

SUMANAWATHIE
v.
MAHINDA

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. NO. 540/96
D.C. HOMAGAMA NO. 1698/P
AUGUST 18, 1998

Partition Action – Co-owner seeking to construct building – corpus a paddy field – rights and obligations of co-owners in relation to common land.

The plaintiff-respondent instituted action to partition a 'paddy field'. The defendant petitioner, while the action was pending sought to construct a building on the field in question. The District Court restrained him from constructing the building.

Held:

1. In the circumstances, the defendant-petitioner as a co-owner is precluded from building on the land which is meant primarily for cultivation of paddy without the consent of the other co-owners. The material before court showed that the proposed erection of the building would materially change the character of land.

Per Weerasuriya, J.

"One co-owner may restrain another by an injunction only when his co-proprietary rights are being violated and that so long as the land is being put to the use for which it was specifically adopted, no restraining by an injunction is permissible. If building on a common land constitutes merely a means of exploiting and enjoying the property in a manner which could be regarded as natural and ordinary having regard to such factors as the character and location of the land, the construction of a building by one co-owner does not require the leave and acquiescence of the others. However in circumstances where building would constitute an unexpected and novel use of co-owned property – consent of all other co-owners is necessary".

Application in Revision from the judgment of the District Court of Homagama.

Case referred to :

1. *Elpi Nona v. Punchi Singho* – 52 NLR 115.

W. Dayaratne with R. Jayasekera for 20th defendant-petitioner.

Nihal Jayamanne PC with Ajith Munasinghe for plaintiff-respondent and 4th, 6th, 8th, 9th and 11th defendant-respondent.

Cur. adv. vult.

September 25, 1998.

WEERASURIYA, J.

By this revision application 20th defendant-petitioner (hereinafter referred to as the defendant-petitioner) is seeking to set aside the order of the District Judge, dated 01. 09 1992, restraining her from constructing a building on the land which formed a part of the corpus in the partition action bearing No. 1698 instituted in the District Court of Homagama.

The facts as set out by learned counsel for the defendant-petitioner are briefly as follows:

The plaintiff-respondent by plaint dated 06. 05. 1992, instituted action in the District Court of Homagama to partition the land called Hatara Anda Hena Kolain Kumbura, morefully described in the schedule to the plaint. The plaintiff-respondent in this action further prayed for an interim injunction to restrain the defendant-petitioner from constructing a building on land which formed a part of the corpus. The learned District judge on the application of the plaintiff-respondent, issued an enjoining order in the first instance and at the inquiry into the application for an interim injunction, directed the parties to tender written submissions and thereafter by his order dated 01. 09. 1992, issued an interim injunction restraining the defendant-petitioner from constructing the building. The present application has been filed against that order.

At the hearing of this application, counsel for the defendant-petitioner submitted that the learned District Judge had misdirected herself by holding that the plaintiff-respondent had established a *prima facie* case against the defendant-petitioner. He based his contention on the following grounds:

- (a) that the learned District Judge had failed to consider that plaintiff-respondent was entitled to an extent of 0.77 perches of the corpus;
- (b) that the learned District Judge had failed to consider that construction work had commenced upon permission obtained from Sri Lanka Land Reclamation and Development Corporation;
- (c) that the learned District Judge had failed to consider that the construction work covered only an extent of 5.6 perches.

Learned counsel for the plaintiff-respondent submitted that the defendant-petitioner by commencing to construct a building on a paddy field had attempted to change the intrinsic character of the land and that he was rightly restrained by an injunction from constructing a building on such land.

Learned counsel for the defendant-petitioner submitted that a co-owner is entitled to use and enjoy common property in proportion to his share and that she can build on such land proportionate to his soil rights.

The defendant-petitioner had obtained permission from Sri Lanka Land Reclamation and Development Corporation to develop a portion of land as evidenced by letter dated 16. 05. 1994, marked P7. However, P7 does not disclose with certainty the effective date of approval given by Sri Lanka Land Reclamation and Development Corporation and whether such approval relate to the land in suit. The inquiry into this application by the District Judge had been concluded on 29. 06. 1992 as evidenced from the written submissions tendered by parties. Thus, the contention of the defendant-petitioner that she commenced building operations by filling the land on approval from Sri Lanka Land Reclamation and Development Corporation is untenable.

