

1962

Present: Herat, J.

R. FERNANDO *et al.*, Appellants, and H. S. COORAY, Respondent*S.C. 21/61—C.R. Colombo, A1481/74430*

*Improvements made by a licensee—Bona fide improver—Right to claim compensation—
Right to remain in possession until compensation is paid.*

When the owner of a land, without protest and being fully aware, allows a person to enter that land and improve it by erecting a building, the latter is in the position of a *bona fide* improver and is entitled not only to claim compensation for the value of the building but also to a *jus retentionis* until compensation is paid.

¹ (1814) *Gurney's Rep.* p. 479.

APPEAL from a judgment of the Court of Requests, Colombo.

C. D. S. Siriwardene, for the Defendants-Appellants.

No appearance for the Plaintiff-Respondent.

June 14, 1962. HERAT, J.—

In this case the plaintiff, one Somapala Cooray, sued the three defendants-appellants for damages in respect of wrongful possession of a land and a building and for ejectment therefrom. The action was a representative action where the three defendants-appellants had been appointed under section 16 of the Civil Procedure Code to represent an unincorporated society known as Sri Punyawardhana Samitiya of Rajagiriya. The 3 defendants-appellants were office-bearers in the said society. The facts as found by the learned Commissioner of Requests are as follows:— The plaintiff-respondent's father, one M. H. C. Cooray (hereinafter referred to as Cooray Senior), was a member of the abovementioned society sometime ago. The said society was formed to run a Dhamma school. It appears that the land and premises on which the society ran that school originally, for various reasons became unavailable to the society. The society was at a loss as to where it should conduct its activities. Thereupon Cooray Snr. came to the society's rescue and permitted the said society to build a structure for the purpose of conducting its activities upon the land claimed in this action which undoubtedly belonged to him.

Subscriptions were collected from members of the public by the society and, as the learned Commissioner finds, a substantial building was erected on the land in question with the leave and licence of Cooray Snr. No protests of any kind or conditions were laid down by Cooray Snr. as regards the erection of the said building. After the said building had come into existence and the Dhamma school was conducted therein further activities of an educational nature were conducted by the society on week days.

Cooray Snr. died in 1955 but shortly before his death he executed a deed of gift including the land on which the said building stands, in favour of his son Somapala Cooray the plaintiff-respondent. The plaintiff-respondent states that he duly notified the society to quit and deliver quiet possession of the land and premises in question to him but that the society has failed to do so. He thereafter brought the present action claiming damages for wrongful possession and for ejectment from the said building. The defendants-appellants on behalf of the society as an alternative claim stated that the building was worth about Rs. 15,000

and claimed compensation. Although the claim of Rs. 15,000 was beyond the jurisdiction of the Court of Requests and judgment cannot be given to the defendants-appellants in that sum, in any event it was within their rights to raise such claim for compensation in order to meet the claim of the plaintiff-respondent for ejectment and damages.

As Cooray Snr. voluntarily allowed the building to be erected without protest and it was so erected with his leave and licence as the Commissioner finds the question arises as to what the position of the society is. It is now clear law that if a person who is the owner of a land without protest and being fully aware allows another to enter that land and improve it by erecting a building he cannot seek ejectment of the builder from the building and the land unless the builder is given adequate compensation for the building erected. The development of the modern Roman Dutch Law has tended to put such a builder in the shoes of a *bona fide* improver and to give him not merely the right to claim compensation for improvements but also to claim a *jus retentionis* in respect of the property improved until compensation is paid. This principle is indicated in the judgment of Lord de Villiers, Chief Justice, in the case of *Rubin v. Botha*¹ and in the more recent judgment of the Privy Council in the case of *Hassanally v. Cassim*² where the opinion of the Judicial Committee was delivered by Viscount Simonds. Therefore, applying the principles of law stated above, the society in this particular case had a right to claim compensation for the value of the building erected on the said land in suit and also to remain in possession thereof as well as the land appertaining to the building until compensation was paid in view of the *jus retentionis* given to it by the law. It is admitted that the plaintiff-respondent has not tendered any compensation or made any offer of compensation to the society. It cannot, therefore, be said that the society is in wrongful possession of the building and its adjuncts so that no claim for damages can be successfully maintained against the society. For the same reasoning the claim for ejectment must also fail because until compensation is duly assessed and tendered to the society the society has a right to remain in possession in view of the *jus retentionis* referred to above.

I, therefore, set aside the decree of the Court of Requests. I allow the appeal and dismiss the plaintiff-respondent's action.

The appellants will be entitled to costs of this appeal and also to costs in the Court of first instance.

Appeal allowed.

¹ 1911 A. D. 568.

² (1960) 61 N. L. R. 529.