SIYADORIS *v.* HENDRICK.

1896.
May 12.

D. C., Galle, 3,027.

Co-owners of landed property—Unlawful ouster by a co-owner—Partnership—Roman-Dutch Law—Digging for plumbago without consent of co-owner.

An action by a co-owner of a land for his share of the value of the plumbago dug therein, after an unlawful ouster of the plaintiff, is maintainable without a prayer for dissolution of partnership.

The rights of co-owners of landed property in Ceylon are governed by the Roman-Dutch Law, and not by the English Common Law.

It is not competent for one co-owner against the will of the other to deal with the property in a manner inconsistent with the purpose for which the joint ownership was constituted.

The law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances.

ON the 9th September, 1890, the first plaintiff and the first defendant jointly purchased from the Crown certain lands which were said to contain plumbago. Owing to a dispute between the purchaser as to the payment of the purchase money the Crown grant was not signed till 11th October, 1892, nor issued till the month of December following. In the meantime the first defendant, who claimed to be solely entitled to the land, entered into possession of the land and leased it to certain plumbago miners, who bound themselves to pay him a royalty of one-eighth of the plumbago raised.

Subsequently to the mining lease, but prior to the Crown grant, the first defendant agreed with the second defendant (Carimjee Jafferjee) to sell him a moiety of the land, and executed a conveyance to him of that moiety. The plaintiffs and the second defendant thus appeared to be entitled to the land in equal moieties.

The lessees of the first defendant entered on the land and raised a quantity of plumbago, alleged to be about 1,599 tons.

The plaintiffs sought to recover half the value of the plumbago found and Rs. 12,000 " as and by way of mesne profits. "

It was contended for the first defendant that the transaction alleged by the plaintiffs constituted a partnership, and that no action for an accounting or for payment of a specific sum could be brought without a prayer for a dissolution of partnership.

The District Judge (Mr. H. L. Moysey) upheld his plea by the following judgment delivered on 14th October, 1895:—

" It has been laid down in D. C., Galle, 41,723 (*2 S. C. C. 166*), that the joint ownership of a subject of property by a number of persons is a partnership. That decision has been approved in the

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later case, D. C., Galle, 1,020 (*2 C. L. R. 167*). One partner cannot sue another for a share of the profits unlawfully taken, unless at the same time he sue for a dissolution of the partnership. The plaintiffs have mistaken their action. It must be dismissed."

The plaintiffs appealed. The case was argued on 17th March, 1896.

Grenier, for appellants.

Dornhorst, for respondents.

Cur. adv. vult.

12th May, 1896. BONSER, C.J.—

Without hearing any evidence the District Judge has dismissed the plaintiffs' action on the ground that the Court had decided that the joint ownership of land by a number of persons in common is a partnership, and that being so the plaintiffs could not sue for their share of the profits without first getting a dissolution of partnership. The plaint is badly drawn, but it alleges an unlawful ouster by the first defendant assisted by the other two defendants.

Fortunately the rights of co-owners of landed property in this Island are governed by the Roman-Dutch Law, and not by the English Common Law, for unless the plaintiff were ousted by his co-owners and forcibly prevented from enjoying the land, his remedies under the English Common Law would be doubtful.

The case will go back to be tried on the issues raised.

LAWRIE, J.—Concurred.

On the case going back, the following issues were tried:—

(1) Did the first and second defendants, on or about the 26th August, 1892, claiming title in themselves to the whole of the lands, oust the plaintiffs and keep them dispossessed till the 2nd March, 1893 ?

(2) What quantity of plumbago did defendants raise during that period without giving these plaintiffs their due share ?

(3) What sum, if any, are plaintiffs entitled to receive ?

The District Judge's judgment on these questions of fact delivered on 4th January, 1897, were modified in appeal by Lawrie, J., and Browne, A.J., on the 5th July, 1898.

The plaintiffs brought this judgment of the Supreme Court in review on the 11th November, 1898, before Bonser, C.J., Lawrie, J., and Withers, J.

H. J. C. Pereira and *Wendt*, for petitioner, appellant.

Layard, A.-G. (with him *Dornhorst*), for second defendant, respondent.

Cur. adv. vult.

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25th January, 1899. BONSER, C.J. (after setting forth the facts of the case)—

This Court, on the appeal of the second defendant, reduced the damages to Rs. 882.50 and entered up a decree against both defendants for that sum, being the share of the royalty to which the plaintiffs were entitled in respect of their ownership of a moiety of the land. In my opinion the decree of this Court should be varied, and the action dismissed as against the second defendant with costs.

