1972 *Present:* **Wijayatilake, J., and Pathirana, J.**

Y. C. PERERA and 2 others, Appellants, *and*
D. L. D. C. KULARATNE and others, Respondents

S. C. 109/69 (*Inty.*)—*D. C. Kalutara,* 2308/*A*

Partition action—A co-owner's claim to a portion of the corpus exclusively—Evidence led by him that a subsidy to replant rubber on that portion was granted to him upon an application made by him under the Rubber Replanting Subsidy Regulations, 1953—*Weight of the evidence—Trusts Ordinance, s.* 92—*Rubber Replanting Subsidy Act (Cap.* 437).

A co-owner as such is not entitled to make an application for himself under the Rubber Replanting Subsidy Regulations, 1953. Under Regulation 2, it is on an application made by the "Proprietor" as defined in Regulation 12 that a subsidy can be granted for the purpose of replanting rubber in an estate.

A co-owner who manages the common property on behalf of the other co-owners and is their accredited agent is a "proprietor" within the meaning of Regulation 12. Where he has obtained a subsidy for the purpose of replanting rubber in a certain extent of the common property, he cannot claim that extent exclusively for himself unless he proves by clear, cogent and unequivocal evidence that he renounced his position as an accredited agent and also as a co-owner acting on behalf of the other co-owners. The provisions of section 92 of the Trusts Ordinance would also be applicable in such a case.

APPEAL from an order of the District Court, Kalutara.

H. W. Jayewardene, with *N. R. M. Daluwatte,* for the 1st, 4th and 13th defendants-appellants.

A. C. Gooneratne, with *R. C. Gooneratne,* for the plaintiffs-respondents.

Cur. adv. vult.

November 10, 1972. PATHIRANA, J.—

The plaintiffs-respondents instituted this action to partition the land called Lot No. 14 of the Eastern Division of Tempo Estate depicted in the Plan marked 'X' as lots 1 to 7 in extent 51A. 2R. 25P. The 1st, 4th and 13th defendants-appellants in their statement of claim admitted the soil shares given to them but disputed the claim of the plaintiffs-respondents that the entirety of the budded rubber plantations on lots 1 and 4 were made by the first plaintiff exclusively for his benefit. The appellants took up the position that the 1st plaintiff made the plantations for and on behalf of all co-owners.

The only point of contest was whether the 1st plaintiff planted this extent exclusively for himself or on behalf of himself and the other co-owners. It was admitted that the first plaintiff planted lots 1 and 4.

The 1st plaintiff's case was that he commenced to make these improvements in 1956 after he obtained a subsidy of Rs. 9,000 from the Rubber Controller under the Rubber Replanting Subsidy Act, Ch. 437. He had become a co-owner of an undivided 1/10th share on Deed P3 of 30.4.1953 along with the 1st, 2nd, 3rd defendants and 2 others. He uprooted the old rubber trees and got nothing from them as he was not able to sell them for firewood. He had to barb wire and construct drains. He bore the entire expenses of replanting and none of the other co-owners contributed anything. At the beginning he gave a share of the income to the other co-owners but later a kangani who worked under the co-owner gave a share of the income to all co-owners. After 1954 there was no income from the land.

The 13th defendant who gave evidence for the defendants was a purchaser from the 3rd defendant and is a son of the 2nd defendant and a brother of the 5th defendant. He stated that the subsidy was obtained for and on behalf of all the co-owners and that the income from the estate was used by the 1st plaintiff for replanting the land. The 1st plaintiff gave the share of the income of the 2nd and 3rd defendants to his father who maintained the book 1D7.

The learned District Judge held that the 1st plaintiff planted lots 1 and 4 exclusively for himself. This appeal is from this finding.

Three main reasons have been given by the learned District Judge for his decision. Firstly, he says that the application for replanting which was made in forms provided by the Rubber Controller for the purpose marked 1D1 of 1.8.1955 by the 1st plaintiff under the Rubber Replanting Subsidy Act was for himself, and the other co-owners had signed the declaration 1D2 stating that they had no objection to this. The second reason was that the defendants had failed to prove, although the burden of proof was on them, that there was sufficient income from the land which could have been utilized by the 1st plaintiff to plant the land. Thirdly, he held that the defendants had failed to prove that the first plaintiff planted this land for the benefit of the other co-owners on an agreement between the plaintiff and the other co-owners. He further held that all evidence pointed to the 1st plaintiff planting for his benefit exclusively.

