1939 *Present :* **Keuneman and Nihill JJ.**

WIJEYESEKERE *v.* MEEGAMA.

212—D. C. Kalutara, 19,741.

Jus retentionis—*Land planted with consent of owner—Right of planter to compensation for improvements*—Jus retentionis *granted only to those with* possessio civilis—*Extension of doctrine.*

A person who improves a land with the consent or acquiescence of the owner is entitled to compensation for improvements but not to a *jus retentionis.*

Under the Roman-Dutch law the right of retention is only granted to persons who have the *possessio civilis* and to certain special classes of persons whose position has been held to be akin to that of a possessor.

This right has been extended by the decision of our Courts to certain classes of persons who may not come under the strict definition of possessors, as for example persons who are entitled to a planter's share and to persons who make improvements in the *bona fide* expectation of receiving a formal title.

[1] *9 Tax Cases 297.*

[2] *11 Tax Cases 707.*

APPEAL from a judgment of the District Judge of Kalutara.

L. A. Rajapakse, for plaintiff, appellant.

N. E. Weerasooria, K.C. (with him *E. B. Wickramanayake* and *Wijemanne*), for defendant, respondent.

Cur. adv. vult.

February 6, 1939. KEUNEMAN J.—

The plaintiff-appellant brought this action against the defendant for declaration of title to ⅛ plus 1/9 shares of two contiguous allotments of land called lots Nos. 13 and 14 of Millegahawatta *alias* Hermitage. He alleged that the original owner was Don Peter Meegama who died intestate leaving as his heirs eight full brothers and sisters and two children of a deceased half brother. The defendant was one of the full brothers of Don Peter Meegama, and the plaintiff purchased from some of the other heirs on deed No. 169 dated December 14, 1935. The plaintiff also claimed damages of Rs. 150 and further damages at Rs. 50 a month till he was restored to the possession of his shares. The defendant admitted that Don Peter Meegama was the original owner, but contested the correctness of the shares which the plaintiff was entitled to. He also prayed that he be held to be the owner of a certain rubber plantation, and claimed that he was entitled to be in possession of it until he was compensated.

At the trial the following issues were framed :—

(1) Is Don Peter Meegama the owner of the land in dispute ?
(2) What share if any of the soil of this land is the plaintiff entitled to?
(3) How many children did Cecilia leave surviving her?
(4) Did the defendant make the rubber plantation on the land in dispute ?
(5) Is the defendant entitled to remain in possession of the rubber plantation until he is compensated ?
(6) Can the plaintiff maintain this action without joining all the co-owners ?
(7) What damages, if any, is the plaintiff entitled to?

Issue No. (1) was never really in dispute, as both parties agreed that Don Peter Meegama was the original owner. Issues (2), (3), and (6) were decided in favour of the plaintiff, and no question arises with regard to them in this appeal. Issues (4) and (5) were decided in favour of the defendant, and under issue (7) the learned District Judge held that the plaintiff was not entitled to any damages. The District Judge awarded half the costs of the action to the defendant. From these findings the plaintiff appeals.

On the evidence as accepted by the District Judge, Proctor Shelley Edirisinghe and the original owner Don Peter Meegama entered into a planting agreement by deed P 2 of November 20, 1912. Proctor Edirisinghe planted a portion of the land with rubber, but subsequently neglected the plantation with the result that cattle destroyed nearly all the young plants except about 50 rubber trees. Don Peter Meegama and the defendant then persuaded Proctor Edirisinghe to give up the land on the payment of Rs. 250 and the defendant then planted the rest

of the property with rubber, roughly about 550 other trees. The District Judge has given convincing reasons for accepting this evidence, and I do not think we can disagree with his finding in this respect.

Counsel for the plaintiff however argued that the defendant, though entitled under these circumstances to compensation, was not entitled to a *jus retentionis*. Further, he argued that the plaintiff was entitled to damages for the year 1936. As regards the year 1937 there was evidence that the plaintiff received his share of the rubber coupons, and so no claim for damages arose in respect of that year. It is clear that the plaintiff is in any event entitled to damages in respect of his undivided share of the 50 rubber trees planted by Proctor Edirisinghe. The question whether he is entitled to damages in respect of the rest of the plantations depends upon the determination of issue (5). Counsel for both parties agreed that in the event of the plaintiff succeeding, the damages should be fixed at Rs. 12 in respect of the 50 trees, and Rs. 130 in respect of the balance of the plantation.

