1956 *Present:* K. D. de Silva, J., and H. N. G. Fernando, J.

W. E. ALWIS, Appellant, *and* R. A. D. PIERIS APPUHAMY, Respondent

S. C. 341—D. C. Colombo, 6,647

Co-owners—Possessory decree in respect of entire common property—Right of a co-owner to claim it against another co-owner—Elements necessary—Joinder of other co-owners.

The plaintiff, a co-owner of a certain allotment of land, sought a possessory decree in respect of the whole land against the defendant, who was one out of several other co-owners who were not parties to the action. The evidence established nothing more than that the plaintiff had planted cinnamon and manioc on the land 20 years before the action and had at that stage built a small hut on the land. It was admitted, however, that all the cinnamon plants had since been destroyed and that, at the time of the action, there was no cinnamon there. In addition it was alleged that the plaintiff had started cutting cabook on the land about 12 years before the action, but the evidence disclosed that this activity was not carried on during the 8 or 10 years preceding the action. The plaintiff based his cause of action on the mere fact that the defendant erected a hut on the land.

Held, that on the evidence the plaintiff had no right to a possessory decree against one set only of his co-owners. The question of importance was whether the plaintiff had possession *ut dominus* or, in the alternative, whether he had made plantations or erected buildings in respect of which he was entitled to a possessory decree against an interfering co-owner.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q. C., with *D. R. P. Goonetilleke*, for the defendant appellant.

S. B. Lekamge, with *W. P. N. de Silva*, for the plaintiff respondent.

Cur. adv. vult.

February 29, 1956. H. N. G. FERNANDO, J.—

The plaintiff in this case has been granted a decree placing him in possession of lot 1 of a land called Delgahawatta depicted in the plan filed of record. He had asked as an alternative for a declaration of title to the Lot in question, but that was refused by the learned Judge on the ground that the plaintiff and the defendant are co-owners of the land in question.

It has been argued in appeal that the plaintiff did not have possession sufficient to entitle him to a possessory decree, and that even if he did, the decree should not have been granted unless the other co-owners were joined as parties. The question for our decision is whether, in the circumstances of the case, the plaintiff has a right to a possessory decree against one set only of his co-owners.

The learned District Judge has relied on the case of *Abeyratne v. Seneviratne* [1] and that of *Cooray v. Samaranayake* [2]. The first of those cases was considered subsequently in *Sadirisa v. Attadassi Thero* [3] where the effect of the case was summarised in the following terms :—

> "From the short judgment of Lascelles C. J. it appears that the plaintiffs had a lease from Alexander for the entire land and that they had been in possession of the entire land; when a lessee takes a lease for the whole land without being aware of the fact that his lessor was really entitled only to an undivided share and when he gets into possession of the whole land and holds it for a number of years, these facts are entirely corroborative of the fact that possession by the plaintiff was *ut dominus*, in other words, that he possessed it fully believing that the lessor was the owner of the whole land and that he was entitled to keep the possession of the whole land against anybody but his lessor ".

That case then is only authority for the proposition that where a stranger occupies the whole of the land fully believing that his transferor was the owner of the whole, he has the *possessio civilis* necessary to enable him to maintain a possessory action even against a co-owner.

In *Cooray v. Samaranayake* [2], the plaintiff asked to be restored to the possession of a whole plantation from which he had been dispossessed by the defendants after a considerable period of possession. It was held that she was entitled to be restored to possession notwithstanding the fact that the defendants were co-owners and that all the co-owners had not been joined. The judgment chiefly relied on was that of *Heenhamy v. Mohottihamy* [4] which was the judgment of a Full Bench.

In the latter case the plaintiff claimed declaration of title to certain shares of land against the defendant, another co-owner, who contested his title. It was contended in appeal on the authority of certain earlier cases that such an action could not be maintained without joining all the other co-owners. The Full Bench held that having regard to sections 17, 18 and 22 of the Civil Procedure Code, the rule that all the co-owners must be joined cannot be regarded as absolute and invariable, and accordingly, on the footing that the other co-owners were not necessary parties and that the cause of action was that the defendant took the plaintiff's share of the crop presumably planted by the plaintiff, granted the declaration sought by him. It has to be noted however that in that case the declaration sought was a declaration of title to *certain shares of land* and not to the whole land, *and was only incidental to the claim for damages* (*19 N. L. R. p. 237*).

