WANIGARATNE AND ANOTHER
v.
WANIGARATNE

COURT OF APPEAL.
SENANAYAKE, J.,
EDUSSURIYA, J.
CA. 24/94/(F).
D. C. MT. LAVINIA 702/ZL.
SEPTEMBER 16, 1996.

Compensation for improvements – Bona fide *and* Mala fide *possession* – *Jus retentionis-Unjust enrichment* – *Possessio civilis* – Impensa utiles – Impensa Voluptuorie – *Necessary Expenses.*

The plaintiff-respondent instituted action seeking a declaration of Title to the land and premises in question. It is the position of the plaintiff-respondent that her father conveyed the title thereto to her on deed P11, and that the defendant-appellant is in forcible possession of the property.

The defendant-appellant claimed that he was residing on the subject matter on the basis that it would one day be given to him and that he repaired the house and in the alternative claimed a *jus retentionis.*

The defendant-appellant's further contention was that the respondents had failed to prove P11.

Held:

***Per* Edussuriya, J.**

(1) Deed P11 though marked subject to proof was not objected to when the respondents case was closed reading in evidence P1-P17.

"Where no objection is taken when a document is read in evidence at the closure of the case to a document which had been marked subject to proof the earlier objection is deemed to have been waived."

In any event, the Notary gave evidence and had stated that she knew the Donor, Donee and the two attesting witnesses.

(2) The defendants-appellants are not *bona fide* possessors; trespassers cannot foist on the owner what they consider to be necessary improvements done without the owners consent and claim compensation.

***Per* Senanayake, J.**

(3) "It is well settled law that a *male fide* possessor was not entitled under the Roman Dutch Law to compensation for Impensa Utiles, except in cases where the owner of the property stood by and allowed the building to proceed without

notice to his own claim, in such a case the *male fide* possessor would be in the position of a *bona fide* possessor with the rights of retention."

(4) The appellants cannot under any circumstances according to law claim any compensation on the basis of unjust enrichment. It would be unreasonable to allow him to force on the true owner improvements which may be useful according to his own taste, which the plaintiff-respondent never cared to effect.

APPEAL from judgment of the District Court of Mt. Lavinia.

Cases referred to:

1. *Sri Lanka Ports Authority and Another v. Jugolinija-Boat East* [1981]-Sri LR 18.
2. *Hassanally v. M. M. M. Cassim* 61 NLR 529.
3. *Soysa v. Mohideen* 17 NLR 279.
4. *Livera v. Abeysinghe* 18 NLR 57.
5. *Bellingham v. Bloometge 1 Bucham Report 36.*
6. *Wijetunge v. Wille* 63 C.L.W. 41.
7. *Parkin v. Lippert* [1895] 12 SLR 179.
8. *Rubin v. Botha* SASCR App DIV1911 at 568.
9. *General Tea Estates Co., Ltd. v. Pulle* 9 N.L.R. 98.

N. R. M. Daluwatte, P.C. with *Manohara de Silva* for defendant-appellant.

A. K. Premadasa with *C. E. de Silva* for plaintiff-respondent.

Cur. adv. vult.

October 25, 1996.
EDUSSURIYA, J.

This is an appeal from the judgment of the learned District Judge of Mount Lavinia.

The plaintiff-respondent (respondent) instituted this action seeking a declaration of title to the land and premises described in the schedule to the plaint.

It is the respondent's case that her father who was the owner of this land and premises conveyed the title thereto, to her on deed 'P11' of 7th January, 1980, and that the defendants-appellants (appellants) broke open the locks of the premises bearing assessment No. 331 referred to in the schedule to the plaint and got into forcible possession thereof on 14th January, 1980.

On the other hand the 1st appellant claims to have been residing on the subject matter of this action from 1969 until he went abroad in 1977 and that till he returned in 1979 his wife the 2nd appellant was residing thereon, and that on his return in 1979 he repaired the house standing thereon and effected improvements incurring an expense of Rs. 150,000/- (paragraph 6 and 7(a) of the amended answer dated 18th June 1988 page 58 of the Brief). Having stated all this, claimed a *jus retentionis* till a sum of Rs. 200,000/- is paid by the respondent if judgment is entered in favour of the respondent. However on a reading of paragraphs 7(b) and 7(c) of the amended answer one gets the impression that the 1st appellant contradicts the position set out in paragraph 7(a) that all improvements to the original house which stood on the land were effected after his return from abroad in 1979, by stating that these improvements were effected after 1969 when he came into residence.

The first contention of the appellant's Counsel was that the respondent had failed to prove deed 'P11', her title deed.

