[FULL BENCH.] 1917.

*Present* : Ennis J., Shaw J., and De Sampayo J.

SAIBO *v.* BABA *et al.*

*4—D.C. Matara, 7,164.*

*Planter's share—Well dug by planter—Right of retention—Compensation—Improvements.*

A planter was held to have been entitled to retain possession of a well dug by him until he was compensated (Shaw J. dissenting).

ENNIS J.—The digging of a well by a planter for the purpose of the plantation, or as incidental to the right to live on the plantation, is not unreasonable; it would be unreasonable for the holder of a "planter's share" to turn it into a public bathing establishment or to sell the water.

SHAW J.—I know of no authority showing that the planter has any rights to a well made by him on the owner's property. He may have a right to make and use a well for the purpose of watering his plantation, but there is no necessity for this in the present case, as the trees are fifteen years old. He certainly has no right as planter to the use of a well for profit as a bathing well. His position is more like that of a lessee, who, whatever right he may have to compensation, has no right of retention.

DE SAMPAYO J.—It may be that a planter cannot make a well except for the purpose of irrigating the plantation. But both the making and the user of it as a bathing well was acquiesced in from the beginning by the owner, and I think it is too late and unreasonable now, after forty or fifty years, to raise any question as to the planter's right to make and use such a well.

A lessee who makes improvements with the consent of the lessor is entitled to compensation, though perhaps not to retention. But a planter who is admitted to be entitled to a "planter's share" is not in the same precarious position as a lessee. He has a sufficient interest in the land to constitute him a *bona fide* possessor in respect of improvements outside the actual planting.

THE facts appear from the judgment.

*Drieberg*, for appellant.—A planter has no right known to law to a well dug by him upon the land planted, nor is he entitled to the use of it for himself and his family for domestic purposes or as a bathing well. The utmost extent of his right is to use the water from such well for the purpose of watering his plantation. There is no claim by prescription, and no notarially executed deed has been produced. (See *Jayasuria v. Omar Lebbe Marcar.*[1])

[1] 2 *C. L. R.* 6.

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A planter is not a *bona fide* possessor, and accordingly is not entitled to retain the possession of a well dug by him until he is compensated. His position is similar to that of a lessee. (See *Lebbe v. Christie*,[1] *Soysa v. Mohideen*.[2])

In any case, the planter having taken a lease of the land together with the well (2 D 1), is estopped from claiming any right to the well against the owner.

*Keuneman*, for first defendant, respondent.—The right to dig and use a well for any purpose is incidental to the right of the planter to live on the planted land. A well is a necessity for the purpose of living on the land. Similarly a planter has the right to build a house upon the land (D. C. Galle, No. 14,952, Lor. Rep. 201). Planters' rights can be acquired otherwise than by notarial deed and prescription. In *Sinne Wappo v. Mohamadu Alley* [3] the Full Bench held that a planter can acquire his rights by operation of law in the absence of an agreement.

The position of a planter is materially different from that of a lessee. He falls within the definition of a *bona fide* possessor, and is entitled to retain the land until compensated.

No estoppel arises in this case, as the action was brought after the termination of the lease. Further, the lease (2 D 1) is badly drafted, and it is not clear that it was understood by the planter in the sense placed upon it by the owner. In any case, what was leased was whatever right the owner had in the well, *e.g.*, the right of the owner to recover complete ownership in the well by paying full compensation.

*Hayley*, for second defendant, respondent.

*Drieberg*, for plaintiff, appellant, in reply.

*Cur. adv. vult.*

March 16, 1917. ENNIS J.—

The plaintiff-appellant is a lessee under a lease from the second defendant, dated December 13, 1913, of certain land for five years from January 1, 1916.

The property leased is described as follows: "Excluding the planter's share, viz., one-third of the fruit trees on the newly planted portion, which forms the southern part of the lands ....., the soil and all the remaining fruit trees of the lands ....., and also the well existing therein".

