

Present: Garvin A.C.J. and Lyall Grant J.

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JOHANNES v. PODISINGHO.

17—D. C. Kegalla, 7,159.

Co-owner—Partition action—Failure to claim compensation for improvements—Separate action.

A co-owner, who has failed to make a claim in respect of a plantation made by him upon the common land in an action for its partition, may not maintain a separate action to recover compensation for the improvement from the co-owner to whom, the portion of land, upon which the plantation stands, was allotted in the final decree.

A PPEAL from a judgment of the District Judge of Kegalla.

The plaintiff in the present action was a defendant in a partition suit brought by the present defendant for the partition of a land called Dangollahenayaya. He was served with summons but failed to appear in Court or file answer. The Court ordered a partition of the share to which the present defendant was entitled from the rest of the land. And as a result of the decree finally entered, there was allotted to the defendant a portion of the land upon which there was a plantation. The plaintiff then brought this action to recover from the defendant compensation in respect of the plantation which he alleged was made by him on the portion allotted to the defendant in severalty. The District Judge gave judgment for the plaintiff.

H. V. Perera, for defendant, appellant.

Soertsz, for plaintiff, respondent.

June 14, 1926. GARVIN A.C.J.—

The question raised on this appeal is whether a co-owner who has neglected to make any claim in respect of a plantation made by him upon the common land in a proceeding for the partition of that land can maintain an action to recover from a co-owner to whom that portion of land upon which the plantation stands was allotted in severalty by the final decree entered in the partition action compensation for the improvement.

The plaintiff in this action was a defendant in a partition suit brought by the defendant for the partition of a land called Dangollahenayaya. He was duly served with summons, but he did not appear in Court or file answer. In due course the Court ordered a

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partition of the share to which the plaintiff, *i.e.*, the present defendant was entitled from the rest of the common land and abstained from ordering a partition of the entire land. The partition directed by the preliminary decree was duly effected and was confirmed by the final decree; in the result there was allotted to the present defendant as and for his share in severalty the portion of land upon which there was a plantation. An appeal was entered but the Supreme Court refused to interfere. The plaintiff then brought this action to recover from the defendant compensation in respect of the plantation which he alleges was made by him on the portion allotted to the defendant in severalty. He also claims damages which he alleges were sustained by reason of the manner in which the partition was carried out. The claim on the second of these two heads was rightly dismissed by the District Judge. It remains to consider whether the claim under the first of these two heads is sustainable. The facts and circumstances of the case have not been fully investigated. It is not, therefore, possible to say whether in any event the plaintiff was in a position to claim to be compensated for the improvements effected by him, but assuming that the plaintiff is able to establish such facts as might have enabled him, but for the partition action to which I have referred, to maintain a claim to be compensated on the footing that he was a *bona fide* possessor and entitled to be compensated as such, it has still to be considered whether such an action is maintainable by one co-owner against another in any proceeding other than a partition action.

In the case of *Silva v. Silva*¹ Lascelles C.J., after carefully considering the provisions of the Partition Ordinance, came to the conclusion that the full rights of an improving co-owner could only be asserted in a properly constituted partition action. This judgment was followed by Wood Renton C.J., in the case of *Wickremaratna v. Don Bastian*.² The action was for a declaration of title. The plaintiff claimed one-third share of the land and in addition a half of a planter's share of a certain plantation made on the land. His Lordship disallowed the claim to the planter's share observing that the case was governed by the decision in *Silva v. Silva* (*supra*) "from which it results that a co-owner cannot assert as against another co-owner independent rights of this kind in such an action as this, although he can, when proceedings are instituted for partition of the common land, claim either that, if possible, the portion of the land on which the plantation has been made should be allotted to him or, in the alternative, that he should receive compensation in respect of the improvement that he has effected."

In his work on *The Law of Partition in Ceylon* Jayewardene A.J. puts the proposition thus: "A claim for compensation for improvements by one co-owner against others can only be considered in a

¹ 15 N. L. R. 79.² 4 Bal. Notes of Cases 41.

properly constituted partition action." It would seem, therefore, to be well settled law that a claim such as this can only be made by a co-owner in a properly constituted partition action. The plaintiff in this case had an opportunity to prefer his claim in the partition action to which I have referred. He omitted to do so. The provisions of the Partition Ordinance were clearly intended to be a proceeding for the determination of every material question in dispute between the parties. Moreover, there is special provision for the valuation of any improvements made by any of the co-owners and for making due allowance in favour of the co-owners who have made such improvements in the final adjustment of their rights. The partition as settled and embodied in the final decree must be deemed to be a final adjustment of all matters in dispute between the co-owners. Such a final decree has been entered in this case. In my opinion it is no longer open to the plaintiff to maintain a claim for compensation in respect of any improvements which he may have effected but in respect of which he made no claim in the partition proceedings which terminated in that final decree.

The appeal must, therefore, be allowed and the plaintiff's action dismissed.

The appellants are entitled to the costs of this appeal and also to the costs of the trial in the Court below.

LYALL GRANT J.—I agree.

Appeal allowed.

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