1945 *Present:* **Cannon and Canekeratne JJ.**

DIAS, Appellant *and* WICKREMESINGHE, Respondent.

*105—D. C. Ratnapura, 7,327.*

*Co-owner—Improvement made by him—Sale of improved portion—Purchaser's right to claim compensation in partition action—Waste Lands Ordinance, s. 4 (1)—Order made under—Cannot affect rights of improver.*

Where a co-owner planted a portion of the common property with rubber with the acquiescence of many of the other co-owners and sold it—

*Held*, that the purchaser could obtain compensation in a partition action on the same footing as a *bona fide* improver.

*Held, further*, that a settlement order made under section 4 (1) of the Waste Lands Ordinance of 1897 (as amended by Ordinances of 1899, 1900, and 1903) cannot take away from an improver of property any right to compensation in respect of improvements he might otherwise have had.

APPEAL from a judgment of the District Judge of Ratnapura.

*N. Nadarajah, K.C.* (with him *E. B. Wikremanayake* and *H. Wanigatunga*), for the defendant, appellant.

*H. V. Perera, K.C.* (with him *U. A. Jayasundera*), for the plaintiff, respondent.

*Cur. adv. vult.*

July 27, 1945. CANAKERATNE J.—

One G. K. Jayasinghe Bandara appears to have been entitled to two-fifth shares of certain lands appertaining to Handukande Nindagama; in August, 1907, he made a gift of the same to his six daughters, Ratnayake Menike, Hamumahatmaya, Tikiri Menike, Punchi Menike, Dhanasekere Menike and Keerthi Menike.

In December, 1921, a Special Officer appointed under the Waste Land Ordinance of 1897 (amended by Ordinances of 1899, 1900 and 1903), published a notice under section 1 of the Ordinance calling upon persons claiming any rights in the lands commonly called and known as Batalawattehena, Kekunagalahena, &c., situate in the village of Kiriella (in extent 429 acres 1 rood and 19 perches, and shown as lots 95,107,121 and 131 in B.S.P.P. No. 182) to make claim to them or any of them within three months from the date mentioned therein and stating that if no claim was made he would declare the same to be the property of the Crown. Robert Aron Goonetileke (later referred to as Robert), husband of Ratnayake Menike, on behalf of the six donees made claims to the Settlement Officer. The Settlement Officer inquired into the claims to the lands: he apparently did not admit these but instead he, on April 24, 1923, entered into an agreement with Ratnayake Menike as authorised by section 4 (1) of the Ordinance. This agreement (P7) was to the effect that Ratnayake Menike in consideration of her sisters and her daughter, Amelia Goonetileke, being declared in equal shares, *i.e.*, one-sixth share each, the owners of 80 acres more or less of lots 95, 107, 121 and 131 in B.S.P.P. 182, Kiriella, as shown roughly at 144A on the sketch, thereby withdrew all claims to the remainder of lots 95, 107, 131 and the whole of lots 9, 16, 41, 64, 71 and 251 in the said land and thereby also acknowledged that she had no further claim to the lands appearing in the notice.

Agreements in similar terms were entered into by Punchi Menike on March 16, Keerthi Menike on March 21, Dhanasekere Menike on March 31, Hamumahatmaya on April 23, and Tikiri Menike on May 16.

The order made under section 4 (1) on November 15, 1928, was published on December 21, 1928: it sets out the agreements entered into with the six claimants and declares the second, third, fourth, fifth and sixth claimants along with Amelia Goonetileke (the plaintiff who is now married) to be owners in equal shares, *i.e.*, one sixth share of portions of the land more fully described therein (lot 95K Handukandewatta, Batalawattehenyaya, 95o Handukandewatta, 107AO Vedagewattehenyaya, 107AP Handukandehenyaya, 107AQ Kirigahatulehena, 121 Horamandiya, 131 Galagederawattehena): in extent 81 acres 2 roods and 13 perches, less the extent of 2 acres 3 roods and 0 perches.

