Privy Council Appeal No. 3 of 1959

Hussenabai Hassanally and another - - - - - - *Appellants*

v.

Mohamed Muheeth Mohamed Cassim and others - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH MARCH, 1960

Present at the Hearing:

VISCOUNT SIMONDS
LORD TUCKER
LORD JENKINS
LORD MORRIS OF BORTH-Y-GEST
MR. L. M. D. DE SILVA

[*Delivered by* VISCOUNT SIMONDS]

This appeal from a judgment of the Supreme Court of the Island of Ceylon raises a question of considerable importance. It has involved an examination of a body of case law in which their Lordships have had the advantage of the assistance of learned counsel for the appellants, who, appearing without an opponent, has impartially directed attention to all material authority. The facts which are not in dispute can be shortly stated.

The appellants are the executors and trustees of the estate of one Akbarally Abdulhussan Davoodbhoy, who was orginally the fifth defendant in the action out of which this appeal arises. Upon his death they were substituted for him as defendants. He will for convenience sometimes be referred to as the fifth defendant.

The action was concerned with certain land situated in New Moor Street, Colombo, which at the date of her death was held by one Rahumath Umma subject to a fideicommissum created in 1871 in favour of her descendants. She died in 1921 leaving as her heirs two daughters Umma Shiffa and the second respondent Zaneera Umma, each of whom became entitled to a half share of the property subject to the fideicommissum. Umma Shiffa died in March, 1938, leaving as heirs her four children, the youngest of whom, Mohamed Cassim, became the plaintiff in the action and is a respondent to this appeal and the others were defendants in the action and are also respondents to this appeal. The position then was that the second respondent was entitled to 4/8th shares of the property and the other four respondents who have been mentioned to 1/8th share each, all such shares being subject to the fideicommissum. For this reason there were added as defendants certain children of one of the children of Umma Shiffa who are also respondents to this appeal. It was in these circumstances that the plaintiff (the first respondent) brought his action under the provisions of the Partition Act No. 16 of 1951 claiming a declaration of title to the property and a sale under the Act. But for the reason which will now be stated he made defendants not only the persons who were interested with him under the fideicommissum but also the fifth defendant whose interest arose in a different way. It is not disputed that the latter's interest was such that he was a proper and necessary party to the suit.

On the 11th December, 1945, the respondent Zaneera Umma, who was entitled to 4/8th shares of the property by a deed of that date granted to the fifth defendant in consideration of the sum of Rs.2700 and of the covenants and conditions therein contained a lease of the property for thirty years from the 1st January, 1945, at the yearly rent of Rs.180 for the first fifteen years and thereafter at the yearly rent of Rs.240. The deed contained a covenant by the lessee that he would " within a reasonable time lay out and expend at his own expense in erecting and completing fit for habitation with proper materials of all sorts upon the said ground dwelling houses, tenements, shops, boutiques or factories " as therein provided. It was further provided that the lessee having completed the erection of the buildings as therein mentioned should continue to exercise use and enjoy the rights, benefits, interest and income of the premises and the buildings erected thereon during the pendency of the term of thirty years demised by the lease and, further, that the lessee should keep the said buildings in proper order and condition and at the end of the term deliver up the whole of the premises to the lessor free of payment of any kind whatever.

The fifth defendant as lessee entered upon the demised land and duly constructed upon it the buildings for which the lease stipulated. The learned District Judge held that Zaneera Umma held herself out as the sole owner of the land and that the fifth defendant constructed the buildings in the bona fide belief that she was in fact the sole owner. He further held that the plaintiff in the action and the other heirs of Umma Shiffa made no protest but stood by and acquiesced in the improvement of the land by the fifth defendant. The Supreme Court did not concur in this last finding, but their Lordships do not think that this is material.

In these circumstances the fifth defendant by his amended Statement of Claim in the action (inter alia) claimed that in the event of a sale of the property being ordered in terms of the Partition Act the sum of Rs.35,000 as compensation for the buildings erected and other improvements effected by him should be paid to him out of the proceeds of sale.