The plaintiff filed action on March 16, 1916, praying for a declaration of title to, and to be placed in possession of, the well and ground, for ejectment of the defendants, and for damages Rs. 228, and further damages at the rate of Rs. 3 per day. The plaint asserted that the

[1] *(1915) 18 N. L. R. 353.* [2] *(1914) 17 N. L. R. 279.*
[3] *Ram. (1860-62) 113.*

second defendant, acting fraudulently and in collusion with the first defendant, failed to give the plaintiff possession of the well and the ground on which it is. The plaintiff admits that he is in possession of the rest of the ground and of the trees leased.

The first defendant is the widow of the planter of the plantation. No question as to her right to represent her deceased husband has been raised. It appears in evidence that the husband of the first defendant made a plantation and dug the well about forty years ago, that Rs. 100 of the compensation payable to him under the planting agreement has been paid, but further compensation remains to be paid. The second defendant from time to time leased his interest in the land, and on one occasion the first defendant's husband, Solla Muttu, took a lease for four years from January 1, 1912. The second defendant's interest is described in this lease in similar terms to those used in the lease to the plaintiff. As to the well, it appears that not only did Solla Muttu dig this well, but it is known as " Muttu's " well, and he and his wife and family have used it for forty years without any disturbance from any one. It appears to have been dug as a bathing well, and to have been used by people in the neighbourhood. The second defendant and her daughters have been in the habit of charging for drawing the water and service at the well at the rate of five cents a bath, while occasionally more was paid, e.g., by brides.

Solla Muttu's interest in the land was a " planter's share ". The planting agreement is not in evidence, but it appears that Solla Muttu as planter lived on the land. The case turns on the nature and extent of the rights included in a " planter's share ", whether they can be acquired in the absence of a notarially executed agreement, and whether a planter in possession of a " share " is entitled to retain possession until compensation is paid. The nature and extent of a " planter's share " have been discussed in *Jayewardene on Partition* (*page 75 et seq.*) In *Silva v. Cottalewatte Haminey*,[1] Phear C.J. held that undisturbed user would be evidence of the existence and extent of the right. In *Sinne Wappo v. Mohamadu Alley* [2] a Full Bench of the Supreme Court held that planters could claim their rights by operation of law, and not as a consequence of any agreement between them, and that the absence of a written agreement is not fatal to the claim. I presume that this means that a person who has planted, and is *bona fide* in possession as a planter, is entitled to retain possession of the planter's share until compensated, and that in the absence of a notarially executed instrument or a title by prescription a *bona fide* planter could be turned out at any time on payment of full compensation. In D. C. Galle, No. 14,952, [3] it was held that: " A planter is also entitled to live on the land planted by him. For this purpose he may build

[1] *2 S. C. C. 4.*

[2] *Ram. (1860-62) 113.*

[3] *Lor. Rep. 201.*

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a sufficient house on the land; but in repairing the house he must not encroach on the soil, and he can be made to pull down any encroachment. ''.

The digging of a well for the purpose of the plantation, or as incidental to the right to live on a plantation (*i.e.*, for bathing purposes), does not appear to me to be unreasonable, and the evidence of user in this case shows that it has been acquiesced in for forty years. I imagine, however, that in the case of a well it would be unreasonable for the holder of a '' planter's share '' to turn it into a public bathing establishment or to sell the water; such proceedings would be similar to the encroachments on the owner's rights referred to in D. C. Galle, No. 14,952, and could be restrained in proper proceedings. I would pause here for a moment to comment on the exorbitant exaggeration of the plaintiff's claim. It would seem from the headman's report filed in the case that the plaintiff sought to exclude Muttu's widow altogether from the use of the well, and put forward a claim for Rs. 5 per day damages. In the present action he seeks to exclude the widow from the use of the well, but has reduced his claim to Rs. 3 per day, *i.e.*, he claims Rs. 90 per month on the well alone, while his rental under the lease is only Rs. 80 per year. The learned Judge has found, as a fact, that the takings at the well cannot exceed Rs. 30 per month, and that most of that, if not all, is due for the service of the drawers of the water. It seems to me that the encroachment, if any, is such that no reasonable man could complain of it. The wife and the daughters of Muttu received emoluments for their personal service, and the position is much the same as if they had taken money for giving lodging at the house built and occupied by the planter.

