

1943

Present : Moseley S.P.J. and Keuneman J.

JASOHAMY *et al.*, Appellants, and PODIHAMY *et al.*,
Respondents.

274—D. C. Tangalla, 4737.

Usufructuary—Right to compensation—Conveyance of right—Partition action.

A usufructuary, who has made improvements with the consent and acquiescence of the owner, is entitled to compensation.

Where the improvement is conveyed by deed, together with all the right, title, and interest in the property, the right to claim compensation is also conveyed. A claim to compensation may be asserted in a partition action.

THIS was a partition action in respect of a land, which belonged to one M. G. Babunappu, who transferred it on May 30, 1913, to his five children including the first defendant, but reserved the life-interest to himself. Shortly afterwards Babunappu erected a distillery on the land which he possessed during his life-time and which he by deed 1 D 2 of January 24 sold to the first defendant, who was in exclusive possession of it till the death of Babunappu in 1941.

The learned District Judge held that the first defendant did not obtain title by virtue of 1 D 2 to the distillery which was vested in the five children of Babunappu. He further held that Babunappu had a claim for compensation in respect of the distillery and that by the deed 1 D 2 this right to compensation was conveyed to the first defendant.

H. V. Perera, K.C. (with him E. B. Wikremanayake), for the plaintiffs, appellants.—It cannot be said that any right to claim compensation was conveyed to the first defendant by deed 1 D 2. What was conveyed by that deed was the improvement itself, *i.e.*, the distillery. The case of *Mohamad Bhai et al. v. Silva et al.*¹ which the District Judge has referred to, dealt with the rights of a purchaser of land, and is not applicable in the present case. Deed 1 D 2 conveyed the building alone and not the land on which the building stood.

The vendor in 1 D 2 was only a usufructuary. A usufructuary cannot claim compensation in respect of improvements made by him. This question was exhaustively examined by Kotze J. in *Brundson's Estate v. Brundson's Estate et al.*² and it was held that a usufructuary is, in the absence of special circumstances, not entitled to claim compensation for improvements. See also *Wait v. Estate Wait*³. A usufructuary is fully aware of the nature of his possession and is not in the same position in law as that of a *bona fide* possessor. See *Wille on Principles of S. African Law*, p. 353 (1937 ed.). It has been held that a purchaser from a fiduciary heir cannot claim compensation for useful improvements from the fidecommissaries—*Livera et al. v. Abeyesinghe et al.*⁴, a case which went up in appeal to the Privy Council⁵.

¹ (1911) 14 N. L. R. 193.

² S. A. L. R. (1920) C. P. D. 159.

³ S. A. L. R. (1930) C. P. D., 1 at 4.

⁴ (1914) 18 N. L. R. 57.

⁵ (1917) 19 N. L. R. 492.

It must be presumed that Babunappu intended, when he made the improvement, to benefit all his children. The rule of resulting trust will not apply when an investment is made by a person in the name of his child or children—*Ammal v. Kangany*¹.

A pure claim for compensation cannot be asserted in a partition action—*Silva v. Linohamy*²; *de Silva v. de Silva*³.

U. A. Jayasundere (with him *S. R. Wijayatilake*); for the first defendant, respondent.—The case of *Mohamad Bhai et al. v. Silva et al.* (*supra*)⁴ is applicable to the facts of this case. The right to claim compensation is included in the conveyance 1 D 2 which transferred “all the right, title and interest” of the vendor.

Useful expenses can be recovered by a usufructuary—*Maasdorp's Institutes of South African Law* (5th ed.) vol. 2, p. 183. Even a usuary can claim compensation—*Maasdorp's translation of Grotius II. c. 10, § 8*. For meaning of the word “bruicker” see also *Lee's Introduction to Roman-Dutch Law* (3rd ed.), 186. The claim in *Livera et al. v. Abeyesinghe et al.* (*supra*) was not successful because it was made by a trespasser. See, (however, *Dassanayake v. Tillekeratne*⁵, *Saibo v. Baba et al.*⁶, *Fletcher and Fletcher v. Bulawayo Waterworks, Co., Ltd.*⁷, *Rubin v. Botha*⁸, *Wille's Principles of S. African Law*, p. 353. The guiding principle is that a party should not be enriched at the expense of another.