The learned District Judge in the first place directed that the property should be sold subject to the right of the sixth and seventh defendants (the present appellants), who had by then been substituted for the fifth defendant, to remain in possession of a half share of the premises and the entirety of the buildings thereon for the full term of thirty years demised by the lease. This part of the order has not been supported by the appellants and need not further be considered. The learned Judge however further held that in the event of his order not being upheld the appellants were entitled to compensation out of the proceeds of sale for improvements effected by the fifth defendant. He fixed the quantum of compensation at Rs.25,122.45 and this figure is not in dispute. It is this part of the decision which was rejected by the Supreme Court on appeal and the appellants now seek to maintain.

The Supreme Court in deciding that the respondents are entitled to enjoy the fruits of the fifth defendant's labour and expense without paying any compensation therefor were largely influenced by a decision of the Supreme Court in *Soysa* v. *Mohideen* (1914) 17 N.L.R. 279. But before examining this case their Lordships think it right to refer to certain authorities which, had they there been referred to, might well have led to a different conclusion. Their immediate purpose in doing so is to show that hitherto no distinction had been drawn between the case of an improver whose bona fide occupation had rested on a purported lease and that of any other improver who had assumed to be in lawful possession, but that, on the contrary, the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity.

Reference may first be made to textbooks of high authority. In Wille's " Principles of South African Law " 4th Ed. at page 479 it is said " A very common application of the doctrine of unjust enrichment occurs

in cases where improvements or additions to landed property have been made, without the express or implied consent of the owner of the property, by a person in possession of the property. A person who expends money or labour in improving property with the intention of doing so for his own benefit whereas in fact he had no right or title to the property, in consequence of which the improvements are acquired by the owner of the property by virtue of accession is entitled to claim from the latter the amount by which the property has been enhanced in value.

Improvements of this nature are effected as a rule to the land of one person by a bona fide possessor of the land, such as a fiduciary, or by a person who believes that he is a fideicommissary A bona fide occupier of land, such as a person occupying land under the mistaken belief that he has a lease of the property has the same right to compensation as a bona fide possessor."

Earlier editions of this work had substantially the same statement.

In "The South African Law of Obligations" by Lee and Honoré (1950), paragraph 713 at p. 189 runs as follows :

" Preservation and improvement of property. A person who preserves the property of another from loss, deterioration or destruction, or who, acting on his own behalf, improves the property of another in the belief that it is or will be his own (or in some cases that it belongs to a third person) may claim compensation from the owner for necessary and useful expenses thereby incurred not exceeding the value of the benefit accruing to the owner." For this proposition numerous cases were cited to some of which their Lordships will now refer. Before doing so they observe that in the present case the often troublesome questions whether the improver has acted bona fide or mala fide and whether he is entitled to remain in occupation of the land until compensation has been paid do not arise. The bona fides of the fifth defendant is admitted and the appellants do not in a partition action claim to remain in possession.

In 1874 the case of *Bellingham* v. *Bloometje* Buchanan's Reports page 36 was decided by Villiers C.J. in the Supreme Court of the Cape of Good Hope. It must be examined at length because it goes to the root of the matter and it has not been fully appreciated in the Supreme Court of Ceylon. The headnote so far as material is as follows " Where a person has bona fide built upon land not his own he is entitled to compensation for useful expenses incurred by him to the extent to which the value of the land has been enhanced by the building." The defendant acting in good faith and the belief that he had a lease of certain land, which in fact did not form part of land leased to him, built on it a house and a dam. The true owners sought to evict him. It was held that he was entitled to compensation for the amount by which the value of the land was enhanced by the house and dam. At page 38 of the Report the Chief Justice says " I am of opinion that the appellant had not sufficient reasons to believe he was building on another man's ground but that he was the bona fide occupier of the land. . . . All the Roman Dutch authorities are agreed that where a bona fide occupier has built upon land belonging to another he is entitled to compensation for the useful expenses incurred by him, that is to say, for the expenses to the extent to which the value of the land has been enhanced by the building." For this proposition the learned Judge cites a wealth of authority, including Voet & Grotius, and then goes on to discuss the rights of a mala fide possessor, which are not now relevant. But the salient fact is that in this case the improver, who was held to be entitled to compensation, thought that he was, but in fact was not, the lessee of the land which he had improved. It was because he bona fide thought that he was entitled to occupy the land and in that belief improved it, that his claim to compensation arose. Nothing turned on the fact that he was truly the lessee of the adjoining land or that his bona fide mistake was about the boundaries of the land demised. He was a bona fide occupier.

