Present: Lyall Grant J. and Maartensz A.J. 1926.

PODI SINNO *et al. v.* ALWIS.

99—D. C. Kalutara, 11,248.

Co-owner—Right to fruits of improvement—Action against another for damages—Partition decree.

An improving co-owner is entitled to the fruits of the improvement effected by him.

THIS was an action for the recovery of damages from the defendant for wrongful possession of plaintiffs' share of a rubber plantation called Palligodakele. In an action for the partition of that land the present plaintiffs were declared entitled to two-fifths of the land, the present defendant to one-third, and the fifth and sixth defendants in that action to four-fifteenths. They are not parties to this action. The plaintiffs and the fifth and sixth defendants were held to have made the entire rubber plantation. The plaintiffs now sue the defendant for the recovery of damages,

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alleging that the defendant was in the possession of the entire rubber plantation from June, 1921, to February, 1922. The learned District Judge gave judgment for the plaintiffs.

H. V. Perera, for defendant, appellant.

De Zoysa, for plaintiffs, respondent.

November 9, 1926. LYALL GRANT J.—

This is an action in which damages are claimed in respect of the wrongful possession of a rubber plantation.

The plaintiffs and the defendants were originally co-owners of a piece of land called Palligodakele. The land was made the subject of a partition action and the parties to this case each received a share in the soil. The defendant was ordered to pay compensation to the plaintiffs in order to equalize the shares allotted. In the partition proceedings there was a dispute between the present plaintiffs and the defendants as to who made a certain rubber plantation on the land. It was then decided that the present plaintiffs, with certain other co-owners not parties to the present action, made the entire rubber plantation.

In the present action damages are claimed on the ground that for a period of about eight or nine months the defendant forcibly and unlawfully possessed the said plantation.

These facts are now admitted, and on them the learned District Judge held that the plaintiffs were entitled to damages.

On appeal it was argued for the appellant that the defendant was entitled to possession as a co-owner, that a plantation accedes to the soil, that each co-owner has a right of property in it which carries with it the right of possession, and that no co-owner can claim sole rights in a plantation.

It was further argued that a partition decree is a final decree as it affects rights of parties, and that it is not now possible to re-open any question affecting the adjustment of the co-owner's rights as between themselves.

The latter point has been settled by the case of *Silva v. Silva*,[1] which follows the case of *Samarasinha v. Balahamy*.[2]

There it was held that a claim for damages by one co-owner against another could not be joined in a partition action. It does not appear that these cases have been over-ruled, and the principle must now be treated as settled law. It follows, therefore, that the final decree in a partition action does not bar a claim by one co-owner against another for damages for wrongful possession of a plantation.

[1] *(1906) 9 N. L. R. 110.*

[2] *(1902) 5 N. L. R. 379.*

It being admitted that the defendant had the use of the plantation for a period during which the plaintiffs were entitled to profits, it is clear that he must account to them for the profits. The only difficulty is to ascertain whether he as a co-owner is entitled to a share of the profits which accrue from improvements made by other co-owners. On this point the decisions are conflicting. In *Chellappah v. Ponnampalam* [1] Lawrie A.C.J. held that in such circumstances the improving co-owner is entitled to the whole of the planter's share, but that there is also a landowner's share for which he is bound to account to his fellow co-owners.

On the other hand, in a comparatively recent case *Fernando v. Rodrigo* [2] De Sampayo J. says:—

> "It is well known that the fruits of the improvement itself cannot be set off in calculating the amount of compensation."

If this is correct, it follows that in the absence of evidence to the contrary, an improving co-owner is treated as a *bona fide* possessor and is entitled to the mesne profits unless it can be shown that he is not *bona fide*, *e.g.*, by showing that against the expressed wishes of his fellow-owners he has planted an area greater than that to which his share would entitle him. It follows that he is entitled to damages for the loss of these profits. That case has not been over-ruled, and has been followed by the learned District Judge in the present case.

The District Judge, who has had long experience in this class of case, says that "it is the invariable custom of the country for every co-owner who effects improvements in the way of permanent plantations on a common land alone to possess such plantations and the fruits of such plantations . . . . and that he has never heard the contrary proposition propounded."

That this is the custom is not disputed by the appellants, but they say that custom cannot over-ride the law. There is, however, no enactment to the contrary effect, and accordingly custom must prevail on the principle, if on no other, that it is a guide to what was in the minds of the parties who respectively made the plantation and suffered it to be made.

I think the decision appealed from should be affirmed, and the case returned to the District Court for the assessment of damages on this basis.

The appeal is dismissed, with costs.

MAARTENSZ A.J.—

This is an action for the recovery of damages from the defendant, who is alleged to have been in wrongful possession of plaintiffs' share of a rubber plantation on a land called Palligodakele.

