Present: De Sampayo J. and Loos A.J.

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SILINDAHAMY *et al. v.* PERIS *et al.*

333 and 334—D. C. Ratnapura, 2,840.

*Right of co-owner to dig for plumbago—Right to minerals reserved in Crown grant—Action by miner against co-owner and lessee for recovery of possession and damages—*Jus tertii.

The Crown sold in 1892 a piece of land reserving mining rights. Out of several shares, the plaintiffs became entitled to a share, and the fifth defendant to another. On a mining lease from several co-owners, the plaintiffs opened a pit for plumbago, and after the expiration of the lease continued to work it with the tacit consent of all the co-owners.

The sixth defendant, who took a lease from the fifth defendant, dispossessed the plaintiffs and worked the pit. The plaintiffs sued for recovery of possession and damages.

Held, that, though the Crown had reserved mining rights, the plaintiffs were entitled to maintain the action.

The possessor of a thing may maintain, an action against the wrong-doer, though not against the true owner.

The plaintiffs were entitled to the plumbago, though they may have to account for it to the Crown.

Where a co-owner carries on mining operations on the common land, he is entitled to appropriate to himself the whole output, less the ground share of the other co-owners.

Silva v. Fernando [1] distinguished.

THE facts appear from the judgment.

Samarawickreme (with him *E. G. P. Jayatilleke*), for sixth defendant, appellant.

Drieberg (with him *F. M. de Saram*), for fifth defendant, appellant.

Bawa, K.C. (with him *A. St. V. Jayawardene* and *Wijemanne*), for plaintiffs, respondents.

Cur. adv. vult.

April 11, 1919. DE SAMPAYO J.—

These are two appeals taken by the fifth defendant and sixth defendant, respectively, in an action arising out of a dispute to a plumbago mine on a land called kiriwelahena. The main appeal is that of the sixth defendant, who has raised certain important questions of law. The land originally belonged to the Crown, and was sold on a Crown grant dated June 6, 1892, which reserved to the Crown all right and title to the mines and minerals on the land,

[1] *(1912) 15 N. L. R. 499.*

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together with power of entry for discovering or working such mines, or for procuring and carrying away any minerals in or upon the land. By devolution of title from the Crown grantees the details of which need not be mentioned the first and second plaintiffs, who are husband and wife, are now entitled to one-fifteenth share of the land, and fifth defendant to one-fifth share, and the first, second, third, and fourth defendants to the remainder of the land. The land contains plumbago, and for many years several pits have been worked thereon either by the co-owners or by lessees under them. The present disputes relates to a pit called Galpatala, the history of which may be stated as follows. On February 5, 1898, the co-owners gave a mining lease for eight years to the first plaintiff, who opened a pit and worked it till January 24, 1903, when he assigned his interest to the third plaintiff. The original lease expired in 1906, but the third plaintiff, with the tacit consent of the co-owners, continued to work the pit under the first plaintiff, whose wife, the second plaintiff, had in the meantime become entitled to one-sixtieth share of the land by purchase. The third plaintiff having worked the pit for some time gave certain interests therein successively to two persons named D. A. Fernando and Weerakoon. These persons gave up the pit, and the third plaintiff resumed work again and continued to mine for plumbago with the first plaintiff, who himself acquired title to another three sixtieth share of the land in 1908. The pit was a very expensive one, and its name indicates that rocks had to be blasted and other difficult operations performed. By this time it had reached a depth of over 30 fathoms. The plaintiffs' case is that, while they were thus in possession of the pit Galpatala and were digging for plumbago, the sixth defendant, who had in 1915 taken a lease from the fifth defendant, forcibly entered and ejected the plaintiffs from the pit Galpatala, and began to dig and take out plumbago and appropriate the same. The sixth defendant denied the alleged dispossession, and, in effect, stated that the pit Galpatala had been abandoned by the plaintiffs, and that he lawfully worked it himself under the lease from the fifth defendant. The latter took the same attitude, and, further, made a claim in reconvention in respect of two other pits, which, he said, the first and second plaintiffs were working on the same land. The first to fourth defendants are co-owners, and have been joined only for the purpose of constituting the action, and no relief is claimed against them. The plaintiffs asked for possession, and claimed against the fifth and sixth defendants a decree for Rs. 75,000 as damages up to the date of action, and for further damages at the rate of Rs. 6,000 till restoration to possession. The District Judge gave judgment for the plaintiffs for possession and for the sum of Rs. 40,000 as mesne profits or damages, with further damages at Rs. 600 a month, and he dismissed the fifth defendant's claim in reconvention. The fifth and sixth defendants have appealed.

