1950 *Present :* **Gratiaen J. and Gunasekara J.**

ELPI NONA, Appellant, *and* PUNCHI SINGHO *et al.*, Respondents

S. C. 205—D. C. Avissawella, 5,272

Co-owner—His right to build on the common property—Scope of such right.

Where certain co-owners claimed a mandatory injunction for the demolition of a building which had been put up by another co-owner on the common land contrary to their express wishes—

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.

APPEAL from a judgment of the District Court, Avissawella.

N. E. Weerasooria, K.C., with *Frederick W. Obeyesekera* and *B. S. C. Ratwatte*, for the defendant appellant.

No appearance for the plaintiffs respondents.

Cur. adv. vult.

November 21, 1950. GRATIAEN J.—

The plaintiffs are jointly entitled to an undivided 11/24 share of the land described in the schedule annexed to the plaint. The defendant owns an undivided $\frac{1}{4}$ share, while the remaining interests belong to a man named William Singho who is not a party to those proceedings.

The plaintiffs sued the defendant for a declaration that they were jointly entitled to an undivided 13/24 of the land, but in the course of the trial their claim was restricted to the admittedly correct share which is 11/24. The outstanding dispute relates to a building which the defendant had in February, 1948, commenced to erect on the common land for the exclusive use of herself and her family. It was completed before the trial commenced. The plaintiffs claimed a mandatory injunction for the demolition of this building. After trial the learned District Judge entered decree against the defendant ordering that the building should be demolished, and the present appeal is from the order for demolition. I am far from satisfied that such a decree could in any event be properly entered in proceedings to which one of the interested co-owners had not been joined as a party, but the appeal can be decided without expressing a definite opinion on this point.

Mr. Weerasooriya was content to argue the defendant's appeal on the basis that the relevant facts are correctly set out in the evidence led by the plaintiffs at the trial. His submission is that in law these facts do not justify the mandatory injunction ordered by the learned Judge. The plaintiffs were unfortunately not represented at the hearing of the appeal.

There can be no doubt that the defendant erected the building in question contrary to the express wishes of the plaintiffs, and that she had been forewarned of the plaintiffs' intention to seek the intervention of the Court should she persist in ignoring their protests. The building is described in the 1st plaintiff's evidence as " a big wattle and daub house with a cadjan roof .....worth about Rs. 300 ". There is no evidence as to the ground space covered by this building or as to its situation in relation to the plantations on the land. The plaint had alleged that it had been erected on that portion of the land " where the plaintiffs' plantations stand, ... causing irreparable damage to them ", but no attempt was made at the trial to substantiate this allegation. The case for the plaintiffs, as I understand it, was presented at the trial on the assumption that under the Roman Dutch Law a co-owner is *under no circumstances whatever* entitled to put up a building on the common land without the consent of all his co-owners; and that in the absence of such consent any co-owner is entitled as of right to demand its demolition. No material was placed before the Court for the purpose of establishing that the erection of the building had caused any material damage to the plaintiffs, or that it interfered with such co-proprietary rights as the plaintiffs had hitherto exercised on the land. In this state of things it is necessary to consider whether the Roman Dutch Law does go so far as to vest a co-owner with an absolute right to prevent other co-owners from building on the common land.

The rights and obligations of co-owners in relation to the common land have been considered in many earlier decisions of this Court, but it is perhaps convenient in the first instance to examine the views of the jurists on which these decisions are based. According to Grotius (*3-28-4;* Vide *Lee's Translation Vol. 4, 437*) " So long as the community (of ownership) continues, an obligation exists to use the thing fairly for the

common advantage ". Wille (*Principles of South African Law, page 159*) states with reference to this principle that each co-owner is " entitled to make a reasonable use of the common property, *proportionate to his interest, in accordance with the object for which such land is destined* ". The limitations on the right of a co-owner to enjoy the common land are prescribed by Voet who declares (*10-3-7*) that " no innovation can be made with regard to the common property by one owner if the other objects, and the position at law of the person forbidding is the better of the two; so that if anything new (*quid novi*) is done or ordered to be done to it by one of the owners against the other's wish, he can be compelled to restore the property to its original condition ". It is on the application of this principle that co-owners have been held by the South African Courts to be precluded from converting pasture into arable land or from building upon such pasture land unless the other co-owners consent. (*Botha, Smith at al. v. Kinnear—Kotze, 215*).

It seems to me that in accordance with what has been laid down by the jurists every co-owner has the right to enjoy his share in the common land *reasonably and to an extent which is proportionate to his share*, provided that he does not infringe the corresponding rights of his co-owners; moreover, neither he nor they can, except by mutual consent, apply the common land to new purposes *in such a manner as to alter the intrinsic* character of the property. Should the erection of a building, for instance, (or, for that matter, any assertion of a co-proprietary right) be proved to constitute an interference with the legitimate use of the property by an objecting co-owner, a cause of action accrues to compel the wrongdoer to restore the *status quo*. The question whether in any particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors, and cannot, in my judgment, be solved as an abstract question of law.

