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Present: Bertram C.J. and Ennis J.

THE GOVERNMENT AGENT, CENTRAL PROVINCE, *v.* LETCHIMAN CHETTY *et al.*

44—D. C. (Inty.) Kandy, 298.

Compensation for improvements—Bona fide *and* malâ fide *possession discussed—Development of Roman law principles to suit our civilization.*

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 the Land Acquisition Ordinance were abandoned. and proceedings started afresh.

The claimants contended that the land should be valued on the condition of the land at the date of the award, and the Government Agent, on the other hand, claimed compensation for improvements effected by him.

Held, that the Government Agent was not a *mala fide* possessor when he effected the improvements and was entitled to compensation.

A person who takes possession of land and executes improvements thereon on expectation of a formal title, which in good faith he believes himself certain to obtain, may be a *bonæ fidei possessor*.

Marthelis Appu v. Jayawardene [1] followed.

Held, further, that the costs of the drains which extended out of the land should be taken into consideration in assessing the value of the improvements.

Mala fide and *bona fide* possession discussed.

BERTRAM C.J.—We are, I think, entitled to develop the legal principles handed down to us *in connection with new situations* which arise in our own civilization. The tests which were taken, as determining tests under the Roman law, are not always justly applicable as determining tests in the various combinations of fact, which, from time to time, present themselves in modern life. The principle involved was originally an equitable principle, and it is more in accordance with the spirit of that principle that we should administer it equitably, rather than upon strictly rigorous lines. But, I think, it must be recognized that it is a development.

THE facts appear from the judgment.

Pereira, K.C. (with him *E. W. Jayawardene, H. V. Perera* and *Navaratnam*), for appellant.

Akbar, Acting S. G. (with him *Brito Muttunayagam, C.C.*) for respondent.

October 12, 1922. BERTRAM C.J.—

The facts of this case are of a peculiar nature, and they raise a very special case with regard to the right of a *bona fide* possessor to compensation for improvements. The question arises in certain land acquisition proceedings with regard to a swamp at Nawalapitiya. But before I recite the facts, it might be convenient that I should make a few observations with regard to the law on the subject. The right of a *bona fide* possessor to improvements was an equitable right recognized by the Roman prætors. It arose primarily in the action *de rei vindicatione* and also in the action *de hereditatis petitione*. "The defendant was entitled, from the time of Hadrian onwards, to claim by *exceptio, ius retentionis*, but not by action, an allowance for expenses to an extent which varied from time to time and

[1] *(1908) 11 N. L. R. 272.*

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according to his good or bad faith." Buckland, Roman law, p. 669. See *Digest 6, 1, 48.*

> " Sumptus in praedium, quod alienum esse apparuit, a bonæ fidei possessore facti neque ab eo qui prædium donavit neque a domino peti possunt, verum exceptione doli posita per officium iudicis æquitatis ratione servantur;"

that is to say, the prætor allowed an equitable exception which was accorded to the conscientious possessor and denied to the unconscientious.

The natural test of conscientiousness was belief by the possessor in the validity of his title. On these lines the law developed with a certain definiteness. If the possessor had a *conscientia trei alienæ* he was a *matæ fidei possessor;* if he had no such *conscientia* he was a *bonæ fidei possessor.* The ordinary case was the case of a man who bought from a vendor whom he believed to be entitled to the property and entitled to dispose of it. See *Voet 41, 3, 6.*

> " Bona fides, alterum usucapionis requisitum 'est illæsa * conscientia putantis rem suam esse, dum credit, eum, a quo nactus est possessionem, fuisse dominum illius rei et alienandi iure haud destitutum."

But " *bona fides* refers to every possible ground of detention; whosoever conceives himself to have a lawful ground for the detention, which he is exercising, is called a *bonæ fidei* possessor." (*Savigny on Possession, Perry's Translation, Bk. 1, s. 8, p. 67.*) The same test is embodied in two well-known definitions of *Grotius, 2, 2, 10 and 11.* " Possession *bonæ fidei* is when the possessor entertains any probable or apparent right to the property possessed. *Malæ fidei* is when he does not entertain the same."