The question whether there was a resulting trust was not raised at the trial. The evidence, indeed, is that the improvement was made by Babunappu for his own benefit and that his children (the owners) stood by without protesting. In the circumstances the appellant, as vendee of Babunappu, is entitled to claim compensation—*Walter Pereira's Laws of Ceylon*, p. 377, *Nugapitiya v. Joseph*⁹, *Wijeyesekere v. Meegama*¹⁰.

A co-owner can, in a partition action, claim compensation for improvements—*Jayawardene's Law of Partition*, p. 117, *Appuhamy v. Sanchihamy*¹¹, *Johannes v. Podisingho*¹², *Silva et al. v. Silva et al.*¹³.

H. V. Perera, K.C., in reply.—A building can be sold apart from the land on which it stands—*jus superfiçiarium*. If the building comes down, vendee cannot build again on the land. The subject-matter of the transfer in 1 D 2 was the building. The conveyance was one of property and not of any chose-in-action. The vendee of an improvement cannot claim compensation unless the land on which it was built was also transferred.

It is true that a person who builds on a property which he *bona fide* believes belongs to him or which he thinks he has a right to occupy for some substantial period can claim compensation. The compensation is awarded on the ground of failure of expectation. Such a question of failure of expectation does not arise in the present case. See *Fletcher and Fletcher v. Bulawayo Waterworks Co., Ltd.*¹⁴. I rely on the judgment of *Kotze J. in Brundson's Estate v. Brundson's Estate, et al.* (*supra*).

¹ (1910) 13 N. L. R. 65.

² (1913) 2 Bal. N. C. 19.

³ (1908) 1 S. C. D. 70.

⁴ (1911) 14 N. L. R. 193.

⁵ (1917) 20 N. L. R. 89.

⁶ (1917) 19 N. L. R. 441.

⁷ S. A. L. R. 1915 A. D. 647.

⁸ S. A. L. R. 1911 A. D. 568.

⁹ (1926) 28 N. L. R. 140.

¹⁰ (1939) 40 N. L. R. 340.

¹¹ (1919) 21 N. L. R. 33.

¹² (1926) 28 N. L. R. 283.

¹³ (1911) 15 N. L. R. 79.

¹⁴ S. A. L. R. 1915, A. D. 647 at 649.

At the time he put up the citronella distillery, which was not only a useful but also a necessary improvement, the father must be deemed to have made a gift of it to all his children. His subsequent transfer of it to a particular child should be disregarded.

The legal position of the first defendant is not that of an improving co-owner. If Babunappu had transferred to a stranger his right, if any, of claim to compensation, the latter would not be permitted to intervene in the present partition action. A person who has no interest in the soil but has only a building on the land is not a co-owner of the common property—*Hamidu v. Gunasekera et al.*¹.

Cur. adv. vult.

July 7, 1943. KEUNEMAN J.—

This is a partition action, in which the title to the soil shares was not in dispute. The only point of dispute was the ownership of the citronella distillery on the land sought to be partitioned. It was admitted that the distillery was about 35 years old.

The whole land at one time belonged to M. G. Babunappu, who transferred it to his five children, including the first defendant, but reserved to himself the life interest in it (see P 7 or 1 D 7 of May 30, 1913). It is in evidence that the distillery was erected after this date, and the first plaintiff, another child of Babunappu, stated that her husband assisted Babunappu to erect the distillery, and that she thought Babunappu was erecting it for his children, and that Babunappu possessed the distillery in his life-time. By his deed 1 D 2 of January 24, 1934, Babunappu for the sum of Rs. 300 sold the distillery to the first defendant, who stated that she was in exclusive possession of it from that date till the death of Babunappu in 1941.

