

Present: Lascelles C.J. and Wood Renton J.

BANDA *et al.* v. CADER.

295 and 296—D. C. Kegalla, 2,724.

Partition—Defendant in bona fide possession of whole land—Compensation for improvements—Profits taken after litis contestatio—Set off—May claim for the value of profits taken after litis contestatio be made in partition action?

The right to compensation is an incident of *bona fide* possession, and depends upon the possession being of that character. But the effect of *litis contestatio* is to change the character of the possession. After *litis contestatio* the possession is no longer *bona fide*, and the possessor is liable to account for the profits which he has taken after that.

Partition actions do not stand on a different footing to ordinary actions for declaration of title as regards the liability of the *bona fide* possessor to account for his profits after *litis contestatio*.

LASCELLES C.J.—The point at which the *litis contestatio* arises is marked by the filing of the contesting defendant's answer.

Where a defendant (co-owner) was in *bona fide* possession of the whole land, the Court set off the value of the profits taken by him after *litis contestatio* as against the compensation that was due to him, but declined in the partition action to order the defendant to account for the entire profits taken after the *litis contestatio*, though the value of the profits taken by him was in excess of the sum due to him for compensation, as it was in substance a claim for damages which cannot be combined with a partition action on unstamped pleadings.

THE facts appear from the judgment.

Bawa, K.C., for the defendant, appellant, in No. 295, and for the defendant, respondent, in No. 296.—The plaintiffs were not entitled to set off the profits which the defendant derived from the improvements since *litis contestatio*.

In partition action there cannot be said to be a *litis contestatio* at any particular point of time. The whole duty of investigating into the title of the parties is cast on the Court. Therefore the

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principles applicable to ordinary actions do not, apply to partition actions. In partition actions *litis contestatio* arises, if at all, only when the Court holds that a party is not entitled to the share claimed by him. Till then the party must be deemed to be a *bona fide* possessor. The Court had, moreover, no jurisdiction to decide the question of damages and set off in this case.

Counsel cited *Van Leeuwen (Kotze)*, Vol. II., pp. 368 and 450; *Walter Pereira's Right to Compensation for Improvements* 49; *Samarasinghe v. Balahamy*;¹ *Silva v. Silva*;² *Perera v. Silva*.³

A. St. V. Jayewardene, for the plaintiffs, respondents, in No. 295, and the plaintiffs, appellants, in No. 296.—There is no difference between ordinary actions and partition actions as to the liability of a possessor to account for the fruits of his improvements.

It was agreed between the parties that the question of set off should be tried, and the defendant is now estopped from disputing the propriety of the issue. Counsel cited *Gurdeo Singh v. Singh*,⁴ *Cornelis v. Endoris*,⁵ *Adarahamy v. Abraham et al.*,⁶ *Ponnamma v. Arumugam*.⁷

January 21, 1913. WOOD RENTON J.—

The points involved in these appeals do not, in my opinion, present any very serious difficulty, and both appeals may be dealt with together.

The action is one for partition. The plaintiffs alleged that they were entitled to a two-thirds share, and allotted to the defendant a one-third share, of the land in suit. The defendant in his answer claimed the entirety of the whole land. The learned District Judge gave judgment in the plaintiffs' favour, and his decision was affirmed in appeal. He held, however, that the defendant had been in *bona fide* possession of the land. The question then arose as to the compensation to which the defendant was entitled. The Commissioner appointed to settle the scheme of partition appraised the value of the land, as enhanced by the defendant's improvements on it, at Rs. 500 an acre, and considered that a sum of Rs. 200 was sufficient to cover the defendant's outlay in connection with his improvements. The learned District Judge in the result fixed the compensation at Rs. 716, but set off as against that amount the profits made by the defendant through his possession of the land since *litis contestatio* in the action. This set off is far more than sufficient to extinguish the compensation awarded to the defendant. The amount of compensation fixed by the learned District Judge is not challenged. But the defendant contends that the profits made

¹ (1902) 5 N. L. R. 379.

² (1905) 9 N. L. R. 110.

³ (1910) 13 N. L. R. 88.

⁴ (1907) 36 Cal. 193, at pp. 205-208.

⁵ (1907) 1 A. C. R. x.

⁶ (1907) 2 A. C. R. 120.

⁷ (1905) 8 N. L. R. 228.