It does not appear from the judgment in *Cooray v. Samaranayake* [2] that there was a full realisation of the point that the Full Bench in *Heenhamy v. Mohotihamy* [4] only decided that the plaintiff in that case was entitled to a declaration of title to certain shares, whereas in *Cooray v. Samaranayake* [2] the plaintiff asked for restoration of possession to the entire common property. But on the facts of the latter case it would appear that the rubber plantation had belonged to the plaintiff's husband

[1] *(1914) 3 Bal. N.C. 22.*
[2] *(1946) 47 N. L. R. 322.*
[3] *(1936) 38 N. L. R. 308.*
[4] *(1916) 19 N. L. R. 235.*

and had been exclusively possessed by the husband and thereafter by herself and her children. That being so, the restoration of the plaintiff to possession of the plantation and the grant to her of damages for ouster was, if I may say so with respect, justified not so much on the earlier Full Bench decision, but on the principle recognised in a later case to which I shall immediately refer.

In *Pieris v. Appuhamy* [1] the plaintiff brought an action to be declared entitled to possess the rubber plantation on the land in question, which he held under a lease fronm one Bastian Pieris. The defendant who claimed title to a ¼th share of land, forcibly took possession of 30 rubber trees out of the plantation of 130 rubber trees. It was proved that Bastian Pieris had made the plantation in question with the acquiescence of the other co-owners. The principle stated by Lascelles C. J. that "it is difficult to see on what principle an improving co-owner, who is entitled to compensation, can be excluded from the benefit of the *ius retentionis*" was cited with approval by Keuneman J., who observed that it must follow that, until common ownership is terminated by partition, the improving co-owner is entitled to retain possession of the improvement. On this footing Bastian Pieris and his lessee the plaintiff were entitled to possess the plantation as against the other co-owner defendant, and accordingly the lessee was granted his declaration.

In yet another case, *Kathonis v. Silva* [2], a co-owner who had erected a house on the common land asked for a declaration of title to the house, and for ejectment. It was held that the erection of a house was in exercise of the rights of a co-owner and that the right to build a house on the common land and to live in it must carry with it a right to keep the house private and to that extent to an order for ejectment. In the circumstances of that case this Court held that the plaintiffs were entitled to a declaration of their right to the improver's interest and to an order ejecting the defendant from the house.

In *Sadirisa v. Attadassi Thero* [3] Akbar J. pointed out that the plaintiff was asking for a possessory decree not with regard to an undivided share, but with respect to the whole land, and that he was asking for a decree against two co-owners without making the other co-owners parties to the action. He therefore said that it was "very material to find out whether the possession alleged by the plaintiff was *possessio ut dominus* or whether it was possession by him with the full knowledge that he was a co-owner, and with the knowledge that the law presumes in such circumstances, namely, that his possession must enure to the benefit of his other co-owners also". On the facts, which were that the original owner, a priest Gunatissa, died in 1917, and that after his death all his pupils (i.e. the co-owners under deeds of donation) came to the understanding that the plaintiff should possess the field in question, Akbar J. held that it was unreasonable to conclude that the possession was *ut dominus* or *animo domini* and he thought that the period from 1918 to the year 1934 was too short a preseriod for peripticn against the other co-owners. On these grounds he dismissed the plaintiff's action.

[1] *(1947) 48 N. L. R. 344.* [2] *(1919) 21 N. L. R. 452.*
[3] *(1936) 38 N. L. R. 398.*

These authorities no doubt establish the proposition that all the co-owners of a common property need not necessarily be made parties to every action in which one of them (or a person claiming under him) seeks recognition of his title to, or possession of, the property as against another co-owner. The general rule as to joinder is subject to exceptions which are made in certain clear circumstances.