It is necessary to consider on the evidence first whether the defendant was a possessor, *i.e.*, had the *possessio civilis*, and next whether such possession was *bona fide* or *mala fide*. The only person who gave evidence on this point was the defendant. He said "Peter Meegama got me to plant this land on the agreement that I should get half the land and plantations. Peter said he would give me a deed. I did not get a deed as Peter was my brother and I wanted to get the whole by buying the other half". In his answer the defendant stated "This defendant made the . . . . plantation . . . . upon the understanding that the owner, the said Don Peter Meegama, would convey to this defendant a half share of the soil and of the contemplated plantation standing therein, but the said Don Peter Meegama died while he was contemplating the transfer of such half share in favour of the defendant".

Now considering that the plantation was made in 1914 or 1915, and that Peter Meegama died in 1924, there was ample opportunity for him to implement his promise if he ever made such a promise. Further, the defendant made a very unfavourable impression on the District Judge who was not willing to accept his evidence except where there was reliable corroboration. On the point under consideration, there was no corroboration at all. Taking into consideration the fact that defendant was the brother of Peter Meegama, and that his evidence with regard to the alleged promise cannot be depended on, I think we must hold that in this case the planting was done without any agreement or understanding with Peter Meegama, although it is clear that Peter Meegama was aware of and acquiesced in the planting.

The case falls within the principle decided in *Fernando et al. v. Menchohamy et al.*[1] In that case Drieberg J. stated "In their answer the first and second defendants said Juan Naide had planted the land with coconut and jak trees and was in possession of it as the agent of Avu Lebbe, and they limited Mathes' planting to the rubber only. They did not say what the terms were of the agreement with Juan Naide and Avu Lebbe under which the plantation was made, and there is no proof that it is customary in the case of rubber planting for the planter

[1] *10 C. L. Rec. 124.*

to get a half share of the plantation. The rubber was not tapped until 1923 or 1925—there is a conflict of evidence on this point—so that Mathes and his heirs have not acquired an independent title to a planter's share by prescriptive possession. Their position, therefore, is that of persons who held the land on an agreement with the owner which gave them the right of possessing it and improving it for a remuneration not yet given or agreed upon. I cannot regard such a person is in a better position than a lessee ".

In *Soyza et al. v. Mohideen*[1] it was held that a lessee has no *possessio civilis*, nor can his enjoyment of the land be deemed to be a *bona fide* possession. This is a decision of three judges ".

In *Silva et al. v. Banda et al.*[2] it was held that a lessee who made improvements was not entitled to a *jus retentionis*. A similar opinion was expressed in *Saibo v. Baba et al.*[3] but a distinction was drawn there as regards a planter who is admitted to be entitled to a " planter's share ". Sampayo J. held that such a planter was not in the same precarious position as a lessee, but had sufficient interest in the land to constitute him a *bona fide* possessor.

Much reliance was placed by counsel for the respondent on certain cases. In *Mohamadu v. Babun*[4] Pereira J. held that where the defendant built a house and made a plantation with the leave and licence of the owner, he was entitled to all the rights of a *bona fide* possessor, including the *jus retentionis*. No dispute however was raised in that case as to whether the defendant had the *possessio civilis*. I may mention that Pereira J. was a member of the Court which decided *Soysa v. Mohideen* (*supra*) and concurred in that decision. Again in 406 D. C., Kandy, 29,879—S. C. Mins. 29.6.23, a wife who built on her husband's land with the consent of the husband and on his promise to transfer the land to her was held to be entitled to compensation and to retain the property until compensation was paid. Sampayo A.C.J. held there that the wife " believed that she was entitled to the land and to the house and to its possession ".

In *Government Agent, Central Province v. Letchimanan Chetty et al.* it was held that a person who takes possession of land and executes improvements thereon on expectation of a formal title, which in good faith he believes himself certain to obtain, may be a *bona fide* possessor. It should be noted here also that the question discussed was not with regard to the possession but to the fact whether the possession was *bona fide* or *mala fide*. Bertram C.J. himself said that his interpretation was a " development " of the law.

