1969 *Present :* **Samerawickrame, J., and Weeramantry J.**

T. K. BURAH, Appellant, *and* P. G. PREMADASA, Respondent

S. C. 609/66—D. C. Tangalle, 267/M

Partition action—Co-owner—Improvements effected by him—Compensation awarded to him in interlocutory decree—His right to a jus retentionis *until compensation is paid—His right to mesne profits before or after interlocutory decree—Partition Act (Cap. 69), ss. 34 (1), 34 (2), 52.*

Where, in an interlocutory decree entered in a partition action, a co-owner is declared entitled to compensation in respect of improvements effected by him to the common land, he has the right to remain in possession until the compensation due to him is paid. Hence there can be no question of mesne profits claimable against him by the other co-owners for the period of his possession before or after the interlocutory decree.

APPEAL from a judgment of the District Court, Tangalle.

N. E. Weerasooria, Q.C., with *G. P. J. Kurukulasuriya*, for the defendant-appellant.

D. H. Pandita-Gunawardene, with *Mohini I. Gunasekera*, for the plaintiff-respondent.

Cur. adv. vult.

December 17, 1969. WEERAMANTRY, J.—

The plaintiff claims in this case a sum representing the mesne profits for three years, namely 1962, 1963 and 1964, of a field possessed by the defendant who was, according to the plaintiff, entitled to only a very small share of the land. It is common ground that the plaintiff purchased his interests on 7th March 1960 and that in a partition case instituted in respect of this land, interlocutory decree had been entered on 18th December 1963 declaring the defendant (who was the third defendant in that case) entitled to a 53/1728 share of the land, and the present plaintiff entitled to a 720/1728 share. This decree further provided that the plaintiff should pay a sum of Rs. 500 as compensation to the defendant for the improvements to the land effected by him.

The sum of Rs. 500 was not paid by the plaintiff till November 1965.

The defendant claims as a matter of law that he was entitled to remain in possession until payment of the compensation due to him and states further that the mesne profits claimed by the plaintiff are calculated on an imaginary and unreasonable basis.

The main question involved in this case is the right to a *jus retentionis*, of a co-owner who has effected improvements to the common land, and the effect of an interlocutory decree in terms of which such co-owner is declared entitled to compensation for the improvements effected by him.

The crops which the defendant is alleged to have appropriated are Maha 1962, Yala and Maha 1963 and Yala 1964, of which it will be observed that Yala 1964 is subsequent to the interlocutory decree. The appropriation of the first three crops will therefore have to be considered on the basis of the common law, while the appropriation of the last will require consideration also in the light of the statutory provisions relating to partition decrees.

There is little difficulty in regard to the legal principles applicable, for the co-owner's right to a *jus retentionis* in respect of his improvements is well settled. It has been stressed on behalf of the respondent that in the present case the defendant has stated that he had improved the land on behalf of his co-owners. The co-owners included the defendant's own daughter, and it is submitted that in these circumstances there would clearly be no desire on the part of the improving co-owner to hold the improvements as against the other co-owners. It is hence submitted that there is no *jus retentionis* in such a case.

However, there is the fact that a claim for compensation has apparently been made in respect of these improvements and has resulted in an award of a sum of Rs. 500 as compensation to the improving co-owner. Moreover there would appear to be no circumstances indicative of the improving co-owner depriving himself in any way of his ordinary rights in respect of such improvement or of a desire on his part to make a gift of that improvement to all the co-owners, some of whom were not so closely related to him.

It would appear then that when the defendant said that he was making these improvements on behalf of his co-owners he was saying little more than what the law implies in every case of such improvement, namely that the improvements enured to the benefit of all the co-owners.

If then there is no essential difference between this and the ordinary case of improvement by a co-owner, the law applicable would, as laid down in a succession of decisions of this Court, be that the improving co-owner would, if he has acted with the acquiescence of the other co-owners, be entitled to possess the entirety of the plantation as against the others.[1] These specific decisions of this Court in regard to co-owners make it unnecessary to consider the submission by learned Counsel for the respondent based on *Wijeyesekera v. Meegama* [2] that it is not every class of improver who is entitled to a *jus retentionis*.

Two decisions to which I would wish to refer are *Peiris v. Appuhamy* [3] and *de Silva v. Sangananda Unnanse.*[4] In the first of these cases it was held that where in a partition action compensation for improvements due to a bona-fide possessor is determined, he has the right to retain possession until the compensation due to him is paid and in the second case it was held that a co-owner who makes a plantation on common property with the consent of the others is entitled to possess the entire plantation until

[1] *Gunasekera v. Silva (1955) 58 N. L. R. 83 ; Podisingho v. Alwis (1920) 28 N. L. R. 401.*

[2] *(1939) 40 N. L. R. 340.*

[3] *(1947) 48 N. L. R. 344.*

[4] *(1938) 40 N. L. R. 162.*

the rights of parties are finally decided in a partition action. It is thus clear that the defendant was entitled to remain in possession until the amount due to him was paid.

To refer now to the provisions of Statute law, there is in the first place the proviso to section 52 of the Partition Act which states that even after final decree a party to whom a lot is allotted is not entitled to obtain an order for delivery of possession until that amount is paid. As was observed in *Samarakoon v. Gunewardene* [1], this provision implies that a party to whom compensation is due may remain in possession until compensated.

Reference should be made, secondly, to section 34 (2) of the Partition Act which provides that the amount determined by the Court under section 34 (1) as compensation for improvements or owelty shall from the date on which final decree is entered be a charge on the portion of the land or the extent of land finally allotted to the party made liable for the payment of such compensation or owelty as the case may be.

On the basis of these principles an improving co-owner to whom compensation is due is under no obligation to deliver possession until compensated, and there would consequently be no question of mesne profits claimable against him by the other co-owners for the period of his possession by virtue of a right so given to him by law. This would apply whether the period of possession be before or after interlocutory decree. Hence no mesne profits would be claimable in respect of the four crops in question.

The learned District Judge's award of damages to the plaintiff is based largely on the decision in *Abideen Hadjiar v. Aiysha Umma.* [2]

In that case it was observed that where improvements are effected for the benefit of the owner of property the improver is not entitled to compensation. The improver in that case admitted that he effected the improvements in the interests of his wife and children, but a basic difference between that case and the present is that at the time of improvement the person effecting the improvements was not as in the present case a co-owner. At the time of improvement he had no interests in the property at all, being merely the husband of the owner. It was only thereafter, upon her death, that he became a co-owner of the property. That decision can therefore be no precedent on the question of the award of compensation or the grant of a right of retention to a co-owner who improves the common property.

The learned Judge's award of damages to the plaintiff would therefore appear to be on a mistaken basis and as stated earlier the plaintiff's claim in respect of all four crops must fail. The judgment appealed from is accordingly set aside and the plaintiff's action dismissed with costs both here and in the Court below.

SAMERAWICKRAME, J.—I agree.

Appeal allowed.

[1] *(1964) 67 N. L. R. 110.*

[2] *(1963) 68 N. L. R. 411.*