[FULL BENCH.]

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Present: Lascelles C.J., Pereira J., and De Sampayo A.J.

SOYSA *et al. v.* MOHIDEEN

57—D. C. Colombo, 36,278.

Donation subject to fidei commissum—*Acceptance by the fiduciary donees—Revocation by the donor—Lease by the* fiduciarius—*Agreement by* fiduciarius *to compensate lessee for improvements—Is lessee entitled to compensation from* fidei commissarius ?

Per LASCELLES C.J. and DE SAMPAYO A.J.—Where a donation subject to a *fidei commissum* in favour of the descendants of the donees was accepted by the fiduciary donees,—

Held, it was not open to the donor to revoke it and grant it absolutely to the donees, even though no issue of the donees were *in esse* at the date of the first deed, and though the *fidei commissarius* had not accepted the gift at the date of the revocation.

In the case of such a donation acceptance by the fiduciary donee is a sufficient acceptance on behalf of the unborn descendants.

FULL BENCH.—A parcel of land which was subject to a *fidei commissum* had been occupied by defendant as lessee of one of the *fiduciarii*, who had agreed to pay defendant half the value of the buildings on the termination of the lease. In an action by the *fidei commissarii* (the *fiduciarii* having died) to vindicate the land,—

Held, that it was not competent to defendant (lessee) to set up a claim for compensation for improvements.

THE facts of this case are as follows:—

Peter Cornelius de Zoysa, by deed No. 1,412 dated February 21/27, 1877, gifted the land in question to four persons, whom he described as his nephews and niece, but who in fact were children of a cousin, viz., Herbert Edwin, George, Albert, and Jane, subject to the condition that they should not alienate the property, but that on their death the property should devolve on their issue, and if any of them should die without issue, his or her share should devolve on the others and their issue. The donation was on the face of the deed accepted by the donees subject to this condition. George and Jane subsequently died without issue, and the donor, Peter Cornelius de Zoysa, by deed No. 3,088 dated December 15, 1895, after reciting that the shares of George and Jane had devolved on the surviving donees, purported to cancel the deed of gift No. 1,412 and to re-gift the property to Herbert Edwin and Albert free of any condition or restriction. By deed of lease No. 2,785/1,032 dated September 27.

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1900, Herbert Edwin and Albert leased the property to the defendant on certain terms for a period of fifteen years, and the defendant has been in possession and has made certain improvements on the land according to the stipulation in the deed of lease. Herbert Edwin died in 1912 leaving issue, the plaintiffs in this action. The plaintiffs were born after the date of the original gift in 1877, and are still minors. This action is brought by them for the recovery of a half share of the property. The defendant denied the right of the plaintiffs to any share of the property, and in the alternative claimed compensation for improvements.

The District Judge decided in favour of the plaintiffs. The defendant appealed.

The case was reserved for argument before a Bench of three Judges by Lascelles C.J. and De Sampayo A.J. by the following judgment:—

LASCELLES C.J.—Peter Cornelius de Zoysa, by deed D 1 dated February 27, 1877, conveyed certain land and buildings at Mutwal to his nephews Herbert Edwin de Zoysa, Albert de Zoysa, and George de Zoysa, and his niec Jane Robertina de Zoysa, by way of gift absolute and irrevocable. It is not disputed that the terms of this deed created a *fidei commissum* in favour of the issue of the donees.

By deed D 2 dated December 15, 1895, Peter Cornelius de Zoysa purported to revoke the above-mentioned deed, and to convey the property comprised in it absolutely to Herbert Edwin de Zoysa and Albert de Zoysa, George and Jane Robertina having died in the meantime.

By agreement D 3 dated September 29, 1900, Herbert Edwin and Albert, in consideration of an advance of Rs. 1,250, purported to lease the property to the defendant for a term of fifteen years. At the end of the term the Rs. 1,250 was to be repaid by the lessors, repayment being secured by a mortgage of the property. The lessors, in the meantime, were to pay the lessee Rs. 3.75 every month by way of interest at 18 per cent. on the sum of Rs. 250. It was also provided that, on the termination of the lease, the lessors should take over any buildings erected by the lessee, paying the lessee half the cost of putting them up.

