**1953** *Present :* **Gratiaen J. and H. A. de Silva J.**

A. A. JAFFERJEE *et al.*, Appellants, *and* CYRIL DE ZOYSA, Respondent

*S. C. 238—D. C. Colombo, 5430/L*

*Lessor and lessee—Improvements effected by lessee—Compensation.*

(i) Under the general law, and subject to any agreement to the contrary, a lessee who has erected buildings with the lessor's consent or acquiescence has, upon the expiration of the lease, the option either of removing the materials affixed to the soil or of permitting ownership in them to pass to the owner of the land ; in the latter event, he must be compensated for the loss of his materials.

(ii) Under the terms of a contract of lease the lessee was entitled at his discretion to erect buildings on the leased property, and he agreed in that event " to yield up and surrender " such buildings to the lessor at the determination of the lease. The contract did not stipulate for the payment by the lessor of compensation for the buildings.

*Held*, that, at the determination of the lease, the lessor was entitled to take possession of the property, including the buildings, without payment of compensation. The lessee had in effect renounced his option (under the general law) either of removing the materials or of claiming compensation for them.

APPEAL from a judgment of the District Court, Colombo.

*S. J. V. Chelvanayakam, Q.C.*, with *N. Samarakoon*, *I. Perera* and *G. Candappa*, for the plaintiffs appellants.

*H. V. Perera, Q.C.*, with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the 2nd defendant respondent.

*Cur. adv. vult.*

October 29, 1953. GRATIAEN J.—

The appellants are the executors and trustees of the late Abdulhussein Jafferjee who died on 1st September, 1946. By an indenture of lease P1 dated 13th November, 1937, Jafferjee had leased an allotment of bare land situated in Galle Road, Colombo, to the Shell Company of Ceylon, Ltd., for a period of ten years commencing on 1st November, 1937. It is quite evident from the terms of the lease that the erection of substantial buildings on the land at the lessee's expense (but entirely at his discretion) was within the contemplation of both parties. In that connection, the lessee undertook *inter alia :*

" 3. To pay the cost and charges for gas incandescent and/or for other illuminant used or consumed in *the buildings that may be erected on the demised premises* and to pay the water rate levied in respect of the said buildings.

" 4. Not to sell or dispose of any earth cabook clay gravel or sand from the said demised premises *nor to excavate the same except so far as may be necessary for the erection of the said buildings.*

" 5. *From time to time well and substantially to repair and clean all new buildings structures and erections which may at any time during the said term be erected* on the said demised premises.

" 7. At all times to observe fulfil and comply with the laws bye-laws rules and regulations of the Municipal Council of Colombo in respect of the sanitation of the City of Colombo and all the other requirements in regard to the occupation and use of the demised premises *and the said buildings to be erected thereon* and to keep the Lessor at all times indemnified against all prosecutions and fines for the breach of or non-compliance with any of the laws bye-laws or regulations of the said Municipal Council.

" 9. *At the determination of the tenancy to yield up and surrender to the said Lessor the demised premises with all the buildings that may be erected on the said demised premises and all the permanent fixtures that may be affixed thereon* during the said term *in good and tenantable repair and condition* in accordance with the covenants hereinbefore contained. "

By a contemporaneous indenture of lease P2 (attested by the same notary) the lessee, with the lessor's consent, sublet the land to the respondent for the full term of the lease. P2 conferred and imposed on the respondent in respect of " the buildings that may be erected " rights and obligations precisely similar to those contained in P1 which I have previously quoted.

The respondent was placed in occupation of the land as sub-lessee, and from time to time erected fairly substantial buildings on it. At a later stage he himself sublet the property to various persons on the terms of monthly sub-tenancies, and at the time of the expiry of the main lease, the 3rd and 4th defendants to this action were the tenants in occupation on that basis.

On 29th July, 1948, the appellants instituted this action against the Shell Company (as 1st defendant), the respondent (as 2nd defendant) and the 3rd and 4th defendants, claiming (*a*) a declaration that they were entitled to the leased premises and all the buildings and fixtures standing thereon *without payment of compensation*, (*b*) for ejectment, damages and continuing damages.

On 15th November, 1949, while the action was still pending, a partial adjustment of the dispute between the parties was arrived at whereby the 3rd and 4th defendants attorned to the appellants and continued thereafter to occupy the premises as their monthly tenants at an agreed rental ; the respondent undertook to pay to the appellant the arrears of rent (or more strictly, the damages) for the period 1st November, 1947, to 30th November, 1949—this amount being subsequently fixed by agreement at Rs. 4,465 ; and the 1st, 3rd and 4th defendants were discharged from the action.

