1954 *Present :* **Gratiaen J. and Fernando A.J.**

HARRIET SAMARASEKERA, Appellant, *and* LAKSHAMI MUNASINGHE *et al.*, Respondents

S. C. 28 (Inty.)—D. C. Colombo, 5,518/P

Servitude—Jus superficiarium—Acquisition by prescription—Compensation—Basis of assessment—Partition sale.

Where A. puts up a building at his own expense on the land of B. with B.'s consent and approval, and exclusively enjoys the use of it as a superficiary for a period of ten years without interference by the soil owner B., he acquires, by prescription, the servitude known as the *jus superficiarium*. This right which a person has to a building standing on another's ground is acquired and lost like immovable property. It can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death.

The soil owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its " present value " (and not merely its original cost if that be less). The same basis of assessment should be adopted where the servitude is extinguished, by consent of parties, at a partition sale.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *D. L. Edusuriya* and *D. A. Jayasuriya*, for the 2nd defendant appellant.

N. E. Weerasooria, Q.C., with *Sir Ukwatte Jayasundera, Q.C.*, and *G. T. Samarawickreme*, for the plaintiff respondent.

Cur. adv. vult.

June 7, 1954. GRATIAEN J.—

This appeal calls for a decision as to the precise nature of the legal rights enjoyed by certain parties in respect of a building (described for convenience as the " Victoria Petrol Service Station ") standing on a land in Peliyagoda.

The plaintiff instituted this action under the Partition Ordinance for a sale of the land together with all the buildings standing on it. Admittedly, the land had at one stage belonged to Don Thomas who by P3 dated 21st September, 1940, gifted it to his two daughters (the plaintiff and the 1st defendant) in equal shares. Certain buildings (other than the Victoria Petrol Service Station) went with the soil shares, and there is no dispute as to them.

The circumstances in which the Victoria Petrol Service Station came into existence in or before the year 1928 are not in dispute either. It had been built by Don Thomas' son Don Chandradasa at his own expense at a time when the father was the exclusive owner of the land. An almost contemporaneous notarial lease 2D1 (which both Don Thomas and Don Chandradasa signed) was executed in favour of the Asiatic Petroleum Co., Ltd., and it recites that Don Chandradasa had " with Don Thomas,

consent and approval" incurred this expenditure "for the purpose of carrying on the said premises the business of storing and selling Shell Motor spirit, motor oil and other accessories". A later notarial lease (P4 of 1934) in favour of the Shell Co. of Ceylon Ltd. (the successors of the former lessee) establishes that Don Chandradasa in fact carried on the business as previously arranged in his own right. It was he (and not Don Thomas) who received the stipulated lease-rent under P4.

Don Chandradasa died on 29th June, 1939, leaving as his intestate heirs his widow (the appellant), his father Don Thomas, and three sisters (the plaintiff, the 1st defendant and the 3rd defendant). A subsequent deed of gift P3 of 1940 executed by Don Thomas is instructive as to how the members of the family at that time understood the legal rights which had passed to them in respect of the Petrol Service Station upon Don Chandradasa's death: Don Thomas, while donating the soil rights and the other buildings to two of his daughters (the plaintiff and the 1st defendant) on the footing that he enjoyed absolute *dominium* over them, only conveyed to them his "undivided ½ share of Victoria Petrol Service Station building". In other words, Don Thomas recognised that the rights which he now enjoyed in respect of this superstructure were rights (short of absolute *dominium*) which had been transmitted to him in 1939 as one of his son's intestate heirs. Similarly, in 1946, the appellant, the plaintiff and the 1st and 3rd defendants jointly executed a further notarial lease of the Petrol Service Station in favour of the Shell Company—thereby indicating that the rights in respect of this building had come to them by intestacy (and, as far as Thomas' inherited rights were concerned, by virtue of his subsequent deed of gift P3).