The plaintiffs, who are the children of Herbert Edwin, now claim half the property, on the footing that the deed D 2 was inoperative to revoke the *fidei commissum* in the favour created by deed D 1. The present appeal is from the decision of the District Judge in favour of the plaintiffs.

The case of the defendant-appellant is that, inasmuch as the deed was not accepted by the plaintiffs, it was revocable, nd was in fact duly revoked by the subsequent deed.

Up to a certain point the law is clear. As a general rule, in order that a *fidei commissum* created by gift should be valid, the donation

must be accepted by the *fidei commissary* as well as by the *fiduciarius* (*2 Burge 148 and De Silva v. Thomis Appu*[1]). But this rule is not without exception. The guardian may accept for an infant; or if the child is *in utero*, the acceptance may be made by the person under whose authority he will be placed at birth[2]. In the present case it is material that the plaintiffs, who now sue as minors, cannot have been *in esse* at the date of the *fidei commissum* in their favour.

Whatever room there might have been for doubt, if the matter had been *res integra*, the question is concluded, so far as we are concerned, by the judgment of the Full Court in *John Perera v. Avoo Lebbe Marikar* [3]. It was there held, on the authority of a passage in Perezius, that when a gift is made to one in favour of a family in which the giver wishes the property to remain, the giver is not allowed to revoke the limitation to aftercomers. This decision, which appears to be supported by Voet [4], is binding on us, as there can be no doubt of the intention of the donor, when he executed D 1, to keep the property in the family to which his nephews and niece belonged.

The decision of the learned District Judge on the question of title was thus right in my opinion.

Then we come to the defendant's claim to retain possession of the property until the plaintiffs have paid him half the cost of his improvements. On this point the learned District Judge has ruled against the defendant on the ground that he is not a *bona fide* possessor, and that the improvements made by him are not necessary or useful.

I think that there can be no doubt that under the Roman-Dutch law a lessor had not the *jus retentionis* which would entitle him to remain in possession against a successful claimant until he has been compensated for improvements. The occupation of a lessee is not *possessio civilis*, for he does not occupy the property in the belief that it is his own. On the contrary, his interest in the property is defined and limited by the terms of the lease.

But it is said that the decision of *Muttiah v. Clements*[5] and *Mudianse v. Sellandyar* [6] have admitted or established the right to a lessee to set up a *jus retentionis* in respect of compensation for improvements. I am by no means certain that this is the effect of these cases. In the first-named case the attention of the Court does not appear to have been directed to the objections to holding that a lessee can be treated as a *bona fide* possessor. *Mudianse v. Sellandyar* [6] is no doubt an authority for the proposition for which the appellant contends, though the learned Judges in that case seem to have been influenced to some extent by equitable considerations.

[1] *7 N. L. R. 123.*
[2] *Walter Pereira 606.*
[3] *(1884) 6 S. C. C. 138.*
[4] *Bk. 39 5, 40.*
[5] *(1900) 4 N. L. R. 158.*
[6] *(1907) 10 N. L. R. 209.*

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On the other hand, the South African case of *De Beers Consolidated Mines v. London and South African Exploration Co.*, [1] cited by Mr. Justice Pereira in his work on the *Right to Compensation for Improvements* (*p. 65*), tells strongly in the other direction, as does the passage there cited from Maasdorp.

On general principles, and on the authority of the Roman-Dutch jurists, I should have no difficulty in coming to the conclusion that lessees do not possess the right to compensation for improvements on the footing that they are *bona fide* possessors, but that their right to compensation from their landlords depends upon wholly different conditions, which are plainly set out in the text books. But I think that it is very desirable that the uncertainty which now exists as to this important branch of the law should be set at rest, and with that object I would set the case down for re-argument on this point before the Collective Court.

