against the plaintiffs. In their Lordships' view that is not the type of case which falls within section 189 of the Civil Procedure Code, and that is sufficient to dispose of this appeal. Their Lordships would add, however, that, having carefully considered the terms of the judgment of the 6th February, 1941, and having heard an elaborate argument as to its meaning and effect, they do not find themselves in agreement with the view of either of the courts in Ceylon. They are satisfied that in his judgment of the 6th February, 1941, the learned judge did not decide, or intend to decide, upon the title to the land edged green. The highest the case can be put on behalf of the appellants is that there are passages in the judgment which suggest that if the judge had been minded to decide the question, he would have decided it in favour of the appellants. The judge may have had good reasons for not deciding the question. He may have thought it inappropriate to decide on the title to a piece of open land when he was dealing only with issues relating to the cost of improvements in buildings, or he may have thought that any such decision might be embarrassing to parties not before the court who had interests in the land. At any rate whatever his reasons may have been their Lordships are satisfied that the learned judge deliberately refrained from deciding the title to the land edged green and that matter is still at large.

For these reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs.

Appeal dismissed.

1950 *Present :* **Jayetileke S.P.J. and Gunasekara J.**

THEVCHANAMOORTHY *et al.*, Appellants, *and* APPAKUDDY *et al.*, Respondents

S. C. 393—D. C. Jaffna, 1,159

Partition Ordinance—Section 6—Commissioner's scheme of partition—Re-issue of commission to Commissioner to submit a fresh scheme—Return of commission—Duty of Court to issue notice to all parties again—Co-owner's right to be allotted portion which contains his improvements.

Where, in a partition action, a second scheme of partition is ordered notice should be given to the parties of the day on which the second scheme will be considered by the Court. The notice which the Court has to give to the parties in terms of section 6 of the Partition Ordinance cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner.

A co-owner should be allotted the portion which contains his improvements whenever it is possible to do so.

APPEAL from a judgment of the District Court, Jaffna.

S. J. V. Chelvanayagam, K.C., with *S. Thangarajah*, for the 13th to 16th defendants appellants.

H. W. Tambiah, with *A. Nagendra*, for the 20th to 23rd and 26th to 29th defendants respondents.

C. Shanmuganayagam, for the plaintiffs respondents.

Cur. adv. vult.

March 10, 1950. JAYETILEKE S.P.J.—

This is an action for the partition of a land called Puthiyanputhukadu. The plaintiffs alleged in para. 21 of the plaint that, about 20 years earlier, the land was amicably partitioned among the co-owners, and that divided lots were possessed by the co-owners since then, but the title deeds dealt with undivided shares. In para. 22 they alleged that the parties were in possession of the lots referred to therein, and were entitled to the improvements effected by them on the said lots. They alleged that lot 3 in the sketch annexed to their plaint with the margosa trees and young palmyrahs in it was possessed by the 13th, 15th and 16th defendants.

On February 18, 1944, the District Judge issued a commission to C. J. Sabapathy, Licensed Surveyor, to make a survey of the land and to furnish the Court with a plan. On March 23, 1944, the Commissioner returned the Commission to Court with a plan bearing No. 784 and his report.

Paragraph 2 of the report reads —

> "The 1st plaintiff stated that the land was amicably partitioned and they are claiming the respective lots for the past several years and that lots 1, 6, 7, 15 and 16 do not form part of the land under partition. According to him the respective lots with their appurtenances are claimed as follows :—
>
> Lot 2 by 24th defendant.
> Lot 3 by 23rd defendant.
> Lot 4 by 7th and 8th defendants.
> Lot 5 by 10th and 12th defendants.
> Lot 9 by 1st, 2nd, 4th and 6th defendants.
> Lot 10 by 7th, 8th and 9th defendants.
> Lot 11 by 17th, 18th and 19th defendants.
> Lot 12 by 13th, 15th and 16th defendants.
> Lot 14 by plaintiff."

