1937 *Present :* **Fernando A.J.**

GNANAPRAKASAM *et al.* *v.* MARIAIPILLAI.

*42—C. R. Jaffna, 4,091.*

*Encroachment on another's land—Erection of building—Alternative remedy—Right to remove building or claim damages—Delay on part of plaintiff.*

Where a building is erected partly on one's own ground an encroached partly on the ground of another, the Court may either order the encroachment to be removed or the party encroaching to take a transfer of the piece of ground actually occupied by the encroachment and so much of it as is rendered useless by the encroachment and pay the value of the ground transferred together with the costs of transfer and a reasonable sum as damages.

The Court will grant such remedy as is reasonable in the circumstances of each case.

Whether there has been delay on the part of the party encroached upon or not, the party encroached should not be ordered to remove the building, if the other party could be compensated in damages.

*Bisohamy v. Joseph* (*23 N. L. R. 350*) and *Sego Madar v. Makeen* (*27 N. L. R. 227*) referred to.

APPEAL from a judgment of the Commissioner of Requests, Jaffna.

*H. V. Perera, K.C.* (with him *T. Nadarajah*), for plaintiffs, appellants.

*L. A. Rajapakse* (with him *N. Nadarajah* and *M. I. M. Haniffa*), for defendant, respondent.

July 1, 1937. FERNANDO A.J.—

On the evidence before him, the Commissioner of Requests held that there was an encroachment by the defendant on the land belonging to the plaintiffs, and that encroachment is shown in Mr. Weerasingham's plans as being 25 kulies in extent. The Commissioner of Requests also found that the defendant did not act maliciously, but in the mistaken belief that the encroachment was on her own property, and that such mistake on her part was perfectly *bona fide*.

It would appear from the evidence of the Surveyor, Manuel, that he was taken by the plaintiffs to the spot to test the correctness of the then existing boundary, namely, the fence that stood between the two lands. He found that there was an encroachment by the defendant of about 2 or 2½ inches on the eastern corner of the plaintiffs' land, and as the encroachment was very small, the surveyor thought it could be passed,

and his evidence is to the effect that on that occasion both the plaintiff and the defendant accepted the boundary fence which existed as the limit. After the fixing of the boundary, the defendant began the construction of her building, and it would appear that the first protest by the plaintiff was in April, 1936, by which time the foundation had been laid and the wall on the plaintiffs' side had come up about 5 feet. It is possible that the plaintiff began to dispute the boundary only after he realized that there would be a window opening on to his land. This window was apparently removed in view of the objection, but the plaintiff persisted in claiming the land, and has brought this action.

Counsel for the appellant contended that in a case where a building is erected partly on one's own ground and encroaches partially on the ground of another, 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 the ground as is rendered useless to him thereby, and to 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 (see *Institutes of Cape Law, vol. II. (1903 edition)*, *pp. 47-48*. The passage continues in these words "where however, there has been delay in applying for the former remedy, the Court will restrict the party injured to the latter." On the strength of this passage, Counsel argues that the owner has the option of asking for one or other of these two remedies, and that the Court is bound to give him the first remedy if he has not been guilty of any delay. It seems to me, however, that the passage cited may be read as meaning that the owner has one of two remedies, and may press for one or other of them, and that the Court will grant him such remedy as is reasonable in the circumstances, but where there has been delay on the part of the plaintiff, he will not be allowed the first remedy in any event.

Whatever the interpretation of that passage may be the law as applied in Ceylon is not exactly in the terms of that passage. De Sampayo J. in *Bisohamy v. Joseph*[1] said that "In a case of encroachment like this, it does not necessarily follow that plaintiff should get judgment for the actual portion encroached on, with the result that any building should be broken down." He referred to the case of *Miguel Appuhamy v. Thamel*[2], as an authority for the proposition that in certain circumstances, the Court instead of ordering the removal of the encroachment may either order compensation to be paid by the defendant or compel the defendant to buy the land encroached upon. In *Bisohamy v. Joseph*, the evidence indicated that the plaintiff was aware of the building, and did not object to it until the defendant after completing the building of the wall, sent him a letter of demand claiming half the expenses. The wall in that case was only a boundary wall, but in spite of that circumstance, the case was sent back to the Court of Requests in order that the Commissioner might award to the plaintiff reasonable compensation for the encroachment. In *Sego Madar v. Makeen*[3], de Sampayo and

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[1] *23 N. L. R. 350.*

[2] *2 Current Law Reports 209.*

[3] *27 N. L. R. 227.*

Porter JJ. set aside the judgment of the District Court by which an injunction had been allowed compelling the defendant to remove a building put up by him encroaching on the plaintiff's land. "It has been pointed out", said de Sampayo J., "in the course of the argument that the principle both of English equity and the Roman-Dutch law, is that an injunction of this sort should not be granted if the plaintiff can be compensated in damages." The principle is apparently applicable whether there has been delay on the part of the plaintiff or not. The order of the District Court was set aside, and the case was sent back so that the District Judge might consider the question of compensation to be paid, and assess the proper amount of damages that were due to the plaintiff. In the circumstances of this case, I see no reason why that principle should not be applied.

The encroachment is very small in extent, and there is nothing to indicate that the plaintiff has suffered damages in any way except with regard to the value of the portion of land which has been encroached upon. The learned Judge appears to have accepted the evidence of the Surveyor, Manuel, to the effect that the portion of land encroached upon is worth about Rs. 40 and he ordered Rs. 50 to be paid to the plaintiff as compensation. I see no reason to interfere with this order, and I would affirm the judgment of the Commissioner of Requests. The plaintiffs-appellants will pay to the defendant-respondent her costs of this appeal.

*Appeal dismissed.*