In *Parkin* v. *Lippert* (1895) 12 S.C.R. 179 the facts were somewhat complicated but the case illustrates the importance of bearing in mind the distinction between improvements effected by a lessee whose lease endures for the stipulated term and those effected by a lessee whose term is prematurely determined by operation of law. The material part of the headnote is as follows " Where a lessor takes advantage of the law which puts premature end to a lease upon the insolvency of the lessee, he is liable, in the absence of any stipulation to the contrary, to the trustee of the lessee's estate for the value of improvements made by such lessee in contemplation of the lease being allowed to run its full term and to a sub-lessee to whom the lessee had legally sublet the land before his insolvency and who in contemplation of the lease continuing to its end had made such improvements." The same learned Judge having invoked the principle that " the presumption against forfeiture of property in any shape or form lies at the root of the well-known maxim of our law that no one shall be enriched at the expense of another " observed that there was no difference in principle, although there might be in degree between the case of a lease being abruptly terminated by the operation of a special law and that of a bona fide possessor making improvements in the belief that he will have the permanent enjoyment of them. Here then was the case of an improver who, lawfully occupying under a lease and in that capacity making improvements, was entitled to compensation because his occupation was prematurely determined.

In *Rubin* v. *Botha* S.A.S.C.R. App. Div. 1911 page 568 the essential facts closely resembled those of the present case and the decision derives special importance from the fact that it was that of Lord de Villiers C.J., Innes J. and Maasdorp J.P. There the plaintiff and defendant entered into an agreement of lease under which the plaintiff was to have the use and occupation of a portion of the defendant's farm for ten years without payment of rent and was to erect a building thereon which at the expiration of that period was to become the property of the defendant. After the plaintiff had erected the building and been in occupation of the building for three years the defendant gave him notice to quit on the ground that the agreement was null and void as not having been executed as required by the Transvaal law. It was held that the plaintiff was entitled to be paid for the improvements to the extent to which the value of the defendant's farm had been improved thereby less the value of the plaintiff's use and occupation for three years. There was a difference of opinion as to the quantum of compensation which does not arise in the present case, but there was unanimity upon the right to some compensation. Some passages may be quoted from the judgment of the Chief Justice with whom Maasdorp J. agreed. " The present case " he said " differs from the many cases in the Cape Supreme Court relating to the compensation payable to the owner of land by the person effecting improvements thereon in this respect that the improvements were made by a person who knew that he was not the owner and intended that the buildings should become the property of the owner but believed that he would as lessee enjoy the use and occupation for the full period contemplated by the lease executed between him and the owner. That lease proved to be null and void by reason of its not being notarial and the question to be determined is what should be the basis of the compensation admittedly payable by the defendant to the plaintiff." The learned Chief Justice then referred to his decision in *Bellingham* v. *Bloometje*, which has already been cited, and to the authority of Groenewegen upon which it had been decided, and said " Lessees as has often been pointed out in the Cape cases, especially in *De Beers Mines* v. *London & South African Exploration Company* (10 Juta 359) stand on a different footing from other occupiers as their rights have been defined by special legislation. Where however as in the present case, the relation of lessor and lessee does not exist between the owner and the occupier by reason of the agreement of lease proving null and void, there is no valid reason why the basis of compensation applicable to lessees should be applied to improvements made by the occupier." Then after referring to the already cited case of *Parkin* v. *Lippert* the Chief Justice said " The plaintiff was not a " possessor " in

the strictly juristic sense of the term but he was a bona fide occupier who believed he had the right not only of occupation but of erecting the buildings on the land so occupied. True it is that he intended that the building should become the property of the defendant but only upon the expiration of the ten years during which the occupation was to last. The defendant took advantage of the law which, by declaring the lease to be void, frustrated the true intentions of both parties, and there appears to me to be no reason in the world why he should not be subject to the equitable rule of the Dutch law that no one should be enriched to the detriment and injury of another." Then a little later " The defendant in the present case took advantage of the law which declared his agreement to be void and he cannot insist upon compensation being payable as if the lease had been a valid one."

