[FULL BENCH.] 1916.

Present: Shaw A.C.J., De Sampayo J., and Schneider A.J.

HEENHAMI *v.* MOHOTIHAMI.

326—D. C. Ratnapura, 2,640.

Co-owners—Action by one co-owner against another for declaration of title and damages—Are all co-owners necessary parties to action?—Civil Procedure Code, ss. 17, 18, and 22.

There is no rule of law that a co-owner cannot maintain an action against another co-owner without joining all the other co-owners of the land.

"No doubt in many cases they are proper parties, and would be joined on an application being made for the purpose. In some cases they may even be parties, whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon all the questions involved in the action, in which case the Court may add them of its own motion under section 18, but if they are not added, the Court should, in accordance with the provisions of section 17, deal with the matter in controversy so far as regards the rights of the parties actually before it."

THE facts are set out in the judgment.

R. L. Pereira (with him *P. M. Jayewardene*), for appellant.—The rule is well established that one co-owner cannot sue another co-owner without joining all the co-owners, whether it be for declaration of title, possession, or ejectment. The non-observance of the rule is bound to disturb the possession of the other co-owners if they do not admit the correctness of the shares decreed to the parties before the Court, and this will lead to a multiplicity of actions. The object should be to settle the disphte once and for all. *Mudiyanse v. Silva*[1] and D. C. Matara, No. 6,583. [2].

Samarawickreme, for respondent.—No objection on the ground of non-joinder of parties was taken at the trial. There is no invariable rule that all co-owners should be joined in an action where the dispute is between some only. The matter could be decided without involving the plaintiff in the expense of joining all co-owners. Any judgment will bind only the parties, and will not affect the rights of others. Section 17 of the Civil Procedure Code provides that no action shall be defeated by reason of the non-joinder of parties.

Cur. adv. vult.

[1] *(1916) 19 N. L. R. 120.* [2] *S. C. Mins., August 4, 1916.*

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September 22, 1916. SHAW A.C.J.—

In this case the plaintiff claimed a declaration of title to certain shares of land against the defendant, another co-owner, who contested his title and damages. The District Judge after hearing the evidence made the declaration asked for, and directed the defendant to pay Rs. 50 damages agreed upon.

The defendant appealed, basing his appeal on the ground that there were other co-owners of the land who have not been joined as parties, and it was contended that two recent cases (*Mudiyanse v. Silva* [1] and D. C. Matara, No. 6,583 [2]) have decided that a co-owner cannot maintain an action against another co-owner without joining all other co-owners of the land. No objection on this ground was taken at the trial, and no application was made by the defendant to add the other co-owners.

When the appeal first came before my brother De Sampayo and myself, it appeared to us that, in view of the provisions of sections 17, 18, and 22 of the Civil Procedure Code, it was doubtful whether the contention raised was sound. We accordingly reserved the case for the consideration of the Full Court.

I am by no means certain that the Judges who decided those cases ever intended to lay down the proposition contended for by the appellant. In view of the express provisions contained in the Civil Procedure Code, it appears to me impossible to contend that an action by one co-owner should be dismissed unless all the co-owners are made parties to the suit. No doubt in many cases they are proper parties, and would be joined on an application being made for the purpose. In some cases they may even be parties, whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon all the questions involved in the action, in which case the Court may add them of its own motion under section 18, but if they are not added, the Court should, in accordance with the provisions of section 17, deal with the matter in controversy so far as regards the rights of the parties actually before it.

Passivoo Appuhamy v. Leana Appu [3] and other cases cited in *Mudiyanse v. Silva*,[1] which appear to hold an action cannot be maintained unless all the co-owners are made parties, were prior in date to the provisions contained in the sections of the Civil Procedure Code I have referred to, and, in so far as they may so decide, are superseded by those provisions. I am by no means sure that those cases ever decided that all co-owners must always be joined, but in view of the opinion I have expressed above I need not go into that matter.

[1] *(1916) 19 N. L. R. 129.* [2] *S. C. Mins., August 4, 1916.*

[3] *7 S. C. C. 190.*

The cases decided since the enactment of the provisions in the Civil Procedure Code, *Arnolis v. Dissan* [1] and *Perera v. Fernando*,[2] appear to show that it was not considered that all co-owners must the result of the present suit.

In the present case the co-owners who have not been joined were not necessary parties, and it is even doubtful if they were proper parties to have been joined. Their rights will not be affected by the result of the present suit.

I would dismiss the appeal, with costs.

