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Present : The Hon. Mr. A. G. Lascelles, Acting Chief Justice, and Mr. Justice Wendt.

SILVA *et al. v.* SILVA *et al.*

D. C., Galle, 6,462.

Co-owners, rights of—Erecting building without consent—Improvement—Compensation—Right to remove building—Partition Ordinance (No. 10 of 1863), ss. 2 and 5.

One of several co-owners of a land has no right to build on the common property without the consent of the other co-owners. Where a co-owner does so, he has no right to compensation from the other co-owners, unless it could be shown that the building of a house on the land was a use of the joint property which would naturally have been in the contemplation of the parties.

Where in a partition suit the District Judge ordered that a building put up by one of several co-owners against the wish of some of them should be included in the *corpus* to be partitioned, and that each of the co-owners should get his share out of the *corpus* so made up without any payment of compensation,—

Held, that the decree was wrong and should be amended by giving the co-owner who put up the building liberty to remove the same, in the event of its being allotted to any one of the objecting co-owners.

LASCELLES A.C.J.—An objecting co-owner has no right to take the benefit of the improvement without paying compensation.

LASCELLES A.C.J.—The improvements referred to in sections 2 and 5 of the Partition Ordinance (No. 10 of 1863) are improvements for which compensation is payable under the common law of Ceylon.

THIS was a partition suit in which the 21st and the 124th defendants claimed compensation for a house built by them on the common property. The plaintiffs objected to the building of the house by these defendants at the earliest opportunity and took steps to have them restrained by injunction from doing so; but the injunction was refused. The District Judge disallowed the claim of the 21st and 124th defendants to compensation and ordered that the building should form part of the corpus to be partitioned among all the co-owners of the land according to their respective shares. On the question as to the right of one co-owner to build on the common property without the consent of the other co-owners the District Judge (G. A. Baumgartner, Esq.) held as follows:—

" 6. The conditions under which co-owners are allowed to enjoy the common property are referred to in *Siyadoris v. Hendrick* (1), where Chief Justice Bonser said:—' There is little to be found in the books as to the rights of co-owners under Roman-Dutch Law. Voet says:—*Invito autem unosocio nihil novi per alterum potest fieri in re communi, meliorque prohibentis conditio est: adeo ut, si quid novi per alterum socium invito altero factum sit, aut fieri mandatum, is cogi possit ut id in pristinum statum restituendum* (*Bk.* 10, 3, 7). By this I understand that it is not competent for one co-owner against the will of the other to deal with the property in a manner inconsistent with the purpose for which the joint ownership was constituted, but I do not understand the law to prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances.'

" 7. That was a case of plumbago mining. In *Silva v. Silva* (2) the law so laid down was applied to the case of one co-owner building a house on the common land without obtaining the consent of other co-owners, and it was held that he was not at liberty to do so.

" 8. Voet's original authority shows that every act whatever done by any co-owner on the common property must have the consent of the rest. It is in the *Digest* 10, 3, 28 and runs:—

'*Sabinus (ait) in re communi neminem dominorum jure facere quidquam, invito altero, posse. Unde manifestum est, prohibendi jus esse: in re enim pari potiorem causam esse prohibentis constat.*'

(1) (1896) 6 *N. L. R.* 275. (2) (1903) 6 *N. L. R.* 225.

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" 9. The correct principle no doubt is that every act of a co-owner rests for its legality on the consent expressed or implied of the whole body of owners. That is the principle laid down by Chief Justice Phear in *Appuhamí v. Ádria* (1).

" Some acts may be so natural or necessary, for example, the planting of a land with the fruit trees for which its soil is suitable, that the consent of the co-owners to them may be taken as implied, but such consent must always underlie them, though the legal necessity for it may be lost sight of.

" 10. Or the act may interfere to so slight an extent with the common equal enjoyment of the land that it is not worth complaining against. Of such a nature might be the building of a house by one co-owner on a very extensive land, in which the remaining co-owners are all still left with ample ground equally suitable for building on.

" 11. The act of building in such a case is justified not because there is a custom for co-owners to build without the leave of other co-owners (and to appropriate to themselves pieces of the common property), as was claimed but over-ruled in *Silva v. Silva* (2), but because *de minimis non curat lex*, a principle recognized by Justice Moncreiff in the case just mentioned.