'P11' though marked subject to proof was not objected to when the respondent's case was closed reading in evidence 'P1' to 'P17'.

It has been held that where no objection is taken when a document is read in evidence at the closure of the case, to a document which had been marked subject to proof, the earlier objection is deemed to have been waived. (*Sri Lanka Ports Authority and Another v. Jugolinija-Boat East*[1]).

In any event the notary who attested 'P11' has given evidence and stated that she knew the donor on deed 'P11', the donee and the two attesting witnesses as well.

However, Counsel for the appellants drew our attention to the notary's evidence-in-chief wherein she has stated (according to the proceedings – page 184) that all the witnesses had not come when 'P11' was signed.

This appears to have been a mistake or an error in recording the proceedings since the witness has immediately thereafter said 'this deed has been correctly executed". Further the notary has categorically stated that the witness, the donor and the donee were all present at the time of the execution of 'P11' and that the witnesses signed in her presence (page 198). Then again in re-examination (page 199) the notary has repeated this.

Therefore we hold that the first contention of the appellants' counsel must necessarily fail.

From 'P11', a letter written by the 1st appellant from England to his mother, bearing the postal date stamp 14th January 1979, it appears that the 1st appellant had resided in the premises no. 331, but it is also clear from 'P11' that his wife was not residing there when he was abroad as stated in paragraph 7(a) of the amended answer (page 64) because the 1st appellant has told his mother to give the keys to his wife Piyaseeli to enable her to remove her belongings to Pamunuwa.

In 'P11' the 1st appellant has told his mother that she can give the house to any one and take the money because such money does not belong to him. He has also stated therein that once the house is given to outsiders he will not come back to the house on his return from abroad.

These statements show that the 1st appellant if at all had been merely allowed to reside there. These statements do not substantiate the 1st appellant's position that he was made to understand that the subject matter of this action would one day be given to him. 'P1' also show that by the date of that letter the 1st appellant had not spent any money on any improvements to the house. Had he done so he would certainly have claimed it in 'P11'. Further if as the 1st appellant alleges his father had made him understand that he would be given this land he undoubtedly would have said so in 'P11'. 'P11' shows clearly that the 1st appellant was merely allowed to reside there.

Then the question is when were the "improvements" effected?

According to the 1st appellant's evidence he returned to the island bringing with him four (4) vehicles, two of the vehicles he sold in the later half of 1979 and used that money to effect improvements (page 246). According to paragraph 7(a) of his amended answer too he effected the improvements after his return in 1979. The 1st appellant has gone on to state (page 24) that at first he got an electricity connection to the house and "things like that" and that later he demolished the house and started building six annexes and that his father did not object till then. Further, according to him all constructions were completed by mid 1980.

On the other hand in January 1980, the father had conveyed title to the respondent and whilst he was in hospital he had sent his wife (the mother of the 1st appellant) to complain to the Police (P9) that the 1st appellant had forcibly occupied the subject matter of this action, (on receipt of information to that effect). Besides the mother of the 1st appellant has said in evidence that she saw that the 1st Appellant had got into the subject matter of this action and through fear went away. Further the 1st appellant's own document 'D12' a Grama Sevaka's certificate of registration of residence which has been issued on 23rd January 1980 states that the 1st appellant was residing at the subject matter of this action from 1971 to 1st May 1978 and again from January 1980. Therefore he would have got even the electricity connection after January 1980 and he admitted (page 255) that his mother objected at that stage.

For the abovementioned reasons and the reasons set out in the learned District Judge's judgment which I see no purpose in re-iterating here, I see no cause whatsoever to interfere with the findings of fact that the appellants had got into forcible possession of the subject matter of this action as alleged by the respondent and then surreptitiously constructed buildings thereon, in spite of objections, for which they now claim compensation.

Counsel for the appellants contended that the appellants are entitled to compensation on the basis of unjust enrichment of the respondent and relied on the decision in the case of *Hassanally v. M. M. M. Cassim*[2].

That decision has no relevance to the facts of this case. In that case it was a lessee who effected the improvements in the *bona fide* belief that the lessor was the sole owner and further the other co-owners had made no protest but stood by and acquiesced in the improvements. In this case the appellants are not *bona fide* possessors as it was decided that the respondent's predecessor in title (the father) had never led the appellants to believe that this property would be given to them, and therefore the respondent cannot be ordered to pay compensation for buildings which were constructed by the appellants who are *mala fide* possessors.