I would add that if the defendant's right to compensation is to be determined on equitable grounds, I should be of opinion that he has no right at all. The plaintiffs in no way acquiesced in the building agreement between the defendant and his lessor, and I cannot say on what principle the plaintiffs are to be saddled with the burden of this agreement.

Bawa, K.C., for defendant, appellant.

E. W. Jayewardene, for plaintiffs, respondents.

March 25, 1914. LASCELLES C.J.—

The further argument before the Full Court has confirmed me in my opinion that the defendant is not entitled to the compensation which he claims. A more detailed examination of *Muttiah v. Clements* [2] and *Mudianse v. Sellandyar* [3] shows that in both these cases the judgments may have been influenced by equitable considerations, which are not to be found here. In the first-named case the defendant was promised a lease by the incumbent of a temple, and was allowed by the trustee to cultivate the land in expectation of a lease. Then the trustee and the committee leased to the plaintiff, so there was a contractual relation between the plaintiff and the owner, by whose permission the cultivation had taken place.

In *Mudianse v. Sellandyar* [6] the plaintiffs had improved under an unregistered planting lease; the lessors then sold to the first and second defendants, whose deed, being registered, took priority over the plaintiff's lease. These defendants may, therefore, have been regarded to have succeeded to the obligation of the lessors to compensate the plaintiffs.

[1] *10 S. C. 259.*

[2] *(1900) 4 N. L. R. 158.*

[3] *(1907) 10 N. L. R. 209.*

No such circumstances is to be found in the present case, where the plaintiffs' claim is adverse to the right set up by the defendant's lessors.

I would further add that, since the decision in *Punchirala v. Mohiaseen*,[1] it can hardly be said that the current of local authority is in favour of the appellant's contention.

With regard to Mr. Bawa's ingenious suggestion that the defendant may be regarded as the assignee of the rights of his lessors as fiduciaries against the *fidei commissary*, I will only say that this view appears to me to be quite inconsistent with the terms of the lease and the capacity in which the lessors purported to act.

DE SAMPAYO A.J.—

His Lordship stated the facts, and continued:—

The plaintiffs' title turns on the question whether the revocation of the deed of gift is good in law so far as the plaintiffs are concerned. There is no dispute between the parties that the deed created a valid *fidei commissum*, but it is contended on behalf of the defendant that there was no acceptance by the plaintiffs, and that therefore it was within the power of the donor to revoke the ultimate gift to the plaintiffs. There is no doubt that under the Roman-Dutch law even a *fidei commissary* gift may be revoked by the donor before acceptance by the *fidei commissary* (*Voet 39, 5, 43*), but I think that in the case of gift to a person subject to a *fidei commissum* in favour of his descendants the Roman-Dutch law recognizes an exception, and regards the acceptance by the immediate donee as a sufficient acceptance on behalf of the descendants as well. This would undoubtedly be so if the *fidei commissaries* were alive and the donee was otherwise competent to accept a gift on their behalf, as, for instance, where the *fidei commissaries* are minors or *in utero* (*Voet 39, 5, 12*). I think the law is the same in the case of an unborn generation. In view of the general principles of the Roman-Dutch law, and especially on the express authority of Perezius (*De Donat LV., 12*), it was so decided by the majority of the Judges in *John Perera v. Avoo Lebbe Marikar*[2] which I consider a binding decision in this point. *Burge, Vol. II., pp. 149 and 150*, where other Roman-Dutch authorities are cited, is to the same effect. In the passage above referred to Perezius had spoken of a donation which, though given to one person, contemplates his family: *donatio uni facta concernat favorem familiæ in qua vult rem donatam manere donator*, and it was argued on behalf of the appellant in this case that the exception to the rule of personal acceptance there allowed must be confined to the case of *fidei commissum* in favour of a *familia* which includes other people besides children and descendants. But no such distinction is intended, and the reasoning