Robert appears to have taken a portion of the land referred to in the deed of gift in extent about 30 acres and planted it with rubber. It can be gathered from the evidence that the rubber portion was yielding an income in 1928, if not earlier; this portion was registered under the Rubber Control Ordinance of 1933. In October, 1927, Keerthi Menike by deed D1 sold to Ratnayake Menike all the soil, trees and plantations belonging to an undivided one-sixth share of land remaining after excluding a portion in extent 9 acres and also excluding the rubber plantation,

planted by Robert, on the remaining portion of land in extent 80 acres standing on the land called Handukande Nindagama. By deed P2, Ratnayake Menike and her husband in October, 1928, sold to the defendant all the undivided one-sixth share of the soil, trees and plantations standing on the remaining 80 acres together with the whole rubber plantation standing on the land called Handukande Nindagama; actual possession of the rubber portion came to her hands in June, 1933. The plaintiff instituted this action in April, 1943, for declaration of title to an undivided one-sixth share of the land known as Batalawattehena, Kekunagalahena, &c., in extent 81 acres 2 roods and 13 perches, and for the recovery of the one-sixth share of mesne profits which she assessed at Rs. 3,000 for three years preceding the action and at the rate of Rs. 100 a month thereafter. The defendant filed answer claiming the entirety of the rubber plantation on the strength of D2: she further claimed alternately compensation for improvements and a *jus retentionis* in respect of the share claimed by plaintiff. The trial Judge gave Judgment for plaintiff for the one-sixth share claimed : he ordered defendant to pay plaintiff Rs. 400 per annum for three years prior to date of institution of the action and thereafter at the rate of Rs. 40 per mensem as damages until plaintiff is restored to possession.

One of the contentions of the plaintiff is that she is not liable to pay any compensation as she became entitled to the share claimed by virtue of the final order. The Ordinance cannot take away from an improver of property any right to compensation in respect of improvements he might otherwise have had. To alter any clearly established principle of law a distinct and positive legislative enactment is necessary. The language of the Ordinance is fully satisfied by interpreting it to mean, what needed is the plain and natural meaning of the words used, that the title to the lands is finally decided and that the land becomes vested in the persons mentioned in the order [1].

Robert planted a portion in extent 30 acres with rubber long before the time the plaintiff became entitled to a share therein. She had never been to the land : neither she nor her co-grantees on P 1 had possession of it save Punchi Menike who apparently got possession about October, 1937 : she does not know the circumstances under which the plantation was made by her father; no reliable evidence has been given by plaintiff on this point, the only explanation ventured is, what her mother is alleged to have told her, that her father was possessing the plantation. She said that she came to know there was a land like this, presumably the rubber land, about 1927 when she was twenty years old : she does not say that her father could have planted the portion on her behalf, she could hardly make a statement to this effect as she became entitled to a share only in December, 1928. The father is alive, the mother presumably is not dead ; neither of them was called by the plaintiff as a witness. The onus is on the party who says that the planter effected the improvement on behalf of all the the co-owners. That *onus* was not in this case discharged.

[1] *F C : Hethuhamy v. Boteju (1941) 43 N. L. R. 83 (a decision under the new Ordinance Chapter 319).*

The right of a common owner extended over the whole property though it was cut down by the existence of the others. Each had the right of enjoyment subject to the concurrent rights of the others : a co-owner could do not act of administration affecting the others against the will of the others : is it without the consent of the others or rather against their prohibition ? Roman law allowed acts to be done by one if they are clearly to the benefit of the group as a whole. The common law does not prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances [1]: so a land fit for paddy cultivation may be used for that purpose, [2] a chena land or waste land of a similar description may be planted with tea [3] or rubber [4].

Robert's wife was entitled to an undivided share of the land. She had a right to make reasonable use of the common property proportionate to her share therein : she could have got a portion planted with rubber herself or allowed her husband to plant it on her behalf. The husband and wife may have chosen to devote money in their hands to open up this portion and to improve it. How did they treat the money they spent on the improvements ? Did they regard this as an advance to the quasi-partnership or as money due from them to it or was it regarded by them in some other way ? Her attitude in October, 1927, when she purchased the rights of her sister was that her husband had made a rubber plantation on the land and that the plantation belonged to her or her husband. It became necessary in October, 1928, for the husband and wife to deal with the interests they had in the land : when they came to dispose of the same, she treated the whole rubber plantation planted by them on the land as belonging to them. The improvements were, in her view, effected by her husband for her. One must think that she and her husband were making a correct statement at this time : it would be unfair to presume tortuous conduct on their part.