When plan No. 784 is compared with the sketch it is clear that lot 12 corresponds with lot 3 in the sketch.

Several defendants filed answers. The 7th, 8th, 9th, 10th 17th, 19th and 24th defendants filed a joint answer in which they alleged that lot 2 was possessed by the 24th defendant, lots 4 and 10 by the 7th and 8th

defendants, lot 5 by the 10th and 12th defendants and lot 11 by the 17th, 18th and 19th defendants. In para. 10 of their answer they alleged that they had acquired a title by prescription to the said lots, and they prayed that they may be declared entitled to and allotted the said lots.

The 1st, 3rd, 4th, 5th and 6th defendants filed a joint answer. They alleged that the 1st, 2nd, 4th and 6th defendants were in possession of lot 9 and the houses and plantations standing thereon.

On April 3, 1944, the 29th defendant moved to be added as a party and his application was allowed. In his statement of claim he alleged that he had purchased from the 25th defendant a 1/8th share of a portion that was dividedly possessed for a period of over ten years, which portion was to the South of the portion belonging to the plaintiff. He prayed that a 1/8th share be allotted to him out of that portion.

At the trial which was held on July 2, 1945, the plaintiff gave evidence. He stated that the land was possessed dividedly for convenience of possession, and that he was in possession of lot 14, the 13th, 15th and 16th defendants were in possession of lot 12, and various other defendants were in possession of other lots.

On August 23, 1946, interlocutory decree was entered. Paragraphs 1, 4 and 10 read as follows :—

Para 1. A divided 32/288 share with its appurtenances and the shop building lying in lot 9 be allotted and given to the 1st and 2nd defendants.

Para 4. A divided 1/18th or 16/288th share which is reduced out of the 1st and 2nd defendants' share be allotted and given to the 29th defendant.

Para 10. A divided 24/288th share with its appurtenances and with the improvements in lot 12 be allotted and given to the 13th, 15th and 16th defendants.

It is clear from the plaint and the answers filed by the defendants that all the parties desired that they should be allotted the shares to which they were entitled out of the lots they were in possession of. When the learned District Judge used the word "divided" in the paragraphs referred to above and in all the other paragraphs in the interlocutory decree, it seems to me that what he meant was that an extent equal to the undivided shares he referred to should be given to the various parties out of the divided lots they were in possession of. That would amount to a special direction to the Commissioner as to the manner in which the partition was to be made. Quite apart from the direction, one of the rules to be observed by a Commissioner in partitioning is that, whenever possible, owners should be allotted the portions containing their improvements.

On August 27, 1946, a commission was issued to the same Commissioner authorising and requiring him to make a partition of the said land and of the appurtenances thereto belonging. He returned the commission to Court on January 15, 1947, together with a plan bearing No. 1,010 and his report. In that plan he allotted to the 13th, 15th and 16th defendants lot 14 which is a portion of lot 12 in plan 784, and he allotted to the 29th defendant lot 12.

On the same day the District Judge appointed February 11, 1947, for consideration of the Commissioner's return and directed notice to be given to all the parties as required by section 6 of the Partition Ordinance.

On February 11, 1947, the inquiry could not be held as notices were not served on some of the parties. The 29th defendant appeared in Court and stated that he objected to the scheme of partition. The Court gave him time till March 11, 1947, to file his objections, and directed notices to be re-issued on the parties who were not served. On March 11, 1947, the notices were reported to have been served, and the 29th defendant filed his objections. The Court, thereupon, fixed the inquiry into the objections for April 1, 1947.

