

1947

Present : Jayetileke J. and Nagalingam A.J.

MARCELINE FERNANDO *et al.*, Appellants, and
PEDURU FERNANDO *et al.*, Respondents.

53—D. C. Negombo, 12,202.

*Fidei-commissum—Improvements effected by purchaser from fiduciarius—
Right to claim compensation from fidei commissarius.*

A purchaser from a *fiduciarius* is entitled to claim compensation from the *fidei commissarius* for improvements effected by him to the *fidei commissum* property, if he was unaware of the existence of the *fidei commissum* and effected the improvements in the *bona fide* belief that he was the owner of the property.

A PPEAL from a judgment of the District Judge of Negombo.

The plaintiffs brought this action for the partition of a land. The original owners of the land had gifted it to one Peduru by deed No. 8,737 of November 21, 1862 P 1), subject to a *fidei-commissum* which extended to four generations. The deed, however, was not registered. The 4th-9th defendants claimed the land on two deeds (4 D 2 and 4 D 3) executed by the heirs of Peduru in favour of their predecessor in title Franciscu Fernando. They claimed, in the alternative, compensation for certain improvements effected by them and their predecessor in title. It was established that deed No. 8,727 created a valid *fidei-commissum*. Further, the 4th-9th defendants were entitled to compensation for the improvements effected by Franciscu Fernando—*Mudaliyar Wijetunga v. Duwallage Rossie et al.* (1946) 47 N. L. R. 361. The remaining question for consideration in appeal was whether the 4th-9th defendants could claim compensation for the improvements effected by them after they entered into possession of the land unaware of the *fidei-commissum* attaching to it and in the belief that they were the owners of the property.

L. A. Rajapakse, K.C. (with him H. W. Jayawardene), for the 4th-9th defendants, appellants.—The learned District Judge should not have held that Franciscu Fernando was a *mala fide* possessor. The deed P 1 was not registered and the evidence is that Franciscu was not aware of its contents till a copy was obtained for this case. There was no reason for him to think that by deeds 4 D 2 and 4 D 3 he did not become the owner absolutely. A fiduciary is entitled to claim compensation for improvements from the *fideicommissary*—*Dassanayake v. Tillekeratne*¹; *Du Plessis v. Estate Meyer et al.*²; *Brunsdon's Estate v. Brunsdon's Estate et al.*³; *Wijetunga v. Duwalage Rossie*⁴.

N. E. Weerasooria, K.C. (with him E. B. Wikramanayake and S. R. Wijayatilake), for the plaintiffs, respondents.—The cases referred to do not apply to the facts of the present case. Here we are concerned with the right of a purchaser from a fiduciary to claim compensation from the

¹ (1917) 20 N. L. R. 89.

² S. A. L. R. (1920) S. C. 159.

³ S. A. L. R. (1920) S. C. 1006.

⁴ (1946) 47 N. L. R. 361.

fideicommissary. The Privy Council case of *De Livera v. Abeyasinghe*¹ is more in point. There it was held that the purchaser from the fiduciary was not entitled to compensation.

[JAYETILEKE J.— Did the Privy Council in that case lay down a general principle or did they merely say that in the circumstances of that case the purchaser not acting *bona fide* and being a trespasser was not entitled to compensation ?]

The Privy Council did not hold that a purchaser acting *bona fide* was entitled to compensation. This judgment should be considered in relation to the facts set out in the judgment of the Supreme Court. Moreover, in this case it cannot be said that the improvements were necessary or even beneficial to the property concerned. In fact we are prepared to allow them to remove the alleged improvements.

L. A. Rajapakse, K.C., in reply.—Under the Roman-Dutch law a purchaser from a fiduciary is entitled to compensation—*vide* Steyn's *Law of Wills in South Africa* at page 274. The Privy Council decision is by implication an authority upholding this proposition; *vide* report of the case in 1917 A.C. 534.

S. R. Wijayatilake (with permission of Court).—The case referred to by Steyn does not bear out the principle as stated by him.

The South African cases cited for appellant have been referred to in a later decision and a distinction appears to have been drawn between different classes of fiduciaries. See *Revington et al. v. Short et al.*²

A fiduciary is entitled to compensation in respect of such improvements as a *bona fide* possessor would be entitled to. He can recover necessary expenses, but only such useful expenses as enhance the value of the property, and then only to the extent of the actual expenditure. See *Ex parte Boshoff*³.

Cur. adv. vult.

May 7, 1947. JAYETILEKE J.—

This is an appeal from a decision of the District Judge which arose under these circumstances. The plaintiffs brought this action for a partition of the land depicted in plan Z. They alleged that the original owners of the land were Rapiel and his wife Maria and that they gifted it to their son-in-law Peduru by deed No. 8,737 dated November 21, 1862 (P 1) subject to a fidei-commissum which extended to four generations. The fourth to ninth defendants denied that P 1 created a fidei-commissum and claimed the land on two deeds No. 11,484 dated April 29, 1897 (4 D 2) and No. 16,943 dated July 2, 1906 (4 D 3) executed by the heirs of Peduru in favour of their predecessor in title Franciscu Fernando. They claimed, in the alternative, compensation for certain improvements effected by them and their predecessor in title. The District Judge held that P 1 did not create a valid fidei-commissum, and there was an appeal to this Court against that order. This Court reversed the judgment of the District Judge and sent the case back for inquiry into the alternative claim. At the inquiry, after evidence was led on both sides, the question was raised whether the 4th-9th defendants were legally entitled to claim compensation. The District Judge held that

¹ (1917) 19 N. L. R. 492.

