

Present : De Sampayo and Porter JJ.

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AHAMPARAPILLAI v. PODI SINGHO.

23—D. C. Batticaloa, 5,144.

Partition action—House built on an agreement with one co-owner—Purchase by builder of co-owner's share—Is builder entitled to the entire house?—Compensation.

The defendant built a house on a land under an agreement with one of the co-owners A, by which it was provided that the defendant should build at his own expense, and that when he died or left the house, it should belong to the said co-owner A without payment of compensation. The defendant bought the half share of A after the house was built.

Held, that defendant was not the sole owner of the house, nor entitled to compensation.

THE facts are set out in the judgment.

Balasingham, for the appellant.

Bartholomeusz (with him *R. C. Fonseka*), for the respondent.

June 21, 1922. DE SAMPAYO J.—

This appeal involves a somewhat novel point, but I have no doubt as to how it should be decided. The action is one for the partition of a land which belonged to two persons named Umayathai and Ummini. Umayathai died leaving a son Appuhamy, who sold Umayathai's half share to the plaintiff. Ummini's half share has gone by a sale to the defendant. So far there is no dispute between the parties. The trouble is as regards a house which has been built on the land. It appears that in 1902 an agreement was entered into between Ummini and the defendant, by which it was provided that the defendant should, at his own expense, build a boutique and reside in it during his life or during pleasure without paying any rent, and that at his death, or when he finally leaves, the boutique should be taken possession of by Ummini without paying any compensation. It appears that on that agreement the defendant built a boutique, and has traded and resided in it up to now. In this action he claims to be entitled to the house upon grounds which I cannot quite understand. But the District Judge, as I understand the judgment, has awarded to him the house on the ground that it was built, not only upon the written agreement between the defendant and Ummini, but also without any objection and with the implied consent of Umayathai, and that, therefore, the defendant is entitled to the house. Mr. Bartholomeusz, for the defendant,

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does not support the exact claim made by the defendant in the District Court to the house itself. But he contends that the defendant is entitled to compensation as a *bona fide* improver. Before I come to that argument, I should like to say that I do not agree with the finding of the District Judge that Umayathai was alive at the date of the agreement in question and while the house or boutique was being built. Two witnesses, whose evidence I have no reason to reject, have given positive testimony that Umayathai died twenty years before the trial, that is to say, about a year before the agreement between Ummini and the defendant. With regard to one witness, the only remark the District Judge made was that he was not a relative of the family, and had no particular interest in its members, and that he could not well speak of the death of Umayathai. With regard to the other witness, who is a headman, and who appears to be now about forty-five years of age, the District Judge says that he was not expected to remember what took place some twenty years before, and therefore his evidence, as regards the time of Umayathai's death, is not of much value. I do not think these remarks are sufficient to reject the evidence of those two witnesses. The defendant's standpoint was that Umayathai died only ten years ago, and that was supported by evidence by no means as strong as that of the plaintiff's. In appeal, Mr. Balasingham, appearing for the plaintiff-appellant, has produced a death certificate annexed to an affidavit. No doubt, excepting under special circumstances, fresh evidence will not be admitted by this Court. But this is more or less of a formal character, and the plaintiff in his affidavit states what I think is a sufficient reason for his not being able to get at this death certificate before the trial was concluded. I do not think we should shut our eyes to the decisive effect of this document. It was sought to get over it by saying that the name of the person whose death is registered is not the same person as the Umayathai in question. But I do not think there is any force in this objection. The parties would appear to belong to that peculiar class of people in the Eastern Province where the distinction between the Sinhalese and the Tamils is not very marked. It appears that Umayathai's family were originally Tamils; that they intermarried with the Sinhalese; that the children sometimes took Sinhalese names; for instance, Umayathai herself would appear to have married a Sinhalese man, and her son, the vendor to the plaintiff, is called Appuhamy. In the death certificate the name of the person whose death is registered is described as Umayal. The name that is given in the record of the case is Umayathai. It is well known that the last syllable in the word represents the Tamil termination of the name, the substantial portion of it being Umay, which is the same in both languages. But the matter is put beyond doubt by the name of the father. In the judgment of the District Judge the father's name of Umayathai is stated to have

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been Murugakappatal, and in the death certificate, which by the way is that of a Sinhalese Registrar, it is given as Murugapuwa. The termination "*tas*," again, is a characteristic of the Tamil language. I have no reason to doubt at all the death certificate applies to the Umayathai in question. We thus conclude, as appears from the death certificate, that Umayathai died in April, 1901, over a year before the date of the agreement between the defendant and Ummini. Consequently, she could not, by any act of hers, recognize the building of the boutique which was being erected by the defendant. Further, it may be added that Umayathai's heir, Appuhamy, was a minor of two years, so that he could not be bound by any conduct which may be said to be a recognition of the defendant's acts in regard to the building. In the circumstances, I think the District Judge's determination of the first two issues formulated by him is erroneous. When we come to the application of the law, I think there is no difficulty, even supposing Umayathai was alive at the date of the building. To take Mr. Bartholomeusz's suggestion that the defendant was not claiming the house itself, but only compensation for himself, a person in connection with a partition case can only claim compensation for improvements made by him as a co-owner. But at the time of his building the boutique he was not a co-owner, nor was he expecting to be owner in any sense. As a matter of fact, the agreement expressly declared that he was not to be the owner of the house, but that he must give it back at his death or whenever he left the house. Then it is sought to put the claim for compensation on the general ground of a *bona fide* possessor. Now, the broad distinction between a *bona fide* possessor and a *mala fide* possessor is that a *bona fide* possessor believes, though mistakenly, that he was entitled to the land on which he was making the improvement; whereas a *mala fide* possessor knows that the property is not his own. Now, in this case there is no question that the defendant had not the slightest idea that he had any interest in the land. As a matter of fact, his agreement between Ummini is clear enough acknowledgment of the right of other people to the entire land, he only getting permission from one of them to build a house on it on certain terms. Mr. Bartholomeusz, however, says that that is too narrow a view of the law, and he cites to us the case of *Marthelis v. Jayawardene*,¹ where the facts were that the plaintiff instituted the action, alleging that the defendant agreed to sell him the land, and had received an advance of Rs. 720 as part of the consideration, and that he was put in possession of the land, which he improved by building two houses. The plaintiff prayed that the defendant be called upon to execute a transfer, or, in the alternative, to refund the advance of Rs. 720, and pay compensation for the improvements made by the plaintiff. This Court held that not only was he entitled to reclaim

¹ (1909) 11 N. L. B. 272.

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the money advanced, but he was also entitled to compensation in respect of the buildings. It is quite clear to my mind that the order on which that decision was given is quite inapplicable to the circumstances of the present case. The decision appears to me to have been based on the principle of fraud which otherwise would have succeeded against the plaintiff, if the defendant, who was guilty of that conduct, was not ordered to pay compensation for the loss incurred by the plaintiff. In this case, not only did not Umayathai join in the transaction with the defendant, but the defendant built the house on specific terms with the other co-owner Ummini, and I do not think that we can extend his rights by referring to such cases as the one cited. I think the defendant is not entitled even to the compensation to which the claim is restricted in appeal. I would set aside so much of the decree as awards the house to the defendant, and direct that the house should be regarded as having accrued to the soil, and as now belonging to both co-owners. The plaintiff is, I think, entitled to the costs of this appeal.

PORTER J.—I agree.

Set aside.