[FULL BENCH]

1919.

Present: Ennis, Shaw, and De Sampayo JJ.

APPUHAMY *v.* SANCHIHAMY *et al.*

252—D. C. Chilaw, 5,170.

Partition—Improvement by one co-owner—Measure of compensation.

Where a co-owner has effected improvements on a portion of the land sought to be partitioned, and such portion is allotted to another co-owner, the compensation to be paid to the co-owner who has effected the improvements is the present value of the improvements or the cost of effecting the improvements, whichever may be less.

Moldrich v. La Brooy explained

THE appellant sued in this case for the partition of a land called Ambagahawatta, and in his plaint stated that the husband of the fourth defendant, and father of the fifth, sixth, seventh, eighth, and tenth defendants, had planted the southern portion of the land with coconuts and built a house thereon.

The fourth, fifth, and seventh defendants, and ninth and eleventh defendants, who are the husbands of the eighth and tenth defendants, respectively, disputed the correctness of the shares allotted to them, and the sixteenth defendant intervened as a lessee from the other defendants.

After trial the Court passed a decree for partition according to the shares stated by the appellant, and further directed that the fourth, fifth, and seventh to eleventh defendants be allotted their shares on the side where they have planted and where their house stands, and declared them entitled " to compensation for balance plantation not allotted to them."

The Commissioner appointed to partition reported that the plantations and the building, which have got included in the portion allotted by him to the appellant, are of the value of Rs. 996.80 and Rs. 75, respectively, and that the appellant should pay to the fourth, fifth, sixth, seventh, eighth, and tenth defendants the entire total thereof, namely, Rs. 1,071.80, and likewise that the twelfth, thirteenth, and fourteenth defendants, in whose lots certain plantations are included; should pay full value of the same, namely, Rs. 101.50.

When the said report of the Commissioner came up for consideration, the appellant objected to the award of compensation as above, on the ground, first, that compensation for improvements

[1] *(1911) 14 N. L. R. 331.*

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did not mean the whole or part of the said improvements irrespective of cost thereof, and called evidence to prove what the actual expenditure incurred on the improvements should be assessed at. No evidence was adduced on the other side.

The learned District Judge gave judgment ordering final decree to be entered in terms of the Commissioner's report, that is to say, awarding to the fourth, fifth, sixth, seventh, eighth, and tenth defendants full value of the improvements.

The plaintiff appealed.

A. St. V. Jayawardene, for plaintiff, appellant.—A co-owner who makes improvements is not entitled to any larger rights than a *bona fide* improver of property which is not his own. (*Perera v. Pelmadulla Rubber and Tea Co.*[1]) [De Sampayo J.—Are we not governed by the Partition Ordinance?] The Partition Ordinance merely indicates the procedure. It does not lay down substantive law on the question of compensation to an improving co-owner. We are governed by the rule of the common law, which is, that the co-owner is entitled to the full value of the improvements or the expenses actually incurred by him, whichever is less. This rule has been consistently followed by the Supreme Court. Counsel cited *II. Maasdorp 312; Voet 10, 3, 3* (*Samson's Translation*); *Silva v. Babunhamy;*[2] *Silva v. Silva;*[3] *De Silva v. Siyadoris;*[4] *Silva v. Silva;*[5] 783, D. C. Chilaw;[6] 7,904, D. C. Colombo.[7]

Our Ordinance is based on the English law. (*Vol.—XXI., Halsbury's Laws of England, page 851; Watson v. Grass;*[8] *Re Jones Farrington v. Forrester;*[9] *Leigh v. Dickeson.*[10])

Croos-Dabrera, for defendants, respondents.—The rights of a co-owner to compensation for improvements are no longer governed by the common law. Under the Partition Ordinance the Commissioner is asked to partition the land with reference to the value of improvements made by the co-owners. This implies that the co-owner is entitled to the full value of the improvements at the time of institution of the action. (See *Silva v. Wiratunga.* [11]) If the improvements made by a co-owner fall on the portion allotted to him at the partition, he is not expected to pay any compensation (*Moldrich v. La Brooy.* [12]) This can only be done on the basis that the co-owner is entitled to the full value of the improvements. Otherwise he should be ordered to compensate the other co-owner. In *Fernando v. Sleman,* [13] Wood Renton J. said " that