Further trespassers cannot foist on the owner what they consider to be necessary improvements, done without the owner's consent and claim compensation. It could well be that the owner had other plans and may have to demolish the "improvements" effected by the

trespassers because they are not necessary improvements. Besides there is no evidence that they are necessary improvements. If Courts of Law were to hold that owners of land should pay compensation to trespassers who have put up buildings thereon, then we would be paving the way for trespassers to build as they like, because at the end of the day they can walk away with compensation, after having been in forcible possession for a period of years and having rented out such buildings and earned thereby, as in this case.

For the above mentioned reasons the appeal is dismissed with costs fixed at Rs. 4,200/-.

SENANAYAKE, J.

I had the opportunity of reading the judgment of my brother Edussuriya, J. I am in agreement with the reasons set out in his judgment.

I wish to add only on one matter. The learned Counsel for the appellants contended that the appellants were entitled to compensation on the principle of unjust enrichment of the respondent. He relied on the decision in the case of *Hassanally v. M. M. M. Cassim*[2]. In my view the learned Counsel had failed to appreciate the reasoning in that case. In the instant case the evidence categorically establish that the appellants were trespassers and therefore were *mala fide* possessors, but in the case of *Hassanally v. M. M. M. Cassim (supra)* the facts were quite different. The facts of that case was concerned with certain lands situated in New Moor Street, Colombo which at the date of her death was held by Rahumath Umma subject to the fideicommissium created in 1871 in favour of her descendants. She died in 1921 leaving as her heirs two daughters Umma Shiffa and the second respondent Zanera Umma subject to the fideicommissium Umma Shiffa died in 1938 leaving as her heirs her four children on 11th December 1945. The respondent Zanera Umma fiduciary who was entitled to half share of property purported to be sole owner, granted a lease of the property for 30 years. The lease agreement contained a covenant by the lessee that he would "within a reasonable time lay out and expand at his own expense in erecting and completing fit for habitation with proper materials of all sorts upon the said ground dwelling houses tenements, shops, boutiques or factories" as there provided. It was provided that the lessee could enjoy the use and benefits and

income of the buildings constructed during the pendency of the lease and the lessee had at the end of the term to deliver up the entire buildings to the lessor free of payment of any kind.

The lessee in good faith constructed buildings upon the property and was in possession for a few years. When an action for sale of the property was filed under the Partition Act by a fideicommissary heir of the fiduciary. The lessee who was the 5th defendant by his amended statement of claim, claimed in the event of sale of the property ordered in terms of the Partition Act, compensation for the buildings. The learned District Judge held that Zanera Umma held herself out as the sole owner of the land and that the 5th defendant constructed the buildings in the *bona fide* belief that Zanera Umma was in fact the sole owner and awarded compensation in a sum of Rs. 25,127.45 cts. The lessee's claim to compensation for the buildings from the proceeds of sale was dismissed by the Supreme Court vide 59 N.L.R. page 160 at 164 on the ground that the rights if any arising from a contract between the lessor and lessee cannot be enforced by the lessee as against fideicommissary owners who were not parties to the contract. H. N. G. Fernando, J. held that the Court was bound by the decision of the Full Court in *Soysa v. Mohideen*[3]. Fernando, J. observed at page 161:

> "The Full Court unanimously decided that the lessee was not entitled to compensation. The following passage occurs in the judgment of Pereira, J. at pages 285 and 286. 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 *possessio* naturalis. The former, of course meant *detentio animo domini* (3 Burge).

Fernando, J. at page 164 (*supra*) observed "Having considered many and subsequent cases I would hold that none of them have in any way qualified the principle laid down in *Soysa v. Mohideen*[3] that the rights if any arising from a contract between a lessor and lessee cannot be enforced by the lessee as against fideicommissary owners who were not parties to the contract".

In *Livera v. Abeysinghe*[4] the Supreme Court held that a purchaser from a fiduciary heir cannot claim compensation for useful improvements from the fideicommissary but upon appeal to the Privy Council 19 N.L.R. 492 the question of law was left undecided because Their Lordships preferred to act upon the finding of fact that the improver was not acting *bona fide* and had to be treated as a mere trespasser. The law was only reviewed in *Hassanally v. M. M. M. Cassim* vide (*supra*) 529.

The decision of the Supreme Court was pointed out to be due to faulty reasoning by Viscount Simonds in *Hassanally v. M. M. M. Cassim* (*supra*). Viscount Simonds points out it was the assumption of the Supreme Court that it was dealing with a claim by a lessee whereas the very basis of the claim was that the lease has been repudiated and that he cannot claim under it. Their Lordships observed that it **would be difficult to imagine a clearer violation of the moral principle upon which the rule against unjust enrichment rests** than that an owner who has for whatever reason prematurely brought a lease to an end should at once deny to the lessee the rights which the lease or common law gives him as lessee and, because he was a lessee, deny also his claim to compensation for improvements. The Privy Council held that the claim of the improver was based not on contractual rights under the lease but upon an equitable principle which is an application of the cardinal rule against unjust enrichment.

