IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Jayasekera Liyanaarachchilage
Dhanasiri,
Bamunugama,
Horapawita.
3rd Defendant-Petitioner

CASE NO: CA/363/2006/LA
DC MATARA CASE NO: 11437/P

Vs.

Jayasekera Liyanaarachchilage
David,
Bamunugama,
Horapawita,
Plaintiff-Respondent
and 8 other
Defendant-Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Ranjan Suwandaratne, P.C., with Anil Rajakaruna for the 3rd Defendant-Petitioner.
Rohan Sahabandu, P.C., with Surekha Withanage for the Plaintiff-Respondent.

Written Submissions:
by the 3rd Defendant-Petitioner on 19.06.2018
by the Plaintiff-Respondent on 21.06.2018

Decided on: 20.07.2018

Samayawardhena, J.

The 3rd defendant-petitioner filed this application seeking leave to appeal against the order of the learned District Judge of Matara dated 25.08.2006 whereby the Commissioner's Scheme of Partition depicted in Plan No.433B was accepted with slight modifications as the Final Partition Plan.

When this matter came up for the first time before me learned President's Counsel appearing for both sides agreed the leave inquiry and the main argument being taken up together and disposed of by way of written submissions.

According to the Interlocutory Decree the 3rd defendant gets the largest share, and on top of it, he will also get the shares of the 4th, 6th, 7th and 9th defendants.

The only grievance of the 3rd defendant against Plan No.433B is that he has not been given any road frontage whereas the entire road frontage has been given to the plaintiff.

The 3rd defendant has got alternative Plan No.1225 prepared wherein Lot 2 which is 10 perches in extent has been given to the 3rd, 4th, 6th, 7th and 9th defendants in common to address this grievance. Lot 2 has a small road frontage and through that Lot the 3rd, 4th, 6th, 7th and 9th defendants can have access to their larger Lots, which are Lots 3 and 7 of that Plan. According to this Plan, as per the evidence of the Surveyor, the 3rd, 4th, 6th, 7th and 9th defendants get 46 foot road frontage and the plaintiff gets 172 (or 218-this evidence is not clear) foot road frontage.

The short question to be decided is whether some road frontage can be given to the 3rd defendant who gets the largest share. This

has been denied according to the impugned order on two grounds: (a) according to the Report of the Preliminary Plan No.433, Lot 1 which covers the entire road frontage had been claimed by the plaintiff before the Surveyor and (b) as Lot 1 is a *Deniya* and Paddy Field (දෙනිය සහ කුඹුර) and therefore unbuildable no special advantage would accrue to the plaintiff in giving that entire Lot to him. It is clear from the order that the District Judge's particular emphasis is on (b) above.

There is no dispute that according to section 31 of the Partition Law, No. 21 of 1977, as amended, the Final Scheme of Partition shall be prepared in conformity with the Interlocutory Decree. According to the Interlocutory Decree, Lot 1 of the Preliminary Plan (which is 1 Rood and 13.2 Perches in extent) is only a *Deniya* without any cultivation. (වැවිලි නැත-දෙනියකි) Therefore the finding of the District Judge that Lot 1 being a Paddy Field and *Deniya* is an unbuildable (marshy) land and therefore no significance can be attached to that Lot notwithstanding it covers the whole road frontage is in my view not correct. On the other hand, if it is a useless Lot, it does not affect the plaintiff if the Court gives a small road frontage through that Lot to the 3rd defendant who gets the largest share of the whole land.

This also goes to show that notwithstanding the plaintiff has claimed Lot 1 before the Commissioner at the Preliminary Survey, he has not made any improvements in that Lot except having a well, which is also not masonry (නොබැඳි ළිඳ).

The District Judge in the impugned order has referred to section 33 of the Partition Act in favour of the plaintiff, as I understand, in connection with (a) above. That section reads as follows:

"The surveyor shall so partition the land that each party entitled to compensation in respect of improvements effected thereto or of buildings erected thereon will, if that party is entitled to a share of the soil, be allotted, so far as is practicable, that portion of the land which has been so improved or built upon, as the case may be."

