

1955

*Present: Gratiaen, J., and Sansoni, J.*J. D. A. GUNASEKARA *et al.*, Appellants, andB. M. SILVA *et al.*, Respondents*S. C. 374—D. C. Galle, 5167/L**Co-owner—Plantation made by him—Acquiescence of other co-owners—Right to possession—Right to order of ejectment.*

A co-owner who makes a plantation on the common property with the acquiescence of his co-owners is entitled to possess the entirety of that plantation as against the other co-owners until the common ownership is terminated by a partition action. It makes no difference if two or more co-owners make the particular improvement and only some of them sue to enforce their rights of possession against a co-owner or any outsider who has no right to enjoy such improvement. The exact share of the person suing in such a case is irrelevant so long as he establishes that the person sued has no right to enjoy the improvement.

Although the co-owner who made the plantation is entitled to an order of ejectment against a person who obtained a lease of the plantation from a co-owner who had no right to enjoy the improvement, an order of ejectment will not be made against the lessor himself, as he is a co-owner of the land.

**A**PPPEAL from a judgment of the District Court, Galle.

*A. L. Jayasuriya*, for the plaintiffs appellants.

*H. W. Jayewardene, Q.C.*, with *D. R. P. Goonetilleke*, for the defendants respondents.

*Cur adv. vult.*

February 2, 1955. SANSONI, J.—

The three plaintiffs sued the 1st defendant in this action claiming a declaration that they and their co-heirs were entitled to an undivided 3/10th share of a land and the plantation of 40 coconut trees on the eastern side. They also prayed that the 1st defendant be ejected from the land, and for damages until they were restored to possession. The plaintiffs claimed that this particular plantation had been made by two planters in 1905 at the instance of their predecessors in title, and had been possessed by them and their co-heirs until the 1st defendant dispossessed them in 1951.

The 1st defendant is a lessee on a deed of lease executed in 1949. His lessor, who claimed to be a co-owner of the 3/10th share of the land, was added as the 2nd defendant. The two defendants pleaded that the plantation in dispute had been made by the 2nd defendant's predecessors in title.

The learned District Judge held in favour of the plaintiffs and against the defendants on the question as to who had made the plantation but he thought that they were not entitled to any relief as they had not established the exact share to which they were entitled. I think there was ample oral and documentary evidence to support the learned Judge's finding as to who made the plantation in dispute. I would also accept his finding that the 2nd defendant is a co-owner of the land. It does not however follow that the 2nd defendant is, for this reason, entitled to a share in the produce of the plantation which was made by the plaintiff's predecessors in title.

It may now be regarded as well settled that a co-owner who makes a plantation or builds a house on the common property with the acquiescence of his co-owners is entitled to possess the entirety of that plantation or house as against the other co-owners until the common ownership is terminated by a partition action. It makes no difference if two or more co-owners make the particular improvements and only some of them sue to enforce their rights of possession against a co-owner or any outsider who has no right to enjoy such improvement. The exact share of the person suing in such a case is irrelevant so long as he establishes that the person sued has no right to enjoy the improvement. I would therefore hold that the plaintiffs are entitled to a declaration (a) that they are entitled to possess the plantation in dispute as against the defendants, and (b) that the defendants have no right to possess that plantation.

But are the plaintiffs also entitled to an order of ejection against the defendants? If the improvement in dispute had been a house they would clearly have been entitled to such an order in view of the judgment in *Kathonis v. Silva*<sup>1</sup>, but, as it is a plantation that is in dispute I think a distinction must be drawn between the two defendants. An order of ejection may be made against the 1st defendant who is only a lessee of the plantation and who has therefore no rights outside the plantation; but as the 2nd defendant is a co-owner of the land an order of ejection cannot be made against him because such an order will prevent him from exercising his right to possess the land apart from the plantation. We have to enforce the rights of an improving co-owner without unduly interfering with the rights of other co-owners. I think that is why no order of ejection was made in such cases as *Arnolis Singho v. Mary Nona*<sup>2</sup>, and *Peeris v. Appukamy*<sup>3</sup>.

With regard to the rest of the relief claimed by the plaintiffs, however, the plaint itself showed that there were several other co-owners of the 3/10th share of the land, and the evidence led at the trial did not clearly establish to what specific share of the land or of the plantation the three plaintiffs were entitled. A person cannot be granted a declaration of title for himself and persons who are not parties to the action. I agree with the learned Judge that in these circumstances the plaintiffs had not established their right to a declaration of title to the 3/10th share of the land. Nor can they be awarded any damages since they have not proved the exact share of the damages which they were entitled to recover, and damages which were due to their co-heirs cannot be awarded to them. I would therefore set aside the decree appealed from and direct that a decree be entered declaring (a) that the plaintiffs are entitled to possession of the plantation of 40 coconut trees on the eastern side of the land described in the plaint and that the two defendants have no right to possess that plantation, and (b) that the 1st defendant be ejected from the said land. The plaintiffs will also be entitled to their costs in both courts.

GRATIEN, J.—I agree.

*Decree set aside.*

<sup>1</sup> (1919) 21 N. L. R. 452.

<sup>2</sup> (1916) 47 N. L. R. 561.

<sup>3</sup> (1947) 48 N. L. R. 344.