Admittedly, the plaintiff-respondent was entitled to 0.77 perches from the corpus and 18th and 19th defendants were entitled to 720/1440 shares jointly and the defendant-petitioner was entitled to 12 perches. However, the plaintiff-respondent and 8th to 15th defendant-respondents are brothers and sisters and the 7th defendant-

respondent is the mother and they are jointly entitled to 90/1040 shares or about 13.8 perches from the corpus. Thus, they jointly possess a substantial share of the corpus and they have a right in law to safeguard their interests in respect of the common property.

The rights and obligations of co-owners in relation to common land have been considered in many decisions of our Courts. Wille's *Principles of South African Law* by J. T. R. Gibson (7th ed. at p. 213) states that each co-owner "is entitled to reasonable use of the property, proportionate to his interest, in accordance with the object for which the property is intended to be used". The limitations on the right of a co-owner to enjoy the common land are laid down by our Courts in accordance with the principles prescribed by jurists. The cardinal principle is that one co-owner may restrain another by an injunction only when his co-proprietary rights are being violated and that so long as the land is being put to the uses for which it was specially adopted, no restraining by an injunction is permissible. If building on a common land constitutes merely a means of exploiting and enjoying the property in a manner which could be regarded as natural and ordinary having regard to such factors as the character and location of the land, the construction of a building by one co-owner does not require the leave and acquiescence of the others. However, in circumstances where building would constitute an unexpected and novel use of co-owned property consent of all other co-owners is necessary.

In Elpi Nona v. Punchi Singho⁽¹⁾ it was held that a co-owner has the right to build on the common property without the consent of his co-owners, provided that he acts reasonably and to an extent which is proportionate to his share and does not infringe the co-proprietary rights of his co-owners; moreover, he cannot, except by mutual consent apply the common land to new purposes in such a manner as to alter the intrinsic character of the property.

It was laid down at page 117 as follows:

"The cause of action in proceedings of this kind is based on the infringement of the rights of the objecting co-owners and not a right simpliciter to withhold consent to something which has not been proved to be quid novi in the sense in which, I think, the term is used by Voet – that is either an alteration or conversion

of the intrinsic character of the common property or an attempted user of the property which is disproportionate to the defendant's interest therein".

In the instant case, the plaintiff-respondent filed action to partition the land which was basically a paddy field and the portion on which the defendant-petitioner sought to build, lies on the southern side facing the road in extent of about 10 perches. The defendant-petitioner had placed before the District Judge that he took steps to fill it, as it was a marshy land. Thus, it would be clear that, to erect a building on this land he had to take steps to fill it by changing the character of the land. There was no material placed before Court that any building had been constructed previously on the land by any co-owner. He had failed to place any material that there was a practice among the co-owners to build on this land. The material that he placed before the Court was sufficient to prove that proposed erection of the building would materially change the character of the land, even though that portion of the land had been severed from the rest of the land by the main road. However, it would appear that, that portion still remain a cultivable area as other portions of the land.

The reference by the District Judge, in her order, to the provisions of the Agrarian Services Act, is clearly an acknowledgement that special procedure is envisaged in situations where building operations are contemplated on marshy land primarily meant for paddy cultivation. Thus, the conclusion is inescapable, upon a survey of the case law, that the construction of a building on a common property requires the consent of all the co-owners in circumstances where building constitutes either an alteration of the inherent character of property or an attempted user of the common property disproportionate to rights. In the circumstances, the defendant-petitioner as a co-owner, is precluded from building on this land which is meant primarily for cultivation of paddy, without the consent of other co-owners.

For the foregoing reasons, it seems to me that there is no basis to interfere with the findings of the District Judge. Therefore, I dismiss this application with costs.

DE SILVA, J. – I agree.

Application dismissed.