1957 *Present:* H. N. G. Fernando, J., and T. S. Fernando, J.

M. M. MOHAMED CASSIM, Appellant, *and* A. R. ZANEERA UMMA *et al.*, Respondents

S. C. 619—D. C. Colombo, 6759/P.N.

Fideicommissum—*Lease of property by fiduciarius—Improvements made bona fide by lessee—Claim by lessee for compensation from the* fideicommissarii—"*Unjust enrichment*".

A lessee of a *fiduciarius* is not entitled to claim compensation from, or a *jus retentionis* against, the *fideicommissarii* in respect of improvements made by him on the fideicommissary property in good faith and in ignorance of the existence of a *fideicommissum*. The rights, if any, arising from a contract between a lessor and lessee cannot be enforced by the lessee as against fideicommissary owners who were not parties to the contract.

APPEAL from a judgment of the District Court, Colombo.

Sir Lalita Rajapakse, Q. C., with *C. Chellappah* and *V. C. Gunatilaka*, for the plaintiff-appellant.

H. V. Perera, Q. C., with *G. T. Samerawickreme* and *Miss Maureen Seneviratne*, for the defendants-respondents.

Cur. adv. vult.

September 5, 1957. H. N. G. FERNANDO, J.—

This is an action for a declaration of title to a property now bearing assessment No. 113, New Moor Street, Colombo, and for a sale of the property under the Partition Act. The plaintiff claimed that the property was held by one Rahimuth Umma under a bond of fideicommissum in favour of her descendants, and that in terms of the instrument creating the entail, title is now vested as to a half-share in the 1st defendant and as to a one-eighth share in each of the following, that is the plaintiff and the 2nd, 3rd and 4th defendants, in each case subject to the fideicommissum. The 1st defendant is a daughter of Rahimath Umma, and the other claimants are the children of another daughter now deceased. The 8th, 9th and 10th defendants, being the children of the 4th defendant and therefore prospective fideicommissaries are made parties under section 5 of the Act.

None of the parties already mentioned has contested the action, but the 6th and 7th defendants do so in the following circumstances. As representatives of the Estate of the 5th defendant, now deceased, they filed answer denying the existence of a fideicommissum and pleading that on the death intestate of Rahimath Umma (in 1921) her daughter the 1st defendant became the sole and absolute owner of the property; they claimed that the 1st defendant had leased the property to the 5th defendant by 6 D2 of 1945 for a period of 30 years, that rent for the first 15 years of the term (that is until 31st December 1960) had been paid in advance; and further that in terms of the lease the 5th defendant had

erected buildings to the value of Rs. 35,000. They prayed for a dismissal of the action, or in the alternative for payment to them out of the proceeds of sale of the value of the buildings. At the commencement of the trial the contest as to title was abandoned, and the only point of contest upon which the parties went to trial concerned the question of compensation. On this point too, Counsel restricted the claim to Rs. 25,000 odd which is the amount of compensation ultimately awarded in the decree. But the learned trial Judge went further than the contesting defendants appear to have anticipated, and in ordering decree for sale declared that they would be entitled to remain in possession of a half-share of the premises and of the entirety of the buildings for the full term of the lease, that is until December 31st 1976 ! The plaintiff has appealed against both the award of compensation and the declaration in favour of the contesting defendants.

The lease 6 D2 in favour of the 5th defendant clearly provided that the lessee should erect buildings on the land, and that he would at the end of the 30 year term deliver possession of the buildings to his lessor without payment of compensation, and it is clear that the buildings were in fact erected on the faith of these provisions in the lease and in ignorance of the fact that persons other than the lessor had any rights or interests in the land. The question which arises is whether a lessee of one fiduciary owner who in good faith makes improvements is entitled to claim compensation for improvements as against the other fiduciary owners and prospective fideicommissaries and if so whether there is any *ius retentionis* until the payment of such compensation.

