[IN THE PRIVY COUNCIL]

1960 *Present :* **Viscount Simonds, Lord Tucker, Lord Jenkins, Lord Morris of Borth-y-gest, Mr. L. M. D. de Silva**

S. A. SUPPIAH, Appellant, *and* J. J. KANAGARATNAM (deceased) and others, Respondents

PRIVY COUNCIL APPEAL NO. 19 OF 1959

S. C. 232—D. C. Nuwara Eliya, 3181

Jus superficiarium—*Claim based thereon—Requirement of appropriate pleadings and issues—Erection of a building by several persons—Ownership of the building—Exclusive right of ground-owner.*

The right of superficies, which is the right which a man has to a building standing upon another man's ground, cannot be claimed in an action unless the pleadings and issues expressly refer to it.

No one can be the owner (or co-owner) of a building if he is not at the same time owner of the land on which the building stands.

The plaintiff and the defendant contributed to the cost of erecting a building on a piece of land belonging solely to the defendant as a leaseholder from a third party :—

Held, that the plaintiff was not entitled to claim a declaration of title to a proportionate share of the building. Nor was it open to the plaintiff, in the absence of appropriate pleadings and issues, to base a claim on the ground of *jus superficiarium*.

APPEAL from a judgment of the Supreme Court reported in *61 N. L. R. 282.*

Stephen Chapman, Q.C., with *Ralph Millner*, for the plaintiff-appellant.

Walter Jayawardene, for the defendant-respondent.

Cur. adv. vult.

February 18, 1960. [DELIVERED BY LORD TUCKER]—

The appellant was the plaintiff in an action heard in the District Court of Nuwara Eliya on various dates in the years 1952 and 1953, judgment in which was delivered on the 5th February, 1954. The defendants were J. J. Kanagaratnam and the present respondents Nos. 8 and 9, Thambiah and Selliah Pillai. The plaintiff, however, claimed no relief against the two last-named parties who were joined only for conformity. Judgment was given against Kanagaratnam. On his death the

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respondents numbered 1-7, having been substituted in his place as defendants, successfully appealed to the Supreme Court and the plaintiff now appeals to Her Majesty in Council against the judgment of that Court dated 28th June, 1957. The appellant Suppiah and the deceased Kanagaratnam will be referred to hereafter as plaintiff and defendant.

The action concerned the rights of the parties with regard to the Tivoli Theatre, Nuwara Eliya, which had been constructed between November, 1946, and 10th July, 1947, on a piece of land of which the defendant had obtained a lease in his own name dated 31st October, 1946, from the owner, a widow named Moraes. The cost of the building including the hire purchase price of the equipment required for its adaptation for use as a cinema was Rs. 145,185·70, to which the plaintiff had contributed Rs. 42,559 and the defendant Rs. 26,848. The balance had been provided by the respondents numbered 8 and 9 and three other persons not parties to the action named Ranasinghe, Karuppiah Pillai and Dr. Silva, who had obtained promissory notes or oral promises to repay the sums advanced by them. The intention of all these persons was to form a limited liability company to take over and run the theatre as a cinema. As the costs of building increased some of those who had embarked on this venture claimed their money back, quarrels between the original promoters broke out, and the company was never formed. Hence these proceedings.

It will be convenient at this stage to examine the averments and relief claimed in the plaint dated 19th June, 1950. Para. 1 states that the subject matter of the action was the Tivoli Theatre bearing assessment number 81 and more particularly described in the schedule thereto. The schedule describes the property as " all that theatre called and known " as ' Tivoli Theatre' Nuwara Eliya bearing assessment No. 81 in Ward " No. 2 on the Udapussellawa Road, Nuwara Eliya in the Central Province " and bounded on the north by property belonging to Varghese, presently " occupied by Roy Studio, south by municipal premises, east by " Chiselhurst path and west by Old Bazaar Main Road ".

Para. 2 reads : " The plaintiff and the defendants built the said theatre " called and known as the ' Tivoli Theatre ' and equipped it with plant " and machinery and the plaintiff and defendants became entitled to the "said theatre together with the said plant and machinery in the proportion " of one-fourth share to each ".

Para. 3 alleged that the defendant " as such co-owner " had been in possession since June, 1948, and collected the rents and profits for the benefit of himself and the other co-owners.

