

1947 Present : Keuneman A.C.J. and Wijeyewardene S.P.J.

PEERIS, Appellant, and APPUHAMY, Respondent.

S. C. 300—D. C. Panadure, 422.

Co-owner—Plantation on common property—Acquiescence of other co-owners—Right to possession.

A co-owner who makes a plantation on the common property with the consent of the others is entitled to possess the entire plantation until common ownership is terminated by a partition action.

Semble : This principle may not apply where the improvements have been made against the wishes or without the acquiescence of the other co-owners.

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

H. A. Koattogodde, for the defendant, appellant.

Vernon Wijetunge, for the plaintiff, respondent.

Cur. adv. vult.

July 16, 1947. KEUNEMAN A.C.J.—

The plaintiff brought this action, claiming to be declared entitled to possess the rubber plantation on the land in question, under lease P 1 of December 28, 1942, from Bastian Peiris, and asking for damages. The District Judge entered judgment for plaintiff, and the defendant appeals.

The land at one time belonged to Machohamy, the wife of Bastian Peiris, and to her sister Nanohamy. Nanohamy sold her half share by P 2 of July 10, 1921, to Bastian Peiris. Later Machohamy died leaving as her heirs, Bastian Peiris and her son the defendant. The defendant who claimed title to a $\frac{1}{4}$ th share of the land and the rubber trees forcibly took possession of 30 rubber trees out of the plantation of 130 trees.

The District Judge has held on the evidence that Bastian Peiris planted the rubber after his purchase from Nanohamy, and in his own right and not for his wife. Bastian Peiris himself gave evidence to this effect, and his evidence was accepted by the District Judge, and I see no reason to disagree with this finding. It is also in evidence that immediately after the execution of P 1, Bastian Peiris placed the plaintiff in possession of the whole rubber plantation of 130 trees, and the defendant subsequently dispossessed him in respect of 30 rubber trees.

Counsel for appellant argued that as the defendant was a co-owner of the land, he was entitled to a $\frac{1}{4}$ th share of the rubber trees as well as the soil, and that the action of the plaintiff is misconceived.

For the defendant it is argued that the improving co-owner was entitled to be in possession of the whole plantation and was entitled to mesne profits, and that an alienee from the improving co-owner was entitled to the same rights, at any rate till the rights of the parties were finally determined in a partition action.

In *Silva v. Silva*¹ Lascelles C.J. said "It is difficult to see on what principle an improving co-owner, who is entitled to compensation, can be

¹ (1911) 15 N. L. R. 79.

excluded from the benefit of the *jus retentionis*". He held that the improving co-owner was entitled to retain the portion of the property improved until compensation is paid, as ascertained in a partition action. "But it is a different matter when the claim takes the form of refusing to give up possession, while the property is still undivided, until a specific sum is paid by the other co-owners as compensation". In other words the amount of the compensation payable has to be determined in a properly constituted partition action, and not in another suit.

In *Podi Singho v. Alwis*¹, it was held that an improving co-owner is entitled to the fruits of the improvement effected by him. It must follow that he is entitled to retain possession of the improvement. In this case apparently conflicting decisions were considered and reconciled.

In *Arnolis Singho v. Mary Nona*², it was held that where a co-owner plants more than his proportionate share of the common property, he is entitled to possess the entire plantation as against the other co-owners until the common ownership is terminated by a partition action.

It is possible that on the authorities this view will have to be modified to this extent, that it will not apply where the improvement has been made against the wishes or without the acquiescence of the other co-owners. In the present case, however, this particular consideration cannot arise, for it is clear that Machohamy acquiesced in the making of the plantation.

In this case then I hold that Bastian Peiris was entitled to possession of the improvement made by him, *i.e.*, the rubber plantation, and that his lessee, the plaintiff, has been rightly declared to be entitled to possess this plantation, until the rights of the parties are finally decided in a partition action. The claim for damages can therefore be sustained.

The appeal is dismissed with costs.

WIJEYWARDENE S.P.J.—I agree.

Appeal dismissed.

