

1933

*Present : de Silva A.J.*CHARLES *v.* THEMANIS *et al.*

218—C. R. Panadure, 1,449.

Co-owner—Objection to another building on common property—Right to an injunction—Cannot be compelled to bring partition action.

A co-owner, who objects to another co-owner, building upon the common property is entitled, in an action for a declaration of title, to ask for an injunction restraining the defendant from building.

He cannot be compelled in the circumstances to institute a partition action.

A PPEAL from a judgment of the Commissioner of Requests, Panadure.

Ranawake, for plaintiff, appellant.

Rajapakse, for defendant, respondent.

Cur. adv. vult.

March 27, 1933. DE SILVA A.J. —

The plaintiff instituted this case for a declaration that he was entitled to an undivided $\frac{1}{8}$ plus $\frac{1}{24}$ of a land called Medawatta. He stated in the 9th paragraph of the plaint that the defendant denied his title and was "unlawfully and forcibly and against the plaintiff's consent" attempting to put up a house on the land. He stated further that the defendant's object was to prevent him from being allotted that portion of the land should a partition be made. It will appear from what follows that this last averment was unnecessary. He asked among other things for an injunction restraining the defendant from building a house. It appears from the proceedings of August 3, 1932, that the defendant's position was that he had acquired a title by prescription to a defined portion of land. It is not clear what this portion is but presumably it is the portion on which he is said to have attempted to build a house. An objection was taken by the defendant that the plaintiff was not entitled to maintain this action and that his only remedy was a partition action. This objection was upheld by the learned Commissioner who dismissed the plaintiff's action.

It was laid down by Pereira J. in the case of *Goonewardene v. Silva*¹, that a co-owner may not put up a building on the common property in defiance of an objection expressed by another co-owner. It is one of the disadvantages of common possession that a co-owner may not build when another co-owner objects. Any co-owner who is dissatisfied with this incident of common ownership is free to bring a partition action. It is not correct that the co-owner who objects to the building must resort to a partition action. He is entitled in law to prevent building and to ask for an injunction against a co-owner who proposes to build. This view was taken by Shaw J. in the case of *De Silva v. Karaneri*².

Apart from the question of the injunction, if a co-owner asserts title to an undivided share of the land and this assertion is disputed by another co-owner, the first co-owner is entitled to bring an action to have the dispute settled. No doubt, a very convenient form of action is a partition action but a co-owner is not prevented from bringing an action for declaration of title. Indeed it appears that he must bring the latter action, and not a partition action, where he claims damages. It is frequently the case that when an action for declaration of title is filed another co-owner institutes a partition action, and, in appropriate circumstances, it is right that the action for declaration of title should be laid over pending the partition case. It is, however, clear that a co-owner whose rights are disputed by another co-owner is not compelled to bring a partition action.

I set aside the order of the learned Commissioner. He will proceed to find whether in fact the plaintiff is entitled to an undivided share of the land as stated by him in his plaint. If he is so entitled, an injunction will issue restraining the defendant from building on the land. If necessary, after such inquiry as he thinks fit, he will issue an interim injunction

¹ (1914) 17 N. L. R. 287.

² 1 Ceylon Law Recorder p. 28.

restraining the defendant from building pending the decision of the action. The learned Commissioner will also go into the question of the damages which are claimed.

The appellant will be entitled to the costs of this appeal and to the costs of the proceedings of August 3, 1932. The learned Commissioner will fix the latter in such sum as he thinks fit.

Set aside.