Para. 4 alleged that the defendant had unlawfully appropriated to himself all the mesne profits and rents of the theatre and refused to give the plaintiff his share.

Para. 5 alleged that a cause of action had thus arisen to sue the defendant for declaration of title to and possession of the undivided one-fourth share of the theatre and for mesne profits and rents together with interest thereon.

The prayer is as follows :—

" Wherefore the plaintiff prays :—

(1) " That he be declared entitled to one-fourth share of the said " theatre and the plants and machinery thereof.

(2) " That he be placed in quiet possession of the said one-fourth share.

(3) " That the defendant be ordered to account to the plaintiff for " his share of the rents and profits from June, 1948, up to date " of action.

(4) " For judgment against the first defendant in such sum as may " be found due to the plaintiff on such accounting.

(5) " For costs of this action and for such other and further relief " as to this Court shall seem meet ".

By his answer the defendant denied the averments in the plaint and pleaded that he was in possession under a lease granted by the widow Moraes which fact was well known to the plaintiff when he contributed to the cost of the building. He further pleaded that the claim to a share was not maintainable in the absence of notarial writing, and similarly the claim for an account could not be sustained in the absence of an agreement in writing to carry on business at the theatre as the capital exceeded Rs. 1,000 and in fact the business was carried on in partnership.

At the hearing before the Board, counsel for the defendant stated that he did not contend that any partnership existed prior to the building of the theatre.

On these pleadings issues were framed and approved. They appear on pages 30 and 31 of the record and need not be set out.

It is difficult to suppose that anyone reading these pleadings and the issues framed thereon would infer that the plaintiff at the trial was going to endeavour to establish a right to a *jus superficiarium* as against the defendant in his capacity as lessee under a lease for 20 years. This right in Roman Dutch law, which seems but rarely to have arisen for consideration in the Courts of Ceylon and as to the nature of which it is necessary to refer to the ancient jurists, is nowhere mentioned in the pleadings or issues. It is defined by Grotius in Book II of his Jurisprudence of Holland at Ch. 46, sections 8-10, as translated by Professor Lee at page 279 of Volume 1 of his translation of Grotius as follows :—

8. " The right of superficies is the right which a man has to a building " standing upon another man's ground.

9. " This right is not full ownership, because in law no one can " be full owner of the building if he is not at the same time owner of " the ground : but it is the right of building upon the site, and of " retaining and using the building until the ground-owner pays the " value of the building or an agreed sum ".

10. " This right is acquired and lost like immovable property : and " is understood to be effectively granted when the owner of the soil " allows anyone to build upon it ".

The District Judge described the case made by the plaintiff as follows :—

" The case for the plaintiff is that the partnership or company which " was to do business in the building was to come into being only after " the building was completed and that the building itself was not an " asset or liability of the partnership but was a building co-owned by " plaintiff and the 1st, 2nd and 3rd defendants ".

He held on the evidence that the association with regard to the building was not a partnership, but having considered the sums contributed by the parties he said :—" I am satisfied on the evidence before me that " plaintiff contributed Rs. 42,559 to the nearest rupee out of the total " spent on the theatre. *I therefore am of opinion he is entitled to Rs. 42,559/145,185 of this building.* (The italics are not those of the learned Judge.)

A few lines later he continued :—" The ownership of a building apart " from the site on which it stands is well known to our law. It is called " the right of Superficies. Now counsel for the first defendant claims " that in the absence of a notarial agreement plaintiff cannot claim this " right. What is the right of Superficies ? It is the right to build on the " soil and to hold and use the building until such time as the owner of " the soil tenders the value of the building if the amount to be paid has not " been previously agreed upon. Now in this case if the plaintiff was " seeking to enforce rights as against the soil owner there might be merit " in the contention of counsel for the first defendant but what plaintiff is " seeking in this case is only to be declared to his fractional share of the " building as against others who with him have put up the building and " one of whom now does not concede to him his fractional share although " that very person admits that plaintiff did contribute even as he contribu- " ted to the putting up of the building. I can see no legal objection to " plaintiff being declared entitled to his fractional share as against his " co-builders ". Finally at the end of the penultimate paragraph of his judgment he said, " I would point out, however, that in this case plaintiff " is not seeking to be declared entitled to the building as aginst the soil " owner—what plaintiff is seeking is a declaration of what fractional " share of the building he is entitled to as against the other co-owners of " the building which has nothing to do with the right of Superficies ". He proceeded to make a declaration that the plaintiff is entitled to Rs. 42,559/145,185 of the Tivoli Theatre building and equipment.

