Present: Lascelles C.J. and Pereira J.

1914.

SANCHI APPU *v.* MARTHELIS *et al.*

115—D. C. Negombo, 9,628.

Partition—Co-owners agreeing as to respective shares after title has been ascertained—Commissioner appointed under s. 5 of the Partition Ordinance—Notice to the public—Co-owner—Right to building—Compensation.

When in an action for partition under Ordinance No. 10 of 1863 the Court has ascertained the co-owners of the land sought to be partitioned and their respective rights, shares, and interests, there is no objection to the parties agreeing as to the different portions of the land to be allotted to them respectively by the final decree and having their agreement embodied in the interlocutory decree, but what the parties so agree to can have no force other than as a mere direction to the commissioner to be appointed under section 5 of the Ordinance. The parties cannot, however, by agreement dispense with the appointment of a commissioner, because unless a commissioner were appointed the requirements of the proviso to section 5 of the Ordinance as to notice to the public, &c., cannot be carried out.

A building erected by a co-owner on the common property is itself the common property of all the co-owners, the builder being, in certain circumstances, entitled to compensation.

THE facts appear from the judgment.

Bawa, K.C., for plaintiff, appellant.

A. L. R. Aserappa, for defendants, respondents.

Cur. adv. vult.

[1] *S. C. Civil Min., March 4, 1914*

1914.

June 8, 1914. PEREIRA J.—

Sanchi Appu v. Marthelis

The District Judge in his judgment calls this action a "partition suit," and although the prayer of the plaint is not quite in accordance with section 2 of the Partition Ordinance, the action must be deemed to be, and treated as, an action for partition of land under that Ordinance, for the reason, if for no other, that the provision of the Stamp Ordinance, 1909, exempting from stamp duty "all pleadings and other documents in actions or proceedings for the partition or sale of land instituted under the provisions of Ordinance No. 10 of 1863," has been availed of by the parties, and the pleadings and other documents in the action have not been stamped.

The land sought to be partitioned is that shown on plan No. 706 a page 45 of the record. The parties are agreed that the plaintiff is entitled to a half of the land, the second defendant to a share equivalent to two acres, and the first defendant to the rest of the land. The plaintiff on the one side and the two defendants on the other were at issue as to who was entitled to the house on the land. The District Judge has held that the house was built by the second defendant, and I see no reason to doubt the correctness of that decision. It appears that there was an informal partition of the land among the plaintiff and the defendants in January, 1913. At that partition the plaintiff was allotted the portion marked C, the first defendant the portion marked B, and the second defendant the portion marked A, on which the house referred to above stood. The plaintiff alleges, rightly or wrongly, that he was to get on the agreement as to partition Rs. 250 from the second defendant as his share of the value of the house. This claim is contested by the defendants, and hence this action. The District Judge says that the plaintiff should have instituted an action for the recovery of Rs. 250 instead of seeking a partition of the land, but it is clear that the plaintiff could not do that, because the agreement on which the plaintiff claimed that sum was not enforceable in law. The District Judge has practically confirmed the partition of January, 1913, but has held that the plaintiff was not entitled to any part of the value of the house. It has been argued that a decree such as that entered up by the District Judge is a decree in practical compliance with the Partition Ordinance. It may be that when the co-owners of a land sought to be partitioned under the Ordinance and their rights, shares, and interests are definitely ascertained by the Court, the parties held to be entitled to such rights, shares, and interests may agree as to the different portions of the land to be allotted to them respectively by the final decree, and have their agreement embodied in the interlocutory decree, but what the parties so agree to can have no force other than as mere directions to the commissioner to be appointed under section 5 of the Ordinance. Anyway, it seems to me that parties cannot

avoid the appointment of a commissioner, because unless a commissioner were appointed the procedure laid down in the proviso to section 5 of the Ordinance as to notice to the public cannot be observed, and the reason for giving a conclusive effect to the final decree under section 9 of the Ordinance is largely referable to that procedure.

The situation in the present case is that the plaintiff does not consent to a partition in terms of plan No. 706, if that partition does not involve the payment to him of Rs. 250 by the defendants. That being so, the only interlocutory decree that can be entered appears to me to be one declaratory of the rights and interests of the respective parties. The second defendant, as builder of the house, has not, as the District Judge appears to think, become entitled to it. The house is the common property of all the co-owners, the second defendant being entitled to only compensation, which is to be calculated as laid down in the judgment of this Court in the case of *Silva v. Babunhamy*.[1] Whether the second defendant built the house before he became a co-owner of the land or thereafter he would be entitled to compensation, as even a *mala fide* possessor of land equally with a co-owner who improves it with the consent and acquiescence of the rightful owner or the other co-owners, as the case may be, is entitled as regards compensation for improvement to the rights and remedies of a *bona fide* possessor (see *Eliatamby v. Sinne Tamby* [2]).

I would set aside the judgment appealed from, and enter up in lieu thereof an interlocutory decree declaring the house as well as the land sought to be partitioned to be the joint property of the plaintiff and the defendants; the plaintiff being entitled to a half share thereof and the defendants to the other half, the second defendant being entitled to a share of that half equivalent to an extent of two acres, and declaring further that the second defendant is entitled to compensation in respect of the house from his co-owners to be calculated as indicated in the case cited above, and directing that, if practicable, the second defendant, on the partition, be given a portion with the house on it. In that event he will, of course, have proportionately less of the land.

I would direct that each party do bear his own costs of the contest in both Courts, and that the other costs be borne by the parties *pro rata*.

LASCELLES C.J.—I agree.

Set aside.

[1] *(1912) 16 N. L. R. 43.*

[2] *2 Leader L. R. 121.*