If the plaintiffs had proved their allegation that the building had, despite their protests, been erected on their plantations in the common land, I do not doubt that they would have been entitled to the relief they have claimed in these proceedings. In the absence, however, of proof that their rights as co-proprietors have been infringed in this or in any other way, I am unable to discover a legal basis on which they can be declared entitled in law to a mandatory order for the demolition of the building concerned. The cause of action in proceedings of this kind is based on the infringement of the rights of the objecting co-owners and not on 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.

I now proceed to examine some of the earlier decisions of this Court affecting the question. In *Siyadoris v. Hendrick* [1], Bonser C.J. took the view that the law does not prevent one co-owner from the use or enjoyment of the common property in such a manner as is natural and necessary under the circumstances. *Silva v. Silva* [2] is not in conflict with this view, although a mandatory injunction to demolish a building constructed against the wishes of the

[1] (*1896*) *6 N. L. R. 275.* [2] (*1903*) *6 N. L. R. 225.*

co-owners was ordered in the circumstances of that particular case. " I would not say that in no case can a co-owner build without expressed consent ", said Moncreiff J. " Building might be a natural and necessary act ..... I conceive that consent of the co-owners would not be required for an act sanctioned by the practice of the co-owners, or which is a natural or necessary element of their co-ownership.". Similarly, Layard C.J. took the view that the building objected to in that case was " an act prejudicial to the community of the land because it converted part of the land to another use from that to which it was previously devoted ". In the present case there is no evidence of such conversion, and one cannot lose sight of the fact that in many small holdings held in common by villagers in this country, it is customary for some at least of the co-owners to reside on the common land in buildings constructed for the purpose by themselves or their predecessors. These buildings no doubt remain joint property so long as the bond of common ownership exists but it is well settled law that during the co-parcenary each such building may be enjoyed exclusively by those for whose benefit they had been constructed.

In *Kathonis v. Silva*,[1] Ennis A.C.J. (De Sampayo J. concurring) expressly held that " a co-owner has the right to build and live on the common land, *though presumably this right is limited to the accommodation which his share would provide when convenience of possession is considered* " (Vide also *Girihagama v. Appuhamy* [2]). In *Goonewardene v. Goonewardene* [3] Wood Renton J. stated that the decisions in *Siyadoris v. Hendrick* (supra) and *Silva v. Silva* (supra) had " constantly been followed in later cases ", and agreed that " the law does not prohibit one co-owner from the use and enjoyment of the property in such a manner as is natural and necessary in the circumstances ". A mandatory injunction was granted by Hearne J. and Fernando A.J. in *Muthaliph v. Mansoor et al.*[4] in respect of a building erected on the common land by one co-owner without the consent of the others, but an examination of the facts set out in Fernando A.J.'s judgment shows that the building concerned had been erected so as to obstruct a passage which had for many years been reserved to provide access to other buildings on the land. Similarly, in *Perera v. Podisingho* [5], certain objecting co-owners successfully obtained an order of court for the demolition of a building which was found to enjoy a road-frontage disproportionate to the share to which the defendant was entitled. In each of these cases, therefore, one finds that a clear infringement has been established by the evidence. With great respect, I think, that the contrary view expressed by Pereira J. in *Goonewardene v. Silva*, [6] to the effect that " a co-owner has no right whatever to build on the common property without the consent of his co-owners " is unacceptable if it purports to lay down a general proposition of law.

The plaintiffs in the present action have failed to establish that by erecting a building on the common land, the defendant has infringed their rights as co-proprietors. In my opinion, the onus of proving such an infringement fell on the plaintiffs. Under the Roman Dutch law

[1] *(1919) 21 N. L. R. 452.*
[2] *(1939) 14 C. L. W. 11.*
[3] *(1913) 17 N. L. R. 143.*
[4] *(1937) 39 N. L. R. 316.*
[5] *(1946) 47 N. L. R. 347.*
[6] *(1914) 17 N. L. R. 287.*

a party applying for an interdict is required to establish *inter alia* " that the interference or injury complained must clearly be of such a nature as to prejudice the applicant in his rights ". (*Nathan on Interdicts, page 30*). If the English law were to apply, the position would be precisely similar.

I would set aside the judgment of the learned District Judge and amend the decree appealed from by deleting that portion of it which orders the demolition of the building erected by the defendant on the common land. The plaintiffs should pay to the defendant her costs in this Court and in the Court below.

GUNASEKARA J.—I agree.

Appeal allowed.