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Present: Garvin and Lyall Grant JJ.

NUGAPITTIYA v. JOSEPH.

352—D. C. Kegalla, 7,167.

Jus retentionis—Improvement of land on informal agreement—Knowledge and consent of owner—Right to compensation.

Where a person effected an improvement on land with the knowledge and consent of the owner and upon the latter's representation that he would be allowed to possess it as long as he wished, upon the payment of a specified ground rent.—

Held, that he was entitled to retain possession of the land until he was compensated.

BY an agreement dated July 3, 1912, which was not notarially attested, H. A. Molligoda purported to grant to the defendant a certain allotment of land for him "to build a tiled boutique thereon" subject to the condition that upon the payment of a ground rent of Rs. 5 per mensem the defendant was at liberty to stay in the boutique for any length of time. The defendant entered upon the land and built a house in compliance with the terms of the agreement. On October 20, 1919, Molligoda sold the premises to the plaintiff, who brought the present action to eject the defendant. In his answer the defendant claimed compensation for the improvements effected by him and the right to retain possession until he was compensated. The learned District Judge held that he was entitled to compensation, but not to the *jus retentionis*.

Keuneman, for defendant, appellant.

H. V. Perera (with *Ranawake*), for plaintiff, respondent.

Cur. adv. vult.

May 14, 1926. GARVIN J.—

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The question raised by this appeal is whether the appellant is entitled to the *jus retentionis* in respect of improvements effected by him on a land of which the respondent is now the owner. By an agreement dated July 3, 1912, which was not notarially attested, one H. A. Molligoda, the then owner of this land, purported to grant to the appellant a certain allotment of land for him "to build a tiled boutique thereon" subject to the condition *inter alia* that upon payment of a ground rent of Rs. 5 per mensem the appellant was to be at liberty to stay in the house built by him "for any length of period." This agreement is in Sinhalese, and the translation, as usual, is not very satisfactory, but in substance the agreement seems to be that upon payment of ground rent of Rs. 5 the appellant was to have the right to the enjoyment of the boutique built by him as long as he wished. The appellant entered upon the land, built a house, and in compliance with the terms of what he believed to be a binding agreement regularly paid this ground rent of Rs. 5. On October 20, 1919, Molligoda sold the premises to K. B. Nugapitiya, his son-in-law. On June 9, 1925, Nugapitiya brought the present action asking for declaration of title to the land and that the defendant, *i.e.*, the appellant, be ejected therefrom. The plaintiff has ignored the agreement and has chosen to treat the defendant as a trespasser. The defendant in his answer claimed compensation for the improvements effected by him and the right to retain possession until he was compensated. The learned District Judge held that the defendant was entitled to compensation, but that he was not entitled to the *jus retentionis* in respect of the house built by him. The defendant appeals both from the order of compensation as well as from the refusal of the District Judge to recognize his claim to retain the premises until compensation is paid. He has also appealed from an award of damages made in favour of the plaintiff. There can be no doubt that the appellant had a good and enforceable right to compensation as against Molligoda. It is not necessary to consider whether the right to compensation is available against Molligoda's vendee. The plaintiff has acquiesced in the order for compensation made against him, and the whole argument in appeal has proceeded upon the footing that the rights which were available to the appellant against Molligoda are available against the plaintiff. The question we have therefore to decide is, whether in respect of the improvements made by him the appellant was entitled as against Molligoda to retain possession of the house he built until he was compensated. It is a principle of the Roman-Dutch law relating to compensation for improvements that a person who has the *possessio civilis* has an absolute right to be compensated for improvements made by him and a right to retain possession where

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his possession was *bona fide* until compensated. A person is said to have the *possessio civilis* if he is in possession with the intention of holding the property as owner. The appellant is clearly not a possessor in that sense. It is contended that his possession is akin to that of a lessee. It is well established law in this Colony that a lessee has no *possessio civilis*, and that the rights to compensation conceded to a lessee are of a strictly limited character and are only available against his lessor. But is it competent for a lessor, who repudiates his lease because the failure to comply with certain requirements enables him to do so, to deny his lessee the benefits of the lease, and at the same time to limit the improver's rights to compensation by the very lease which he repudiates? The lease admittedly is null and void. If the lessor is free from the obligations imposed upon him by the lease, so also is the lessee. What is the position of a person who is found in possession of land under these circumstances? He is not a *bona fide* possessor. For his possession cannot possibly be said to be *detentio animo domini*. He is not a lessee, because the lease is null and void. He is a person who has entered upon a land and has improved it under the *bona fide* belief that he was entitled to possess and enjoy his improvements so long as he pleased. There is a further fact which has an important bearing on the question, and this is that the improvements were made with the knowledge and consent of Molligoda. The case we have to consider, therefore, is that of a claim for compensation by an improver against the owner of a land for an improvement made by him with the knowledge and consent of that owner and on the representation of the owner that if he made the improvement he was to have the right to possess and enjoy it for so long as he wished on payment of the specified ground rent. Such a person has not the *possessio civilis*. This is a circumstance which may deprive him of the right to claim compensation in other cases, but where, as in this instance, his claim is in effect against the person with whose knowledge and consent those improvements were made, it has been found possible to give him the rights of a *bona fide* possessor though in point of fact he has not the *possessio civilis*. In the case of *Mohamadu v. Babun*,¹ the defendant in an action for declaration of title and ejectment pleaded that he built a house standing on the land that he made the plantation thereon with leave and licence of the owner, and that he was therefore not liable to be ejected until compensated for the improvements. Pereira J. held that in those circumstances he was entitled to all the rights of *bona fide* possessor, including a right to retain possession until compensated. The case of *Mohamadu v. Babun* (*supra*) is referred to by Bertram C.J. in the case of *Davithappu v. Bahar*,² who regards it as development