The effect of the lease taken by Muttu remains to be considered. It is asserted that Muttu by taking the lease admitted the second defendant's title. This is true, but the admission in the case of the well is no more than the admission in case of the land. As a planter, Muttu could use the land for planting and residence and the purposes incidental thereto. The evidence in the case proves the planter's use of the ground to build a house and dig a well. The Full Court case cited shows that the rights of the planters (known as the planter's share) arise by implication of law on immemorial custom. The planter, therefore, in taking the lease did not do more than admit the landowner's rights in the soil; his own rights as planter remained unaffected.

I am of opinion that the first defendant is entitled to the exclusive user of the well, just as she is entitled to the exclusive user of the house, both of which were made by the planter, until she has received full compensation as a *bona fide* holder of a '' planter's share. ''

The second defendant has filed objections to the order as to costs. The learned Judge found that the second defendant did

not act in collusion wth the first defendant, and he is entitled to his costs, inasmuch as the planter's share was mentioned in the lease.

I would dismiss the plaintiff's appeal and allow the objection. The plaintiff should pay costs in both Courts.

SHAW J.—

By deed of lease dated October 13, 1913, the second defendant let to the plaintiff from January 1, 1916, the adjoining lands Ralagewatta and hena, " and also the well, " save and except the planter's one-third share of the fruit trees of new plantations of the southern portion.

The well included in the lease is a bathing well, to which people living in the neighbourhood have been accustomed to resort on payment. The profit to the proprietor is estimated by the Judge at Rs. 30 a month.

When the plaintiff went to take possession under his lease, the first defendant disputed his right to the well, and claimed to be entitled to the possession of it. The plaintiff thereupon brought the present action against her, claiming a declaration that he was entitled to possession and damages, and joined his lessor as a defendant in the suit.

The first defendant claims the well on the ground that it was made by her husband, who was the planter of certain plantations on the land, and whose interest in the last plantation has not yet been paid off.

It appears from 2 D 1 that the first defendant's husband on November 2, 1911, took a lease of the land from the second defendant, which lease specifically included the well, and excepted only the planter's share in the new plantation in the southern portion, which was his own property as planter.

The Judge has found that the first defendant is entitled to possession of the well, as planter, until compensated, and has dismissed the action, but has ordered the second defendant to bear his own costs.

The plaintiff appeals, and the second defendant has given notice of objection to the order as to his costs.

I think the decision is wrong. I know of no authority showing that the planter has any rights to a well made by him on the owner's property. He may have a right to make and use a well for the purpose of watering his plantation, but there is no necessity for this in the present case, as the trees are fifteen years old. He certainly has no right as planter to the use of a well for profit as a bathing well. Moreover, the lease to the first defendant's husband of November 2, 1911, shows that he did not himself set up any right to the well, and

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it would appear from the first defendant's evidence that the lease of 1911 was not the first lease he took; she says in her evidence " my husband used to take the lease " from the landowner.

I would set aside the judgment appealed from, and enter judgment declaring the plaintiff entitled to possession of the well against the first defendant, with damages at the rate of Rs. 30 a month from January 1, 1916, with costs of the action and this appeal.

No cause of action has been made out against the second defendant, and he is entitled to his costs against the plaintiff in both Courts.

The arguments on the re-hearing have not affected the view I have expressed above.

On the re-hearing, the respondent's claim to retain possession of the well was put principally on the ground that the well was an improvement made by her husband as a *bona fide* possessor.

There appear to be two answers to this. First that a planter is not a *bona fide* possessor within the meaning of the word when used in connection with the law with reference to compensation for improvements, he not having the *possessio civilis*, and not purporting to hold *ut dominus*. (See *Walter Pereira 353-355*, *Lebbe v. Christie*,[1] *Soysa v. Mohideen.*[2]) His position is more like that of a lessee, who, whatever right he may have to compensation, has no right of retention. (*Walter Pereira 373.*)

A second answer is that even had the planter a right to retention of the well until he was compensated for it, that right is gone in consequence of his having given up the well to the owner of the land, and having specifically taken a lease of the well from him.

