

1971

Present : Sirimane, J., and Weeramantry, J.K. A. SEDIRIS PERERA, Appellant, and S. B. MARY NONA *et al.*,
Respondents*S. C. 22/69 (Inty.)—D. C. Gampaha, 13620/P**Partition action—Improvements made by a co-owner despite protest by the other co-owners—Allotment of shares—Interlocutory decree—Variation of it in the final decree—Permissibility—Partition Act (Cap. 69), s. 33.*

Although, according to section 33 of the Partition Act, a co-owner should ordinarily be given by the commissioner an allotment which includes the improvements he has made, this rule need not be adhered to if, in doing so, a fair and equitable division is rendered impossible. Accordingly, an alternative scheme may be adopted at the stage of the final decree so that a building put up in spite of protest may fall into a lot given to a co-owner other than the person who put up the building.

APPPEAL from an order of the District Court, Gampaha.*W. D. Gunasekera*, for the plaintiff-appellant.*J. G. Jayatileke*, with *G. O. Fonseka*, for the 2nd defendant-respondent.

1st and 3rd defendants-respondents absent and unrepresented.

May 27, 1971. SIRIMANE, J.—

The plaintiff-appellant is entitled to a $\frac{1}{4}$ th share of the soil, and $\frac{1}{4}$ th share of a fairly large house shown as No. 2 in the preliminary Plan marked X.

When he filed this action he also filed petition and affidavit alleging that the 1st to 3rd defendants, who are members of one family, were putting up a foundation on the land sought to be partitioned and were "making preparations to put up a building encroaching on a larger portion of this land" After notice of injunction was served on the defendants, they had completed the building which is shown as No. 5 in Plan X.

The commissioner has submitted a scheme of division in Plan No. 678/P in which lot B was allotted in common to the 1st to 3rd defendants, and lot A to the plaintiff. The western boundary of lot A is irregular, as the commissioner has attempted to exclude the building, put up under protest, from lot A. The alternative scheme submitted by the plaintiff is depicted in Plan No. 180/68 which gives lot 4 to the plaintiff and lots 1, 2 and 3 to the defendants in accordance with their respective shares. The irregularity of the boundary on the west is removed and the plaintiff gets a proportionate road frontage. But house No. 5 falls into lot 4.

We are of the view that in the circumstances of this case, the alternative plan depicts a fairer division. Ordinarily a commissioner should give a lot to a co-owner to include the improvements he has made. (Vide Section 33 of the Partition Act.) But if in doing so, a fair and equitable division is rendered impossible, this rule need not be adhered to.

The mere fact that the judgment says that a particular building "belongs" to a particular person (and the interlocutory Decree based on that judgment, reflects that finding) it does not follow that the commissioner must in all circumstances allot a building to the particular co-owner who built it. A building put up under protest, as in this case, may fall into a lot given to a co-owner other than the person who built it, unless there is a specific direction to the contrary with the decree.

The learned District Judge was incorrect when he thought that if he confirms the alternative scheme there would be a violation of the Interlocutory Decree.

We, therefore, set aside the Final Decree entered in this case. Plan No. 180/68 dated 5.12.1968 is approved. The defendants-respondents may, if they so desire, take in common the adjacent lots 1, 2 and 3. The plaintiff-appellant will, of course, be liable to pay compensation, if any, for house No. 5 when one takes into consideration his $\frac{1}{4}$ th share in house No. 2, which falls outside his lot.

A new summary of distribution should be filed with reference to Plan No. 180/68, and Final Decree entered, thereafter.

Plaintiff-appellant is entitled to costs of appeal.

WEERAMANTBY, J.—I agree.

Decree altered.