¹ (1912) 2 C. A. C. 86.² (1923) 26 N. L. R. 73.

of the law by the extension of the doctrine of the rights of a *bona fide* possessor to compensation for improvements, to a class of persons who have not the *possessio civilis*. With all respect, it does not seem to me that relief in this case was granted by treating these persons as having a *utilis possessio* which is akin to *possessio civilis*, as is suggested by the same learned Judge in the case of *Appuhamy et al. v. The Doloswala Tea & Rubber Co.*¹ The result is reached by the extension and application of another rule, which is, that an owner who acquiesces in the making of improvements is estopped from disputing the right of the improver to be compensated on the same footing as a *bona fide* possessor. In *Eliyatomby v. Sinnatamby*² the rights of a *bona fide* possessor were accorded to an improver who was a *mala fide* possessor. This case is based on the case of *The General Ceylon Tea Estates Co., Ltd., v. Pulle*.³ That was a claim by a *mala fide* possessor, and it was held that the rights of a *bona fide* possessor, including the right of retention, would be conceded to *mala fide* possessors in cases where the owner of the property stood by and allowed the improvement to be made. In the case of *De Beer's Consolidated Mines v. London & South African Exploration Co.*⁴ the following passage in Maasdorp was quoted with approval:—

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A *mala fide* possessor is in the position of a spoiler who is bound before all things to restore that which he has obtained by spoliation, and therefore he is not entitled to a right of retention, but is bound to restore the land before the question of compensation can be raised by him; but if the owner of the ground has stood by and allowed the building to proceed without any notice of his own claim, the *mala fide* possessor will, through the fraud of the owner, be placed in the same position as a *bona fide* possessor and entitled to the same right of retention."

The *mala fides* of the possessor is assumed, and the special relief granted does not proceed upon any principle by which such a possessor is to be deemed in certain circumstances to be a *bona fide* possessor. The true principle is that the owner who stands by and acquiesces in the acts done by a *mala fide* possessor is estopped by his own "fraud" from pleading the *mala fides* of the possessor in order that he may take the benefits of the improvements himself without paying compensation at all. Applying this principle to the facts of this case, as it has been done by Pereira J. in the case of *Mohamadu v. Babun* (*supra*), the appellant would seem entitled to all the rights of a *bona fide* possessor, not because he is to be deemed to have the *civilis possessio* or something akin to it in the way of *utilis possessio*, but because the owner who stands by—and

¹ (1921) 23 N. L. R. 129.

² 2 Weerakoon 54.

³ (1906) 9 N. L. R. 98.

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in this instance induced the improver to make the improvement on a representation that he was to enjoy it so long as he liked— will not be permitted to deny the improver's status to claim compensation so that he may take the full benefit of the improvement and enrich himself at the improver's expense. In this view of the law the appellant is entitled to retain possession till he is compensated. It remains for me to deal with two subsidiary points which were taken in the course of this appeal. The learned District Judge has assessed the value of the building at Rs. 600, from this he has ordered that the value of the timber which was supplied by Molligoda should be deducted; but in doing so he has directed that the amount so to be deducted should be Rs. 250, which was the value of the timber in the year 1912. The present value of the timber is Rs. 150, and the sum that should be deducted from the present value of the building is the present value of the timber. It remains for me to consider whether the District Judge is right in awarding damages to the plaintiff at the rate of Rs. 10 per mensem. It is said that the plaintiff told the appellant that he expected him to pay Rs. 10 for the use of the premises. He is not prepared to say that the appellant agreed to do so. If the plaintiff did not wish to permit the appellant to continue in occupation upon the basis of the informal agreement, it was open to him to treat the agreement as null and void, as he has since done, pay the appellant the compensation due to him, and determine his tenure. He has not done so. He clearly had no right to treat him as a trespasser unless and until he had been fully compensated for the improvements. In my opinion he is not entitled to recover from the appellant anything more than Rs. 5 per mensem, which was all that the appellant was liable to pay by way of ground rent.

I would therefore set aside the judgment of the District Judge in so far as he has denied the appellant the *jus retentionis* to which he is entitled. In respect of the compensation the District Judge's assessment of Rs. 600 will remain, but the amount to be deducted in respect of timber supplied by Molligoda will be reduced from Rs. 250 to Rs. 150. The amount payable by the appellant to the plaintiff will be assessed on the basis of Rs. 5, and not Rs. 10. I direct that a decree be entered accordingly.

The appellant is entitled to the costs both here and in the Court below.

LYALI. GRANT J.—I agree.

Appeal allowed.