

1948

Present: Soertsz A.C.J. and Canekeratne J.

APPUHAMY, Appellant, and WEERATUNGE, Respondent.

27—D. C. (Inty.) Matara, 154/13,628.

Partition action—Commissioner appointed to make partition—Cannot be supplanted by nominee of party dissatisfied, with proposed scheme—Weight of scheme suggested bona fide by Commissioner—Partition Ordinance (Cap. 56), s. 5.

In a commission for partition under section 5 of the Partition Ordinance the Commissioner, once he is appointed, cannot be supplanted by a person retained by a party who objects to the scheme proposed by him. It must be the Commissioner's scheme, as proposed by him or modified on the directions of the Court, that is confirmed for the purpose of entering the decree.

A partition proposed by the Commissioner will not be rejected on light grounds or for mere inequality of value of the allotments if, in making it, the Commissioner has honestly exercised his judgment.

A PPEAL from an order of the District Judge of Matara.

L. A. Rajapakse, K.C. (with him *S. W. Jayasuriya*), for the plaintiff, appellant.

H. W. Jayewardene, for the first defendant, respondent.

Cur. adv. vult.

November 7, 1945. SOERTSZ A.C.J.—

Section 5 of the Partition Ordinance empowers the Court to issue a Commission to a Commissioner or to Commissioners agreed upon by all the parties to the suit or, in the event of the parties not agreeing in that respect, to some fit person named by the Court. In this instance, there being no opposition forthcoming from any of the parties to the appointment, the Court appointed the Surveyor who had made the preliminary plan to carry out the partition. He duly effected the partition, and made his return to the Court showing on Plan No. 3,166 the division he proposed, and he also filed the schedule required by section 5.

The first defendant objected to the proposed partition principally on the ground that, according to this partition which gave the plaintiff lot A, the defendant would lose a part of the plantation made by him. He submitted another scheme of partition made by a Surveyor chosen by him, and asked that that return be adopted. No schedule was filed with it. The Court, after examining the two plans and hearing the parties made this order "I find that plan 1522 (i.e., the plan made by the Non-Commissioner Surveyor) more equitable. Remit plan to Mr. de Niese (i.e., not the Commissioner) for demarcation and appraisal at the expense of the first defendant in the first instance". This is, clearly, quite irregular procedure.

When the Court appoints a Commissioner that Commissioner assumes, in a sense, as pointed out in several judgments of this Court, the responsible position of an officer of the Court. His functions are quasi-judicial and he is expected to act fairly and impartially. Section 5 provides that on an appointed day, the Court after summary inquiry, and if need be, after making such further reference as the Court shall deem necessary, shall either confirm or modify the partition proposed by the Commissioner. It will be observed that there is no provision whatever for supplanting the Commissioner by a Surveyor retained by a party and for adopting as was done in this instance, a scheme made *ex parte*, and unaccompanied by a schedule. But, it is said that this practice has been long in vogue. All I would say to that is that it is an irregular and mischievous practice and that the sooner it is discontinued the better for all parties. It is not open to Judges by disregarding a requirement of procedure to establish a *cursus curiae* of their own.

There can be no objection, however, to a party calling a Surveyor as a witness in order to support his opposition to the scheme proposed by the Commissioner, and to the Court, if it thinks fit, referring his plan to the Commissioner for such modification as the Court may deem necessary, but it must be the Commissioner's scheme as proposed by him or modified on the directions of the Court, that is confirmed for the purpose of entering the decree.

Now in regard to the partition proposed by the Commissioner, it has been repeatedly held that a partition will not be rejected on light grounds or for mere inequality of value of the allotments, if in making it, the Commissioner has honestly exercised his judgment (see *e.g.*, *Peers v. Needham*¹). Examined in that way, the scheme proposed by the Commissioner commends itself to my brother and me as a fair partition of the land although it would be possible to put forward as good alternative schemes. But there must be an end to a case, particularly to a partition case which is generally of a protracted nature and which prevents parties to it from dealing with the land as freely as they would wish to in the interval. I would allow the appeal. The 1st respondent will pay the costs of the plaintiff-appellant which I would fix at Rs. 73.50 in respect of this inquiry here and below.

CANEKERATNE J.—I agree.

Appeal allowed.