DE SAMPAYO J.—

This is an action in which the plaintiff claimed title to certain shares of land, and complained that the defendant, who was also entitled to some share, had cultivated and appropriated the whole crop. He asked for declaration of title and for damages. There appears to have been other co-owners who were no parties to the action. In the pleadings and at the trial no question was raised as to the constitution of the action, and the District Judge decided the case on the merits in favour of the plaintiff. But in the petition of appeal the defendant took an objection to the effect that the plaintiff could not maintain this action against the defendant without joining the other co-owners as parties. When the appeal came up for argument before the Acting Chief Justice and myself, the judgment of my brother Schneider, concurred in by Ennis J., in *Mudiyanse v. Silva*, [3] was cited to us in support of the objection, and it was thought desirable, especially in view of the provisions of sections 17 and 22 of the Civil Procedure Code, to refer the point for consideration by a Bench of three Judges.

The judgment of my brother Schneider reviews the previous cases on the subject of joinder of co-owners, and contains a careful exposition of the rule of procedure requiring such joinder, and I need not say that I fully accept the general principle therein stated. The principal case referred to in that judgment was decided before the Civil Procedure Code came into operation, and none of the cases appear to me to support the view that the rule is absolute and invariable, and that the non-observance of it must necessarily result in the dismissal of the action. Nor do I think that the judgment in the Ratnapura case itself was intended to go that length. For my brother Schneider, in the concluding portion of his judgment, considered the question of sending the case back for the purpose of adding the absent co-owners under section 18 of the Code, but he thought that as the title had not been properly stated by either side no useful purpose would be served by following such a course, but dismissed the case with liberty to bring a fresh action. In the later case, 294—D. C. Matara, 6,583,[4] decided by the same learned

[1] *(1900) 4 N. L. R. 163.*
[2] *(1908) 2 L. L. R. 48.*
[3] *(1916) 19 N. L. R. 120.*
[4] *S. C. Mins., August 4, 1916.*

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Judges, the plaintiff's action was dismissed only because it was not a simple claim of title between two parties, but was a complicated question between co-owners, which it was practically impossible to decide without all the co-owners being made parties to the action. This, I think, indicates the right view to be taken even in cases where the objection is raised at the proper time. Section 17 of the Civil Procedure Code provides that no action shall be defeated by reason of the non-joinder of parties, and that the Court may in every action deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Section 22 provides that all objections for want of parties shall be taken at the earliest possible opportunity, and in all cases before the hearing, and any such objection not so taken shall be deemed to have been waived by the defendant. In *Juan Appu v. Helena Hamy*, [1] Lawrie J. considered that these sections disposed of the objection which had been taken only in appeal, and added "I quite agree that in the ordinary case all the shareholders should be parties to the action for the ascertainment of the shares of one or more of them, but that is not an absolute rule, each case must depend on its own facts. In some cases the dispute may so obviously be between only a few of the shareholders that it would be merely embarrassing to bring in others." In the same case Bonser C.J., while adhering to the opinion expressed in *Arnolis v. Disan*,[2] agreed to affirm the decree because the objection was not taken in the Court below, and because the dispute was so limited to the persons concerned that it might be fitly decided without endangering the rights of any of the other co-owners. In *Paulu Perera v. Constantine Fernando*, [3] where the District Judge had ordered the outstanding co-owners to be added, Wendt and Wood Renton JJ. even doubted whether in the circumstances of that case the order was correct, but would not interfere with the discretion of the District Judge, who had thought that the presence of the co-owners was necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. In my opinion sections 17 and 22 of the Code are intended to do away with all technical objections on the score of non-joinder or mis-joinder of parties unless they are taken in due time and for good reason. If, however, it be found that the action cannot proceed for want of parties, section 18 enables the Court even *mero motu* to add such parties. In the present case the cause of action is that the defendant took the plaintiff's share of the crop, and the prayer for declaration of title is only incidental to the claim for damages against the defendant. The dispute, I think, is one purely between the plaintiff and the defendant, and the decision of it will in no way prejudice the rights of the other co-owners.

[1] *(1901) 2 B. 19.*

[2] *(1900) 4. N. L. R. 163.*

[3] *(1908) 2 L. L. R. 48.*

In my opinion the objection should not prevail, and as there is no other point seriously pressed, the appeal should be dismissed, with costs.

SCHNEIDER A.J.—

I have had the advantage of reading the judgment of my brother De Sampayo in this appeal. He has correctly interpreted my judgment in *Mudiyanse v. Silva.* [1]

I have nothing to add to what I said in that judgment of mine, and agree with my brother De Sampayo's judgment in this appeal and with the order he proposes to make.

Appeal dismissed.