Their Lordships have referred at length to this case both because it appears to them to apply in an unimpeachable way the cardinal principle of Roman Dutch Law in regard to unjust enrichment and because it was ignored in the leading case of *Soysa* v. *Mohideen* to which they will presently recur. But before doing so they will mention the case of *Fletcher* v. *Bulawayo Waterworks Company Ltd.* (1915) S.A.L.R. App. Div. 636. In that case again the defendants had leased a piece of land but had by mistake sunk a well beyond its boundary within the plaintiff's land. The plaintiff bringing an action for ejectment, the defendants claimed compensation for the improvement effected by the sinking of the well. The Court (consisting of Innes C.J., Solomon J.A. and Maasdorp J.A.) considered and applied *Rubin* v. *Botha* and held that they were entitled to it. There is much in the judgments of all three judgments which illuminates the principle but their Lordships think it sufficient to cite a single passage from the judgment of the Chief Justice: " But it " he said (the case of *Rubin* v. *Botha*) " certainly did decide that a person who had made improvements upon the land of another, not as possessor but under the mistaken idea that he was a lessee, was entitled to compensation on the same basis as a possessor, subject to an equitable deduction necessitated by the special circumstances."

Why then, it must be asked, did the Court in the present case deny to the 5th defendant the right to compensation, thereby depriving him of the fruit of his labours and expense and permitting the unjust enrichment of the co-heirs? The answer is found in *Soysa* v. *Mohideen* which, rightly perhaps, appeared to them to be a binding authority. It must therefore be closely examined. Two important points were raised in the case, only one of which is relevant to the present question, and the facts can be shortly stated. A parcel of land which was subject to a fideicommissum had been occupied by the defendant in the action as lessee of one of the fiduciarii who was entitled to one half of the property and had agreed to pay him half the value of the buildings upon the termination of the lease. The plaintiffs, the fidei commissarii, (the fiduciarii having died) successfully challenged the validity of the lease, whereupon the defendant claimed to retain possession of the land until the plaintiffs paid him half the cost of his improvements. This claim was rejected by the Court, and once again their Lordships must cite considerable passages of the judgment, pointing out with respect how error has found its way into their conclusions. At a first hearing before Lascelles C.J. that learned Judge said " I think there can be no doubt that under the Roman-Dutch law a lessor had not the jus retentionis which would entitle him to remain in possession against a successful claimant until he has been compensated for improvements. The occupation of a lessee is not possessio civilis, for he does not occupy the property in the belief that it is his own. On the contrary his interest in the property is defined and limited by the terms of the lease ". The learned Chief Justice thought that the uncertainty which existed upon that branch of the law should be set at rest and adjourned the case for re-argument before the Collective Court. The observation that has been cited proved to be the basis of the judgment of that Court. The Chief Justice himself added little to his previous judgment. De

