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Present: Ennis J. and Schneider A.J.

MUDIYANSE *et al. v.* SILVA *et al.*

230—D. C. Ratnapura, 2,212.

Co-owners—Action by one co-owner against another co-owner for declaration of title—Joinder of other co-owners.

One of a number of co-owners cannot sue one or more of his co-owners either for possession or declaration of title or in ejectment without making all the other co-owners parties to the action.

THE facts are fully set out in the judgment.

R. L. Pereira, for defendants, appellants.—All the co-owners are not before the Court. It is difficult to find out the exact shares of the plaintiffs and defendants in the present state of the pleadings and evidence.

The plaintiffs should have brought a partition action; or they should have at least joined the other co-owners as parties to this action.

G. Koch (with him *A. Drieberg*), for the respondent.—The objection as to non-joinder comes too late. The defendants must be taken to have waived the objection. See Civil Procedure Code, section 22. The other co-owners would not be bound by this judgment, and would not, therefore, be prejudiced. They do not dispute the plaintiffs' share.

It is not well settled that all the co-owners should be joined in an action like this. See *1 Br. 340*. The Court may send the case back for joinder of all parties if necessary.

Cur. adv. vult.

July 5, 1916. SCHNEIDER A.J.—

In this action the plaintiffs pray to be declared entitled to an undivided share of a land, and to be "placed and quieted in the possession thereof." There is no prayer for ejectment. But as an ouster by the defendants from the entirety of the shares claimed is pleaded as the cause of action, I shall assume that the plaint also prays by implication that the defendants be ejected from the possession of these undivided shares. Counsel on both sides admitted at the argument of this appeal that there were co-owners who are no parties to this action. But for the purpose of the application of the law, and to indicate the complicated nature of the title on both sides, I shall refer briefly to the devolution of the title as developed by the allegations in the pleadings and the admissions at the trial. The land is said to have originally belonged to three brothers, Sahanda, Kirisanda, and Pinsanda. The entirety of Kirisanda's one-third is claimed by the first plaintiff by right of purchase. According to the plaint, Pinsanda's one-third, as also Sahanda's one-third, devolved by intestate succession on the five children of Sahanda, viz., Kiribinda, Guneya, Ratta, Malbinduwa, and Setu. At the trial it is recorded that one of these children—Ratta—had no children. I believe that what was meant by this was that his share devolved on his four brothers and sisters. One of these four—Guneya—died intestate, leaving five children, viz., Pinsetu, Kirihatana, Kalu Heena, and Babonchi. One of the others—Setu—is alleged to have died leaving four children, viz., Hopi, Kirilamaya, Babi, and Batti. Besides Kirisanda's one-third the first plaintiff claims 5/36 by purchase from Pinsetu and Babonchi, alleging that Pinsetu had acquired a 1/18 from his sister Setu by purchase. Thus, according to the plaintiffs, the shares of Kiribanda, Malbinduwa, Kirihatana, Kalu and Heena, and a portion of the shares of Setu are unaccounted for. But the first

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defendant claims Kiribinda's and Malbinduwa's shares, as also the shares of three of the children of Setu. Thus, according to both parties, there is still outstanding the shares of two of the children of Guneya and of one of the children of Setu. These shares are not claimed by any of the parties to the action, and yet the plaintiffs claim 1/3 plus 5/36, which are equal to 17/36, the defendants 1/4 plus 13/36, which are equal to 22/36, and the added defendant 1/6, which are equal to 6/36. These shares total 45/36. This shows decisively the overlapping of the claims. As regards Kirisanda's one-third, there is a triangular contest, the first plaintiff, the intervenient Gomes, and the defendants, all claiming it; according to the defendant, Batti, a child of Setu's, who is no party to this action, having also a share. The plaintiffs, the added defendant, the defendants, and the intervenients are all at variance as to the shares which devolved upon Sahanda's descendants, and yet two of them are not parties to this action. The learned District Judge holds that the plaintiffs are entitled to 41/90. He makes no adjudication upon the claims of any of the other parties, although there was an added plaintiff, an added defendant, and an intervenient. He says: "I cannot in the present case decide the rights of all the co-owners, nor can I apportion the buildings. If the parties wish these points to be decided, they must institute a partition action." Even as to the subject-matter of the action—whether it consists of one or of two lands—the parties are at variance.

