[FULL BENCH.] 1915.

Present: Wood Renton C.J. and Ennis and Shaw JJ.

LEBBE *v.* CHRISTIE *et al.*

200—D. C. Kandy, 22,968.

Lease by Kandyan widow of her husband's property—Lease invalid except as to her life interest—Compensation for improvements by lessee—Is mother a natural guardian of her children after husband's death?—Civil Procedure Code, chapter XL.

Where a Kandyan widow leased without the sanction of the Court, for a period of forty years, a land belonging to her husband over which she had a life interest,—

Held, that the lease was invalid so far as it exceeded the term of her life interest and did not bind her children, who were minors at the date of the lease.

Held further, Ennis J. *dissentiente*, that the lessee was not entitled to compensation for improvements as against the lessor's child, who brought an action to vindicate his share.

Under the Roman-Dutch law as it exists in Ceylon the mother does not become, on the death of the father of a minor child, the guardian of the latter, otherwise than by appointment made by Court under chapter XL. of the Civil Procedure Code.

WOOD RENTON C.J.—The authorities do not establish the proposition that under the Kandyan law a widow was the natural guardian of her minor children and was entitled to alienate or lease the ancestral property.

THE case was reserved for argument before a Full Bench by Ennis J. and Shaw J. The facts are set out in the following judgment of Ennis J.:—

The land in dispute in this case originally belonged to one Mahaduraya, a Kandyan. By his will he bequeathed the lands to his three children, Rankiri, Kiri Ukku, and Sahundera, subject to a life interest in his wife, Ukku. On his death Ukku obtained probate as executrix. Kiri Ukku then died, and her brothers Rankiri and Sahundera became entitled to her share. Then, on November 14, 1896, the executrix, Ukku, conveyed the lands by deed to Rankiri and Sahundera, with a reservation of her life interest.

On February 5, 1898, Ukku executed a lease, for herself and as natural guardian of her minor children Rankiri and Sahundera, for forty years in favour of one Amath Bukar. The lease gave the extent of land as 25 acres 2 roods and 25 perches. The rent reserved

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was Rs. 13.41 per acre, and twenty years' rent was paid to Ukku in advance. The lease recites that it was for the purpose of cultivating and improving the lands in the interest of the minors, and it contains a covenant by the lessee to cultivate. The lessee, on December 12, 1898, transferred his interest in the lease to Thomas and George Christie, the first defendant.

Rankiri came of age in 1905, and then, with his mother Ukku, executed a deed, No. 7,161 of August 27, 1905, by which he conveyed his half share of the lands, and Ukku conveyed her life interest, to Thomas Christie. On September 22, 1910, Thomas Christie conveyed his interest in the lease and his interest in the lands to the first and second defendants. Ukku died in March, 1913. On April 6, 1914, Sahunder conveyed his undivided half share in the lands to the plaintiff, in consideration of a sum of Rs. 11,500.

The plaintiff prayed for a declaration of title to a half share of the lands, for ejectment of the defendants, and for Rs. 500 damages. The defendants prayed that the plaintiff's action should be dismissed, or, in the alternative, for Rs. 4,750 as compensation for improvements, and a declaration that they were entitled to retain possession of the entirety of the lands until the compensation was paid.

The learned District Judge held that the lease was an improvident one, and invalid and ineffectual so far as the plaintiff and his vendor were concerned. He gave judgment for the plaintiff as prayed, but with nominal damages at the rate of Rs. 125 per annum from April 6, 1914, until the plaintiff was restored to possession.

Before dealing with the case on its merits I would observe that the plaintiff's claim for damages should have been one for an account, and the decree should not have contained an order for ejectment, as the defendants were co-owners and could not lawfully be ejected.

On the appeal, Mr. Samarawickreme, for the respondent, relied upon the case of *Soysa et al. v. Mohideen*,[1] contending that the lease was invalid, and that the defendants-appellants were not *bona fide* possessors, and were therefore not entitled to any compensation.

The first point for consideration is the law applicable to the case. Counsel for the appellants cited the case of *Appuhamy v. Kiriheneya*,[2] and also the cases reported in *1 S. C. Reports 71* and *2 Browne 19*, to show the position of a Kandyan widow as natural guardian of her minor children ; but we were not referred to any Kandyan law as to the powers of a Kandyan guardian to alienate or execute leases of the property of the ward. This question must, therefore, in accordance with the provisions of Ordinance No. 5 of 1852, be decided by Roman-Dutch law.