² S. A. L. R. (1920) C. P. D. 462.

³ S. A. L. R. (1943) O. F. S. P. D. 56 and 170.

Franciscu Fernando was a *mala fide* possessor, and that, therefore, the 4th-9th defendants were not entitled to claim compensation. The present appeal is against that order. At the argument before us Counsel for the 4th—9th defendants urged that the finding of the District Judge is in the teeth of the evidence, and he invited our attention to two passages in the evidence at pages 40 and 54 of the typewritten copy which show that P 1 was never registered and that no one was aware of its contents till a copy was obtained for the purposes of this case. It must be noted that at the time P 1 was executed there was no provision in our law for the compulsory or optional registration of deeds. In view of the evidence it seems to me that it was not possible for the District Judge to hold that Franciscu Fernando was a *mala fide* possessor. The deeds 4 D 2 and 4 D 3 purported to convey the lands to him absolutely and there is no reason to think that he did not enter into possession in the *bona fide* belief that he was the owner. What then are his legal rights in regard to any improvements effected by him to the property? On this question the judgment of the Privy Council in *De Livera v. Abeyasinghe*¹ appears to be of some assistance though the facts are different from those in the present case. The facts of that case show that the claim for compensation was made by a purchaser from a fiduciary who was in the position of a trespasser. In the course of his judgment Earl Loreburn said:—

“In the facts of the present case the appellant was not acting *bona fide*. He knew the risks, he knew the facts, showing that he was a mere trespasser in what he did, and he knew that he was invading the rights of the heirs, and knew that Mary de Livera had no right to alienate, and knew that he was altering the character of this property without the consent of the persons whose interest it was to preserve it, and without any authority from anyone except the trustee whose duty it also was to preserve it. Their Lordships think in such a case as this, it is quite impossible to suppose compensation would be payable”.

Their Lordships did not decide the question whether a purchaser from a fiduciary is entitled to claim compensation from the fideicommissary for improvements effected by him to the property, but it seems to me that there is necessarily implicit in the passage quoted above that he is entitled to do so if he effected the improvements in good faith. There is ample authority that a fiduciary or his estate is entitled to claim compensation as against the fideicommissary for beneficial expenditure upon the property which forms the subject of the fidei-commissum. (*Vide Dassanayake v. Tillekeratne*²; *Du Plessis v. Estate Meyer and others*³; *Brunsdens Estate v. Brunsdens Estate and others*⁴. There is also authority that a purchaser from a fiduciary would likewise be entitled to compensation⁵.

The question of principle raised here is indistinguishable from that which was argued in *Mudaliyar Wijetunge v. Duwalage Rossie et al.*⁶,

¹ (1917) 19 N. L. R. page 492 at page 493.

² (1917) 20 N. L. R. page 89.

³ (1913) Cape Supreme Court Reports 1006.

⁴ (1920) Cape Supreme Court Reports 153.

⁵ Steyn “Law of Wills in South Africa” page 274.

⁶ (1946) 47 N. L. R. page 361 at 372.

before my brother Wijeyewardene and myself. The facts of that case are as follows:—Two persons, Nandiris and Siyaneris, were entitled to a land in equal shares. By deed P 3 of 1906, Nandiris gifted his half share to Carlina subject to the condition that she should not sell mortgage or otherwise alienate the said share and that upon her death it should devolve on “all her children being heirs descending from her and those who have obtained authority as her executor or administrator”. By deed D 1 dated March 22, 1918, Nandiris purported to cancel the conditions in P 3 and to gift the half share absolutely to Carlina. By deed D 6 dated March 24, 1918, Carlina transferred the half share to Nandiris. In the year 1919, one E. C. de Fonseka wanted to purchase that share from Nandiris and he consulted his legal advisers whether the title was good. He was advised that the title was good and he purchased the share on deed D 3 of 1919. After his purchase he entered into possession and planted the land with budded rubber. The question arose whether E. C. de Fonseka was a *bona fide* possessor. It was held that he was and that the purchaser at the sale in execution against him was entitled to claim compensation for the improvements effected by him. This is an exact authority which determines the present case.

I would, accordingly, set aside the order appealed against and send the case back so that the District Judge may decide what sum the 4th-9th defendants are entitled to on the findings already made by him. If he has failed to find on any of the items claimed by the 4th-9th defendants he will hold a further inquiry, if necessary, and make his decision. As the 4th-9th defendants have claimed unsuccessfully to exclude a portion of the land from the action I would award them half costs of appeal. The parties will bear their own costs of the inquiry.

NAGALINGAM A.J.—I agree.

Order set aside.