The learned District Judge held that the first defendant did not obtain title by virtue of deed 1 D 2 to the distillery, which became vested in the five children of Babunappu. He further held that Babunappu had a claim for compensation in respect of the distillery, and that by the deed 1 D 2 this right of compensation was conveyed to the first defendant, and that the first defendant was entitled to claim Compensation from the other co-owners in respect of the distillery. He accordingly made order that it would be best if by agreement of parties the Commissioner appointed for partition could divide the land so that the distillery falls within the block allotted to the first defendant. Failing that, the question of the amount of the compensation was to be decided later.

From this decision the plaintiffs' appeal and many matters of law were argued before us. The first contention of the appellant was that the deed 1 D 2 did not convey to the first defendant, the right to claim compensation. By this deed Babunappu purported to convey the iron citronella boiler and the buildings and appurtenances belonging thereto together with all his right, title, and interest and all things belonging thereunto. In *Mohamad Bhai et al. v. Silva et al.*² it was held that a purchaser of land stands in the same position as his vendors in regard to any claim for improvements made by the vendors. As Middleton J. put it, "He will stand in the same position as they did in regard to any claim for compensation that might have been sustainable by them as

¹ (1922) 24 N. L. R. 143.

² (1911) 14 N. L. R. 193.

the successor in title of their right, title, and interest in the property." It is contended that where the property itself was not conveyed, but the improvement only, the right to claim compensation did not pass. I do not agree with this contention. In my opinion the words "together with all my right, title, and interest and all things belonging thereunto" are wide enough to convey the right to claim compensation for the improvement.

Further, it was argued by the appellant that Babunappu was only a *usufructuary*, and that as such he had no claim to compensation in respect of improvements made by him. No case has been cited to us, where this matter has been adjudicated upon in Ceylon, and the question is not free from doubt. In *Livera v. Abeyesinghe*¹ it was held that a purchaser from a *fiduciary* heir could not claim compensation for useful improvements from the *fidecommissaries*. The matter went up in appeal to the Privy Council—see *Livera v. Abeyesinghe*² where this particular matter was not decided, but on the facts the appellant was held not to have acted *bona fide*. Later in *Dassanayake v. Tillekeratne*³ it was held that a *fiduciary* is entitled to the same right of compensation for improvements as any other *bona fide* possessor, and to retention of the property until the compensation is paid, and that a purchaser from a *fiduciary* is in the same position as the *fiduciary*.

The rights of the *usufructuary* have been considered in South Africa, and there is a conflict of opinion. Maasdorp in his *Institutes of South African Law (5th Edition)* at page 183 says, "Useful expenses may also be recovered by the *usufructuary* at any rate to the extent to which the property has been enhanced in value thereby." The authority cited is *Schorer Note 228 to Grotius*. Maasdorp, however, also refers to the case of *Brundson's Estate v. Brundson's Estate and Others*,⁴ where, in a learned judgment Kotze J. points out *inter alia* that there was a mistranslation of the Dutch word "bruicker" in the text of Grotius. He adds that the word does not mean "usuary" but merely "tenant or lessee". Kotze J. comes to the conclusion "that the statement made by Schorer . . . is not borne out by an examination of the sources, and that both principle and authority lead to the conclusion that a *usufructuary* is not, in the absence of special circumstances, entitled to claim for improvements made by him to the property over which he enjoys the right of usufruct." Kotze J. does not define what the "special circumstances" are.

As I have said before, this matter is not free from doubt, and will have to be decided in a proper case. I do not think it is necessary to decide the matter now, for the respondent contends that in this case the improvements have been made with the consent and acquiescence of the true owners. The District Judge has so held, but the appellant disputes that finding, and contends that in this case, it must be presumed that Babunappu in making the improvements intended to benefit his children either at once or at his death. I do not think it is possible to hold that he intended to benefit the children at once, because the evidence is that Babunappu was in possession of the improvement from the time he made it, and it was an improvement which was useful for his own occupation and enjoyment of the citronella land. Did he intend that the improvement should go to his children at his death, so as to

¹ (1914) 18 N. L. R. 57.

² (1917) 19 N. L. R. 492.

³ (1917) 20 N. L. R. 89.