The next point for consideration is whether the lease was an improvident one. The learned District Judge has held it to be so because Ukku took twenty years' rent in advance, and because she had no right to execute a lease which might tie up the lands

[1] *(1914) 17 N. L. R. 279.*

[2] *(1896) 2 N. L. R. 155.*

as against the minors for many years. He emphasized the latter point by suggesting that if it were not so she might have executed a lease for one hundred years. In my opinion neither of these reasons is sound for finding the lease improvident. The question is one of fact in each case. In the present case it appears that at the time of the lease the land was jungle land and practically unproductive. There is also evidence that the widow sought no interest for herself, as she took the twenty years' rent in advance in order to pay off some of her husband's debts. If this be so, then she herself received no benefit from her life interest, and it is certain that on her death her children could have claimed rent, notwithstanding that it has been paid in advance to Ukku, and would not have been injured by the advance payment. It is in evidence that the lessee and his successors, in pursuance of the covenant in the lease to cultivate, have planted the land with tea and rubber and brought it to a high state of cultivation, so much so that Sahundera realized Rs. 11,500 on the sale of his interest. It would seem, therefore, that the Kandyan widow Ukku, as natural guardian of her children, *bona fide* did her best to develop the property in the interests of the minors, without seeking advantage for herself, and the term of forty years does not appear excessive to induce a third party to undertake the expenditure necessary to the development. He had to recoup himself for his expenditure within that period, and give the land back in its improved state at the end of the term without compensation. In the circumstances of the case, therefore, it would seem that Ukku acted disinterestedly, wisely, and providently.

I have next to consider the validity of the lease. During the life of Ukku it was doubtless effectual ; but could she bind the minors ? Under the Roman-Dutch law tutors and curators were prohibited from alienating the immovable property of a pupil or minor. But a lease is not an alienation, although it has been held to be a *pro tanto* alienation for the purpose of giving a lessee a right to bring a possessory action. Voet, discussing the affinity of a lease to a sale and the question as to whether a lease for more than ten years would give rise to a *jus in re* (*i.e.*, a right of dominium or ownership), says (*Voet 19, 2, 1, Berwick's translation, p. 197*):

" For as we are all agreed that no *jus in re* is acquired by a lessee by the hiring of immovables for a moderate time, or at least not such a one as requires for its creation the formality of delivery of the thing leased before the tribunal of the place, there is the more reason why neither should any *jus in re* be acquired to the lessee by an agreement for a longer term. "

And after further comment Voet continues : " The differing opinion of the doctors may perhaps be reconciled by this distinction, that a private lease for more than ten years is good as between the contracting parties themselves and their heirs, but not to the

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prejudice of a third party, he being a singular successor, or of creditors, who might be defrauded by so long a lease. "

In the present case Sahundera does not derive title as heir of Ukku, but under the will of his grandfather. These passages from Voet show that a lease for more than ten years was so closely akin to an alienation that it bound the land as against the lessor and his heirs, but not to the prejudice of a singular successor ; but it does not say what happens when a singular successor is not prejudiced.

Johannus Sandé, in his *Treatise upon Restraints upon the Alienation of Things* (*Webber's translation, 1892, p. 25*), clearly explains the views of the Roman-Dutch jurists. He says : " Leasing is akin to emphyteusis, and it may be for a long, or a short, or a moderate period of time. A lease is said to be made for a long period of time when it extends at least beyond ten years. By such a lease it is the common opinion that an alienation is made, and as it were, the dominium transferred ..... And the doctors declare that a lease for a long term passes into an emphyteusis .....Wherefore the common opinion is that a thing, the alienation of which is forbidden, cannot be leased for a long term ..... This opinion of the doctors, however, is hardly supported by the strict reading of the law. For never, in law, does any real right arise from a simple lease, for whatever term, nor is a *quasi* dominium transferred; nor does a lease, to whatever term it be extended, pass into an emphyteusis ..... Now, although these things are so, yet it is dangerous to depart, in practice, from a generally received and ancient opinion. Nor does it seem unjust that the power of letting, without the authority of a Judge, the estate of a pupil or minor for many years should be denied to pupils or minors, or their tutors or curators ..... A lease made for a short term is binding ; for he who so leases does not alienate ..... And if the lease is extended beyond the time during which the tutelage or curatorship lasts, the pupil or minor is held bound by the lease made by the tutor or curator ..... And it is very clearly to the pupil's interest that what has been done by the tutor in his name should be protected, otherwise no one would be willing to contract with the tutors of pupils. "

Further on, in the same treatise (*Webber 42*), he says: " Minors, however, who vindicate their property which has been alienated without an order of Court ought to refund the purchaser the purchase price ..... The improvements ought also to be given back to the purchaser if he has made improvements on the estate sold without an order of Court. "

From these passages it is, in my opinion, certain that under Roman-Dutch law a lease for more than ten years was dealt with for certain purposes as if it were an alienation. If made by a tutor or curator it required the sanction of the Court, in the same way as alienation by sale.

In the present case the lease was made without the sanction of the Court, and is therefore invalid as against Sahundera and his successor, the plaintiff.

I have now to deal with the claim of the defendants appellants to compensation for improvements, and to retain possession pending payment. For a clear understanding of the law on the subject it seems desirable to set out the various positions from which claims to compensation may be advanced by lessees. There seem to be: (1) Claims by lessees against their lessors on the termination of the lease by time ; (2) Claims by lessees against their lessors when the lease has been found inoperative, owing to some defect, before the expiration of its term ; (3) Claims by lessees against third parties when the lease has failed before the expiration of the term.

Claims of the first kind are decided by the terms of the lease. *The London and South African Exploration Co., Ltd., v. De Beers Consolidated Mines, Ltd.*, [1] is a case which falls under that head. The report of the appeal before the Privy Council, which is the only report of the case I have before me, is of no assistance in the present case ; but Maasdorp, relying mainly upon this case, says (*Maas. Inst., vol. II., pp. 56, 57*) : " It may be stated generally 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 ; but if the improvements have been made with the consent of the owner he will be entitled to a tacit hypothecation for the value of the materials even after giving up possession."

