

**GUNASEKERA
V.
SOOTHANONA**

COURT OF APPEAL,
WIJETUNGA J. & S.N. SILVA J.
C.A. NO. 351/81 (F)
D.C.MATUGAMA No. 2851/P,
MARCH 02, 1988.

Partition — Commissioner's scheme of partition — Commissioner's failure to carry out directions-Interlocutory decree - Road frontage - Alternative scheme.

The Commissioner's scheme of partition should not be lightly rejected but in the case the Commissioner did not allow building No. 17 to the 25th defendant on the ground it would be unfair to do so and apportioned the road frontage unfairly and gave all the marshy land to the defendants. The alternative scheme was rightly regarded as more fair but while adopting the division proposed by it the proper cause is for the Judge to re-issue the Commission to the

Commissioner with direction to modify his scheme on the lines approved by Court on the basis of the alternative scheme. The Judge cannot enter final decree directly in terms of the alternative scheme.

It is no part of the Commissioner's function to make observation on what the decree ordains.

Cases referred to

1. *Appuhamy v. Weeraturge* (1945) 46 NLR 46
2. *Hendrick v. Gimarahamine* (1946) 47 NLR 30

APPEAL from judgment of the District Judge, Matugama

S. Gunasekera for plaintiff—appellant

T. S. Medahinna for the defendant — respondent

D. R. P. Gunatilleke with *T. S. Medahinna* for 25th and 30th defendant
—respondents.

Cur. adv. vult.

May 06, 1988

WJETUNGA, J.

This is an appeal by the plaintiff from the order of the learned District Judge dated 31.3.81 accepting the scheme of partition submitted by G. Ambepitiya, Surveyor, marked R. 1, in preference to the scheme proposed by the Commissioner, M. J. Setunga, marked Z/P. 1.

• The learned District Judge finds that the scheme prepared by the latter is not in conformity with the interlocutory decree in certain respects and with some of the special directions contained therein. He makes particular reference *inter alia* to the Commissioner's failure to allot building No. 17 to the 25th defendant who was declared entitled thereto in the interlocutory decree, on the ground that the Commissioner considered it unfair to do so. The judge comments that it was no part of the Commissioner's functions to make such observations on matters outside his purview. He further finds that though the plaintiff is entitled to only 145 links of road frontage according to his shares, he had been given 182 links of road frontage, whereas lot No. 6 which is larger in extent gets a smaller road frontage. He makes mention of the fact

that the eastern portion of the corpus, which is marshy land unsuitable for building purposes, has not been evenly apportioned. He observes that whereas the plaintiff has not been given any part of the marshy land, the entirety of it has been apportioned among the defendants. He concludes that the manner of partition is distinctly biased in favour of the plaintiff and is contrary to the interlocutory decree. He comes to a strong finding that the plan of partition prepared by the Commissioner is an unfair one and proceeds to reject his scheme.

In comparison, the learned District Judge finds that the scheme of partition depicted in the plan of Surveyor Ambepitiya (R.1) ensures that the land is partitioned in a more equitable manner, the plaintiff as well as the defendants receiving the good as well as the marshy portions of the land, according to their shares. He points out that though some of the parties including the plaintiff would get less road frontage than they would be entitled to according to their shares, the scheme provides for a fairer distribution of the land among the parties and is in conformity with the interlocutory decree. He, therefore, accepts that scheme in preference to that of the Commissioner.

On an examination of the two schemes, it is apparent that the scheme preferred by the learned District Judge is undoubtedly the better one. He has given cogent reasons for his conclusion. The alternative scheme further gives the improvements and buildings to the parties according to the interlocutory decree.

Though a scheme of partition proposed by a Commissioner would not be lightly rejected (*vide Appuhamy v. Weeratunge* (1)) having regard to the particular facts and circumstances of this case, we see no reason to interfere with the strong findings of the learned District Judge which are well supported.

However, it was not open to the learned District Judge to enter final decree of partition in terms of the plan of Surveyor Ambepitiya (R.1) and his report, as the law requires the court

to confirm with or without modification the scheme of partition proposed by the Commissioner. As was held in *Hendrick v. Gimarahamine (2)* where a scheme of partition submitted by a Surveyor is found to be better than that submitted by the Commissioner in the case, the proper course to adopt would be to remit the scheme to the Commissioner with a direction to him to modify the scheme on the lines prepared by the Surveyor.

I would, therefore, vary that part of the learned District Judge's order and direct that the scheme proposed by the Commissioner be remitted to him requiring the Commissioner to modify his scheme of partition in the manner suggested by Surveyor Ambepitiya in plan No. 867 marked R. 1.

Subject to this variation, the appeal is dismissed. There will be no costs.

S. N. Silva, J. I agree.

Appeal dismissed subject to variation
