1957 *Present :* **Sansoni, J., and L. W. de Silva, A.J.**

KANAGARATNAM, Appellant, *and* SUPPIAH *et al.*, Respondents

S. C. 262—D. C. Nuwara Eliya, 3181

Ownership of buildings—Exclusive right of soil owner—Erection of building by several persons—Claim to co-ownership of building—Maintainability—Jus superficiarium.

A building cannot be owned apart from the land on which it stands. Accordingly, where several persons join in erecting a building on a land, one of them who has no interest in the land cannot maintain an action against the others to be declared entitled to an undivided share of the building. Nor can he claim, for the first time in appeal, a *jus superficiarium*, especially when there is no evidence of any agreement between him and the soil owner.

APPEAL from a judgment of the District Court, Nuwara Eliya.

H. W. Jayewardene, Q.C., with *P. Somatilakam*, *D. R. P. Goonetilleke* and *P. Naguleswaram*, for the substituted defendants-appellants.

S. J. V. Chelvanayakam, Q.C., with *E. B. Wikramanayake, Q.C.*, and *D. J. Tampoe*, for the plaintiff-respondent.

Cur. adv. vult.

June 28, 1957. SANSONI, J.—

The plaintiff came into court in this action claiming that he and the three defendants built a theatre in Nuwara Eliya called and known as the Tivoli Theatre, and equipped it with plant and machinery. He further pleaded that he and the defendants became entitled to the said theatre together with the plant and machinery in the proportion of ¼ share each. He complained that the 1st defendant as a co-owner has, since June 1948, been in possession of and managed the theatre and collected the rents and profits for the benefit of himself and the other co-owners, but has at the same time unlawfully appropriated to himself all the mesne profits and rents of the theatre and refused to give the plaintiff his share. The plaintiff accordingly claimed that he had a cause of action to sue the 1st defendant for a declaration of title to, and possession of, an undivided ¼ share of the theatre and the mesne profits and rents. No relief was claimed against the 2nd and 3rd defendants whom the plaintiff has joined because he claimed they were co-owners.

In his prayer the plaintiff prayed :—

(1) that he be declared entitled to ¼ share of the theatre and the plant and machinery thereof;

(2) that he be placed in quiet possesson of the said ¼ share ;

(3) that the 1st defendant be ordered to account to the plaintiff for his share of the rents and profits from June 1948 up to date of action and for judgment against the 1st defendant in such sum as may be found due at such an accounting.

The first defendant filed answer denying that the plaintiff and the defendants are co-owners. He pleaded that neither the plaintiff nor the 2nd and 3rd defendant had any right in law in the said building. He further pleaded that he was the lessee of the land on which the building stands on a deed of lease of 1946, and that the plaintiff and the 2nd and 3rd defendants with full knowledge of that fact contributed money and put up the said building along with the 1st defendant, with a view to carrying on business at the theatre. He pleaded that the claim for an accounting was not maintainable as the agreement to carry on business at the theatre was not in writing, and the said business was a partnership, of which the capital was over Rs. 1,000.

The case went to trial on several issues one of which was :— (10) Can the plaintiff ask for a declaration of title without a notarial writing giving him any share of the premises ? After the plaintiff's case was closed, his counsel wanted to raise an issue as follows :—Is the 1st defendant in possession of the Tivoli theatre partly on his own behalf and partly on behalf of the plaintiff and the 2nd and 3rd defendants as trustees ? The trial Judge then himself raised the question whether an action brought by a co-owner for a declaration of title to a share of a building could be properly joined with a claim for an accounting of the profits of the business which had been run in that building.

After hearing argument, he held that the plaintiff had violated the provisions of section 35 of the Civil Procedure Code by joining these claims without the permission of the Court. The plaintiff's counsel was given an opportunity to amend the plaint by striking out his claim for an accounting apparently because, as appears from the reasons given in the order, he had invited the Court, if it held that there was a misjoinder, to strike out the additional claim for an accounting and allow the plaintiff to proceed with the action for a declaration of title to the building. The Judge accordingly decided that the case should be confined to deciding what fractional share, if any, the plaintiff was entitled to in the building. He added that in these circumstances the issue as to whether the 1st defendant held the lease in trust for the plaintiff and the 2nd and 3rd defendants, did not appear to arise or be relevant.

