1965 *Present:* **Manicavasagar, J., and Alles, J.**

N. DALUWATTA, Appellant, *and* M. B. SENANAYAKE (Assistant Government Agent) and another, Respondents

S. C. 334/63—D. C. Tangalle, 288/L. A.

Land acquisition—Reference of a claim or dispute to court for determination—Right of claimant to amend his claim after such reference—Payment of estate duty by a third party—His right to re-imbursement from the compensation payable in respect of the acquired land—Principle of injust enrichment—Land Acquisition Act (Cap. 460), ss. 10(1)(b), 12—Civil Procedure Code, s. 93—Estate Duty Ordinance (Cap. 241), s. 27 (1).

Where an acquiring officer refers, under the provisions of Section 10 (1) (*b*) of the Land Acquisition Act, a claim or dispute for determination by a District Court, the claimant is entitled to amend his claim after it is referred to Court. Section 12 (1) of the Land Acquisition Act, read with section 93 of the Civil Procedure Code, enables a party to apply for such amendment.

Where a person, although he does not regard himself as a bona fide possessor, has paid a sum of money to have a land released from seizure and sale for non-payment of estate duty by the executor, he is entitled to be paid back such money out of any compensation payable under the Land Acquisition Act in respect of that land. He is entitled to be paid back the money on the principle that no one should be enriched at the expense of another.

APPEAL from a judgment of the District Court, Tangalle.

N. R. M. Daluwatte, for the 1st defendant-appellant.

C. Ranganathan, with *M. T. M. Sivardeen*, for the 2nd defendant-respondent.

Cur. adv. vult.

June 29, 1965. MANICAVASAGAR, J.—

This appeal by the 1st defendant-appellant is from the judgment of the District Judge, Tangalle, in a contest between him and the 2nd defendant-respondent in regard to their title to or interest in a land called Maha Koratuwa *alias* Mahahena *alias* Puhujulahena within the Urban Council limits of Tangalle, which was referred by the Acquiring Officer of the Hambantota District to the District Court for determination, under the provisions of Sec. 10 (1) (*b*) of the Land Acquisition Act (Cap. 460 Vol. XII, Legislative Enactments of Ceylon, revised edition 1958).

The relevant facts are as follows :—

Dona Gimara Abeydira was admittedly the owner of the land. By her last will and testament executed on 27.2.44, she appointed her son William Conrad Abeysinghe to be her executor and trustee ; she devised all her property to him upon trust subject to certain directions, and provided that he shall stand possessed of the residuary estate and use the income thereof for his maintenance ; she further provided that when he thought it fit and proper, to convey one half of her estate to her daughter Charlotte Euginie Abeydira *nee* Abeysinghe or her heirs, executors, or administrators, and the other half to her grandson Hector Nandimitta Abeysinghe or his heirs, executors, or administrators upon such conditions and stipulations as the trustee may consider fit and proper. Hector Nandimitta died on 10.12.44, whilst the testamentary suit was still pending ; his heirs were his father William Conrad and his mother Laura. William Conrad sold the entirety of the land by deed 5528 (1D1) of 5.11.55 to the 1st defendant-appellant even before the estate duty on Dona Gimara's estate had been paid : in that deed he recited his title as being a gift from one Don Nades Wickremasinghe Patabendi Ralahamy, but gave no particulars at all of the deed. William Conrad died on 23.10.58 before the testamentary proceedings were concluded, and the 2nd defendant-respondent was granted letters of administration with the will annexed on 12.1.60.

In the proceedings before the Acquiring Officer the appellant claimed the entirety of the land on Deed 1D1 : and the respondent claimed a one seventh share, which we are told would be his share as heir *ab intestato*, and made particular reference to the testamentary case of which he was the administrator. This dispute was referred by the Acquiring Officer to the District Court for decision.

The first question for determination is whether a claimant before the Acquiring Officer is entitled to amend his claim after it had been referred to court, different to what he had stated in his claim to the Acquiring Officer : Counsel for the appellant submitted that the claimant is not entitled to do so, nor has the Court jurisdiction to allow such an amendment. In support of this submission he cited the case of *Perera v. Dingiri Menika et al.*[1] ; this was a case where the District Judge allowed

[1] *(1960) 63 N. L. R. 169.*

parties who had not made claims before the Acquiring Officer to intervene in the action after it had been referred to Court, and put forward their respective claims; the particular submission which was addressed to us in the instant case was not in issue in the case cited to us, though the judgment of Basnayake C.J. is that the Court has no jurisdiction to inquire into any matter other than that which has been referred to it under Sec. 10 of the Act. I am of the view that a claimant before the Acquiring Officer can move to have his claim amended after it is referred to Court, because the procedure provided for civil suits is applicable to proceedings before the Court: Sec. 93 of the Civil Procedure Code enables a party to have his pleadings amended provided the amendment sought does not offend against certain well defined principles which have time and again been stated in several cases. Can it be said that a party whose case is referred to Court is precluded from amending his claim and pleading what he considers he is entitled to, because either by error or carelessness he had not in his statement to the Acquiring Officer made a right estimate of his interest? My answer is that the provision of Sec. 12 (1) of the Act, read with Sec. 93 of the Civil Procedure Code enables a party to apply for amendment, and gives the Court jurisdiction to consider the application on its merits: he is certainly not tied down to the particular interest he claimed before the Acquiring Officer.