DE SAMPAYO J.—

This case was referred to a Bench of three Judges on account of a difference of opinion between my learned brothers as to the right of the first defendant to retain possession of a certain well on the land leased by the second defendant to the plaintiff. The evidence is very meagre, and does not show clearly the circumstances in which the well was first built. The first defendant's husband, Solla Muttu, made the second plantation on the land fifty years ago, on an agreement with the second defendant. Whether the agreement was in writing or not, and what the terms of it were, does not appear, but Solla Muttu built a house on the land in connection with the plantation, and he and his family have lived on the land ever since. He appears to have built the well about the same time. It has been used up to date by him and the family as a bathing well, and they have made a profit out of it by taking a few cents from people who resorted there for baths. He appears to have made another

[1] *(1915) 18 N. L. R. 353.*

[2] *(1914) 17 N. L. R. 279.*

plantation on an agreement with the second defendant in 1883. This agreement was in writing, but has not been produced. It is, however, sufficiently clear from the pleadings and the evidence that Solla Muttu thereby became entitled to a "planter's share", namely, one-third of the trees of the plantation in the southern portion of the land. A receipt of 1893 for Rs. 100 paid by the second defendant as part compensation indicates that Solla Muttu was either only entitled to compensation on the agreement, or subsequently agreed to take money in lieu of the trees. In any case, full compensation has not been paid, and the first defendant is entitled to remain in possession of the plantation. The District Judge's finding is that the well was made by Solla Muttu incidentally to his rights as planter. It may be that a planter cannot make a well except for the purpose of irrigating the plantation. But both the making and the user of it as a bathing well was acquiesced in from the beginning by the second defendant, and I think it is too late and unreasonable now, after forty or fifty years, to raise any question as to the planter's right to make and use such a well. If, then, the making of the well was one of the operations in connection with the planting, consented to and acquiesced in by the landowner, I think the planter is entitled to retain possession of the well, just as much as any house, until compensation is paid. There is another point of view from which, I think, the first defendant may equally claim a right to be in possession. A lessee who makes improvements with the consent of the lessor is entitled to compensation, though perhaps not to retention. But a planter who is admitted to be entitled to a "planter's share" is not in the same precarious position as a lessee. He has a sufficient interest in the land to constitute him a *bona fide* possessor in respect of improvements outside the actual planting.

The plaintiff relies greatly on a lease given to Solla Muttu by the second defendant in 1911, whereby, excluding the planter's one-third share of the fruit trees of the new plantation in the southern portion, "the soil, the remaining trees, and the well" were leased, and it is contended that this is an acknowledgment of the second defendant's right to the bathing well now in question. Solla Muttu appears to be dead now, and the second defendant did not give any evidence at all. There is another well on the land, and in the absence of any explanation there is no certainty as to what well was meant. The deed itself is so worded in the Sinhalese that there appears to have been some difficulty at the fist hearing of the appeal as to what exactly was the subject-matter of the lease, and I do not think it fair to conclude that Solla Muttu, who was a Tamil man, understood that the well dug by himself and used for his own benefit for forty years and upwards was being leased to him by this imperfectly worded Sinhalese deed. According to the Vidane Arachchi, who was called for the plaintiff, the water from the other well is also sold for drinking, and it may well be that the well mentioned in the lease was

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that well. The first defendant is stated to have said in cross examination, " my husband used to take the lease " from the landowner. I cannot conclude from this peculiar sentence that Solla Muttu took more than one lease, and much less that the well in question was thereby leased to him. On the other hand, the evidence on behalf of the plaintiff himself shows that there were at least three other lessees under the second defendant, but that, nevertheless, Solla Muttu, and not the lessees, possessed this well.

In my opinion the District Judge is right in holding that the first defendant cannot be ejected until compensation is paid. The case was dismissed against the second defendant also, as the plaintiff made him a party on an allegation that he had colluded with the first defendant in keeping plaintiff out of possession, and as the plaintiff failed on the only issue stated between him and the second defendant. The plaintiff's appeal should, I think, be dismissed, and the plaintiff should pay the first defendant's costs of appeal, and should also pay the second defendant's costs of action and of the appeal.

*Appeal dismissed.*