1938 *Present :* **Abrahams C.J. and Soertsz J.**

DE SILVA *et. al. v.* SANGANANDA UNANSE *et al.*

144-5—D. C. Galle, 34,729.

Jus retentionis—*Partition action*—Bona fide *possessor—Right to compensation—Effect of decree.*

Where in a partition action compensation for improvements due to a *bona fide* possessor is determined, he has the right to retain possession until the compensation due to him is paid.

It is not necessary expressly to reserve the *jus retentionis* in the decree.

APPEAL from an order of the District Judge of Galle.

L. A. Rajapakse, for the fifth and sixth defendants, appellants.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*), for the second defendant, respondent.

N. E. Weerasooria (with him *V. Gooneratne*), for eighth and ninth defendants, respondents in appeal No. 144.

N. E. Weerasooria (with him *V. Gooneratne*), for eighth and ninth defendants, appellants in appeal No. 145.

H. V. Perera, K.C. (with him *E. B. Wikramanayake*), for second defendant, respondent in appeal No. 145.

Cur adv. vult.

January 28, 1938. SOERTSZ J.—

In this case two appeals have come before us. The first of these is at the instance of the fifth and sixth defendants, and the second, eighth, and ninth defendants are the respondents. The second appeal is made by the eighth and ninth defendants, and is directed against the second defendant alone.

Both appeals arise from an order of the District Judge of Galle in which he held that the second defendant is entitled to draw the sum of Rs. 800 less a sum of Rs. 50 which, by consent of all the parties concerned, went to the first defendant. The Rs. 800 was the amount of compensation tendered by the Executive Committee of Local Administration acting under delegation by His Excellency the Governor, in the course of acquisition proceedings under Ordinance No. 3 of 1876 in respect of certain buildings standing on a lot of land acquired for public purposes.

It is common ground that these buildings were put up by a Buddhist Monk Ratnajoti with funds he had raised among friends and relations, and that the buildings were to be used as school rooms for the children of the village. At the time the buildings were erected, the land on which they were built was held in common by a number of co-owners. They consented to or, at least, acquiesced in these operations, and, therefore, the builder or builders occupied the position of *bona fide* improvers, and as such became entitled to compensation and to the *jus retentionis* in respect of the buildings.

In this state of things, the entire land on which the buildings stood was made the subject of partition case D. C. Galle 10,541. Final decree was entered on March 11, 1934, and the portion of land on which the building stood was allotted as lot No. 6 to one Bilinduhamy, the seventh defendant in that case, "subject to the payment of Rs. 175.63 to the second defendant". It was further ordered in the decree "the seventh defendant to pay Rs. 600 to Mudaliyar Gooneratne for the school". The evidence shows that at the date of the decree Gooneratne was the manager of the school carried on in these buildings. That fact establishes that Ratnajoti put up these buildings not for himself, but to serve the children of the village.

Now, the contention of the fifth and sixth defendants-appellants is that the final decree entered in the partition case resulted in Bilinduhamy obtaining an absolute title to lot No. 6, and to the buildings on it, that is to say, a title free from any right which any person may have had over it. It was a title free from the *jus retentionis* which had accrued to the improvers. The *jus retentionis* could have been conserved in the decree, but it was not, and it was, therefore, wiped out. All that remained to the improvers was the right to claim compensation from Bilinduhamy, and that was only a personal claim they had against her and her estate. That is the argument advanced on behalf of the fifth and sixth defendants-appellants, and it is claimed in consequence, that when Bilinduhamy conveyed in 1919 to James de Silva this lot of land, he obtained a clear title to it and to the buildings on it, and that by virtue of his last will and testament that title has devolved on the fifth and sixth defendants, who are thus the owners of these buildings, and as such, entitled to the compensation tendered.

It is admitted that Bilinduhamy did not pay the Rs. 600 which she was ordered to pay for these buildings. Her successors-in-title have not paid it. If, therefore, the Rs. 800, or rather the Rs. 750 is to be paid to the fifth and sixth defendants, they get a windfall, and those who spent and laboured to put up these buildings go unrecompensed. This is a consummation devoutly to be avoided unless the law clearly compels us

to it. It is contended that that is the inevitable result of the *jus retentionis* not being reserved in the final decree. I am not satisfied that this contention is sound. Jayewardene in his Commentary on the Partition Ordinance says at pp. 129 and 130, that "the effect of the authorities dealing with claims to compensation for improvements in partition actions . . . . may thus be summarized :

1. All claims for compensation for improvements whether by co-owners or *bona fide* possessors must be asserted in the partition action as otherwise they are liable to be extinguished by the final decree.
2. The Court should decide whether any person, co-owner or *bona fide* possessor, has made any improvements.
3. The Court should also assess the value of such improvements.
4. . . . .
5. . . . .
6. In the case of *bona-fide* possessors they will be entitled to be paid the compensation due to them and to retain possession of the improvements until such compensation is paid.
7. . . . .
8. . . . .
9. . . . .
10. In a partition action when the compensation due to a co-owner is ascertained, he has the right to retain possession of the portion he has improved until the compensation due to him is paid" . . . .

