ROWEL APPUHAMY *et al. v.* MOISES APPU *et al.*

D. C., Chilaw, 1,450.

1899.
January 14 and 28.

Action for possession of trees planted on another's land—Interest in land—Crop severed from trees—Evidence of dispossession—Possessory suit.

Possession of trees standing on another's land is an interest in immovable property, but when the nuts are picked the crop becomes movable property.

Proof that defendant carried away nuts lying on the ground without giving a share thereof to his co-sharer, the plaintiff, and disputed plaintiff's right thereto, is sufficient evidence of dispossession to justify a possessory action.

A possessory action is inappropriate where the defendant is admittedly a co-owner. If co-owners cannot agree as to the exercise of the common rights, the only appropriate remedy is an action for partition.

Jayasuriya v. Omer Lebbe—2 C. L. R. (6) explained.

PLAINTIFFS, alleging that they were the owners of an " undivided half share, by right of purchase and prescriptive " possession, of all that cocoanut and other productive trees stand- " ing " on a certain land belonging to the heirs of one Senaviratne Mudaliyar, and that defendants " unlawfully entered the said " land on the 6th February, 1896, and removed 54 cocoanuts there- " from which had been gathered by the plaintiffs from the trees " belonging to them, and that since such unlawful entry and " removal the defendants have been in possession of half of the " said trees," prayed " for a declaration of title to an undivided half " share of the cocoanut and other productive trees on the said " land " and for damages.

Defendants denied plaintiffs' right as owners, and pleaded that the first defendant was owner of one-fourth share of the trees in question under a deed of sale, and that his vendor had planted the land for the heirs of Senaviratne Mudaliyar, and had so become entitled to the said one-fourth share as planted, and they prayed for a dismissal of plaintiffs' case.

The issues settled were :—

(1) Whether plaintiffs and their vendor had been in prescriptive possession of a half of the trees in question.

(2) Whether the defendants unlawfully removed 54 nuts from the said trees and held forcible possession of same since 6th February, 1896.

The District Judge, after hearing the evidence of the second plaintiff only (which was to the effect that he entered into possession from the date of his purchase, and that he plucked all the nuts and gave a moiety thereof to the landowners, and that

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there was no planting agreement in writing between the plaintiffs and the landowner), dismissed the plaintiffs' action in these terms:—

"The action cannot be maintained. The right to the land and "the produce is vested in the owner, who has allowed the plaintiffs' "vendor and the plaintiffs to plant the land. Plaintiffs are in "possession as servants under the owner, not *ut domini*. and have "no title in themselves to any of the trees."

Plaintiffs appealed, and the Supreme Court remitted the case for trial *de novo*, as the dismissal of the action was premature.

At the new trial it was proved that the plaintiffs had bought the planter's share from one Migel Appu by deed dated 8th December, 1894; that soon afterwards they entered into possession of the trees by picking nuts from time to time for about a year; that at the sixth picking the first defendant carried away the 54 nuts; that the soil belonged to the heirs of Senaviratne Mudaliyar; that it was planted by Migel's father; that defendants' vendor was Joronis, a brother of Migel; and that both Migel and Joronis had a share in the original plantation made by their father.

The District Judge stopped further evidence and dismissed plaintiffs' action, on the ground that he could not pray for a declaration of title to an undivided half share of the cocoanut trees, as the evidence showed that Migel, their vendor, had no notarial agreement to justify his possession, and had no right to pass any title to the plaintiffs; nor could the action be maintained as a possessory suit, since the possession proved was not exclusive, nor was it in regard to immovable property, but only to the nuts plucked.

Plaintiffs appealed.

H. Jayawardane, for appellant.—An interest in standing trees and crop thereon is an interest in immovable property. It is true that when the crop is removed from the trees it becomes movable property, but plaintiffs have alleged and proved that since the forcible removal of the nuts, defendants had continued in unlawful possession of the trees. They would have proved their vendor's title had they been allowed to do so by the District Judge. Defendants have not led any evidence whatever. Plaintiffs' case therefore stands unrebutted. The evidence recorded suffices for a possessory action. Plaintiffs deny defendants to be co-owners, and there is ample evidence that for some years previous to the disturbance the plaintiffs had been in exclusive possession. They are entitled to a decree to be restored to possession.

Seneviratne for respondent.—In *Perera v. Fernando* (*1 S. C. R. 329*) it has been held that no possessory action could be brought by one co-owner against an intruder who entered and dispossessed him, because the possession of a co-owner is not such an exclusive possession as entitles him to an action; and in *Jayasuriya v. Omer Lebbe* (*2 C. L. R. 5*), a planter's interest was held not acquirable otherwise than by deed. Migel had no right to convey to the plaintiffs.