It was argued that the digging of plumbago by a joint owner without the assent of his co-owner is a wrongful act amounting to an ouster. There is little to be found in the books as to the rights of co-owners under Roman-Dutch Law. Voet says: *Invito autem uno socio nihil novi per alterum potest fieri in re communi, meliorque prohibentis conditio est; adeo ut, si quid novi per alterum socium invito altero factum sit, aut fieri mandatum, is cogi possit ad id in pristinum statum restituendum* (*bk. 10, 3, 7*). By this I understand that it is not competent for one co-owner against the will of the other to deal with the property in a manner inconsistent with the purpose for which the joint ownership was constituted, but I do not understand the law to prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances. This was in substance the law laid down by Bacon, V. C., in *Job v. Potton* (*L. R. 20 Eq. 84*), and is, I venture to think, in accordance with good sense and not inconsistent with the Roman-Dutch authorities.

In the present case there can be no doubt that this land was purchased for the purpose of getting the plumbago contained in it. It is not suggested that the usual and customary method of getting plumbago was departed from, or that the lessee was improvident, or the royalty inadequate.

As far as the second defendant is concerned, I see no reason whatever for making him liable in this action. All that he did was to acquiesce in the lease which he had no power to repudiate, and to take his share, and no more than his share, of the royalty. It is evident that the plaintiffs did not conceive that they had any grievance against the second defendant, for early in 1893 the first plaintiff entered into an agreement with him for the joint working of this very plumbago mine, which was acted upon for a considerable period, and it was only after they had quarrelled that the plaintiffs bethought themselves of claiming anything from him in respect of the prior working.

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The decree in review will be in accordance with the opinions of the majority of the Court that the action be dismissed as against the second defendant with costs, and in other respects the decree of this Court be affirmed.

LAWRIE, J.—

It seems to me impossible to say that it was the first defendant more than the second defendant who prevented the plaintiff from getting his share. I cannot earmark the plaintiff's plumbago or his profits, and say that these were taken by the first defendant and not by the second.

Whatever be the law as to the rights of enjoyment of a land owned in common, especially land from which minerals and the like are dug, this at least is certain, that an owner who has been deprived of his property has right to recover it from any one who has taken it, or to get its value if the property has been converted into money, and here I think it is proved that both the defendants kept the plaintiff out of possession, that both of them took plumbago in which the plaintiff had a share, and that both are jointly and severally liable.

This seems to me to be a case distinguishable from *Job v. Potton* (*L. R. 20 Eq. 84*). There one co-owner took no more than his share, leaving untouched enough for the other co-owners; here the first and second defendants, acting together, prevented the plaintiff (a co-owner) from getting any share at all. For his share of the profits, received during the months the plaintiff was excluded, the first and second defendants are in my humble opinion jointly and severally liable.

I would affirm the judgment now under review.

WITHERS, J.—

The two questions we have to consider are these:—

(1) What was the amount of plumbago taken from the pits after the plaintiff and the first defendant became jointly entitled to the two contiguous lots on which the pits were sunk?

(2) For how much of that plumbago is second defendant responsible to plaintiff?

[After considering the first question his Lordship continued:—]

Then, as to the liability of the second defendant, I think the judgment we are now reviewing very rightly reduced the liability of the second defendant.

The Roman-Dutch Law is clear on this point:—*Invito autem uno socio nihil novi per alterum potest fieri in re communi, meliorque prohibentis conditio est; adeo ut, si quid novi per alterum socium invito altero factum sit, aut fieri mandatum, is cogi possit*

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ad id in pristinum statum restituendum. Quod si, extraneo quid novi faciente, sociorum alter id passus sit, cum prohibere posset, nec tamen mandaverit, opus quidem destruere non compellitur, sed hoc judicio conveniri potest ad damni inde dati reparationem. (Voet, lib. 10, tit. 3, section 7.)

Now, between the 11th October, 1892, and March, 1893, Tinoris was virtually the plaintiff's co-owner. He had a lease from the first defendant of the pits for one year. The second defendant could not interfere with his operations; he had no voice in the matter; this lease went before his sale. He had an interest in the ground share, and he employed people to protect that interest. There is really not the slightest evidence that the second defendant assisted the first defendant and Tinoris in extracting this plumbago, or that he knew it was done against the consent of the first plaintiff.

In fact, I think the plaintiff was fortunate in recovering anything by way of damages from the second defendant. I would restore the amount decreed against the first defendant by the District Judge, and with this modification I would affirm the judgment in review.