So that although the right to compensation on the expiration of the term depends on the contract, Roman-Dutch law assumed a hypothecation of the land as against the lessor, when the lease provided for compensation.

In the other two classes of claims I have set out above the right to compensation does not necessarily turn on the terms of the lease. In the present case the lease provided that the lands should be handed over without compensation at the expiration of the term. The right to compensation is given, if at all, by Roman-Dutch law, and the claim may be based on the loss of the use of the land for the remainder of the term, or on occupation irrespective of the lease, and, as I hope to show, it must be based on the loss of use, and not on occupation irrespective of the lease. The *ratio decidendi* in the case of *Soysa et al. v. Mohideen*,[2] upon which the plaintiff respondent relies, is not easily seen. The three judgments do not appear to be based on the same considerations ; but in the result a lessee who had three more years to run before the expiration of his lease, and lost possession owing to a legal defect, was held not entitled to compensation against a third party who had title independently of the lessor. So far as I can see this result was arrived at on the facts of that case rather than on the law,

[1] *(1895) A. C. 451.*

[2] *(1914) 17 N. L. R. 279.*

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notwithstanding that it was reserved to a Full Court on a point of law. The ruling of Lascelles C.J. draws a distinction between the case and two previous cases, *Muttiah v. Clements* [1] and *Mudianse v. Sellandyar*,[2] which were at variance with the conclusion arrived at, on the ground that the previous cases had been influenced by equitable considerations which were not found in the case before him. The two previous cases were therefore not over-ruled. De Sampayo A.J. also drew a distinction between the case and the two previous ones ; Pereira J. did not mention the earlier cases. All three Judges came to the conclusion that whatever rights a lessee might have against a lessor, the lessee, plaintiff in that case, had no right to compensation against a party who derived title from a source other than the lessor, in the absence of an assignment by the lessor to the lessee. Pereira J said: " 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 ..... does not arise in the present case. "

So far as I can gather from *Soysa v. Mohideen*,[3] equitable considerations, if present, might have altered the result, and the lessor might have rights to claim compensation against a third party. *Soysa v. Mohideen* [3] cannot be a conclusive authority in the present case. Here there are equitable considerations, and the lessor, Ukku, has assigned her rights to the defendants by an effective conveyance on August 27, 1905, so the defendants can claim under that conveyance the rights of Ukku, the lessor. I would turn, then, to the Roman-Dutch jurists. Sandé, in the passage I have already cited, shows how the Roman-Dutch law prohibited curators from making leases without the sanction of the Court for more than ten years, as if such leases were alienations, and he states that by Roman-Dutch law minors who vindicated their property which had been alienated without an order of the Court should make compensation to purchasers . . their improvements. He does not expressly say that the latter rule would apply to lessees as well as purchasers, but if letting is so akin to alienation that the law dealt with it as if it were an alienation, the latter rule would, in my opinion, apply to lessees as a matter of course.

In the South African case, *Rubin v. Botha*, [4] which was a case by a lessee against his lessor for compensation for improvements, when, after three years' occupation out of ten the lease was found to be null and void because it had not been notarially executed, Lord de Villiers, in a judgment in which Maasdorp P.J. agreed, said : " In the case of *Bellingham v. Blommentje* [5] . . . . . the defendant knew that he was not the owner of the land, but, inasmuch as he honestly believed that he was the lessee thereof, and was entitled

[1] (1900) 4 *N. L. R. 158.*
[2] (1907) 10 *N. L. R. 209.*
[3] (1914) 17 *N. L. R. 279.*
[4] *S. Af. L. R. 1911, App. Div. 568.*
[5] (1874) *Buch 36.*

to erect buildings for use during his tenancy, it was held that the owner should not be enriched at his (defendant's) expense. This decision was arrived at on the authority of *Groenewegen* (*de leg abr Inst. 2, 1, 30*), who does not confine the right of being compensated for improvements to occupiers having the *possessio civilis* as opposed to those who have the *possessio naturalis* ...?..... Groenewegen extends the right of obtaining compensation to occupiers who know that they are building on the land of another, and consequently are not in possession in the strict legal sense. ..... The objections raised by some later Dutch writers to Groenewegen's statement of the law, as being wide enough to confer on *mala fide* possessors the right to compensation for useful expenses, would not apply to a case like the present, where a *bona fide* occupier, although he knew he was building on the land of another, believed that the enjoyment of those improvements would be secured to him for the full period of his invalid lease. "

It would seem, therefore, on the authority of Voet, of Groenewegen, and of Sandé, that by Roman-Dutch law possession under a lease was so near akin to possession *ut dominus*, especially when the lease was for a long term, that the law treated a lease for more than ten years in the same way as an alienation of the *possessio civilis*. This was probably on equitable grounds, for, Sandé says, " nor does it seem unjust. " The jurists found it a fertile ground for academical discussion, and the later jurists strove hard to reconcile the conflicting opinion of the doctors ; but they all agreed it was in fact law that a lease which required for its validity a delivery of possession before a Judge was dealt with in law as if it were an alienation of the *possessio civilis*, *i.e.*, of the ownership. It gave rise to the same actions, and the same equitable considerations applied, subject, however, to such modifications as the peculiar features of possession under a lease demanded, for instance, as the possessor under a lease had no intention to hold after the expiration of the term, it substituted a tacit hypothecation for the *jus retentionis* where compensation was found due after the expiration of the term.