The same position is also recognised in the plaint in the present action. The plaintiff claimed in paragraph 10 that she and her sister the 1st defendant were each entitled (under P3) to an undivided ½ share of the land and the buildings other than the Petrol Service Station, whereas the latter superstructure, instead of passing with the soil rights in the ordinary way, "belonged" to the parties in the following shares:

1. to the plaintiff and the 1st defendant in respect of a 5/24 share each (i.e., partly as Don Chandradasa's intestate heirs and partly under P3);
2. to the 3rd defendant in respect of an undivided 1/12 share (by intestacy);
3. to the appellant, as Don Chandradasa's widow, in respect of an undivided 1/2 share (by intestacy).

The plaintiff asked for a sale of the land and buildings (including the Petrol Service Station) under the Partition Ordinance, but subject to a direction that the Commissioner should first make a "just appraisement of *the value* of the superstructure Victoria Petrol Service Station built by the said Don Chandradasa". The clear intention was that if either of the co-owners of the land (i.e., the plaintiff or the 1st defendant) should exercise her right of pre-emption under the Ordinance, she should be given credit for her share of *the value* of this particular building; and that, out of

the balance proceeds of sale, each of the other parties should in turn be entitled to draw her appropriate share of its "*appraised value*"

The appellant filed answer agreeing to judgment in the form suggested, and, after some formal evidence had been led, this proposal was adopted in the decree for sale. The decree itself declares that "the parties are entitled to compensation for the improvements made by Don Chandradasa", but gives no special directions as to the basis on which such compensation should be assessed. Up to this stage, it seems to have been conceded that the true basis of appraisement was the value (and not the original cost) of the buildings.

At the judicial sale which followed, the 1st defendant purchased the entire property for Rs. 81,000. A dispute then arose for the first time as to the basis of assessment that should be adopted for the purpose of setting apart a portion of the purchase price for distribution between the parties as "compensation" in respect of the Victoria Petrol Service Station.

According to the appellant's contention, this superstructure should be assessed at Rs. 32,400 (i.e., its agreed *value at the date of the sale*); the plaintiff submitted on the other hand that it should be assessed only at Rs. 8,400 (i.e., the *original cost* of making the improvement in 1928). The learned judge who dealt with this outstanding dispute adopted the latter basis of assessment. (To some extent he was, I think, handicapped by the fact that he was not the judge who had tried the action up to the stage when a decree for sale was ordered.)

It was argued on behalf of the appellant that the right which Don Chandradasa enjoyed in respect of the building, and which had been transmitted on his death to his intestate heirs, was a right of servitude known as *jus superficiarium*. The learned judge, however, took the view that "his position had been simply that of a *bona fide* improver who can only claim the actual cost of his improvements or their present value, whichever is less".

The later basis of assessment certainly conforms to the correct principle for awarding compensation to a man who improves land belonging to someone else under the *bona fide* belief that he is its true owner; and also in certain analogous cases: for example, where the true owner stands by and acquiesces in the improvement of his land by a trespasser, or where a co-owner who has improved the common land must be compensated by another co-owner who, in an ultimate partition, is allotted the portion which includes the improvement. But the circumstances in which Don Chandradasa erected the Petrol Service Station cannot be equated to any of these situations, nor is it suggested that he was a mere "lessee" who had improved the property with his lessor's consent. The basis on which he (or after him, his heirs) should be compensated upon the extinguishment of the right to enjoy the building must therefore be ascertained by reference to some other principle of our common law.

The servitude of *jus superficiarium* is of ancient origin, and is well-recognised by the Roman Dutch law—*vide* generally on this topic, *Lee's*

Elements of Roman Law (2nd Ed.) p. 170, para 243. In *Ahamado Natchia v. Muhamedo Natchia*[1] Layard C.J., with whom Wendt J. agreed, said, " The *jus superficiarium* is the right which a person has to a building standing on another's ground. It cannot be termed full ownership, for no one can be legally full owner of a building who has not the ownership of the soil. It is the right to build on the soil and to hold and use the building so erected, *until such time as the owner of the soil tenders the value of the building, if the amount to be paid has previously not been agreed upon.* The right is acquired and lost like immovable property, and is even presumed to be granted when the owner of the ground permits another to build thereon. *The right can be alienated and consequently there can be no doubt of its passing to the heirs of the original owner of the right* ".

