1937 *Present :* **Hearne J. and Fernando A.J.**

MUTHALIPH *v.* MANSOOR *et al.*

285—D. C. Kandy, 4,438.

Co-owners—Right to build on common land—Obstruction to a passage common to all—Right to injunction—Proof of irremediable harm unnecessary.

A co-owner is not entitled to build a house on a land held in common without the consent of the others.

An injunction may be issued against the offending co-owner to remove the building without proof of irreparable damage to the party complaining.

Goonewardene v. Silva (*17 N. L. R. 287*) followed.

THE plaintiffs in this action complained that the defendant was forcibly putting up a building on a portion of land which was left unallotted in the partition action, D. C. Kandy, 17,450. The plaintiffs and the defendant were the co-owners. The plaintiffs prayed that the defendant be restrained by an injunction from continuing to build on the portion of land which is referred to as a passage and that he be directed to remove the obstructions and buildings constructed by him. The defendant, after the notice of the injunction had been served on him, converted a portion of the passage into a boutique. The learned District Judge ordered an injunction to issue restraining the defendant from continuing to obstruct and build on that portion of the land in dispute, the demolition of the building erected by him on the land and the payment of Rs. 250 as damages.

Hayley, K.C. (with him *H. V. Perera, K.C.* and *N. Nadarajah*), for defendant, appellant.—The learned District Judge held that a co-owner could not build against the wish of the other co-owners. He gave a mandatory injunction to pull the building down and damages. Firstly, he did not appreciate the limitations to the general rule. The other co-owners cannot capriciously withhold their consent. In this respect their behaviour should be taken into consideration. The building cost nearly Rs. 2,000. Secondly, the order of the learned District Judge is wrong in this case. There is no express law for the issue of such an injunction. It exists only in practice. The principles applicable are the same as those applicable in English law, namely, harm should accrue to the other side which could not be compensated by money. Wood Renton C.J., in *Goonewardene v. Goonewardene*[1], held that where the co-owners withhold their consent, a partition action could be brought. The subject-matter in question is a tenement land and the various co-owners have built on it continuously. The rights of co-owners are discussed in *Siyadoris v. Hendrick*[2], and in *de Silva v. Karaneris*[3]. In this case the portion in dispute has been used as a path.

It is immaterial whether there are judgments where injunctions were granted to pull down the buildings as in *de Silva v. Karaneris* (*supra*). They were of small value compared to the one in this case. The building was put up long before the plaintiffs took action. A mandatory injunction

[1] (*1913*) *2 C. A. C. 149.*

[2] (*1896*) *6 N. L. R. 275.*

[3] (*1918*) *1 Ceylon Law Rec 28.*

should not be granted except in serious cases. The leading case is *Isenberg v. East India House Estate Co., Ltd.*[1] This question was discussed in *Durell v. Pritchard*[2]; *Stanley v. The Earl of Shrewsbury*[3]; *The National and Provincial Plate Glass Insurance v. The prudential Insurance Company*[4]; and *Allen v. Seckham*[5].

Unless the plaintiffs have shown that the severest damage is caused the injunction should not have been granted. Even if the defendant is in the wrong, he must not be asked to pull down the building, but be compelled to pay damages. This is a case where a partition can be brought at any time and the building will enhance the value, and compensation may be due.

N. E. Weerasooria (with him *S. W. Jayasuriya*), for plaintiff, respondent.—The plaintiffs alleged that the defendant was building on the portion concerned. The answer was a denial that he was obstructing. After the defendant filed the affidavit, he had encroached on the passage. If he converted the temporary structure into a boutique, he cannot be heard to say subsequently that he cannot be asked to remove the encroachment.

In the English cases the Judges held that each case depended on the circumstances of its particular facts. There are many cases where mandatory injunctions were granted (*Samaraweera v. Mohotti*[6]).

Hayley, K.C., in reply.—The damages as far as the land is concerned should be claimed in a partition action. Only damages with regard to user can be claimed. In *Samaraweera v. Mohotti* (*supra*), the defendant was encroaching on the other person's land. This is a case dealing with co-owners.

Cur. adv. vult.

September 20, 1937. FERNANDO A.J.—

The plaintiffs in this action complained that the defendant-appellant was forcibly putting up a building on the portion coloured pink in plan X made by Mr. G. E. de la Motte, and filed in the case and that he was thereby obstructing the use of the ground marked pink in the plan, and prayed that the defendant be restrained by an injunction from continuing to build on the portion in pink which is referred to as a passage, and that he be directed to remove the obstruction and the buildings constructed by him.