The equivalent in Ceylon for the Roman-Dutch formality of delivery before a Judge is the transfer in writing notarially executed and registered, and I take it, the Roman-Dutch principles apply in Ceylon to all such leases. We find that lessees have been allowed to maintain a possessory action, and we find equitable considerations given effect to in claims for compensation ; the *bona fides* of the lessee's possession is considered, and the equitable principle that no man shall enrich himself at the expense of another is applied. The *bona fides* of a lessee's possession, as distinct from the *bona fides* of a possessor who holds the dominium, is weighed with a due consideration of the effect which a lessee's intention to hold for a term of years requires. In the South African case of *Rubin v. Botha* [1] we

[1] *S. Af. L. R. 1911, App. Div. 568.*

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find Lord de Villiers expressly stating that a *bona fide* occupier under a lease, notwithstanding that he is not a *bona fide* "possessor" in the strict juristic sense of the word, is entitled to compensation (*i.e.*, he is not to be regarded as a *mala fide* "possessor"); and he also said there is no reason in the world why the equitable rule of Roman-Dutch law, that no one should be enriched to the detriment of another, should not apply. It seems to me that the difference between a claim for compensation after the expiration of the term and a claim to compensation before the full term of the lease has expired has not been sufficiently borne in mind in the Ceylon cases. If the facts show that the lessee is a *bona fide* occupier and has effected improvements for which he is entitled to compensation, I am unable to see why he should not have a right in possession until the expiration of the full term of the lease, if the compensation be not paid. Applying the principle of the Roman-Dutch law, I think he would have both a right to compensation during the remainder of the term and a *jus retentionis* to the end of the term.

Should the consent of the owners to the improvements be required to entitle a lessee to compensation?—The case of *The London and South African Exploration Co., Ltd., v. De Beers Consolidated Mines, Ltd.*,[1] is not, in my opinion, an authority in the matter. In that case the full term of the lease had expired. A lessee does not expect to remain in possession beyond the term of his lease, or to have the use, after the expiration of the full term, of any improvements he may make hence he can only claim compensation for improvements if the right is accorded him as a matter of contract, *i.e.*, by the consent of the lessor as shown in the lease. A lessee disturbed before the expiration of the full term is not in this position. He expects to have the use of the property and any improvements he may make for the full term of the lease; and there is no reason that I can see why he should not be able to claim compensation for the loss of the use of his improvements for the remainder of the full term, and stop the lessor from being enriched at the expense of the lessee to an extent he did not contemplate at the time of making the lease.

As against Ukku's estate, therefore, I think the defendants would be able to maintain a claim for compensation for the loss of use of their improvements for the remainder of the term, and to claim a *jus retentionis* till the expiry of the term. It is the second class of claim I have enumerated above. The claim as lessee in this case, however, falls within the third class of claim. It is against a third party, who does not derive title from Ukku. Apart from any privity of contract, the defendants, in my opinion, would, under Roman-Dutch law, be entitled to compensation as against the plaintiff to the same extent as they could claim against Ukku's estate, provided it can be shown, as it admittedly is in this

[1] (*1895*) *A. C. 451.*

case, that the defendants have acquired the benefit. A lessee for a long term was treated by Roman-Dutch law, as I have shown above, as if the lease were an alienation, and a minor vindicating his property after coming of age was bound to pay compensation for improvements which were not improvident.

I have already distinguished the case of *Soysa v. Mohideen* [1] from the present one. That appears to have been decided in the absence of equitable considerations, and the absence of any transfer of the lessor's rights to the lessee.

In the present case, however, the defendants are in a stronger position than the lessee in *Soysa v. Mohideen*,[1] for they hold a conveyance of Ukku's rights. If the administrator of a tenant for life can claim compensation for improvements from the owner, the defendants can maintain their claim as successors to Ukku, the tenant for life in this case. In my opinion the administrator of a tenant for life could maintain such an action, although instances of it would be very rare, as the owners are nearly always also the heirs of the tenant for life. It is certain that a *fidei commissary* would be liable to pay compensation for improvements on taking over from the fiduciary (*Voet 36, 1, 61*). The extent to which compensation would run would depend upon the nature of the improvements, and if they were not improvident the claim would succeed.

I hold, therefore, that either as lessee or as assignee of the lessor the defendants, in the circumstances of this case, have a right under Roman-Dutch law to compensation for improvements, and the right as lessees gives them a *jus retentionis* to the end of the term of the invalid lease.