[1] *(1900) 3 N. L. R. 118.*

[2] *(1919) 21 N. L. R. 415.*

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The trial proceeded on admissions made by the parties, and the facts noted in the judgment of the District Judge were taken as correct at the argument in appeal. They are as follows:—

The third plaintiff sued for the partition of the land Palligodakele in case No. 10,504 of the District Court of Kalutara. The first, second, and fourth plaintiffs were the fourth, third, and second defendants in that action, and the defendant was the seventh defendant.

The present plaintiffs were declared entitled to two-fifths of the land, the present defendant to one-third, and the fifth and sixth defendants in the partition action to four-fifteenths. They are not parties to this action.

The plaintiffs and fifth and sixth defendants were held to have made the entire rubber plantation.

The plaintiffs, on the strength of this decision, that they and fifth and sixth defendants, made the rubber plantation, sued the defendant for the recovery of damages, alleging that the defendant was in possession of the entire rubber plantation from the middle of 1921, to February, 1922.

The defendant does not deny being in possession of the entire plantation during this period, but alleges that he was by an injunction issued at the instance of the plaintiffs deprived of possession from February, 1922, and in reconvention claims a sum of Rs. 1,000 by way of damages.

The appellant's contention is that although he did not make the rubber plantation he is entitled to a share of the income as the owner of a one-third share of the soil.

The contention is a startling one, as there can be little doubt that according to the custom of the country a co-owner takes all the fruits of any improvement effected by him. He cannot at a partition of the land claim to be entitled to the improvements made by him, but if they do not fall within the share allotted to him, he can claim by way of compensation the cost of the improvements or the improved value, whichever is less.

Two cases were relied on by the appellant: *Chellappah v. Ponnambalam (supra)*, where Lawrie A.C.J. sitting alone held in a very short judgment that one of two co-owners of a parcel of land, who plants half of it is bound to give the other, as part owner of the land, his share of the proceeds of the cultivation; and *Thinohamy v. Paulis*.[1] In this case the plaintiff claimed a defined one-third share of a land called Delgahawatta. The only dispute was as to the plantation, the entirety of which was claimed by the second defendant. The second defendant was at one time entitled to two-thirds of Delgahawatta and had made the whole plantation—a portion of the land representing a two-thirds share of the soil and plantation was

[1] *(1915) 6 Bal. Notes of Cases 1.*

separated off and sold by the second defendant to one Mendis Appuhamy in 1890. The defendant still claimed the plantation on the remaining one-third portion which admittedly belonged to the plaintiffs. The Commissioner, purporting to base his judgment on the authority of *Moldrick v. LaBrooy*,[1] held defendant was entitled to one-third of the plantation and dismissed plaintiff's action except as to the soil.

In appeal De Sampayo J. said:—

> "The partition Ordinance provides for a co-owner being allowed credit for any improvement made by him, but there is no law which declares a co-owner entitled to the entirety of a plantation or other improvement made by him on the common land, unless of course he has acquired it by prescription."

He also said:—

> "A co-owner who plants is not entitled to what is generally called 'planter's interest.' The plantation accrues to the soil in proportion to the shares of the respective co-owners, the improving co-owner being in certain circumstances entitled to compensation—see *Silva et al. v. Silva et al.*[2] "

It was argued on the authority of these propositions that the owner of the soil is also entitled to a share of the fruits of the improvements.

On the other hand, De Sampayo J. himself held in the case of *Fernando v. Rodrigo* (*supra*) that the fruits of the improvement itself (consumed before date of assessment) is not to be set off in calculating the amount of the compensation due to a co-owner for improvements effected by him. Schneider A.J. agreed.

In the case of *Silva v. Silva*[3] Lascelles C.J. held that the Partition Ordinance introduced no change with regard to the rights of co-owners under the Roman-Dutch law to be compensated for improvements. In *Silva et al. v. Silva et al.* (*supra*) Middleton J. treated co-owners who had improved the land as *bona fide* possessors even if they planted more land than their shares amounted to if the other co-owners acquiesced in their doing so. In the present case no evidence had been led on the point, and as the defendant did not take the objection that he did not acquiesce in the plaintiffs planting the whole land, I shall presume that he did acquiesce.

It is settled law that a *bona fide* possessor is not liable to account to the rightful owner for the rents and profits of the property enjoyed by him. *A fortiori* he would not be liable to account for the fruits of the improvements.

[1] *14 N. L. R. 331.*

[2] *15 N. L. R. 79.*

[3] *9 N. L. R. 114.*

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The defendant in this action is therefore not entitled to the fruits of the improvements effected by the plaintiffs.

Another objection to his claim is that he did not in the partition suit set up a claim to any share of the plantation as soil owner. It is true that he could not claim damages in the partition suit, but he could have asked the Court to decree that he was entitled to a share in the plantation as soil owner.

The decree declares the plaintiffs and the fifth and sixth defendants in the partition suit entitled to the entire rubber plantation, and whatever rights the defendants had in the plantation upon which he could set up a claim for damages have been extinguished. He has, in fact, lost the foundation for his present action.

I would accordingly dismiss the appeal, with costs.

Appeal dismissed.