1956 *Present :* K. D. de Silva, J., and Sansoni, J.

D. H. HALAHAKONE, Appellant, *and* L. L. FERNANDO, Respondent

S. C. 369—D. C. Negombo, 15841/M

Co-owners—Exclusive use of common property by one co-owner—Profits derived therefrom—Right of the other co-owners to share the profits.

Where a co-owner excludes the other co-owners from possession and puts the common property to its normal use, he must account to the other co-owners for their proportionate share of the profits which he makes.

The plaintiff and the defendant were two co-owners of a coconut desiccating mill and had the right to common enjoyment of it. The defendant infringed that right when he alone earned the profits by excluding the plaintiff deliberately from possession.

Held, that the plaintiff was entitled to recover a half share of the nett profits earned by the working of the mill.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q.C., with *H. W. Jayewardene, Q.C., G. T. Samerawickreme, P. Ranasinghe* and *N. R. M. Daluwatte*, for the defendant-appellant.

N. K. Choksy, Q.C., with *J. M. Jayamanne, T. B. Dissanayake* and *Miss Maureen Seneviratne*, for the plaintiff-respondent.

Cur. adv. vult.

July 3, 1956. SANSONI, J.—

This is a dispute between two co-owners of a coconut desiccating mill. The mill and the land on which it stands were purchased by the plaintiff and the defendant's brother on deed P1 of 30th June, 1945, for a sum of Rs. 27,100. By deed P2 of 21st March 1946 the defendant bought his brother's half share, and since then the plaintiff and the defendant have been co-owners of the land and the mill. The plaintiff and the defendant had to spend over Rs. 50,000 to put the mill into working order. The expenses incurred in this connection were shared by them, and the manufacture of desiccated coconut was begun in March 1947. There was a quota system in operation during the years 1946 to 1950 under which the owners of such mills obtained a quota which permitted them to manufacture a specified quantity of desiccated coconut. The quantity varied from year to year, but the right to obtain a quota was a very valuable one as the evidence shows.

It is common ground that from the time the mill was worked in March 1947, until it was closed down in September 1949 owing to the market being unfavourable, the plaintiff and the defendant shared the profits and the expenses of working the mill, and these included such profits as were derived from the use of the quotas received for each year. Very large profits were earned by the co-owners during this period, as the accounts produced by the defendant show. The nett profit of each co-owner for only twenty-six days in March 1947 came to over Rs. 12,200, while for the year ending 31st March, 1948 each of them reaped a nett profit of Rs. 63,444·75.

Late in 1948 or early in 1949 differences arose between the two co-owners. Each of them has given his version of the dispute and has sought to blame the other, but it is conceded by the plaintiff that when the quota issued in the names of both of them was received by him early in 1949 he returned it, as he and the defendant were unable to work the mill together. From that time the mill was not worked until July 1950 because the co-owners were unable to agree on a common basis of working it. On 26th September 1949 the plaintiff filed a partition action, as common possession was impracticable, in order to have the common property divided, and in the following month he applied to the Court to have a Receiver appointed in respect of the common property. The defendant objected to the appointment of a Receiver and no Receiver was in fact appointed.

The defendant has admittedly been in possession of the mill since the partition action was filed. He applied to the authorities for the issue of the quota to him on the ground that he was in possession, but the plaintiff objected to the issue of the quota to the defendant on the ground that there was a dispute between the co-owner over the possession of the mill. Ultimately the defendant was informed by the authorities that the question of issuing a quota would have to await the decision of the Court in the partition action. Owing to the dispute between the parties no quota was in fact issued thereafter in respect of this mill, and the quota system itself ceased to be in force from June 1950. One result of the non-issue of the quota during that period was that the mill could not be worked. After the quota system was abolished the defendant alone worked the mill, and admittedly for the period 11th July, 1950—31st March, 1951 he earned a nett profit of Rs. 64,951·78, and for the period 1st April 1951—31st August 1951 he earned a profit of Rs. 4,943·09, totalling Rs. 69,894·87.

