

1950 Present: **Dias S.P.J. and Pulle J.**

MOOSAJEE, Appellant, and FERNANDO, Respondent

S. C. 389—D. C. Colombo, 5,082

*Improvements—Claim for compensation—Set-off of income from the property.*

When a *bona fide* possessor of property makes a claim to compensation for any necessary improvements made by him, the rents and profits which have been received from the property should be set-off against the expenses incurred in making the improvements.

**A**PPEAL from a judgment of the District Court, Colombo.

*N. E. Weerasooria, K.C.*, with *Ivor Misso* and *W. D. Gunasekera*, for the defendant appellant.

*H. W. Jayewardene*, with *A. M. Gooneratne*, for the plaintiff respondent.

*Cur. adv. vult.*

June 21, 1950. PULLE J.—

The appellant in this case is the defendant against whom the plaintiff has obtained a decree declaring him entitled to a valuable portion of land abutting on 4th Cross Street, Colombo, shown as lot C in Plan No. 541 and awarding him damages for wrongful possession thereof by the appellant.

The plaintiff bases his title on the final decree entered in D. C. Colombo (Partition) Case No. 30,623 on the 16th July, 1935. He alleges that the lot in question is the divided portion in extent decimal 761 perch shewn as lot C in Plan No. 541. The appellant traces his title to one H. H. Dharmawansa, the brother of the plaintiff, who mortgaged the lot to one Seturaman Chettiyar to secure a sum of Rs. 300 by a bond, D4, dated 19th July, 1938. Seturaman Chettiyar put the bond in suit in C. R. Colombo Case No. 56,513 and the property was sold on the 30th July, 1940, and purchased by the appellant who obtained a Court conveyance D6 of the 17th February, 1941. The appellant also relied on prescriptive possession and further alleged that he made improvements by construction of a boundary wall which cost him Rs. 875.

Dharmawansa under whom the appellant claimed had no title whatsoever to lot C. The present action was instituted on the 8th September, 1947, and sufficient time could not elapse after the sale in 1940 to convert appellant's possession into title. To retrieve this hopeless situation he thought, apparently, that the best form of defence was to strike at the very root of the plaintiff's case. The appellant contested the identity of the plaintiff as the party in the partition case to whom lot C was allotted and also raised an issue on the validity of the partition decree itself on the familiar ground that it had not been entered in due conformity with the provisions of the Partition Ordinance.

The learned District Judge held against the appellant on every issue and in appeal the argument was confined to whether the learned Judge was right in finding in favour of the plaintiff on the issues of identity and compensation for improvements.

The plaintiff gave evidence, with a wealth of circumstantial detail, of his movements since he first left Ceylon for Singapore in 1925. He returned to Ceylon from Singapore in April, 1929, to find his mother ill. She died on the 19th May, 1929, and on the following day he gave information to the Registrar of Deaths, as the son of the deceased, in regard to all the particulars in the prescribed form. He goes back to Singapore in June, 1929, and during his stay there the partition action referred to earlier was instituted and he sends his proxy to a firm of lawyers who were also acting for the plaintiff's sister Sisilin Fernando and her husband, Julius Fernando.

By the time the plaintiff returned to Ceylon in December, 1936, he found that the partition action had been brought to a close and all his brethren, except Dharmawansa, doing well in life. Before leaving Ceylon for Singapore early in 1937 he asked Dharmawansa to take the rents from lot C and to appropriate them to his own use. The war in South-East Asia cut the plaintiff off from Ceylon till September, 1947. In fact two brothers and a sister thought that he was dead and they instituted

an action D. C. Colombo Case No. 17,987, against the appellant for the recovery of their share of the rents on the basis that they were intestate heirs of the plaintiff. The plaintiff's return to Ceylon coincided with an application by the plaintiffs in case No. 17,987 to withdraw their claim against the appellant, because the plaintiff whom they believed to be dead was alive. Three days after the present action was instituted. It is only natural that the plaintiff who found that Dharmawansa was unfaithful to his stewardship and who had gone to the extent of forging his signature discarded him altogether and would not call him as a witness. On the other hand the appellant was equally distrustful of him and felt that his case would suffer if he depended on his evidence.

Now the important point about the plaintiff is that the learned Judge says that he gave his evidence "very well and in a very convincing fashion". According to an observation made by him it is not unlikely that appellant's counsel received the same impression for the learned Judge says:

"At one stage an attempt was made by the defendant to prove that the plaintiff was not the same person as the 14th defendant in the partition case referred to. Later on, I think, the defendant's counsel gave up that line of defence after the plaintiff was questioned by this Court as regards the interrogatories that had been served on him and after the production of the Death Certificate of his (plaintiff's) mother, where the plaintiff had given information and had described himself as the son of his mother".

What the learned Judge says above may well account for the fact that after the plaintiff finished giving evidence no further witness was called to support him and that no one was called by the appellant to rebut the plaintiff's claim that he was the indential person to whom lot C was allotted in the partition suit. It is impossible, in my opinion, to accede to the contention on behalf of the appellant that the finding in favour of the plaintiff should be reversed.

The only point that remains to be considered is whether the appellant is entitled to any compensation for improvements. It is not contested that he incurred liability for half the cost of erecting a boundary wall between lot C and a contiguous allotment belonging to one Abdul Latif. The plaintiff submits that, assuming the appellant to have been a *bona fide* possessor and that the wall was a necessary improvement, any claim for improvements by him should be set-off against the rents and profits enjoyed by him. In my opinion the plaintiff's submission prevails. It is supported by authority. Walter Pereira in the Law relating to the Right of Compensation for Improvements says at p. 52:

"But, curiously, although in strict law as explained above, a *bona fide* possessor is entitled to the benefit of fruits gathered by him during his possession, still, when it comes to a matter of calculating the amount of the compensation to be paid to him for improvements, the authorities are agreed that the rents and profits which have been received are to be set-off against the expenses incurred in producing those profits as well as in the general improvements of the property itself."

and again at p. 53:

“ The position then is that while a *bona fide* possessor is not accountable for the income of the property possessed to its rightful owner, yet when he makes a claim to compensation for improvements, he is liable to deduct therefrom the amount of the income that he has derived from the property except the income from improvements themselves.”

Reference may also be made to the cases of *Nicholas de Silva v. Shaik Ali* <sup>1</sup>, and *Bilindi et al. v. Aththadissi Thero* <sup>2</sup> which proceed on the same basis. The appeal fails on every point and should be dismissed with costs.

.DIAS S.P.J.—I agree.

*Appeal dismissed.*

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