1946 *Present :* **Howard C.J. and Canekeratne J.**

BILINDI *et al.*, Appellants, *and* ATHTHADASSI THERO, Respondent.

97—D. C. Kurunegala, 43.

Improvements effected by bona fide *possessor—Assessment of compensation—No deduction for fruits obtained, before assessment, from the improvement.*

In a claim for compensation for improvements a *bona fide* possessor need not deduct the value of the fruits obtained by him, before the date of assessment, from the improvement itself.

APPEAL from a judgment of the District Judge of Kurunegala.

L. A. Rajapakse, K.C. (with him *H. W. Jayawardene*), for the defendants and added defendant, appellants.

H. V. Perera, K.C. (with him *N. E. Weerasooria, K.C.*, and *S. R. Wijayatilake*), for the plaintiff, respondent.

Cur. adv. vult.

June 28, 1946. CANEKERATNE J.—

On March 25, 1927, the Trustee of Ginikarawa Temple instituted an action (D. C. 12,182) against one Poola Louis (fifth defendant) and three others for declaration of title to certain lands. After a survey made on August 12, 1927 (Plan P2 or Q) it became clear that there was no dispute as regards lots A, B2, B3 and C3 ; the defendants' title to lot A and the plaintiff's to the other lots were accepted.

The defendants claimed lots A, A1 and A2 as part of the land called Ehelegollewatta, lots C, C1 and C2 as part of Moragehewatta, lots A3, A4, A5, B and B1 as part of Nagahadalupothe. They alleged that they were in possession of these lands since the year 1921 and had improved the same.

After hearing evidence the learned trial Judge held that lots A and A1 (Ehelegollewatta) belong to the defendants and that lots A2, A3 (Kurundugollehena), lots A4 and B1 (Kandehena), lot A5 (Diggalagawahena) and lot B (Dansalapitiyehena) and lots C, C1 and C2 (Mutugollehena) belong to the plaintiff.

The land claimed by the temple was apparently in jungle in 1921 except a portion which was cleared and planted on behalf of the temple by one Aruma some years before the defendants, according to the learned Judge, after the execution of deed D11 in 1921, took possession of this land in the belief that it was their property, cleared and planted it.

The learned Judge held that the plaintiff is entitled to all the land depicted in the plan except lots A and A1, that the defendants were entitled to compensation for improvements in respect of the houses on the land, one of which is the tiled house that was renovated, and the plantations on the land except the plantation that was raised by Aruma (apparently on lots C1 and C2). As the learned Judge was unable to assess the compensation he referred the parties to a separate action.

The defendants appealed to the Supreme Court and the appeal was dismissed after argument on February 15, 1938. According to the judgment the finding of the learned trial Judge as regards the title to lots C, C1 and C2, to lots A4 and B1, to lots A2, A3 and A5 was right and the learned Judge was justified in holding that the defendants were entitled to compensation.

The Trustee filed the present action on March 7, 1939. He alleged that he estimated the value of the plantations on the three lots A2, A3 and A5 at Rs. 900 and the house on lot A5 at Rs. 75. His prayer for relief against the defendants included the ejectment of the defendants from lots A2, A3, A5, C1, C2, A4 and B1 (an extent of 34 acres) and damages at the rate of Rs. 75 a month. The defendants in their answer claimed that they were entitled to compensation for improvements in respect of these lots and the buildings on lot A5 ; they claimed a sum of Rs. 20,000, *i.e.*, Rs. 15,000 in respect of the plantations and Rs. 5,000 in respect of the buildings and a *jus retentionis* until the sum claimed was paid.

At the trial a surveyor gave testimony on behalf of the plaintiff regarding the valuation of the improvements and on the other side a planter with considerable experience of coconut estates was called ; he furnished two valuations : one regarding improvements as they stood at 1927 and the other, the values as at the time of action. On the basis of the 1927 values he valued 7½ acres at Rs. 800 an acre, 19 acres at Rs. 600 an acre, 8 acres at Rs. 300 an acre and an acre of jungle land at Rs. 150. On the basis of values at the time of action he valued the 34 acres at Rs. 350 an acre and an acre of jungle land at Rs. 50. The learned Judge accepted the valuation of the premises as at 1927 and assessed the compensation at Rs. 6,481·56 in respect of the plantations, Rs. 1,000 for the tank, Rs. 75 for the thatched house on A5, Rs. 50 for the two " bissas " and Rs. 125 for the bathing well, *i.e.*, a total sum of Rs. 7,806·56 ; it is urged in appeal that there are certain arithmetical errors in this computation. As the defendants had been in possession of the lands

all throughout they were ordered to pay damages to the plaintiff at the rate of Rs. 60 a month from October 10. 1938, till he is restored to possession.

