

**ALBERT
V.
RATNAYAKE**

COURT OF APPEAL
WIJETUNGA, J. AND ANANDACOOMARASWAMY, J.
C. A. NO. 37/88
D. C. MATARA NO. 11370/P
JUNE 23, 1988

Partition — Scheme of partition — Partition Law, Ss. 33 and 36 — Modification of Commissioner's scheme.

Under S. 33 of the Partition Law, the surveyor is required to so partition the land that each party entitled to compensation in respect of improvements is allotted, as far as is practicable, the portion of the land which has been so improved.

In confirming the scheme the expression "modifications" should not be taken to mean only "slight alterations." In an appropriate case a scheme with substantial changes could be adopted. The trial judge may adapt the scheme of partition prepared by the Commissioner with changes in any manner which he deems necessary.

Cases referred to

1. *Thevchanamoorthy v. Appakuddy* 51 NLR 317
2. *Sedins Perera v. Mary Nona* 75 NLR 133

APPLICATION for revision of order of the District Judge of Matara.

N. R. M. Daluwatte P.C. with *Chula Boange* for 3rd defendant-petitioner

K. M. P. Rajaratne for 1st defendant-respondent

Y. L. Geethananda for plaintiff-respondent.

Cur. adv. vult.

October 7, 1988

WIJETUNGA, J.

The 3rd defendant-petitioner seeks to revise the order of the learned District Judge dated 28.9.87 confirming the scheme of partition submitted by the Commissioner, viz. plan No. 2642 dated 16.12.85, prepared by S. L. Galappaththy, Licenced Surveyor, on a commission issued to him.

An alternative scheme submitted by the 3rd defendant-petitioner which is depicted in plan No. 2669 dated 14.3.87, prepared by M. A. S. Premaratne, Licenced Surveyor has also been considered by the District Judge at the Scheme Inquiry.

He points out that under the scheme submitted by the Commissioner, all the parties have direct access to the V.C. road which is 10 feet wide, whereas under the alternative scheme submitted by surveyor Premaratne a new roadway has to be constructed from the V.C. road, along the eastern boundary of 3rd defendant's land. He comments that the scheme submitted

by surveyor Premaratne benefits only the 3rd defendant and is designed to protect the interests of that defendant. Under the Commissioner's scheme, each of the parties gets a road frontage along the V. C. road and even the 3rd defendant gets more than half the total V.C. road frontage. He further states that the only disadvantage that the 3rd defendant can complain of is that he does not get the entirety of the tea plantation he claims. But he would receive adequate compensation in lieu thereof. The District Judge, therefore, does not consider the alternative scheme a fair one.

On an examination of the two schemes, it is patently clear that the scheme preferred by the learned District Judge is undoubtedly the better one. He has given valid and cogent reasons for his conclusions. That scheme is indeed reasonable and is in conformity with the interlocutory decree. It does not cause injustice to any of the parties and ensures proportionate road frontage to each of them, along the V.C. road.

Under Section 33 of the Partition Law, the surveyor is required to, so partition the land that each party entitled to compensation in respect of improvements is allotted, so far as is practicable, that portion of the land which has been so improved. To my mind, the scheme submitted by the Commissioner satisfies this requirement, so far as is practicable.

In *Thevchanamoorthy v. Appakuddy*, (1) Jayatileke S. P. J. states at page 321 that "the policy of the law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so."

In *Sediris Perera v. Mary Nona*, (2) Sirimane, J., with Weeramantry, J. agreeing, has held that although 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.

Applying these principles to the instant case, I am satisfied that the scheme preferred by the District Judge ensures a much fairer division than the alternative scheme.

The learned District Judge, however, in considering the ambit of the words "confirm with or without modification the scheme of partition proposed by the surveyor" in Section 36 of the Partition Law, has taken the view that the court can only make 'slight alterations' to the scheme. He states that the alternative scheme proposed by surveyor Premaratne is entirely different from that of the Commissioner and is not merely a 'slight alteration'.

I am unable to agree with this view. The word 'modification', though it ordinarily means making partial changes, does not in my opinion restrict the court to effecting only 'slight alterations' in a scheme of partition. In an appropriate case, it could extend to substantial changes, in other words, the trial judge may adapt the scheme of partition proposed by the Commissioner in any manner which he deems necessary.

However, the trial judge's aforesaid view in regard to the scope of modification does not affect the validity of his ultimate conclusions in respect of the scheme of partition confirmed by him.

Thus, I see no merit in the 3rd defendant-petitioner's application for revision and would dismiss the same with costs.

ANANDACOOMARASWAMY, J. — I agree.

Application dismissed.