The most important question raised by the sixth defendant is whether, in view of the reservation of mines and minerals in the Crown grant, the plaintiffs are entitled to claim damages for the entry upon the pit Galpatala and in respect of the plumbago taken therefrom. The authority cited on behalf of the appellants is the decision of the Privy Council in *Silva v. Fernando*.[1] It should be noted, in the first place, that the defendant in that case was a stranger, and it is questionable whether the sixth defendant, who has obtained a right to mine from the fifth defendant, a co-owner of the land, can dispute the right of the other co-owners, the plaintiffs, to do the same. Mr. Samarawickreme, however, says that the sixth defendant is in the position of a trespasser both as regards the plaintiffs and as regards the Crown, and is entitled to put the plaintiffs to the proof of their right. I am willing to consider the case on that footing. In this connection it should be observed, in the next place, that the decision of the Privy Council proceeded upon the basis of an admission at the Bar, on behalf of the plaintiff in that case, that the plaintiff in order to succeed must establish his title. There is no such admission in the present case, but, on the contrary, the plaintiffs rely on their actual possession. It is a well-known principle that the possessor of a thing may maintain an action against a wrong-doer, though not against the true owner. The nature of the possession of land is such that it involves possession, not only of the surface, but also all that is contained beneath the surface. In the present case the act of possession is still more effective, because the plaintiffs, having mined from the surface, had reached the deposits of plumbago, and were, therefore, in actual possession of the plumbago. They are, I think, entitled to keep the plumbago, though they may have to account for it to the Crown. Indeed this act of possession appears to me to be lawful even as regards the Crown, because the Crown has waived its right to mines and minerals in the case of lands alienated before 1901. The facts as regards the waiver are disclosed in the judgment of the Privy Council in the above case. With regard to the rights of action arising from actual possession, Mr. Bawa, for the plaintiffs, has cited a number of cases, which appear to me very apposite. In *Lewis v. Branthwaite*,[2] the owner of an adjoining colliery, without breaking the surface of the soil, had tunnelled into the sub-soil and taken coal therefrom. The copyhold tenant was held to be entitled to sue the owner of the colliery, on the ground that he had possession of the soil from the surface to the centre of the earth, though the property in the mines was in the lord. *Keyse v. Powell*[3] enunciated the same principle. That was the case of an ordinary lessee, and Lord Campbell said: " Being in possession of the surface, in point of law he was in possession of the minerals. He had no right

[1] *(1912) 15 N. L. R. 499.*

[2] *(1831) 2 B. & Ad. 437.*

[3] *(1853) 2 Ell. & Bl. 132.*

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to work the minerals. If he had done so, it would have been waste but the lessor could not have sued him in trespass; and if strangers had worked the minerals even without breaking the surface, (he) might have maintained trespass against them." *Macswinney on Mines* (*3rd ed., 388*) summarizes the cases as follows: "If the injured party had the right of possession, as if he is a tenant for life of years impeachable of waste, or a tenant from year to year, or a tenant at will, or a copyholder, he may in general maintain trespass, or he may have an account." This action is, in effect, an action for an account of the plumbago which has been removed, and can no longer be restored in specie. Since, for the purpose of questioning the right of the plaintiffs, the sixth defendant wishes to dissociate himself from his lessor, the fifth defendant, and to make himself a stranger, I think that on the principles of law to which I have referred, he is liable to account to the plaintiffs for the plumbago of which they had possession, and of which they were deprived. On the general question of the right of a bare possessor, it may be stated that as regards him *jus tertii* is not only no defence to the action, but no ground of mitigation of damages. The rule that he is entitled to full value of the things as damages used to be put on the ground that he would be liable to the true owner, but in *The Winkfield* [1] the principle was established that the full value might be recovered although there was no liability over. Mr. Samarawickreme vigorously contended that the plaintiffs had no possession, because, as he said, the plaintiffs had ceased to work the pit Galpatala and had abandoned it. I do not think the evidence in the case supports this view of the facts. Moreover, the mere ceasing to work a mine is not of itself such an act of abandonment as amounts to loss of possession. (*The Low Moor Co. v. The Stanley Coal Co.*[2]). Nor does any material difference arise from the fact that the pit Galpatala was begun by the first plaintiff as a lessee or licencee, and was subsequently continued by him as a co-owner of the land.