(*a*) Where, as in *Abeyratne v. Seneviratne* [1] a person in good faith possesses the whole land under the impression that it is not subject to co-ownership ;

(*b*) where, as in *Cooray v. Samaranayake* [2] and *Pieris v. Appuhamy* [3] one co-owner has grown and possessed a plantation whether on the whole or part of a common land in the exercise of his due right as a co-owner, and then seeks recognition of his *ius retentionis* of the plantation until such time as co-ownership is terminated by partition ;

(*c*) where, as in *Kathonis v. Silva* [4] a co-owner erects a house on the common land and seeks to be protected in his possession of it; and

(*d*) where, as in *Heenhamy v. Mohotihamy* [5] a co-owner whose crops are improperly taken by another co-owner asks for a declaration of title to a share of the land as incidental to his claim for damages for the unlawful removal of his crops.

This last case is in reality not substantially different from the one secondly mentioned, in that the declaration is sought by way of protection for a right to retain a plantation and take the crops thereof. The above classification may not be exhaustive and there may be other instances which fall substantially within the principles recognised in the cases to which I have referred. But in cases which do not fall within these principles, disputes between co-owners should be settled either by partition or at least by an action to which all the co-owners are parties.

In the present case the learned Judge has held that the plaintiff and defendant are co-owners of the disputed Lot, and having regard to the evidence on which that finding was reached, it follows that there are other co-owners who are not parties. Hence, as in the case of *Sadirisa v. Attadasi Thero* [6], the question of importance is whether the plaintiff had possession *ut dominus*, or in the alternative whether he had made plantations or erected buildings in respect of which he is entitled to a possessory decree against an interfering co-owner. The evidence establishes nothing more than that the plaintiff had planted cinnamon and manioc on the land 20 years before the action and had at that stage built a small hut on the land. But it is admitted that all the cinnamon plants have since been destroyed and that there is now no cinnamon there. In addition it was alleged that the plaintiff had started cutting cabook on the land about 12 years before the action, but it would appear from the evidence of the Headman that this activity was not carried on during

[1] (*1914*) *3 Bal. N. C. 22.*
[2] (*1946*) *47 N. L. R. 322.*
[3] (*1947*) *48 N. L. R. 344.*
[4] (*1919*) *21 N. L. R. 452.*
[5] (*1916*) *19 N. L. R. 235.*
[6] (*1936*) *38 N. L. R. 308.*

the 8 or 10 years preceding the action. Apart from the bare statement of the plaintiff that he possessed the land prior to the alleged ouster (which consisted merely of the erection of a hut on the land by the defendants) there is no evidence of physical possession by the plaintiff during recent years, and indeed on his own evidence that there is now no plantation nor erection on the land one cannot imagine that there was any possibility of acts of physical possession.

In these circumstances it is difficult to see how the plaintiff can be said to have had possession *ut dominus* or *animo domini*. Nor also would there be any question of a *ius retentionis* in the absence of plantations or erections made by the plaintiff in his capacity as a co-owner. He does not come within the *ratio decidendi* of *Heenhamy v. Mohotihamy* [1] because he never claimed a declaration to shares in the land, but a declaration to the whole land or in the alternative, a possessory decree in respect of the whole land. He made no attempt to establish the specific share to which he is entitled. Ultimately therefore, his cause of action is based on the fact merely that the defendants erected a hut on the land. This was a proper exercise by the defendant of his rights as a co-owner, and, in the absence of erections or plantations made by the plaintiff, cannot be construed to have been derogatory of any right which the plaintiff might properly claim as a co-owner. If, as it is alleged, the defendant is in possession of the Lot, and the plaintiff now seeks entry in his right as a co-owner and is resisted, he might be entitled to the assistance of the Court if the circumstances bring him within the principle set out in *Heenhamy v Mohotihamy* [1]; or else, whether with or without an attempt to enter, it would be open to him to maintain a partition action. But there is for the present no circumstance which entitled him to either of the reliefs which he has claimed.

For these reasons I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

K. D. DE SILVA, J.—I agree.

Appeal allowed.