

Present : Fisher C.J. and Garvin J.

1929.

BEEBEE v. MAJID.

334—D. C. Kandy, 33,840.

*Compensation for improvements—Bona fide possession—Value of improvements—Set-off—Fruits of improvement.*

A *bona fide* possessor is not required to set off as against the value of improvements made by him the fruits of the improvement itself.

**A** PPEAL from a judgment of the District Judge of Kandy. This was an action for declaration of title to land in which the defendants pleaded that, in case the plaintiff be declared owner, they be entitled to retain possession of the premises until the value of improvements made by them be paid. The defendants, after inspection of certain documents, admitted the claim of the plaintiff, and the question of compensation was referred to a Commissioner, who assessed it at Rs. 350. It was contended by the plaintiff that as against this sum there should be set off the mesne profits derived by the defendants since *litis contestatio*.

The learned District Judge rejected the claim.

*Navaratnam* (with *H. K. P. de Silva*), for appellant.

*Keuneman*, for respondents.

February 4, 1929. GARVIN J.—

The defendants in their answer prayed that the plaintiff's action to be declared the owner of this land be dismissed, and in the alternative that the plaintiff be ordered to pay to the defendants the sum of Rs. 700 as value of improvements made by them, and that they be declared entitled to retain possession of the premises until the value of the improvements be paid.

During the pendency of the action, the defendants, after inspection of certain documents, admitted the claim of the plaintiff.

The question of the defendants' claim for the value for improvements was referred, in the first instance, to a Commissioner, who made a report dated June 2, 1928. The improvements fell under two heads: (a) buildings and (b) plantations. In regard to the buildings it was agreed by the parties that the sum of Rs. 300, which was the Commissioner's estimate, should be taken to be the correct value of the improvement. The Commissioner's estimate of the compensation payable in respect of the plantations was

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Rs. 117·40. The parties did not agree to this, but after consideration they agreed instead that the value of the improvements under that head should be fixed at Rs. 50. The plaintiff, however, contended that against the total sum of Rs. 350 there should be set off the mesne profits derived by the defendants since *litis contestatio*. The learned District Judge rejected their contention and they have appealed.

No evidence has been led in this case to show what profits, if any, were yielded by the premises.

So far as the plantation is concerned it is not possible, in view of the fact that the Commissioner's estimate and report has not been accepted on this point, to determine what plantations were made by the defendants. But whether the defendants planted all the trees set out in the Commissioner's report or not there is not the faintest suggestion that the plantation yields any fruits.

The buildings consisted of a row of huts, and the report indicates that some of them at least were let out on rent. Although there is not in this record the material which would enable us to assess the actual profit derivable therefrom, there are sufficient indications that in all probability the premises do yield a profit. The simple question, therefore, is whether the plaintiff can claim that these profits which arise from the improvements effected by the defendants should be set off against the value of improvements in so far as they were received by the defendants after *litis contestatio*.

Rules 4 and 5 of the rules formulated by Mr. Berwick, District Judge, and approved by this Court in *Silva v. Shaik Ali*<sup>1</sup> on this question of compensation for improvements are as follows :—

- (4) When a claim is made for compensation, an account has to be taken of the mesne profits received, and only so much of the expenditure, whether made on the production of the fruits or on the property itself, as exceeds the amount of these profits or *fructus* can be allowed, subject, however, to the preceding rules ;
- (5) And, in taking this account, fruits which have been consumed as well as those which are still extend must be set off against the claim for expenditure. The fruits of the expenditure itself—*fructus ex ipsa melioratione percepti*—are to be excluded from the accounting and not to be set off against the claim.

There is, therefore, clear authority here for the proposition that the fruits of the improvements themselves should not be set off against the costs of improvements. This question is fully discussed by Voet (*bk. VI. tit. I, sec. 39*), and the conclusion at which he arrives is

<sup>1</sup> (1895) 1 N. L. R. 228.

that a *bona fide* possessor should not be required to set off as against the value of improvement made by him the fruits of the improvement itself.

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This view is in accordance with the rule in *Silva v. Shaik Ali* (*supra*) and is well settled law—*vide Neuman v. Mendis*,<sup>1</sup> *Silva v. Fernando*,<sup>2</sup> and *Mudianse v. Bannekgedera Appuhamy*.<sup>3</sup>

The judgment under appeal must therefore be affirmed and the appeal dismissed with costs.

FISHER C.J.—I agree.

*Appeal dismissed.*