The 29th defendant's objection to the scheme was a curious one. He said that he had agreed to sell his share to his lessees, the 26th, 27th and 28th defendants, and received an advance of Rs. 1,000, and that the 26th, 27th and 28th defendants requested him to get his share allotted adjoining the lot that was allotted to the 21st defendant who was a sister of the 26th defendant. It was really not an objection but an application by him to amend his statement of claim and the interlocutory decree, and it should not have been entertained by the Court. On the date of inquiry the 29th defendant asked the Court to give him a lot adjoining lot 15 which had been allotted to the 21st defendant, and moved that the Commission be re-issued to the Commissioner to submit a fresh scheme. The District Judge allowed the application and issued a Commission to the same Commissioner returnable on June 9, 1947.

On June 9, 1947, the Commissioner moved for and obtained time till June 30, 1947, for the return of the Commission, on which date he returned the Commission with a plan bearing No. 1,010A and his report, and the District Judge fixed the inquiry for July 21, 1947. In plan No. 1,010A the Commissioner allotted to the 29th defendant lot 14 which he had previously allotted to the 13th, 15th and 16th defendants. On July 21, 1947, the 13th, 15th and 16th defendants were absent, and the District Judge after examining the Commissioner adopted plan No. 1,010 subject to the modifications in plan No. 1,010A.

On July 30, 1947, the 13th, 15th and 16th defendants filed an affidavit in which they stated that they were not aware that consideration of the scheme of partition had been fixed for July 21, 1947, and moved that the order made on July 21, 1947, be vacated. The District Judge refused to allow the application for the following reasons :—

(1) That the affidavit did not disclose any grounds for setting aside the order.

(2) That there was much cogency in the argument of the 29th defendant that he should be allotted lot 14 which adjoins lot 15 allotted to the 21st defendant as the 29th defendant had agreed to sell his share to the 26th defendant, a sister of the 21st defendant.

(3) That the 13th, 15th and 16th defendants had been given compensation for the improvements.

The present appeal is against that order. Mr. Chelvanayagam argued that the order made on July 21, 1947, is invalid as notice was not given

to the 13th, 15th and 16th defendants that the alternative scheme No. 1,010A would be considered by the Court on July 21, 1947. He relied on section 6 of the Partition Ordinance which provides as follows :—

> "On the receipt of the return of such Commission the Court shall fix a day, of which notice shall be issued to all the parties and which said notice shall be served in the same way as the original summons for considering the return; and on that day or such other day as the Court shall then appoint, the Court after summarily hearing the parties, and if need be, making such further reference as the Court shall deem necessary, shall either confirm or modify the partition proposed by the Commissioner and enter final judgment accordingly in the cause."

The section provides that on the return of the Commission (1) the Court shall fix a day for consideration of the return and (2) the Court shall give notice to all the parties that it would consider the return on that day. It provides further that on the day fixed by the Court or on such other day as the Court shall then appoint the Court shall confirm or modify the partition proposed by the Commissioner.

In this case notice was given to the parties that the first scheme of partition would be considered by the Court on February 11, 1947, but no notice was given to the parties that the second scheme of partition would be considered by the Court on April 1, 1947. The requirement regarding notice is imperative. In *Dissanayake v. Dias* [1] it was held that if the scheme of partition is confirmed and final decree entered without notice the Court has inherent power to set aside the decree so entered. In my opinion the notice which the Court has to give to the parties cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner, because the original scheme may not be acceptable to the parties and the Commissioner may be ordered by the Court to furnish an entirely different scheme. The order made by the learned District Judge on July 21, 1947, is, in my opinion, wrong and must be set aside.

It seems to me to be unnecessary to send the case back for a consideration of the second scheme of partition. I think it is wrong in principle to allot to one co-owner a lot which has been improved and possessed by another co-owner in order to enable him to sell that lot to a person who is not allotted a share in the decree. 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. The only person who objected to the original scheme of partition was the 29th defendant and his objection appears to me to be one which cannot be supported in law. I would set aside the order made on July 21, 1947, and direct the District Judge to make an order confirming the original scheme of partition. The appellant will be entitled to the costs of appeal and of the inquiry in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.

[1] *(1919) 6 C. W. R. 137.*