1939 *Present :* **Keuneman and de Kretser JJ.**

JAYASENA *v.* KARLINAHAMY.

166—D. C. Galle, 29,477.

Partition action—Decree for sale—Purchase of lot by improver—Price below value of improvements—Right of improver to compensation—Claims of other improvers to compensation.

Where, in a partition action, the land is sold in lots under a decree for sale and a lot is purchased by an improver,—who claimed improvements upon it—at a price below the assessed value of his improvements,—

Held, that the improver is not entitled to the full value of his improvements but is bound to bring into Court the proportionate share of the compensation due to other improvers of the lot in question.

The Court should provide in the conditions of sale that, in the event of the sale realizing less than the appraised value, the purchaser shall pay the improvers in full or that an improver shall not buy at less than the appraised value of the improvements.

THIS was a partition action in which a decree for sale was entered and certain parties were declared entitled to compensation for buildings and plantations. The land was sold in blocks and at the sale the sixth defendant purchased lot C for Rs. 3,555. He was entitled to compensation for a building in the lot, which was valued at Rs. 6,000. The scheme of distribution provided that the sum available should be distributed rateably among all the parties including those entitled to compensation The sixth defendant claimed that he was entitled to be paid the full value of his building. The learned District Judge held that there should be a proportionate reduction of all claims.

H. V. Perera, K.C. (with him *S. W. Jayasuriya*), for the sixth defendant, appellant.—There should be one guiding principle applicable to the case where the land is sold at a figure in excess of the appraised value and to the case where it fetches a figure below it. Once a valuation is made under section 8 of the Partition Ordinance and the Court approves of it, it becomes an order of Court and must be given effect to. The matter really is one of *res judicata* as between the improver and the soil owner. See *Jayawardene on Partition, p. 174.*

A case of hardship cannot alter the principle. That a soil owner should get nothing may appear anomalous to a layman but not to a lawyer. Injustice should be distinguished from hardship.

An improvement is appraised to pay off an improver, but the soil is appraised for a totally different purpose.

In the converse case, where there is an excess, it has been held that the improver is entitled to the value of the improvement ; see *Kanapathipillai v. Nagalingam* [1], the improvement being regarded as a fixed quantity which cannot be enhanced or decreased, *de Silva v. Odiris* [2].

The District Judge agrees that one legal principle should govern both the cases, but assumes the anomaly in the case of a deficiency to be absurd. The principle laid down in the later decisions is correct and should be followed, or the whole matter should be referred to a fuller Court.

L. A. Rajapakse (with him *J. R. Jayawardene*), for the seventy-second defendant, respondent.—In this case there has been no order of Court accepting the appraisement. The anomaly has arisen because the improvers have purchased the lots, on which their own improvements stand, for very much lower figures than the appraisement.

Section 8 of the Partition Ordinance does *not* require that the "just valuation" should be approved by the Court. An anomaly or hardship will not arise if the Court abstains from making the valuation of the Commissioner an order of Court *before* the sale. The "just valuation" is merely a tentative figure which in the opinion of the Commissioner will be the price the property will fetch. It is to be the upset price when the property is sold among the co-owners only. *After* the proceeds of sale are paid in, the Court should hold an inquiry into the proportion of the respective shares of the parties, utilizing the "just valuation" as perhaps a guide, and then make an order of payment in such proportions.

[1] *22 N. L. R. 223.*

[2] *34 N. L. R. 176.*

In the case of a partition under sections 5 and 6, the assessment of an improvement may be to pay off an improver, but in the case of a sale under section 8, it is to ascertain the proportion payable.

An improvement connotes a rendering better of something. The improvement should not get a preference or swallow up the thing improved. In fact the improvement must accede to the soil. An improver as distinct from a soil owner are both treated as co-owners under the Ordinance. Neither should have an advantage over the other. See sections 2, 4, and 14.