The land shown in plan X was the subject-matter of a partition action, D. C. Kandy, 17,450, and the decree in that action allotted to the parties the portions of the land shown in that plan, except only the portion coloured pink. That pink portion was not covered by that decree, and as it was held by this Court in appeal that pink portion remained unallotted. The title to that portion remained in the original co-owners, and that title is in no respect affected by the partition decree. The defendant in this action derives title to the portions allotted to Assen Peer and it was admitted at this trial that the defendant is a son of Assen Peer, and is therefore a co-owner of the portion coloured pink to the extent of $\frac{1}{3}$. The plaintiffs, on the other hand, are some of the successors

[1] *(1863) 3 De.G. J. & S. M. 263.*
[2] *(1865) 35 L. J. Ch. 223.*
[3] *(1875) 44 L. J. Ch. 389.*
[4] *(1877) 46 L J. Ch. 871.*
[5] *(1879) 48 L. J. Ch. 611.*
[6] *(1914) 18 N. L. R. 187.*

in title of the other parties to that partition action, and are co-owners, along with certain others who have not been joined in this case, to the remaining $\frac{2}{3}$ of the portion coloured pink.

The partition decree in D. C. 17,450 was considered by this Court in the appeal in D. C. 35,389, and although the learned District Judge has referred to the ruling in appeal in that case, I do not think the decision of this Court in appeal, or the reasons, are in any way relevant to the questions involved in this appeal. The plaintiff-respondent to that appeal had not shown in that action that he had acquired any interest in the portion coloured pink, and the judgment entered by the District Court in his favour on the assumption that the plaintiff-respondent in that action had acquired the rights of Assen Peer was set aside because he had failed to prove that he had so acquired any interest in that portion. It is now admitted that the plaintiffs-respondents to this appeal and the defendant-appellant are all co-owners of the land coloured pink. The learned District Judge held that the defendant-appellant had built upon the portions coloured pink, and that the plaintiffs-respondents were entitled to call upon him to remove the building inasmuch as the act of the defendant in putting up that building was not a natural or proper use of the common property. He also ordered an injunction to issue restraining the defendant from continuing to obstruct and build on that portion of the land in dispute which is referred to as a passage and the defendant was also ordered to demolish the building erected by him on that passage and to pay Rs. 250 as damages.

Counsel for the appellant contends that the learned District Judge was wrong in holding that the act of the defendant was not a natural or proper use of the common property. There appears to be very little doubt with regard to the law in Ceylon as to the rights of co-owners to build on the common property. As Wood Renton J. stated in *Goonawardene v. Goonawardene*[1], " there is no doubt, but that by the Common law of this colony, one co-owner cannot build a house on a land held in common without the consent of the co-owners . . . . There is, however, a class of exceptions to the general principle which I have just stated. It is defined by Sir Charles Layard in *Silva v. Silva*[2], and by Sir John Bonser in *Siyadoris v. Hendrick*[3]. These decisions stand by their own authority, but they have constantly been followed in later cases. The class of exceptions referred to may be defined in this way. The law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances. For example, as in *Siyadoris v. Hendrick* (*supra*), if the land had been purchased for the express purpose of digging plumbago contained in it, it would have been unreasonable that any co-owners should have been prohibited from digging for plumbago without the consent of the other co-owners. Sir Charles Layard gives another illustration in *Silva v. Silva* (*supra*), 'If the land were fit for paddy, it could scarcely be contended that any one co-owner would be entitled to prevent the other co-owners from cultivating it that way' ". Wood Renton J. then went on to deal with the facts of the case before him and expressed the opinion that there was

[1] *(1913) 2 C. A. C. 149.*

[2] *(1896) 6 N. L. R. 225.*

[3] *(1896) 6 N. L. R. 275.*

no instance in which any house had been erected without the consent of the other co-owners. This decision was expressly followed by Perera J. *in Goonawardene v. Silva* [1], and he stated the rule of law in these words :— "A co-owner has no right whatever to build on the common property without the consent of his co-owners". He referred to the decision in *Goonawardene v. Goonawardene* [2] and the cases referred to by Wood Renton J., and then proceeded to deal with the remedy available to a co-owner against another co-owner who has built on common property, and allowed the plaintiff's prayer for an injunction and for an order that so much of the house as had already been built be taken down on the principle that "proof of irremediable loss is not absolutely necessary under our law to entitle one to an injunction". The same question came up again before Shaw J. in *de Silva v. Karaneris* [3]. "It is clear law", he said, "that one co-owner has no right to build on the common land without the consent of his co-owners." "It is not very clear from the evidence", he continued, "whether the defendant had in fact completed the building before the action was commenced, but whether he had done so or not, it does not seem to me to give him any right to retain the building on the land because it was not put up with the consent of the plaintiff who is one of the co-owners and who, in fact, remonstrated so soon as he knew that the building was in course of erection. The plaintiff is, in my opinion, entitled to an injunction against the defendant and for an order that he remove the building which has been put on the land. The damages had been agreed at the sum of Rs. 10. The plaintiff will be entitled also to judgment for that amount." Now it will be noticed that in all the cases, a co-owner has been held not to be entitled to build on the common land without the consent of the other co-owners whatever the nature of the land itself. The user of the land for the cultivation of paddy is obviously a user which will not prevent the subsequent user by all the co-owners for the natural use to which the land can be put, and with regard to the case of *Siyadoris v. Hendrick* (*supra*), the Court appears to have taken the view that co-owners should not be prevented from using the land for the express purpose of digging plumbago contained in it, which purpose all the co-owners had in view. The judgment of Bonser C.J. seems to suggest that the defendant in that action had only taken a share of the plumbago, and if a co-owner only takes a proportionate share of the mineral dug from a land, there is no room to suggest that he has interfered with the rights of his co-owners as long as he has not prevented them from taking their share of the plumbago, but the case of building on common land stands on entirely different footing. Counsel for the appellant in *Goonawardene v. Goonawardene* (*supra*) appears to have suggested that the land had been acquired by the co-owners as a building site, but as Wood Renton J. remarked, the evidence indicated that certain houses had been built by common consent of the co-owners, and there was no instance in which one co-owner had built without the consent of the others. Here too, Counsel for the appellant argues that this land was a building site, but if we look at the portion coloured pink in the plan X, it is apparent that that portion

