1952 *Present :* **Pulle J. and Choksy A.J.**

ALLES, Appellant, *and* KRISHNAN *et al.*, Respondents

S. C. 407—D. C. Colombo, 19,943

Landlord and tenant—Should landlord be owner of premises let?—Improvements effected by tenant—Subsequent transfer of premises—Compensation for the improvements—From whom should claim be made ?

Where improvements were effected by certain tenants with the consent of the landlord (A.) who was not the legal owner of the premises let—

Held, (i) that the tenants were entitled to claim compensation for the improvements from A., although the premises were subsequently transferred by the legal owner and the tenants attorned to the transferee.

(ii) that the relationship of landlord and tenant can exist between the tenant and a party who is not the owner of the premises so long as the latter fulfilled the obligation of a landlord by putting the tenant into possession.

(iii) that a tenant's claim for compensation can only be made after the tenancy has expired and the tenant has vacated the premises. Upon the attornment, however, there was a notional vacation of the premises and a new tenancy came into existence.

APPEAL from a judgment of the District Court, Colombo.

E. B. Wikramanayake, Q.C., with *T. Arulananthan*, for the 1st defendant appellant.

N. Kumarasingham, for the plaintiffs respondents.

Cur. adv. vult.

June 11, 1952. CHOKSY A.J.—

The plaintiffs filed this action against the defendants for the recovery of a sum of Rs. 4,028·30, as compensation for the improvements effected by them to premises No. 106, College Street, Kotahena, which the plaintiffs had taken on rent from the 1st defendant. The 1st defendant filed answer denying that the plaintiffs effected any improvements ; alternatively, he pleaded that he was not liable to pay for any improvements. He also took up the position that he collected the rent of the premises, which belonged to his late father, on behalf of his father, and after his death, on behalf of his estate and that he carried out " the necessary repairs and improvements " on behalf of the estate and heirs of his deceased father. The 2nd defendant was made a party on the footing that he had purchased the premises from the 1st defendant and therefore compensation was claimed by the plaintiffs against the defendants jointly and severally. The second defendant's defence was a general denial of the plaintiffs' claim and a plea of misjoinder of parties and causes of action, a plea which was raised by the first defendant also.

At the commencement of the trial the plaintiffs wanted the second defendant dismissed from the action. This was agreed to and the second defendant was dismissed from the case, plaintiffs paying the second defendant Rs. 105 by way of agreed costs. The evidence shows that the second defendant himself had disposed of the property to a third party in or about May, 1948.

At the trial the position taken up by the first defendant was that the premises at no time belonged to him but that they belonged to his father at the time of the commencement of the tenancy in or about June, 1942. His father died in 1946 and therefore the first defendant's position was that thereafter he collected the rents on behalf of his father's estate. The plaintiffs' case was that they were not aware at any stage that the first defendant's father was the owner of the premises, and that they did not become the tenants of the first defendant on behalf of his father but that the contract of tenancy was one directly between them and the first defendant and that they continued to be the first defendant's tenants till the first defendant requested the plaintiffs to pay the second defendant the rent subsequent to the second defendant's purchase of the premises whereupon the plaintiffs attorned to the second defendant and continued to pay rent to him. It would appear from the first defendant's evidence that the deceased father had gifted the property to the first defendant's mother by deed of 7th February, 1945, and that it was the mother who later transferred the premises to the second defendant, who in turn disposed of the property to a third party in May, 1948. The receipt issued by the first defendant for a sum of Rs. 100 paid by the plaintiffs as an advance, on 27th February, 1942, has been produced. This does not contain anything to show that the first defendant was acting on behalf of anyone other than himself. The District Judge found upon the evidence that the plaintiffs had never at any time been appraised that the premises did not belong to the first defendant. The " to-let " board which was fixed on the premises before the plaintiffs took them on rent, and which has been produced, has the words " To Let. Apply Alles, Ceylon

Wharfage Co., Ltd. ". The first defendant had been employed at the Ceylon Wharfage Co. Ltd., his father being the late shroff of the Chartered Bank of India. In view of this strong evidence furnished by the receipt for the advance, the " to-let " board, and other evidence in the case, the learned Judge's finding that the first defendant was the landlord of the plaintiffs is correct and cannot be reversed.

