

Present: Lascelles C.J. and Pereira J.

SILVA v. BABUNHAMY *et al.*

74—D. C. Galle, 9,918.

Co-owner—Right to build on common land—Right to compensation—Sale of house—Right to soil.

A co-owner has no right to build on the common property without the consent of the other co-owners. Where a co-owner builds with the consent and acquiescence of the other co-owners, he has no greater right than a mere improver of property that does not belong to himself; he can claim either the cost of the improvement or the difference between the original and the enhanced value of the property, whichever is less.

Where the Fiscal sold under a writ "the tiled and whitewashed house bearing assessment No. 344 and standing on the land Wellawalawatta,"—

Held, that the property sold was not the mere materials of the house to be taken down and removed, but the house as a whole (as a fabric or structure as it stood on the land) without the portion of land on which it stood.

PEREIRA J.—A conveyance of land includes everything on it and below it, unless something is expressly excluded; but I am not aware that there is any authority in support of a converse proposition, and I hold that in the present case the appellant bought no more than the house; that is to say, he bought the fabric or structure, and not the portion of land on which it stood.

THE facts appear sufficiently from the judgment of Pereira J.

Bawa, K.C., for 47th defendant, appellant.

H. A. Jayewardene, for 9th defendant, respondent.

Cur. adv. vult.

October 16, 1912. PEREIRA J.—

In this case the question is how much the 47th defendant is entitled to be paid for his interest in house marked F in plan No. 2,764A. The house stands on a small portion of the land known as Wellawalawatta, which has been dealt with in this case under the Partition Ordinance. It appears that originally a partition of the whole land was decreed, but, later, with the consent of all the parties, a decree for the sale of the whole land and distribution of the proceeds was entered up. The house in question belonged to the 9th defendant who was a co-owner, with the other parties to the action, of the land referred to above. During the pendency

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of the partition proceedings, the house was sold on a writ against the 9th defendant and purchased by the present appellant. I may here observe that it has been held by this Court that such a sale is not obnoxious to the provisions of section 17 of the Partition Ordinance.

Now, in the first place, it is necessary to ascertain what was actually sold by the Fiscal to the 47th defendant, because it was contended by his counsel in appeal that by his purchase he became owner, not only of the house, but of the portion of land on which it stood, and he himself in his evidence says that he bought "the house and the soil covered thereby." He continues: "At the time of my purchase I so understood." The best evidence of what was purchased by the appellant is the Fiscal's transfer in his favour dated October 25, 1911. In it the property sold is described as "the tiled and whitewashed house of twenty-five feet in length and twelve feet in breadth, and bearing assessment No. 344, and standing on the land called Wellawalawatta." This description makes it clear that the property purchased by the appellant was the house F on plan 2,764A; that is to say, the property purchased was not the mere materials of the house to be taken down and removed, but the house as a whole—as a fabric or structure as it stood on the land named. Such a purchase, it was contended, carried with it title to the piece of land covered by the building. With reference to that contention, I need only say that I am aware that there is authority for the proposition that a conveyance of land includes everything on it and below it, unless something is expressly excluded (*cujus est solum ejus est usque ad cælum et inferos*); but I am not aware that there is any authority in support of a converse proposition, and I hold that in the present case the appellant brought no more than the house; that is to say, he bought the fabric or structure, and not the portion of land on which it stood.

It was further contended by the counsel for the appellant that at the present stage of proceedings in this case the appellant was entitled to receive in respect of the house in question whatever his predecessor in title, the 9th defendant, was entitled to receive for it as a co-owner of the land, the assumption underlying that contention being that a co-owner who builds on the common property was entitled to something more than the mere cost of improvements. I am not prepared to accede to that proposition. A co-owner has no right to build on the common property without the consent of the other co-owners (see *Silva v. Silva*¹ and *Voet 10, 3, 7*), and where he builds with the consent and acquiescence of the other co-owners, I am not prepared to say that he has any greater right than a mere improver of property that does not belong to himself. In the case of the latter, it is well-established law that he can claim either the cost of the improvement or the difference

¹ 6 N. L. R. 225.

between the original and the enhanced value of the property, whichever is less. There is good reason for this provision of the law. A person will not be allowed by building, on his own initiative and account, on another's land to benefit by the enhancement in value of what does not belong to him. At the same time he will not be allowed, by putting up, let us assume, an unsuitable building, which does not in the least degree enhance the value of the land built upon, to place on the owner of the land the burden of making good the full cost of the building. Hence the reason for the rule mentioned above. But whatever the rule may be, I am not prepared to hold that the present applicant is exactly in the same position as the 9th defendant would have been in but for the sale. He bought no more than the house, and he is only entitled to the present value of it. He himself says in his evidence that the mere structure is not worth so much as Rs. 100, and the evidence of his own witnesses is very much to the same effect. In these circumstances, I would affirm the order appealed from.

LASCELLES C.J.—I entirely agree.

Appeal dismissed.

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PERBIA J.

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