1948 *Present :* **Dias and Basnayake. JJ.**

VAZ, Appellant, and HANIFFA, Respondent.

S. C. 7—D. C. Colombo, 138/Z

Co-owner—Lease of common property—Right to lease more than undivided share.

A co-owner has no right to lease more than his undivided share of the common property.

[1] *(1892) 1 S. C. R. 326.* [2] *(1894) 3 S. C. R. 35.*

APPEAL from a judgment of the District Judge, Colombo.

E. B. Wikramanayake, for the defendant, appellant.

M. I. M. Haniffa, for the plaintiff, respondent.

Cur. adv. vult.

March 18, 1948. DIAS J.—

The premises known as Nos. 36, 38 and 40, Dam street, Colombo, belonged to (1) M. M. M. Nazim, (2) M. M. M. Nalir, (3) M. M. H. Mamida, (4) M. M. Sithy Ravha, (5) M. M. Nooraima, (6) M. M. Sithy Zahira Umma, (7) M. M. Umma Nasima and (8) M. M. Sithy Hanidu Umma. The second and third of these persons were minors. In D. C. Colombo Curatorship Cases 4,124 and 4,216 Nazim was appointed their curator.

By an indenture of lease marked " P " and dated January 17, 1941, Nazim, Nooraima and Sithy Zahira Umma had purported to grant a lease of the *whole* property to the defendant for a term of five years commencing from February 1, 1941. Not only was the consent of the Court not obtained for the leasing of the minors' interests, but it is doubtful whether a curator had been appointed to safeguard their interests at all. There is also nothing to show that the other co-owners who did not join in the lease consented to what was done. The District Judge has held that the defendant was well aware of the true position.

The rental was fixed at Rs. 125 per mensem. The lease expired on February 1, 1946.

By deed P2 dated February 8, 1945, all the co-owners including the minors acting through their curator conveyed the premises to the plaintiff. It is common ground that thereupon the defendant became the tenant of the plaintiff.

In this action the plaintiff alleged that his vendors being Muhameddans the males were each entitled to 2/10ths and the females to 1/10th. He further contended that the effect of the lease P was merely to demise 4/10ths of the premises to the defendant. The plaintiff therefore claimed the rent under lease P in regard to 4/10ths and in regard to the balance 6/10ths a sum of Rs. 350 per mensem as being a reasonable rental.

The District Judge has found that the plaintiff was entitled to receive Rs. 130 as the 4/10ths share of the rent up to the end of May, 1945, and for the other 6/10ths a sum of Rs. 312 up to the end of May, 1945. He also awarded damages fixed at Rs. 130 for the month of June, 1945, and Rs. 350 per month from July, 1945, until the defendant is ejected and the plaintiff was restored to possession.

It was argued that one co-owner was entitled to lease the whole of the common property. It was submitted that a co-owner was entitled to possess the whole of the common land, and that the possession of one co-owner was the possession of all the co-owners. If one co-owner could possess the whole land, he could possess through a servant or an agent ; and if through a servant or agent, why not through a lessee ? It was conceded that the co-owner would be liable to account to the other co-owners for their share of the rent. Furthermore, if one co-owner

was dissatisfied, he had his remedy by seeking a partition. A co-owner may give a lease of his undivided share in a land but he has no right to lease anything more than his share. The rights of a co-owner to deal with the undivided property was considered fully in the recent judgment in *Vanderlan v. Vanderlan* [1]. The right of a co-owner to enter into a lease in regard to the *whole* property is not one of the things a co-owner may do. In the case of *Thamboo v. Annammah* [2] it was laid down that a co-owner was not entitled to grant a servitude over even a portion of the common land without the concurrence of the other co-owners. It might at first sight seem that the case of *Perera v. Perera* [3] is an authority the other way. An examination of the judgment of Jayewardene J. shows that it is not so. The question which arose there was whether one co-owner had effectively prescribed against his co-owners. It was held that where one of several co-owners leased the entire property, the possession of the lessee enured to the benefit of the co-owner who granted the lease. That is not an authority for the general proposition that one co-owner is legally entitled to lease the whole of the common land. In Wille on Landlord and Tenant (3rd Ed.) p. 13 it is said : " A co-owner of undivided property who lets any portion of it without the knowledge or consent of his co-owners must account to the latter for his share of the profits derived from the lease ; if a co-owner desires to lease a portion of the property as if it were his own, he can always protect himself by claiming a division of the property before entering into the lease ". I am, therefore, of opinion that the lease P was effectual only as regards 4/10ths of the common property. The District Judge has held that the defendant was well aware of the true facts, and it is impossible on appeal to say that his view is erroneous. When the plaintiff became the owner of the whole property, he was entitled to call upon the defendant to pay rent in regard to the balance 6/10ths of which he was in possession.

It was also urged that the damages awarded are incorrectly assessed. I am unable so to hold. The appeal is dismissed with costs.

BASNAYAKE J.—I agree.

Appeal dismissed.

[1] *(1940) 41 N. L. R. at p. 549–50.* [2] *(1934) 36 N. L. R. at p. 333.*
[3] *(1932) 10 T. L. R. 11.*