Feb. 4, 1910

Present: Mr. Justice Middleton and Mr. Justice Grenier.

PUNCHIRALA *v.* MOHIDEEN *et al.*

D. C., Kandy, 18,626.

*Improvements effected by lessee—Compensation—*Jus retentionis.

A lessee who has planted trees on the lessor's land, with the consent and acquiescence of the lessor, is entitled to the mere cost of the planting at the time of planting, and the lessee has a tacit hypothec for the amount of that cost in the land improved by it, but has no *jus retentionis*. If there was no acquiescence or consent, then the lessee is entitled to nothing.

THE facts material to this report are set out in the judgment of Middleton J.

A. St. V. Jayewardene, for the plaintiff, appellant.

B. F. de Silva, for the defendants, respondents.

Cur. adv. vult

February 4, 1910. MIDDLETON J.—

This is an appeal from a judgment in favour of the plaintiff for the land in dispute, but permitting the first and fourth defendants to remain in possession until the payment of compensation by the plaintiff for the tea planted thereon by the first and fourth defendants, and further dismissing the plaintiff's action against the second and third defendants with costs. The second and third defendants were employés of the first and fourth, and were in possession through them. They, however, disclaimed title, and did nothing to prevent the plaintiff recovering possession. The evidence shows they helped first defendant in his boutique, but there is nothing to show they had anything to do with the land.

I think the judgment in this respect must stand therefore. As regards the first and fourth defendants, they are not, strictly speaking in the eye of the law, possessors at all, but lessees from the plaintiff. They cannot, therefore, be in the position of *bona fide* or *mala fide* possessors, and their claim for compensation must depend on their position as such lessees. If it is proved that the lessee had planted trees on the lessor's land with the consent or acquiescence of the lessor, then the lessee is entitled to the mere cost of the planting at the time of planting, and the lessee has a tacit hypothec for the amount of that cost in the land improved by it, but has no *jus retentionis*. If there was no acquiescence or consent, then the lessee is entitled to nothing.

Feb. 4, 1910

MIDDLETON J.

Punchirala v. Mohideen

This, I think, may be clearly inferred from *Van Der Keesel 215; Maasdorp, vol. II., 56;* as derived from the ruling in the case of *De Beer's Consolidated Mines v. London and South African Exploration Co.*, quoted by Mr. Walter Pereira in his little book on the Right of Compensation for Improvements. I think also that tea is rather more than a plant properly so called, and in its class as a shrub may be more correctly reckoned amongst trees than plants properly so called, which Van Der Keesel states may be removed by a lessee.

I think that the burden of proof was on the defendants claiming the right of compensation and hypothec to show that they planted the tea in question with the acquiescence or consent of the plaintiff.

We called upon the first and fourth defendants' counsel to show that this had been done by the evidence in the record; but it is clear that this point was not, as it ought to have been, in issue before the Court at the trial, and that it was not even incidentally proved.

It was the duty of the first and fourth defendants to have made out their case on this point, and they have failed to do so; and in my opinion, therefore, the judgment of the District Court must be varied by depriving them of the compensation awarded therein. In other respects the judgment will stand. The first and fourth defendants will pay plaintiff's costs in both Courts.

GRENIER J.—

[His Lordship stated the facts, and continued.]

On the third issue, which involves the question whether the tea plantation now on the land was made with or without the consent of the plaintiff, there is no finding by the District Judge, who had only found as to the bare amount of compensation. On the determination of that question, the first and fourth defendants' claim for compensation largely rested. It was open to the first and fourth defendants to prove consent or acquiescence, but there is no evidence that I can find in the record in support of either. All that the District Judge finds is that the first and fourth defendants *bona fide* improved the land. This is not enough to discharge the onus cast by the third issue on the first and fourth defendants to prove consent or acquiescence. . . .

Varied.