

Present : Lascelles C.J. and Middleton J.

Aug. 18, 1911

MOLDRICH v. LA BROOY.

228—D. C. Tangalla, 895.

Partition—Improvements effected by a co-owner with the consent of the other co-owner—Portion improved should be allotted to him—Improving co-owner need not pay compensation to other co-owner.

Where improvements have been effected with the assent of the co-owner, that portion of the land on which the improvements stand should, if possible, be allotted, on a partition of the land, under Ordinance No. 10 of 1863, to the co-owner who has made the improvements; he should not be required to pay compensation to the other co-owner for these improvements. "If the land on which the improvements are made is superior in point of fertility to the rest of the land, a different consideration arises."

THE facts are stated by Lascelles C.J. in his judgment as follows :—

The plaintiff and the defendant were co-owners in equal shares of three adjacent parcels of land, on one of which the plaintiff, with the consent of his co-owner, had planted coconuts and built a small bungalow. The co-owners agreed to a partition, and the Commissioner submitted a scheme under which the plaintiff takes the half of the land on which the improvements were made, but is required to pay to the defendant one-fourth of the assessed value of the trees. The scheme has been confirmed by the District Judge. The plaintiff now appeals against so much of the order as requires him to pay compensation.

A. St. V. Jayewardene, for the appellant.—The plaintiff in this case is not a mere outsider who has planted the land on a planting agreement; he is a co-owner who has improved the land with the consent of the other co-owner. The improving co-owner in these circumstances is entitled to the full value of the improvements; he need not give the other co-owner half the value of the improvements. The term "planter's share" cannot be used with respect to an improving co-owner. Counsel cited *Sanchi v. Wijegunasekera*;¹ *Silva v. Silva*;² *Newman v. Mendis*;³ *Andoris v. Rajapakse*;⁴ 37—D.C. Negombo, 6,701;⁵ D. C. Chilaw, 786;⁶ 2 *Maasdorp* 132, 133; 2 *Burge* 680; *Domat's Civil Law* 614 (1, 4, 2; ss. 10, 11, 12, and 13).

¹ (1902) 6 N. L. R. 1, at pages 11, 12.

² (1906) 9 N. L. R. 114, at page 121.

³ (1900) 1 Br. 77.

⁴ (1901) 2 Br. 101.

⁵ S. C. Min. Oct. 28, 1909.

⁶ S. C. Min. July 28, 1896.

Aug. 18, 1911

*Moldrich v.
La Brooy*

Fernando (with him *Allan Drieberg*), for the defendant, respondent.—All the cases cited follow the *Chilaw* case. That case lays down the rule that the improver can claim only his expenditure. Counsel referred to *Andoris v. Rajapakse*.¹

Jayewardene, in reply.

Cur. adv. vult.

August 18, 1911. LASCELLES C.J.—

The ground taken by the District Judge appears from the following passage from his order : “ In this case the plaintiff planted up a portion of the land with the knowledge of the defendant, who did nothing to improve the land. By custom each would have equal rights in the plantation made by the plaintiff, that is to say, the plaintiff would get the planter’s half share plus half of the soil owner’s moiety, whilst defendant would only get half of the soil owner’s moiety, which is equivalent to one-fourth of the value of the trees. The value of the plantation is given as Rs. 997·85, and one-fourth of that is Rs. 249·46.”

The reference to “ custom,” “ the planter’s half,” and to the “ soil owner’s moiety ” indicate that the District Judge considered the custom which prevails in the District of Tangalla with regard to planters’ shares to be applicable to the present case. This view is clearly erroneous. There is no analogy between the planter who plants on land belonging to another and receives as his remuneration a customary share in the plantation or in its produce or in the land, which varies in different districts in Ceylon, and a co-owner who effects improvements with the consent of the other co-owners on the common property. In dividing the property it is no more than equitable, and it is in accordance with authority that, where it can be conveniently done, the improving co-owner should be allotted the property on which he made the improvements ; but it is not reasonable, and it is against all authority, that the improving co-owner should be required to pay compensation to the other co-owner for these improvements. If, of course, the land on which the improvements are made is superior in point of fertility to the rest of the land, a different consideration arises. I need not refer to the authorities which have been cited in the judgment of my brother Middleton.