Whether the amount exceeds or is less than the just valuation, it should be proportionately distributed (*de Silva v. Gunawardene*[1]; *de Silva v. Lokuhamy*[2]; and *Disemas v. Dandu*[3]). These cases were not cited in *Kanapathipillai v. Nagalingam* (*supra*), and the decision in *de Silva v. Odiris* (*supra*) is applicable to the very special circumstances there.

Cur. adv. vult.

July 27, 1939. DE KRETSER J.—

In this case a decree for sale was entered and the land was to be sold "as per Block plan No. 1236, Scheme B, made by Mr. H. B. Gunawardene, Licensed Surveyor". The scheme had been accepted by all the parties.

The decree declared certain of the parties to be entitled to compensation for buildings and plantations.

The Commissioner who was appointed tendered a valuation report giving the value of the soil, plantations, and buildings on each block. This report is dated February 15, 1937, and was tendered with a motion dated February 16, asking for extra remuneration on account of extra trouble incurred. The Court made order regarding that request, but neither approved nor confirmed the appraisement.

The land was thereafter sold in blocks. At that sale the sixth defendant, who is the appellant, purchased lot C for Rs. 3,555. He was entitled to compensation for a building, and in the valuation report this lot was appraised as follows:—

	Rs.	*c.*	
Soil	710	40	
Building of sixth defendant ..	6,000	0	
Building of Marthelis ..	20	0	
27 coconut trees ..	202	0	planters' shares to
4 jak trees	42	50	Ujeris' heirs
6 coconut trees ..	10	0	Maishamy
4 breadfruit trees ..	8	0	Ujeris' heirs
	6,992	90	

Other lots were sold in the same way, and in particular lot M which was purchased for Rs. 2,630 by the first defendant who owned a building on it valued at Rs. 4,750, the lot being valued at Rs. 5,246.50.

After the sale the Proctor for plaintiff prepared a scheme of distribution. He allotted to the Proctor in the case Rs. 3,520.45, including Rs. 200 for himself for preparing the scheme of distribution, and made available for distribution among the parties Rs. 7,052.10. He seems to have

[1] *1 Matara Cases 43.*

[2] *1 Matara Cases 46.*

[3] *5 Bal. Rep. 87.*

distributed this sum rateably among all the parties to the case, including those entitled to compensation. The appellant then raised the contention that he was entitled to be paid compensation in full for his building and that there should be no proportionate reduction. The first defendant apparently was willing to reduce his claim proportionately.

The learned District Judge, after reciting the decisions of this Court on the subject, thought that there should be a proportionate reduction of all claims, as was decided in two earlier judgments of this Court reported at pages 43 and 46 of *1 Matara Cases.*

For the respondent Mr. Rajapakse attempted to support this view on the ground that the decree having fixed the rights of the parties and having in effect fixed the proportion of each party, all parties should divide on that basis, and the law as to the relations between owner and improver could no longer operate. In fact, he suggested that it could not be applied in cases under the Partition Ordinance. He emphasized the words in section 8 which say "and the purchaser shall pay into Court the amount of the purchase money . . . . to be paid over to the persons entitled thereto, under the order of the Court, in the proportion of their respective shares".

Mr. Perera for the appellant urged that once the valuation was accepted by Court, the Court fixed the value of the compensation and therefore all parties were bound by the sum which the Court accepted. He also urged that these matters must be decided on some legal principle and the principle was quite clearly that laid down in the later cases which the District Judge had not followed.

The earlier decisions went on the footing that the appraised value was not a true test, and that a proportionate increase or reduction was a fair method of dealing with the problem and would work satisfactorily. Whether the appraised value is a true test or not is a question of fact, which it may not be open to the parties to contest after they have accepted it; and whether a particular method is the fairest or not is best decided by acting on legal principles which represent the experience of many years and of many types of cases.

In the latest decision of *de Silva v. Odiris* [1], these earlier decisions were considered, as they were by Mr. A. St. V. Jayewardene (afterwards Mr. Justice Jayewardene) in his work on the *Law of Partition*, and a definite legal principle was acted upon. I find myself in agreement with the later decisions.