" 12. But a co-owner has always the right to object to another co-owner building and to invoke the intervention of Court, and it rests with the Court to decide whether the act objected to will prejudicially affect the rights of the objector. That was the course approved in the decision contained in *Sande's Decisionum Frisicarum lib. III., tit.* 8, *definitio* I. In that case the plaintiff, one of the co-owners of a pool of water, proposed to drain it to prevent the flooding of his land below it. The other co-owners objected on the ground that the pool was required as an outlet for rain water from their lands. The plaintiff offered to provide equally suitable outlets for this rain water. On that condition the Court allowed the plaintiff's application. The reasons are there given as follows:—

'*Regula enim juris tradita, in Digest* 10, 3, 28, *dictitans quod socius invito socio in recomuni nihil facere possit, hanc interpretationem recepit, quod scilicet socius nihil possit facere propria auctoritate. Omnis actio et oppositio fundata est in eo, quod interest. Quando igitur socii prohibentis nihil interest, istius prohibitionis vel oppositionis nulla habendi est ratio; quia est potius pervicacia et invidia, quam justa prohibendi causa, eoque non attendenda.*'

" 13. The question, therefore, is whether the building to which the plaintiffs object in the present case is one that prejudicially

(1) (1879) 2 *S. C. C.* 166. (2) (1903) 6 *N. L. R.* 225.

affects their interests. Very slight proof of this will suffice. An inspection of the plan shows that the appropriation of the road frontage occupied by the defendant's house materially restricts the frontage available as sites for other co-owners, especially the plaintiffs, who would naturally wish to build on lot B, where they have their plantation. 1906. June 6.

" 14. The defendants have placed their house almost in the centre of the frontage of the lots A and B, and have thus made it impossible for the defendants to build an equally large house on B, which was their legal right.

" 15. Of course, neither party had a vested right in either lot. Neither could count on being allotted on partition the lot claimed but it is the practice to allot, as far as practicable, to each party the lot on which he has a house.

" 16. The defendants evidently desired to forestall the plaintiffs, and to secure by the building of their house more than their due share of the frontage. It is therefore a fallacy to argue that they were merely putting the land to the purpose for which it was specially adopted, namely, for building on, for the more it was in demand for building purposes the more necessary was it to respect the right of their co-owners to build, and to do nothing to prejudice that right.

" 17. Prior occupation of the ground cannot be allowed to give them any advantage. In Johannes Voet, *de Familia Erciscunda, chap. V.*, 3, it is laid down that there must be good faith and no fraud in a division among heirs:—

' Neque enim hic locum habere debet occupatio, quâ videlicet unusquisque cohœredum aliqua sibi vindicaret per possessionem bona hœreditaria: sed potius illi, qui primi rerum hœreditariarum possessionem adepti sunt, officio judicis sunt constringendi, ut ea, quæ clandestinâ occupatione acquisita detinent, exhibeant, aut saltem omni priventur possessionis commodo.'

" 18. And it is no answer that the owner who complains of the loss of a building site will get money compensation on a partition. One owner cannot force compensation in lieu of a share of the land on his unwilling co-owner. Voet, *de Fam. Ercisc., chap. VI.*, 9:—

'Nec invitum poterit hæredem constringere, ut rerum hæreditariarum integrum dominium cohœredi cedat, earumque pretium pro ea, qua succedit, parte recipiat: injustum enim est legibusque repugnans, quod consors aut socius suam cogeretur invitus portionem vendere vel extraneo vel consorti.'

" 19. These rules restricting co-owners in their enjoyment and appropriation of the common property apply *ex hypothesi* to

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bona fide possessors, so that the plea that a co-owner is a *bona fide* possessor will not avail if he infringes them, and therefore the right of the present defendants to compensation for improvements on the ground of their being *bona fide* owners of a share and to that extent with a *conscientia rei suæ* [*Newman v. Mendis* (1)] is subject to these rules.

" 20. A fallacy lurks in the argument that the *bona fide* owner of a share is entitled to deal exclusively with any part. The house in question was not built for the common benefit. The 21st and 124th defendants in paragraph 5 of their answer of September 26, 1903, state that the house was built for the 124th defendant alone by his father of the 21st defendant. It is valued at from Rs. 1,500 to Rs. 2,500, and the plaintiffs object to having to contribute against their wish to the cost of a building so palatial as they call it.

