

1917.

Present : Shaw J. and De Sampayo J.

SILVA v. WIRATUNGA.

17—D. C. Tangalle, 1,540.

Improvement by one co-owner with the consent of the other co-owner—Sale by co-owner of half share, including plantations, made by the other co-owner—Action by co-owner against the other co-owner for half costs of improvement—Rights of co-owners.

Where X, a co-owner, planted and improved a piece of land with the consent and approval of his co-owner Y, and where Y sold his undivided half share, including the plantation,—

Held, that X had no cause of action against Y to recover half the cost of the plantation.

" X has still his right to compensation under the Partition Ordinance, in the event of a partition, should he not get the whole of the portion of the land which he has improved; and if Y has purported to sell to the purchaser of his interest the improvements effected by X, that is a matter between themselves, in which X is not concerned. "

The rights of co-owners for compensation for improvements rest on quite a different footing to the rights of persons who have improved another person's property, and are regulated by the Partition Ordinance.

THE facts are set out in the judgment.

Bawa, K.C. (with him *Ismail*), for appellant.—The plaint does not disclose any cause of action against the defendant. The plaintiff may in a partition action against the purchaser get compensation for improvements effected by him. Counsel cited *De Silva v. Siyodoris*,¹ *Silva v. Babunhamy*,² *Silva v. Silva*,³ *Geris Appu v. Silva*,⁴ *Wighton v. Brown*.⁵

Samararickrema, for the respondent.—The plaintiff has a personal claim against the defendant, with whose consent and approval he made the improvements, and a *jus retentionis* against any purchaser from him. The fact that he has a *jus retentionis* which he can enforce against the purchaser, or that he can claim compensation in a partition action, does not take away his right of action against the defendant (see 2 *Maas*. 54, 55). Plaintiff is a *bona fide* possessor,

¹ (1911) 14 N. L. R. 268.² (1911) 15 N. L. R. 79.³ (1912) 16 N. L. R. 43.⁴ (1915) 18 N. L. R. 219.⁵ (1889) 8 S. C. C. 203.

and is entitled to compensation (see *Newman v. Mendis*¹). Even if he is not a *bona fide* possessor he is entitled to compensation (see *Mudyanse v. Sellandyar*,² *Eliatambi v. Sinnatambi*³). The improvements were effected with the consent and approval of the defendant. He has enriched himself by selling the improvements to his purchaser.

Bawa, K.C., in reply.—If the defendant does not object to the improvements, why should he be called upon, as soon as the improvements are made, to pay the plaintiff their value? These are questions for a partition action.

The plaintiff is clearly a *mala fide* possessor, and is not entitled to compensation. Counsel cited *The General Tea Estates Co., Ltd., v. Pulla*,⁴ *Moldrich v. La Brooy*.⁵

Cur. adv. vult.

April 17, 1917. SHAW J.—

The plaint alleges that the plaintiff and defendant were co-owners of certain lands, and that the plaintiff, with the consent and approval of the defendant, planted with young coconuts and otherwise improved the lands. That the defendant has sold his undivided half share of the land, including the plantation, to a Mr. Wickremanayake, and a cause of action has accrued to the plaintiff against the defendant to recover half the cost of putting up the plantation.

The defendant, by his answer, in addition to other defences, took the objection that the paragraphs of the plaint setting up this claim disclosed no cause of action. The Judge has found a preliminary issue, raising the point in favour of the plaintiff, and the defendant appeals.

I think the decision is wrong. I cannot see what right of action a co-owner who has made improvements can have against a former co-owner who has parted with his interest. He has still his right to compensation under the Partition Ordinance, in the event of a partition, should he not get the whole of the portion of the land which he has improved; and if the former co-owner has purported to sell to the purchaser of his interest the improvements effected by the plaintiff, that appears to me to be a matter between themselves, in which the plaintiff is not concerned.

It was attempted, on behalf of the respondent, to apply the principles of the Roman-Dutch law where improvements have been made upon the land of another by a *bona fide* or *mala fide* possessor. These principles appear to me to have no application, for the improvements were not on the land of another, but on the improver's own land; and even if the land can be said to be that of another, in consequence of that other having an undivided interest, then the

¹ (1900) 1 Br. 77.

² (1907) 10 N. L. R. 209.

³ (1909) 2 Leader 121.

⁴ (1906) 9 N. L. R. 98.

⁵ (1911) 14 N. L. R. 331.

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improver cannot be said to be a *bona fide* possessor, because he knew the other was a co-owner; and if he is a *mala fide* possessor, then *The General Tea Estates Co., Ltd. v. Palle*¹ shows that he cannot claim compensation at all. The rights of co-owners for compensation for improvements appear to me to rest on quite a different footing to the rights of persons who have improved another person's property, and to be regulated by the Partition Ordinances.

Counsel could cite no case to us where a co-owner has claimed the value of his improvements against his co-owners, except a partition suit, and, as I said in the course of the argument, it is hardly likely, if such a fruitful source of litigation existed, that it would have been so long neglected.

There was another small claim for Rs. 25 in the action, which was admitted by the defendant. The plaintiff is entitled to judgment for this amount, but I would dismiss the claim for compensation, and give the defendant the costs of the action and of this appeal.

DE SAMPAYO J.—I agree.

Set aside.