⁴ S.A.L.R. (1920) C.P.D. 159.

negative any claim for compensation for improvement on his part? The evidence of the first plaintiff is that she thought her father was erecting the distillery for his children, but this represents nothing more than her hope, and perhaps explains the eagerness with which she consented to the improvement. As against this is the fact that the erection of the distillery was a good business proposition for Babunappu himself, and the further fact that in 1934 he transferred the distillery to one of the children only. This appears to have been done without any protest by the other children, and the first defendant has been in exclusive possession of the distillery from that date.

We have been asked to presume in this case that Babunappu intended, in making the improvement, to benefit his children by it. It has certainly been held that a resulting trust, which would otherwise be held to arise, when one man pays the purchase price of property, but takes the transfer in the name of another, may be rebutted, where such other person is the lawful wife or child. In such a case a *prima facie* but rebuttable presumption arises, that the purchaser intended the ostensible grantee to take beneficially. No case has been cited to us, in which a similar presumption has been applied to circumstances akin to those existing in the present case, and I think that in some of the cases cited to us, the point, if valid, may well have been taken. Apart, however, from any presumption, I think it is permissible to lead evidence in a case of this nature, to prove that the improver did not intend to benefit himself, or intended to benefit the real owner, so as to negative any claim for compensation. On an examination of the whole of the evidence, which is in fact very scanty, I think that we may hold that Babunappu erected the distillery for his own benefit, and not for the benefit of his children. His conduct is more consistent with that view, and I think it is more likely that the children also took the same view. Also there is no evidence that Babunappu ever expressed an intention that the improvement should go to the children, and the fact that he retained a substantial interest in the land and in the improvement, I think, entitles us to hold that he made the improvement for his own benefit.

There can, I think, be no doubt that the children, the real owners of the property, consented to and acquiesced in the making of the improvements.

It has been strongly argued that even this does not give to a usufructuary the right to claim compensation.

Wille in Principles of South African Law (1937 edition), page 353 sets out the right to improvements to property as follows:—

“A person who expends money or labour in improving property, intending to do so for his own benefit, thinking either that the property belongs to himself, or that he has the right to occupy it for some substantial period, whereas in fact he has no such right or title to the property and in consequence the improvements are acquired by the owner of the property, is entitled to claim from the latter the amount by which the property has been enhanced in value. Even a person who has made improvements on another person's property *mala fide*, that is, knowing he had no title to the property, is entitled to claim the same measure of compensation if the owner stood by and allowed him to make the improvements without objection.”

It is to be noted that in South Africa the right to claim compensation has been given to a *bona fide occupier*, e.g., a person holding an invalid lease as against his own lessor, and a person holding a lease from A, who unwittingly made improvements on B's land. (Vide *Rubin v. Botha*¹ and *Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd.*”).

Now in the present case, I think Babunappu must be regarded as a *mala fide improver*, because he knew he had no title to the property. The rule that consent and acquiescence on the part of the owner gives a right of compensation to the improver is, I think, of wide application, and is not restricted to special classes of persons, such as lessees or tenants. In *Nugapitiya v. Joseph*² Garvin J. said, “the owner who stands by . . . will not be permitted to deny the improver's status to claim compensation, so that he may take the full benefit of the improvement and enrich himself at the improver's expense.” That case is somewhat akin to the present case. I do not think that the right to claim compensation can be denied to Babunappu and to the purchaser from him—the first defendant.

I may add that the question whether the first defendant was entitled to a *jus retentionis* did not arise for determination in the present case.

A further point was taken that the present claim to compensation being a mere money claim cannot be asserted in a partition action, and reliance was placed by the appellant on two cases, *Silva v. Silva*³ and *Silva v. Linohamy*⁴. I do not think these cases are of authority to-day—see *Jayawardene on Partition*, pages 118 to 120—and they do not appear to be consistent with later decisions. I am inclined to be in agreement with the dictum of Garvin A.C.J. in *Johannes v. Podisingho*⁵ that “the provisions of the Partition Ordinance were clearly intended to be a proceeding for the determination of every material question in dispute between the parties.”

The appeal is dismissed with costs.

MOSELEY J.—I agree.

Appeal dismissed.