1957 *Present:* K. D. de Silva, J. and H. N. G. Fernando, J.

H. G. R. PODI APPUHAMY and another, Appellants, *and* H. G. R. DANIEL APPUHAMY and another, Respondents

S. C. 106—D. C. Avissawella, 827/P

Partition action—Interlocutory decree entered—Right of a co-owner to effect improvements thereafter.

Where interlocutory decree has been entered in a partition action, a party to the decree is not entitled to claim as against the other parties the ownership of, or compensation for, improvements made on the common property subsequent to the date of the interlocutory decree.

APPEAL from a judgment of the District Court, Avissawella.

G. T. Samerawickreme, for 4a and 4b Defendants-Appellants.

Miss Maureen Seneviratne, for 1st and 8th Defendants-Respondents.

Cur. adv. vult.

December 20, 1957. K. D. DE SILVA, J.—

This action which is for the partition of the land called Phalagederawatta in extent 2 roods and 19 perches and depicted in plan No. 724 was instituted in the year 1929 and the interlocutory decree was entered on February 15, 1932. However, for various reasons which it is unnecessary to detail, the proceedings thereafter were continued in a very dilatory manner and the commission for the final partition was executed only in the year 1949. The scheme of partition submitted by the Commissioner is plan No. 1081 dated August 27, 1949.

By the interlocutory decree Serahamy the 4th defendant was allotted an undivided 1/16th share of the land together with the thatched house marked No. 3 used as two boutique rooms while Daniel Appu the 1st defendant was allotted an undivided 1/6th share of the land and house No. 2 and the plantations.

The 4th defendant died sometime in the year 1935 leaving as his heirs two children Podi Appuhamy and Dingiri Menike and they were substituted in his place as 4a and 4b defendants respectively on August 18, 1948. The 4a and 4b defendants by deed 1R1 dated August 5, 1935, sold the undivided 1/16th share of the land which they inherited from their father for a consideration of Rs. 40 to one K. D. H. Appuhamy who by deed 1R2 of December 16, 1937, sold that share together with a thatched house which he claimed to have built to Karamanisa the 8th defendant for a sum of Rs. 200. The 8th defendant by deed 1R3 dated October 20, 1938, transferred a half share of the interests he purchased on 1R2 to the 1st defendant for a consideration of Rs. 100. When the Commissioner submitted the scheme of partition No. 1081 in Court the plaintiff and the 4a and 4b defendants filed objections to that scheme. The 4a and 4b defendants stated, *inter alia*, that the buildings Nos. 3, 6, 7 and 8 which had been allotted to the 1st defendant by the Commissioner in fact belonged to them.

Thereafter, on May 5, 1950, Karamanisa who was later added as the 8th defendant intervened in the action claiming 1/32nd share of the land and a half share of the house No. 3 by right of purchase on deed 1R2. He further stated that he had improved that house by replacing the cadjan roof with a zinc one.

The scheme of partition No. 1081 came up for consideration on September 1, 1950. As the learned District Judge considered that this scheme was inequitable he ordered that another scheme be prepared complying with certain directions given by him. That scheme is plan No. 204. The 1, 2, 4a, 4b and 8th defendants filed certain objections against this scheme. The 1st and 8th defendants claimed, *inter alia*, the interests which had been originally allotted to the 4th defendant. The 1st defendant further claimed the entirety of buildings 6, 7 and 8 and a half share of house No. 3 while the 8th defendant claimed the remaining half share of the latter building. The 1st defendant also averred that he and the 8th defendant had improved the house No. 3 but the 8th defendant contended that it was he who had effected that improvement.

When the schemes of partition came up for consideration in the year 1955 the learned District Judge, on the suggestion of the lawyers appearing for the different parties, proceeded to inquire into the question of ownership of buildings 3, 6, 7 and 8 and the claim of the 1st and 8th defendants to the soil share allotted to the 4th defendant.