It does not appear to have been disputed that after the first defendant's mother's sale to the second defendant the plaintiffs attorned to the second defendant and paid rent to the second defendant thereafter.

The learned Judge has also found that the first defendant consented to, or at least acquiesced in, the plaintiffs effecting the improvements in question. Indeed it was the first defendant who actually signed the Application to the Municipality for sanction to effect the alterations to the premises which alterations constitute the improvements. He has signed the form as the " owner " of the premises.

We therefore find ourselves confronted with a case where, as between the plaintiffs and the first defendant, the latter was to all intents and purposes the owner of the premises which he had let to the plaintiffs as landlord, and that he consented to or at least acquiesced in the improvements intended to be effected by the plaintiffs on the footing—as between the parties—that he was the owner of the premises. As a result of the improvements being effected the Municipal Assessment of the premises was increased with the consequence that the plaintiffs had to pay an increased rental, and that to the first defendant himself. The result therefore is that whilst the tenants had the use and benefit of the improvements themselves, their landlord also reaped the benefit of the improvements in the shape of an enhanced rent. The question that arises for consideration, therefore, is whether the plaintiffs, being tenants, are entitled to claim compensation for the improvements effected by them from the person who was their landlord at the time the improvements were effected, or should claim them from the actual owner of the premises to whom they had later attorned.

It is of course not necessary that the owner himself should be the landlord. The relationship of landlord and tenant can exist between the tenant and a third party who is not the owner of the premises let so long as he fulfils the obligations of a landlord by putting his tenant into possession [1]. He will then be the person entitled to receive the rent during the period of the tenancy.

It was conceded in the lower Court that the tenant is not entitled to a *jus retentionis* for the improvements effected by him. Even a lessee under a notarial lease is not entitled to a *jus retentionis* [2]. A lessee is neither a bona fide possessor nor a mala fide possessor. He certainly has not the *possessio civilis* and therefore his claim for compensation must depend on his possession as a lessee, because he is not such a " possessor " as is contemplated in the context of a claim for compensation for improvements [3]. In *Costa v. Abeykoon* [4], this Court has held that a tenant is not entitled to a *jus retentionis* even for improvements made by agreement with his landlord in the absence of an express or implied term in the agreement

[1] *(1935) 14 C. L. Rec. 210.*
[2] *(1924) 26 N. L. R. 97.*
[3] *(1910) 13 N. L. R. 193.*
[4] *(1908) 4 Bal. Rep. 25.*

giving him a *jus retentionis*—see *Saboor v. Appuhamy*[1]. The tenant in that case, however, was in fact the lessee under a lease. Whatever may be his position in regard to a tacit hypothec it is clear on the authorities that a tenant is entitled to claim compensation for improvements effected by him during the tenancy provided those improvements had been effected by him either with the consent or acquiescence of the landlord. That claim however can only be made after the tenancy has expired and the tenant has vacated the premises. The topic is discussed, among other authorities, by Wille in his standard work on *The Law of Landlord and Tenant in South Africa, 3rd edition, pages 259 to 261.* Whilst it is true that Wille relies, for his statement, on the placaats of 1658 and 1696 he also relies on decisions of the South African Courts to that effect.

Mr. Wikramanayake, while not contesting the proposition that a tenant would be entitled to compensation for improvements effected with the consent or acquiescence of the landlord strenuously pressed upon us the point of view that it was the actual owner of the premises at the date of the termination of the tenancy and vacation of the premises by the tenant who is liable to pay such compensation and not the landlord who consented to or acquiesced in those improvements. We were told that there is no direct authority on the point amongst the local decisions. The case of *Scrooby v. Gordon & Co.*[2] was relied on by him. The question which was formulated as being the one coming up for determination in that case was whether a lessee was entitled, on the termination of the lease, to be compensated by the lessor for the value of the improvements effected before the termination of the lease, if before the termination of the lease the property had been sold by the lessor to a third party. The Court held that it was established law in South Africa that in the absence of a special agreement, a lessee who annexes materials to the soil retains his property in those materials during the tenancy, that he can dissever and remove those materials, before the expiry of the lease, provided he can do so without serious damage to the land ; that at the expiry of the lease the owner of the land at that date becomes the owner of the materials ; that the lessee cannot retain the leased property after the expiration of the tenancy, but can recover, as compensation, the value of the materials annexed by him to the soil with the landlord's consent. The Court then put itself the question as to whether the tenant could enforce that claim for compensation against the person who was the owner at the time when the improvements had been effected or against the person who is the owner at the time when the lease terminates and the lessee has to quit possession. The Court was of the view that it is the owner at the time of the termination of the lease who is the person against whom the lessee could assert his right to compensation, principally because where a property which is sold is subject to a lease it is acquired by the purchaser subject to the lessee's rights. The Court held that the lessee has the right to continue in occupation of the premises as against the purchaser, during the balance period of the lease, subject to the due observance by him of all the terms and conditions of the lease, and also the right to receive compensation, on its expiry, in respect of the materials annexed to the soil by the lessee with the consent of the original lessor. It was pointed out that this obligation of