I would now come to the amount of compensation. If the claim is considered as one by a lessee, the amount of compensation would vary with the length of the term unexpired, for if only one year remained before the lessee was bound to surrender without compensation the amount would be less than if several years still remained. In such a case, I take it, the measure of compensation would be the annual rate at which a prudent man would, in the circumstances, provide for a sinking fund for his outlay, plus the annual profit, and the amount of compensation would be a matter of calculation on that basis. If, however, the claim is considered one by an assignee of the lessor as distinct from a claim by a lessee (we have both these claims in the present case), the measure of compensation should, I consider, be the present value of the land with the improvements, less the present value of the land without the improvements. I do not consider it necessary to send the case back to ascertain the amount of compensation. There is evidence that the land originally was not worth more than Rs. 40 per acre, while in its improved state today it is worth about Rs. 750 per

[1] *(1914) 17 N. L. R. 279.*

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sere. The defendants' claim is so moderate it must fall well within the sum awardable. The plaintiff is entitled to a deduction for the rent due and payable after Ukku's death.

I would set aside the decree and declare the plaintiff entitled to an undivided half share of the lands in dispute. The plaintiff should pay as compensation for improvements the amount claimed by the defendants, less the amount of rent due under the lease, and until such compensation is paid, or the full term of the lease expires, whichever is less, the defendants are entitled to retain possession, after which the plaintiff is entitled to be placed in possession.

I would allow the defendants the costs of appeal and in the Court below.

[The case was argued before a Full Bench on July 20 and 22, 1915.]

Bawa, K.C., Acting Solicitor-General, and *J. W. de Silva*, for the defendants, appellants.

Samarawickreme and *C. H. Z. Fernando*, for the plaintiff, respondent.

Cur. adv. vult.

July 30, 1915. WOOD RENTON C.J.—

[His Lordship set out the facts, and continued]:—

I agree with the learned District Judge and with my brothers Ennis and Shaw that the lease granted by Ukku in 1898 in favour of Mr. Christie's conductor is invalid in law, although I am not prepared to say that it was improvident. The only evidence in the record as to the circumstances in which it came to be granted is that of Mudalihamy Korala, who states that Ukku consulted him before she gave the lease, said that her husband owed some debts which she wished to pay, and asked him to try and negotiate the business. I do not think that that evidence was admissible under section 32 (3) of the Evidence Ordinance, and, even if it were, it does not carry us far.

The defendants' counsel argued that the validity of the lease should be considered from the standpoint of Kandyan law, and that under that law a widow was the natural guardian of her minor children, and was entitled even to alienate, and, *a fortiori*, to lease, the ancestral property. In support of this contention he referred to *Appuhamy v. Kiriheneya* [1] and *Juwan Appu v. Helena Hamy*. [2] The point that the power of Ukku to alienate her husband's lands depended upon Kandyan law was not taken in the District Court or in the petition of appeal, and the authorities above mentioned do not, in my opinion, establish it. In *Appuhamy v. Kiriheneya* [1] the question was the right of a Kandyan widow to sell her deceased husband's lands in payment of his debts. We are here concerned with a lease, and not with a sale, and, as I have already said, the

[1] *(1896) 2 N. R. R 155.* [2] *(1901) 2 Br. 19.*

evidence that the lease was effected for the payment of debts is wholly insufficient. *Juwan Appu v. Helena Hamy* [1] is directly against the argument that I am considering. It was there held that under the Kandyan law a father—and, I take it, that the same reasoning would apply to a mother—has the right of managing the property of a minor child for the advantage of the latter but cannot alienate it without the authority of the Court. Under the Roman-Dutch law, as it exists in Ceylon, the mother does not become, on the death of the father of a minor child, the guardian of the latter, otherwise than by an appointment made by the Court under chapter XL. of the Civil Procedure Code (see *Gunasekera Hamine v. Don Baron*,[2] *Mustapha Lebbe v. Martinus*,[3] and *Mana Perera v. Perera Appuhamy* [4]). The passages from *Voet* [5] and *Sandé on Restraints*, [6] quoted by my brother Ennis, show that the authority of the Court is necessary for a lease exceeding, as was here the case, a period of ten years, of the property of a minor.

On the question of compensation, I hold that we are concluded by the authority of the decision of the Full Bench in *Soysa v. Mohideen*.[7] It is true, as the defendants' counsel argued, that the Judges in *Soysa v. Mohideen* [7] do not expressly over-rule the earlier judgments of this Court in *Muttiah v. Clements*[8] and *Mudianse v. Sellandyar*,[9] in which the position was recognized that a lessee of land may be entitled, as its *bona fide* possessor or occupier, to claim compensation for improvements made by him on his eviction before the end of the lease. There are other authorities to the same effect (see D. C. Badulla, No. 20,541,[10] and *c.f. Tikiri Banda v. Gamagedera Banda* [11]). But even these are not unanimous (see *Punchirala v. Mohideen* [12]). And the right of a lessee to possessory remedies had been clearly recognized, *Fernando v. Fernando*. [13] But the case of *Soysa v. Mohideen* [7] was referred to the Full Bench for the very purpose of having the decisions in *Muttiah v. Clements* [8] and *Mudiyanse v. Sellandyar* [9] re-considered, and the language in which the Judges distinguished these authorities shows beyond all doubt that they regarded them as being limited to the particular facts on which they turned—facts disclosing equities in favour of the party claiming compensation. I have myself explained both cases in the same sense in an unreported decision, of which I have kept no note. Whether the decision in *Soysa v. Mohideen* [7] was sound or not is a question that I do not propose to discuss. Sound or unsound it is a decision of the Full Bench, and as such (see *Rabot v. De Silva* [14]) is binding upon us here. Nor do I think that we can profitably enter

