

RECORD

2. The said Action was instituted under the provisions of the Partition Act No. 16 of 1951 for a declaration of Title to a property now bearing assessment No.113 (formerly No.38), New Moor Street, Colombo and for the sale of the property under the said Act.

pp.26-28

3. The Plaintiff-Respondent, in his amended plaint dated 14th August 1954, pleaded:-

pp.70-71

(a) That one Rahumath Umma had held the said property subject to a fideicommissum, created by Deed No. 943 dated the 22nd July 1871 (Exhibit Pl(a)), in favour of her descendants; 10

(b) That Rahumath Umma died leaving as her heirs two daughters, namely one Umma Shiffa and the 1st Defendant-Respondent each of whom became entitled to a half share of the property subject to the fideicommissum;

(c) That on the death of Umma Shiffa her four children, namely, the Plaintiff-Respondent and the 2nd, 3rd and 4th Defendants-Respondents, became entitled to a one eighth share each of the said property subject to the fideicommissum; 20

(d) That the 8th, 9th and 10th Defendant-Respondents were the minor children of the 4th Defendant-Respondent.

The Plaintiff Respondent in his prayer to the amended plaint asked for a declaration that he and the 1st, 2nd, 3rd and 4th Defendant-Respondents were entitled to the said property in the shares set out in the plaint and for an order for the sale of the property in terms of the Partition Act. 30

pp.29-31

4. In the amended Statement of Claim dated the 1st September 1954, the Appellants, inter alia, pleaded:-

pp.84-89

(a) That the 1st Defendant-Respondent had by an indenture of lease No.737 dated the 11th December 1945 (Exhibit 6D 2) leased the entirety of the property to the 5th defendant for a term of 30 years commencing on the 1st January 1946;

(b) That first defendant-Respondent in executing the lease represented to the 5th defendant that she was the sole owner of the property and that she was entitled to grant the lease; 40

(c) That the decd No.943 dated the 22nd July 1871, on which the plaintiff Respondent relied to establish the fideicommissum pleaded by him, was not duly registered; pp.70-71

10 (d) That in accordance with the terms and conditions of the lease, the 5th defendant erected buildings and made other improvements on the property leased at a cost of Rs.35,000/- and that the buildings and other improvements affected by the 5th defendant were worth Rs. 35,000/- at the date of the claim.

20 The Appellants, in their prayer to the Statement of Claim asked, inter alia, that in the event of a sale of the property being ordered in terms of the Partition Act, the Court be pleased to order that a sum of Rs. 35,000/- being compensation in respect of the buildings erected and other improvements made by the 5th Defendant, be paid to the Appellants out of the proceeds of sale, and the rents of unexpired term of the lease be refunded by the 1st defendant-Respondent to the Appellants:-

In their Statement of Claim the Appellants also traversed the averments in the amended plaint in regard to the devolution of title; but, at the trial, the Appellants' case, in so far as it involved the denial of the title of the Plaintiff-Respondent and of the 1st to the 4th defendant-Respondents, was abandoned.

30 5. At the trial before the District Court, the following points of contest were formulated:- p.32, L.32

(1) Whether the 6th and 7th defendants(Appellants) are entitled to compensation in respect of the buildings put up by the 5th Defendant on the lease No.737 of the 11th December 1945? pp.84-89

(2) If so, in what sum?

40 6. At the Trial, the Plaintiff-Respondent gave evidence and also called one E.F.D. Perera, an Architect, to give evidence on the quantum of compensation. The Plaintiff-Respondent, under cross examination gave the following evidence:- pp.33-34

"Q. So far as you are aware from the time you came to know things Zaneera Umma (1st Defendant-Respondent) held herself out to be the owner of the entire property? p.34, L.16.

A. Yes.

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Q. Had Zaneera Umma by deed by lease No. 737 of 11th December, 1945, marked 6D 2 leased the entirety of this property along with the Siripina Lane, property which forms the subject matter of case No.6806/P to the 5th Defendant?

A. Yes.

Q. For a period of 30 years from 1st January 1946?

A. Yes.

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Q. The 5th defendant put all the buildings on this land?

A. Yes.

Q. In 1949?

A. Yes.

pp.46-49

7. The learned Trial Judge by his Judgment dated the 20th May 1955 directed that decree for the sale of the property be entered subject to the right of the Appellants to remain in possession of half share of the property and of the entirety of buildings thereon for the full period of 30 years commencing on the 1st January 1946.

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The learned Judge also held that, in the event of his said direction being reversed in appeal, the Appellants were entitled to the sum of Rs. 25,122.45 as compensation for the buildings erected by the 5th Defendant out of the amount which represents the value of the buildings when the property is put up for sale in pursuance of the decree entered in the case.