[1] *(1916) 2 C. W. R. 186.*

[2] *(1904) Transvaal Law Reports 937.*

the purchaser to pay compensation in such circumstances is founded on the broad-based equitable doctrine of Roman-Dutch Law, which is capable of infinite adaptation and application to the varying circumstances and situations that arise under the continuously changing conditions of civilization, that " no man shall enrich himself at the expense of another ". The person who appeared to the Court to be enriched was the person who was the owner of the property at the termination of the lease, owing to the fact that it was at the termination of the lease, and not earlier, that the materials ceased to be the property of the lessee (who has not removed them earlier) and became the property of the owner of the soil.

The case of *Lechoana v. Cloete and others* [1] was also relied on in support of that proposition. In the course of his judgment De Villiers A.J. cites the case of *Hendersons Transvaal Estates Ltd. v. Bloom* [2], as deciding that a person who bona fide occupies land either under a mistaken belief that he is the tenant thereof, or in the expectation of a lease being granted to him (the owner consenting to such occupation with the intention of granting him a lease), is a tenant-at-will and that upon the termination of his occupation such person is entitled to compensation for the value of the materials standing on the premises and which the tenant has annexed to the soil with the consent of the owner. The report of *Hendersons Transvaal Estates Ltd. v. Bloom* is not available but it appears to be the case of a claim for compensation against the very person who gave his consent for the occupation. *Lechoana's case* was also concerned with a claim for compensation being made against the very body of persons (viz., the Mission Society) with whom the defendant there had dealt, and not with any purchaser from the Mission Society. That case therefore is not of as much assistance as is the case of *Scrooby v. Gordon & Co.* (*supra*).

The case which comes closest to the present case is that of *Gibson v. Frost* [3], which is referred to and distinguished in *Scrooby v. Gordon & Co.* (*supra*). In *Gibson v. Frost* the defendant rented the house to his daughter the plaintiff, and boarded with her, paying for his board. She put up a fence with his knowledge and without his objection. He gave her to understand that she was to get that house after his death. But in May, 1895, he transferred the property to his son. Despite the transfer he continued to receive the rent and treat her as his tenant whilst she regarded him as the landlord. In December, 1895, he asked her to vacate the premises at the end of January, 1896, as he required them for his own use. She agreed to do so but claimed compensation for the improvements and said that she would remove them if he refused to pay for them. Then the defendant for the first time said that his son was the owner and that she could not remove the improvements. She accordingly left the premises and sued her father for compensation. Her claim succeeded on the footing that she had made improvements with the defendant's consent. It was argued contra that she could recover compensation only from the person who was the owner at the date of the termination of her tenancy because the law reserves a tacit hypothec in favour of the lessee for such compensation. After considering the effect on tacit hypothecs, of a certain Act, the Court considered the question even on the footing that the tacit hypothec

