

1936

Present : Akbar and Koch JJ.

GUNATILEKE v. THE MUNICIPAL COUNCIL,
COLOMBO.

63.—D. C. Colombo, 330.

Compensation for improvements—Building upon neighbour's land—No right to compensation—Right to remove the building—Roman-Dutch law.

A person who builds partly on his own land and partly on his neighbour's land has no right to claim compensation for the value of the building or a portion of it from the owner of the land encroached upon.

His right is restricted to a removal of the encroaching portion of the building or a right to buy the land on which it stands.

THIS was an action in which the plaintiff claimed compensation for the value of a building a portion of which had encroached on a road reservation vested in the defendant Council. The defendant denied that the plaintiff was in law entitled to compensation for improvements even if he was a *bona fide* possessor. The learned District Judge dismissed the plaintiff's action.

¹ 68 *Law Times Reports*, p. 29.

H. V. Perera (with him *Molligodde* and *E. B. Wikramanayake*), for plaintiff, appellant.—Lessor can claim for improvements made by lessee (*Appuhamy v. Doloswala Tea & Rubber Company*¹). This principle can be applied to a licensee. Compensation can be claimed against the Crown just as against a private party (*Velapodi v. Kanda Perumal*²). The making of an encroachment on a road reservation *bona fide* is not a criminal offence. The only criminal offences are those that are wilful (section 91). The question of compensation depends on *bona fides*. In 25 N. L. R. 267 the lessee was a lessee under a long lease. The improvements were obviously made by the lessee for his own benefit. It was held that the lessor could take the benefit. *A fortiori* in the case of a lease for a short time, and more so in the case of a licensee.

Keuneman, for defendant, respondent.—The theory of compensation is based on the principle that a person shall not enrich himself at the expense of another. Also a person cannot get compensation except to the extent that a particular land has been enhanced in value. Nature of improvement must be looked at from the nature of the property. Building on a road reservation is of no use. Usefulness cannot be considered from the point of view of the improver (1 N. L. R. 228). Encroachment like this is not an improvement. Plaintiff had no right to encroach on the road. Why should the Council pay him for something he had no right to do and which is of no use to the Council (2 *Maarsdorp* 48). Case in 25 N. L. R. does not apply to the facts of this case. Besides both Judges did not agree in that case on this point.

H. V. Perera, in reply.—Useful improvement is not to be looked at from the point of view of owner. Owner cannot reduce a *bona fide* possessor to the level of a *mala fide* one. Only *mala fide* possessor can be asked to remove his improvements. Useful improvements are defined in *Pereira* p. 352. Intention is the intention of the man who made the improvements. The object is to compensate a man who is losing something. In considering the market price and the land improved one must take into consideration the possibility of the encroacher being a possible purchaser. The saleable value to the owner is increased by the encroachment. One must consider the question in the abstract, not from the point of view of a particular owner.

Cur. adv. vult.

June 2, 1936. AKBAR J.—

This appeal raises an important question of law which depends on facts which cannot be disputed. Plan D 7 shows a boutique which we may assume as having been built by the plaintiff. Now this boutique stands for the most part on land owned by the plaintiff, but a portion of it to the north-east abuts on the portion coloured pink in plan D 7, which the District Judge has held to be a portion of a road reservation. This finding was not disputed in the argument before us and therefore this north-eastern portion of the boutique is an encroachment on the defendant's land. It is argued for the respondent that, even assuming the plaintiff to be a *bona fide* possessor of that portion of the space coloured pink on which the north-eastern corner of the boutique stands, he is not entitled in law to claim compensation for improvements.

¹ 25 N. L. R. 267.

² 4 Bal. 126.

Under Ordinance No. 6 of 1910 all road reservations are included in the definition of "Street" in section 3 and under section 70 all streets, excepting such as shall be specially exempted by the Governor in Executive Council are vested in the Municipal Council for the purpose of the Ordinance. Under section 154 any street or part of any street vested in the Council which shall be discontinued under the Ordinance or is otherwise no longer required for use as a street, may be sold or leased or exchanged only with the sanction of the Governor. So that the defendant has no power to sell or lease any part of the portion coloured pink without the sanction of the Governor. Assuming, therefore, that the plaintiff is a *bona fide* possessor of the portion on which the encroaching portion of the boutique stands in the space coloured pink in plan D 7, is the plaintiff entitled to claim compensation from the defendant in this action?

With regard to the right of a *bona fide* possessor to claim compensation for useful improvements, Maasdorp in Volume 2 of his *Institutes of the Cape Law* at pp. 47, 48, and 96 speaking of an encroachment made by a building, which stands partly on one property and partly on another, states as a definite principle of the Roman-Dutch law as accepted in South Africa that the owner of the ground encroached upon may demand that the encroachment be removed or that the encroacher shall take a transfer of the piece of ground actually covered by the encroachment and of so much of the rest of the ground as is rendered useless to him thereby and pay him the value of the ground so transferred together with a reasonable sum as damages for the trespass and as a solatium for the compulsory expropriation of his property. Walter Pereira in his *Laws of Ceylon*, p. 350, refers to the same principle and this rule has been quoted with approval by the Supreme Court in *Migel Appuhamy v. Thamel and Others*¹. It must follow from this principle that the plaintiff has no right to claim money compensation for the value of the building or a portion of it from the owner of the land encroached upon. His right is restricted to a removal of the encroaching portion of the building or a right to buy the land on which it stands. Mr. Perera suggested that this law would only apply to an encroachment by a building built on a mistaken idea as to the boundaries, and not to a case where the plaintiff *bona fide* thought that he was the owner of the portion on which he had encroached owing to a mistaken view as to title. This distinction is too subtle for me to appreciate it. A person who builds a portion of his building on his neighbour's land, *bona fide*, does so because he thinks he has a good title to the portion encroached upon. The exceptional principle which I have stated above applies only to buildings partly on one land and partly on another and the reason for its adoption is reasonable enough. It would be unreasonable to expect the owner of the land encroached upon to pay compensation for a portion of a building which will be of no use to him. On the other hand to restrict the owner of the building to the right to carry away the materials of the building in so far as it abuts on the neighbouring land may destroy the value of the whole building and render it useless to him.

¹ 2 *Cur. L. R.* 209.

In the case before me too only a small part of the boutique when compared with the whole abuts on the road reservation, and I see no reason why the Roman-Dutch law should not be applied. As I have already indicated the defendant has no power to sell or lease a portion of the road reservation without the Governor's sanction and the Government is not a party to the action. In any event, the claim to compensation cannot be made in this case. As the appellant's counsel only restricted his argument to the boutique and did not press his claim to the foundation the appeal must stand dismissed with costs.

Koch J.—I agree.

Appeal dismissed.
