1942 *Present :* **Howard C.J. and Keuneman J.**

MARIKAR *et al. v.* PUNCHI BANDARA *et al.*

184—D. C. Avissawella, 2,880.

Appeal—Action on usufructuary mortgage—Claim in reconvention by defendant—Judgment for plaintiff for reduced amount—Dismissal of claim in reconvention—Appeal by plaintiff—Right of defendant to raise question of counter-claim—Civil Procedure Code, s. 772.

In an action on a usufructuary bond the defendant claimed in reconvention damages for injuries caused to the property mortgaged.

Judgment was entered for the plaintiff for a smaller sum than that claimed by him. The defendant's claim in reconvention was dismissed.

***Held* (on an appeal by the plaintiff), that the defendant was not entitled to raise the question of his counter-claim unless he has filed a cross-appeal or given notice of objection under section 772 of the Civil Procedure Code.**

THE plaintiffs sued the defendants to recover a sum of Rs. 6,500, together with legal interest from date of claim on a mortgage bond, which provided that in lieu of interest on the said sum plaintiffs were to take the produce of two-thirds of the rubber plantation standing on the mortgaged premises. The defendants admitted that a sum of Rs. 6,500 was due on the bond but claimed in reconvention—(*a*) the sum of Rs. 3,126.65 on the ground that plaintiffs had appropriated the produce of the remaining 1/3 share of the rubber plantation and (*b*) the sum of Rs. 9,128, being damages for injuries caused wantonly and maliciously to the rubber plantation by bad tapping. The learned District Judge gave judgment to the plaintiffs for the sum of Rs. 2,500.

H. V. Perera, K.C. (with him *H. W. Jayewardene*), for plaintiff, appellants.—There is no justification for the reductions made in the principal amount by the District Judge. This is an usufructuary mortgage and, in such a case, where the profits taken in lieu of interest are uncertain, reductions of this nature should not be made. (Vide *Burge Vol. 3, p. 197; also Wille, Mortgage and Pledge in South Africa, page 173.*)

N. E. Weerasooria, K.C. (with him *A. C. Alles*), for defendant, respondents.—We do not seek to justify this part of the judgment. The issue on damages has been decided in our favour. There is evidence to show that when the property was handed over to the appellants it was in a good condition. Therefore it is the duty of the mortgagee at the end of the mortgage to return the property in as good a condition as when he got into possession. Failing this, he must pay the assessed damages (*3 Burge 205,206*).

H. V. Perera, K.C., in reply.—Respondents cannot maintain their claim for damages. Appellants' claim is a liquid claim and the respondents cannot in the circumstances claim in reconvention an unliquidated amount by way of damages. Even if they could do so they cannot claim damages now since they were not awarded damages in the lower court and have failed to file a cross-appeal. Section 772 of the Civil Procedure Code has no application here ; even if it did, the requisite seven days' notice has not been given.

(*N. E. Weerasooria, K.C.*, cites *Rabot v. de Silva* [1].) That case has no application here. The judge has held against the respondents on the issue of damages and therefore they should have given notice under section 772. If respondents' claim can be made at the end of the mortgage then it is premature at this stage. The mortgage has not ended yet, appellants have only sought to enforce their rights on the existing mortgage. *3 Burge 205,206* refers to the mortgagee-in-possession known to English law and not to our usufructuary mortgagee. Hence it has no application here.

Cur. adv. vult.

March 17, 1942. HOWARD C.J.—

In this case the plaintiffs appeal from a judgment of the District Judge of Avissawella entering judgment for the plaintiffs for Rs. 2,500 and ordering that the costs be divided. The plaintiffs claimed a sum of Rs. 6,500, together with legal interest thereon from the date of claim on a mortgage bond dated September 24, 1925. The bond contained a proviso that in lieu of interest on the said sum of Rs. 6,500 the plaintiffs were to take the produce of two-thirds of the rubber plantation standing on the mortgaged premises. In pursuance of this proviso the plaintiffs appropriated the produce of two-thirds of the rubber plantation of the mortgaged premises in lieu of interest. The defendants admitted that a sum of Rs. 6,500 was due on the bond but claimed in reconvention (*a*) the sum of Rs. 3,126.65 on the ground that the plaintiffs have appropriated the produce of the remaining one-third share of the rubber plantation and (*b*) the sum of Rs. 9,128 being damages for injuries wantonly and maliciously caused to the rubber plantation by the plaintiffs by bad tapping. The defendants claimed that judgment should be entered in their favour for the sum of Rs. 5,714.65 together with costs.

