1967 *Present :* **Alles, J., and Siva Supramaniam, J.**

A. GUNAWARDENA, Appellant, *and* S. BANDARANAYAKA and another, Respondents

S. C. 335/1965—D. C. Badulla, 2130/L

Compensation for improvements—Value of the fruits of the improvements cannot be deducted.

A *bona fide* possessor who is entitled to compensation for improvements effected by him is under no liability to account, to the owner of the property improved, for the value of the fruits which he derived from his own improvements.

APPEAL from a judgment of the District Court, Badulla.

Bala Nadarajah, for the plaintiff-appellant.

T. B. Dissanayake, with *Nalin Abeysekera*, for the defendants-respondents.

Cur. adv. vult.

February 13, 1967. ALLES, J.—

The plaintiff instituted this action against the two defendants as heirs of the late T. B. M. Bandaranayake for a declaration of title to a portion of land called Hirimoletenne described in the schedule to the plaint, or in the alternative that the defendants be ordered to pay to the plaintiff compensation for the value of the improvements made by him in the event of the defendants being declared entitled to the land. According to the plaintiff, he cleared the land in 1947 when it was in scrub jungle, constructed some buildings and made certain plantations. The plaintiff maintained that prior to his death in 1952, Bandaranayake gave the land to him on an informal verbal agreement, having received a sum of Rs. 200 as consideration and promising to give him a deed later. This evidence has not been accepted by the learned District Judge. By Indenture of lease No. 15545 of 22nd July, 1953 marked P4, Bandaranayake's widow leased an undivided seven acres in extent from the land called Hirimoletenne of ten acres extent to the plaintiff. The lease was to continue for five years, at the expiration of which the plaintiff was required to hand over possession of the leased premises to the defendants. According to the terms of the lease bond it was expressly agreed between the parties that the plaintiff would not be entitled to compensation for any improvements effected by him. It was the plaintiff's case that the portion leased to him on P4 did not constitute any part of the land in suit while the defendants contended otherwise. The learned District Judge has accepted the evidence of Surveyor Balasingham to the effect that the land in suit falls within the premises leased to the plaintiff on P4.

The learned Judge's findings on the above facts may be summarised as follows :—

(*a*) that the plaintiff is not entitled to a declaration of title in his favour to the land described in the schedule to the plaint ;

(*b*) that although the said land was subsequently included in the lease bond P4, the plaintiff was a bona fide possessor of the said land and is entitled to compensation for the improvements effected by him.

We see no reason to disturb the aforesaid findings.

When the lease expired in 1957, the plaintiff continued to remain in possession of the land and in 1958 the widow, the first defendant in the present action, sued the plaintiff in the Court of Requests, Badulla, in Case No. 15453 for ejectment from the land and claimed damages at the rate of Rs. 25 per year till she was restored to possession. The present plaintiff, who was the defendant in that case, filed answer on 20th January 1961 claiming title to the land. The case however did not proceed to trial and the present plaintiff undertook to file an action for declaration of title and the present action was instituted on 6th May 1961. The learned District Judge has held on a balance of evidence that the buildings and plantations had been made by the plaintiff prior to the execution of the lease and that therefore these improvements did not fall within the ambit of the covenant in the lease that the plaintiff was not entitled to claim compensation for the improvements.

The learned Judge has assessed the compensation payable in respect of the buildings at Rs. 3,000. As regards the compensation payable in respect of the plantations, he has accepted Welgolla's valuation. Surveyor Welgolla valued the lime plantation at Rs. 634 and the other permanent plantations at Rs. 49. There were also temporary plantations which he valued at Rs. 180. The sum payable as compensation for the permanent plantations is therefore Rs. 683 and not Rs. 634 as stated by the learned Judge. The total compensation payable is Rs. 3,683.

Having held that the defendants were liable to pay compensation for the improvements effected by the plaintiff, the learned Judge proceeded to state :

> " From this amount, however, the plaintiff has to restore to the defendants who are the owners of the soil, all the fruits actually gathered by him after the 'litis contestatio', that is, after the closing of the pleadings in the action with reference to the possession or ownership of the ground, because by the 'litis contestatio' a bona fide possessor becomes converted into a mala fide possessor. "

He fixed the date of *litis contestatio* to be 20th January 1961, being the date on which answer was filed in the C. R. action ; and he determined the value of the fruits at Rs. 700 per annum on the basis of an admission

by the plaintiff in the course of his evidence that he sold limes from the trees on the land for Rs. 900 in 1962 and for Rs. 500 in 1963 and on the average for about Rs. 600 a year. Although the plaintiff did not say that the sums stated by him represented the nett profits from the sale of fruits, the learned Judge appears to have assumed that they were nett profits. He has held that on a set-off of the value of the fruits payable by the plaintiff to the defendants against the compensation payable by the defendants to the plaintiff, no sum of money is payable by the defendants and has dismissed the plaintiff's action.

