1967 *Present :* **Manicavasagar, J., and Samerawickrame, J.**

THE GOVERNMENT AGENT, KALUTARA, and another, Appellants, *and* K. P. GUNARATNA and others, Respondents

S. C. 92-93 (Inty.)/1966—D. C. Kalutara, 1163/MR

Co-owners—A co-owner's application for licence to manufacture arrack on the common land—Whether another co-owner can object—Addition of parties —Civil Procedure Code, s. 18.

A co-owner, even though he may not have the consent of his co-owners, is entitled to use the common land reasonably for the common advantage, in proportion to his share and for the purpose for which the land is intended.

Where a land owned in common has been used by all the co-owners for several years as a distillery and warehouse for the manufacture of arrack, a co-owner is not entitled to object to the issue and/or renewal of a licence in favour of another co-owner to manufacture arrack at the distillery. In such a case, the affected co-owner is entitled to be added as a party in terms of section 18 of the Civil Procedure Code.

APPEALS from an order of the District Court, Kalutara.

H. L. de Silva, Crown Counsel, for the 1st defendant-appellant in S. C. 92/66.

G. P. J. Kurukulasuriya, for the intervenient petitioner-appellant in S. C. 93/66.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera* and *N. E. Weerasooria* (Jnr.), for the plaintiff-respondent in both appeals.

Cur. adv. vult.

March 19, 1967. MANICAVASAGAR, J.—

Appeal 92/66 is by the Government Agent, Kalutara (the 1st defendant), from the order of the District Judge of Kalutara restraining him from issuing and/or renewing a licence in favour of Siritilleke Gunaratna or his nominee to manufacture arrack at the Siri Landa Distillery referred to in the plaint, and to work the said distillery and warehouse for any period from 1st April, 1966 without the consent and approval of the plaintiff-respondent until the present action is heard and determined.

The plaintiff-respondent and Siritilleke Gunaratna are 2 of 9 co-owners of the land on which the distillery and warehouse stand. These buildings were erected about 1935 by G. R. P. Gunaratna, the lessee, according to an agreement of lease between him and the curator of the 9 minor co-owners. Gunaratna had the option under the agreement to remove the buildings he had constructed at the termination of the lease in 1950, but he did not exercise the option. The distillery and the warehouse has since 1950 been used by the co-owners for the manufacture of arrack, the plaintiff-respondent being a share-holder in the business, until 1964, when differences arose between him and some of the co-owners. Consequent on these disputes, the plaintiff-respondent has instituted more than one action, the instant action is one where he seeks *inter alia* a declaration that the appellant is not entitled to issue or renew a licence in favour of Siritilleke Gunaratna to manufacture arrack at the distillery from 1st April, 1966 without his consent and approval, and a permanent injunction embodying the aforesaid declaration.

The issue which is before us for determination involves a consideration of the rights and obligations of co-owners under the Roman-Dutch Law which applies to this topic, and in particular whether a co-owner is entitled to obtain a licence to manufacture arrack on the common land without the consent of his co-owners. The law on this subject is now well settled and has been consistently followed since the judgment of Bonser C.J. in an unreported case from the District Court of Galle, where commenting on a passage from Voet (10.3.7) he said :

> " By this I understand that it is not competent for one co-owner against the will of the other to deal with the property in a manner inconsistent with the purpose for which the joint ownership was constituted, but I do not understand the law to prohibit one co-owner from the use and enjoyment of the property in such manner as is natural and necessary under the circumstances."

The only case I recall which is out of line with this proposition is in the judgment of Pereira J. in *Goonewardena's case* [1] where the learned Judge, referring to *Silva's case* [2] and *Siyadoris's case* [3] which followed the dictum of Bonser C.J., observed :

> " It hardly means that one co-owner can in defiance of an expressed objection by the others put up a building on the common property.',

This decision whilst favourable to the respondent stands by its own authority ; it is broadly stated and runs counter to established principles that have been consistently followed, that it can be overlooked.

The first principle is that any act of a co-owner rests for its legality on the consent of the remaining co-owners, either expressed or implied (*2 S. C. C. 166*) : but the rigour of this rule has been mitigated by the exception that a co-owner even though he may not have the consent of his co-owners is entitled to use the common land reasonably for the common advantage, proportionate to his share for the purpose for which the land is intended. Moncrieff J. in *Silva's case* [4] said :

> " I would not say that in no case can a co-owner build without expressed consent. Building might be a natural and necessary act. If the land were fit for paddy, I conceive that one co-owner could not forbid another to cultivate without reasons given, nor could consent be required for an act which is a natural or necessary element of their co-ownership."

This leads to the second principle : joint property cannot be converted to other purposes, other than those for which it is intended, nor can it be applied to new uses, nor its character changed without the consent of all the proprietors, and if anything of the kind is attempted by one of the proprietors, he can by interdict be compelled to restore the property to its original condition. (Voet 10.3.7).

[1] *(1914) 17 N. L. R. 287.*
[2] *(1903) 6 N. L. R. 225.*
[3] *(1896) 6 N. L. R. 275.*
[4] *(1903) 6 N. L. R. 225 at 229.*

In the present case the facts are much stronger than in the run of cases in our law reports. Here we have a land which the curator of the minors with the permission of the Court leased for a term of 15 years with the stipulation that a distillery and warehouse be built: the co-owners after the lessee had quit continued for several years to use the distillery and warehouse for tho manufacture of arrack: the buildings were intended and used by the Co-owners for this purpose: in this situation a co-owner cannot be heard to object to an user which is "a natural and necessary element of co-ownership", an user which he had acquiesced in over the years, nor is his consent a necessary pre-requisite for the use of the common land for the purpose for which it was intended. The grant of a licence in these circumstances to a co-owner is not a wrongful act and the plaintiff-respondent has no just cause for complaint: for this reason alone the order of the Judge restraining him by injunction is wrong.

Appeal 93/66 is by Siritilleke Gunaratna from the order of the District Judge refusing his application to be added as a party to the action. The application was resisted strongly by the plaintiff-respondent in the original Court, and sensibly not opposed before us.

The plaintiff claims that the defendants and Siritilleke Gunaratna have acted in concert in obtaining a licence for 1965 to manufacture arrack, without his consent, that they have acted wrongfully and unlawfully, and he seeks to restrain the 1st defendant from issuing a licence to Siritilleke from 1st April, 1966. Is his presence therefore necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action? We have in the plaint an allegation of collusion against the intervener; had this been the only assertion I would rule against the application: but we have also a claim for relief which would affect him in the enjoyment of his legal rights: this is a sufficient reason to grant the application, though this is not the only rule which would enable the Court to act under Section 18.

This appeal too is allowed. The orders made by the District Judge in both matters are set aside: in the first the interim injunction is discharged, and in the second the intervenient should be added as party-defendant.

The plaintiff-respondent will pay the costs of his appeal, and of the inquiry in the original Court to each of the successful appellants.

SAMERAWICKRAME, J.—I agree.

Appeals allowed.