The presumption always is in favour of the *bona fides* of the possessor [5]; she would know that this land was joint property but there is no evidence to show that Robert effected the improvements contrary to the express wishes of his wife's co-owners. About 1919 three of the co-owners came to live with the plaintiff's mother, presumably they continued to live with their sister for some time. The youngest of them was Keerthi Menike. Whan she came to deal with the property she disposed only of her interest to the soil. She asknowledged that there was a rubber plantation on the land made by Robert and that he was entitled to it. She may of course have been ignorant of her right but if there was any doubt as to her knowledge her conduct after the agreement with the Settlement Officer cannot be entirely ignored. These circumstances fairly lead to the inference that Robert carved out a portion of the land gifted to his wife and planted it with rubber for the exclusive use of his wife; some of the other co-proprietors, those living in his house at any

[1] *Siyadoris v. Hendrick (1896) 6 N. L. R. 275.*
[2] *Silva v. Silva (1903) 6 N. L. R. 225 (obiter).*
[3] *Newman v. Mendis (1900) 1 Browne 77.*
[4] *Appuhamy et al v. The Doloswala Tea and Rubber Company (1921) 23 N. L. R. 129*
[5] *Carimjee et al v. Abeywickreme (1920) 22 N. L. R. 286.*

rate, allowed them to continue in this course without raising any objections, they thus tacitly acquiesced in its continuance; the fact that Punchi Menike brought an action in 1935 does not alter the position as regards the plantation made long before.

Trees of one person planted and taking root in the land of another are thereby entirely incorporated in the land, the land maintains its identity in spite of the union. The owner of the principal thing by which the accessory has been absorbed becomes the owner of the accessory; the former owner of the accessory is limited to a claim for compensation. Under the common law a co-owner could obtain compensation in a partition suit on the same footing as a *bona fide* improver—the same principles are applicable [1]. The owner of a property is not bound to repay the amount actually expended by the possessor; either the improvement exceeds in value the sum expended (as is usually the case in a plantation), in which case the owner may free himself by merely repaying the out-lay; or on the other hand, the amount expended is greater than the value of the improvements (which is usually the case in building) in which case the amount expended is to be refunded only in so far as the property has really been improved thereby [2]. There remains the question whether the compensation payable should not be reduced by the amount realised by the sale of rubber and coupons.

The possessor cannot be made to restore the fruits of the fruit or the advantage derived from his improvements. The income derived from the rubber plantation is a direct result of the work done by the planter; it is a fruit of the improvement itself and not of the property generally. With regard to fruits of improvement the correct principle seems to be that they cannot be set off against a claim for compensation in respect of the improvement which produced them [3].

The possessor is bound to restore to the owner all fruits actually gathered by him after the *litis contestatio:* after this date the possessor is no longer *bona fide* and is liable to account for the profits which he has taken since.

There has been a full inquiry into the matters in dispute between the parties, viz., the question whether compensation is payable to the defendant and the amount of mesne profits or damages payable to the plaintiff. These matters can be finally decided now instead of relegating the question of compensation to be decided later in a partition action The judgment will therefore be for the plaintiff declaring her entitled to an undivided one-sixth share of the land referred to in P1, that she be placed in possession thereof, and that the defendant do pay to the plaintiff damages at the rate of Rs. 40 a month from August 17, 1943, until plaintiff is restored to possession. There will be a declaration that plaintiff is liable to pay compensation to the defendant in respect of

[1] *Silva et al v. Silva et al (1911) 15 N. L. R. at page 82.*
[2] *Fernando v. Rodrigo (1919) 21 N. L. R. 415.*
*Schorer, note 92.*
*Nicholas de Silva v. Shaik Ali (1895) 1 N. L. R. 228.*
[3] *Voet 6-1-39*
[3] *Burge 34.*
*Fernando v. Rodrigo (1919) 21 N. L. R. 415.*
*Bee v. Majid (1929) 30 N. L. R. 361.*

improvements effected on the one-sixth share she gets, and that the amount due as compensation in respect of same be determined in a partition action, unless this is settled by agreement between the parties.

The judgment of the learned Judge is set aside. As success has been divided between the parties the fair order is that each party should bear its own costs in the District Court. The plaintiff is to pay defendant half the costs of the hearing in this Court.

CANNON J.—I agree.

*Set aside.*