[1] *(1884) 13 N. L. R. 193.*

[2] *(1884) 6 S. C. C. 138.*

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applies even more strongly to a *fidei commissum* in favour of a family in the narrower sense of a man's own children and descendants. Perezius means to lay down generally that acceptance by the immediate donee, who is the head of the family, is valid acceptance on behalf of all those who follows him, and that, then, the entire donation is considered *perpetua* or at once complete in respect of all the succeeding beneficiaries. This appears to be the view taken by the Supreme Court in *John Perera v. Avoo Lebbe Marikar*,[1] for there, too, the *fidei commissum* was in favour of the descendants of the immediate donee, and not of her family in the technical sense. I am therefore of opinion that the *fidei commissum* created by the deed of gift remains unaffected by the attempted revocation on the part of the donor, and that the plaintiffs are presently entitled to a half share of the property.

The defendant's claim for compensation presented some difficulty, especially in view of certain decisions of this Court, and that question was accordingly referred to and re-argued before a Bench of three Judges. A lessee is not a *bona fide* possessor, and is therefore not entitled to compensation for improvements on that footing. The Roman-Dutch law, however, recognizes his right to compensation from the lessor in respect of improvements made by him with the consent of the lessor, as decided in the well-known case of *De Beers Consolidated Mines v. London and South African Exploration Co.*,[2] and the defendant in the present case would no doubt be able to maintain his claim against his lessors Herbert Edwin and Albert in pursuance of the agreement contained in the deed of lease. The case of *Mudianse v. Sellandyar*,[3] however, went a step further, and gave compensation to the lessee against the vendees of the lessor. The same thing appears to have been done in the South African case of *Scrooby v. Gordon & Co.*,[4] a note of which I find in Roos and Reitz's *Principles of Roman-Dutch law*, at page 195. But these cases are explainable by the consideration that a singular successor like a purchaser becomes, in respect of a lease, entitled to the rights and subject to the obligation of the lessor, but a *fidei commissary* does not derive title from the fiduciary but independently of him. The other local case, *Muttiah v. Clements*,[5] appears at first sight to have gone even beyond this, but there were special circumstances attaching to that case which might be said to have induced the decision. The defendant Clements took an informal lease from the incumbent of a Buddhist temple at a time when the incumbent was competent to deal with temple property, and after the Buddhist Temporalities Ordinance came into operation the trustee thereunder appointed gave a lease to the plaintiff Muttiah. In these circumstances, Muttiah might be regarded as being substantially in the same

[1] *(1884) 6 S. C. C. 138.*
[2] *10 S. C. 259.*
[3] *(1907) 10 N. L. R. 193.*
(1904) T. S. 9
[5] *(1900) 4 N. L. R. 158.*

position as the purchaser in the cases above referred to. Moreover, there was evidence that the trustee after his appointment had consented to Clements going on with the cultivation, in respect of which compensation was subsequently claimed. I therefore think that the two decisions of this Court, which mainly necessitated the reference of this case to the Full Court on the question of compensation, do not conflict with the principle of the Roman-Dutch law that a lessee does not stand in the position of a *bona fide* possessor, and cannot, except within the limits above mentioned, claim compensation against the true owner for the time being. Mr. Bawa, for the defendant, however, sought to put the claim on another basis. It is good law that a fiduciary, when he hands over the property to the *fidei commissary*, is entitled to claim compensation for any useful improvements he may have made during his possession (*Voet 36, 1, 61*) and probably Herbert Edwin's legal representative might make such a claim in respect of the improvements made through his lessee, the defendant. It was thereupon argued that the effect of the stipulations in the lease was to assign to the defendant Herbert Edwin's claim to compensation against the plaintiffs and his right of detention in respect thereof. But it is impossible to construe the lease as having the effect of such an assignment. The lessors, as a matter of fact, thought that they were entitled to the property free of any *fidei commissum*. The provisions of the lease were a pure matter of contract as between them and the defendant, and the defendant himself in his answer made his claim on that footing and on a denial of the existence of any *fidei commissum* at all.

