

1964

Present : Sirimane, J.

J. D. SAMARAKOON and others, Appellants, and
D. P. GUNAWARDENE, Respondent

S. C. 70/61—C. R. Hambantota, 7170

Partition action—Interlocutory decree—Award therein of compensation for improvements—Jus retentionis—Wrongful dispossession—Damages—Partition Act. (Cap. 69), s. 52.

A party to a partition action to whom, according to the interlocutory decree entered in the case, compensation is due in respect of improvements is entitled to remain in possession of such improvements until he is compensated. Accordingly, if he is dispossessed of them by a co-owner before final decree is entered he is entitled, in a separate action, to claim damages for the entirety until he is restored to possession, or until final decree is entered, whichever event takes place earlier.

APPEAL from a judgment of the Court of Requests, Hambantota.

E. B. Wikramanayake, Q.C., with *S. W. Jayasuriya*, for Defendants-Appellants.

E. A. G. de Silva, for the Plaintiff-Respondent.

Cur. adv. vult.

June 5, 1964. SIRIMANE, J.—

The plaintiff-respondent had been enjoying the produce of the entire coconut plantation which stood on the land called Debarawewakele of which he was a co-owner. It is not clear whether he had planted all those trees, or planted some of them and purchased the others from the planters, but he was in fact taking the produce of the entire plantation without dispute.

The defendants-appellants filed a partition action No. P. 60, in the District Court of Tangalle, in which the present plaintiff was the 6th defendant. Interlocutory decree had been entered in that case as far back as 16.2.55, by which the plaintiff-respondent was allotted 1/6th of the soil and the 1st defendant-appellant 1/12th share of the soil. The interlocutory decree also awarded the entire plantation and buildings to the plaintiff-respondent in the following terms :—“ It is further

ordered and decreed that as the 6th defendant has bought off the planter's rights he is hereby declared entitled to compensation for the cost of planting and compensation for buildings."

As I understand it, this means that after the scheme of partition is drawn and the final decree entered, the plaintiff-respondent would be entitled to claim compensation for those trees which would fall outside the lot allotted to him for his 1/6th share, from those on whose lots those other trees would fall.

The plaintiffs in the partition case (that is, the present defendants-appellants) had not, as far as one can gather, taken steps to get the final decree entered in that case. No final decree was produced at the trial. On the contrary the journal entries in P60 (P10) show that even on 23.11.60, the commission to survey had not been executed.

On 1.8.60, the defendants-appellants had taken possession of the entire coconut plantation, and in this action the plaintiff-respondent had successfully claimed damages from them.

I am unable to agree with the contention of Mr. Wikramanayake that once interlocutory decree was entered the plaintiff's rights were limited to a right to claim compensation only, and that he had lost his rights to remain in possession of his plantation. As stated earlier the quantum of compensation payable to the plaintiff-respondent and by whom such compensation is payable can only be ascertained after final decree is entered. In fact the defendants-appellants filed answer in this case on the footing that final decree had been entered and that they possessed only the trees which fell within the lot allotted to them—a position which is factually incorrect. There is one matter, however, to which Mr. Wikramanayake has drawn my attention which needs correction. The decree entered in this case grants the plaintiff-respondent damages until he is compensated. Mr. Wikramanayake points out that in terms of this decree, even if his clients give up possession of the trees the plaintiff-respondent can still claim damages until compensation is paid. I think the plaintiff is entitled to damages until he is restored to possession, or until final decree is entered, whichever event takes place earlier; for once final decree is entered some trees would at least fall on his lot and he would not be able to claim damages for the dispossession of those trees.

It should be noted that under the proviso to Section 52 of the Partition Act (Volume 3, Chapter 69) even after final decree a party to whom a lot is allotted, is not entitled to take possession of that lot until compensation, if any, due from him is paid. This provision implies that a party to whom compensation is due may remain in possession until compensated.

Subject to the variation in the decree set out above the appeal is dismissed with costs.

Appeal dismissed.