In this instance, the requirements in paragraphs 1, 2, 3 above were complied with in the partition case. The results indicated in paragraphs 6 and 10, therefore, followed, and the improver was entitled to the *jus retentionis* when he was decreed entitled to compensation. It was not necessary expressly to reserve the *jus retentionis* in the decree. It was a legal implication of the declaration in the decree that the improver was entitled to compensation. Moreover in this case the improver was authorized by the soil owner to continue in possession, and he or rather his representatives, were in possession of the buildings at the time the question of compensation arose in these proceedings inasmuch as the school was being conducted in them. They were persons interested in the allotment of the compensation tendered, for section 7 of the Land Acquisition Ordinance provides for claims to compensation for all "interests", in the land sought to be acquired. A *jus retentionis* is such an interest.

It is next contended that these claims of Ratnajoti's representatives cannot be set up against the fifth and sixth defendants-appellants because Bilinduhamy conveyed to their father, their predecessor in title, the entirety of the lot and buildings free of encumbrances. This contention too, I fear, is unsound. The correct view, if I may say so with respect, appears to be that taken by Clarence J. in *Appuhamy v. Silva*[1]. He said : "If the first defendant by making improvements acquired a right to retention against Thambugalla Vidane, the mere conveyances by which title has passed from Thambugalla Vidane to plaintiff do not imperil his position. He is entitled to hold his possession till compensated by the owner for the time being. Nor is there any hardships in this so far as the purchaser is concerned, for a prudent man before buying land makes

[1] *1 S .C. R. 71.*

inquiry as to actual occupiers and the terms on which they hold". In this instance, the fifth and sixth defendants-appellants were "the owners for the time being", namely, the time of the acquisition, and they were entitled to receive the amount tendered, but were liable to pay Ratnajoti's representatives at that time, the compensation which the partition decree directed the fifth and sixth defendants' predecessors-in-title, Bilinduhamy, to pay. The fifth and sixth defendants-appellants are, therefore, entitled to Rs. 150 and Ratnajoti's representatives to Rs. 600. It was urged, however, that this sum of Rs. 150 too should go to these representatives because Rs. 750 was the sum at which Ratnajoti's improvement was valued *at the date of the acquisition.* I do not think this is right. There is no sufficient evidence, and there is no finding that Ratnajoti or those who came after him enhanced the value of the improvement after the decree in the partition case. They can, therefore, fairly ask *only for the* amount at which the compensation due was fixed in that case as between the soil owner and the improver. If for instance Bilinduhamy was able to find a purchaser wishing to pay Rs. 800 for these buildings she was entitled to sell them and out of the proceeds of sale to pay Rs. 600 for the school, pocket the Rs. 200 for herself, and request those in occupation to quit the buildings. What happened when these acquisition proceedings were launched was not different. A purchaser willing to pay Rs. 800 for the building, was forthcoming.

The Rs. 150 due out of the compensation to the fifth and sixth defendants cannot, however, be paid out to them, because they held the land which was acquired, subject to a *fidei commissum.* I therefore direct that in terms of section 37 of Ordinance No. 3 of 1876 that this sum shall be retained in the District Court of Galle to abide its further orders in accordance with that section.

In regard to the sum of Rs. 600, it was argued that it should not be paid out to the second or the eighth or the ninth defendants, because the partition decree made it payable to Mudaliyar Gooneratne. In my view this submission is devoid of substantial merit. The evidence in the case makes it clear that Mudaliyar Gooneratne was figuring in the partition case as the manager of the school. The compensation is really destined for the benefit of the school. Mudaliyar Gooneratne's heirs or his successor in the managership of the school have not made a claim. The eighth, ninth, and second defendants claim in opposition to one another as the persons occupying the position of Ratnajoti who built these school rooms in his capacity of incumbent of Bataduwe Vihare. The question then is, who the present incumbent of the vihare is. That question is easily answered. The second defendant claims to be the incumbent on a deed given to him by Ratnajoti. The deed has been produced, and what is more, the ninth defendant who filed a joint statement of claim with the seventh and eighth defendants admits that the second defendant is the incumbent. The Rs. 600 should, therefore, be paid to the second defendant but, of course, he will hold it for the school.

There is one other matter to which reference is necessary. The eighth and ninth defendants complained that without an issue being raised on the point, the trial Judge found that the second defendant who in his

evidence claimed to be Ratnajoti's senior pupil, was that in fact. That, I think, is a well founded complaint, and it must be clearly understood that this sum of Rs. 600 is awarded to the second defendant not because he is Ratnajoti's senior pupil—he may or may not be—but because he is admittedly the incumbent of Bataduwa Vihare.

I set aside the order of the District Judge and make order that Rs. 600 be paid to the second defendant as incumbent of Bataduwa Vihare to be utilized by him for the school ; and that the balance Rs. 150 be dealt with by the District Judge under section 37 of the Acquisition Ordinance.

In regard to costs, the eighth and ninth defendants have failed against the second and the fifth and sixth defendants, and must pay their costs in both Courts. The fifth and sixth defendants have failed in respect of four-fifths of their claim against the second defendant, and they must pay him some costs of their appeal against him. I think it will be sufficient if they pay him half the costs of appeal. As between them, I make no order as to costs in the lower Court, as the trial Judge made no such order.

ABRAHAMS C.J.—I agree.

Appeal allowed.