The only dispute which remained for adjudication was the question whether the appellants were entitled, as lessors under the original lease P1, to take over the buildings erected on the land without payment of compensation (as they contended) or on payment of compensation to the respondent (as he alleged). For the purposes of this dispute the other defendants—i.e., the original lessee and the subsequent sub-lessees—expressly ceded to the respondent such rights, if any, to compensation as they enjoyed against the appellants.

The learned District Judge held that the provisions of P1 and P2 did not operate as a surrender of the right of either lessee (under the general law) to recover compensation for improvements effected by him during the period of the lease. He accordingly decided that the appellants were liable to pay compensation which he assessed at Rs. 20,000. On this basis, a decree was entered in favour of the respondent for Rs. 15,535 (i.e., Rs. 20,000 less the agreed amount representing accrued rent or damages). The present appeal is from this decision.

Mr. Chelvanayakam abandoned in the course of his argument the objections raised in the petition of appeal to the *quantum* of compensation payable by the appellants in the event of their liability being established. We need only decide, therefore, whether, in the circumstances of this case (i.e., upon the true construction of the indentures of lease or, alternatively, under the general law), the appellants are liable to pay compensation to the respondent for the improvements effected by him during the currency of the lease.

It is convenient, I think, to inquire in the first instance whether the appellants would have been liable *under the general law*—and without any reference to the terms of the contracts P1 and P2—to pay compensation for the buildings erected by the respondent (and eventually " yielded up and surrendered " to them after the determination of the lease). We shall then be in a better position to judge the extent, if any, to which the rights and obligations of one party or the other have been enlarged or reduced *by agreement*.

According to the Roman-Dutch common law a *bona fide* possessor was entitled to claim compensation for necessary and useful expenses and to retain possession until compensated—see *Grotius : Introduction to Roman-Dutch Law 2.10.8*, *Muttiah v. Clements* [1], *Mudianse v. Sellandyar* [2] (both cases of occupiers—in one case occupying in expectation of getting a lease, in the other occupying under a planting agreement—who were treated as being on the footing, *not* of lessees, but of *bona fide* possessors) ; *cf. Soysa v. Mohideen* [3]. A *mala fide* possessor, on the other hand, was generally entitled (on the view which has prevailed in Ceylon) to necessary expenses only, and (subject to certain exceptions) he has no right of retention—*General Ceylon Tea Estates Co., Ltd. v. Pulle* [4].

As regards lessees, Grotius said (2.10.8) that they were entitled to compensation for improvements in the same way as *bona fide* possessors. In Ceylon, however, as far back as 43 years ago, the principle was laid down in *Punchirala v. Mohideen* [5] that the claim to compensation of a lessee, who is technically in the eye of the law not a " possessor " at all, depends on special considerations. The principles laid down in this case as regulating a lessee's right to compensation were said to be based on Van Der Keessel's *Select Theses* and on a passage in Maasdorp's *Institutes of Cape Law* which was " derived from the ruling in the South African case of *De Beers Consolidated Mines v. London & S. African Exploration Co.*[6] quoted by Mr. Walter Pereira in his little book on the Right of Compensation for Improvements ". As the principles laid down in

[1] *(1900) 4 N. L. R. 158.*
[2] *(1907) 10 N. L. R. 209.*
[3] *(1914) 17 N. L. R. 279 at 281–2 and 284–5.*
[4] *(1906) 9 N. L. R. 98.*
[5] *(1910) 13 N. L. R. 193.*
[6] *(1893) 10 S. C. 359.*

*Punchirala v. Mohideen* (*supra*) have been uniformly accepted and applied in subsequent cases—see, e.g., *Soysa v. Mohideen* [1], *Saboor v. Appuhamy* [2], *Silva v. Banda* [3], *Alles v. Krishnan* [4]—it is necessary to consider the principles expounded in the classic judgment of De Villiers C.J. in *De Beers' case* cited in *Punchirala v. Mohideen* (*supra*) and expressly approved by the Privy Council in appeal (*1895*) *12 S. C. 107*.