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8. In support of his direction that the sale of the property should be subject to the right of the Appellants to remain in possession of the buildings for the term of the Lease, the learned Trial Judge said:

p.47, L.25.

"But the question is whether the lessee is not entitled to remain in possession of the premises until the expiration of the period of 30 years stipulated in the lease or to receive compensation if the lease is terminated before the stipulated period. The situation that has now arisen was not certainly envisaged by the parties and no provision has been made in the deed of lease itself to meet this situation. Such a situation could not have

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been contemplated by the 5th defendant at the time of the execution of the lease as the lessor, the 1st defendant, leased the entire premises representing herself to be the sole owner thereof. The position taken by the plaintiff that 6th and 7th defendants are not entitled to compensation, or to remain in possession is an attempt on his part to completely ignore the provisions of the deed of lease. A similar case came up for consideration before the Supreme Court recently viz: Harriet Samarasekera vs. Lakshmi Munasinghe and four others (51 C.L.W. 102 also reported in 55 N.L.R. 558). In the course of the judgment in that case Gratiaen J., made the observation that the decree might well have directed a sale of the property subject to the servitude. That was also an action under the Partition Act for the sale of the land together with the buildings standing thereon. The building had been erected not by the owner of the land, but by a third party with the consent of the owner of the land. There is nothing in the Partition Act of 1951, which prevents me from entering a decree for a sale of these premises in question subject to the rights of the 6th and 7th defendants to remain in occupation of the buildings for the full period of the lease".

9. In regard to the Appellants' right to compensation for improvements, the learned trial Judge summarised the facts as follows:-

30 "That the 5th Defendant constructed the buildings on the land on the strength of the lease is not denied. Neither the final decree in the Partition case nor the deed of gift creating the fideicommissum appears to have been registered. The 1st Defendant no doubt held herself out as the sole owner of the land and the 5th defendant constructed the buildings subject to the conditions set out in the deed of lease in the bona fide belief that the 1st Defendant was the sole owner of the premises. 40 The Plaintiff and the other heirs of Umma Sheefa made no protest. They stood by and acquiesced in the improvement of the land by the 5th Defendant."

p.48, L.10

10. The law applicable to the Appellants claim to compensation was stated by learned trial Judge in the following terms -

"There is authority for the proposition that the fiduciary is entitled as against the fideicommissary to the same rights of compensation for

p.48, L.20

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improvements as any other bona fide possessor and to the retention of the fideicommissum property until compensation is paid and that a purchaser from a fiduciary is in the same position as a fiduciary (47 N.L.R. 361). The original lessee in this case is more or less in the same position as a purchaser."

11. On the quantum of compensation the learned trial Judge accepted the evidence of the architect called by the Appellants and held that the appellants were entitled to a sum of Rs. 25,122.45 as compensation. 10

p.49, L.5

12. The Plaintiff-Respondent appealed from the judgment of the District Court, and the Supreme Court by its Judgment dated the 5th September 1957 allowed the appeal holding that the Appellants were not entitled to any rights as against the plaintiff-Respondent. The Supreme Court also amended the decree for sale entered by the District Court by striking out all the directions which followed the order for sale and for payment into Court of the proceeds of sale to abide the further orders of the District Court. 20

pp.55-61
p.61, L.27

13. On the question whether the Appellants were entitled to compensation for improvements, the Supreme Court held that the 5th Defendant was a bona fide improver acting in the belief that his lessor was the absolute owner of the property, but followed the decision of a Divisional Bench of the Supreme Court in Soysa v. Mohideen (1914) 17 N.L.R. 279 where a claim to compensation for improvements made by a lessee against the true owners in circumstances substantially similar was rejected. It is submitted, however, that in view of the development of the law since, the decision in Soysa v. Mohideen should be reviewed and reversed in so far as it affects the rights of lessees holding under fiduciaries honestly believed to be absolute owners. 30

p.57, L.16

14. In Dassanayake v. Tillekaratna (1917) 20 N.L.R. 89 the Supreme Court held that a bona fide grantee from a fiduciary had the right to be compensated for improvements effected by him and also to retain the property until compensation was paid. This decision was followed in the case of Mudaliyar Wijetunga v. Rossie (1946) 47 N.L.R. 361. 40

15. Long leases are, according to the law of Ceylon, regarded as pro tanto alienations; and in

view of the fact that the rigour of the rule as to the necessity of *possessio civilis* in claims for compensation has been relaxed, it is submitted that the decision in *Dassanayake v. Tillekaratna* should also apply to claims to compensation by lessees *bona fide* holding under a long lease from a fiduciary who had purported to act as absolute owner of the property leased.