The fifth defendant did not raise the defence of the right of the Crown, but in appeal he joined forces with the sixth defendant and contended that the plaintiffs could not maintain this action. This is a somewhat strange position for the fifth defendant to take up. Notwithstanding the right of the Crown, he himself joined the other co-owners in giving a mining lease to the first plaintiff in 1898, and from time to time received his share of the plumbago, and, as stated above, he alone gave to the sixth defendant in 1915 a similar lease, which is the immediate cause of the dispute in this action. Moreover, he received wthout question his share of the plumbago won from two other pits which the first plaintiff dug on the land. In any event, the general reason for rejecting the defence of *jus tertii* equally applies to him.

[1] *L. R. (1902) P. D. 42.*

[2] *(1875) 33 L. J. 436.*

I see no reason to dissent from the finding of the District Judge on the issue of forcible dispossession. This issue has no material importance, except as it bears on the question of the measure of damages. When a co-owner digs and works a pit on common land, it is the custom in Ceylon among plumbago miners to regard the pit as belonging to him, and concede to him all rights, as if he is sole owner of the pit and the plumbago won from it. It is on this footing that the plaintiffs alleged an unlawful ouster by the fifth and sixth defendants. Even if this point of view is rejected, the result, I think, is practically the same. The law allows a co-owner to make such use of the land as it is naturally capable of, even without the consent of the other co-owners. In the present case the plaintiffs had the tacit, if not the express, consent of all the other owners. If it is plumbago land, the co-owner may dig for plumbago though, of course, he must give his co-owners their shares of any plumbago found. If these co-owners are dissatisfied, their proper remedy is to put an end to the common ownership by partition. If, however, the mining operations continue and plumbago is found, what is the share due to the co-owners? In the ordinary system of plumbago mining, which is always a risky speculation, the landowner gets what is called the ground share, and the miner the balance output for his risk and expenses. I do not see why any other principle should be followed in the case where the co-owner is himself the miner. The co-owner who does the mining will distribute the ground share among the co-owners, and will appropriate the balance to himself. The evidence in this case discloses the fact that all the parties concerned recognized and acted upon that principle. The evidence of the fifth and sixth defendants themselves shows this, and indeed, the fifth defendant in his pleadings makes the counterclaim against the plaintiffs on the same basis. Further, it was maintained in appeal on behalf of the fifth defendant that the first and second plaintiffs were only entitled to a share of the ground share of the plumbago put out by his lessee, the sixth defendant. There thus appears to be no real dispute as to the principle. The ground share is regulated either by agreement or by custom, and in the present instance the ground share appears to have been one-seventh or one-eighth of the gross output. If the plaintiffs had not been ejected from the pit Galpatala, they would have been able to continue to mine, and after giving to the defendants their due share of the ground share, appropriate the rest of the plumbago to themselves. But the District Judge has given judgment for the plaintiffs for much less than they would have got on that basis. He has made a calculation of the probable output of plumbago, which I have no reason to consider erroneous, and has given judgment for the plaintiffs for a sum equal to one-tenth of the value of the output. I think the amount is reasonable.

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As regards the appeal of the fifth defendant, who counterclaims for his proportionate share of the ground share of two other pits which were opened and worked by the first plaintiff, the District Judge has found that the fifth defendant has failed to prove that he had not received his proper share. The evidence of the first plaintiff that he had duly distributed the ground share has, in the opinion of the District Judge, not been rebutted by any reliable evidence on the part of the fifth defendant. I see no good reason to disturb the decision as regards the fifth defendant's counterclaim.

In my opinion both the appeals should be dismissed, with costs.

Loos A.J.—I entirely agree.

Appeal dismissed.