[1] *(1913) 16 N. L. R. 306.*
[2] *(1912) 16 N. L. R. 43.*
[3] *(1911) 15 N. L. R. 79.*
[4] *(1911) 14 N. L. R. 268.*
[5] *(1906) 9 N. L. R. 114.*
[6] *S. C. C. Min., July 28, 1896.*
[7] *S. C. C. Min., Nov. 7, 1889.*
[8] *(1881) 51 L. J. (Ch.) 480.*
[9] *(1893) 2 Ch. 461.*
[10] *(1884) 15 Q. B. D. 67.*
[11] *(1917) 20 N. L. R. 218.*
[12] *(1911) 14 N. L. R. 331.*
[13] *(1911) 14 N. L. R. 282.*

the words 'just valuation' in section 8 of Ordinance No. 10 of 1863 should be interpreted as meaning a valuation considered as an improvement."

In most cases the cost of the improvement and the present value are practically the same. The adoption of the latter basis provides a surer test, and parties need not undergo the inconvenience of incurring heavy expenses in establishing the cost of the improvement.

Cur. adv. vult.

February 26, 1919. ENNIS J.—

The only question for decision in this case is, upon what basis is compensation to a co-owner to be assessed in a partition suit? The learned District Judge has given the full present value of the improvements, and the plaintiff appeals. It is contended that the assessment should be either the cost of the improvements or the present value, whichever is less.

The Partition Ordinance, No. 10 of 1863, says, section 2, that the plaint is to set forth, *inter alia* " the improvements, if any, which have been made on the property, and by which of the owners "; section 4 provides that all points in dispute are to be determined by the Court; and section 5 gives power to the Court thereafter to issue a commission to a person to partition the land, who is to do so " according to the ascertained proportions of the several owners, and with reference to the value of any improvements made thereon, and the party by whom they have been made."

The Ordinance nowhere makes provision for the payment of compensation, or for the assessment of compensation. Section 5 is merely a direction to the person making the partition, and does not authorize him to decide the value of the compensation. That is a matter for the Court.

The Court must be guided by the common law rules relating to compensation in the absence of any specific direction in the Ordinance. There can be no doubt as to the common law rules in the circumstances. *Voet 10, 3, 3*, shows that on partition a co-owner can claim contribution towards the costs of improvement. The rules have been summarized in Pereira's *Compensation for Improvements, page 76 et seq.*, and the question discussed at page 47 *et seq.* The principle has been applied in Ceylon in the case of *Silva v. Babunhamy* [1] and *Perera v. Pelmadulla Rubber and Tea Co.*[2]

The difficulty in the case is the apparently conflicting decision in *Moldrich v. La Brooy* [3] and *Fernando v. Sleman.*[4] These cases may be regarded as exceptions.

By the common law rule the assessment in the present case must be either the costs of the improvements or the present value, whichever is less. It may be that in the present case the cost of

[1] *(1912) 16 N. L. R. 43.*
[2] *(1913) 16 N. L. R. 306.*
[3] *(1911) 14 N. L. R. 331.*
[4] *(1911) 14 N. L. R. 282.*

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the plantation up to date of action and the present value are practically the same, but it is a matter for the Judge of first instance to decide (note, the only dispute is with regard to the plantation). I would set aside the decree, and send the case back for further decision; the costs of the appeal to abide the result of the further finding.

SHAW J.—

The question raised for our decision in this case is, what is the proper measure of the compensation to be paid to a co-owner of land when the portion of land on which the improvements have been made is allotted to another co-owner in a partition suit ? The learned District Judge has given the full present value of the improvements. The appellant contends that it should be the cost of effecting the improvements, or the present value of the improvements, whichever may be less. The current of judicial authority is strongly in favour of the appellant's contention. In *Perera v. Pelmadulla Rubber and Tea Co.*[1] the precise point under consideration arose for decision, and it was held by Lascelles C.J. and Pereira J. that the rights of a co-owner to compensation in a case such as we are considering is the same as that of a *bona fide* improver of property which is not his own, namely, that he is entitled to either the value of the improvements or to the difference between the original and the enhanced value of the property, whichever is less. In *Silva v. Babunhamy* [2] the same two Judges expressed a similar opinion. The decision in the unreported case, D. C. Chilaw, 783,[3] cited by the learned District Judge in his judgment, is to the same effect.

