

1956 Present: K. D. de Silva, J., and Sansoni, J.

H. D. CHARLES *et al.*, Appellants, and H. A. D. JUSE APPU,  
Respondent

*S. C. 92—C. R. Gampaha, 6265*

*Co-owners—Building standing on the common property—Action between co-owners  
for declaration of title thereto—Maintainability.*

A co-owner is not entitled to maintain against another co-owner an action  
for a declaration of title to a building put up by him on the common property.

**A**PPPEAL from a judgment of the Court of Requests, Gampaha.

*H. W. Jayewardene, Q.C.*, with *Frederick W. Obeyesekere*, for defen-  
dants-appellants.

*N. D. M. Samarakoon*, with *J. C. A. Perera*, for plaintiff-respondent.

*Cur. adv. vult.*

July 11, 1956. DE SILVA, J.—

This is an appeal from the judgment of the Commissioner of Requests, Gampaha, declaring the plaintiff entitled to a house standing on the land called "Alubogahawatte" and for ejection and damages.

The 1st defendant is the husband of the 2nd defendant. Admittedly, the plaintiff and the 1st defendant are co-owners of this land. The plaintiff alleged that he built this house in or about the year 1932 and shortly after, the defendant came into occupation of it with his leave and licence. Later, according to him, the 1st defendant became his tenant of this house. The 1st defendant counter-claimed the building also by right of construction. The learned Commissioner entered judgment in favour of the plaintiff.

In June 1952, the plaintiff sued the 1st defendant in C. R. Gampaha Case No. 5473 for rent and ejection. In that case too the 1st defendant set up a claim to the house. That action was withdrawn by the plaintiff reserving his right to bring an action to vindicate his title to this building. Thereafter he instituted this action. At the hearing of this appeal Mr. Jayawardene contended that a co-owner is not entitled to maintain an action for a declaration of title to a building standing on the common property. This point was not taken in the Court below. In *de Silva v. Siyadoris et al.*<sup>1</sup> Lascelles C.J. dealing with the rights of a co-owner who puts up a building on the common property stated:—

"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 1853."

This view was followed by Basnayake, J. in *Sopihamy v. Dias*<sup>2</sup>. A contrary view was taken by Jayawardene A.J. in *Sopinona v. Pethahamy et al.*<sup>3</sup>. I would prefer to follow the principle laid down in the 1st two cases referred to above. A building accedes to the soil. A co-owner is entitled in law to his undivided share of every inch of the soil. On that principle it would not be open to a co-owner to ask for a declaration of title to a specific portion of the common property. When a co-owner is declared entitled to a building, in effect, it means that he is also declared entitled to the soil covered by it. Of course a co-owner is entitled to maintain a possessory action when he is ejected by another co-owner from a house built by him. That right is based on the principle that a co-owner is entitled to take the benefit of his improvement until compensation is paid to him by the other co-owners. Mr. Samarakoon who appeared for the plaintiff conceded that the point of law raised by Mr. Jayawardene was entitled to succeed. Accordingly I allow the appeal and dismiss the plaintiff's action with costs in the Court below but there will be no costs of appeal.

SANSONI, J.—I agree.

*Appeal allowed.*

<sup>1</sup> (1911) 14 N. L. R. 263.

<sup>2</sup> (1948) 50 N. L. R. 284.

<sup>3</sup> (1923) 25 N. L. R. 313.