The defendants preferred an appeal from this judgment : the plaintiff has filed objections to the decree.

The main appeal falls into two parts : the one is concerned with the question of compensation, the other relates to the claim for an account of the profits. The former resolves into two questions : (*a*) what are the premises in respect of which compensation is payable ? (*b*) should the assessed amount be interrered with as contended by the plaintiff ?

It is not disputed that the defendants are entitled to compensation. By entering the property, clearing and planting it the defendants thought they were doing so as owners : they were, however, mistaken ; the lots were not covered by their deeds and they are now sued by the owner for ejectment.

If one had only to construe the judgment of the learned trial Judge in action No. 12,182, there would be some material for the defendants' contention in respect of the lots referred to. The learned Judge seemed to accept the view of the plaintiff's witness that Aruma was the only person who made any plantation on behalf of the temple and that the rest of the estate was planted by the defendants.

The learned Judge declined to read the judgment of the Supreme Court, though invited to do so, in the light of the earlier judgment of the Court and came to the conclusion that the defendants were entitled to claim compensation in respect of lots A3, A4 and A5 only. The Supreme Court judgment, he said, made it clear that compensation was only to be paid in respect of these lots. The defendants have failed to show that the view of the learned Judge was wrong.

The plaintiff contends that the learned trial Judge has wrongly adopted the valuation of 1927. The defendants do not seriously maintain the contrary. It is clear that the amount of the expenditure which an improver is enabled to recover is restricted to its value at the time he restores the property.

The extent of the three lots is 11 acres 2 roods and 37 perches. As a plantation it would be worth Rs. 4,105·50 but as jungle land only Rs. 586·50. The sum payable as compensation would be Rs. 3,519. There can be no doubt that the learned trial Judge in case No. 12,182 was of opinion that the defendants were entitled to compensation in respect of the tiled house. There was only one tiled house at the time of the hearing of that action and that was the tiled house on lot A5. The reference in the ante penultimate paragraph of the judgment of the Supreme Court to the house on lot A5 is clearly to the tiled house mentioned by the learned District Judge. The defendants are entitled to recover the value of the improvements to this house. The evidence of the sixth defendant is that the house was worth Rs. 4,000. He said that he improved the house by placing calicut tiles on the roof, lime-plastering the walls and cementing the floor and that these improvements cost him Rs. 1,500. It was in evidence that the roof was tiled towards the end of 1935. The surveyor called by the plaintiff valued the tiled

house at Rs. 3,800. The defendants are not entitled to claim any sum for improvements effected after the institution of action No. 12,182 (*i.e.*, March, 1927) and the sum of Rs. 1,500 might be taken as the cost of these improvements. The defendants should be declared entitled to recover the sum of Rs. 2,300 in respect of the tiled house. The order of the learned Judge allowing compensation in respect of the tank at Rs. 1,000, the two " bissas " at Rs. 50, the well and bathing system at Rs 200 will stand.

A person who possesses another man's property in good faith acquires ownership in the fruits, though he is only *bona fide* possessor of the property itself; and if subsequently the owner brings an action against him, he (the possessor) is not required to pay compensation for the fruits which he has gathered in good faith whether they have already been consumed or are still in existence but is only bound to restore the principal thing, together with such fruits as were extant at the moment when *litis contestatio* took place. But as soon as this happens he must know that, possibly, he is in possession of another man's property. From the moment of *litis contestatio* therefore he is bound to apply the utmost care in the cultivation of the fruits. If the owner succeeds in proving his ownership he can require the possessor to hand over all the fruits gathered by him during the action or pay compensation and can further claim damages for such fruits as he could have gathered by the exercise of due care.

A *bona fide* possessor has the right of retaining the property improved by him until payment of compensation: he need not give up possession until he has been compensated for the expenditure incurred by him or the value of the improvements whichever is less. He can, if he so wishes, bring an action against the owner for the compensation.

Though the improver profits by the fruits, his expenses for improvements must nevertheless be reckoned against him. The rents and profits which have been received are to be set off against the expenses incurred in producing those profits as well as in the improvement of the property itself. For although a *bona fide* possessor may have acquired an absolute right in the fruits which have been actually consumed by him, yet there is no reason for not setting them off against his claim for the expenditure.[1]

The Law of Holland went further: it did not make the *bona fide* possessor accountable for the profits which he had received before, and which were in existence at the time of the *litis contestatio*, but only for those received by him after the *litis contestatio*[2]. The case of *Banda v. Cader*[3] quoted by counsel for the plaintiff is an illustration of this rule.