The learned District Judge held that as the deed 1R1 was executed while the partition action was pending no soil rights passed on it. That finding is not canvassed now. He also held that the building which is referred to as house No. 3 in the interlocutory decree came down and that

on its site K. G. H. Appuhamy later erected the existing building which is marked No. 3 in the two schemes of partition. K. G. H. Appuhamy purported to convey that building on 1R1. The District Judge held that although the deed 1R1 was ineffective to pass soil rights yet the vendee was entitled on it to claim compensation for the building. This finding in my view is completely untenable. A deed executed pending partition is absolutely void—*Annamalai Pillai v. Perera* [1]. Therefore on 1R1 no rights whatsoever passed to the vendee.

The District Judge also held that buildings 6, 7 and 8 had been erected by the 1st defendant and that he was entitled to recover compensation for the same. The finding that the buildings 6, 7 and 8 were erected by the 1st defendant was not contested at the hearing of this appeal but Mr. Samarawickreme contended that these buildings and house No. 3 should go with the soil and that no compensation was payable in respect of them. Admittedly these buildings were constructed after the interlocutory decree had been entered. A co-owner is entitled to build on the common property even without the consent of the other co-owners provided that he acts reasonably and does not make use of an extent which is out of proportion to the share he owns—*Elpi Nona v. Punchi Singho* [2]. But when one co-owner institutes a partition action in respect of the common property that is a clear indication that he wishes to put an end to the common ownership. Thereafter no co-owner is entitled to build or make other improvements on the land. Of course a co-owner would be acting within his rights if he effects necessary repairs to a building even after the institution of partition proceedings. If a co-owner is permitted to build or plant the common property even after the institution of the partition action it might result in other co-owners having to pay compensation for improvements which they do not wish to have. Such improvements, very often, prevent an equitable partition being effected, for there is a tendency on the part of co-owners to make the improvements on the most desirable portion of the common property. It was held in *Perera v. Pelmadulla Rubber and Tea Co.* [3] that a co-owner who planted tea on the common property after the institution of partition proceedings was not entitled to receive compensation for that plantation. In the instant case these buildings were erected even after the interlocutory decree had been entered. The rights of co-owners to improvements have to be adjudicated upon before the interlocutory decree is entered. Of course in the case of intervenients that adjudication can take place even after the entering of the interlocutory decree. The 1st defendant in this case was a party to the interlocutory decree. If co-owners are entitled to effect improvements even after the interlocutory decree then the necessity might arise to decide the question of ownership of those improvements. But there is no provision in the Partition Ordinance which enables a party to the interlocutory decree to raise such a claim or the Court to decide it. The Commissioner has to carry out the partition in terms of the interlocutory decree. Therefore he would not be in a position to award compensation for improvements effected after the entering of the interlocutory decree by persons who are parties to it.

[1] *(1902) 6 N. L. R. 103.* [2] *(1950) 52 N. L. R. 115.*
[3] *(1913) 16 N. L. R. 306.*

Accordingly I hold that the 1st defendant is not entitled to have the buildings 6, 7 and 8 allotted to him or to recover compensation in respect of them. The existing house No. 3 was also built after the interlocutory decree was entered. Therefore no compensation would be payable in respect of that building also. If the builder is not entitled to compensation the persons who effected improvements to house No. 3 too cannot claim compensation for it. Apart from that, the evidence does not establish that improvements of any value were in fact made to this building. The 8th defendant who claims to have replaced the roof of that house purchased 1/16th share of the land and the entirety of the building on 1R2 for Rs. 200 and he sold half share of those interests to the 1st defendant on 1R3 for Rs. 100. That supports the view that the 8th defendant did not effect substantial improvements to the building before he sold a half share of it to the 1st defendant. The buildings Nos. 3, 6, 7 and 8 would therefore go with the soil. Accordingly I would allow the appeal in respect of those buildings. The 1st and 8th defendants would pay the costs of this appeal to the 4a and 4b defendants. There will be no costs of this inquiry in the Court below as the 4a and 4b defendants claimed the ownership of these buildings.

H. N. G. Fernando, J.—I agree.

Appeal allowed.