and final decree was entered under section 6 of the Partition Ordinance in terms of the commissioner's scheme on June 11, 1919.

On August 4 of the same year, by deed No. 165, the plaintiff in the partition case conveyed the lot allotted to him by the decree to the present plaintiff, so that the plaintiff became the owner of the entire land. These transactions clearly show that the object of the partition action was not to terminate common possession, but merely to obtain an indefeasible title.

The plantiff brings the present action complaining that since October, 1922, the defendants, the 1st defendant as owner and the second defendant as his lessee, are in the unlawful and forcible possession of his land.

He asks that he be declared entitled to the land described in the final decree and shown in the final decree plan No. 586, which he calls Batadombagahawatta, and for ejectment and damages. The defendants filed answer disclaiming title to the land called Batadombagahawatta, but they said that they were entitled to and in possession of a land called Millegahakanatta, and that the plaintiff was fraudulently bringing this action to deprive them of their land. They gave the boundaries of the land Millegahakanatta, which were entirely different from the boundaries of the land Batadombagahawatta as given in the plaint in the partition action (No. 51,432).

They asked that the plaintiff's action be dismissed. The plaintiff, on the other hand, contended that the land that was partitioned in that case was the land the defendants were in possession of, and that

the final decree in the case extinguished all adverse rights and gave him a title good against the whole world—the defendants and all others. The defendants insisting that the land partitioned was not their land Millegahakanatta, the parties went to trial on the following issue: " Was the land depicted in plan P 1, the land in respect of which final decree was entered in case No. 51,432 D. C. Colombo. "

P 1 is a copy of the partition plan No. 586. It is also a plan of the land which the defendants claim and call Millegahakanatta. On the plans produced in evidence and the evidence of the surveyors called, only one answer was possible to this issue.

There cannot be the shadow of a doubt that it was in respect of the land depicted in plan P 1 that the final decree was entered.

The learned District Judge so held and gave judgment for the plaintiff. In appeal it is contended that the judgment of the District Judge is wrong, and it is also contended that the final decree, if it applies to the land Millegahakanatta is void, because under section 9 of the Partition Ordinance, it is only decrees for partition or sale " given as hereinbefore provided " that are good and conclusive against all the world ; that Millegahakanatta was not described in the plaint or depicted on the plan filed with it, no evidence was led as to the title of the parties to it, and it was not the land declared to be the property of the parties, or directed to be partitioned in the preliminary decrees, and that it is only dealt with in the final decree, if at all. The first contention that the issue has been wrongly decided is, to my mind, entirely untenable.

It is argued that what is binding on the parties is the description of the land given in the decree, and that the plan attached to it is irrelevant and cannot be taken into consideration for the purpose of identifying the *corpus* partitioned.

It is pointed out that in the decree the northern boundary of the land partitioned is given as " the property of Mangiris " and the southern boundary as " the deniya of Anthony Appuhamy and others, " but that these are not the correct boundaries of the land partitioned according to the evidence led in the present case, therefore the land dealt with in the final decree must be some other land.

But I do not think it is possible to ignore the survey plan filed with, and referred to in, the decree, and it is the lots appearing in this plan that the parties are declared entitled to under the decree.

Whatever the boundaries may be, the land partitioned has been surveyed, and by means of the survey the land partitioned can be identified beyond all doubt. It has been so identified in the present case by both the surveyors who were called as witnesses.

It has been marked off on the ground and divided by pickets. It is the land the defendants call Millegahakanatta. The issue was therefore rightly answered in the affirmative. But the matter does not and cannot end there.

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The second contention submitted for the appellants raises in my opinion the real issue in the case: Was the final decree, P 3, " given as hereinbefore provided " ? If not, the decree is useless, and does not bind anybody. It has been held in several cases that when a decree under the Partition Ordinance is pleaded as a basis of title, it is open to the party against whom it is pleaded to show that it is not a decree " given as hereinbefore provided, " and so, has not the conclusive effect given to decrees under section 9. *Samarakoon v. Jayewardene*,[1] *Fernando v. Shewakram*,[2] see also *Dias v. Carlinahamy*,[3] and *Neelakutty v. Alvar*.[4]

In *Jayewardene v. Weeresekere* (*supra*), De Sampayo J. explained the expression decree " given as hereinbefore provided. " He said that this expression appears " to have reference to such essential steps as investigation into the title, the order to partition the land, and the allotments of shares in severalty according to the Commissioner's report. "

It does not apply to the provisions in the Ordinance which were merely directory. Wood Renton C.J. agreed with this view, and in *Neelakutty v. Alvar* (*supra*). Bertram C.J. adopted the same view. He said: " The effect of the words ' given as hereinbefore provided ' has been considered by this Court in a recent case (*Jayewardene v. Weeresekere* (*supra*)), and it was there laid down that the expression ' given as hereinbefore provided ' referred only to such essential steps as might be considered imperative, and not to such provisions of the Ordinance as were of a directory nature only, "—and held that the requirement of competency in the Court in section 2 cannot be regarded as otherwise than imperative and essential.

What are the facts in the present case? The appellant wishes to prove that the land, whether it is called Millegahakanatta or Batadombagahawatta, dealt with in the final decree, was not the subject-matter of partition action No. 51,432, in which the decree was entered. There was no investigation into the titles of the owners in common of this land. The interlocutory order made no declaration with regard to the rights of the parties to it, and did not direct it to be partitioned. The references in the plaint, and in Mr. Frida's plan, and all the steps taken in the action and at the trial were to, and in respect of, a land which is at some distance from the land actually partitioned and shown in plan No. 276 (D 1) made by Mr. Jayawardene, licensed surveyor, as lot B, which also shows the land actually partitioned as lot A. If the defendants can prove their allegation they will, in my opinion, succeed in proving that none of the essential or imperative requirements of the Ordinance in respect of a land sought to be partitioned under it, have been complied with in respect of the land partitioned under the final decree.

[1] *(1909) 12 N. L. R. 316.*
[2] *(1917) 20 N. L. R. 28.*
[3] *(1919) 21 N. L. R. 112.*
[4] *(1918) 20 N. L. R. 372*

The defendants have made out a strong *primâ facie* case in support of their allegations, and it would be a distinct denial of justice to refuse them an opportunity of proving them.

In my opinion, therefore, if the defendants succeed in proving that the land referred to in the plaint and in Mr. Frida's plan, and the land in respect of which the parties in case No. 57,342 proved their title and obtained an interlocutory decree is not the land depicted in P 1, the final decree cannot be regarded as a decree "given as hereinbefore provided," and would not bind any person except perhaps the parties to that decree.

In this view it becomes unnecessary to deal with the defendants' application to amend their answer so as to include a claim for damages under section 9.

But it will be open to the defendants to renew their application, if so advised, when the case goes back for trial.

I would accordingly set aside the decree in favour of the plaintiff, and sent the case back for the decision of the issue whether the final decree on which the plaintiff's title is based is a decree "given as hereinbefore provided" in the light of the opinions expressed above.

The plaintiff is entitled to the costs of the first trial, but the costs of this appeal and the costs of the subsequent trial will abide the event.

SCHNEIDER J.—I agree.

Sent back.