1967 *Present :* T. S. Fernando, A.C.J., and Siva Supramaniam, J.

K. ARUMUGASAMY IYER, Appellant, *and* K. MUTTUCUMAROO IYER, Respondent

S. C. 141/1965—D. C. Point Pedro, 6717/L

Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58)—Section 37—Interest of surviving spouse in estate devolving on minor child—Surviving parent's rights to claim compensation for improvements effected by him—Similarity to those of a usufructuary.

Section 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance reads as follows :—

"37 When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority."

Held, that a surviving parent who continues to possess the estate of a deceased parent which has devolved on a minor child and enjoys the income thereof in terms of S. 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance is not entitled, after the period of minority of the child has elapsed, to claim compensation for improvements effected by him on a land which forms part of such estate. In such a case, the surviving parent is in the very same position as a usufructuary as regards his rights of possession of the minor's property and enjoyment of the income thereof.

APPEAL from a judgment of the District Court, Point Pedro.

C. Ranganathan, Q.C., with *V. Arulambalam*, for the defendant-appellant.

S. Sharvananda, for the plaintiff-respondent.

Cur. adv. vult.

October 30, 1967. SIVA SUPRAMANIAM, J.—

The question that arises for decision in this appeal is whether a surviving parent who continues to possess the estate of the deceased parent which has devolved on a minor child and enjoys the income thereof in terms of S. 37 of the Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 58) (hereinafter referred to as the Ordinance) is entitled to claim compensation for improvements effected by him on a land which forms part of such estate.

This was an action for a declaration of title to a share of a piece of land called Kaluvanuvayadi described in the schedule to the plaint and depicted on survey plan No. 243 dated 25.3.1962 and to the entirety of the buildings standing on lot 4A thereof. The following facts were common ground:—The parties are governed by the provisions of the Ordinance. The defendant's wife had been entitled to 1/144 share of the land in question and on her death that share devolved on Balasubramanya Iyer, her only child of the marriage, who was then about 3 years of age. Balasubramanya Iyer was also entitled to another 1/144 share by right of inheritance from his grandfather. He continued to reside with the defendant and was looked after and maintained by him. The defendant was in possession of lot 4A of the said land in lieu of the 1/72 share which belonged to his son. Under S. 37 of the Ordinance the defendant was entitled to possess and enjoy the income only from the share which his son inherited from his mother. On the said lot 4A, between the years 1933 and 1955, the defendant put up buildings to the value of about Rs. 25,000. The defendant's son died in 1956 but the defendant continued to be in possession of the said lot 4A and the buildings standing thereon even at the date of the present action.

The parties were not agreed as to whether the defendant's son had attained majority at the time of death but it was conceded that, if he had not, he would have attained majority in 1957. His interests in the land in question devolved on his maternal grandmother who, by deed No. 7350 dated 10.2.1960, donated the same to the plaintiff. The plaintiff instituted this action as the defendant refused to deliver possession of the said lot 4A and the buildings standing thereon to him. The plaintiff also claimed certain other undivided shares in the land through other sources. The trial Judge entered judgment in favour of the plaintiff and the defendant has appealed.

At the trial, the defendant set up alternative defences. He alleged that lot 4A on which the buildings stood was not part of the land called Kaluvanavayadi but formed a part of another land called Kalivilappu of which he was the sole owner. He claimed to be entitled to the said land on certain deeds. The trial Judge rejected this claim and characterised the deeds as fabrications. Learned Counsel for the appellant did not seek to canvass that finding.

Alternatively, the defendant claimed a sum of Rs. 25,000 as compensation for improvements and the *jus retentionis*. This claim too was rejected by the trial Judge. It is this finding that has been canvassed in appeal.

The parties were at variance in regard to the source of the funds with which the buildings in question were constructed. According to the defendant, he utilised his own monies for that purpose. The plaintiff stated, on the other hand, that the defendant's son was entitled to a substantial income from a temple and the defendant collected that income and utilised it for the construction of the buildings. The defendant denied that he collected his son's share of the income from the temple but his evidence was not accepted by the trial Judge. Apart, however, from the fact that there is no evidence to prove that the defendant utilised the monies he collected as his son's share of the income from the temple to construct the buildings in question, it should be borne in mind that the defendant was entitled to appropriate to himself the share of the income from the temple to which his son was entitled by way of inheritance from his mother.

It was submitted by learned Counsel for the appellant that the defendant had a vested interest in the land under the law, that he put up the buildings in question bona fide for his own benefit and not for the benefit of his son, and that the son's heirs or representatives in title were not entitled to take advantage of the improvements effected by him without making compensation. I shall examine the submission of Counsel on an assumption of the facts most favourable to the defendant, namely, that he effected the improvements out of his own funds and for his own benefit.