This case laid down the principle that the true owner is not entitled to take advantage without making compensation of the improvements effected by one who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity. Accordingly a person who occupies land *bona fide* and improves it in the mistaken belief that he has a lease of the property has the same right to compensation as a *bona fide* possessor. Vide *Bellingham v. Bloometge*[5] Vide *Wijetunge v. Wille*[6].

An improver who lawfully occupies under a lease and in that capacity makes improvements is entitled to compensation if his term of lease is prematurely terminated by operation of law. vide *Parkin v. Lippert*[7] and *Rubin v. Botha*[8].

In the instant case the appellants were trespassers on the land, therefore they were *mala fide* possessors. It is well settled law and

decided in the case of *The General Tea Estates Co. Ltd. v. Pulle*[9] that a *mala fide* possessor was not entitled under the Roman Dutch Law, as administered in Ceylon to compensation for *impensa utiles*. Pereira Acting Puisne Justice observed in a case reported in 2 Balasingham's Report 149 "a *mala fide* possessor is one who possesses well knowing that he has no right to do so in as much as the property possessed belongs to another and it would be unreasonable to allow him to force on the true owner improvements which very useful though they be are effected according to his own taste or whims and his fancy and may be such as the true owner himself would never have cared to effect."

It was the view that was expressed that *mala fide* possessor is not entitled to *utiles impensa* except in cases where the owner of the property stood by and allowed the building or planting to proceed without notice to his own claim. In such a case the *mala fide* possessor would be in the position of a *bona fide* possessor with the same rights of retention.

Walter Pereira, in his Book Laws of Ceylon at page 377 has stated that (a) "A *bona fide* possessor who has effected useful improvements has the right to have improvements taken over by the owner of the land and compensation paid to him therefore."

(b) "A *mala fide* possessor has a similar right as regards useful improvements when the owner of the land has stood by and allowed the improvements to be effected without protest otherwise a *mala fide* possessor has no right to claim to have the improvements taken over by the owner of the land and compensation paid to him therefore."

Improvements can be classified into three classes *Impensea Necessarie.*

(a) Necessary expenses – may be incurred to preserve the property or to save it from being lost to the owner.

(b) *Impensae Utiles* – Useful Improvement – As Chief Justice Massdorp expressed relying on the proposition on Voet 6.1.36. By useful expense is meant the amount or value of the money and labour expended on the property but only to the extent the value of the land has been permanently enhanced by the building or other

improvements that is to say the possessor will be entitled to claim the difference between the value of the land with and the value of the land without the improvements in so far as it does not exceed what has actually expended Med Massdorp Inst. Volume II page 54.

(c) *Impensea Voluptuorie* are improvements which merely contribute to the adornment of the property but do not permanently enhance its value.

Wille on Principles of South African Law (5th Edition) page 473 states "It is inequitable that one person should be enriched to the detriment and injury of another *jure naturae acquaim est neminem cum alterius detrimento et injuria fieri locupletiorem.* Consequently when unjustified enrichment does take place an obligation imposed on the person enriched to make reparation to the other person, either to restore property to him or pay him compensation vide Grotious 3.30.1 Voet 6.1.36. "This obligation is implied by the law without there having been any previous agreement or understanding on the point between the persons concerned and forms an integral part of our law. The obligation arises from the mere fact of one person enjoying a benefit which results in loss or injury to another and does not depend on a contract or on delict" Vide Pothier Obligation 114.

Therefore we see that payment of compensation is founded directly on the ground of unjust enrichment and so a *bona fide* possessor can in no circumstances recover more that the amount of the expense he has incurred in effecting the improvements. He cannot claim the enhanced value due to the passage of time and inflation.

In the instant case the appellants were *mala fide* possessors and they had entered the land forcibly and the so called improvements were made when the plaintiff-respondent had protested and made a complaint to the authorities. The appellants cannot under any circumstances according to law claim any compensation on the basis of unjust enrichment. It would be unreasonable to allow them on the true owner improvements which may be useful according to him own taste, which the plaintiff-respondent would never have cared to effect. No Court of Law could impose on the true owner to pay compensation for any improvements done by a *male fide* possessor. In the circumstances I dismiss the appeal with costs.