Ahamado Natchia's case (supra) was considered (after a re-trial) in a second appeal by Lascelles C.J. and Middleton J. in *(1906) 9 N.L.R. 331.* They observed that " an agreement between the landowner and the person who acquires the right " is the foundation of the *jus superficiarium,* but the Court did not finally decide whether, in Ceylon, the provisions of section 2 of the Prevention of Frauds Ordinance precludes us from recognising an implied or non-notarial grant which is " inferred from the fact that the owner permits another to build on the land ". Similar doubts were later expressed, but not resolved, by Lascelles C.J., sitting alone, in *de Silva v. Siyadoris* [2].

I conclude from these authorities that the *jus superficiarium* is a servitude which can without doubt be created in Ceylon by notarial grant; similarly, once acquired, it can be alienated by notarial conveyance or transmitted to the heirs of the superficiary on his death; clearly, it can also be acquired by prescription where a person who, in appropriate circumstances, has erected a building on another's land and has without interference by the soil-owner exclusively enjoyed the use and enjoyment of it as a superficiary for the requisite period of ten years. (In such a case he prescribes to the servitude, not to the soil-rights.) The only outstanding problem is whether the servitude can also be created under a non-notarial agreement between the builder and the soil-owner. Mr. H. V. Perera has submitted for our consideration the argument that the Prevention of Frauds Ordinance has no application to an informal agreement whereby a soil-owner merely permits someone else to build on his land, in which case it is in truth the implementation of the agreement (but not the agreement itself) which confers the *jus superficiarium* on the builder *by operation of law.* For the purposes of the present appeal, it is not necessary to decide whether there is some flaw in this attractive argument.

Upon the facts admitted in the pleadings and established by the evidence led at the trial, I am satisfied that Don Chandradasa was from the very outset recognised by his father as enjoying, in respect of the Victoria Petrol Service Station, certain exclusive rights which were equivalent to those of a superficiary. Their foundation was no doubt an informal agreement between father and son, but they had become perfected by prescriptive user before Don Chandradasa died in 1939—

[1] *(1905) 8 N. L. R. 330.* [2] *(1911) 14 N. L. R. 263.*

so that, although the building acceded to the soil, Don Thomas' rights of full ownership were subject to the servitude enjoyed by his son. That servitude has since passed to the parties in the proportions specified in the decree. It has now been extinguished by virtue of the sale under the Partition Ordinance—and the purchaser has virtually acquired (1) the soil-rights and the bare ownership (if I may use that term) of the building which belonged to the plaintiff and the 1st defendant in succession to Don Thomas, and (2) the exclusive right " to hold and use the building " which belonged to these parties who enjoyed the *jus superficiarium* in succession to Don Chandradasa. The decree might well have directed a sale of the property subject to the servitude. But, as the direction was that, in accordance with the intention of the parties, the servitude should be extinguished by the sale, it seems to me that the superficiaries were clearly entitled to receive as compensation the " present value " of the building which constitutes an integral part of the purchase price. In *Ahamado Natchia's case* (*supra*) Layard C.J. explained that a soil-owner who takes over the building from the superficiary must, in the absence of an agreement to the contrary, pay him its *value* (and not merely its original cost if that be less). I see no reason therefore why a reduced figure should be awarded as compensation in a case where the servitude is extinguished, by consent of parties, at a partition sale. Indeed, Mr. Weerasooria's argument seemed to concede that if Don Chandradasa's rights were in truth those of a superficiary, the appellant's arguments must prevail.

I would set aside the order under appeal and direct that, out of the purchase price, the appellant, the plaintiff and the 3rd defendant should each receive her appropriate share of Rs. 32,400 and not of Rs. 8,400 only. The appellant is entitled to the costs of this appeal and of the inquiry in the Court below.

FERNANDO A.J.—I agree.

Order set aside.