I think the appeal fails on all points, and should therefore be dismissed with costs.

PEREIRA J.—

The only question in this case with which I am concerned as one of the Judges constituting the Full Court is whether the defendant is entitled to succeed in his claim for compensation for improvements, because that was the only question referred to the Full Court for decision. Admittedly, the defendant occupied the land claimed by the plaintiffs as a lessee, not of the plaintiffs, but of one of the *fiduciarii* on deed D 1 filed of record. It is now well-settled law in the Colony that, in order to be entitled to compensation for improvements, a person should have had, not only possession of the property improved, but *bona fide* possession of it. By " possession " is here meant what was known to the civil law as the *possessio civilis* as distinguished from the *possessio naturalis*. The former, of course, meant *detentio animo domini* (*3 Burge*). At one time it was thought that, in Ceylon, even a *mala fide* possessor might recover compensation for improvements, and that a lessee might also, in certain

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circumstances, even in the absence of express or implied agreement with the lessor, do so. But all doubts as to the absence of right in a *mala fide* possessor to recover compensation for improvements were set at rest by the judgment of the Full Court in the case of *The General Ceylon Estates Co., Ltd., v. Pulle.*[1] See also *Cornelis v. Endoris.*[2] As regards the lack of any such right in a lessee, the decision in the case of *Punchirala v. Mohideen*[3] is the latest pronouncement by this Court. As pointed out by Kotze, Chief Justice of the Transvaal, in his *Translation of Van Leeuwen's Commentaries* (*Vol. II. p. 112, note*), a lessee has no possession (*possessio civilis*) of the land that he enjoys on the lease, nor can his enjoyment of the land, if it is to be deemed possession at all, be said to be "*bona fide* possession" in the sense in which that expression is understood in the law relating to compensation for improvement, because he knows that the land he enjoys does not belong to him (see *3 Burge 16, 22 ; Voet 41, 3, 6*). He therefore has in no sense of the term the right to compensation for improvements that is vested in a person in *bona fide* possession of land. It has been said that this Court has recognized the fact that the so-called possession of a lessee as much as that of a trustee may in certain circumstances be such as to give him a right to institute a possessory action in respect of the land leased. That may be so, although personally I have to confess to some difficulty in appreciating the force of the reasons for the decision relied on. In any particular case, however, like those referred to the plaintiff may be invested with certain rights so akin to ownership that it would be inequitable to refuse to him the right to maintain a possessory suit, but the concession of such a right to a person will not necessarily vest him with the right to compensation for improvements ; and, moreover, the fact that a person has been in *mala fidei* possession of land is no bar to his maintaining a possessory action in respect of that land. The cases relied on have no application to the question arising in this case. A lessee, however, is not without his rights in respect of improvements made by him on the property leased. As explained by Chief Justice Maasdorp (*Maas. Inst., Vol. II., pp. 56, 57*), a lessee who makes improvements on the property leased with the consent or acquiescence of the lessor has a right to compensation, and also a tacit mortgage, for the value of the materials over the property improved. This, of course, is a right resulting from contract, and it cannot be enforced as against a person who is no party to the contract. It may be that the lessor or his legal representative may claim the benefit of the lessee's improvements and be entitled to compensation. The question here involved does not arise in the present case, and need not be further considered. In view of the fact that the plaintiffs in the present case are the heirs of the defendant's lessor, it may be

[1] *9 N. L. R. 90*

[2] *3 A. C. R. 13.*

[3] *(1910) 13 N. L. R. 193.*

mentioned that they do not sue as his legal representatives, but as having acquired the property in claim from an independent source, that is to say, by operation of the *fidei commissum* created by deed D 1.

For the reasons given above, I am of opinion that the defendant is not entitled to the compensation claimed by him.

Appeal dismissed.