There existed in Nawalapitiya for a long time past an unsightly and insanitary swamp, and the Government had determined to acquire it, so as to enable the Local Board to carry out certain public improvements. Land acquisition proceedings were commenced; a mandate for acquisition was issued on June 15, 1916 (P 7); a notice was issued in the *Gazette* (October 6, 1916), and claimants were summoned to an inquiry before the Assistant Government Agent on November 14. But the inquiry on the date fixed seems to have been little more than an inspection. No valuation was made by the Government Agent, and no sum tendered, but the proceedings were suspended. The reason for the suspension was a question which arose whether it might not be more expedient to proceed by the way of a general improvement scheme under the

* " Illæsa " appears to be used here in the sense of " unqualified, unimpeachable ".

Housing and Town Improvement Ordinance of 1915. Before this question was finally settled, the acquisition proceedings being still in progress, plague broke out in Nawalapitiya, and the Government took systematic measures to cope with it. These included the removal of persons residing in the immediate neighbourhood of this swamp to another locality. Acting under regulation 51 of the Plague Regulations, the Government Agent took possession of this swamp area and enclosed it. Meanwhile, the idea of proceeding under the Town Improvement Ordinance had been abandoned. The original project for the ordinary land acquisition project had been revived, and the Finance Committee of the Legislative Council in November, 1919, voted a sum for " Nawalapitiya swamp works in connection with drainage, filling, &c., and cost of acquisition of land." This, by a letter of November 21, 1919, was communicated to the General Manager of Railways, who had undertaken to do the filling in, and an information copy was sent to the Government Agent.

Being thus already in possession under the Plague Regulations, in anticipation of the conclusion of the acquisition proceedings, the Government proceeded to carry out the improvements ordered, draining and filling up the unhealthy swamp and immensely improving the value of the land. Strictly speaking, before doing this, the Government Agent ought to have obtained a formal order for possession under section 12 (2) of the Land Acquisition Ordinance. This requirement, no doubt, escaped his notice owing to the fact that he was in possession already.

At this point occurred an incident which has somewhat confused the history of the proceedings. It was desired to modify the scheme, and a new plan was ordered taking in premises not previously included, and it was thought convenient to abandon the old proceedings and to start afresh. A new mandate was issued; a new inquiry was held; the Government Agent made an award and tendered a sum in accordance therewith. Owing to the long delay in putting through the acquisition, and owing to the fact that under section 21 (1) the value of the land must be taken to be the market value at the time of the Government Agent's award (for this I take to be the law notwithstanding the inartistic drafting of the Ordinance), the land had to be valued in its improved state, and, as I have already said, the improvements had immensely enhanced its value.

It would of course be obviously and, on the face of it, unjust that the public revenue should be charged, not only with the original value of the land, but also with the enhanced value due to the expenditure of public money in the course of the acquisition proceedings. The Government clearly had an equitable claim in respect of these improvements. It has already been held in our Courts that under our law, unlike the Roman law, such a claim may be the subject of separate proceedings in which the person

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making the improvement may be plaintiff. See *Appuhamy v. Banda.*[1]. And it has been further held that such a claim in respect of buildings erected by the Government as *bonæ fidei possessor* could be advanced by the Government Agent in a reference under the Land Acquisition Ordinance for the purpose of the acquisition of the land on which the buildings have been erected. Relying on this authority the Government put in a claim for compensation in respect of the improvements it had effected in the course of the land acquisition proceedings.

What was the answer to this claim? It was as follows:—You, the Crown, had necessarily a *conscientia rei alienæ*, in that you knew or you might have known, if you had made the most elementary inquiries, that you had not yet acquired the land. You were necessarily a *malæ fidei possessor*. If you had taken precautions to duplicate the title to possession which you already had under the Plague Regulations by an order for possession under the Land Acquisition Ordinance, your possession would have been *bonæ fidei*, as it was *malæ fidei*.