In arriving at the aforesaid conclusion, the learned Judge has erred both on the facts and in law. In view of the finding that the plaintiff was a *bona fide* possessor who was entitled to compensation for improvements, the plaintiff was under no liability to account to the defendants for the value of the fruits which he derived from his own improvements. Voet in his Title on Vindications (Book 6, Title 1, Sections 38 and 39) states :

> " . . . .since decisions to the contrary are also found, I consider that the opinion of those is better founded on reason who hold it unfair that the fruits of improvements should be set off against the improvements themselves. "

vide Gane's translation at p. 252 of Vol. 2). The reasons given by Voet for this view are worthy of reproduction. He says :

> " If such set-off were to be allowed, the ridiculous consequence would in the first place flow from it that a possessor in good faith would see his own improvements paid for out of his own property and his own fruits, which had been received by him in right of ownership from his personal funds invested in the benefit. Thus when the result is looked at, the possessor in good faith would for the whole period of such possession receive precisely no benefit from his own funds disbursed in the hope of profit, but the owner of the property alone would feel it. Not only that, but bear in mind that a possessor in good faith never recovers a greater value for improvements than what they are worth at the time of restoration, so that the whole expenditure is at the risk of such possessor, and he gets either little or nothing according as either little or nothing is left of the improvement made. Thus if set-off is allowed, the effect would surely be that all gain from disbursements indeed would pass to the owner of the property improved, but the burden of the risk of them would fall only and solely on the possessor in good faith. ". . . . . " To this may be added that the more careful the possessor in good faith has been, and the more zealous like a good father of a household to bring the property which he thinks his own into a better state, the worse by so much would be his condition ; but the more careless he has been so much the more would he profit. No one can help seeing how far that departs from natural fairness. "

Voet's view has been adopted in South Africa—vide *Fletcher and Fletcher v. Bulawayo Waterworks Co. Ltd.*[1] and in Ceylon—*Beebee v. Majid*[2] and *Newmam v. Mendis*[3]. In the latter case, Browne, J. at p. 80 states as follows :—

> " And though in assessing compensation for *impensae utiles* the mesne profits including fruits consumed are to be taken into account yet the fruits of the expenditure itself, *fructus ex ipsa melioratione percepti*, are to be excluded from the accounting and not to be set off as against the claim (1 N. L. R. 226). The reason thereof seems obvious. The mesne profits arise out of the original capital of the parties, the land itself, the fruits of improving the expenditure arise from the additional capital brought in by the improver. "

In the case of *Bilindi v. Aththadassi Thero*[4] all the earlier authorities were referred to and this Court held that in a claim for compensation for improvements a bona fide possessor need not deduct the value of the fruits obtained by him, before the date of assessment, from the improvement itself. The date of assessment was held to be the date of the judgment. The finding, therefore, that the plaintiff should account to the defendants for the value of the fruits of his own improvements is wrong in law.

The learned Judge has also overlooked the fact that, in the answer filed by the defendants they did not claim a set-off of the value of the fruits gathered by the plaintiff from the land and there was no issue on that point raised at the trial. All that the defendants prayed for, apart from a declaration of title in their favour and the ejectment of the plaintiff, was a decree for damages in a sum of Rs. 250 and continuing damages at Rs. 50 per annum from the date of the answer, namely, 25th October 1961, until possession of the land was restored to them. Issue 9 (*b*) suggested by the defendants was as follows :—

> " What damages are the defendants entitled to ? "

No evidence was placed before the Court by the defendants on that issue and the learned Judge did not answer that issue, stating that it did not arise for consideration.

On the basis that he was a *bona fide* possessor, the plaintiff was entitled to remain in possession of the land until the compensation due to him was paid. The defendants are not entitled to claim any damages until they pay to the plaintiff or deposit in Court to the credit of the plaintiff with notice to him the sum of Rs. 3,683 payable as compensation. On the date of such payment or deposit, the plaintiff will be liable to deliver possession of the land to the defendants and, on his failure to do so, will be liable to pay to the defendants the entire income derived or derivable by him from the said land (which will include reasonable rental for the

[1] *(1915) A. D. 636 at 651 and 660.*
[2] *(1929) 30 N. L. R.361 at 362.*
[3] *(1900) 1 Browne 77.*
[4] *(1946) 47 N. L. R. 276.*

buildings) from the said date, in addition to damages calculated at Rs. 50 per annum until possession of the land is restored to the defendants. In that event, the learned Judge will, after holding such enquiry as he may think fit, determine the amount that should be paid by the plaintiff to the defendants as refundable income.

We set aside the decree entered in this case and direct that a fresh decree be entered—

(*a*) dismissing the plaintiff's action for a declaration of title to the land set out in the schedule to the plaint and declaring the defendants entitled to the said land ;

(*b*) ordering the defendants jointly and severally to pay to the plaintiff a sum of Rs. 3,683 as compensation for improvements ;

(*c*) for ejectment, as prayed for in paragraph (*c*) of the defendants answer, the writ of ejectment to issue only on deposit in Court or on proof of payment to the plaintiff of the sum of Rs. 3,683 by the defendants ; and

(*d*) ordering the plaintiff to pay to the defendants, with effect from the date of payment to the plaintiff or deposit in Court with notice to the plaintiff by the defendants of the sum of Rs. 3,683, all income derived or derivable by him from the said land, inclusive of reasonable rental for the buildings thereon, along with damages calculated at Rs. 50 per annum from the said date, until possession of the said land is restored to the defendants.

The parties will bear their own costs in the lower Court. The appellant will be entitled to his costs in appeal.

SIVA SUPRAMANIAM, J.—I agree.

Decree set aside and a fresh decree entered.