

**JAYATISSA**  
**v**  
**APPUHAMY**

COURT OF APPEAL  
EKANAYAKE, J.  
GOONERATNE, J.  
CA 752/95 (F)  
DC KALUTARA 5170/P  
SEPTEMBER 19, 2007

*Partition Law – S35 Amendment – Act 17 of 1977 – Scheme Inquiry – Original defendant permitted to object to final plan – Can the person who is substituted be given another opportunity to consider plan/ report?*

**Held:**

When the Court had duly and properly allowed the original defendant to object to the final plan, the person who was substituted in the room of the deceased defendant cannot be given another opportunity to consider the plan and the report.

**APPEAL** from the judgment of the District Court Kalutara.

*Daya Guruge* with *G.M.R. Wimalaweera* for 1A defendant-appellant.

*Hemasiri Withanachchi* with *Shantha Karunadasa* for substituted plaintiff-respondent.

November 13, 2007

**CHANDRA EKANAYAKE, J.**

The 1A defendant-appellant (hereinafter sometimes referred to as the 1A defendant) by this appeal has sought *inter alia*, to set aside the order and decree dated 10.08.1995 pronounced in the District Court Kalutara case No. 5170/P and to direct that a date for consideration of the final plan and report or a date be given to the 1A defendant to file his objections to the scheme of partition plan No. 717 and report. As evidenced by Journal Entry No. 106 of 04.09.1995 the final decree dated 16.08.1995 was tendered and order made to be sent for registration after signing the same. As per

Journal Entry No. 109 of 06.10.1995 the final decree had been returned after due registration. 10:

The original plaintiff had instituted the above styled partition action in the District Court of Kalutara seeking to partition Lot No.3 of "Dodangodagewatte" alias "Dodangahawatta" in accordance with the undivided shares shown in paragraph (4) of the plaint. After filing the statement of claim of the original defendant case had proceeded to trial and the learned trial Judge by judgment dated 05.04.1991 had ordered a partition according to the undivided shares embodied there.

After entering the interlocutory decree commission had been issued to the Commissioner in the case namely – E.T. Gunawardena for the final survey. As seen by the Journal Entry No. 67 dated 19.03.1992 said Commissioner had returned the commission with the final plan bearing No. 1162 of 10.02.1992 together with the summary of distribution. Thereafter as per Journal Entry No. 70 of 29.04.1992 the original defendant's Attorney-at-Law having filed a petition supported by an affidavit had moved to reject the said commissioner's plan No. 1162 and moved for an alternative commission. By order of the Court dated 02.06.1992 (J.E.71) application for alternative plan had been allowed and order was made to issue an alternative commission returnable for 12.08.1992. K.D.L. Wijenayake (L.S) while returning the said commission had submitted the alternative plan No. 178 of 13.08.1992 and scheme inquiry had been fixed for 09.10.1992. 20: 30

At the scheme inquiry on a joint application by both parties commission was issued to both surveyors (Commissioner in the case and K.D.L. Wijenayake – L.S). It appears from the Journal Entry No. 82 of 10.03.1993 that, said commission was returned unexecuted seeking further instructions. Thereafter it was again fixed for scheme inquiry for 09.10.1992, despite both parties having agreed to abide by the plan which would be prepared by both surveyors. However the said commission was not executed and thereafter the matter was again fixed for scheme inquiry on 29.04.1993. It appears that same being resolved by way of written submissions (*vide* Journal Entries 83 to 86) order was fixed for 12.07.1993. 40

By the order dated 12.07.1993 the learned trial judge had ordered to issue a commission to the Commissioner in the case namely – E.T.Gunawardane to prepare a plan and a report according to the instructions given therein. Last paragraph of the said order is as follows:- 50

“නමුත් එකී පිලිබඳ අනුව දැනට ඉඩමේ ප්‍රමාණය රු.ඩී 2යි පර්චස් 24.50 ක් නොව රු.ඩී 2යි පර්චස් 23.50 ක් වේ. ඒ අනුව එම ප්‍රමාණය පැමිණිලිකරුට හා විත්තිකරුට සම සමව යන සේ විත්තිකරුගේ වගා එහි ඇතුළු වනසේ කොටස් කර අළුත් පිලිබඳ සාදා වාර්තාවක් සමඟ එවීමට මිනින්දෝරු ඊ.ටී. ගුණවිධන මහතාට කොමිෂමක් නිකුත් කරන්න.”

That is the plan (No.717) and report submitted in compliance with the above order. Though a joint commission was ordered to bear the expenses jointly by both parties, it is seen from Journal Entry No.95 the plaintiff had undertaken to pay the defendant's share of the commission fees and subsequently commission had to be issued to another Licensed Surveyor as the Commissioner in the case had withdrawn. In the result in compliance with the order of Court Commissioner had been issued to G. Adikaram (Licensed Surveyor) *vide* Journal entry 97 of 19.01.1995 and the respective marginal note of the Registrar of the District Court. The final plan bearing No. 717 dated 25.04.1995 with the report and the other annexures was submitted by G. Adikaram (L.S) as a result of the order of Court dated 12.07.1993, which being the order made after scheme inquiry. For the first time death of the defendant had been brought to the notice of Court on 21.06.1995 (J/E-103) and on 16.08.1995 the 1A defendant was substituted in the room of the deceased-defendant. On that day since there was no objection from 1A defendant, said final plan had been confirmed. Since it was a plan and report submitted in compliance with the joint commission issued in terms of the order dated 12.07.1993 which being an order with regard to the scheme inquiry held (in which the original defendant too participated) no further date need be given to the 1 A defendant to consider same. 60 70 80

In this respect examination of the provisions in section 35 of the Partition Law (as amended by Act No. 17 of 1977) would become relevant. Plain reading of that section would reveal that

after the return to the commission the Court shall call the case in open Court to fix a date for the consideration of the scheme of partition proposed by the surveyor. Of course the time frame within which that has to be done is given in the section. In the case at hand Court had already complied with this provision and furthermore the original defendant being the only defendant in the case was even given an opportunity to tender objections to the final plan and scheme inquiry was fixed. At the inquiry also the original defendant had been duly represented by Counsel and the aforesaid order dated 12.07.1993 was the order which was pronounced after the said inquiry. It is seen that thereafter only the death of the original defendant had occurred and 1 A defendant was substituted. When the Court had duly and properly allowed the original defendant to object to the final plan bearing No. 1162, the person who was substituted in the room of the said deceased-defendant (1 A defendant) cannot be given another opportunity to consider the plan and report (plan No. 717) which being the outcome of the order dated 12.07.1993 – order of the scheme inquiry. For the reasons given as above I see no error in the order dated 16. 08. 1995 of the learned District Judge confirming the final plan bearing No. 717 with the report and the other annexures and in the judgment pronounced also.

For the foregoing reasons this appeal should fail. I would accordingly dismiss the appeal with costs fixed at Rs. 15,000/-

**GOONERATNE, J.** – I agree.

*Appeal dismissed.*