Cur. adv. vult.

28th June, 1899. LAWRIE, A.C.J.—

In the present appeal it seems to me necessary to abstain from considering any questions of title, such as whether Migel alone, or Migel and Joronis together, were planters, or whether there be prescription either between the planters and owners or between the planters themselves. Those are issues inappropriate in a possessory action.

The learned District Judge dismissed the plaintiffs' prayer to be restored to possession—first, because the property of which the plaintiffs complain they were dispossessed is not immovable property; second, because the interest claimed is not exclusive, being an undivided, not a divided, possession.

I am of opinion that dispossession of trees is dispossession of immovable property, and that possession of trees is an interest in immovable property.

Here, however, the immediate act complained of was the taking of 54 nuts which had been picked when they were lying on the ground. The nuts were certainly movables.

However, the answer and proof disclose that the defendants not only took 54 nuts, but have since that date claimed right to one-fourth and have dispossessed the plaintiff. There was (I think) sufficient dispossession of trees on the land to justify a possessory action.

I do not see why possession of a fractional share of land should not be protected, provided the possession was *ut dominus*, or by one having authority from or as representing the owner.

A possessory action would, I think, be inappropriate in cases where the defendant is admittedly a co-owner, entitled to equal possession with the plaintiff. If they quarrel and are not able to agree as to the exercise of the common rights, probably a suit for partition is the only appropriate action.

In the case of co-owners, it might be irrelevant for the plaintiff to aver that he had been in possession for the year before action, for the relevant answer might be that it is the defendants' turn. There might be other defences by a co-owner to an action for

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restoration to possession by another co-owner. Each case depends on its special circumstances. Possession by a co-owner for a year will not, I think, in all cases give him right to get a possessory decree against a co-owner who has turned him out and entered into possession.

Here the plaintiffs deny that the defendant is a co-owner with them. Between them it is a question of title on which we cannot now enter. I think that the plaintiffs have proved that they have been in exclusive possession of the whole of the planter's share for some years prior to the assertion of title and forcible taking of nuts by the defendant. The plaintiffs are entitled to a decree restoring them to possession of the trees.

I would set aside the judgment and enter a possessory decree for the plaintiff with costs.

BROWNE, A.J.—

The true issue of fact in this action is whether Migel Fernando (plaintiff's vendor) solely planted the land in question and so had right to convey to plaintiff a half share of the trees, or whether Joronis Fernando (defendant's vendor) was a co-partner with him, and the planting rights are now equally shared by plaintiff and defendant. Plaintiff alleged, as matter of dispossession and dispute of his title, that when he had plucked 54 cocoanuts on 6th February, 1896, defendants forcibly and unlawfully took them from him, and he therefore twenty-two days subsequently sued to have his right to the planter's half share declared.

The District Judge at the first trial allowed an amendment in the plaint to be made so that a possessory decree could be granted thereon, but prematurely dismissed plaintiffs action. His successor framed issues appropriate to a mere possessory action, and evidence was led relative thereto alone, plaintiff not putting forward his vendor to prove when, after the completion of the agreement, the planter took his share and began to possess. That would be the date from whence, as against the owner of the land, adverse possession would commence to be computed for the planter (*2 C. L. R. 6*). By parity of reasoning, I presume the planter could also reckon adverse possession against all others than the soil owner from that date.

The learned District Judge further held that the decree in a possessory action could not be entered in plaintiff's favour, because that of which he claimed to be restored to the possession was an undivided interest, and that, too, in movable property and not immovable property. The decision which was cited (*1 S. C. R. 327*) was one in an action by one co-owner against another, and

there the Court gave a possessory decree for plaintiff for that portion of the garden of which plaintiff had been in sole possession. Defendants in this action called no evidence to prove they had ever been in possession of this planter's share, while plaintiffs proved they solely possessed it for four years prior to the dispute of their title and the forcible removal of the nuts. Now, if there be title by notarial conveyance or agreement or by prescriptive possession to a planter's interest, that interest will be immovable property. and as in possessory actions the possessor is for the purposes of the action assumed to be one by lawful title, it should, in my judgment, be assumed in an action like the present that the planter's interest in question is an interest in land rather than that it is not. And here, as regards the defendant, the plaintiff must be considered to be one in possession, who has been dispossessed by one without title, who is not proved to be a co-owner with him.

The learned District Judge also upheld the contention that the proof of ouster was insufficient. I do not so regard it, or that, in addition to taking away the cocoanuts with an entire denial of plaintiff's right thereto, plaintiff needed to have proved any further exclusion of him from enjoyment of the fruits as by forcible removal of them from the garden.

I therefore would set aside the dismissal of the action and enter a possessory decree for the plaintiff with costs.