

1923.

Present : Jayewardene A.J.

SOPI NONA v. PETHANHAMY et. al.

252—C. R. Kalutara, 9,860.

Co-owner—Right to build on common land—Right to eject trespasser from house so built.

If a co-owner exercises his right and builds a house for his private use on the common land, he may eject any other co-owner who attempts to occupy that house without his permission.

*Kathonis v. Silva*¹ followed.

IN this case the plaintiff-respondent sued the defendants-appellants for declaration of title to an undivided one-fourth share of the house standing on a piece of land. The plaintiff stated that her husband, Podisingho, who was owner of half share of the said house, died leaving as his heirs herself (his widow) and a minor child.

The defendants-appellants, on the other hand, claimed title to the whole house on the footing that the said house was built by Podi Singho's and Andris's mother, Pethanhamy, the first defendant, and she by her deed of transfer No. 777 dated May 23, 1922, sold and transferred the same together with her soil share 1/24th to Emi Nona Rodrigo, the second defendant, the wife of the first defendant's eldest son, Andris, the third defendant above named. The case went to trial on the following issues :—

- (1) Is the plaintiff entitled to a 3/96 share of the land Karandagahawatta and to 1/4 share of the house on it ?
- (2) Damages, if any ?
- (3) Can the plaintiff maintain this action to vindicate title to a 1/4 share of the house inasmuch as he is entitled only to a 3/96 share of the land ?

The learned Additional Commissioner of Requests (W. H. B. Carbery, Esq.) held as follows :—

On issue (1) I have not the slightest hesitation in holding on the oral evidence adduced by the plaintiff, that the house in dispute was a new one, built on the land Karandagahawatta about seven years ago, by the two brothers—Podi Sinno, the late husband of the plaintiff, and Andris (third defendant)—each being entitled to a half share—

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Now, on the law issue (3) the case cited by learned counsel for the defence, 14, N. L. R. 268, does not, in my opinion, touch the present case. That was an action brought for the partition of certain buildings on a land under the provisions of the Partition Ordinance, and the

¹ (1919) 21 N. L. R. 452.

Appellate Court very correctly held that the plaintiffs could not maintain such an action without making all the co-owners of the soil parties as well.

But in the case, *21 N. L. R. 452* cited by learned counsel for the plaintiff, there is a direct holding that such an action as the present can be maintained, even as to ejection of one who is not a co-owner in the building. The plaintiff's counsel in the present case does not ask for ejection.

Justice Ennis on page 453 says: "A co-owner has the right to build and live on the comr on land. Presumably this right is limited to the accommodation which his share would provide when convenience of possession is considered. If a co-owner exercise his rights and builds a house for his private use on the land, I am quite unable to see why he should not eject any other co-owner who attempted to occupy that house without his permission." Nothing could be more explicit. I would therefore answer issue (3) in the affirmative.

J. S. Jayewardene, for appellants.

H. V. Perera, for respondent.

October 31, 1923. JAYEWARDENE A.J.—

This is an action between co-owners. The plaintiff, the widow of one Podi Singho, who is entitled to a share in the land called Karandagahawatta, sued the defendants, the first of whom is her mother-in-law, the second her sister-in-law, being the wife of the third, who is her brother-in-law. She claims to be declared entitled to a share of the land, and also to a quarter share of a house standing on the land. Her right to a share in the land is not disputed, and the only contest is with regard to her right to a quarter share of the house. Her case is that the house on the land was built by her husband and her brother, the third defendant, and that she was conducted to his house on her marriage, and that she lived there for seven or eight years with her husband, and after her husband's death the defendants would not allow her to enter the house. She claimed a declaration of title, restoration to possession, ejection of the defendants, and damages. The defendants' case was that the house was not built by the first defendant's husband. The learned Commissioner has found that the allegation of the plaintiff on this point is true, and that her husband and the third defendant built the house, and that as one of the heirs of the husband she is now entitled to a quarter share of the house, and he decreed her entitled to this quarter share and ordered her to be restored to possession, and gave her the damages which are given in the decree. The defendants appeal, and it is contended for them that the plaintiff and the defendants are co-owners of the soil, and it is not competent for the plaintiff to bring an action for declaration of title to any improvement effected by a co-owner. The law on the right of a co-owner in these circumstances to sue for a specific share or the entirety of the improvements made by him or his predecessor in

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title is not in a very satisfactory state. The learned Commissioner followed the latest case upon the subject, namely, a judgment of His Lordship the Acting Chief Justice in *Kathonis v. Silva (supra)*, where, without any reference to the previous authorities, he laid down that :—

“ A co-owner has a right to build and live on the common land. Presumably this right is limited to the accommodation which his share would provide when convenience of possession is considered. If a co-owner exercises his right and builds a house for his private use on the land, I am quite unable to see why he should not eject any other co-owner who attempted to occupy that house without his permission.”

De Sampayo J. agreed with this judgment.

This principle, no doubt, is in direct conflict with the principles laid down in numerous cases referred to by counsel for the appellants in this case, but I feel that it lays down a reasonable rule, and a rule which is consistent with the customary method of dealing with improvements effected by co-owners of land in this country. Perhaps the matter requires final settlement before a Full Court, but until this is done I am content to follow the judgment in *Kathonis v. Silva (supra)*, which, as I said, lays down a practical rule.

In the circumstances, I hold that the Commissioner was right in declaring the plaintiff entitled to the quarter share, and also to damages. Of course, the plaintiff is not entitled to an order for the ejectment of the third defendant or his wife, the second defendant, from the house, and in this particular case, I do not think the first defendant can be treated as a stranger, and she also is not liable to be ejected from the premises, but the plaintiff is entitled to be restored to the possession of her quarter share. Until that is done the defendants will pay her the damages decreed by the Commissioner.

I would dismiss the appeal, and affirm the judgment.

The respondent is entitled to her costs.

Appeal dismissed.