Now this is not the case of a possessor appropriating the ordinary fruits of the land belonging to another. The nuts taken from the trees were the produce of the improvement made by the defendants, for unless the trees had been planted by them there would have been no produce to be obtained. These were the fruits of the improvement itself and not of the property generally. It was the direct result of the work done by the defendants.

[1] *Voet 6–1–38 (Probably the Roman Law).*
[2] *Voet 41–1–33; 3. Burge 35 (Burge treats this passage of Voet as applicable to fruits gathered by a* bona fide *possessor).*
[3] *(1913) 16 N. L. R. 79.*

The view of some, especially *Sande* [1] was that there was no difference between the fruits received by a *bona fide* possessor in consequence of his improvements and the fruits of the property generally ; this doctrine, however, was opposed by others. It tends to deprive a *bona fide* possessor of the protection which the Law intended to give him and as the amount of the expenditure which he is enabled to recover is restricted to its value at the time he restores the property, there would be great injustice in subjecting him to the whole risk of that expenditure, since it might happen that at the time of the restitution the value of the improvements had from various causes been diminished [2].

Though the *bona fide* possessor must reduce his claim by the value of the fruits received by him he cannot be made to include the fruits of the fruits or the advantage derived from his improvements [3]. The question is how long is he entitled to take such fruits ? It is argued for the defendants that as the improver has a *jus retentionis* he need not bring into account such fruits till he is paid. The authorities do not appear to make the position very clear. The view adopted in *Fernando v. Rodrigo* [4] was that no deduction should be made for fruits consumed before the date of assessment ; the case of *Podi Sinno et al v. Alwis* [5] seems to take the same view. The decision in *Beebee v. Majid* [6] can hardly be said to decide the contrary, though it negatives the right of the owner to claim a deduction in respect of fruits received after *litis contestatio*. In these circumstances a safe guide appears to be furnished by the first of these cases. [*Fernando v. Rodrigo*].

The learned Judge made his decision on November 3, 1941. The defendants therefore need not deduct the fruits of the fruits obtained by them before this date. They failed to prove their contention that they were entitled to claim compensation in respect of lots A4, B, B1, C, C1 and C2 ; they ceased to be *bona fide* possessors of these lots on October 10, 1938, according to the judgment of the learned District Judge. The fruits gathered by them thereafter should be applied in reduction of the amount awarded for compensation. The extent of these lots is about two-thirds of the whole area in dispute : the learned trial Judge assessed the profits at Rs. 60 a month. A sum of Rs. 40 may be fairly taken as the profits for these lots. The defendants ought to account to the plaintiff at the rate of Rs. 40 a month from October 10, 1938, till the date of decree [November 3, 1941].

The defendants are entitled to recover as compensation the sums of Rs. 3,519·50, Rs. 2,300, Rs. 1,000, Rs. 50 and Rs. 200 amounting in all to Rs. 7,069·50. The plaintiff must pay the defendants this sum less the sum that should be deducted as mesne profits, namely, at the rate of Rs. 40 a month from October 10, 1938, to November 3, 1941, and at the rate of Rs. 60 a month from November 3, 1941, till the date when the plaintiff obtained possession of the property.

There now remains the question of costs. Instead of tendering such adequate and reasonable amount as the circumstances showed to be due, the plaintiff alleged that a sum of Rs. 975 was due as compensation.

[1] *Frisian Decisions 3–15–3 ; Burge 34.*
[2] *Voet 6–1–39 ; 3 Burge 34.*
[3] *(1895) 1 N. L. R. 228 ; 3 Bal Rep. 61.*
[4] *(1919) 21 N. L. R. 415.*
[5] *(1926) 28 N. L. R. 401.*
[6] *(1929) 30 N. L. R. 361.*

The defendants disputed the right of the plaintiff to obtain an order of ejectment as no tender was made and claimed Rs. 20,000 as compensation for improvements and a right of retention till this sum was paid.

The plaintiff has succeeded in his claim to an account and the defendants, in obtaining as compensation a considerable sum in comparison with the sum pleaded by the plaintiff. The fair order seems to be that each party should bear its own costs in the District Court and in appeal.

HOWARD C.J.—I agree.

Varied.