Given the facts of this case I do not think that the said section is helpful to the plaintiff as the said Lot has not either been "*improved or built upon*" by the plaintiff. It is noteworthy that this section speaks of "*portion of the land which has been so improved or built upon*" and not "*portion of the land which has been so improved or built upon or claimed before the surveyor*".

I am quite aware that the policy of the law has been to allot to a co-owner the portion which contains his improvements and which he has been in possession whenever it is possible to do so. (*Thevchanamoorthy v. Appakuddy*[1], *Sinchi Appu v. Wijegunasekera*[2], *Albert v. Ratnayake*[3])

However this is not an invariable, rigid, absolute rule.

In *Premathiratne v. Elo Fernando*[4] it was held that "*Although, in a partition decree, a co-owner should, whenever possible, be given the lot which carries his improvements, this principle should not be adhered to if, in the process of giving effect to it, substantial injustice is likely to be caused to the other co-owners. Where, however, improvements made by one co-owner fall within the portion allotted to another co-owner the latter should pay compensation to the former in respect of the improvements.*"

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[1] (1950) 51 NLR 317 at 321
[2] (1902) 6 NLR1 at 11-12
[3] [1988] 2 Sri LR 246 at 248
[4] (1954) 55 NLR 369

As I said earlier, in Lot 1, there are no improvements and therefore the question of payment of compensation does not arise.

In *Liyanage v. Thegiris*[5] it was held that "*In an action for the partition of a land owned in common the rule that a co-owner should be allotted the portion which contains his improvements is not an invariable rule; it will not be followed if it involves substantial injustice to the other co-owners*."

The conclusion was the same in *Sediris Perera v. Mary Nona*[6]: "*Although, according to section 33 of the Partition Act, 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. Accordingly, an alternative scheme may be adopted at the stage of the final decree so that a building put up in spite of protest may fall into a lot given to a co-owner other than the person who put up the building.*"

It is not fair to deprive the 3rd defendant who gets the largest share from the corpus of any road frontage whatsoever and give the entire length of road frontage to the plaintiff on the basis that the plaintiff claimed the Lot which covers the entire road frontage before the Commissioner at the Preliminary Survey especially when there are no improvements made on that Lot by the plaintiff. I have already stated that the finding of the District Judge that the said Lot is a *Deniya* and Paddy Field and therefore unbuildable is factually incorrect and against the Interlocutory Decree.

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[5] (1954) 56 NLR 546
[6] (1971) 75 NLR 133

I must state that the 3rd defendant does not ask for a road frontage proportionate to his share. He is asking a small road frontage in comparison with what the plaintiff will ultimately get.

Notwithstanding the Commissioner's Scheme of Partition shall not be lightly rejected (*Appuhamy v. Weeratunga*[7]), I am of the view that, in the facts and circumstances of this case, the alternative Plan No. 1225 depicts a fairer division. However, as the District Judge in the impugned order has stated the entire length of the road which runs across the land shall be 12 feet wide.

Where a scheme of partition submitted by a Surveyor is found to be better than that submitted by the Court Commissioner, the proper course to adopt would be to remit the scheme to the Commissioner to modify the scheme on the lines prepared by the Surveyor with further directions if any given by Court. The Court cannot enter the Final Decree on the approved alternative Plan. (*Hendrik v. Gimarahamine*[8], *Gunasekera v. Soothanona*[9])

Counsel for the 3rd defendant in his written submissions has stated that the Court Commissioner is now dead and therefore in terms of section 18 of the Partition Law Court shall necessarily send the commission to the Surveyor General to prepare the Final Partition Plan. Section 18 has no application to the instant matter as it is applicable to the Preliminary Plan. If the Surveyor who prepared the alternative Plan No. 1225 is alive, let the District Judge send the commission to him, or if he is unavailable, any other Surveyor in the Penal of Surveyors of the District Court to prepare the Final Scheme of Partition in lines with the alternative

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[7] (1945) 46 NLR 461
[8] (1946) 47 NLR 30
[9] [1988] 2 Sri LR 8

Plan No. 1225 subject to widening 10 foot road running across the land to 12 feet.

The impugned order of the District Judge is set aside and the appeal is allowed with costs both here and the Court below.

Judge of the Court of Appeal