

1962 Present : H. N. G. Fernando, J., and T. S. Fernando, J.

WILLIAM SILVA, Appellant, and K. ATTADASI THERO, Respondent

S. C. 283/1960—D.C. Kandy, 1575

Compensation for improvements—Improvements effected on land with knowledge and consent of owner—Improvements made by a “lessee” under a non-notarial document—Jus retentionis.

A person who improves a land on the faith of a document from the owner which turns out to be void in law is entitled to retain possession, and is not liable to be ejected, until compensated for the improvements.

Defendant entered into occupation of a land and erected a building thereon after the execution of a non-notarial document which purported to be a lease from the plaintiff's predecessor in title, the object of the purported lease being that the defendant should construct a permanent building of specified dimensions, paying a ground rent of 33 cents per month.

Held, that the document, being non-notarial, was void and conferred no rights of occupation on the defendant, who was therefore never a tenant of the plaintiff. The defendant had, however, the rights of a *bona fide* possessor and was therefore entitled to remain in possession of the land until he was paid the compensation due for the improvement, namely the value, at the time of the action, of the building which he erected with the express consent of the plaintiff's predecessor.

APPPEAL from a judgment of the District Court, Kandy.

S. Sharvananda, for defendant-appellant.

B. J. Fernando, for plaintiff-respondent.

Cur. adv. vult.

March 29, 1962. H. N. G. FERNANDO, J.—

The only question for determination in this appeal is whether the Defendant, who is to be ejected from the Plaintiff's land, is entitled to a *jus retentionis* until he is paid compensation for improvements effected on the land with the knowledge and consent of the Plaintiff's predecessor in title. The Defendant's appeal is against a finding of the learned District Judge that, although he is entitled to compensation in respect of the building erected by him, his claim for compensation can only be enforced after he vacates the land. This finding is based upon *dicta* of this court in the cases of *Alles v. Krishnan*¹, and *Jafferjee v. Cyril de Zoysa*², to the effect that a tenant's right to claim compensation accrues after the tenancy has expired and after he has vacated the leased property. Although counsel has invited us to consider whether these *dicta* correctly express the common law applicable in Ceylon, it is unnecessary for us to examine their correctness in the circumstances of this particular case.

¹ (1952) 54 N. L. R. 155.

² (1953) 55 N. L. R. 127.

The Defendant entered into occupation of the land and erected a building thereon after the execution of the document *D1* which purported to be a lease executed by the owner, the object of the purported lease being that the Defendant should construct a permanent building of specified dimensions, paying a ground rent of 33 cents per month. This document, being non-notarial, was plainly void, and the Plaintiff's action for ejectment depended on the fact that the document conferred no rights of occupation on the Defendant, who was therefore never a tenant of the land. That being so, the decisions which construe the law applicable in a case in which a tenant may claim compensation at the termination of the period of the tenancy are not applicable. What is directly applicable is the decision of Garvin, J. in *Nugapitiya v. Joseph*¹, and it is useful to cite in full his observations as to the mode in which the right to compensation has been accorded in our law to a person who improves a land on the faith of a document from the owner which turns out to be void in law :—

“ 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 right 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 a direct bearing on the question, and this is that the improvements were made 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 might 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*² 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 a *bona fide* possessor, including a right to retain possession until compensated. The case of *Mohamadu v. Babun* (*supra*) is referred to by

¹ (1926) 28 N. L. R. 140.

² (1912) 2 C. A. C. 86.

Bertram, C. J. in *Davithappu v. Bahar*¹, who regards it as development 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 *utilis possessio* which is akin to *possessio civilis*, as is suggested by the same learned Judge in the case of *Appuhamy et al. v. Doloswala Tea and Rubber Co.*² 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."

Counsel for the Plaintiff-Respondent has not referred us to any subsequent decision which doubts the correctness of the view here expressed by Garvin, J. On the contrary, the recent decision of the Privy Council in *Hassanally v. Cassim*³ confirms the view that in a case where an owner repudiates an alleged contract of tenancy and relies upon its invalidity, the claim of the occupier to compensation for improvements is not to be treated as a claim by a tenant.

The decision in *de Silva et al. v. Perusinghe*⁴ does not deal with a case in which the owner of property repudiated a purported tenancy. In so far therefore as it held that a tenant has no *ius retentionis* even though he may effect improvements in good faith the decision is of no assistance in determining the rights of a person who has not been in fact a tenant.

Following the decision in *Nugapitiya v. Joseph (supra)*, I hold that the Defendant must be accorded the rights of a *bona fide* possessor, and is therefore entitled to remain in possession of the land until he is paid the compensation due for the improvement, namely the present value of the building which he erected with the express consent of the Plaintiff's predecessor. The value was in dispute at the trial, but no finding as to the value was reached. When the record is received in the District Court, the District Judge will proceed to reach such a finding after hearing such evidence as the parties may adduce as to the present value of the building. He will thereafter enter decree for ejectment, but the decree must provide that writ of ejectment cannot issue until the Plaintiff pays to the Defendant the amount fixed as compensation less any amount due as arrears of rent from 20th October 1951 to the date of issue of writ.

The decree already entered is set aside *pro forma*. The Defendant will be entitled to the costs of the previous proceedings in the District Court as well as to the costs of this appeal.

T. S. FERNANDO, J.—I agree.

Decree set aside.

¹ (1923) 26 N. L. R. 73.

² (1921) 23 N. L. R. 229.

³ (1960) 61 N. L. R. 529.

⁴ (1939) 414 C. L. W. 137.