10 16. In the case of the Government Agent, Central Province v. Lechiman Chettiyar (1922) 24 N.L.R. 36 the Supreme Court recognised the right to compensation in respect of improvements made by person who did not have *possessio civilis* in the strict sense of the term. Bertram C.J. in delivering judgment in the case said: "The principle involved was originally an equitable principle, and it is more in accordance with the spirit of that principle that we should administer it equitably rather than upon strictly rigorous lines. But, I think, it must be regarded as a development." The application of the decision in *Dassanayake v. Tillekeratna* to the facts of the present case would be in accord with the development of the law in the particular field and would also satisfy the fundamental principles of the Roman Dutch Law in regard to unjust enrichment.

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30 17. It is submitted that the Appellants are entitled to compensation also on the ground that the heirs of Umma Shiffa had acquiesced in the improvements effected by the 5th defendant. It is respectfully submitted that the Supreme Court was wrong in reversing the Learned District Judge's finding of fact in favour of the Appellants. In addition to the evidence of the Plaintiff under cross-examination, there is other evidence to support the learned District Judge's finding - namely, the circumstance that the heirs of Umma Shiffa had become entitled to the dominium and possession of the property about eleven years before the 5th Defendant started making the improvements. Fideicommissaries who would take after the Plaintiff-Respondent and after the 1st, 2nd, 3rd and 4th Defendant-Respondents would be prejudiced neither by the decree of the District Court nor by the alternative order proposed by the District Judge for the payment of compensation since these fideicommissaries would in either case get at least what they would ordinarily be entitled to, namely, the unimproved value of the property.

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18. In support of the decree of the District Court, it is urged that the Lease No. 737 dated the 11th December 1945 (Exhibit 6 D2), containing as it does an express condition that the property should be improved by the lessee, is a contract by a fiduciary for the benefit of the fideicommissary property and should therefore be treated as binding on the fideicommissaries. In this view of the matter, the Appellants would be entitled to an order reserving their right to possess the improved premises for the period of the lease, and, in the event of the decree for sale extinguishing that right, to compensation for the loss of the right.

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19. In any event, the appellants are entitled as against the 1st Defendant either to an order for compensation out of the share of the proceeds of sale to which the 1st Defendant-Respondent is entitled or to an order reserving the interests of the Appellants as lessees of the 1st Defendant-Respondent. It is respectfully submitted that the Supreme Court erred in holding that the Appellants were not entitled to an order for such compensation for the reason that they had not asked for it in their prayer. It is submitted that, in view of the fact the action is a Partition Action, the points of contest formulated at the trial were sufficient, even in the absence of express pleading, to enable the Appellants to obtain such an order for compensation.

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The Appellants respectfully submit that the Decree of the Supreme Court dated the 5th September 1957 should be reversed and that the Decree of the District Court dated the 20th May 1955 or in the alternative the alternative order proposed by the Learned District Judge for the payment of compensation to the Appellants should be restored for the following among other

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R E A S O N S

1. Because the Learned District Judge was right in holding that the Appellants were entitled to remain in possession of the premises until the expiration of the period of the lease.

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2. Because the Appellants are entitled, in the event of a decree for sale extinguishing their right of possession, to compensation for the loss of that right.

3. Because all persons taking under the deed creating the fideicommissum were bound by the lease.

4. Because the decision in the case of Soysa Mohideen should be reviewed and reversed.

5. Because the Appellants are entitled to compensation for improvements on the ground of acquiescence by the Plaintiff Respondent and by the other heirs of Umma Shiffa.

10 6. Because the Supreme Court were wrong in reversing the finding of the District Court that the Plaintiff-Respondent and the other heirs of Umma Shiffa had acquiesced in the improvement of the premises by the 5th Defendant.

20 7. Because the Supreme Court were wrong in holding that the order of the District Court regarding possession and compensation prejudiced the rights of the fideicommissaries who may in the future take under the deed creating the fideicommissum.

8. Because the Appellants are, in any event, entitled to an order reserving their rights as lessees under the 1st Defendant-Respondent, and, in the event of a decree for sale extinguishing such rights, to compensation out of the share of the proceeds of sale to which the 1st Defendant Respondent is entitled.

30 9. Because the relief contended for by the appellants can properly be granted in the present case notwithstanding that there has been no express pleading in that behalf.

E.F.N. GRATIAEN.

WALTER JAYAWARDENE.

No. 3 of 1959

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME

COURT OF THE ISLAND OF CEYLON

B E T W E E N :

HUSSENABAI HASSANALLY and ANOTHER

- and -

MOHAMED MUHEETH MOHAMED CASSIM
and OTHERS

CASE FOR THE APPELLANTS

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