Present : Lascelles C.J.

June 27, 1911

DE SILVA *v.* SIYADORIS *et al.*

193—*C. R. Balapitiya*, 7,951.

Superficies—Rights of a co-owner who builds on common land—Compensation—May a co-owner of a building bring an action to partition house apart from soil?—Ordinance No. 10 of 1863, ss. 2 and 5.

LASCELLES C.J.—The ownership of a building vests, by the rule of accession, in the owner of the soil. It is true that in some cases a person who builds on the land of another obtains the essential rights of an owner by virtue of the right of superficies, but the right is acquired by means of agreement between the owner and the superficiary ; and in view of the provisions of Ordinance No. 7 of 1840, it is at least doubtful whether such an agreement would be valid unless evidenced by notarial deed. But the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owners. The co-owner could prevent him from building on the common property without the consent of the other co-owners, but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action.

THE facts are set out in the judgment of Lascelles C.J.

A. St. V. Jayewardene, for defendants, appellants, contended that the Court was wrong in holding that the plaintiff was entitled to maintain the action under the Partition Ordinance in respect of the buildings alone. The houses sought to be dealt with in this

[1] *L. R. 14 Q. B. D. 141.*

action were built by the predecessor in title of the plaintiff and the defendants at a time when he was a co-owner of the land. The *jus superficiarium* is the right which a person has to a building on another's land (*Grot.* 2, 47, 9). A co-owner cannot have a right of superficies in respect of a building standing on the common land. Whatever a co-owner builds accedes to the soil, and although he may be allowed the exclusive possession or enjoyment of a building or other improvement which he has the right to make, when the co-ownership is to be dissolved under the Partition Ordinance he can only claim compensation for improvements. Here the plaintiff and the defendants are admittedly co-owners, not only of the buildings, but also of the soil. A partition cannot be maintained in respect of a part of a *corpus*. By upholding the plaintiff's right the Court has been compelled to make a decree, which is not only not warranted by the Partition Ordinance, but is also clearly unworkable.

H. A. Jayewardene, for the plaintiff, respondent.—A superficies can be the subject of a partition action (*Abdul Rahman v. Muttu Natchia*[1]). The documentary evidence shows that the buildings in question were considered to be separate from the land, and so dealt with in the deeds. The houses belong to the plaintiff and the defendants alone ; while the entire land is owned in common, not only by the plaintiff and the defendants, but also by a large number of other co-owners who have no interest in the buildings.

A. St. V. Jayewardene.—Abdul Rahman v. Muttu Natchia can be distinguished. There the parties had no interest whatever in the soil. All the co-owners of the land have an interest in the buildings erected thereon, and ought to be made parties to this action.

Cur. adv. vult.

June 27, 1911. LASCELLES C.J.—

This is a partition suit relating to a land held in undivided shares by a number of co-owners, on which several houses have been erected at different times by various co-owners.

The plaintiff claims title from one Edoris Bastian, who, with two others, was the owner of the property on whcih the houses were erected. The plaintiff alleges that Edoris Bastian was the lawful owner of three houses " by right of building," and, after tracing the devolution of the title to these buildings, claims an undivided one-third share for himself in the three houses, as distinct from the soil on which they stand. and allots the remaining shares in different proportions to the defendants, who are some, but not all, of the co-owners of the common property.

The defendants, on grounds to which I need not now refer, dispute the scheme of partition propounded by the plaintiff. The added defendant disputes the identity of the buildings now in existence

[1] *(1900) 1 Br. 250.*

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with those erected by Edoris Bastian, and claims the whole of one of the buildings on the ground that he himself had built it, and also the half of another house.

At the trial the added defendant's proctor objected that the houses formed part of the soil, and therefore could not be the subject of a partition action. He also contended that the action should have been for the partition of the whole land, and that all the co-owners should have been made parties. These well-founded objections were over-ruled by the Commissioner of Requests, who, by his judgment, defined the shares in which the parties were entitled to the buildings ; directed the buildings to be sold ; and ordered that "if a soil owner buys any house, the house need not be broken down," and that "if a person not a soil owner buys a house, it must be on the distinct understanding that the house is to be broken down, and the material only removed within a date to be fixed by the Commissioner." In my opinion the judgment of the Commissioner of Requests, and also the numerous transactions which have taken place with reference to these buildings, are based on a misapprehension of the rights of the owner of an undivided share who erects a building on the common land.

By the law of Ceylon the ownership of a building vests, by the rule of accession, in the owner of the soil. It is true that in some cases a person who builds on the land of another obtains the essential rights of an owner by virtue of the right of superficies, but this right is acquired by means of agreement between the owner and the superficiary ; and in view of the provisions of Ordinance No. 7 of 1840, it is at least doubtful whether such an agreement would be valid unless evidenced by notarial deed. But the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owners. One co-owner could prevent him from building on the common property without the consent of the other co-owners (*Silva v. Silva*[1]), but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action under sections 2 and 5 of Ordinance No. 10 of 1863. The claim of the plaintiff, therefore, rests on no legal foundation, and should have been dismissed. There is, of course, nothing in this decision to prevent any of the co-owners from claiming a partition, in a properly constituted partition suit, of the whole of the property, and in such an action the right of the builders of the houses now in dispute could be adjusted.

The appeal is allowed, and the action is dismissed with costs here and in the Court below.

Appeal allowed

[1] *(1903) 6. N. L. R. 22.*