De Villiers C.J. explains that the Roman and Dutch jurists, in dealing with the case of one person building on the property of another, reconciled as far as possible the rigours of the ancient maxim that " everything built on the soil accedes to it " with the more liberal maxim that " no one should gain profit to the detriment of another ". He then comes to consider improvements made by a lessee which, as mentioned above, are governed by special considerations. He points out that such cases were governed by a Placaat of 26th September, 1658, Articles 10 to 12 of which, says the Chief Justice (at p. 370), are treated by Van der Keessel " as having been *incorporated into the common law of Holland and Friesland relating to landlord and tenant* ".

De Villiers C.J. sets out the provisions of these articles of the Placaat, the effect of which were to give a lessee who has built structures with the lessor's consent a claim to what the materials would be worth if demolished and removed (the claim being enforceable only after vacating possession), and to give even those lessees who built without the lessor's consent a right of removing the materials before the expiry of the lease.

In his judgment, the learned Chief Justice shows how the Roman-Dutch law, in relation to those improvements to which the Placaat applies, modified the maxim " whatever is affixed to the soil accedes thereto " by applying the principle prohibiting unjust enrichment. " The Dutch law . . . . gives the tenant an opportunity during his tenancy of preventing the rigid application of the more ancient maxim and, *if it deprives him after the expiration of his term of the ownership in the materials affixed by him, it allows him to recover the cost of those materials if they had been affixed with the landlord's consent* ".

These principles were doubtless influenced in certain respects by the terms of the Placaat of 26th September, 1658. The question may be asked whether it is proper to regard any part of that enactment as having been incorporated in the general law of Ceylon. No submissions were made to us either way upon this point, but the answer, I think, admits of little difficulty. The Roman-Dutch Law was first introduced into Ceylon in 1656, and *prima facie* a Placaat enacted subsequently would have no application in this country in the absence of clear proof that it has, either by custom or by binding judicial interpretation, become incorporated at some stage in our legal system. *Karonchihamy v. Angohamy* [5] *cf.* Lee : *Introduction to Roman-Dutch Law* (5th Edn.) p. 7, *Estate Heinemann v. Heinemann* [6]. Applying this test, I am perfectly satisfied that, *as far as a lessee's right to compensation is concerned*, the rules enunciated by De Villiers C.J. in *De Beers' case* (*supra*) have for over forty years been accepted and consistently acted upon in this country ever since their

[1] (*1914*) *17 N. L. R. at 286.*
[2] (*1916*) *2 C. W. R. 186 at 187.*
[3] (*1924*) *26 N. L. R. 97 at 100.*
[4] (*1952*) *54 N. L. R. 154 at pp. 156–7.*
[5] (*1904*) *8 N. L. R. 1.*
[6] (*1919*) *S. A. A. D. 99 at 114.*

adoption in *Punchirala v. Mohideen* (*supra*). In these circumstances, the extent to which they were originally influenced by articles 10 to 12 of the Placaat is at this stage only of academic interest : it is too late now to challenge the irrevocable incorporation of the rules themselves into our general law. [On issues affecting *the quantum of compensation*, however, the development of our law need not be examined in connection with this appeal.]

Let me attempt to summarise, for the purposes of the present appeal, what has been accepted by the Courts in this country as the basis of a lessee's right to compensation for buildings erected with the lessor's consent or acquiescence. He is presumed, in the absence of an agreement to the contrary, to have effected these improvements only " for the sake of temporary and not perpetual use " ; he is accordingly regarded as retaining the ownership of the materials affixed to the soil throughout the period of his tenancy, and, at the expiration of that term, he has the option *either* of removing what is in truth his own property *or* of permitting ownership in them to pass to the owner of the land ; in the latter event, he must be compensated for the loss of his materials which, by operation of law, passed to the lessor.

It logically follows that, *if the terms of the contract between the parties show that the building improvements were effected not only for the lessee's temporary use, but also for the lessor's future benefit, he has in effect renounced the option* (*which he would otherwise have had under the general law*) *either of removing the materials or of claiming compensation for them.* In other words, the maxim *quidquid inaedificatur solo, cedit solo* is not tempered in such a case by the application of the rule against unjust enrichment, so that the lessor cannot claim compensation *unless he has expressly stipulated for its payment.*

The extent and limits of the right of a lessee to claim compensation for buildings erected on the leased premises are now made clear, and I do not doubt that, unless this right had been renounced " by special agreement " (either expressly or by necessary implication) in the present case, the respondent's claim would be irresistible. For it is admitted that the buildings had all been erected with Jafferjee's consent (antecedently given upon the execution of the document P1).

