

Present : Ennis J.

1922.

FERNANDO v. WICKREMESINGHE et al.

49—D. C. (Inty.) Ratnapura, 3,681.

Action by lessor against heirs of lessee for recovery of possession—Decree for delivery of possession—Subsequent action for compensation for improvements—Jus retentionis.

The loss of the *jus retentionis* by a person who had effected improvements on landed property does not bar his right to compensation.

THE facts appear from the judgment.

E. W. Jayawardene, for the appellant.

Samarawickreme (with him *Arulanandan*), for the respondents.

July 6, 1922. ENNIS J.—

The only question on this appeal is whether the fourth plaintiff was entitled to claim compensation in respect of a building. It appears that the fourth plaintiff is the widow of one Marthenis Silva, by whom she had three children, the first, second, and third plaintiffs. On the death of Marthenis, the defendant, who had leased certain land to Marthenis, brought an action, D. C. 3,391, against the present fourth plaintiff for the recovery of possession of the leased land. In that action the present fourth plaintiff claimed as heir to her husband. During the course of the action, the present fourth plaintiff asserted a title independently to a portion of the land. But no issue was raised on the point in the case, and under the terms of the lease the lessee was bound to give up possession to the lessor,

1922. which was accordingly ordered in that case. It is now urged on appeal that, inasmuch as the present fourth plaintiff did not claim compensation in that action, she is barred under section 207 of the Civil Procedure Code from claiming it in the present action. This point has already been decided in the case of *Appuhamy v. Banda*¹ and in the case of *The Assistant Government Agent, Kegalla, v. Banda*.² In the latter case Pereira J. said that the loss of the *jus retentionis* by a person who has effected improvements on landed property does not bar his right to compensation. The only other case cited to us was the case of *Casie Chetty v. Cowell*.³ I am unable to see how that case is in conflict with the principle decided in *Appuhamy v. Banda* (*supra*) and in *The Assistant Government Agent, Kegalla, v. Banda* (*supra*). In *Casie Chetty v. Cowell* (*supra*) there had been a previous claim for a declaration of title for the whole land, and the defendant in the action had not in his defence claimed a right of way over the land. It was held that the omission to claim this right of way barred a subsequent action for the right of way, because a right of way effected the corpus of the land which was in claim in the previous suit, and would, therefore, under section 207, be a claim which could have been put in issue upon the cause of action for which the action was brought. But in case No. 3,391 a claim to compensation did not affect the subject of the claim in the plaintiff's cause of action. I would accordingly dismiss the appeal, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

¹ (1914) 16 N. L. R. 203.

² (1914) 16 N. L. R. 274.

³ 2 C. W. R. 255.