The law governing the relations between an improver and an owner are too well known to require stating again. This Court has held that a co-owner who builds on the common property has no greater rights than an ordinary improver, *vide Silva v. Babunhamy* [2]; *Perera v. Pelmadulla Tea and Rubber Co.* [3]; *Sanchi Appu v. Marthelis* [4]; *Appuhamy v. Sanchihamy* [5].

The circumstances of a particular case cannot alter that law. Hardship may result in a number of ways, *e.g.*, an improver getting a decree for compensation may issue writ and not only buy the land improved but can

[1] *34 N. L. R. 176.*
[2] *16 N. L. R. 43.*
[3] *16 N. L. R. 306.*
[4] *17 N. L. R. 297.*
[5] *21 N. L. R. 33.*

issue writ for any balance remaining unpaid, in such a case he would get the whole land and the owner would lose his land. Such a situation may arise even under a decree for the partition of a land. That it happens in a case where the decree is for the sale of the land should make no difference.

I am not satisfied that the valuation report can be said to have been accepted by the Court, and so Mr. Perera's argument based on *res judicata* fails; but the valuation has been accepted by all parties and can be used for the purposes of this case.

Mr. Rajapakse's argument based on section 8 loses sight of the very strong words in section 9 which makes the decree "good and sufficient evidence of the titles of the parties to such shares and interests as have been thereby awarded in severalty". The decree refers to both "shares" and "interests" and the former word may be applied to the rights of the owners of the land and the latter to the rights of those having claims to compensation and the like. When therefore section 8 uses the words referred to, there is perhaps a carelessness in expression, the idea being to define the duty of the purchaser and not to define the rights of the parties *inter se* since those have already been determined.

Mr. Rajapakse's other argument also cannot be sustained, for the decree does not allot to the improver a share of the land but a fixed sum which must be paid first, and the owners of the land then share what remains. Even if the decree does not expressly state that the improver is to be paid before the owners, that is the right he has by law and that right cannot be taken away by words of doubtful implication, and when the decree fixes the amount to be paid to him it cannot be considered as fixing that sum with reference to the value which the land may fetch at a sale, to be reduced or enhanced accordingly.

In *Kanapathipillai v. Nagalingam*[1], de Sampayo J. approached the present problem unfettered by previous decisions, and he laid down the legal principle which should govern such a case and he has ample support for what he decided. The case of *Appuhamy v. Sanchihamy* (*supra*), is a decision by the Full Bench of that day, and the rights of improvers in a partition action can no longer be canvassed either by us or by the subordinate Courts.

There is room perhaps for the procedure adopted in the Courts being improved. De Sampayo J. indicated that the Court should decide the extent of compensation payable when it enters the decree under section 4. I believe that it is usual for the Court to declare the right and to leave it to the Commissioner to report on the value of the right, and it is possible that Commissioners do not understand the principles on which compensation should be assessed. I see no objection to the Court declaring the right and then fixing a day for inquiry into the question of the amount of compensation payable, nor is there any objection to the Court having the assistance of a report from a competent Commissioner, sworn to in the first instance and supported by evidence in the event of a controversy; but there ought to be a decision before the sale is allowed to go forward. The commission ought to indicate the lines on which the valuation should be made. If the valuation be properly decided, then the improver can never get more than the value of the land or even as much as the value of

[1] *22 N. L. R. 223.*

the land, and the owners of the land cannot suffer as they have the right of buying at the sale on favourable conditions and can always see that the land realizes its proper price. If they choose to pass a low appraised value and do not bid at the public auction they have only themselves to blame for the consequences. It is to the interest of all parties to have the property justly valued under section 8, and it would serve a useful purpose if the Court fixed a date for consideration of the report of the Commissioner, the Court fixing that date when it makes its first order and making the commission returnable at an earlier date. Then on the day fixed or an adjourned date the amount of the compensation will be determined and also the upset price at which the land will be sold.