There is another reason why the appellant must fail in this submission; this question has been raised for the first time in appeal; questions of law may be submitted for decision by this Court, though not put in issue at the trial, provided all relevant facts bearing on the question are before the Court. In the instant case para. 4 b of the plaint states that the 2nd defendant-respondent claims a one seventh share, and particular reference was also made to the testamentary case of Dona Gimara of which he was the administrator; it was submitted that the claim was only to a one seventh and no more; for the respondent it was contended that the claim before the Acquiring Officer was for the entirety as administrator, and that is why reference was made to the testamentary case; on the facts appearing on the record it is not possible to say that the claim of the respondent was different to what was pleaded in his answer filed in Court; had this question been in issue at the trial, the respondent would have had the opportunity of proving the claim he had submitted to the Acquiring Officer; in the absence of this, all facts necessary for the decision of this question are not before this Court, and the submission is rejected because it was not put in issue at the trial.

The next question is whether the first defendant-appellant is entitled

before estate duty was paid ; he had not the power to do so ; it is significant though the land admittedly belonged to the estate of Dona Gimara, William Conrad recited his title from another source of which he gave no particulars at all ; there can be no question that the sale by William Conrad was in breach of the trust and the directions of the testatrix ; the title he recited was untruthful ; none of the directions imposed by the testatrix antecedant to William Conrad disposing of the residuary estate were fulfilled ; in my view 1D1 did not pass title to the appellant on its execution.

Lastly, the appellant's claim is that Rs. 2,800 be paid out of the compensation payable under the Act ; this represents the payment by him to have the land in suit released from seizure and sale for non-payment of estate duty by the executor. The claim is made on the ground that it is an improvement to the land in suit. The appellant relies on a passage from the judgment of Bonser C.J. in *de Silva v. Sheik Ali* [1] in which two judges were associated with him. The learned Judge observes that a mortgage should be treated as an *utilis impensa* and a payment of the mortgage debt by a bona fide possessor is an improvement to the property, as if the money had been laid out in material additions to the property. *Impensa utilis* is the value of the money and labour expended on the property to the extent to which the value of the land has been permanently enhanced by the improvement : having regard to this concept, I am somewhat in doubt whether a mortgage should be treated as an *utilis impensa*. Counsel for the appellant contended that as estate duty being a first charge on all the property of the deceased which the latter was competent to dispose (Sec. 27 (1) of the Estate Duty Ordinance, Cap. 241 Vol. VIII), the payment made by the appellant is an improvement which should be paid out of the compensation. In my view the release of a charge created by the Estate Duty Ordinance on a deceased person's property, by payment, cannot be equated to a payment of a mortgage which encumbers property : the charge itself ranks in priority after the instances stated in provisos (*a*) and (*b*) to Section 27. Even if the principle stated by Chief Justice Bonser is right—the correctness of it was doubted by Pereira J. in the case cf *Muttiah Chetty v. Latchumana Chetty* [2]: and MacDonell C.J. said there was hardly any authority to support the view that a mortgage should be treated as an *utilis impensa* (36 N. L. R. 113 at page 117)—it does not apply to the instant case, for the payment was not by one who regarded himself as a bona fide possessor.

I have no doubt however that on the principle that no one should be enriched at the expense of another, the appellant is entitled to be paid back the money he claims : the question is whether it should be paid out of the compensation payable under the Act, or recoverable from the estate and effects of the deceased testatrix. As the seizure and sale

[1] *(1895) 1 N. L. R. 228 at page 234.*

[2] *(1913) 6 Balasingham Notes of Cases page 3 at page 5.*

of the land in suit was released by the appellant paying the estate duty, I think that he should be paid out of compensation payable under the Act.

The compensation payable in respect of the land should be regarded as part of the estate of the deceased, Dona Gimara.

The appeal is dismissed subject to the variation in regard to the Rs. 2,800. The appellant must pay the costs of this appeal, as well as the costs ordered by the District Judge.

ALLES, J.—I agree.

Appeal dismissed.