On 1D1 when the 1st plaintiff made the application for a replanting permit and a subsidy on 31.8.1955 he was only a co-owner of an undivided 1/5th share which amounted to a little over 5 acres. His application was to replant 10 acres. The application was made as a co-owner in respect of Tempo Estate. He has given the names of the other co-owners. In the cage: "If you are not the sole owner give the names of the other co-owners and ask them to sign against their names to show that they agreed to this replanting the land and receiving the subsidy on their behalf"; the other co-owners had accordingly entered their names and put their signatures. 1D2, presumably annexed to 1D1, is a declaration signed by the other co-owners to the effect that they had no objection to the 1st plaintiff being registered as the Proprietor of the entire Lot 14 which is Tempo Estate.

ID3 is an application made to the Rubber Controller by the 1st plaintiff dated 25.8.1956 for a subsidy to replant another 15 acres. On Deed No. 1991 of 9.2.1956 (P6), the 1st plaintiff had become entitled to another 1/10th share. In this application which was again on a printed form the 1st plaintiff stated that he was not the absolute owner of the land but only a co-owner and an authorized agent of the other co-owners whose names he mentioned. He further stated that in order to replant the land and for the purpose of obtaining the subsidy the other co-owners had consented. The name of the estate for which the subsidy was applied for was stated as Tempo Estate. 1D1 is a letter dated 3.9.1961 to the 1st plaintiff from the Rubber Controller in respect of lot 14 Tempo Estate issuing him a permit to plant another extent of 26A. 2R. 25P. The permit was valid up to 31.12.1961. On 1D6 dated 18.1.1963 the Rubber Controller had extended this permit up to 31.12.1963.

A co-owner of a land as such cannot make an application for himself under the Rubber Replanting Subsidy Regulations, 1953 (Subsidiary Legislation of Ceylon, Volume VII, Chapter 437). Under Section 2 of these regulations, it is on an application made by the "Proprietor" that a subsidy can be granted for the purpose of replanting rubber in an estate. Under Regulation 12 the Proprietor is defined as follows:—

> "Proprietor, in relation to a Rubber Estate, means the owner or lessee of such estate and includes a duly accredited agent of such owner or the lessee and the person for the time being in charge of such an estate."

The 1st plaintiff in his evidence has admitted that from the date he and the other co-owners purchased the land in 1953 he managed the property on their behalf as the other owners were living far away and he gave a share of the income to the other co-owners. The 13th defendant on behalf of the other defendants in his evidence has confirmed this. Documents 1D1, 1D2 and 1D3 along with this evidence unequivocally make the 1st plaintiff the "Proprietor" within the meaning of Regulation 12 as he is the duly accredited agent of the owners of this rubber estate and was the person for the time being in charge of the estate. The 1st plaintiff has therefore undertaken to replant this land not only as a co-owner but also as an accredited agent of the other owners. In the circumstances, if he desired to assert his own rights and claim that he independently for himself and not on behalf of the other co-owners obtained this subsidy and commenced to replant the land for his exclusive benefit, there must be evidence that he first renounced his position as an accredited agent and also as a co-owner acting on behalf of the other co-owners. Whenever a person acts as an agent, he is estopped from setting up any claim adverse to that of his principal in respect of the subject matter of his authority. Thus, he cannot dispute his principal's title to goods or money which have been entrusted or received by him in his capacity as agent..... If the agent wishes to assert his own right he has first to renounce his position as Agent. (Powell on the Law of Agency, Second Edition, Page 327).

The 1st plaintiff is also in the position of a co-owner in terms of Section 92 of the Trusts Ordinance, who as representing all persons interested in a property, gains an advantage; he must hold for the benefit of all persons so interested, the advantage so gained. He having taken advantage of his position as a co-owner and acting for and on behalf of the other owners obtained a subsidy from the State to replant the land and having also made a declaration which he has certified as true and correct to that effect, he cannot now be allowed to claim this advantage for himself and claim the sole benefit of it. He is in a position analogous to that of a co-owner who wishes to set up prescriptive title. He must, therefore, adduce clear, cogent and unequivocal evidence that he had shed his character as Agent or trustee when he obtained this subsidy and also when he started replanting the land. The burden of proof is therefore clearly on the 1st plaintiff and on the evidence he has failed to prove this. On the contrary, there is a preponderance of evidence both oral and documentary in favour of the view that he obtained this subsidy to replant rubber for and on behalf of the other co-owners of this Division of the Tempo Estate.

