July 11, 1911

Present : Middleton J.

BLACKETT *v.* DE SILVA.

223—*C. R. Gampola,* 11,759.

Compensation for improvements—Fruits of the improvements should not be set off against the value of the improvements—Bona fide *possessor.*

In a claim for compensation for improvements the fruits of the improvements themselves should not be set off against the value of the improvements.

THE facts are set out in the judgment of Middleton J.

Hayley, for the plaintiff, appellant.—There is no evidence to show that the defendant was in possession of the land for ten years. Even if there was, the defendant having refused to accept the land on payment of Rs. 68, which was half the improved value, the Crown

had a right to sell the land and refer the defendant to his common law right, which was one for compensation only. Counsel referred to *Perera v. Fernando*,[1] *Mohamado Ali v. Seneviratna*.[2] The defendant is only entitled to Rs. 22·50, which is the value of the improvements. But even from this sum must be deducted the income derived from the land after the date of the Crown grant in 1906. After the Crown grant to plaintiff, defendant possessed the land as a *mala fide* possessor, as he was aware that the plaintiff was the owner. Counsel cited *Nicholas v. Shaik Ali* ;[3] Walter Pereira's *Compensation for Improvements, pp.* 51, 52. The defendant, by his act in bidding at the first sale, is now estopped from claiming compensation. *Carpen Chetty v. Wijesinghe*,[4] *Kartikesar v. Kandaiya*.[5]

Alwis, for defendant, respondent.—The fruits of the improvements cannot be set off against the value of the improvements. *Voet* 6, 1, 39.

There is no estoppel, as there was no representation on the part of the defendant by which plaintiff was misled. The evidence shows that the facts of this case are very different from those in *Carpen Chetty v. Wijesinghe*[4] and in *Kartikesar v. Kandaiya*.[5] Counsel referred to *Angell on Limitation*, 420–421 ; *Odris v. Mendis et al.*[6]

Hayley, in reply.

Cur. adv. vult.

July 11, 1911. MIDDLETON J.—

This was an action for declaration of title to a piece of land, but at the trial the defendant admitted the plaintiff's title, and his defence was limited to a claim for compensation for the planting of tea on it. The plaint also contained a claim for Rs. 25 as damages for the wrongful possession of the defendant, and Rs. 5 per mensem for the continuance thereof. It was agreed that the defendant's claim for compensation for *impensae utiles* was justly estimated at Rs. 22·50. The Commissioner of Requests, however, on the ground that the defendant as against the Crown—the grantor to the plaintiff—had been entitled to a grant of the land on payment of half the improved value, under section 8 of Ordinance No. 12 of 1840, considered that defendant was entiled as against the plaintiff to half the present value of the land, *i.e.*, Rs. 84·37, and gave judgment in defendant's favour for that sum, together with Rs. 22·50, or a total of Rs. 106·87, and held that plaintiff was bound to pay that sum to the defendant before taking possession of the land. The Commissioner of Requests gave the plaintiff his costs of action, subject to a deduction on account of the defendant's costs in proving his claim to compensation. The plaintiff has appealed.

[1] *(1906) 2 A. C. R. 112.*
[2] *(1904) 2 A. C. R. 113.*
[3] *(1895) 1 N. L. R. 228.*
[4] *(1910) 14 N. L. R. 152.*
[5] *(1910) 5 Bal. 103.*
[6] *(1910) 13 N. L. R. 309 (at page 315).*

July 11, 1911

MIDDLETON J.

Blackett v. De Silva

The facts as proved or admitted were that the defendant produced a conveyance (marked X) dated December 17, 1904, from one Hatena to Aberan Appu, which the Crown refused to recognize, and stated that the land was advertised for sale in 1904, and he also produced an extract from the *Government Gazette* (marked Y) dated September 2, 1904, showing that the land had tea on it then six years old. Defendant refused to buy it for Rs. 68, and it was put up for auction by Government and bought by the defendant, the plaintiff being the next highest bidder, and apparently from receipt Z Rs. 62·78 was paid to Government by the defendant. The plaintiff seems to have got this purchase cancelled through the Colonial Secretary. The land was then put up again for sale and purchased by the plaintiff, who obtained a Crown grant on February 23, 1906. The land is only a small strip of 1 rood 5 perches, and the defendant made no claim to it other than as a person who has, under the impression that it was his own, planted the land, and who as a *bona fide* possessor has the *jus retentionis* of it. The defendant did not in his answer or evidence set up specifically any claim in support of the allowance made to him by the Commissioner under section 8 of Ordinance No. 12 of 1840, and the only issue material to his claim for compensation was (2). That issue was : " Is defendant entitled to compensation for improvements," *i.e.*, to *impensae utiles*, not to half-improved value, or half the value of the land. There is no complaint made by the defendant that the sale to him was improperly set aside, or that the money he paid by receipt Z was not returned to him. The inference I draw is that the Government were of opinion that he was not entitled to come in under section 8 of Ordinance No. 12 of 1840, and that defendant acquiesced in that decision, and he has not during the trial set up any such claim. There is, moreover, no evidence on the record that he held uninterrupted possession of the land in question for not less than ten years, nor more than thirty years, under the section. In my opinion, therefore, the Commissioner of Requests was wrong in awarding the defendant more than the sum of Rs. 22·50 as compensation for *impensae utiles*. The question on the (1) issue, " To what extent plaintiff has suffered damage, if any ? " was not considered by the Commissioner, and it was contended for the plaintiff before me, that although the defendant may have been a *bona fide* possessor up to the date of the sale to the plaintiff, that since the sale he has in law lost the *possessio civilis*, and so has become a *mala fide* possessor, and liable to account to the plaintiff for the fruits and produce, and *De Silva v. Shaik Ali*[1] was relied on. I cannot concede to the argument of Mr. Hayley, founded on the assertion of a change of status, without being referred to explicit authority. It is clear, however, from the case referred to, that the *fructus ex ipsa melioratione percepti* are to be excluded, and there are no other fruits here, except the pickings of the tea

[1] *(1895) 1 N. L. R. 228.*

bushes, which the defendant himself planted. In my opinion the status of the possessor *ab initio* is the criterion of his right to compensation for *impensae utiles* and *jus retentionis*. Were this not so, I do not see how a *jus retentionis*, admittedly a part of the Roman Dutch law, could ever occur. If further authority is needed, it may be found in *Voet* 6, 1, 39 (*Casie Chetty's translation, p.* 63), relied on by defendant's counsel. The defendant was, therefore, entitled to retain possession until he was paid the value of the *impensae utiles*, and his answer to the plaint should have been an assertion of this right, when the estimate which the plaintiff has proved and the defendant has accepted might have been determined, instead of setting up a title to the land itself. I must direct that the judgment of the Commissioner be varied by omitting from it the order to pay the defendant the sum of Rs. 84·37. As regards the costs in the Court below, the judgment is rather ambiguous, and I must further vary it by ordering that the plaintiff is entitled to the costs of this action, subject to the deduction of the defendant's costs of his proctor and of the answer and his own appearance as a witness at the trial. As plaintiff has substantially succeeded in the appeal, I give him his costs of the appeal.

In my opinion, when a *bona fide* possessor is exercising his *jus retentionis* for compensation for *impensae utiles*, he ought to furnish the real owner as soon as possible with a demand of the amount he claims for his improvements, but I do not know of any law to compel him to do so.

Varied.