[1] *(1901) 2 Br. 19.*
[2] *(1902) 5 N. L. R. 213.*
[3] *(1903) 6 N. L. R. 364.*
[4] *(1895) 1 N. L. R. 140.*
[5] *Berwick's Voet 127.*
[6] *Webber's Sandé 26 and 42.*
[7] *(1914) 17 N. L. R. 279.*
[8] *(1900) 4 N. L. R. 158.*
[9] *(1907) 10 N. L. R. 209.*
[10] *(1877) Ram. 1877, 333.*
[11] *(1879) 3 S. C. C. 31.*
[12] *(1910) 13 N. L. R. 193.*
[13] *(1910) 13 N. L. R. 164.*
[14] *(1907) 10 N. L. R. 140.*

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upon the question whether, even if the defendants had a *conscientia rei alienæ*, they might still be held entitled to compensation on the authority of the South African cases of *Rubin v. Botha* [1] and *Bellingham v. Blommentje*,[2] in view of the decision of the Full Court in *General Ceylon Tea Estates Co., Ltd., v. Pulle*,[3] even if the express authority of *Soysa v. Mohideen* [4] did not itself preclude us from doing so. I may add that I do not think that the record contains sufficient material to enable us to express an opinion one way or the other on the question of the defendants' *bona fides* in fact.

There remains only the question whether the defendants, having acquired Ukku's life interest by purchase, are entitled to set up any claim that Ukku might have as *fiduciarius* to compensation for improvements as against her minor children. The passage in *Voet*,[5] on the strength of which it was contended that a *fiduciarius* can claim compensation for such improvements as we have here to do with, is obscure (see *Livera v. Abeysinghe* [6]). I am inclined to think that it refers to *impensæ necessariæ* only, and this seems to be the view of Sandé. [7] In McGregor's notes to Voet, *ad loc. cit.*, he quotes Shorer's comment on *Grotius 2, 20, 13*, that the fiduciary heir may recover necessary, and also sometimes useful, expenses. But there is no explanation of the term "sometimes," and Shorer can scarcely be regarded as a clear authority upon the point. In *Soysa v. Mohideen* [4] my brother De Sampayo speaks of a claim for compensation by the fiduciary for "useful improvements." But in that case the point was not expressly raised, the question at issue being the right to any compensation at all. It is, however, unnecessary to consider the matter here, inasmuch as the present case is not really one of *fidei commissum* at all, but of the right of usufruct of a Kandyan widow. Moreover, even if Ukku could be regarded as a fiduciary, the improvements in question were not made by her, nor was any expense in connection with them incurred by her. If she had not parted with her life interest, I do not think that she could have set up any claim to compensation in respect of them, and if that be so, it is clear that she could not transmit any such right to the defendants. Counsel for the respondent did not contest the correctness of the modifications proposed by my brother Shaw as to the cooly lines and the order as to ejectment. I agree with him that those modifications should be made, and subject to them that the appeal should be dismissed with costs.

I may add that I do not think there is any conflict between the cases of *Hewavitarane v. Dangan Rubber Co.*[8] and *Soysa v. Mohideen*.[4] But even if there were any conflict between the two decisions, that in *Soysa v. Mohideen* [4] must prevail.

[1] (1911) *S. A. Cases 568, 582.*
[2] (1874) *Buch. 36.*
[3] (1906) *9 N. L. R. 98.*
[4] (1914) *17 N. L. R. 279.*
[5] *Voet 36, 1, 61.*
[6] (1914) *18 N. L. R. 57.*
[7] *Restraints upon Alienation, Part 2 Ch. 8, ss. 58, 59, 60, and 61.*
[8] (1913) *17 N. L. R. 49.*

ENNIS J.—

This appeal has now been re-heard before the Full Court. I see no reason to alter the conclusion to which I have previously arrived. The case of *Tikiri Banda v. Gamagedera Banda* [1] has now been cited, together with certain passages in *Modder*, to show that Kandyan law recognized the principle of compensation for improvements. Berwick J. in *Tikiri Banda v. Gamagedera Banda* [1] illustrated (at page 34) his argument with a Kandyan case in which a person who re-asweddumized an abandoned paddy field with or without permission was held entitled to compensation for the work. *Tikiri Banda v. Gamagedera Banda* [1] was referred to in the case of *The General Ceylon Tea Estates Co. v. Pulle*, [2] where there was a strong finding that the possession of the defendant was *mala fide*. The decision in *The General Ceylon Tea Estates Co. v. Pulle* [2] was that by Roman-Dutch law as applied to Ceylon a *mala fide* possessor was not entitled to compensation for improvements. In the present case the appellant cannot be said, in the strict juristic sense, to be a possessor at all, as he does not hold the *possessio civilis*, and therefore is neither a *bona fide* possessor nor a *mala fide* possessor.

The lease is invalid because the possession of a lessee is so analogous to the *possessio civilis* as to require the sanction of a Court for its validity. I am still unable to see any logical reason for disregarding the analogy in considering the claim for compensation. It does not seem to me to be equitable to approve the argument in one case and disapprove of it in the other.