It is obvious on the pleadings, and now on the findings of the learned Judge, who tried some of these issues, that this is essentially a case where the well-established rule should have been enforced, that one of a number of co-owners cannot sue one or more of his co-owners, either for possession or declaration of title or in ejectment, without making all the other co-owners parties to the action. It has been held that such joinder is not necessary to enable one co-owner or some of them jointly to sue a stranger trespasser, as, for instance, in *Mohammadu Ismail v. Don Andris*[1] and *Cassy Lebbe Marikar v. K. Baba*,[2] to name two among other cases.

For the last forty years the necessity for the joinder of co-owners has been consistently insisted on, and referred to in a large number of cases. To cite a few. In the case of *Uduma Lebbe v. Mohidin*[3] Phear C.J. held that all the co-owners should have been parties for two reasons: (1) Because the ouster alleged, viz., the denial of the plaintiffs' share of the produce at the periodic distribution among the co-owners involved all the co-owners, and not only the defendants; and (2) that as the possession was not several, no decree declaratory of title could be passed between the plaintiffs and

[1] *(1885) 7 S. C. C. 48, 87.*

[2] *(1885) 7 S. C. C. 97, 132.*

[3] *2 S. C. C. 148.*

the defendants without immediately effecting all the co-sharers in their possession. But, apart from these two reasons, which were immediately concerned with the particular facts of that case, he proceeded to say: " No doubt recourse may often be usefully had to the Court for the determinating of any question, which has *bona fide* arisen between the owners in regard to the relative proportions of their shares without the Court being called upon to deal with the actual possession at all; but even in that case, it is essential that all the co-owners should be before the Court. " Note the words " it is essential. " The principle so laid down was reiterated in no unequivocal terms in 1886 by the judgment of the Full Bench, consisting of Burnside C.J. and Dias and Clarence JJ., in the case of *Passivee Appuhamy v. Liana Appu.*[1] Burnside C.J. dissented from the other members of the Bench, but it appears to me that he misunderstood the second of the reasons given by Phear C.J. He read it to say that the decree would bind the other co-owners who were no parties to the action. But what Phear C.J. did say was that the enforcement of the decree would affect the other co-owners in their possession, for the reason, I take it, that if these co-owners do not admit the correctness of the shares decreed, the possession, whether by division of fruit or by separate portions of land or trees, is disturbed by the declaration in the decree.

Bonser C.J., in the case of *Arnolisa v. Dissan,*[2] in 1900, quoted with approval, and followed the principle, that all the co-owners should be parties. He also indicated that section 12 of the Civil Procedure Code applied only to cases against stranger trespassers, and did not repeal the practice requiring all the co-owners to be before the Court.

Bonser C.J. and Lawrie J., in 1901, in the case of *Ranesinghe v. Cooray,*[3] recognized the validity of the principle requiring joinder of all co-owners.

In 1908, in the case of *Perera v. Fernando,*[4] Wood Renton and Wendt JJ. followed the same principle.

It will be thus seen that the rule had been recognized and consistently followed by several Judges of this Court. I do not regard the decision of *De Silva v. De Silva,*[5] in 1900, as in any way an authority for the proposition that all the co-owners need not be joined. For one thing I am unable to follow the reasoning in it. But it is clearly of no authority, being the judgment of a single Judge as against the Full Bench decision already referred to by me. Now the reason for the rule of the Roman-Dutch law requiring joinder of all the co-owners is well founded. I cannot do better

[1] *(1886) 7 S. C. C. 190.*
[2] *(1900) 4 N. L. R. 163.*
[3] *(1901) 2 Br. 20.*
[4] *(1908) 2 N. L. R. 48.*
[5] *(1900) 1 Br. 340.*