The next question is, whether he planted an extent larger than that he was entitled to, was on the basis that the other co-owners had agreed to sell the said extents of land to him. Both in the plaint and the amended plaint and in the submission made by Counsel in the opening of the case, this was not given as the reason for replanting. It only transpired in evidence. The 13th defendant denied such an agreement. The 1st plaintiff is a trader, 57 years old, and it is very unlikely that he would have embarked on a venture like this to plant an area of land out of proportion to an extent which he was in fact not entitled to and especially after making the declarations 1D1, 1D2 and 1D3, without at least obtaining some writing even of an informal nature that the defendants would transfer the said portions to him on completion of planting.

The learned District Judge has suggested that the burden was on the appellants to prove that there was sufficient income from the land which was utilized by the 1st plaintiff for the purpose of replanting. If as the 1st plaintiff admitted that he was looking after the land when the other co-owners were far away, the burden will be on him to give an account of his management and produce accounts and all presumptions would be available against him if he does not do so—*Medonza v. Kiel*,[1] 61 N.L.R., 459, *Chattoor v. The General Assurance Society Ltd.*,[2] 60 N.L.R. 169.

Mr. Jayewardene has drawn our attention to the plaintiff's list of documents dated 23.8.1968, in which are listed the books of accounts in respect of the land called Tempo Estate, Lot 14. The 13th defendant has stated in evidence that his mother had asked the 1st plaintiff to submit accounts in respect of the income from the uprooted rubber trees, income from the estate and the expenses incurred in replanting. He further stated that the 1st plaintiff had kept accounts which were checked by himself and his mother. These books of accounts were not produced by the plaintiff. On the other hand the 13th defendant has produced a pass book D7 maintained by his father in respect of Tempo Estate which gives an account of all income given by the 1st plaintiff to the father of the 13th defendant on behalf of the 2nd and 3rd defendants up to 1956. There are no entries after this date. This is possible as the uprooting of the old rubber trees started in 1956 and the replanting commenced in 1957. There is also in 1D1 the statement of the 1st plaintiff in his application to obtain a rubber subsidy that the production for the year 1954 was 1,500 pounds of latex and 200 pounds of scrap rubber. The learned District Judge did not seek to place much reliance on 1D7

[1] *(1957) 61 N. L. R. 459.*

[2] *(1958) 60 N. L. R. 169.*

because the 13th defendant's father had not been called as a witness although he was present in Court. The intrinsic evidence in this document 1D1 however suggests strongly that these were accounts in respect of Tempo Estate as there were also entries regarding the execution of deeds in respect of this land and also fees paid to Notaries etc. along with the income received.

In addition to the documentary evidence in the case which supports the position that the 1st plaintiff obtained the subsidy and improved the land on behalf of the other co-owners, there is the legal position that whenever a co-owner plants or improves the common property the improvements accrue to the benefit of all co-owners and the improving co-owner is only entitled to possess the plantations till common ownership is put an end to by the institution of a properly constituted partition action, in which the improving co-owner's rights to compensation will be adjudicated and compensation ordered in the event of improvements made, been allotted to other co-owners—*Arnolis Singho v. Mary Nona*[1] 33 C.L.W. 64, *Peiris Singho v. Nonis*[2] 33 C.L.W. 65, *Appuhamy v. Sanchi Hamy*[3] 21 N.L.R. 33. The very concept of co-ownership is incompatible with the assertion that one co-owner can improve land exclusively for himself. A co-owner when he starts to improve the land acts as the Agent of the other co-owners, the improvements accede to the soil and all that he is entitled to is compensation for improvements.

In this connection, the 1st plaintiff has received a subsidy of Rs. 9,000 for himself and on behalf of the other co-owners to replant the land. He has had the benefit of the old rubber trees for which he has not given proper accounts. He has managed the property for and on behalf of the other co-owners. Although the burden was on him he has failed to show accounts of the income and expenses of his stewardship. Shaw J. in *Appuhamy v. Sanchi Hamy*[4] 21 N.L.R. 33 at 36 refers to a decision in an unreported case S.C. Min. July 28, 1896. In that case Withers J. referring to the improvements made by a co-owner said "If the entire increase in value is due to his expenditure, the whole of the expenditure, but no more, will have to be brought into account. If part only of the increase is due to the outlay, so much will only have to be brought into account. If nothing is due to the outlay, nothing will be brought into account."

[1] *(1946) 33 C. L. W. 64.*
[2] *(1944) 33 C. L. W. 65.*
[3] *(1919) 21 N. L. R. 33.*
[4] *(1919) 21 N. L. R. 33 at 36.*

On the totality of the evidence, I am of the view that the 1st plaintiff improved the land for himself and on behalf of all the other co-owners. The appeal of the first, fourth and thirteenth defendants-appellants is therefore allowed with costs in both Courts.

WIJAYATILAKE, J.—I agree.

Appeal allowed.