1957 *Present :* **Weerasooriya, J., and Sansoni, J.**

G. A. D. P. DE S. JAYASURIYA *et al.*, Appellants, *and* A. M. UBAID, Respondent

S. C. 252—D. C. Tangalla, 113P

Partition action—Corpus—*Duty of Judge to satisfy himself as to its identity*—*Preliminary plan—Proof thereof—Civil Procedure Code, ss. 428, 429, 432.*

In a partition action there is a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) in order to make a proper investigation.

Any plans which the parties may seek to put in evidence must be marked if necessary for their case, and duly proved, if objected to. Sections 428, 429 and 432 of the Civil Procedure Code do not justify a preliminary plan made by a Commissioner after the plaint is filed and before summons is served on the defendant being treated as evidence when it has not been marked and proved by the plaintiff.

APPEAL from a judgment of the District Court, Tangalla.

E. A. G. de Silva, for defendant-appellant.

W. D. Gunasekera, for plaintiff-respondent.

Cur. adv. vult.

March 11, 1957. SANSONI, J.—

The plantiff brought this action for a partition of a land called Habarakiriwannehena described as Lot 160/6 in T. P. 269370, and in extent 3A. 1R. 7P. He claimed 1/2 share of the soil and plantations and allotted the other 1/2 share to the 1st defendant.

The 1st defendant in his answer pleaded that the land in question was a part of a larger estate of the same name which he and another had possessed for many years : and that at a partition of that estate a portion within which the land in dispute fell was allotted to the 1st defendant, who later transferred this portion to his daughters the 1st and 2nd added-defendants.

The trial of this action proceeded after certain matters in dispute between the parties were recorded, but no specific issue was framed regarding the actual corpus to be partitioned. A preliminary plan had been made on a commission issued by the Court after the plaint had been

filed but before summons had been served on the defendant. After evidence was led on both sides, counsel for the 1st defendant and the 1st and 2nd added defendants addressed the Court. In the course of that address he pointed out that the preliminary plan had not been marked in evidence and proved. The plaintiff then moved to mark the plan, and objection was taken to that step on the ground that the plan had to be proved and the surveyor tendered for cross-examination, and it was too late for such a step to be taken.

The learned District Judge then made order that as the surveyor had refused to come to give evidence in this Court it was not likely that he would be available in this case. As it was a partition action, he directed the issue of a fresh commission to another Commissioner.

We do not know what reasons the Judge had for being so pessimistic about obtaining the attendance of the first Commissioner. He has surely underestimated the power of the Court to insist on the attendance of an officer of the Court, for that is what the Commissioner was in this instance. The obvious step for the Judge to have taken was to summon the Commissioner at his own instance in order that the preliminary plan might be proved in evidence. There is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make a proper investigation. In *Thayalnayagam v. Kathiresapillai* [1] Hutchinson, C.J., said :—

> " In a partition action such as this is, I think that the judge has power, and that in some cases it may be his duty, even after the parties have closed their case, to call for further evidence. But if he does, he must do it in a regular manner ".

The recent judgment of the Privy Council in *Mohamedaly Adamjee v. Hadad Sadeen* [2] draws attention again to the duty of the Court to make a full investigation as regards title and possession in a partition action.

Counsel for the plaintiff-respondent submitted before us that the preliminary plan could have been treated as evidence by the Judge even though it had not been marked and proved by the plaintiff and he relied on sections 428, 429 and 432 of the Civil Procedure Code. He submitted that the Commissioner in making the preliminary plan and report was acting under sections 428 and 429 and that the Court was entitled under section 432 to treat the report as evidence in the action. I do not agree, because there is authority against this view in the judgment of Layard, C.J., in *Kasinather v. Sathasivan* [3]. The learned Chief Justice there held that section 428 contemplates a Commissioner being appointed for the purpose of elucidating some particular matter in dispute, such matter being specified in the commission. Again, there is no evidence as such taken by the Commissioner who made the preliminary plan. Another

[1] *(1910) 5 Balasingham, p. 10.*

[2] *(1956) 58 N. L. R. 217.*

[3] *(1905) 4 Tambyah Rep. p. 169.*

objection is that the Judge in this instance clearly did not choose to act on the plan and the report without examining the Commissioner as a witness, and he was quite entitled to take that course.

A fresh commission having been issued to another Commissioner, who duly returned a plan and report to Court, the trial was resumed over a year later. The new Commissioner was called to give evidence and he produced his plan and report. It then transpired that the land which the plaintiff in fact wanted to partition was lot 1 but not lot 4 in the T. P. No. 269370, and two other lots 2 and 3, which fell outside that Title Plan. As counsel for the defendant and the 1st and 2nd added-defendants did not take part in the further hearing, this very important difference between the corpus originally sought to be partitioned and the corpus depicted in the second plan does not seem to have been brought to the notice of the learned Judge. In his judgment he seems to have been under the impression that the corpus sought to be partitioned was always that depicted in the second plan as lots 1, 2 and 3. He declared the plaintiff entitled to 1/2 share and the 1st defendant and 1st and 2nd added-defendants to 1/2 share. The 1st defendant and the 1st and 2nd added-defendants have appealed against this decree.

It now becomes clear that the plaintiff himself was uncertain as to what was the land of which he claimed 1/2 share, and it is impossible to say what view the Judge would have taken if the change in the corpus had been duly brought to his notice.

I think it is to be regretted that counsel for the contesting defendants chose not to take part in the further hearing and to assist the Court to arrive at a proper decision of the matters which the Court had to consider. It would have been far better if, having raised his objection to the procedure which the Judge was adopting if he thought such procedure was irregular, he had at the same time assisted the Judge in making a full and proper investigation.

The plaintiff's counsel has asked us to ignore the second plan and the evidence recorded at the adjourned hearing. I do not think we can do that because it is evidence on which the Judge has acted to base his findings. Nor again can we act on the assumption that the Judge would have arrived at the same findings if he had considered only the first plan made in this case. I think the only course open to us now is to set aside the judgment and decree and order a re-trial of this action, and I would only draw attention to the obvious requirement that any plans which the parties may seek to put in evidence must be marked if necessary for their case, and duly proved, if objected to.

The costs of the arbortive trial and of this appeal will abide the result of the new trial.

WEERASOORIYA, J.—I agree.

Case sent back for re-trial.