The plaintiff brought this action on 9th August 1950 to recover from the defendant either damages on the basis that the defendant wrongfully and unlawfully worked the mill by himself, or in the alternative to recover a half share of the nett profits made by the defendant. He claimed Rs. 48,300 as due up to date of action and a further Rs. 13,650 per week thereafter. The defendant in his answer pleaded that although he worked the mill since 11th July 1950 his action was neither wrongful nor unlawful and that he has not caused loss or damage to the plaintiff. In reply to the alternative claim for a share of the nett profits, he pleaded that the relationship between the parties was that of a partnership which could not be established in the absence of a written agreement. He further pleaded that in any event the plaintiff was not entitled to claim anything more than a half share of a reasonable rent for the mill and premises, and he assessed this half share at Rs. 400 per mensem. For a claim in reconvention the defendant pleaded that the plaintiff wrongfully and by fraudulent misrepresentations deprived the defendant of the quotas for the years 1949 and 1950 and thereby caused loss and damage to him. He estimated his damages on this account at Rs. 118,019·85. The learned District Judge gave judgment for the plaintiff for Rs. 34,947·43 and the incurred costs of this action. He disallowed the claim in reconvention.

At the hearing before us much of the argument on behalf of the defendant-appellant was directed to showing that the relationship between the parties in respect of the business of running this mill was a partnership which could not be established by the plaintiff as its capital was over Rs. 1,000. But ultimately it was conceded by the defendant's Counsel that even if there had existed a de facto partnership it had been terminated by July 1950, since it was at most a partnership at will.

It thus becomes necessary to consider the rights and obligations of these parties in regard to the mill during the relevant period 11th July 1950—31st August 1951 when the defendant, as a co-owner in sole possession, worked the mill himself. The short point for decision is whether such a co-owner, who uses the common property exclusively and makes

profits by such use, must account to his co-owner for a proportionate share of those profits, or whether his liability is only to pay a reasonable rent for the use of the property.

It was submitted for the defendant that a distinction must be drawn between a case where the common property yields produce which is sold at a profit, for example a common land on which a plumbago mine is worked, and a common property which can only be made to yield profits by the use of raw material brought in from outside and manufactured into a finished product which is finally sold at a profit, as in the case of this mill. It was submitted that as in the latter ease the profits were obtained by conducting a business, the common property being only one adjunct of that business, it was the defendant's industry which directly produced the profits, and there is no reason why the plaintiff should obtain a half share of such profits.

On the other hand it was submitted for the plaintiff that this mill was a common property which could only be worked as one unit, and although it did not yield fruits directly as in the case of a plumbago mine, the normal use of this mill yielded the profits and the defendant has no right to appropriate them entirely.

I do not think there is any such distinction as was sought to be drawn by the defendant's Counsel, and it seems to me that if the profits are traceable directly to the use of the common property those profits must be shared between the co-owners. The rule is that " all profits accruing from the property must be divided proportionately among the joint owners " [1]. The author relies for this statement on Grotius' Introduction [2], where it is stated that " all profits and losses must be divided in equal proportions except such losses as are occasioned by bad faith or extraordinary neglect of anyone ". To the same effect is a pasage in Domat's Civil Law [3] which reads " he who has had the enjoyment of the common thing ought to communicate all the fruits and all the profits which he has made by it, for without this communication the equality which ought to be observed among all the co-partners would be violated "; and in paragraph 5 it is stated that " those who have an affair or other thing in common together are mutually accountable to one another for their management and their conduct in relation to it. " Domat is here dealing not with partnership as we understand it now, but co-ownership. The principle that all profits and losses connected with the common property must be shared proportionately among the owners, except losses occasioned by bad faith or gross negligence, has been adopted in South Africa. In *Runcyman v. Scholtz* [4] it was held that where a co-owner of an undivided farm lets any portion of it without the knowledge or consent of his co-owner he must account to the latter for his share of the profits derived from such letting. The same principle underlies the decision in *Appuhamy v. Adria* [5] where Phear, C.J. said " the joint ownership of a subject of property by a number of persons in common is a partnership in which the partners manage their own affairs among themselves by a

[1] *Wille, Principles of South African Law, p. 159.*
[2] *Bk. 3, 28, 9.*
[3] *Bk. 2, Title 5, Sec. 2, Para 3.*
[4] *(1923) T. P. D. 45.*
[5] *(1879) 2 S. C. C. 166.*

common consent ". In that case it was decided that where only some of the co-owners had dug and removed plumbago from the common land, the others should not claim damages but an account of the plumbago which had been raised. It would seem that the proper conception of a claim made by one co-owner against another co-owner who has derived profits from the common property is that it is a claim for compensation, and not one for damages or mesne profits which would be more appropriate against a person who had no title.

The plaintiff's claim in this case to a share of the profits seems to me to be all the stronger because very shortly after the defendant began to work the mill the plaintiff, through his lawyers, gave the defendant notice that he was claiming a half share of the nett income, subject to an allowance being made to the defendant on account of his meeting the plaintiff's share of the working expenses. In the alternative, the plaintiff said that he was prepared to take the mill over, work it, and pay the defendant on the same basis. The plaintiff was even willing to entrust the working of the mill to a Manager appointed by mutual consent. No definite answer was given by the defendant, and the plaintiff filed action shortly afterwards. The defendant has, however, stated in his evidence that he was not agreeable to any of these proposals and that he informed his Proctor accordingly. Perhaps that is why no reply was sent.