[1] (*1925*) *A. D. 536.*

[2] (*1911*) *W. L. D. 88.*

[3] *13 S. C. 169.*

continued in favour of the tenant despite the Act. The Court held that merely because the tenant had a tacit hypothec it would not follow that the tenant lost her personal right of action against the landlord with whom she had entered into the original contract of lease, and who consented to the materials being annexed before he parted with the ownership of the property and who during the subsistence of the tenancy had prohibited the removal. That personal right, it was held, she still enjoyed, whatever real rights she might retain in respect of the land itself. It may be that the landlord would have had a good defence if he had proved that, after he ceased to be the owner, and before the termination of the tenancy, the tenant had negligently failed to remove the materials, but that defence could not have been raised in that case as he had prohibited the removal. On the evidence it was clear that when the tenancy expired the defendant still regarded himself, and was regarded by the plaintiff, as the landlord. He gave notice to quit, he received the rents and he prohibited the removal of the materials. Buchanan A.J. said that it did not lie in the defendant's mouth to set up a transfer as, to the very end, he acted as the landlord between the plaintiff and himself and that it would not be equitable to allow the defendant to shelter himself behind the transfer. It was pointed out that the plaintiff's position was further strengthened by the fact that although the defendant parted with the ownership he still retained an usufructuary interest in the land.

It would be observed that there was a legal nexus between the landlord (the defendant's father) and his vendee, who could be said to have bought the property subject to all claims against the former owner. Nevertheless, the Court held that although the tenant may have real rights as against the owner of the land by virtue of the transfer of the legal estate in it by her landlord to the purchaser, she still had her personal claims against the former owner, her father. In the present case there is no legal nexus between Alles, the defendant, and either his mother or the second defendant as neither of these two got title through Alles but independently of him ; also, there was no consent or acquiescence by the real owner to any of the improvements all of which were effected on the footing that, as between the plaintiffs and the defendant, the defendant was the owner of the demised premises.

There are local cases in our own law reports, in addition to the case of *de Silva v. Perusinghe* [1] which was cited to the learned District Judge, which have a bearing on the questions before us. That case mainly dealt with the classes of persons entitled to the *jus retentionis*—a question which does not arise in this case.

In *Soysa v. Mohideen* [2] a bench of three Judges held that a lessee of one of the fiduciaries who had agreed to pay at the termination of the lease half the value of such improvements as the lessee may effect, was not entitled to claim compensation for those improvements as against the fideicommissaries. The reason for the decision was that the fideicommissary claims on a title independent of the fiduciary. Lascelles C.J. explained that in the earlier case of *Muttiah v. Clements* [3] and *Mudianse v.*

[1] *(1939) 14 C. L. W. 137.* [2] *(1914) 17 N. L. R. 279.*
[3] *(1900) 4 N. L. R. 158.*

Sellandayar [1] lessees were granted compensation as against the successors to the original lessors in view of the contractual relation between these successors in title, against whom compensation was claimed, and their predecessors in title, namely, the persons with whose permission improvements had been effected. De Sampayo J. further explains that Clements was granted compensation against the trustee appointed under the Buddhist Temporalities Ordinance, even though Clements had effected improvements under an informal lease taken from the incumbent, whose rights ceased upon the appointment of a trustee under the Buddhist Temporalities Ordinance, because the trustee appointed under the Ordinance had, after his appointment, himself consented to Clements improving the property. De Sampayo J. also observes that in Clements' case the incumbent was in law competent to deal with that temple property at the time he executed the informal lease. In the present case there is no evidence that either the defendant's mother or the second defendant approved of the improvements ; indeed all the evidence is to the contrary. Moreover, Alles the defendant was in no sense legally competent to deal with the property he rented, as was the case with the incumbent in Clements' ease. De Sampayo J. refers to *Scrooby v. Gordon & Co. Ltd.* (*supra*) and *Mudianse v. Sellandayar* (*supra*) and shows that both decisions are capable of explanation on the footing that a successor-in-title to the lessor, such as a purchaser from him, becomes entitled to the rights and liable to the obligations of the lessor. That of course would be in a case where the lessor is himself the vendor so as to make the purchaser a legal successor-in-title to the lessor. The position in the present case is entirely different as neither the defendant's mother nor the second defendant were privies or successors of Alles the landlord so as to saddle either the mother or the second defendant with the legal liability to compensate the plaintiffs for the improvements. Lascelles C.J. states that a lessee's rights to compensation are derived from considerations wholly different to those applicable to " bona fide possessors " as lessees do not come within the category of either " bona fide possessors " or " mala fide possessors " as those terms are understood in the context of claims to compensation for improvements. De Sampayo J. makes it clear that a lessee's right to compensation is a right *resulting from contract*, which cannot be enforced as against a person who is not a party to the contract. Applying that basis to the present case neither the defendant's mother nor the second defendant nor the subsequent purchaser from the second defendant were parties to the contract between Alles the defendant and the plaintiffs, nor were they in any sense of the term successors-in-title to Alles so as to be bound by any obligations of Alles. In these circumstances the plaintiffs could not make their claim to compensation against any party other than Alles who alone was the other contracting party.