No issue as to the *bona fides* of the defendant was framed at the trial, and the judgment of the learned District Judge seems to indicate that he believed them to be *bona fide* in fact but *mala fide* by an inference of law, as they had notice they were dealing with the property of minors and should have known the transaction required the sanction of the Court. It seems to me that the authorities are all against any such inference being drawn. No evidence, in the absence of an issue, was led with regard to the making of the lease, and there is a presumption of law in favour of *bona fides*.

The case of *Soysa v. Mohideen* [3] is not an authority for the proposition that a lessee is in every case to be regarded as a *mala fide* holder. It does not go beyond the proposition that a lessee cannot claim compensation on the footing that he is a *bona fide* possessor. I do not, however, think it goes so far as that, for, as I have explained above, the earlier cases were not over-ruled, and since the hearing I have found a case, *Hewavitarane v. The Dangan Rubber Co.*,[4] which was not cited to us or in *Soysa v. Mohideen*,[3] where a lessee was deemed to be a *bona fide* possessor. In my opinion

[1] *(1879) 3 S. C. C. 31.*
[2] *(1906) 9 N. L. R. 98.*
[3] *(1914) 17 N. L. R. 279.*
[4] *(1913) 17 N. L. R. 49.*

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the validity of an ex-lessee's claim to compensation turns upon the *bona fides* of his occupancy, and this does not appear to have been put in issue in the present case. I would make the order I have already formulated.

SHAW J.—

[His Lordship set out the facts, and continued]:—

The District Judge has held that the lease of February, 1898, was void in so far as it purported to affect the reversionary interest of the children, and has made the declaration claimed by the plaintiff, and given nominal damages at the rate of Rs. 125 per annum from April 5, 1914, when the plaintiff became entitled to possession. He has also refused to decree that the defendants are entitled to compensation, on the ground that they were not *bona fide* possessors, and from his decision the present appeal is brought. In my opinion the decision of the District Judge is correct on both points.

Dealing first with the power of Ukku to grant the lease. No authority has been cited that appears to me in any way to show that under the Roman-Dutch law a mother, or even a guardian appointed by the Court, can alienate or encumber the property of an infant, or grant a lease of his property to extend beyond, at the most, the term of ten years, except by permission of the Court. On the contrary, it appears to be a clear principle of the Roman-Dutch law that a minor's immovable property cannot be alienated without the decree of a court of competent jurisdiction (see judgment of Layard C.J. in *Mustapha Lebbe v. Martinus* [1] and the authorities there cited). It is true that *Van der Linden, ch. 4, sec. 1*, says that after the death of the father the parental power devolves on the mother alone, and that such power consists in the entire direction of the maintenance and education of the children and the management of their estate. There is nothing, however, that in any way suggests that the mother as natural guardian has any power to alienate or encumber the infant's property, unless she is appointed guardian and has the authority of the Court. However this may be, no legal right in the natural guardian to deal with the infant's property is recognized by our Courts (see *Gunasekera Hamini v. Don Baron* [2]). Chapter XL. of the Civil Procedure Code requires every person who shall claim a right to have charge of property in trust for a minor to apply to the Court for a certificate of curatorship. Such persons, when appointed, have the powers conferred upon guardians by the Roman-Dutch law (see *Perera v. Appuhamy* [3]), which, as I have said before, do not include any power to alienate or charge except by leave of the Court.

[1] *(1903) 6 N. L. R. 364.* [2] *(1902) 5 N. L. R. 278.*
[3] *(1895) 1 N. L. R. 140.*

In my opinion, therefore, Ukku had no power to grant the lease of September, 1898, beyond the term of her life interest and, in so far as it exceeded that, it was void.

Even had Ukku been a guardian appointed under chapter XL. of the Civil Procedure Code, and had applied for permission to grant the lease, I do not think such permission would have been properly granted, for I agree with the District Judge that, so far as the interests of the minors was concerned, it was an improvident lease and not for their benefit. It deprived them of their property for a period of forty years for the insignificant rent of 50 cents an acre, and was a bargain which Ukku would herself never have entered into had she not been tempted by the twenty years' rent in advance, which she had clearly no right to accept, as her interest might have terminated on the next day. The fact that Sahundera has obtained a good price for his interest in the land from the plaintiff does not in any way show that the lease was not an improvident one so far as he was concerned, the price having of course been influenced by the fact that the plaintiff has bought under the view that the lease is void, and that Sahundera is entitled to make a good title to the land in its present condition.

It has been decided in the case of *Juwan Appu v. Helena Hamy*,[1] that although under the Kandyan law a father may manage his minor son's property for his son's advantage, he cannot alienate it without the leave of the Court. It was, however, contended on behalf of the appellants, on the authority of *Appuhamy v. Kirihenaya*,[2] that a Kandyan widow has the same power of management and may alienate for the purpose of paying the debts of her deceased husband, and that in the present case there is evidence to show that this was her purpose in granting the lease under consideration. I think this evidence, such as it is, is contradicted by all the facts of the case. In the first place, Ukku was in this case appointed by the Court as executrix of her deceased husband, and any rights of alienating to pay debts under Kandyan custom were absorbed in her rights as executrix. She duly closed the estate, and four years after the testator's death conveyed the land to the persons entitled, without having raised any money from it for paying debts. When she granted the lease, six years after the testator's death, his debts would have been barred by prescription, and the lease itself makes no mention of any such purpose, but, on the contrary, it recites that it is for the use and benefit of the minors and herself. I therefore think that there was no power to grant this lease under any Kandyan law or custom.

