1936

Present : **Dalton S.P.J. and Koch J.**

FERNANDO *v.* BABANISSA *et al.*

314 and 315—D. C. Kegalla, 9,398.

Planting agreement—Agreement by planter to deliver a share of the produce—Nature of right—Permanent right to trees—Partition action—Order for sale—Ordinance No. 10 of 1863, s. 14.

Where a planting agreement provided as follows :—

"After the planting of the said land is over the planter shall yearly deliver to the owner of the land or to an heir one-third share of the produce derived from the said land, and the planter or his children heirs and grandchildren descended of him up to their generations shall be entitled to possess the remaining two-third share thereof as planter's compensation ",—

***Held*, that the agreement vested the planter with only a permanent right of property in the trees upon the land with the rights necessary to the enjoyment of that right within the meaning of section 14 of the Partition Ordinance and that the interest of the planter may be sold under a decree entered in a partition action in respect of the land.**

APPEAL from an order of the District Judge of Kegalla.

Case No. 314.

H. V. Perera (with him *M. T. de S. Amerasekera* and *E. B. Wikramanayake*), for plaintiff, appellant.

H. E. Garvin, for first defendant, respondent.

Case No. 315.

H. V. Perera (with him *M. T. de S. Amerasekera* and *E. B. Wikramanayake*), for second defendant, appellant.

H. E. Garvin, for first defendant, respondent.

Cur. adv. vult.

February 21, 1936. DALTON S.P.J.—

The two appeals arise out of a partition action, the plaintiff (appellant in No. 314) and the second defendant (appellant in No. 315) being co-owners of the land sought to be partitioned. The first defendant, who claims an interest in the land under a planting agreement, is the respondent in both appeals. He also claimed title by prescription, which could not be maintained and was not pressed. At the trial the appellants claimed to be entitled to an order for the sale of the property under section 14 of the Partition Ordinance. The respondent, on the other hand, claimed for himself and his heirs to be entitled in perpetuity to possession of lot 3, roughly representing the planted portion, subject only to the delivery to the soil owners of a one-third share of the produce.

The planting agreement (exhibit P 10) is dated December 31, 1901, and was between the respondent and a predecessor in title of the appellants. The land to be partitioned is 4 acres 15 perches in extent, and 2 pelas of the whole, to the eastern side, was delivered to the respondent to be planted within a period of eight years. There were the usual provisions as to catch crops and as to what was to happen in case of default in planting within the time limited.

The agreement then, in paragraph 5, went on to provide as follows :

" After the planting of the said land is over as hereinbefore agreed upon, the planter shall yearly deliver to me the owner of the land or to an heir one-third share of the produce derived from the said land, and the planter or his children, heirs and grandchildren descended of him up to their generations shall be entitled to possess the remaining two-third share thereof as planter's compensation ".

In view of the terms of this paragraph, the trial Judge holds that the respondent is in a more secure position than a person having a permanent right to growing trees on the land sought to be partitioned. This is so, he states, because under the agreement P 10 not only his rights but those of his heirs and successors are secured. He further held that a sale would be inequitable and was unnecessary. He thereupon ordered a partition of the land, subject to the respondent's right to remain in possession of 2 pelas or 2½ acres on the east of lot 3 under the conditions mentioned in the planting agreement. He further declared that the respondent and his successors were entitled to remain in possession of the 2 pelas or 2½ acres and to pay one-third of the produce to the appellants and their successors in title.

The trial Judge, I think, has misconstrued the document. There was, it is true, some attempt to support his judgment on the footing that the document created something in the nature of a *fidei commissum*, but that could not possibly be maintained. It was conceded that all the soil rights (to use a fairly common but somewhat inconvenient expression) were in the appellants, and taking the document as a whole, I fail to see that it is anything but an ordinary planting agreement with the usual compensation to the planter and his heirs. The terms of these agreements as to details generally differ. In some cases the planter takes half the soil as well as an interest in the trees or produce. Under the agreement before us, in my opinion, the respondent is nothing but a person with a permanent right of property in the trees upon the land, with of course the rights necessary to the enjoyment of that right, within the meaning of section 14 of the Ordinance. The addition of the words " heirs " and " children " in no way limits the rights of the planter. The interest acquired under the agreement is his to be dealt with at his own will, is saleable by him, is inheritable by his heirs, is subject to his devise, and to his creditors for his debts as any other property (see *Jayewardene on Partition, p. 265*).

The order appealed from and the preliminary decree entered must therefore be set aside. The case must go back to the lower Court for a decree for sale to be entered. The steps required by the Ordinance preparatory to sale will of course be observed. The first defendant must pay the costs of the contest in the lower Court, the costs of sale to be paid by the parties, one-third by the first defendant, and the remaining two-third by the plaintiff and the second defendant *pro rata*.

The appellants are entitled to their costs in this Court.

KOCH J.—I agree.

Appeal allowed.