The learned District Judge has treated this question as a pure question of fact, and for this purpose has interpreted the words "*bonæ fidei*" as being used in their ordinary sense. The question is a question of fact, but, in my opinion, it must be decided in accordance with the legal principles which have been accepted as governing the matter. But the question arises: Is the law in so rigorous and unreasonable a condition that it must necessarily impute *malâ fides* to a person who, in fact, has acted in perfect good faith, but has neglected to observe a particular formality, which it was in his own hands to take. 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. There has in fact been such a development by an express authority in our own books. See *Marthelis Appu v. Jayawardene* (*supra*). In that case plaintiff was put into possession of land by the owner under an agreement to sell. He paid him an instalment of the purchase price and expended his money on the land in reliance on the agreement. Hutchinson C.J. refused to hold that he took possession in bad faith, "for many purposes a man is presumed to know the law, but he is not necessarily a *malâ fide* possessor, because he knew or must be presumed to have known that his title was bad or defective . . . . I have not found any definition of a *malâ fide* possessor, but I think a man who takes possession in the mistaken belief that he has a title or that he is certain of obtaining one, whether his mistake be a mistake of fact or of law, cannot be said to do so *malâ fide*." Wood Renton J. expressly concurred in this expression of opinion.

It was urged before us that we ought to disregard this judgment of these two learned Judges, because it was obvious that they had not

[1] (1912) 16 *N. L. R.* 203

fully considered the subject inasmuch as the Chief Justice had avowed that he had not found any definition of *malâ fide* possessor, whereas there is such a definition in *Grotius*. The opinion must nevertheless be taken to be well considered. Hutchinson C.J. spoke not only with reference to the case before him, but also with reference to a similar case which he had heard a short time before, and said with regard to the plaintiff in that case: "I considered, and I still think, that he was a *bona fide* possessor." Sir Alexander Wood Renton was not in the habit of concurring in general expressions of legal principles unless he had duly considered them.

In my opinion this development of the law should be welcomed, and the present case should be treated as coming within the principles laid down. Indeed, as a Court of two Judges, we are bound by that decision. It was contended, however, for respondent that that decision is inconsistent with the decision of the Privy Council in *De Livera v. Abeyasinghe*.[1] I do not agree with that contention. There it was found that the possession and the improvement were in fact *malâ fide*, and the circumstances of the case were wholly different from those of the present case. We are, I think, entitled to develop the legal principles handed down to us in connection with new situations which arise in our own civilization. The tests which were taken as determining tests under the Roman law are not always justly applicable as determining tests in the various combinations of fact, which, from time to time, present themselves in modern life. The principle involved was originally an equitable principle, and it is more in accordance with the spirit of that principle that we should administer it equitably rather than upon strictly rigorous lines. But, I think, it must be recognized that it is a development.

There is a passage in the *Digest* which, at first sight, seems contrary to the principles enunciated by Hutchinson C.J. See *Digest, 41, 2, 5.*

> "Si ex stipulatione tibi Stichum debeam et non tradam eum, tu autum nanctus fueris possessionem, prædo es; æque si vendidero nec tradidero rem, si non voluntate mea nanctus sis possessionem, non pro emptore possides, sed prædo es."

In other words, if the purchaser takes possession of land sold to him, but not yet conveyed, he is not to be treated as being in possession as a purchaser, but is to be regarded as a robber. But it should be noted that the important words are "*non voluntate mea*," so that if the purchaser takes possession with the consent of the vendor, as in *Marthelis Appu v. Jayawardene* (*supra*), it would seem to follow that his possession is to be counted as *bonæ fidei*. This passage, therefore, may be considered as indicating that *conscientia rei alienæ* is not necessarily an absolute test, but that the equitable considerations of the case are to be regarded.

[1] *(1917) 19 N. L. R. 492.*

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Exception was taken to the method of calculating the costs of the improvements. The improvements consisted partly of filling up the swamp, partly of the construction of drains, which were not wholly situated in the land improved, with a view to carrying of the water which would otherwise flood the land. The costs of these improvements has been distributed *pro ratâ* over the whole area acquired, and I think that this is a just principle.

I would therefore dismiss the appeal. With regard to the costs, appellant must pay the costs of this appeal. As the Crown does not insist upon the order made by the learned Judge in the Court below, I think in the Court below each side should pay its own costs.

ENNIS J.—I agree.

Appeal dismissed.