Their Lordships find difficulty in ascertaining the basis upon which this judgment rests. As no case had been pleaded or presented to the Court in support of a claim based on the *jus superficiarium* they agree that no such claim could have succeeded, but as partnership has been rejected and is not now relied upon and as the contribution made by the plaintiff could give him no interest in the soil there remains no justification for the declaration made.

The Supreme Court allowed the defendant's appeal.

Sansoni, J. (with whose judgment de Silva, A. J. agreed) said that the learned Judge was in error in saying " the ownership of a building apart " from the site on which it stands is well known to our law. It is called " the right of Superficies ". He said " It is clear beyond doubt that our " law does not recognise the ownership of a building apart from the land " on which it stands " and referred to the case of *Samaranayake v. Mendoris*[1]. He then referred to the submission of counsel for the plaintiff that his claim could be supported on the ground of the *jus superficiarium*. He said there were several objections to this contention, the chief being that the plaintiff's claim was to be declared entitled not to a *jus superficiarium* but to an undivided ¼ share of the building and added that he could not at that late stage be allowed to make out a new case quite different from the one to be found in his plaint.

With all these observations their Lordships are in complete agreement. On the hearing before the Board counsel for the plaintiff put the claim to *jus superficiarium* in the forefront of his case and invited their Lordships to hold that this right can be acquired as against a leaseholder and in the absence of a notarial document. He conceded that he could cite no decided case in his favour on either of these points but based himself on references to passages in the works of ancient jurists which he said supported his contention. In two or three cases in Ceylon, the last of which prior to the present case was *Samarasekera v. Munasinghe*[2], the question of the requirement of notarial writing to support the acquisition of a *jus superficiarium* otherwise than by prescription, has been discussed but always left open for future decision.

In these circumstances their Lordships would in any event have been loath to give any decision on such important and difficult questions without the assistance of considered judgments by the Courts of Ceylon on the subject, but in the present case there is the further fatal objection as stated in the judgment of the Supreme Court that a claim on the basis of *jus superficiarium* was not open to the plaintiff on his pleading.

Counsel for the plaintiff submitted in the alternative that he was entitled to a declaration that the defendant was a trustee of the lease for the plaintiff and the other defendants or that the case should be remitted for consideration on this basis.

It is clear that no such claim was pleaded nor were the facts necessary to support it alleged. At the close of the plaintiff's case in the District Court counsel for the plaintiff asked for leave to raise the following issue :— " Is the first defendant in possession of the Tivoli Theatre partly on his " own behalf and partly on behalf of the plaintiff and the second and third " defendants as trustee ?" Counsel for the defendant objected on the ground that this was raising an entirely new issue of which he had had no notice and which he was not ready to meet. Counsel for the plaintiff replied that it was clear that the theatre was built by monies advanced by the plaintiff and the first, second and third defendants and that the first defendant taking advantage of the position had got into possession

[1] *(1928) 30 N. L. R. 203.* [2] *(1954) 55 N. L. R. 558.*

to the disadvantage of the others. He said that in such circumstances section 92 of the Trusts Ordinance applied. At this stage the learned Judge raised the question whether any action for declaration of title to immovable property could be joined with a claim to a share of the profits of a business carried on in the theatre. The case was adjourned for a week when after further argument the Judge ruled that the joinder was bad. Accordingly counsel for the plaintiff agreed, without prejudice to his rights to an appeal, to amend the plaint by striking out the claim to a share of the profits of the business. On the defendant lodging his petition of appeal the plaintiff lodged a cross objection against the District Judge's decision as to misjoinder. A study of the arguments before the District Judge and the Judge's ruling on this point seems to show either that the new issue was regarded as relevant only to the plaintiff's claim to a share of the profits and was necessarily ruled out when the Judge decided that such a claim could not be joined, or that the question of the suggested new issue was lost sight of in the discussion as to joinder and never raised again. However this may be it is clear that an application at the close of the plaintiff's case seeking to raise a new issue unsupported by the necessary evidence and not pleaded could not succeed, and there are no findings upon which such a declaration could now be made. Their Lordships are accordingly of opinion that the alternative claim also fails.

For the reasons stated their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.