1950 *Present :* **Nagalingam J. and Pulle J.**

SILVA, Appellant, *and* SILVA, Respondent

S. C. 79—D. C. Balapitiya, 78

Encroachment—Power of Court to order sale of ground encroached upon—Reasonable terms—Compensation.

Where a building has been erected not wholly on the ground of another, but is built partly on one's own ground and only encroaches partially on the ground of another, the Court may, where it is equitable to do so, order the owner of the ground encroached on to transfer that portion on reasonable terms to the party who made the encroachment.

APPEAL from a judgment of the District Court, Balapitiya.

A. L. Jayasuriya, for the first defendant appellant.

S. W. Walpita, with *L. F. Ekanayake*, for the plaintiff respondent.

Cur. adv. vult.

June 20, 1950. PULLE J.—

This appeal relates to two contiguous allotments of land each of the extent of 3.92 perches called lots B7 and B8 in Plan No. 1199 dated 22nd November, 1948. The 1st plaintiff became the purchaser of lot B8 from his father the 2nd plaintiff and one Saranapala Thero on deed P4 of the 23rd November, 1935. From about 1930 to 1937 the 2nd plaintiff was the owner of also lot B7 which he transferred to one K. Jamis de Silva by deed 1 D3 of 17th January, 1937. The 1st defendant, who is the appellant, purchased the interests of K. Jamis de Silva in 1943 and 1945. There are three boutiques on the lots, of which boutique No. 1 is situated wholly on lot B8 and boutique No. 3 on lot B7. Boutique No. 2, however, is partly on lot B7 and partly on lot B8 and the extent of the ground space occupied by it on lot B8 is decimal 53 perch. This area is depicted as lot A in Plan No. 1199 and the learned District Judge has held that the 1st plaintiff is entitled to that portion of boutique No. 2 standing on lot A.

It is not necessary to discuss the evidence on which the finding is based. The plans and the deeds make it abundantly clear that the 1st defendant-appellant has no manner of right or title to the portion of land in dispute. At the hearing of the appeal a settlement was suggested on the basis that the 1st plaintiff should sell lot A to the appellant on a valuation and a date was given for that purpose. It would appear that the parties are not agreeable to a settlement and it has become necessary to consider whether, in all the circumstances, the 1st plaintiff ought to be compelled to sell lot A.

Now the major portion of boutique No. 2 which consists of one room and is five cubits in extent lies on lot B7 owned by the appellant. Assuming that the room could be partitioned along the boundary line between lots B7 and B8, it is obvious that the entire space occupied by the boutique would thereby be rendered sterile. In that event appellant's loss would be greater than the 1st plaintiff's. The Judge has found that the three boutiques on lots B7 and B8 were built about 1937 by the 2nd plaintiff, the predecessor in title of both the 1st plaintiff and the appellant, and there is no circumstance which would render it inequitable to grant to the appellant the option of purchasing lot A. The case of *Miguel Appuhamy v. Thamel and others* [1] which has been followed, except on one point, in *Samaraweera et al. v. Mohotta et al.* [2] and without qualification by De Sampayo J. in *Bisohamy v. Joseph et al.* [3] has laid down that " The Court may, according to the circumstances, after it is satisfied that there has been an encroachment, either order the removal of it, or, according to the authority quoted to us by the defendant's counsel, order the defendant to buy that part of the plaintiff's land on which he has encroached ". Massdorp states in the Institutes of South African Law, Vol. II (6th Edition), p. 54,

> " A difficulty arises where a building is erected not wholly on the ground of another, but is built partly on one's own ground and only encroaches partially on the ground of another. In such a case the owner of the ground encroached on may demand that the encroachment be removed, or that the party making the encroachment shall take a transfer of the piece of ground actually occupied by the encroachment and so much of the rest of his ground as is rendered useless to him thereby, and pay to him the value of the ground transferred together with the costs of transfer and a reasonable sum as damages for the trespass and as a solatium for the compulsory expropriation of his property. Where, however, there has been delay in applying for the former remedy, the Court will restrict the party injured to the latter ".

In my opinion, having regard to the findings of the learned Judge on the value of lot A, compensation to the 1st plaintiff in a sum of Rs. 300 would be adequate.

The case will go back with the order that the 1st plaintiff do transfer to the 1st defendant lot A upon payment of the sum of Rs. 300 on or before a date to be fixed by the Judge. The 1st defendant will bear the expenses of the transfer. If the 1st defendant is not prepared to take a transfer, the appeal will stand dismissed.

In any event, the 1st plaintiff will be entitled to the costs of appeal and the order as to costs in the District Court will stand.

Inasmuch as the 1st defendant was in *bona fide* possession of lot A and the portion of the boutique standing thereon built by his predecessor

[1] *(1910) 2 Cur. L. R. 209.*
[2] *(1916) 18 N. L. R. 187.*
[3] *(1923) 23 N. L. R. 350.*

in title, the father of the 1st plaintiff, I do not think that the 1st plaintiff was entitled to any damages based on the rental value of boutique No. 2. The order for damages is, therefore, set aside.

NAGALINGAM J.—I agree.

Order varied.