Throughout the argument of the defendant's Counsel a distinction was sought to be drawn between the common mill and the use to which it was put, or the business, as it was termed, of producing desiccated coconut. It was argued that it was the business that yielded the profits and not the mill. I cannot appreciate this distinction. If the only use to which the common property can be put is the business of producing desiccated coconut, it seems to me that there is no real difference between the conduct of the business and the use of the property. Since admittedly there was no partnership in existence from July 1950 while the mill was being worked by the defendant alone, without any agreement subsisting between him and the plaintiff, the only basis on which the plaintiff can claim compensation for the use of his share of the common mill is as one co-owner against another who had the exclusive possession of the common property, and I have already set out how such compensation is to be measured. We were not referred to any authority which stated that in such a case the plaintiff should be compensated only on a rental basis. As I have pointed out already, these two co-owners had, when they were on friendly terms, shared the profits accruing from the common working of this mill during the years 1946–1948, and I can see no reason why the defendant should be in a better position because he deliberately kept the plaintiff out of possession.

And this brings me to what I consider an over-riding consideration in this case. The plaintiff undoubtedly had the right to common enjoyment of this mill which belonged to both of them. The defendant infringed that right, and he alone earned the profits because he excluded the plaintiff deliberately from possession. Can he by such conduct be allowed to

derive a greater advantage than he would have derived if the mill had been worked in common ? Yet this is what the submission on behalf of the defendant amounts to. There are indications in the judgment of Howard, C.J. (Soertsz, J. agreeing) in *Vanderlan v. Vanderlan* [1] of the view he would have taken in a dispute such as this. In that case too a common mill had been worked exclusively by some of the co-owners and their lessees, but the plaintiffs there had acquiesced in that method of working the mill on the understanding that they would be given their share of the lease rent. But the learned Chief Justice considered the principle that would generally be applicable and said : " In view of the evidence of the plaintiff and the fact that the property was dealt with by the defendant in accordance with the purpose for which the joint ownership was constituted, the user by the defendants and added defendants was lawful but in excess of the restriction imposed by law and *they must not appropriate to themselves more than their share.* In the circumstances the defendants can be regarded as being in default only in so far as they have failed to pay the plaintiffs *their share of the profits* for working the mill ". It seems to me, therefore, that the answer to the question whether, where a co-owner uses a common property exclusively and makes profits by such use he must account to the others for their snare of the profits, is clear.

In regard to the claim in reconvention, I do not think that the plaintiff acted wrongfully when he returned the quota early in 1949 or when he protested against the issue of the entire quota in respect of the mill to the defendant. The plaintiff was acting in defence of his interests as a co-owner, and the subsequent attitude of the defendant proves that the plaintiff had not been unduly watchful of his own interests. It is unfortunate that the parties could not agree to work this common mill amicably, for the consequence was that the quota which was issued in the names of both of them was rendered useless. When the defendant sought to obtain the entire quota for himelf, the plaintiff was quite entitled to protest since each was entitled to his share and no more. It was not the plaintiff's fault if the defendant failed to persuade the authorities to issue to him a half share of the quota which was issuable in respect of the entire mill.

In the result the plaintiff is entitled to recover a half share of the nett profit earned by the working of this mill. But in order to arrive at the correct figure I think an allowance should first be paid to the defendant for having solely conducted the working of the mill. It seems reasonable that the defendant should be compensated for the time and energy expended by him, and I would allow him a monthly sum of Rs. 500 on this account, amounting to Rs. 7,334 for the period 11th July 1950—31st August 1951. The nett profit shown in the defendant's books should therefore be reduced by this amount and would then be Rs. 62,560·87. The plaintiff is therefore entitled to Rs. 31,280·43.

With regard to the order of the learned Judge that the defendant should pay the plaintiff his incurred costs, I can see no justification for this unusual order. The plaintiff's claim was grossly exaggerated and if it

[1] *(1940) 41 N. L. R. 547.*

had not been that the defendant made an unsustainable claim in reconvention, the plaintiff would not have been granted even his taxed costs of the action.

I would therefore set aside the decree entered, and direct that the defendant should pay the plaintiff a sum of Rs. 31,280·43 and his taxed costs in both Courts.

DE SILVA, J.—I agree.

Decree varied.