

**RATHNAYAKE
VS.
WIJewardANA AND OTHERS**

COURT OF APPEAL,
SOMAWANSA, J. (P/CA) AND,
BASNAYAKE, J.,
CA 1106/2004,
DC GALLE 15068/P,
MARCH 10, 2005.

Civil Procedure Code - Partition action - Alleged co-owner constructing a building - Permissibility?

The plaintiff petitioner in the partition action instituted complained that the 1st defendant having entered the land unlawfully without any right or title is attempting to construct a building. The Court granted an enjoining order, but refused the interim injunction, on the basis that the 1st defendant is a co-owner.

The plaintiff petitioner moved in revision.

Held ;

- (1) The 1st defendant admits that the plaintiff is a co-owner, the plaintiff does not admit the 1st defendant as a co-owner. The pedigree filed by the defendant is different to that filed by the plaintiff.
- (2) The defendant claims a share through a certain deed, this deed has to be examined and accepted to consider the 1st defendant as a co-owner.
- (3) The court could not consider the defendant as a co-owner prior to considering the validity of the deed of the defendant he becomes a co-owner provided he gets a share through the said deed.
- (4) Thus there is a serious question to be tried in this case, the plaintiff has a strong case.

APPLICATION in revision from an order of the District Court of Galle.

Cases referred to :

1. *Elpi Noná vs. Punchi Singho* -52 NLR 115.
2. *Sumanaweera vs. Mahinda* -(1998)3 Sri LR 4

S. N. Vijith Singh for Petitioners.

Ms. Malini Maitipe for 1st respondents.

Cur. adv. vult

July 28, 2005

Eric basnayake, J.

The plaintiff petitioner (plaintiff) filed a Partition action in the District Court of Galle, to have the land called "Deeganowita", an extent of 100 kurunees of paddy, to be partitioned. The plaintiff named 6 defendants. Shares were allotted to the plaintiff and 2-6 defendants in the plaint. The plaintiff states that the 1st defendant having entered into this land unlawfully without any right or title is now attempting to construct a building. The District Court issued notice and an enjoining order at the first instance.

The 1st defendant-respondent (1st defendant) filed objections claiming 1/14 and 1/28 shares through a deed marked V2. He admits to the

construction of a building. The 1st defendant took up the position that the construction was in proportion to his share. The defendant does not disclose the area in which the construction is being done or the extent to which the defendant is entitled to occupy in this land. The defendant also does not claim exclusive possession.

The Learned District Judge has found that the plaintiff has failed to disclose the manner in which the construction is being done and the progress thereof. The court has also found that the 1st defendant is a co-owner. Therefore as a co-owner the 1st defendant is entitled to enjoy the land proportionate to his share and the onus is on the plaintiff to prove that the defendant is using the land disproportionate to his share and also that irreparable damage would be caused in the event of a construction. The court found that the plaintiff has failed to establish a case against the defendant and refused an interim injunction.

The plaintiff in this case is seeking to revise the said order of the learned District Judge dated 21.04.2004. After the counsel was heard in support, this court issued notice on the defendants. The court also issued an interim order in terms of prayer 'c' to the petition staying the construction. The counsel for the 1st defendant informed court that he would not be filing any objections to this application. At the hearing the learned counsel for the petitioner agreed to file written submissions.

The following facts are not disputed in this case. Namely,

- (1) The corpus.
- (2) The fact that the plaintiff is entitled to a share.
- (3) The fact that the defendant is constructing a building in the corpus.

In *Elpi Nona vs. Punchi Singh*¹¹ Gratiaen J. held that "every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportionate to his share, provided that he does not infringe the corresponding rights of his co-owners. More over neither he nor they can, except by mutual consent apply the common land to new purposes in such a manner as to alter the intrinsic character of the property. Should the erection of a building for instance (or for that matter any assertion of a co-proprietary right) be proved to constitute an interference with the legitimate use of the property by an objecting co-owner, a cause of action accrues to compel the wrongdoer to restore the status quo. The Question

whether in any Particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors, and cannot be solved as an abstract question of law."

Each co-owner is entitled to a reasonable use of the property proportionate to his interests in accordance with the object for which the property is intended to be used. Weerasuriya J. in *Sumanawathie vs. Mahinda*⁽²⁾ citing wille, Principles of South African Law editor at page 213 said Construction by one co-owner does not necessarily require the leave and acquiescence of the others. The law does not require the consent of all the co-owners to construct buildings on the common property provided the act of building does not constitute either an alteration of the inherent character of the common property or an attempted user of the common property to an excessive extent G. L. Pieris - Laws Property 15 Ed page 396.

The 1st defendant admits that the plaintiff is a co-owner. The plaintiff does not admit the 1st defendant as a co-owner. The 1st defendant is claiming a share through a deed marked "V2". This deed has to be examined and accepted to consider the 1st defendant as a co-owner. The 1st defendant was never in possession of this land until he started constructing this building. The present action was filed when the 1st defendant began to appear on this land. Where the act of building would constitute an unexpected and novel use of co-owned property consent of all other co-owners is necessary - *Weerasuriya J. Sumanawathie vs. Mahinda* (Supra)

The extent of the land is given as 10 "kurunees". There is no indication as to the nature of the land ; whether it is a land for building or cultivation. The 1st defendant too does not claim this land to be a land meant for building. The 1st defendant, although he claims that he is building in proportion to his share, does not mention the extent of his share or the extent of land used for this building. I am of the view that the learned District Judge erred in considering the 1st defendant as a co-owner prior to considering the validity of the deed marked "V2". The requirement of consent applies only to co-owners. The 1st defendant becomes a co-owner provided he gets a share through the deed "V2".

The defendant filed a pedigree which is different to the pedigree filed by the plaintiff. Therefore there is a serious question to be tried in this case.

The 1st defendant admits that the plaintiff is entitled to a share. If the plaintiff's pedigree is accepted by court, the defendant may even lose. Therefore I am of the view that the learned District Judge erred by deciding that the plaintiff did not have a strong case.

In view of the established principles enumerated above I am of the view that the learned District Judge erred in law in refusing an interim injunction. The court therefore allows this application and sets aside the order of the learned District Judge dated 21.04.2004. The court also issues an interim injunction as prayed for in the plaint. The plaintiff is entitled to costs in a sum of Rs. 10,000/- by the 1st defendant.

SOMAWANSA, J., — I agree

Application allowed.
