

1954

Present: Nagalingam S.P.J. and Fernando A.J.

W. AGNES PERERA, Appellant, and W. EDWARD PERERA
et al., Respondents

S. C. 94—D. C. (Inty.) Colombo, 6,099/P

Co-owner—Right to build on the common land—Order for demolition of building—Propriety of seeking it in partition action.

In a partition action, the Court is entitled to order the demolition of a building constructed by a co-owner contrary to the protests of the other co-owners and in violation of their rights as co-owners.

Where a co-owner puts up a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation. *

A^oPPPEAL from an order of the District Court, Colombo.

The appellant, a co-owner, had put up a building on the common land in violation of the rights of the other co-owners to have an adequate road frontage to enable them also to put up buildings on the portion of the land which, it was common ground, was the most valuable part as a building site.

H. V. Perera, Q.C., with *H. W. Jayewardene, Q.C.*, and *D. R. P. Goonetilleke*, for the 1st defendant appellant.

N. E. Weerasooria, Q.C., with *Vernon Wijetunge* and *S. Sharvananda*, for the plaintiff respondent.

Cur. adv. vult.

December 10, 1954. NAGALINGAM S.P.J.—

The main point for decision on this appeal is whether an order for demolition of a building constructed by one co-owner contrary to and in spite of the protests of another co-owner can be legally made in an action for partition. Learned Counsel for the 1st defendant-appellant contends that where one co-owner builds or is alleged to have built in defiance of the protests of another co-owner, the remedy of the latter co-owner is to institute an action for an injunction to prohibit the continuance of the building and, if necessary, for a mandatory order to compel the demolition of the structure or any part thereof that may have been put up, but not to commence an action under the Partition Ordinance. No authority however for this proposition has been cited and there is nothing in the writings of Roman Dutch Jurists to support this view. I should have thought that a partition action would be the most appropriate form of

proceedings to determine all the questions that arise in connection with an allegation that one co-owner has wrongfully put up buildings infringing the rights of the other co-owners.

Any building put up on common property by a co-owner accedes to the soil and itself becomes common, but of course the co-owner who put up the building is entitled to the use and enjoyment of it until such time as common ownership is put an end to ; and in fact at a division of common property the co-owner who has put up a building, though erected contrary to the wishes of the other co-owners, is entitled to be allotted that building if he can satisfy the Court that having regard to the nature, extent and amenities available in respect of the land, he could not be said to have violated the rights of his co-owners by erecting the structure.

It is obvious that such a question as whether the co-owner who has put up the building without the consent of his co-owners should be permitted to retain it or not in appropriate circumstances cannot be as conveniently determined in a proceeding which has for its object the grant either of a prohibitory injunction or a mandatory order as in a partition action.

The absence of judicial opinion on this question may be ascribed to the view that the proposition being so evidently patent the matter has never before received judicial attention. But there is a case which may be regarded as deciding the converse of the proposition contended for on behalf of the appellant. That is the case of *de Silva v. Caraneris*.¹ That was a case where one co-owner brought an action for declaration of title for his undivided shares and for an injunction against the defendant co-owner restraining him from building on the common land. In granting the injunction, Shaw J. expressed the view that where a co-owner meets with opposition in putting up a building on the common land "his proper method would be to apply for a partition of the land when he would be able to do whatever he likes with the portion allotted to him"—a view which fully recognises the suitability of partition actions for settling disputes arising between co-owners even in regard to their right to build on the common land.

I am of opinion that the learned Judge exercised his jurisdiction properly in these proceedings in adjudicating upon the rights of parties in regard to the building put up by the 1st defendant-appellant in opposition to the wishes of her co-owners.

During the course of the argument, in view of the very substantial nature of the building that has been put up I was inclined to uphold the submission on behalf of the appellant that as she was not unwilling that while building No. 3 in the plan may be allotted to her, order might be made allotting buildings Nos. 1 or 2, or both, to her co-owners subject to the latter paying her compensation as the quantum of such compensation would not be so heavy as if lot 3 had been allotted to them ; we postponed delivering judgment in the hope that the parties might arrive at a settlement on the footing of that submission, but the parties have not been able to compose their differences. It therefore becomes necessary to decide the rights of parties on the basis of legal considerations.

¹ (1918) 1 Ceylon Law Recorder 28.

I think it is settled law that where a co-owner puts up or becomes solely entitled to a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it.

Building No. 1 was allotted to the 1st defendant under an earlier partition decree and she is the owner of it. Building No. 2 was erected by her not only without protests on the part of the plaintiff and the 2nd defendant, but also without violating, it may be said, the rights of the other co-owners. The direction of the learned District Judge that these buildings should be allotted to her at the partition is unobjectionable. In this view it is easy to see that in putting up building No. 3, the 1st defendant has, as has been found by the learned District Judge—a finding which has not been challenged on appeal—committed a flagrant invasion of the undoubted rights of her co-owners to have if not a proportionate, at least an adequate, in so far as circumstances will permit, road frontage along the main thoroughfare, to enable them as well to put up one or more buildings on the portion of the land which, it is common ground, is the most valuable part as a building site.

In this view of the matter, it cannot be said that the order of the learned District Judge, which is in conformity with the principles laid down in the cases of *Silva v. Silva*,¹ *Muthaliph v. Munsoor et al.*,² and *Perera v. Podisingho*,³ is liable to be disturbed. The judgment of the learned District Judge is therefore affirmed and the appeal is dismissed with costs.

FERNANDO A.J.—I agree.

Appeal dismissed.