One other matter remains to be considered. In the present case the land was sold in blocks to suit the convenience of parties. The Ordinance does not seem to contemplate such a sale, but there can be no objection to this mode of sale being adopted if all the parties desire it. Persons owning different lands may have them dealt with in one case, and there is no objection to persons who own one land breaking it up into lots and in effect making it a sale of different lands. But they must then take the disadvantages as well as the advantages of such a mode of sale. A particular lot may fetch a low or a high figure for reasons peculiar to itself. The owners may not wish to deprive a builder of his house and so refrain from bidding; they must then abide by their good intentions. A builder may value his house so much that he bids for the lot on which it stands more than its value; that should not work to his disadvantage by reason of some arrangement regarding some other lot. The truth will often be that a sale of this kind is in reality a disguised partition by which the owners hope to be able to keep the land among at least some of themselves.

I hold therefore that the lots should be dealt with separately.

The next question is—what are the rights of an improver in such a case? There is authority as to how his rights are determined and how those rights are to be assessed, but there is no authority covering the peculiar situation we find in this case. There is no difficulty if we realize that the sale of each lot is a sale of a separate land, and that improvers among themselves must share any loss; they are all entitled to be paid and stand on an equal footing.

If the improver himself buys the land before parties come into Court, he has no further claim against the owner; if another buys the land, the new owner is liable to compensate the improver.

In the case of actions under the Partition Ordinance the remedial rights of the improver are affected by the very nature of the action. Usually he is a co-owner or acting under the ægis of a co-owner, but he may be outside the family of co-owners. The scheme of the Ordinance is to divide in a fair manner the rights of all owning interests in the land, and for this purpose the improver becomes one of the family, so to speak. It is this conception which perhaps gave rise to the idea that he should share with the others both their good and their bad fortune. But he is an outsider whom the law brings in because otherwise the family would benefit at his expense. The law carefully restricts his rights. If at the partition he, as a co-owner, gets a lot on which his improvements stand,

then it being found possible to give him what he is entitled to, he is satisfied. If his improvements do not come to him, then he gets a decree for money and can execute that decree against the owner of the lot on which his improvements stand. It follows that the decree first entered is only a preliminary decree which ascertains the rights of parties in order that the Court may see how best to give each person his due. It is not a decree which a party can execute ; it is not entered against any particular person until the stage of experiment has passed.

The same principle must be applied to the case of a sale, and more especially to schemes which are a mixture of partition and sale. The decree for sale is entered only because division of the land is impracticable or inexpedient ; it is still a mode of partition, a means of apportioning to each person his due. The decree for sale may be final as regards the rights of parties, but the partition action is still pending and the Court is still in the process of apportioning.

What are the principles we have obtained so far ? One is that improvers stand on a different footing from the owners. The improvers all stand on an equal footing, and any loss must be shared by them equally. There ought to be no difference whether a partition or a sale be ordered, but is there nevertheless a possible case in which a difference may rise ? Is there any difference between the case of a co-owner or an improver buying and the case of an outsider buying ?

Where an adequate sum is realized at the sale no difficulty arises. except possibly as a result of a very big bill for Proctors' costs, and that case we need not now consider.

If an outsider buys below the appraised value, then clearly the improvers must first be paid, and if there is not enough money to pay all they must abate their claims proportionately ; they then share with the owners the loss which has occurred. Take the present case ; if an outsider had bought lot C for Rs. 3,555, then the sixth defendant would have lost roughly something like Rs. 2,500, the other improvers about Rs. 50, and the owners about Rs. 800. The improvers are not called upon to make any greater sacrifice, and the alleged equitable reduction proportionately would really work hardship on the improvers.

If a co-owner buys, the position seems to be the same. In both these cases the improvers maintain an equal footing and are given priority over the owners.

There is a difference between a sale by private bargain and one under the Partition Ordinance ; in the former case the purchaser buys merely the owners' rights, in the latter he is buying out everybody.