[1] *(1914) 17 N. L. R. 287.*

[2] *(1913) 2 C. A. C. 149.*

[3] *1 Ceylon Law Rec. 28.*

had been reserved for the benefit of the co-owners who were declared entitled to certain portions of the land and building shown in that plan. The common purpose of the portion in pink as stated by the Surveyor in that case, and as is apparent from the plan was for access to and occupation in connection with the buildings that stood on the rest of the land. Even if the whole land can be regarded as a building site the portion coloured pink was, after the partition decree, if not before, used by all the co-owners for that purpose and not as building land. The question whether the plaintiffs or the persons against whom the defendant brought the previous action were or were not entitled to build on this pink portion is irrelevant for the purpose of this case. The question is whether the defendant was entitled to build on the portion of that reservation which has been referred to in this case as a passage. There is no clear evidence with regard to the exact user of this passage, but the plan itself indicates that at one time it did give access to the buildings behind 16, 15 and 14 on the north, and 11, 10 and 9 on the south. By the erection of these buildings, and by their occupation, that portion had acquired a special character, and I do not think any one co-owner was entitled to build on that passage in such a way as to interfere with the rights of the other co-owners in it, unless of course, he had obtained the consent of those co-owners. I would, therefore, hold that the learned District Judge was right in his finding on issue 2.

Counsel for the appellant next argued that the mandatory order ordering the defendant to pull down the building erected by him was wrong. He relied on a number of English authorities which appear to lay down that an order for pulling down buildings would not ordinarily issue except where irremediable harm has been done or where the person complaining against the building cannot be compensated adequately in damages. The authorities to which I have already referred make it clear that in our law, an injunction will issue even if irremediable harm has not been suffered. It would appear from the judgment of *Samaraweera v. Mohotti*[1], that it had been held in South Africa that where one person builds on his own land, and in the course of that building encroaches on his neighbour's property, the offending party is allowed to pay the other party an adequate price for the portion encroached upon, and damages without being compelled to remove the encroachment. "I am aware of no authority whatever in the Roman-Dutch law", said Perera J., "to support this proposition, and . . . . the circumstances of this case do not in my opinion entitle the defendant to the benefit of any alternative". Following a previous decision in *Miguel Appuhamy v. Thamial*[2], he ordered the defendant to remove the encroachment which he can no doubt do without substantially impairing the use of the house which he had built. The encroachment complained of in *Samaraweera v. Mohotti* (*supra*) consisted of the eaves of the defendants house and the steps leading into the house. The question arises in this case whether or not, the defendant should have been ordered to remove the house built by him so as to encroach on 1½ feet of the passage. There can be no doubt that irremediable loss will occur to the plaintiff if he is ordered to pull down the house or the wall which constitutes the encroachment on the passage. On the

[1] *(1914) 18 N. L. R. 187.*

[2] *2 Current Law Reports 209.*

other hand, the evidence indicates that after encroaching on the passage in this way, the defendant has proceeded to cover up the rest of the passage between the encroachment and the house marked No. 11 in the plan by converting that portion of the passage into a boutique. This construction of the boutique was effected by the defendant after notice of the injunction had been served on him. On the defendant's own evidence it will not be a matter of great difficulty to remove this boutique and to restore the passage to its former state, except for the little encroachment constituted by the main building itself. In these circumstances I would affirm the order made by the learned District Judge, but limit the demolition only to the boutique as distinct from the encroachment to which I have already referred.

The learned District Judge has assessed damages at Rs. 250 but it is not quite clear how he arrived at that figure. In the circumstances I would omit this sum from the decree. The appeal has failed on the major points raised by the appellant, and except for the variations which I have already indicated above the appeal will stand dismissed with costs.

HEARNE J.—I agree.

Appeal dismissed.