An answer to this question was formulated in the case of *Soysa v. Mohideen* [1] many years ago. In that case the owner of a land donated it to A, B, C and D subject to a fideicommissum in favour of the issue of the donees with a provision that upon the death issueless of any donee the other donees would succeed to the share subject to a fideicommissum in favour of their own issue. C and D died issueless and thereafter the donor purported to revoke the original deed and to re-donate the property absolutely to A and B who subsequently leased the property to the defendant for a period of 15 years, the lease containing a condition that upon its termination A and B should take over any buildings erected by the lessee, paying to the lessee half the cost of erection. Shortly before the end of the term stipulated in the lease, A's children successfully claimed half the property on the footing of the original deed and of the invalidity of the purported revocation. The only question that remained was whether the defendant lessee was entitled to claim compensation for the buildings he had erected. The Full Court unanimously decided that the lessee was not entitled to compensation. The following passages occur in the judgment of Pereira, J. at pages 285 and 286 :—"It is now well-settled law in the Colony that, in order to be entitled to compensation for improvements, a person should have had, not only possession of the property improved, but bona fide possession of it. By 'possession' is here meant what was known to the civil law as the *possessio civilis* as distinguished from *possessio naturalis*. The former, of course, meant *detentio animo domini* (3 Burge). At one time it was thought that,

[1] *(1914) 17 N. L. R. 279.*

in Ceylon, even a mala fide possessor might recover compensation for improvements, and that a lessee might also, in certain circumstances, even in the absence of express or implied agreement with the lessor, do so. But all doubts as to the absence of right in a mala fide possessor to recover compensation for improvements were set at rest by the judgment of the Full Court in the case of *The General Ceylon Estates Co. Ltd. v. Pulle.*" "A lessee, however, is not without his rights in respect of improvements made by him on the property leased with the consent or acquiescence of the lessor of the property leased. As explained by Chief Justice Maasdorp (Maas. Inst. Vol. II pp. 56, 57), a lessee who makes improvements on the property leased with the consent or acquiescence of the lessor has a right to compensation, and also a tacit mortgage, for the value of the materials over the property improved. *This of course, is a right resulting from contract, and it cannot be enforced as against a person who is no party to the contract.* It may be that the lessor or his legal representative may claim the benefit of the lessee's improvements and be entitled to compensation. The question here involved does not arise in the present case, and need not be further considered." In my opinion the legal consequences of the transaction involved in the present case would be identical with those which flowed from the facts in *Soysa v. Mohideen* [1]. In both cases the lessee acted in good faith in ignorance of the existence of a fideicommissum, in both cases there had been a lease by a person purporting to claim as absolute owner but who ultimately turned out to be a fiduciary, and in both cases the lease has to be held inoperative in view of an assertion of title by fideicommissary heirs. In fact the present case from the point of view of Equity appears to be stronger for the claimants; because firstly, here the claimants are the heirs of a deceased sister of the lessor, whereas in *Soysa v. Mohideen* the claimants were the children of the lessor although they claimed not in that capacity but on an independent title under the deed creating a fideicommissum; and *secondly* the lease in the present case provided for surrender of the buildings without compensation upon termination and not, as in *Soysa v. Mohideen,* for surrender with half compensation. While the application of that decision is in my opinion conclusive against the claim of the contesting defendants, I shall consider Mr. Perera's argument that subsequent decisions have, by recognition of the principle of "unjust enrichment", modified the rigour of the earlier decision.

In *Livera v. Abeysinghe* [2] this Court held that a purchaser from a fiduciary heir cannot claim compensation for useful improvements from the *fideicommissarii,* but upon appeal to the Privy Council (reported in 19 N. L. R. 492) the question of law was left undecided because Their Lordships preferred to act upon the finding of fact that the improver was not acting bona fide and had to be treated as a mere trespasser. The same point arose again in *Dassanyake v. Tillekeratne* [3] where without much discussion this Court admitted the right of a bona fide possessor, who was a grantee from a fiduciary, to claim compensation for improvements. *Wijetunge v. Duwalage Rossie* [4] was a decision of Wijeyewardene and Jayetileke JJ. to the same effect and the Court there relied on

[1] *(1914) 17 N. L. R. 279.*
[2] *(1914) 18 N. L. R. 57.*
[3] *(1917) 20 N. L. R. 89.*
[4] *(1946) 47 N. L. R. 361.*

certain Roman-Dutch authorities. These decisions are not to my mind a modification of the principle stated in *Soysa v. Mohideen*, but only gave effect to a principle recognised in that case, namely that a person who in good faith has the *possessio civilis* is entitled to compensation as against the true owner.