In giving judgment in favour of the plaintiffs for only Rs. 2,500 the learned Judge, whilst dismissing the defendants' claim in reconvention, restricts the claim of the plaintiffs to this amount on the ground that the plaintiffs were only entitled to interest at a fixed amount. To use his own words he "went through the accounts very carefully". As the result of this scrutiny he has made an elaborate calculation of the profits made during the period when the produce was appropriated by the plaintiffs. From these profits he has deducted certain amounts as interest at fixed rates. The balance he has deducted from the principal sum due to the plaintiffs on the mortgage bond. In this manner and after allowing interest sometimes at 12 per cent. and sometimes at 9 per cent. and making capital reductions after stated intervals, he reduces the amount due to the plaintiffs on the mortgage bond to Rs. 2,500. No legal principle is advanced by the learned Judge in support of this strange method by which the defendants' liability on the mortgage bond has been calculated. Nor has Mr. Weerasooria been able to put forward any argument in its support. This part of the learned Judge's judgment cannot, therefore, be upheld and the plaintiffs are entitled to the sum of Rs. 6,500 on the mortgage bond.

Mr. Weerasooria has, however, contended that the defendants are entitled to deduct from the sum of Rs. 6,500 an amount in respect of

[1] *8 N. L. R. 82.*

damages by reason of injuries caused to the rubber plantation by bad tapping. In this connection Mr. Weerasooria has invited our attention to that portion of the learned Judge's judgment dealing with the claim put forward by the defendants with regard to this aspect of the case. Although finding against the defendants, the learned Judge has stated that "the plaintiffs cannot shirk all responsibility". Moreover, Mr. Weerasooria maintains that the evidence of Mr. de Mel and other witnesses, including that of the 2nd plaintiff, establishes that the plantation has been damaged by excessive tapping. In reply to this contention Mr. Perera maintains that, if the defendant's desire to contest the finding of the Court with regard to the claim in reconvention, the matter must be raised by cross-appeal or in accordance with the proviso to section 772 (1) of the Civil Procedure Code which is worded as follows :—

> "Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the Court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his proctor seven days' notice in writing of such objection."

The respondents have neither cross-appealed nor have they given the appellants notice that they take any objection to that part of the appeal which dismissed their claim in reconvention. Mr. Weerasooria has invited our attention to the case of *Rabot v. de Silva*[1] which he maintains is an authority for the proposition that notice of objection is not required. In this case the District Judge held that the fifth and sixth defendants could not succeed to the estate of Vincent Perera on the ground that they were his children as the result of his adulterous intercourse with the third defendant. The plaintiffs' claim was dismissed on other grounds. The plaintiffs appealed and the Court held that the fifth and sixth defendants, notwithstanding they had not appealed nor filed objections under section 772 (1) of the Civil Procedure Code, could challenge the District Judge's decision as to their paternity and contend that they were not adulterous bastards and support the decree appealed from by claiming the shares devised to them on that ground. In coming to this conclusion, Middleton J. subjected section 772 (1) to a minute examination. He stated that the section divides itself into two parts, comprising support of and objection to the decree. No notice is required except upon an objection to the decree. In *Rabot v. de Silva* (*supra*) there was no objection to the decree, but the respondents desired to support it on the ground that they were the children of one Salman Appu, on which ground the District Court decided against them. It seems to me that this decision has no application to the present case. Issue (7) was worded as follows:—

> "Did the plaintiffs wantonly and maliciously damage the rubber trees by bad tapping?"

[1] *8 N. L. R. 82.*

The learned Judge answered this issue in the negative and hence the claim in reconvention set up by the defendants was dismissed. The Judge, however, by some process of reasoning apparent only to himself, but which had no connection with the defendants' claim in reconvention, reduced the claim of the plaintiffs from Rs. 6,500 to Rs. 2,500. I do not think it can be argued that the respondents have come to this Court to support the finding of the lower Court. They object to the finding on issue (7) and the dismissal of their claim in reconvention. In these circumstances I am of opinion that they should have filed notice of objection in accordance with section 772 (1) of the Code. Having failed to do so they cannot raise this issue on the plaintiffs' appeal.

The decree of the District Court is therefore set aside and the plaintiffs must have judgment as claimed. The defendants' claims in reconvention are dismissed and the plaintiffs must have their costs in this Court and the Court below.

KEUNEMAN, J.—I agree.

Appeal allowed.