The case was thereafter called in Court and the plaintiff's counsel moved to amend the plaint by confining his action to one for a declaration of title to ¼ share of the theatre building, for possession of that share, and for costs : the claim for an accounting and for such sum as may be due on an accounting was therefore deleted. The application was made without prejudice to the plaintiff's right to canvass the order already made in the final appeal if necessary. The trial was resumed and the 1st defendant's case was heard and judgment thereafter given. In his judgment the Judge held that the parties were co-owners of the building and that there was no legal objection to the plaintiff being declared entitled to his fractional share of the building as against his co-builders. He also held that the absence of a notarial agreement was no bar to the plaintiff making a claim to the building. He declared the plaintiff entitled to a specific share of the building and its equipment. The 1st defendant has appealed, and as he died pending the appeal his heirs have been substituted as the appellants.

I think the learned Judge was in error when he said that " the ownership of a building apart from the site on which it stands is well known to our law. It is called the right of *superficies* ". It is clear beyond doubt that our law does not recognize the ownership of a building apart from the land on which it stands. In *Samaranayake v. Mendoris* [1] Drieberg J. so held, and, if I may adopt some words in his judgment, if at the time this theatre building was erected the plaintiff had no interest in the land, he cannot possibly be owner of the building in any sense, for it became the property of the soil-owner.

At the argument before us, counsel for the plaintiff-respondent seemed to accept this as being the correct position in law, but he claimed that the plaintiff had the *jus superficiarium* which he had acquired by virtue of having erected the building. He submitted that the action should be regarded as having been brought on an executed consideration. He relied on *Samarasekera v. Munasinghe* [2] and *Perera v. Fernando* [3].

I see several objections to this contention. The chief is that the plaintiff's claim is to be declared entitled not to a *jus superficiarium* but to an undivided ¼ share of the building. He cannot be allowed at this stage

[1] *(1923) 30 N. L. R. 203.* [2] *(1954) 55 N. L. R. 559.*
[3] *Ramanathan's Reports (1863–68) 83.*

to make out a new case which is quite different from the one to be found in his plaint. The next objection is that, even if such a claim could be entertained at this stage, the plaintiff does not rely on either a notarial document or on prescription as the foundation of his claim. I do not think there is any other mode of acquisition of such a right. The argument that such a servitude as the *jus superficiarium* can also be created by a non-notarial agreement between the builder and the soil-owner was put forward in *Samarasekera v. Munasinghe* [1]. I find great difficulty in accepting such an argument. In any event, it is not suggested that in the present case there was an agreement of any sort between the plaintiff and the soil-owner.

For a similar reason, namely, that this is not an action between the builder and the soil-owner, the case of *Perera v. Fernando* [2] does not apply. That is the leading case on the maintainability of an action for use and occupation of a land even where there is no notarial lease. Such an action is regarded as an action for compensation, and rests on the principle that " where there is no legal obligation to do a future thing, yet if one has in fact enjoyed all the advantages of an agreement, that forms a moral obligation sufficient to support a promise notwithstanding the statute ". But in what sense can it be argued that the present action for declaration of title is one for compensation ? The plaintiff's complaint seems to be that the 1st defendant enjoyed all the advantages of the business which was conducted in this theatre building and has appropriated the rents and profits. But in this situation his claim should surely be not for the building, of which even the 1st defendant is not the owner, but for the money which came into the 1st defendant's hands. But that is the very part of the prayer to the plaint which the plaintiff abandoned in the course of the trial. I would therefore hold that the decree under appeal which declares the plaintiff entitled to a share of the theatre building and its equipment must be set aside.

Cross objections under section 772 of the Code were filed by the plaintiff-respondent, in which he complained that the trial Judge was wrong in disallowing the issue whether the 1st defendant held his lease in trust for the plaintiff and the 2nd and 3rd defendants. Clearly the cross objections are not objections to the decree but to an order made in the course of the trial. In such a case it was the duty of the plaintiff to have filed an appeal against the order in question if he was dissatisfied with it, and it was for this reason that at the hearing of the appeal we decided that we could not entertain any argument in support of the cross objections.

I would therefore allow this appeal, set aside the decree appealed against, and direct that the plaintiff's action be dismissed. The appellants are entitled to their costs in both Courts against the plaintiff-respondent.

L. W. DE SILVA, A.J.—I agree.

Appeal allowed.

[1] *(1945) 55 N. L. R. 559.*

[2] *Ramanathan's Reports (1863-68) 83.*