In *Appuhamy v. Doloswala Tea and Rubber Co.* [1] one Clarke had purchased the land and subsequently leased it to the defendant Company which had planted up the land during the pendency of the lease. The true owners of an undivided share subsequently claimed their share, and the right to compensation for the improvements was set up *not by the defendant company but by their lessor Clarke*. This Court held that Clarke had purchased the land in good faith in ignorance of the title of the plaintiffs. Clarke himself was an added defendant and he claimed compensation for the plantations made by the defendant Company. The question of difficulty which the Court had to decide was whether Clarke was entitled to claim compensation having regard to the fact that the improvements were made not by Clarke himself but by his lessee, the Company. Garvin, J. observed that the question had to be decided on first impression, and in so considering it, stated very forcibly his reasons for holding that a bona fide possessor "cannot be denied the rights of an improver merely because it was not his hand or the hand of his agent that made or erected the improvement." In reaching this conclusion the learned Judge took account of the fact that the defendant Company in that case was a lessee who would under the terms of his lease have been entitled to receive compensation from Clarke. But the question whether the Company itself (the lessee-improver) could have claimed compensation from the true owner was not decided for the reason that the Company in that case was, to use the language of Jayewardene A. J., "satisfied to let the lessor obtain compensation for the improvements". The decision is authority only for the proposition that a bona fide possessor is entitled as against the true owner to compensation notwithstanding that the improvements are effected not by himself but by his lessee. I should add that Jayewardene A. J., in the judgment to which I have just referred, cited, as authority for the view that a lessee can assert a right to compensation against the true owner for improvements made in good faith in the belief that his lessor had title, the case of *Hevavitarane v. Dangan Rubber Co.* [2]. That case, although decided only a few months before *Soysa v. Mohideen*, is not referred to in the Full Bench decision which should in my view be followed in preference. This would be particularly so upon the present facts where the dispute, as in the Full Bench decision, is between a lessee and persons claiming under a fideicommissum. In the *Dangan Rubber Company* case the question whether a lessee's claim for compensation can be maintained against fideicommissary claimants did not arise. The view that the decision in that case is not applicable upon the present facts is considerably strengthened by the circumstance that Walter Pereira, J. who in that case upheld the claim for compensation did not think fit to refer to it in his subsequent judgment in *Soysa v. Mohideen*.

[1] *(1923) 25 N. L. R. 267.* [2] *(1913) 17 N. L. R. 49.*

Silva v. Banda [1] was a case of a claim for compensation by a lessee *against his lessor* and the real ground of the decision as stated by Bertram C. J. was that the lessee is not restricted in his right to recover compensation by the terms of his covenant and that his right is a general one entitling him to compensation for improvements acquiesced in by the lessor. There was no question of any claim by a lessee against a true owner. *Nugapitiya v. Joseph* [2] was a case where the owner of a land had by a non-notarial instrument purported to lease the land to the lessee "to build a tiled boutique thereon". The claim for compensation was preferred by the lessee against a transferee from the original owner but, for reasons which it is not necessary to discuss, the claim was considered in all respects as though it had been preferred against the original owner, and that claim was determined in favour of the lessee on the ground of acquiescence, namely that the owner had stood by and allowed the improvements to be made. The principle applied by Garvin, J. in this case was not that the lessor is deemed to be a bona fide possessor, but that an owner who acquiesces is estopped by his own fraud from pleading the *mala fides* of the possessor in order to take the benefits of the improvements without compensation. There was no question in this case of recognising the rights of a lessee as such because the lease was clearly null and void. Nor was there any determination of the rights of a lessee as against a "third party" who turned out to be the true owner, because that question was never raised, and further because in any event the plaintiff was not a "third party" but a successor in title to the person who let the lessee into occupation. *Wijeyesekera v. Meegama* [3] is also a decision only to the effect that where a person who is in the position of a lessee makes improvements with the consent of the owner he is entitled to compensation as against the heirs of the owners.