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by him through his possession of the land up to the date at least of the judgment ought not to have been set off against the compensation to which the District Judge has held that he was entitled as a *bona fide* possessor. There can be no question but that in an ordinary action for declaration of title to land a *bona fide* possessor would be bound to account for profits after *litis contestatio*. There does not seem to be any very clear authority on the question whether in this Colony there is *litis contestatio* on the filing of the plaint or on the filing of the answer. For the purposes of the present case the point is immaterial. The defendant's contention is that the principle applicable to ordinary actions for declaration of title does not hold good in partition actions in which no peremptory provision is made for pleadings, and it is the duty of the Court to investigate independently the title of every claimant who appears before it. No authority was cited to us in support of this contention, and, in my opinion, it is untenable. In a partition action, as in an action for declaration of title, compensation to a *bona fide* possessor is an incident arising from a declaration of title. Section 2 of the Partition Ordinance of 1863 makes the filing of a libel, or plaint, as it now is, by the plaintiff imperative, and the following sections provide for the appearance of defendants and for a statement by them of their attitude to the plaintiff's claim. In practice the defendant in a partition action invariably defines this attitude by filing a written answer, and I doubt whether in District Court cases there is any other legal mode of placing it before the Court. But be that as it may, the Partition Ordinance creates machinery by which a substantial *litis contestatio* between parties is arrived at. I see no reason why the ordinary rule of the common law as to profits after *litis contestatio* should not hold good in actions under that Ordinance.

The point taken by the plaintiffs in appeal No. 296 is that the learned District Judge should have ordered the defendant to account to them for a two-thirds share of the profits that accrued to him from possession of the land since *litis contestatio* in the action and to pay damages. To this claim it appears to me that there are several answers. In the first place, it is not a claim of which the Court could take account in a partition action. Even as regards the share of profits, it is really a claim in the nature of damages, and in a partition action damages cannot be claimed or awarded. This clearly results from the cases of *Samarasinghe v. Balahamy*¹ and *Silva v. Silva*.² The plaintiffs' counsel referred us to a ruling to the contrary in D. C. Jaffna 5,148.³ But that decision, as the defendant's counsel pointed out, is prior to Ordinance No. 10 of 1897, which exempted the pleadings in partition actions from stamp duty. It was certainly not the intention of the Legislature by that enactment

¹ (1902) 5 N. L. R. 379.² (1905) 9 N. L. R. 110; 3 Bal. 149.³ (1877) Ram. 1877, 189.

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to enable actions for damages to escape from stamp duty by being tacked on to an action for partition. In the next place, it is clear from the record that no claim such as the plaintiffs have now set up was presented to the Judge in the proceedings in the District Court. Their counsel called our attention to the fact that issues had been framed, one of which raised the question as to the damages which they had suffered by the defendant's operations on the land, while another dealt with the income that he had derived from it after *litis contestatio*. It is obvious, however, that the object of these issues was simply to enable the District Judge to decide as to the amount of compensation payable to the defendant, which he expressly declares in his judgment to have been the only question in the case. The inquiry which he held is described in the record as an "inquiry regarding compensation." The judgment deals with compensation only.

On the grounds that I have stated I would dismiss these appeals with costs.

LASCELLES C.J.—

I concur with the judgment of my brother Wood Renton. I cannot see on principle why partition actions should stand on a different footing to ordinary actions for declaration of title as regards the liability of the *bona fide* possessor to account for his profits after *litis contestatio*. That there is a *litis contestatio* where the rights of the co-owners are in dispute is indisputable, and the point at which the *litis contestatio* arises is, under the practice which prevails in our Courts, clearly marked by the filing of the contesting defendant's answer. After this the parties are at issue.

The right to compensation is an incident of *bona fide* possession, and depends upon the possession being of that character. But the effect of *litis contestatio* is to change the character of the possession. After *litis contestatio* the possession is no longer *bona fide*, and the possessor is liable to account for the profits which he has taken after that.

I therefore think that, in assessing the compensation to which the defendant was entitled, the learned District Judge was right in setting off the value of the profits taken by the defendant after *litis contestatio*. If he had not done this, he would obviously have awarded the defendant more than that to which he was equitably entitled.

With regard to the appeal in action No. 296, I need only say that, in my opinion, a claim to account for the whole of the profits after *litis contestatio* is a different matter. It is in substance a claim for damages, which, it is well settled, cannot be combined with a partition action on unstamped pleadings.

I would dismiss the appeal with costs.

Appeals dismissed.