

1946

Present : Howard C.J.

PERERA, Appellant, and PODISINGHO *et al.*, Respondents.

132—C. R. Panadure, 9,881.

Co-owners—Erection of building on common land by one co-owner—Protesting co-owner's right to obtain mandatory order for demolition—Joinder of other co-owners as parties—Not a condition precedent.

The defendant built a house on the common land without the consent of the plaintiff, a co-owner, and depriving the latter of her right to put up a building on the road frontage.

Held, that when one co-owner has erected a house on the common land without the consent of another co-owner the latter can obtain a mandatory order for the demolition of the building. There is no rule of law that, in such a case, the plaintiff should join all the other co-owners of the land as parties.

De Silva v. Karaneri (1918) 1 C. L. Rec. 28, followed.

A PPEAL from a judgment of the Commissioner of Requests of Panadure.

H. V. Perera, K.C. (with him *U. A. Jayasundere* and *L. G. Weeramantry*), for the defendant, appellant.

G. P. J. Kurukulasuriya (with him *C. Dias*), for the plaintiffs, respondents.

Cur. adv. vult.

July 3, 1946. HOWARD C.J.—

The defendant in this case appeals from an order of the Commissioner of Requests, Panadure, entering judgment in favour of the plaintiffs as claimed together with costs. The plaintiffs who are husband and wife sued the defendant for a declaration of title to a 37/82nd share of the land in question and for a mandatory order directing the defendant to demolish the building which he has erected on the land without the consent of the plaintiffs. The Commissioner found that the plaintiffs were entitled to a 37/82nd share in the property and an order compelling the defendant to demolish the house. Mr. H. V. Perera on behalf of the defendant has not questioned the finding in favour of the plaintiffs with regard to their title to a 37/82nd share in the land. He maintains, however, that the order for demolition was not in accordance with the law. It would appear that after the writ of summons had been issued the plaintiffs applied for an interim injunction to prevent any further building of the house which was not completed. This injunction which had been granted was dissolved on June 9, 1943, on the defendant giving an undertaking that neither in the present action nor in any other action would he claim any preferential right to the site on which the building is by reason of the fact that he has put up the building on the site before other co-owners.

The Commissioner was satisfied on the evidence that the defendant had built a house on the common land without the plaintiffs' consent and that the house had deprived them of their right to put up a building on the road frontage. It was contended that in view of the terms of the

order cancelling the order for the injunction the plaintiffs had impliedly consented to the erection of the house. I am of opinion that the Commissioner was right in rejecting this contention.

The only question that remains for consideration is whether the Commissioner was right in making an order compelling the defendant to pull down the house. In Vol. I of the 2nd edition of Nathan's Common Law of South Africa at p. 427 the general principle with regard to the alteration by one co-owner in the form of the common property is stated as follows :—

“ No alteration in the form of the common property (such as a building) can be made by one owner if the other objects. In such a case, the person who objects is in a superior legal position, and he can compel the person making the alteration to restore the property to its former condition. But, if one of the joint-owners has knowingly permitted (but not authorised) a stranger, not having a share in the property, to make an alteration, such joint-owner is liable to pay damages for such alteration, but is not compellable to restore the property to its former condition (10. 3. s. 7).”

“ See Van der Keessel (s. 777), who agrees with this, but adds that a part-owner, who has the smaller share in a house, may, without the other part-owner's consent, cause the same to be repaired ; a view which is in accordance with equity, repairs coming under the head of necessary expenses.”

Mr. Perera has cited the case of *De Silva v. Siyadoris*.¹ In his judgment in this case Lascelles C.J. at p. 270 states as follows :—

“ But the co-owner who puts up a building on the common property is in a totally different position from a person who, under agreement with the owner, builds on the land of another. The co-owner in such a case acquires no title in severalty as against the other owners. One co-owner could prevent him from building on the common property without the consent of the other co-owners (*Silva v. Silva* ²), but the building once erected accedes to the soil and becomes part of the common property. The right of the builder is limited to a claim for compensation, which he could enforce in a partition action under sections 2 and 5 of Ordinance No. 10 of 1863. The claim of the plaintiff, therefore, rests on no legal foundation, and should have been dismissed. There is, of course, nothing in this decision to prevent any of the co-owners from claiming a partition, in a properly constituted partition suit, of the whole of the property, and in such an action the right of the builders of the houses now in dispute could be adjusted.”

The plaintiff in *De Silva v. Siyadoris* claimed a share in the building which had been erected by his predecessor in title as against other co-owners, and it was held that there was no foundation in law for such a claim inasmuch as the building enured for the benefit and was the property of all the co-owners whose rights could be adjusted in a partition action.

¹ (1911) 14 N. L. R. 268.

² (1903) 6 N. L. R. 22.

Mr. Perera also cited the case of *Heenhami v. Mohotihami*¹ the headnote of which is as follows :—

“ There is no rule of law that a co-owner cannot maintain an action against another co-owner without joining all the other co-owners of the land.

No doubt in many cases they are proper parties, and would be joined on an application being made for the purpose. In some cases they may even be parties, whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon all the questions involved in the action, in which case the Court may add them of its own motion under section 18, but if they are not added, the Court should, in accordance with the provisions of section 17, deal with the matter in controversy so far as regards the rights of the parties actually before it.”

Mr. Perera maintains that as the house put up by the defendant in the present case is the property of all the co-owners an order for its demolition cannot be made without joining them all as parties. I do not think that this proposition follows from *Heenhami v. Mohotihami*. In fact it would appear to be contrary to the decision in *Muthaliph v. Mansoor*² in which it was held that a co-owner is not entitled to build a house on a land held in common without the consent of the others and an injunction may be issued against the offending co-owner to remove the building without proof of irreparable damage to the party complaining. It would appear from the judgment of Fernando A.J. in this case that the plaintiffs were only some of the co-owners and others had not been joined in the case. In *Muthaliph v. Mansoor* the case of *De Silva v. Karaneri*s was cited with approval. The headnote of *De Silva v. Karaneri*s³ is as follows :—

“ One co-owner has no right to build on the common land without the consent of the other co-owners. If they object his proper remedy is to bring a partition suit. So long as the land remains in common each co-owner is entitled to the use of every portion of the land and one co-owner has no right to prevent the others from going on any particular portion of the land by building upon it.

When one co-owner erects a building without the consent of the others he can be restrained by injunction from doing so, or if he has completed the building in spite of the protest of the others he may be ordered to pull down the same.

The decision of the Full Bench in the case of *Heenhamy v. Mohoti Appu (supra)* regarding the joinder of co-owners in an action by one co-owner, followed.”

In his judgment Shaw J. states—

“ With regard to the other part of his claim, namely, the claim for an injunction, I have although somewhat reluctantly come to the conclusion that he is entitled to succeed. It is clear law that one co-owner has no right to build on the common land without the consent of his co-owners. If he desires to build on the land and they object

¹ (1916) 19 N. L. R. 235.

² (1937) 39 N. L. R. 316.

³ (1918) 1 C. L. Rec. 28.

his proper method is to apply for a partition of the land when he would be able to do whatever he likes with the portion allotted to him (but so long as the land remains the common property of all the co-owners they are each entitled to the use in common with one another to every portion of the common land, and, therefore, no owner has a right against his co-owners' wishes to prevent them from going on any particular portion of the land by building a house upon it). ”

I find it impossible to distinguish the facts in the present case from those in *De Silva v. Karaneri* which was cited with approval in *Muthaliph v. Mansoor*. In these circumstances I am of opinion that the Commissioner came to a right conclusion and the appeal is dismissed with costs.

Appeal dismissed.