The rights of a lessee *as against his lessor* were considered somewhat exhaustively in *Jafferjee v. de Zoysa* [4] by Gratiaen, J. the real effect of whose opinions is that under the general law and in the absence of express covenants to the contrary, the only right of an improving tenant is the option either of removing the materials of the improvement or of receiving compensation for the loss of materials which otherwise passed to the lessor. The argument that a lessee has any claim to compensation against a true owner claiming adversely to the lessor receives no assistance whatever from this judgment.

Having considered many of the subsequent cases I would hold that none of them have in any way qualified the principle laid down in *Soysa v. Mohideen* [5] that the rights, if any, arising from a contract between a lessor and lessee cannot be enforced by the lessee as against fideicommissary owners who were not parties to the contract. Some attempt was made to set up the ground of acquiescence upon the following evidence of the plaintiff:—

Q. 'The 5th defendant put up all the buildings on this land?'
A. 'Yes.'
Q. 'In 1949?'
A. 'Yes.'

[1] *(1924) 26 N. L. R. 97.*
[2] *(1926) 28 N. L. R. 140.*
[3] *(1939) 40 N. L. R. 340.*
[4] *(1953) 55 N. L. R. 124.*
[5] *(1914) 17 N. L. R. 279.*

The plea of acquiescence was in the teeth of the position taken up in the answer which was a complete denial of the fideicommissum and of the title of the plaintiff and the other claimants, and in any event the learned trial Judge was not invited to hold, and in my opinion could surely not have held, on such slender evidence, even that the plaintiff himself, let alone his brothers, sisters and nephews, had "stood by while the 5th defendant improved the property". The contesting defendants have therefore failed to establish right to compensation and have failed *a fortiori* to establish a *ius retentionis*.

There are two further matters to which reference has to be made. In their statement of claim, the contesting defendants prayed for a refund from the 1st defendant of the rent already paid by them for the unexpired portion of the fifteen year period for which rent had been paid in advance to the 1st defendant. In regard to this matter, however, no point of contest was framed at the trial nor was there any evidence from the plaintiff's side to prove the payment to the first defendant. In the circumstances I do not feel called upon to consider this claim, which is for quite a small amount and would appear to have been abandoned at the time of the trial.

There is also the question whether the declaration in the decree that the land is to be sold subject to the rights of the lessee can be permitted to stand. In *Samaraweera v. Cunjimoosa* [1] which purports to be a decision of a Full Bench it was held that a lease was not an encumbrance within the meaning of section 8 of the former Partition Ordinance (Cap. 56) and that when a land is sold under the Ordinance a lease is extinguished "and the lessee can only get his interest assessed and an equivalent in money in the distribution of proceeds out of the share of his lessor." It may well be that the law is now different because section 48 of the new Partition Act of 1951 under which the present action was brought defines "encumbrance" to include a lease and empowers a Court in entering decree for sale to preserve the interests of a lessee in entering the decree. But even if there has been such a change in the law I doubt whether the power of the Court can be exercised in circumstances such as those existing in this case. At the best the contesting defendants can only claim that the half share of the property to which the 1st defendant is entitled is subject to the lease and that therefore the decree should be for the sale of the entire property subject to the leasehold interests in that half share, but considering that the half share is itself subject to a fideicommissum and will pass free of the lease to the fideicommissaries upon the death of the 1st defendant, it would be gravely prejudicial to the interests of the latter if such a reservation were to be made in the decree for sale. In any event the point is only academic because the contesting defendants did not ask in their prayer for such a reservation in the event of a sale. The connected question whether the value of the lessee's interest should be paid to the contesting defendants out of the proceeds of sale also does not arise for the same reason.

[1] *(1915) 18 N. L. R. 408.*

I would accordingly allow this appeal holding that the 6th and 7th defendants are not entitled as against the plaintiff to any rights. The decree for sale entered by the District Judge is amended by striking out all the directions which follow the order for the sale of the property under the Partition Act and the bringing into Court of the proceeds thereof to abide the further orders of the Court. The 6th and 7th defendants will pay to the plaintiff Rs. 105 as the costs of contest in the District Court and will also pay the costs of this appeal.

T. S. FERNANDO, J.—I agree.

Appeal allowed.