

1946

Present : Howard C.J. and de Silva J.

COORAY *et al.*, Appellants, and SAMARANAYAKE, Respondent.

318—D. C. Colombo, 2,786.

Possessory action—Right of one co-owner to maintain possessory action against another co-owner.

A co-owner who has been in possession of the entire common property for a year and a day *ut dominus* can maintain a possessory action against another co-owner who thereafter ousts him.

A PPEAL from a judgment of the District Judge of Colombo.

N. Nadarajah, K.C. (with him *J. M. Jayamanne*), for the defendants, appellants.

N. E. Weerasooria, K.C. (with him *E. A. G. de Silva*), for the plaintiff, respondent.

Cur. adv. vult.

June 20, 1946. HOWARD C.J.—

The defendants in this case appeal from an order of the District Court, Colombo, giving judgment for the plaintiff and declaring that she is entitled to be restored to the possession of the rubber plantation on the land referred to in the schedule to the plaint together with damages calculated at Rs. 70 a month from March 17, 1943. The plaintiff's case was that her husband Don Peter Wijesekera, Vidane Aratchi, was the owner of the plantation and on his death it passed to her and her children. Since the death of the Vidane Aratchi the plaintiff states that she and her children have had exclusive and uninterrupted possession of the plantation and taken the produce thereof up to March 17, 1943, on which day the defendants wrongfully and unlawfully ousted the plaintiff therefrom. The defendants admit that they took possession of the plantation on March 17, 1943, but maintain that they were entitled to do so as they are co-owners with the plaintiff and others of the plantation. The learned Judge has found that the plaintiff was in possession of the entire rubber plantation for a year and a day prior to March 17, 1943, that the plaintiff's possession of the plantation was *ut dominus*,

and that the plaintiff was entitled to damages calculated at Rs. 70 a month from March 17, 1943. On these findings the learned Judge gave judgment for the plaintiff as already stated.

I do not think that the District Judge's findings of fact can be questioned. In these circumstances the only question that arises for determination is whether he was right in holding that the plaintiff, who was a co-owner with the defendants could maintain a possessory action for the plantation. In *Abeyaratne v. Seneveratne*¹ it was held by Lascelles C.J. that a possessory action can be maintained by one co-owner against the others. In his judgment in this case the Chief Justice referred to the cases of *Silva v. Sinno Appu*² and *Fernando v. Fernando*³ where it was held that an owner of an undivided share of land can maintain a possessory action in respect of such share if he joins the other co-owners as parties. *Rowel Appuhamy v. Moises Appu*⁴ is also an authority for the proposition that, when exclusive possession for the whole of the planter's share for some years prior to the assertion of title and forcible ouster has been established, a co-owner is entitled to a decree against the co-owner who has ousted him. The question as to whether a co-owner can maintain an action against another co-owner without joining all the other co-owners of the land was considered by the Full Bench in *Heenhami v. Mohotihami*⁵. It was held as follows :—

“ There is no rule of law that a co-owner cannot maintain an action against another co-owner without joining all the other co-owners of the land.

No doubt in many cases they are proper parties, and would be joined on an application being made for the purpose. In some cases they may even be parties, whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon all the questions involved in the action, in which case the Court may add them of its own motion under section 18, but if they are not added, the Court should, in accordance with the provisions of section 17, deal with the matter in controversy so far as regards the rights of the parties actually before it.”

The right to maintain a possessory action by a co-owner against another co-owner who attempts to occupy a house built by the former was considered in *Kathonis v. Silva*⁶, the headnote of which is as follows :—

“ A co-owner has the right to build and live on the common land. If a co-owner exercises his right and builds a house for his private use on the land, he may eject any other co-owner who attempts to occupy that house without his permission.

It is possible that a co-owner may have the right to enter the house built by another co-owner for certain purposes, but not to claim one of the rooms for his own personal residence.”

¹ (1914) 3 *Bal. N. C.* 22.

² (1903) 7 *N. L. R.* 5.

³ (1910) 13 *N. L. R.* 165.

⁴ (1899) 4 *N. L. R.* 225.

⁵ (1916) 19 *N. L. R.* 235.

⁶ (1919) 21 *N. L. R.* 452.

Kathonis v. Silva was cited and followed in the judgment of Soertsz J. in *Girihagama v. Appukamy* ¹.

In my opinion the learned Judge was right in holding that the plaintiff could maintain this action. The appeal is therefore dismissed with costs.

DE SILVA J.—I agree.

Appeal dismissed.