The order of the District Judge must be varied by deleting therefrom so much thereof as orders the plaintiff to pay to the defendant the sum of Rs. 249·45. The appellant is entitled to the costs of the appeal.

MIDDLETON J.—

This was a partition action, and upon the Commissioner’s report the District Judge affirmed a scheme for the partition of the land

¹ (1901) 2 Br. 101.

Aug. 18, 1911

MIDDLETON
J.Moldrich v.
La Brooy

by which the plaintiff, the owner of one-half share of the land, was allotted that half of the land on which stood the trees he had planted and the bungalow he had erected, but was ordered to pay one-fourth of the value of the trees he had planted to the defendant, the owner of the other half.

The plaintiff appealed, and for him it was contended that the apportionment was wrong in law and inequitable, on the grounds that the plaintiff was not in the position of an ordinary outside planter making his claim to a planter's share, but that his rights must be governed by the fact that he was a co-owner who had planted with the assent and acquiescence of another co-owner.

It is conceded here, I understand, that the trees in question were planted with the acquiescence of the defendant. In partition actions the principle has always been adhered to that upon the actual partition, where improvements have been effected with the assent of the co-owners, that portion of the land on which the improvements stand shall, if possible, be allotted to the co-owner who has made the improvements, per *Wendt J. in Sanchi Appu v. Wijegunasekera*,¹ and per *Hutchinson C.J. in 37—D. C. Negombo, 6,701*.²

In this case all the tree planting was done by the plaintiff on that half of the land which the commissioner allotted to him. It is difficult to see what principle under these circumstances gives rise to any right of compensation, to be made to the other co-owner. He has incurred no expense, and, unless the planted land is of more value, he has been deprived of nothing, but has his equal half share of the land. It is not contended here that the planted portion was more valuable land than the unplanted, as in the case cited, of which I was unable to obtain a reference.

The "planter's share" is the creation of a custom of Ceylon, which does not, in my opinion, apply to the case of a co-owner whose rights must be adjudicated on by the Roman-Dutch law as altered or amended by the statute law of the Island. The co-owner has planted here on his own land with the assent of his other co-owner, and is not liable to be treated as a planter in the sense given to a creation of custom like the outside planter. I can find nothing in the law on the subject which would compel a co-owner who has planted entirely the share allotted to him on a partition to pay compensation to another co-owner who has not incurred any expense in the matter whatever. The case of *Chellappa v. Ponnambalam*³ may not contain all the facts leading to the decision there, but it seems not to have taken account of the legal principle of the exclusion of the *fructus ex ipsa melioratione percepti* in matters of accounting for *impensae utiles*. The correct view is, I think, that enunciated in the cases of *Newman v. Mendis*,⁴ *Andoris v. Rajapakse*.⁵

¹ (1902) 6 N. L. R. 11.² S. C. Min., Oct. 26, 1909.³ (1898) 3 N. L. R. 118.⁴ (1905) 1 Br. 77.

(1901) 2 Br. 101.

Aug. 18, 1911

MIDDLETON
J.

Moldrich v.
La Brooy

and approved of in *Silva v. Silva* in 9 N. L. R. 114. *Andoris v. Rajapakse* clearly distinguishes between the rights of the planter who has no soil share and those of the co-owner who has.

In my opinion the order of the District Judge appealed against must be set aside, so far as it orders compensation to be paid by the appellant plaintiff, and the partition will award the plaintiff the entirety of the plantation planted by him on the half share which has been allotted to him without any compensation being paid to the defendant, and the appeal will be allowed with costs.

Appeal allowed.