" 21. As Chief Justice Bonser states in *Siyadoris v. Hendrick* (2), it is not easy to find much in the Roman-Dutch Law books showing how the principle of *Voet* 10, 3, 7 and *Digest* 10, 3, 28 should be carried out in practice, but I am indebted to Mr. F. H. de Vos for a reference to *Code* 8, 10, 5, *De Ædificüs Privatis*, which is in point, and by means of it have been glad to trace a Roman-Dutch authority which is also exactly in point. *Code* 8, 10, 5 runs:—

'Si is, contra quem preces fundis, sciens prudensque soli partem ad te pertinere, non quasi socius vel collega communis operis solicitudine solidam balneorum extructionem eâ mente, ut sumptus proportione tua non reciperet, aggressus est, sed ut totius loci dominium usurparet, et collapsum balneum refabricare enisus est: sum ædificia quæ alieno loco imponuntur, solo cedant, nec impensæ his qui improbe id facerint, restitui debeant: antiquato D Hadriani edicto Præses provinciæ memor juris publici, in dirimenda disceptatione legum placita custodiet.'

" 22. The facts of the present case are exactly such as are therein referred to in that the defendants built the house with no intention of asking the co-owners of the land to contribute to its cost, but in order to appropriate the whole site and building for themselves.

" 23. The passage cited lays down that in such circumstances the house becomes common property, and that the builder shall not be entitled to recover contributions to its cost from the co-owners. It is only the institution of the present partition action that has raised the question of contribution to its cost.

" 24. The principle laid down in that passage of the Code has been adopted by the leading Roman-Dutch commentators on the

(1) (1900) 1 *Browne* 77 (2) (1896) 6 *N. L. R.* 275.

Code, Perezius and Brunnemann. I quote from Brunnemann (whose propositions are always clear and practical) 8, 10, 27:—

' Si quis sociorum suo nomine quasi in solidum suum fundum reædificaverit et reparaverit, tunc quod exstructum est cedit solo, ac fit commune, et sic pro parte dedit alteri sociorum et impensas non recuperat, i.e. repetitionem non habet licet expensas has necessarias per retentionem possit servare. Ratio autem: cur inædificans fundo communi ædificatum pro parte amittat, est, quia malâ fide in communi, ut in suo, ædificat. Perez. *ad hunc Titul in fine.* '

" 25. It is right to say that Grœnewegen, *Ad. Cod*, 8, 10, 5, is of opinion that the principle there laid down is opposed to modern views. He seems to concede that the builder in question acts *malâ fide*, but is of opinion that even a *malâ fide* possessor is entitled to recover *utiles impensas* (1) as *poenae legales* depriving any one of his rights have passed into disuse (2), but the weight of authority is against him. Grotius *Introd. Bk. II., ch.* 8, lays down:—' If, however, a person has built *malâ fide*, he is not entitled to claim any but necessary expenses,' and Vanderkeesel, the most modern Roman-Dutch authority in *Thesis* 214 notices the conflict of opinion and lays down:— *Malœ fidei possessorem utiles impensas deducere posse, etsi, contra Grotium, jus civile secutum, doceant multi; eorum tamen sententia admitti nequit.'*

" It was held in *Endorisa v. Andorisa* (3) that a *malâ fide* possessor is not entitled to compensation for *utiles impensas.*

" 26. I find, on the authorities cited, that the defendants in building the house in question without the consent and against the wishes of the plaintiffs, their co-owners, acted *malâ fide*, and are not entitled to compensation in respect thereof, inasmuch as the plaintiffs had a substantial and reasonable ground for refusing their consent to the building and had a right to have the building restrained by the Court in terms of *Voet* 10, 3, 7 and to have the property restored in *pristinum statum.* This being the case, it would obviously be entirely inequitable to make them pay anything towards the cost of the building."

The 21st and the 124th defendants appealed.

Sampayo, K. C. (*E. W. Jayewardene* with him), for the appellants.— The District Judge is wrong in not giving compensation to appellants. A co-owner cannot be put on the same footing as a *malâ fide* possessor. The Roman-Dutch Law is not applicable in view of the express provisions of the Partition Ordinance, which requires all

(1) *Ad. Cod.* 3, 32, 5. (2) *Ad. Cod.* 2, 19, *Ult. and Ad. Inst.* 2, 1, 30.
(3) (1902) 6 *N. L. R.* 350.

