

1965 *Present* : Sansoni, C.J., and Sirimane, J.

ELARIS, Appellant, and KURUPPU, Respondent

S. C. 472/63—D. C. Panadura, 7790

Co-owners—Possessory action between two co-owners—Maintainability.

A co-owner cannot get a possessory decree against another co-owner in respect of a divided portion of the common land.

APPEAL from a judgment of the District Court, Panadura.

H. W. Jayewardene, Q.C., with *L. C. Senewiratne* and *D. S. Wijewardene*,
for Defendant-Appellant.

D. V. A. Joseph, for Plaintiff-Respondent.

Cur. adv. vult.

October 20, 1965. SANSONI, C.J.—

This is a possessory action brought in respect of a portion in extent 3 roods of the land called Nidaumulawatte in extent 1 acre 1 rood 13½ perches. The plaintiff claimed that when he was in undisturbed possession of that portion for over a year and a day, the defendant forcibly encroached on a part of it. The defendant in his answer claimed that he was entitled to and was in possession of an undivided extent of 34 perches of the entire land, in the legitimate exercise of his rights as a co-owner.

It transpired in evidence that the plaintiff inherited his interest from his father, and the plaintiff's brother inherited an equal share with the plaintiff. The plaintiff admitted that he was possessing the land on behalf of his deceased brother's heirs. There are still other co-owners such as the plaintiff's two daughters, and one D. F. G. Perera. Thus there are several co-owners of the land of 1 acre 1 rood 13½ perches, and what the plaintiff has sought to do in this action is to prevent one of the admitted co-owners possessing any part of the portion of 3 roods which he claims to have been possessing.

It is settled law that every co-owner has a right to possess and enjoy the whole property and every part of it, and it is not open to a co-owner, which the plaintiff is, to prevent another co-owner such as the defendant possessing and enjoying a part of that property.

This is not one of those cases where a co-owner who has made a plantation or erected a building on a portion of the common land seeks a possessory decree in respect of that plantation or building against another co-owner who has dispossessed him of his improvements. There are decisions of this Court which hold that the improving co-owner is entitled to the *jus retentionis* of his improvements, and can get a possessory decree in respect of such improvements. Apart from such cases, a co-owner cannot get a possessory decree against another co-owner, since his possession is not *ut dominus*.

The defendant as a co-owner was entitled to possess a portion of the 3 roods extent. Whether he will ultimately be allotted the house he has built or get compensation in lieu of it, is a matter that can only be gone into in a properly constituted partition action.

If the plaintiff wants to have a divided portion for himself, his only remedy is to bring such an action. As long as he is a co-owner, he cannot claim to possess exclusively a divided portion of the common land.

For these reasons the possessory decree which he has obtained in the lower Court must be set aside, and his action dismissed with costs in both Courts.

SIRIMANE, J.—I agree.

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Appeal allowed.