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than quote Mr. Berwick, the then District Judge of Colombo, in action No. 84,120 of his Court.[1] He says the rule is " a corollary from the general principle that one who seeks to recover an inheritance, or his share of it, measures his action, not by what the possessor is occupying, but by his own rights; and these rights in a case of this kind are necessarily confused with those of all the other co-owners, who must therefore be affected by any measurement of the extent of his and of every separate co-owner's right; while reciprocally his rights are to be measured by those of each of them. It must be remembered also that these *pro indiviso* shares are not real, but purely ideal divisions; and that there can be no separate materials or physical possession of these ideal divisions. They may find their practical effect in the actual division of the produce of the soil in corresponding proportions, or in their enjoyment by actual occupation of physically separate and distinct portions of the soil for mutual convenience and by mutual arrangement; but this possession, or rather this mode of enjoying the common property by its division into portions, does not imply any legal title to the occupation of such portions in severalty " . . . . . Keeping in view the purely ideal nature of these *pro indiviso* shares, and the fact that any physical possession of separate portions by metes and bounds is, until a partition has taken place, a mere matter of arrangement as to the mode of enjoyment of common rights, which any one of the co-owners may at any time put an end to, it follows from the very nature of *pro indiviso* ownership that if my co-heir is in the physical occupation of more of the common property than coincides with his ideal share, he must be occupying as such surplus, not merely a part of what permanently belongs to me, but which permanently also belongs to every one of our co-owners in common with me. If I am entitled to an ideal one-sixth, but in the distribution of the temporary mode of enjoying the common whole am only permitted to occupy one-twelfth of the substance, I cannot insist on any redistribution of the occupation, nor can I seize and separate off for my own occupation, in severalty, any other particular part of the common whole large enough to make up what corresponds in physical extent to the proportion of my *pro indiviso* or ideal right. My only remedy is to claim partition, and thus transform ideal shares into physical ones. And it follows from this, not only that so long as there is no partition no determination can be come to as to what and what I shall physically occupy by mutual arrangement in lieu of my ideal share without the corresponding possession of every other co-owner being affected, but also that no determination can be come to as to the extent in ownership of my *pro indiviso* ideal share without the extent in " ownership of every other co-owner's *pro indiviso* and ideal share being also affected. And, therefore, I must claim to have my

[1] *(1882) 1 Br. App. C. iv.*

share of the common estate made up, not from the share of one, but from the shares of each of my co-heirs or co-owners; in a word, must sue not one, but all for each atom, so to speak, of the deficiency; for each atom is the common property of all. Therefore, all must be joined in an action of the nature of the present. ''

But since the coming into operation of our Civil Procedure Code there is added a further reason why the practice of the Roman-Dutch law should be followed. I mean the provisions in section 18 of the Code, which gives a Court wide power to bring into action any person " whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action be added.'' This section corresponds with the language of Rule 11, Order xvi., as pointed out by Withers J. in *Meedin v. Banda.*[1] I would repeat here that passage from the judgment of Lord Esher, M.R., in the case of *Bryne v. Brown,*[2] cited by Withers J.:—

" It seems to me to be the fundamental principle that one of the chief objects of the Judicature Acts that wherever a Court can see in the transaction brought before it that the rights of some of the parties may, or probably will, be affected, so that under the former system of law there might have been several actions brought in respect of the same transaction, the Court shall have power to bring all the parties before it and determine all their rights by one trial.

" The evidence of the issues raised by new parties being brought in need not be exactly the same. It will be enough if the main part of the evidence or of the inquiry will be the same, and the Court has power to bring all the parties before it and to determine the matter in one action.

" Another great principle of the Judicature Acts was to diminish, if possible, the cost of litigation. The Court ought, therefore, to construe these Acts as largely as it can, in order to carry out, as far as possible, those objects to which I have referred. ''

I have considered the question whether this case should be remitted to the lower Court to enable the parties to rectify the omission to join the outstanding co-owners, and have come to the conclusion that to do so would serve no useful purpose. The plaint and the answer are not satisfactory, as title is not properly set out in them. I therefore think the most satisfactory order to make in the circumstances is to dismiss this appeal, as also the whole of plaintiffs' action, without prejudice to his right to bring another action on the same cause of action. As the other parties are equally

[1] *1 N. L. R. 51.*

[2] *58 L. J. Q. B. 411.*

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to blame with the plaintiffs, inasmuch as no objection was taken by them to the constitution of the action, I order that all the parties do bear their own costs.

ENNIS J.—I agree.