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improvements to be taken into account. The building of a house is an improvement, because it enhances the value of the property to that extent. Even if the appellants are not entitled to compensation the other co-owners should not benefit at their expense. The District Judge should give the appellants the option of removing the building.

H. J. C. Pereira (*Peiris* with him), for the plaintiffs, respondents.—The Roman-Dutch Law is applicable to all improvements. The improvements spoken of in Ordinance No. 10 of 1863 are such improvements as the common law recognizes. [LASCELLES A.C.J. —We are of that opinion, and do not wish to hear you on that point.] The authorities relied on by the District Judge clearly show that one co-owner has no right to build on the common property without the consent of the other co-owners. The plaintiffs from the very commencement objected to the building of the house. The house now forms part of the land, and all the co-owners are entitled to it.

Sampayo, K. C., in reply.—The Roman-Dutch authorities do not prohibit one co-owner from building on the common property, but only from doing something that would change the entire nature and character of the land (1).

Cur. adv. vult.

6th June, 1906. LASCELLES A.C.J.—

This is a partition action in which the question is raised whether the 21st and 124th defendants are entitled to be compensated by the plaintiffs in respect of a house built by them on the common property.

The argument addressed to on behalf of the appellants mainly rested on the contention that the Partition Ordinance, No. 10 of 1863, makes special provision over and above that contained in the Roman-Dutch Law for the payment of the value of improvements effected upon the common property.

There is in my opinion no ground for the contention that the Ordinance introduced any change with regard to the rights of co-owners under the Roman-Dutch Law to be compensated for improvements. The improvements referred to in sections 2 and 5 are obviously improvements for which compensation is payable under the common law of Ceylon.

There is no uncertainty with regard to the principles which govern the rights of co-owners to receive compensation for improvements to the common property. They are clearly laid down in the text-books, and have been uniformly acted upon by our Courts. It is

(1) *Maasdorp, Vol. II., p.* 130.

not necessary to refer at length to these authorities; they have been well collated by the District Judge.

In the *Digest* 10, 3, 28 the guiding principle is thus concisely stated:

"*Sabinus (ait) in re communi neminem dominorum juri facere quid quam, invito altero, posse. Unde manifestum est prohibendi jus esse.*"

Bonser C.J., with reference to Voet's commentary on this passage stated: "By this I understand that it is not competent for one co-owner against the will of the other to deal with the property in a manner inconsistent with the purpose for which the joint ownership was constituted, but I do not understand the law to prohibit one co-owner from the use and enjoyments of the property in such manner as is natural and necessary under the circumstances." *Siyadoris v. Hendrick* (1).

Consistently with these principles our Courts have held that the act of building upon land held in common without obtaining the consent of the co-owners is a violation of that co-owners rights, *Silva v. Silva* (2), but that the planting of cocoanut trees on land which would naturally be so used was an improvement for which compensation should be awarded, *Newman v. Mendis* (3).

In the present case it was proved that the plaintiffs made objection to the building of the house at a very early stage, namely, before the whole of the foundation was laid; the value of the land is given as Rs. 4,900 and that of the building as Rs. 1,500; there is no evidence to show that the building of a house on this locality was a use of the joint property which would naturally have been in the contemplation of the parties.

Having regard to these facts, the decision of the District Judge is clearly right. The only question which remains is as to the form of the order. The right of the objecting co-owners is to have the building removed and the property restored into its former state. He has no right to take the benefit of the improvements without paying compensation for it. If any portion of the building is allotted to the respondents, the appellants should be at liberty within a reasonable time to remove the building on the ground so allotted.

I would therefore amend the decree by adding to clause 3 a proviso that the 21st and 124th defendants shall be at liberty, in the event of any part of the said house being allotted to the plaintiffs, to remove the same within six months of the date of final judgment.

I would dismiss the appeal with costs.

WENDT J.—I am of the same opinion, and agree to the proposed modification of the decree.

(1) (1896) 6 *N. L. R.* 275. (2) (1903) 6 *N. L. R.* 225.
(3) (1900) 1 *Browne* 77.