It was argued that the defendant was a bona fide occupier of the land when he put up the buildings and that he was, under the Roman-Dutch law, entitled to claim compensation for the useful expenses incurred by him. Learned Counsel relied on the judgment of the Privy Council in *Hassanally v. Cassim*[1] in the course of which their Lordships stated: " . . . . the right of an improver to compensation rests on the broad 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." The question that arose for decision in that case was whether a person who had lawfully occupied a

[1] *(1960) 61 N. L. R. 529.*

land under a lease and, in that capacity, had made improvements was entitled to compensation when his term of lease was prematurely terminated by operation of law. In upholding the claim of an improver for compensation in those circumstances, their Lordships cited with approval several decisions of the South African Courts which laid down that not only a "possessor" in the strictly juristic sense of the term but also "a bona fide occupier" whose occupation was prematurely terminated was entitled to claim compensation for improvements effected by him in the expectation that he would have the benefit of the improvements until the expiration of the period during which the occupation was to last. The basis of the claim is the deprivation of the use and enjoyment of the improvements by the improver by reason of a premature termination by the owner of the period of anticipated occupation. Where, therefore, a bona fide occupier effected improvements and enjoyed the benefit of such improvements for the full period of occupation contemplated by himself and the owner, he would have no claim whatsoever for compensation.

The position was set out clearly by Gardiner J. in the case of *Urtel v. Jacobs*[1] as follows :—"Where improvements have been made by a person in the faith that he will enjoy these improvements either as owner or as occupier with the right of occupying for a certain fixed period and he has been disappointed in this expectation or his occupation for a certain fixed period has been prematurely terminated, that is, prior to what he had expected, he is entitled to compensation if the real owner has benefited by the improvements .... A lessee who occupies for a fixed period and makes improvements during that period, if his term is allowed to run to an end, or he becomes in default, gets no compensation for improvements."

In the instant case, had his son not died in 1956, the maximum period during which the defendant would have been entitled to remain in occupation of the land was the period of minority of his son, namely, till some date in 1957. But he has, in fact, continued in possession till long after that period. Consequently, even if he came within the category of "a bona fide occupier", referred to above, he has no basis for a claim for compensation in as much as he has had the use and enjoyment of the improvements for the entire anticipated period.

The character of the occupation of the defendant, however, was that of a usufructuary and it is now well settled that under the Roman-Dutch Law a usufructuary is not entitled to claim compensation for improvements. The question whether a usufructuary is entitled to claim for expenses voluntarily incurred by him in the improvement of the property, subject to his usufruct, was examined by Kotze J. in a learned judgment in the case of *Brunsdon's Estate v. Brunsdon's Estate and others*[2] and he held 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." This decision has been followed in subsequent cases

[1] *(1920) C. P. D. 487 at p. 492.* [2] *(1920) C. P. D. 159 at pp. 171 et seq.*

in South Africa (vide *Urtel v. Jacobs* (supra); *Wait v. Estate Wait*[1]) and has been adopted by text writers of such high authority as Wille[2] and Lee[3].

Learned Counsel for the appellant argued that the rights of a surviving parent under the Ordinance are larger than that of a usufructuary and the Roman-Dutch Law in regard to claims of usufructuaries is not applicable to the facts of this case. S. 37 of the Ordinance provides as follows :— " When the estate of a deceased parent devolves on a minor child, the surviving parent may continue to possess the same and enjoy the income thereof until such child is married or attains majority ". The rights of the surviving parent, therefore, are (1) to possess the property and (2) to enjoy the income thereof. The rights of a usufructuary under the Roman-Dutch Law are set out by Lee (supra page 181) as follows :—(1) To use the property and take its fruits as owner; (2) To possess the property and to recover possession from the dominus or from a third party; (3) To alienate the right of use and enjoyment but only for the term of the usufruct and (4) To give the property in pledge or mortgage and to suffer it to be taken in execution but only to the extent of his usufructuary interest. It will be seen, therefore, that the rights of a surviving parent as set out in S. 37 of the Ordinance are narrower in scope than those of a usufructuary, while as regards his rights of possession of the property and enjoyment of the income thereof a surviving parent is in the very same position as a usufructuary. In the instant case, no special circumstances were established by the defendant which would entitle him to claim compensation.

In view of the above conclusion it becomes unnecessary to examine the submission of respondent's counsel, that the presumption of advancement will apply in favour of the defendant's son in regard to the expenditure incurred by the defendant in constructing the buildings in question.

The learned District Judge was right in rejecting the defendant's claim for compensation for improvements. The appeal is dismissed with costs.

T. S. Fernando, A.C.J.—I agree.

Appeal dismissed.