Lebbe v. Christie [2] was a case where a Kandyan widow leased (without the Court's sanction) a land belonging to her husband over which she had only a life interest. That lease was accordingly not operative beyond the period of her life and could not bind her children by her deceased husband. Her lessee was therefore held not to be entitled to compensation for improvements as against the child of the widow by her deceased husband.

[1] *(1907) 10 N. L. R. 209.* [2] *(1915) 18 N. L. R. 353.*

Ennis J., who dissented from the view of Wood Renton C.J. and Shaw J., held that a distinction should be made between the case of a lessee who had not been allowed to possess for the full terms of the lease and a lessee who had possessed for the full term. But he too referred to the right of a lessee to compensation as a right accorded to him as a matter of contract, and then went on to state the equitable considerations applicable to a case where the lessee's term of possession was cut short and what the compensation should be in such a case. In his view *Soysa v. Mohideen* (*supra*) decided that whatever rights a lessee might have against his lessor, the lessee had no right to claim compensation against a party who derived title from a source other than the lessor, in the absence of an assignment by the lessor to the lessee of any rights that the lessor may have to claim the benefit of the lessee's improvements as against the party ultimately entitled to the land. Shaw J. explained that the doctrine of enrichment was limited to compensating a person who is in possession of another's property, bona fide, and in the belief—based on reasonable grounds—that it is his own. That invests his possession with the character implied in the expression " bona fide possession " and attaches an equity in his favour. Were the doctrine not so limited it would appear to be unjust to an owner of land that he should be called upon to pay compensation to any and every person who may have effected so-called improvements on his property without any reference to him and without even so much as his acquiescence. I have already made it clear that the limited right of a lessee to claim compensation for improvements is not based on the character of his " possession " which is neither bona fide nor mala fide, but on contract. The plaintiffs in the present case therefore cannot be referred to the second defendant or his successors on the principle that the latter should not be enriched at the expense of the plaintiffs. Those parties had nothing to do with the contract (express or implied) on which improvements were effected, nor have the plaintiffs that " bona fide " possession which would have entitled them to claim compensation against the true owner on the doctrine of enrichment.

Bertram C.J. who discussed this question of a lessee's right to compensation in his judgment more fully in the *Doloswella case—23 N. L. R. 129* and *25 N. L. R. 267*—does not reach a contrary conclusion, in view of the two cases of *Soysa v. Mohideen* (*supra*) and *Lebbe v. Christie* (*supra*). Garvin J. observed that no authority had been cited to show that an action, apart from contract, was allowed to a lessee (in respect of his claim for compensation for improvements) as against a person who established a claim to the land by a title adverse to and independent of the lessor.

Appuhamy v. Silva [1] is a case where the purchaser from the owner of the land during whose ownership the improvements had been effected by the monthly tenant, was held liable to pay compensation to the tenant on the footing that the purchaser was the legal successor-in-title to the former owner during whose time the improvements had been effected.

[1] *(1891) 1 S. C. R. 71.*

Consistently with this position Ennis and De Sampayo JJ. held in *Mendis v. Dawood* [1] that the fideicommissaries were not bound by the agreement for compensation entered into between some of the fiduciaries and the person who had erected buildings on the land in pursuance of that agreement with those fiduciaries. One of the grounds of the decision was that the fideicommissaries were not the successors to any of the parties to that agreement, as they derived their title from the will which created the fidei commissum and not by succession to the fiduciaries who were parties to the agreement.

Dharmadasa v. Marikkar [2] decided that a lessee (or assignee) cannot claim compensation for improvements effected in terms of his lease, against a person who establishes a superior right to the land than that of his lessor. No fideicommissum was involved in the case as the persons who claimed to be entitled to possession of the land free of any claims to compensation were the children of a Kandyan by his mistress the latter of whom had executed the lease in question during the time when the children were minors. The decisions in *Soysa v. Mohideen* (*supra*), *Lebbe v. Christie* (*supra*) and *Appuhamy v. The Doloswela Tea & Rubber Co. Ltd.*, were applied. *Fernando v. Menchohamy* [3] was also a case where the principle that a lessee is not entitled to compensation as against the real owner who vindicates his title as against the lessor, was reaffirmed.

