Present: Wood Renton C.J. and Pereira J.

GERIS APPU *v.* SILVA.

6—C. R. Matara, 7,913.

Action for declaration of title to a share of the trees against lessee of another co-owner—Is action maintainable?—Claim for ejectment—Partition action.

Plaintiff as lessee of one co-owner of a land sued the added defendant, who is the assignee of a lessee of the other co-owner, for a declaration of title to a half share of the trees on the northern side of the land, for ejectment of the defendant, and for damages.

Objection was taken that plaintiff could not have asserted, except in an action for partition, such rights as he has asserted in this case.

Held, the action was maintainable, but the claim for ejectment was bad.

"There is no objection to one co-owner suing another to have his title declared to a certain share of the property owned in common, and for damages sustained by him by reason of the wrongful enjoyment of his share by the other co-owners. In the case of a multiplicity of co-owners, the convenient course would be to bring an action for partition.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for appellant.

Weeraratne, for respondent.

Cur. adv. vult.

April 1, 1915. Wood Renton C.J.—

This case came before me in the first instance sitting alone. I came to the conclusion that the appeal was entitled to succeed. But subsequently a difficulty occurred to me, and I thought it better to have the case re-argued before two Judges. The plaintiff as the lessee of one co-owner of a land sues the added defendant, who is the assignee of a lessee of the other co-owner, for a declaration of title to a half share of the trees on the northern side of the land, for the ejectment of the defendant therefrom, and for damages. The defendant alleges that under the assignment of the lease on which he relies he is entitled to the possession of all the trees, including those claimed by the plaintiff. The parties went to trial on three issues: in the first place, whether the plantation containing the trees claimed by the plaintiff was made by Don Mathes, the father of the co-owner, who is the plaintiff's predecessor in title; in the second place, that of prescriptive rights of parties; and

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lastly, damages. The learned Commissioner of Requests answered the first and second issues in the plaintiff's favour, declared him entitled as lessee to the possession of one-half share of the trees in question, directed the ejectment of the defendant therefrom, awarded the plaintiff a sum of Rs. 30 a year as damages till possession was restored, and decreed that the defendant should pay the plaintiff's and the added defendant's costs. The plaintiff appeals.

I saw, and see, no ground for interfering with the findings of the Commissioner of Requests on the questions of fact involved in the issues. The point was taken for the first time in appeal that the plaintiff as the lessee of one co-owner could not assert against the assignee of a lease granted by another co-owner the right to a planter's share in an action for declaration of title. In support of this contention the plaintiff's counsel relied on the cases 6—D. C. Matara, 6,245 [1], and *Silva v. Silva* [2]. The principle of those decisions becomes applicable, however, only in cases where the common property has been improved. The plaintiff in the present case is not claiming on the basis of any such improvement. The ground of his claim is that he has acquired a prescriptive title to the share, which the judgment of the Commissioner of Requests has given to him. He has a right. I think not merely to a bare declaration of title, but to a declaration of his title to the possession of the shares in question, and to such compensation as the Commissioner of Requests has awarded if the defendant is to remain in possession of the entirety of the trees. But the plaintiff cannot, in my opinion, claim the ejectment of the defendant from the possession of the trees secured to him by his assignment of the lease. That portion of the decree which directs that the plaintiff should be quieted in his possession of his share of the trees and that the defendant should be ejected therefrom must be struck out. With that modification I would dismiss the appeal with costs.

Pereira J.—

In this case the plaintiff as the lessee of a half share of certain coconut trees claimed to be declared, as against the defendant, entitled to possess that share of the trees. The defendant claimed the right to possess the entirety of the trees by virtue of an assignment of a lease thereof granted by two persons, who, for the purposes of this case, may be assumed to be the owners of the parcel of land on which the trees stood. The plaintiff's case is that one Mathes was planter of the land under the owners, and that, since planting, he acquired by prescriptive possession a right to the half share of the trees now in claim, and after his death his son, the added defendant, leased the half share to the plaintiff. The question whether the added defendant was the sole heir of Mathes need not be considered, because the parties were content to let the decision of the case rest

[1] *S. C. Min., Feb. 15, 1915.*

[2] *(1911) 15 N. L. R. 79.*

on only two issues: (1) " Was the second plantation of the northern portion of Kurundewatta made by Mathes?" and (2) " prescriptive possession." On the evidence led, the Commissioner decided both these issues (rightly I think) in favour of the plaintiff; that is to say, he held that the second plantation referred to was made by Mathes, and that he had prescriptive possession of the half share of trees in claim in the case. The plaintiff and the defendant thus stand in the position of co-owners of the trees, the plaintiff being entitled to a half share and the defendant to the other half. On the Commissioner's finding on the issues, judgment has been rightly entered in the case in the plaintiff's favour. But a variety of objections to the decree have been taken, based mainly on the assumption that the plaintiff stands in the position of a planter, and that he could not, except in an action for partition, assert such rights as he has asserted in this case. The answer to these objections is that the plaintiff's position is not that of a planter of the land, but of a co-owner, with the defendant, of the trees in question, and clearly there is no objection to one co-owner suing another to have his title declared to a certain share of the property owned in common, and for damages sustained by him by reason of the wrongful enjoyment of his share by the other co-owners. Of course, in the case of a multiplicity of co-owners the convenient course would be to bring an action for partition, but where, as here, there are practically only two co-owners, I see no objection to such an action as the present. Clearly, the order for ejectment cannot stand, because the subject-matter of the action is an undivided share of property. Except as to the order directing the ejectment of the defendant from the property in dispute and the placing in possession there of the plaintiff, I would affirm the judgment appealed from with costs.

Appeal dismissed.