Sampayo A.J. opens the relevant part of his judgment with the words "A lessee is not a bona fide possessor and is therefore not entitled to compensation for improvements on that footing" Their Lordships observe that he, like the Chief Justice, assumes that he is dealing with a claim by a lessee whereas the very basis of the claim is that the lease has been repudiated and that he cannot claim under it. In the words of Lord de Villiers he was not a possessor in the strict juristic sense but he was a bona fide occupier who had effected improvements in the mistaken belief that he would enjoy them for the term of the lease. The learned Judge proceeded to distinguish other cases upon which their Lordships do not think it necessary to pronounce. His judgment was in their Lordships' view vitiated by the original erroneous assumption. None of the cases in the South African Courts, to which reference has been made, were noticed by the Court. Pereira J. fell into the same error. After stating that it was well settled law in the colony that, in order to be entitled to compensation for improvements, a person should have not only possession of the property but bona fide possession of it and that by "possession" is here meant what is known to the civil law as the possessio civilis as distinguished from the possessio naturalis, he held that a lessee has not possessio civilis of the land that he enjoys under the lease, for he knows that the land he enjoys does not belong to him : therefore he is not entitled to compensation for improvements. The question whether or not the possession of a lessee is possessio civilis may be open to argument. But in this context it is beside the point. For, as already stated, the claim made by the defendant in the case under review (like the claim made by the appellants in the present case) was not made qua lessee but in respect of the bona fide occupation of land under a lease which had been repudiated. It would, as their Lordships think, be difficult to imagine a clearer violation of the moral principle upon which the rule against unjust enrichment rests, than that an owner, who has, for whatever reason, prematurely brought a lease to an end, should at once deny to the lessee the rights which the lease or the common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. Their Lordships must accordingly pronounce that this case was wrongly decided and have the less reluctance in doing so because, long though the decision has stood, no questions of title can be affected by a contrary view of the law.

But though this decision has stood for so many years, there have been in the Courts of the Island of Ceylon cases which in principle are not easy to reconcile with it. Thus in *Hevawitarane* v. *Dangan Rubber Company Ltd.* 17 N.L.R. 49 (a case decided shortly before *Soysa* v. *Mohideen*) it was held that a "bona fide possessor" need not necessarily be the owner of the property possessed, nor need he have a legal right to possesses it but that it is sufficient if his possession is the result of an honest conviction in his mind of a right to possess. These words were quoted with approval by Wood Renton A.C.J. from *Pereira Right to Compensation* and were not dissented from by the same Pereira J. who was a party to the decision in the later case. It would seem that a discrimination between these two cases can only rest upon a confusion as to the capacity in which a person, who thought he occupied under a valid lease but did not, claims.

A case which usefully illustrates the spirit in which the principle has been developed is the *Government Agent, Central Province* v. *Letchiman Chetty* 24 N.L.R. 37. There the relevant facts (taken from the head note) were that the Government Agent took steps to acquire a swamp under the Land Acquisition Ordinance but suspended it. On the outbreak of plague he entered into possession under the Plague Regulations and in anticipation of the conclusion of the acquisition proceedings improved the land by filling it and draining it with drains which extended out of the land. No formal order of possession was obtained under the Land Acquisition Ordinance. At this stage the scheme was modified, and the old proceedings under that Ordinance were abandoned and new proceedings

started. The question then was whether the land should be valued as at the date of the award in those proceedings, or whether the Government Agent was entitled to compensation for improvements effected by him while he was in possession. He was held to be so entitled upon the ground that he was a bona fide possessor. For a person who takes possession of land and executes improvements upon it in expectation of a formal title which in good faith he believes himself certain to obtain may be such a possessor. Bertram C.J. *in a* weighty and learned judgment treats of the development of the law, observing " In my opinion it would be a most unfortunate position, if the law had not developed principles which would enable it to deal justly with such a case." In that case the question was mainly whether the possession was mala fide or bona fide. No doubt appears to have been entertained that if there was bona fides a valid claim to compensation was established. Again it appears to their Lordships that upon any equitable principles it is unjustifiable to deny to an evicted lessee compensation which is awarded to one who has no title at all however firm may be his belief that he will get one.

