Present : De Sampayo J. and Schneider A.J.

1919.

FERNANDO *v.* RODRIGO.

204—D. C. Negombo, 13,031.

Partition action—Improvements affected by co-owner—Compensation—No deduction for fruits of improvement.

The fruits of the improvement itself (consumed before date of assessment) is not to be set off in calculating the amount of the compensation due to a co-owner for improvements effected by him.

THE facts appear from the judgment.

Croos-Dabrera, for the plaintiff, appellant.—*Primâ facie* a co-owner is a *malâ fide* possessor, if he possesses a larger share than he is entitled to. A co-owner is a *bona fide* possessor only for a particular purpose, viz., for compensating him for improvements made by him. This is an exception to the general rule, and it cannot, therefore, be said that a co-owner is a *bona fide* possessor for all purposes. Ordinarily a *bona fide* possessor is not bound to account for profits, and he is entitled to the *jus retentionis*. But these privileges are denied to a co-owner. This clearly shows that there are limitations, which prevent the principle from being applied generally. This question

1919.

Fernando v. Rodrigo

was not considered by the Full Court. It is submitted that the co-owner who possesses the entire land cannot be considered a *bona fide* possessor, so as to relieve him from the liability to account for fruits gathered by him. It makes no difference because the fruits are derived from improvements made by him, so long as he cannot claim the privileges of a *bona fide* possessor.

Weerasinghe (with him *J. S. Jayawardene*), for first defendant, respondent, not called upon.

October 3, 1919. DE SAMPAYO J.—

This is a partition action in which the first defendant was entitled to compensation for certain plantations and improvements made by him on the common land. The District Judge assessed this compensation at Rs. 174.50. The plaintiff appeals from the order allowing the first defendant compensation to that extent, and says that the amount is excessive. I am unable to accept this view of the case. It appears the original land was deniya or low-lying land, and the first defendant incurred a great deal of expense and trouble in filling it up to the extent of about two feet and then planted it with coconuts. In such a case the expense must necessarily be more than an ordinary case of plantation.

Then, again, the defendant has taken care of the plantation, and now it appears the trees are in a flourishing condition. The rates allowed to the first defendant do not appear to me to be unreasonable. Counsel for the appellant raised a new point, and said that in any case the fruits derived by the co-owner who improves the land must be deducted in making a calculation as to the amount of compensation due. No specific authority has been cited in support of this contention. On the other hand, the Partition Ordinance declares that the improving co-owner shall be entitled to the value of the improvements. That, *primâ facie*, means that no deduction should be made for fruits consumed before the date of assessment.

Moreover, this Court has laid down that an improving co-owner is entitled to compensation on the same principles as those applicable to a *bona fide* possessor, and it is well known that the fruits of the improvement itself cannot be set off in calculating the amount of compensation.

For these reasons I think the appeal fails, and I would dismiss it, with costs.

SCHNEIDER A.J.—I agree.

Appeal dismissed.