With regard to the second question, namely, whether the defendants are entitled to compensation for their outlay in improving the land and to a declaration of a *jus retentionis* therefor, I agree with the finding of the District Judge that the defendants were

[1] *(1901) 2 Br. 19.*

[2] *(1896) 2 N. L. R. 155.*

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not *bona fide* possessors within the meaning of the Roman-Dutch law, and are therefore not entitled to compensation.

It is an undoubted underlying principle of the law of compensation for improvements that one person shall not be enriched at another's expense, and consequently when a person is in possession of another's property *bona fide* and in the belief that it is his own, he is entitled to compensation for his outlay in making useful improvements to the property; and moreover, he is entitled to retain the property until his outlay is reimbursed (see *Tikiri Banda v. Gamagedera Banda* [1]).

In the present case the Messrs. Christie, who cleared the land and planted the tea and rubber, had neither the possession referred to nor was their possession *bona fide*. "Possessor" for this purpose means the person who is in the enjoyment of the *possessio civilis*, which is *detentio animo domini*, and his rights are very different to those of a lessee, which are governed by quite different considerations (see *Pereira's Laws of Ceylon 353-354* and the authorities therein cited, and the judgment in *Soysa v. Mohideen* [2]). The possession here was not in my view *bona fide* in law, because the lease under which the defendants occupied the property showed on the face of it that Ukku had no right to deal with anything beyond a life interest. Although it is not necessary to so decide for the purpose of this case, it appears to me at the least to be doubtful whether Messrs. Christie's possession under the lease was even *bona fide* in fact. The lease was taken in a roundabout way through their conductor, and a payment of rent in advance was made which was palpably improper in the interest of the minors. There was at one time some doubt whether under the law prevailing in Ceylon even a *mala fide* possessor is not entitled to compensation for useful improvements. In view, however, of the Full Court decision in *The General Ceylon Tea Estates Co., Ltd., v. Pulle*,[3] it seems now to be settled law that such a right does not exist (see also *Livera v. Abeysinghe* [4]).

In my view the defendants' claim for compensation with respect to clearing and planting the land and for retention until payment is absolutely concluded by the decision of the Full Court in *Soysa v. Mohideen* [2] above referred to. In that case the defendant had occupied the land subject to a *fidei commissum* as lessee of one of the *fiduciarii*, who had agreed to pay to the defendant, at the termination of the lease, half the value of certain improvements to the property made by him, in accordance with the stipulations of the lease. In an action by the *fidei commissarii*, the *fiduciarii* having died, to recover a share of the property, it was held that it was not competent to the defendant to claim any compensation for the improvements.

[1] (1879) *3 S. C. C. 31.*
[2] (1914) *17 N. L. R. 279.*
[3] (1906) *9 N. L. R. 98.*
[4] (1914) *18 N. L. R. 57.*

I am unable to distinguish that case from the present, except perhaps by saying that equities in favour of the defendant in that appear to me to have been stronger than those of the defendants in the present case. It was further contended on behalf of the appellants that even if they are not entitled to compensation as possessors under the lease of February, 1898, they are so entitled as assignees of Ukku's rights in the land. It is suggested that compensation for useful improvements effected by Ukku as life tenant must be compensated for by the reversioners upon the termination of her interest, and the improvements effected by the appellants, her tenants, must be taken to be improvements effected by her, and that they, as assignees of her interest, stand in her place with regard to the compensation.

There appears to be a total absence of authority in Ceylon regarding the rights of a life tenant or fiduciary to compensation for improvements, and no very great assistance seems to be obtainable from the Roman-Dutch jurists. *Voet 36, 1, 61*, however, would appear to be of opinion that a fiduciary is entitled to the same compensation as allowed to a *bona fide* possessor, and this view appears to be not unreasonable, and in accord with the general principles of the law. However this may be, I do not think it assists the appellants in the present case. The improvements were not effected by Ukku, nor was the expense incurred by her, and had she retained her interest and lived until the termination of the lease I cannot see that her estate would have had any claim against the reversioners in respect of the improvements.

With regard to the costs of putting up the cooly lines, the position is somewhat different to the clearing and planting. They were put up by Messrs. Christie after they had acquired Ukku's life interest and Rankiri's half share, and when they were therefore not only owners of Ukku's life interest but were also co-owners with Sahundera in the reversion of the property. They are, therefore, entitled to remove the lines, or they may be entitled to compensation in some future proceedings for partition if they are in a position to show that erection of the buildings is a proper and customary improvement to a block of land of the description of that in dispute. I do not think, however, that they are entitled to any compensation or *jus retentionis* in the present action.

The form of the decree is not quite correct. It directs that the defendants be ejected from the share claimed. A co-owner cannot be ejected, and the proper order, and the one that appears to be commonly made in such cases as this, is that the plaintiff be put in possession of the half share.

Subject to this amendment, I would, for the reasons given above, dismiss the appeal with costs.

Appeal dismissed.