I now proceed to examine the indentures of lease P1 and P2. Under neither contract was the lessee obliged to erect any buildings on the land, but, if he did so, he undertook at all times *to maintain them in good condition ;* and he unequivocally agreed, at the determination of the lease, to " *yield up and surrender* " (the significance of these words may fairly be emphasised) the buildings " *in good and tenantable repair and condition in accordance with the covenants hereinbefore contained* ". These clauses, I am convinced, can only lead to one conclusion : they very clearly rebut the presumption that the materials affixed by the lessee to the lessor's soil were intended to be fixed exclusively for the sake of his temporary use ; they were affixed and maintained in good repair for the lessor's future benefit as well ; the ownership of " any buildings to be erected " therefore vested immediately in the lessor ; in other words, the lessee had by necessary implication given up his right under the general

law to remove the materials during the pendency of the lease—indeed, they were not his to remove in the circumstances of this particular case after they became affixed to the lessor's soil. For the same reason, there was—in the absence of agreement to that effect—no legal foundation for the exercise of the alternative right to be compensated for the loss of the improvements after the lease had expired.

It is true that, in certain contexts, the renunciation of one of two alternative courses of action need not be construed as an implied renunciation of the other. But if two alternative remedies are based upon a single right, the renunciation of that right necessarily extinguishes every remedy that flows from it.

In the present case, no provision has been made in the indentures of lease for the payment of any compensation, and the respondent has therefore not established a cause of action either under the general law or under the terms of a contract. The issue of " hardship " is irrelevant and merely introduces dangerous opportunities for speculation. The respondent was free to regulate his affairs as sub-lessee as he thought would be most advantageous to his own interests ; after all, he was under no duty to erect any buildings on the land. There are cases in which the law does allow a person to be enriched at another's expense without making compensation. " *Enrichment is not without cause (unjustified) if it is permitted (or) when it is the consequence of a contract,* no matter how disadvantageous it may be to one or other of the parties "—Lee : *Introduction* (5th Edn.) at pp. 347–8 ; *cf. Urtel v. Jacobs* [1].

The judgments of Garvin J. in *Appuhamy v. Doloswala Tea & Rubber Co.* [2], and of Bertram C.J. in *Silva v. Banda* [3] have not, in my opinion, laid down any principle contrary to the views which I have here expressed. Without doubt, a lessee can maintain his right to compensation under the general law " where the contract is silent ", but to my mind the contracts P1 and P2 are far from " silent " on the questions arising on this appeal. *Silva v. Banda* (*supra*) deals with a very different situation. A lessee who had improved the leased premises had stipulated that, in lieu of compensation which he expressly waived, he should have the option of renewing his lease for a further period of ten years. After the improvements had been completed, it was discovered that the lessor (who was a trustee) had no right to lease out the property at all, and the option of renewal was therefore of no avail. Bertram C.J. held that in the circumstances the lessor could not refuse the renewal of the lease and insist at the same time on the lessee's renunciation of his right to compensation. In the present case, by way of contrast, the appellants have not repudiated the contractual obligations in any respect.

We were referred during the argument to a passage in *Wille : Landlord and Tenant* (4th Edn.) p. 271 quoting *Bennet & Tatham v. Koovárjee and Kasaw* [4]. This report was unfortunately not available in Ceylon, but

[1] *(1920) C. P. D. at 493.*
[2] *(1923) 25 N. L. R. 267.*
[3] *(1924) 26 N. L. R. 97.*
[4] *(1906) 27 Natal L. R. 110.*

after I had prepared my judgment, Mr. Chelvanayakam was able to obtain for me an authenticated copy of the opinion there expressed by Bale C.J. A clause in the contract of lease in that case was to the following effect :

> " 10. The said tenant shall give up possession of the land granted, with any improvements and all standing crops, and all fruit trees and plants thereon, on the day of the expiration of the tenancy ". (at p. 113).

The Supreme Court of Natal held that, upon the termination of the lease, (whether by effluxion of time or upon prior forfeiture), the terms of the contract " clearly entitled the lessor to take possession of the property, including the improvements, *without paying any compensation* ". I am fortified by this decision in the view which I had independently reached. Wille regards the case as providing an example of an implied contractual renunciation of a lessee's right to be compensated under the general law for improvements effected by him.

I would set aside the judgment appealed from. The respondent's counter-claim for compensation must be dismissed, and a decree entered against him in favour of the appellants for his admitted liability in the sum of Rs. 4,465. The respondent will also pay to the appellants their costs in both Courts.

H. A. DE SILVA J.—I agree.

*Appeal allowed.*