In *Nugapitiya v. Joseph*[6] improvements had been made by a person who had entered into an informal agreement with the owner, by which the improver was to have the right to the enjoyment of the boutique built by him as long as he wished upon the payment of ground rent of Rs. 5. Garvin J. was satisfied that the improver did not have the *possessio civilis*, but held that under certain circumstances ever such a person could be granted the rights of a *bona fide* possessor. " The case of *Mohamadu v. Babun* (*supra*) is referred to by Bertram C.J. in the case

[1] *17 N. L. R. 279.*
[2] *26 N. L. R. 97.*
[3] *19 N. L. R. 441.*
[4] *2 C. A. C. 86.*
[5] *24 N. L. R. 36.*
[6] *28 N. L. R. 140.*

of *Davithappu v. Bahar*[1] who regards it as a development of the law by the extension of the doctrine of the rights of a *bona fide* possessor to compensation for improvements to a class of persons who have not the *possessio civilis*. With all respect, it does not seem to me that relief in this case was granted by treating these persons as having a *utilis possessio* which is akin to *possessio civilis* . . . . The result is reached by the extensive application of another rule, which is that an owner who acquiesces in the making of improvements is estopped from disputing the right of the improver to be compensated on the same footing as a *bona fide* possessor". It is to be noted however that Garvin J. based his finding on a passage in Maasdorp, where it was laid down that a *mala fide* possessor was entitled to the same rights as a *bona fide* possessor including the right of retention, where "the owner of the ground has stood by and allowed the building to proceed without any notice of his own claim".

Though his language is wide, I doubt whether Garvin J. had any intention of extending the right of compensation and of retention in these circumstances to all classes of persons including lessees and persons in a similar position to lessees. If so, a fundamental distinction in the law of compensation was lost sight of, and his finding was at variance with express decisions of our Courts. Walter Pereira in his *Laws of Ceylon* (*2nd ed., pp. 353, 354*) said "Before entering into a discussion of these questions it is necessary to arrive at a correct understanding of the word "possessor" when used in connection with the law with reference to compensation for improvements. Clearly the word "possessor" means the person who in law is in enjoyment of what is known as the *possessio civilis*. He adds "A lessee's right, if any, to compensation for improvements is subject to considerations totally different from those applicable to the rights of a person having the *possessio civilis*". Maasdorp also in his *Institutes of South African Law* (*5th ed., vol. 11, p. 15*) discussed "possession" as follows:—"It is a compound of a physical situation and of a mental state . . . . The intention must also absolutely be to hold the thing for one's self and not for another, for a lessee, a person who has a thing on loan, or a depository cannot in strict law be said to possess or, if he possesses at all, he possesses not for himself but in the name of the owner". He dealt at page 17 with the classification of *civil* and *natural* possession. "Voet uses the term civil possession as possession which is held by a person as owner or by a *bona fide* possessor with the intention of being or becoming owner". Further at page 61 he stated definitely that "a lessee has in no case the right of retaining or remaining in possession of the land leased after the expiration of the lease. His right to compensation will depend upon whether the improvements were made with or without the consent of the owner".

I am of opinion that under our law the right of retention is only granted to persons who have the *possessio civilis* and to certain special classes of persons whose position has been held to be akin to that of a possessor's. There can be no doubt that this right has been extended by decisions of our Courts to certain classes of persons who may not come under the

[1] *26 N. L. R. 73.*

strict definition of "possessors," *e.g.*, persons who are entitled to a "planter's share", which is a special right, and to persons who make the improvements in the *bona fide* expectation of receiving a formal title. In *Nugapitiya v. Joseph* (*supra*) there was an informal agreement that the improver should have the right of retaining his improvements as long as he wished.

In this case the defendant has not proved any circumstances which show that his enjoyment of the land approximated in any degree to "possession". It is clear that all along he acknowledged the title of Peter Meegama, and there is no proof which can be accepted that any agreement was arrived at between himself and Peter Meegama whereby he was to be invested with title either to the whole or to any part of the soil or plantation, or that he was to retain his improvement until he was compensated. I think therefore that he occupied no better position than that of a lessee. I follow the decision in *Fernando et al. v. Menchohamy et al.* (*supra*). This is the latest of the decisions cited to us, and I do not think this case conflicts with any of the earlier decisions. In view of the fact that Peter Meegama consented to and acquiesced in the making of the improvements, I hold that the defendant is entitled to claim compensation. He has made claim to no specific amount in this action, and I reserve to him the right to make such claim in subequent proceedings. But I hold that he is not entitled to a *jus retentionis* in respect of these improvements. I vary the District Judge's order in this respect.

I further hold that the plaintiff is entitled to damages in respect of the year 1936 and set aside the District Judge's order that he is not entitled to damages, and enter judgment for the plaintiff in the sum of Rs. 142, the amount agreed upon by Counsel for both parties.

As regards costs, the plaintiff has succeeded on most of the issues, but the defendant has succeeded on the issue relating to the planting, and the bulk of the evidence was directed to that issue. I think the fairest order to make is that there will be no costs to either side of the trail. The plaintiff has partially succeeded in the appeal, and I give him half the costs of appeal.

NIHILL J.—I agree.

Judgment varied.