1920.

Present : Shaw J. and Schneider A.J.

CARIMJEE *et al.* *v.* ABEYWICKREME.

22—D. C. Galle, 15,256.

Compensation for improvements—Burden of proof that possession was mala fide—*Amount of compensation.*

The plaintiffs sued for declaration of title to a land. The defendant admitted plaintiffs' title, but claimed compensation for improvements. The possession of the defendant, and the fact that he had made improvements, was admitted.

Held, the burden of proving *mala fide* possession was on the plaintiffs, as there was a presumption in favour of *bona fide* possession.

"The amount to which he (*bona fide* possessor) is entitled is either the improved value of the land, or the cost that he incurred in effecting the improvements, whichever should be smaller."

THE plaintiffs-appellants, setting up title in themselves derived from a Crown grant of May 22, 1894, sued in this action to be declared entitled to the land Kurunduwattabedda, situate at Baddegama, 3 roods and 24 perches in extent, and to have the respondent ejected therefrom.

The defendant-respondent filed answer saying he had planted the land under the *bona fide* belief that it was his land, and that he was willing to give up the land on payment of compensation.

The appellants' title was admitted, and when it came to the question of framing issues, the appellants' counsel submitted the following issue : " Is the defendant a *bona fide* improver ? " The respondent's counsel contended that the issue should be " Is the defendant a *mala fide* improver ?" and that the burden of proving *mala fide* was on the appellants.

The District Judge accepted the issue as suggested by respondent's counsel, and ruled that the burden of proving *mala fide* was on the plaintiffs-appellants, and that the defendant-respondent was not liable to establish *bona fide.*

Zoysa, for plaintiffs, appellants.

A. St. V. Jayawardene (with him *Mahadeva*), for defendant, respondent.

July 15, 1920. SHAW J.—

In this case the plaintiffs claimed a declaration of title to a piece of land called Kurunduwattabedda, situated at Baddegama, and claimed to be put in possession of the land. The defendant

admitted the plaintiffs' title to the land, but he says that he was in possession of the land under the *bona fide* belief that it was his property, and that he had planted the land and improved it, and was willing to give up the land on payment of compensation for his improvements. When the case came on for trial before the Judge, a question arose as to the proper form of the issues to be tried. The fact that the defendant had made improvements to the land was admitted, and the Judge thought that a proper issue was whether the defendant was a *mala fide* possessor. The plaintiffs' contention was that the issue should have been " was the defendant a *bona fide* possessor," and contended that the burden of proof lay upon the defendant to prove the *bona fides* of his possession before he was entitled to any compensation for useful improvements. Thereupon the counsel who appeared for the plaintiffs refused to take any further part in the proceedings, and said he meant to appeal on the question of onus of proof. The defendant and a witness were called showing how he came on the land and how he came to make the improvements, and also showing what he had spent in the actual planting of the land with tea and rubber. These witnesses were not cross-examined by counsel for the plaintiffs. I think the Judge was right in casting the onus of proof in this case upon the plaintiffs. The possession of the defendant and the fact that he had made improvements was admitted, and the law is laid down at page 23 of the late Mr. Justice Pereira's book on the right of compensation for improvements in the following words : " The presumption always is in favour of the *bona fides* of possession, and therefore he who alleges *mala fides* in a possessor is bound to prove that he had knowledge that the property belonged to another." For this he gives reference to *Voet 41, 3, 9*. There is a reference made to the same matter in the case of *The General Tea Estates Company v. Pulle.*[1] In that case Wood Renton J. in the course of his judgment says : " I think that Courts of law ought to scan jealously the evidence of *mala fide* possession, and to insist that the *conscientia rei alianæ* should be clearly proved," evidently showing that it was considered in that case that the proof of *mala fides* should lie upon the person who claimed to oust from the land a possessor who had made useful improvements upon it. With regard to the second point in the case, namely, whether the Judge has properly assessed the amount of the improvements to which the defendant is entitled, I think that the amount awarded by the Judge is not sufficiently borne out by the evidence. The amount of compensation ought to be proved by the defendant, and the amount to which he is entitled is either the improved value of the land, or the cost that he incurred in effecting the improvements, whichever should be the smaller. In my opinion the evidence adduced by him on these points is not sufficient to enable the Judge to come to a true decision as to

[1] *(1906) 9 N. L. R. 98.*

the amount to which he is entitled. In his own evidence he proves that the cost of clearing and planting the tea and rubber was from Rs. 250 to Rs. 300. He also stated that after the planting he had for some years weeded and pruned the land. The amount this cost him he gives no estimate of. He further states that it is worth Rs. 500. It is not possible to tell from the evidence recorded whether the witness meant that the lands are now worth Rs. 500, or whether the improvements were worth Rs. 500. His witness says that the clearing and planting would not cost less than Rs. 250, and that, besides that, it had to be kept up and the fences maintained. But, like the defendant, he gives no estimate of the cost that had been incurred in keeping up and maintaining the tea and rubber. He further states that the improved value of this lot is between Rs. 400 and Rs. 500. This is the whole of the evidence, and it is impossible on that evidence, as it stands, to tell what is the least sum that the Judge ought to have arrived at and allowed to the defendant, whether it was the amount of the planting and upkeeping, or some sum between Rs. 400 and Rs. 500, which the defendant's witness says is the improved value of the land. I think the proper course would be to send the case back to the District Court for the purpose of taking further evidence of the value of the improvements to which the defendant is entitled to be assessed in the manner I have mentioned, namely, as the smaller of the two, the cost of the improvements or the improved value of the land. Both parties have partially succeeded on this appeal. I would make no order as to costs of the appeal, but the costs of the hearing in the Court below I leave to the District Judge on his final determination of the case.

SCHNEIDER A.J.—I agree.

Sent back.