Reference must now be made to *Appuhamy* v. *The Doloswala Tea and Rubber Company Ltd.* 25 N.L.R. 267. In that case there was much discussion of the rights of a lessee in respect of improvements and Garvin A.J. said " It is well settled law that in Ceylon a lessee who has improved his leasehold cannot maintain a claim for compensation in respect of these improvements against a third party who establishes a title superior to that of his lessor from a source other than the lessor. The law was declared in this sense in the case of *Soysa* v. *Mohideen*. Since the decision of that case nothing new has been discovered in the writings of the jurists." The learned Judge then referred to the two South African cases which have already been examined *Bellingham* v. *Bloometje* and *Rubin* v. *Botha* and said " In neither of these cases was compensation granted to the improver in his character of lessee of the property improved. Indeed it was the circumstance that he was not in law the lessee of the premises which enabled him to contend that he was a possessor who entered upon the premises bona fide and with the intention of holding and enjoying the premises, if not as owner, at least for a specified period of time and entitled in equity to a measure of compensation assessed on that footing." It is difficult to understand why the acknowledged principle of those cases did not apply to the case before the learned Judge. But at least he did not dissent from it and the high authority of Garvin J. may be said to reinforce that of the distinguished South African Judges who affirmed the right to compensation in such a case.

In *Jasohamy* v. *Podihamy* 44 N.L.R. 385 the right of compensation for improvements was extended to a usufructuary who made improvements with the consent and acquiescence of the owner. The interest of the case lies in the fact that Keuneman J. cites from Wille's Principles of South African Law (1937 Edition) p. 353 the passage which has already been quoted. It will be observed that the generality of the statement of the relevant law in this citation does not exclude the case of a person who occupies land and improves it in the mistaken belief that he is a lawful lessee. This view is enforced by the fact that the learned Judge then refers without disapproval to the cases of *Rubin* v. *Botha* and *Fletcher* v. *Bulawayo Waterworks Company Ltd.*

Learned counsel referred their Lordships to many other cases in which, as he contended, the Courts of Ceylon had sought to mitigate the rigour of the law as laid down in *Soysa* v. *Mohideen* by means of the doctrine of acquiescence or otherwise. But they think it unnecessary to examine them and will return to the case under appeal. As already observed, the Judges of the Supreme Court founded their judgment on *Soysa* v. *Mohideen* and in particular on the passages that have already been cited from the judgment of Pereira J. Mr. Justice Fernando concludes the relevant part of his judgment by saying that, having considered many of the cases subsequent to *Soysa*, he would hold that none of them had in any

way qualified the principle therein laid down that the rights, if any, arising from a contract between a lessor and lessee cannot be enforced by the lessee as against the fideicommissary owners who were not parties to the contract. This passage serves to emphasise in the clearest way the error which permeates Soysa's case and the case under appeal. In that case, as in this, the claim of the improver was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment. It is beside the mark to discuss whether the possession of a lessee is civilis or naturalis for it is not as lessee that the claim is made. It is, on the contrary, because he is denied his contractual rights by the premature termination of the lease, that he asserts his claim to compensation. Their Lordships entertain no doubt that in allowing it they follow the line of development of an important equitable principle, and derive some satisfaction from the fact that the law of Ceylon will thus be brought into harmony with that established in South Africa nearly a century ago.

As they take this view upon the main question that was argued, their Lordships do not think it necessary to discuss an alternative claim, which was founded on the view that the lessor, Zaneera Umma, was entitled to compensation as between herself and her co-heirs and that by subrogation the fifth defendant and therefore the appellants are entitled to the benefit of her claim. This is a matter which may in some other case call for determination. It is unnecessary and would be inexpedient to deal with it now.

Their Lordships are satisfied that the final adjustment of the rights of the parties including the party claiming compensation as an improver can and should be made in the partition suit. The amount of compensation, if payable, has not been disputed, nor has any equitable plea been advanced for its reduction.

Their Lordships will therefore humbly advise Her Majesty that the Order of the Supreme Court should be set aside, that the Order of the District Court should be restored so far as it directed the sale of the property in accordance with the provisions of the Partition Act 1951 and the bringing of the proceeds of sale into Court to abide further order and the payment of costs but that provision should be made by such further order for paying the sum of Rs. 25, 125.45 thereout to the appellants in priority to the beneficial interests of other parties.

The respondents must pay the costs of the appellants in the Supreme Court and of this appeal.

(39060) Wt. 8078—37 100 3/60 D.L.

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