In that case Withers J., referring to improvements made by a co-owner, said: " If the entire increase in value is due to his expenditure, the whole of the expenditure, but no more, will have to be brought into account. If part only of the increase is due to the outlay, so much only will have to be brought into account. If nothing is due to the outlay, nothing will be brought into account. " In D. C. Colombo 7,904, [4] it was pointed out in the judgment: " The expenditure is not the sole criterion of the amount to be allowed by way of compensation. No more can be allowed than the increased value of the property resulting from the expenditure. " The cases of *Fernando v. Sleman* [5] and *Moldrich v. La Brooy* [6] are referred to, on behalf of the respondents, in opposition to the opinions expressed in the cases I have before referred to. In *Fernando v. Sleman* [5] it was held that the " just valuation," mentioned in section 8 of the Partition Ordinance, of a house sold under the provisions of that section is the present value

[1] *(1913) 16 N. L. R. 306.*
[2] *(1912) 16 N. L. R. 43.*
[3] *S. C. C. Min., July 28, 1896.*
[4] *S. C. C. Min., Nov. 7, 1898.*
[5] *(1911) 14 N. L. R. 282.*
[6] *(1911) 14 N. L. R. 331.*

of the house considered as an improvement. In that case, however, the point raised in the present case was not considered or referred to in the judgments.

In *Moldrich v. La Brooy* [1] it was held that when the portion of the land on which the improvements stand have been allotted to the co-owner who made the improvements, he should not be required to pay compensation to the other co-owners for these improvements. This case raises quite a different point to that raised in the two cases in *16 N. L. R.*, and does not conflict with them. Indeed, Lascelles C.J. was a party to all three decisions.

Under the common law a co-owner could obtain compensation in a partition suit on the same footing as a *bona fide* improver, and the English Courts of Equity gave compensation in a partition suit to an improving co-owner on the same basis as that contended for on behalf of the appellant. It is argued, however, that the whole law on the subject is now contained in the Partition Ordinance, 1863, and that we cannot go outside that Ordinance and refer to the common law to ascertain the basis on which compensation should be made. I am unable to agree with the contention.

The Ordinance makes no provision as to the payment of compensation to co-owners or as to the measure of such compensation. I agree with the opinion expressed by Lascelles C.J. in *Silva v. Silva*,[2] that the Ordinance introduced no change with regard to the rights of co-owners under the Roman-Dutch law to compensate for improvements, and that the improvements referred to in sections 2 and 3 of the Ordinance are improvements for which compensation is payable under the common law. This compensation must, in my view, be estimated on the common law basis.

I agree in the order proposed by my Brother Ennis.

DE SAMPAYO J.—

I am of the same opinion. The question is whether the Partition Ordinance provides for a larger right in a co-owner who has made an improvement than the common law allowed to a *bona fide* possessor. Section 2 requires a person who institutes a partition action to state in the plaint, *inter alia*, the improvements, if any, which have been made on the property, and by which of the owners. The Ordinance contemplates that the Court, at the inquiry into the interests of the various parties, shall ascertain how much more shall be allowed to the improving owner than his original share. There is no express provision for awarding compensation in money, though in the working of the Ordinance it is often necessary, and it has been a recognized practice, to award compensation in money instead of in land. Section 5, in laying down that the Commissioner appointed to carry out the decree shall effect the partition " with reference to the value of the improvements made thereon and the party by

[1] *(1911) 14 N. L. R. 331.*

[2] *(1906) 9 N. L. R. 114, at page 120.*

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whom they have been made," appears to me to have reference to the main object of allotting more land to the improving co-owner in proportion to the compensation sanction by the decree. It does not mean that the Commissioner shall take into account the full present value of the improvements, but that the value of the improvement as allowed by the law shall be considered. This, in reality, is a matter not for the Commissioner but for the Court to determine under section 4 of the Ordinance; that is to say, the Commissioner must follow the direction of the Court. It is true that the Court very often merely declares the right, and leaves it to the Commissioner to ascertain its extent. This, however, is not quite regular, though convenient; but as the Commissioner's report must be considered before final decree is entered, the Court after all has the opportunity to do what the Ordinance requires of it, and allow only such compensation as the law authorizes. When the provisions of the Ordinance are understood in this sense, there is no difficulty in accepting and following the decisions in *Silva v. Babunhamy*,[1] *Perera v. Pelmadulla Rubber and Tea Co.*,[2] and other cases on the same point.

Set aside.