Is there any difference to be made between a case of purchase by an outsider or a co-owner and one by an improver ? In the latter case too does the purchase amount take the place of the land and is that the sum which must be distributed ? At first sight there seems to be no difference. and it is convenient to have one principle governing all sales ; but with some diffidence I venture to say that there is a distinction.

Apart from the fact that an outsider has not the same relationship to the parties that an improver has, a relationship which the Court ought to adjust equitably, there is the fact that an outsider actually pays ready money. So would a co-owner if the purchase amount did not exceed

the value of the improvements. But an improver—like the sixth defendant—would pay nothing or very little, according to the number and the value of the improvements. If one puts him on the footing of an outsider he retains the whole of his building, gets the rest of the land, and takes back all or most of the money he is supposed to have paid at the sale. But he is not on the same footing because, by the very nature of the action, he loses all claims to the balance of the compensation. The whole action is conceived on the basis that the rights of parties are to be satisfied within the compass of the action. Once he has obtained his improvements no Court would allow him something more as well. This was common ground in the arguments of Counsel. In effect therefore the sixth defendant did not buy for Rs. 3,555 but for Rs. 6,000.

In other cases improvers stand on an equal footing, they ought to do so in this case as well; and they will if what is shared proportionately is not Rs. 3,555 but Rs. 6,000. The sixth defendant will lose a little and the other improvers a little and the co-owners all, but that all is very little; in any case they take second place. Such a mode of approach not only maintains uniformity of principle, but also takes into account the realities of the case.

In this case therefore the sixth defendant ought to bring into Court the proportionate amount due to the other improvers of lot C. Roughly it will be about Rs. 130, if I have got the figures correctly. He will also be liable for a proportionate amount of the costs. In the long run he will probably be paying a little over Rs. 7,000 for his lot.

I think that some attention to the conditions of sale may obviate some of the difficulties which arise occasionally. At present improvers pay costs like other co-owners but are not allowed the privilege of buying at the first auction at the appraised value (*Hamidu v. Gunasekere*[1]).

The difficulty can be met by the Court ordering that a second auction be held among the co-owners and the improvers at the value of the improvements, and that the auction be thrown open to the general public only if none of the parties will buy. At sales in execution care is taken to prevent the creditor using his position in such a way as to keep away any other bidders and work detriment to the debtor. Similar precautions are often needed in cases under the Partition Ordinance, and the Court ought to be able to make provision in the conditions to meet such contingencies; *e.g.*, all sales may be subject to the condition that in the event of the sale realizing less than the appraised value, the purchaser shall pay the improvers in full, or that an improver shall not buy at less than the appraised value of the improvements. The one condition will prevent domination by the owner of a large share or by some influential outsider, the other will prevent the improver whose improvements practically cover the value of the land from controlling the auction to his advantage.

I have found some difficulty in getting the figures in the case, and if there is any error the District Judge will see it rectified. The lots Y and Z have been reserved for roads; the decree should make it plain that they no longer remain the property of the co-owners but have now passed as appurtenances to the lots which need them. The Court will make an appropriate amendment of the decree.

[1] *24 N. L. R. 143.*

There is also the question of the charge for preparing the scheme of distribution which he should consider. It is not clear on what basis it is made or whether it has been taxed. It is the Court's duty to draw up the scheme of distribution and, if a Proctor should assist the Court, he does so presumably because he wishes to oblige the Court or he is drawing up the Court's decree ; in the latter case there is provision made for an appropriate charge. Rs. 200 seems a large sum to charge against an insolvent property in which some of the owners get very small sums.

The scheme shows that the sixth defendant was given credit for Rs. 3,666.50, whereas the sale report shows that he bought lot C for Rs. 3,555. So too the scheme shows the first defendant given credit for Rs. 2,367 whereas he bought for Rs. 2,630. There may be other details requiring attention.

The order appealed from is set aside, and the Court will now proceed in the manner indicated in this judgment. The order in the District Court was that each party should bear his own costs. I think the costs of appeal should be borne similarly, as the appellant only gains a technical success.

KEUNEMAN J.—I agree.

Set aside.