Finally in *De Silva v. Perusinghe* [4], Soertsz A.C.J., with whom De Kretser J. agreed, had to consider a claim for compensation for necessary improvements effected by a tenant with the landlord's consent. The Acting Chief Justice compares and contrasts the position of improving tenants with bona fide and mala fide possessors who effect improvements, and states that a lessee's or tenant's position is equiparated to that of a bona fide or mala fide improver according as to whether he has improved the property with or without the consent of the landlord, and points out that whatever controversy there may be amongst the Roman-Dutch Law writers on the question whether a lessee or tenant is entitled to claim compensation from any party seeking to recover possession from him, or only from his lessor or landlord, the matter had been set at rest so far as Ceylon is concerned by the two divisional bench decisions in *Soysa v. Mohideen* (*supra*) and *Lebbe v. Christie* (*supra*). In the case before him the plaintiffs were entitled to the property in question by right of inheritance from their father, a Kandyan. The property was acquired property and so the plaintiffs' mother was entitled to enjoy the income from it in order to maintain herself during her life. During the period of that right the defendant entered into occupation of the premises which he improved. Those improvements had been effected without the consent of the plaintiffs' mother. According to the view taken in South Africa the defendant's position there was similar to that of a *negotiorum gestor* and he would be compensated quasi-ex-contractu ; but as between the plaintiffs and the defendant there was no contract whatsoever, express or implied or constructive. The plaintiffs got their

[1] *(1920) 22 N. L. R. 115.*
[2] *(1926) 7 C. L. Rec. 117.*
[3] *(1929) 10 C. L. Rec. 124.*
[4] *(1939) 18 C. L. Rec. 206.*

title quite independently of their mother and therefore it was held that the defendant could not claim compensation as against the plaintiffs, whose source of title was by inheritance from their father.

Despite the variety of facts and circumstances in the cases I have referred to, the principle that appears to emerge from them is that a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him. In the present case there cannot be any question but that the title of the second defendant was quite independent of and not at all derived from the defendant Alles and therefore the plaintiffs could not have claimed any compensation for their improvements from the second defendant whose predecessor-in-title, the first defendant's mother, also had nothing to do with the improvements and neither of whom were bound by any agreement express or implied between the plaintiffs and the first defendant. Both of them were perfect strangers to and had nothing to do with the plaintiffs and neither of them were bound by any acts or conduct of the first defendant. The plaintiffs were therefore in my opinion right in making their claim to compensation for improvements as against the first defendant.

It was argued that in any event a lessee or tenant can claim compensation only at the termination of the tenancy and upon his quitting the premises. It was said that here the plaintiffs were still in occupation of the premises at the date of this action and therefore not entitled to claim compensation. But there is evidence that the plaintiffs attorned to the second defendant who thereafter continued to receive rent from the plaintiffs. I am of the view that upon the attornment the tenancy that existed between the plaintiffs and the first defendant terminated. One may even say that there was a notional vacation of the premises as far as the first defendant was concerned, and a resumption of possession under a new tenancy as between the plaintiffs and the second defendant. I would accept the view of Basnayake J. in *Samsudeen v. Rahim* [1], where it was held that the status of landlord and tenant that existed between the vendor, who was the landlord, and the defendant, who was the tenant, terminated by the notice which the landlord had sent to the defendant upon his selling the premises, and that that result was brought about even though the defendant ignored the notices he received from both the landlord and the purchaser. That a new tenancy comes into existence upon the attornment is also apparent from the judgment of Gratiaen J. in the case of *Justin Fernando v. Abdul Rahaman* [2].

The conclusion I have arrived at is that the plaintiffs were correctly awarded compensation as against the first defendant and the appeal should therefore be dismissed with costs.

PULLE J.—I agree.

Appeal dismissed.

[1] *(1948) 37 C. L. W. 3.*

[2] *(1951) 52 N. L. R. 462.*