

Present : De Sampayo and Porter JJ.

1922.

SEGO MADAR v. MAKEEN.

496—D. C. Colombo, 1,054.

*Injunction—Building on another's land—Order to remove encroachment—Damages.*

Defendant broke down an old house and built a new one, and in doing so encroached on a small strip of unbuilt land belonging to the plaintiff. Plaintiff prayed for an injunction to compel the defendant to remove the building and restore the strip of land.

*Held*, that in the circumstances if the plaintiff could be compensated by way of damages, the injunction should not be granted.

THE plaintiff was the owner of the house bearing assessment No. 22c as shown in the plan B filed of record, whilst defendant was the owner of the house to the north bearing assessment No. 22B.

Defendant pulled down his old building for the purpose of erecting a new one on its site, and in the course of such erection he broke and dug into plaintiff's wall and wrongfully blocked a door leading into a room in plaintiff's house and also cut a portion of the eaves of his roof. Plaintiff also complained that defendant encroached on his premises to the extent of about 14 inches at its widest part. He valued his right to Rs. 1,000, and claimed Rs. 250 damages. The District Judge granted an injunction ordering the defendant to remove the building.

*A. St. V. Jayewardene, K.C.* (with him *Ratnam*), for defendant, appellant.

*Samarawickreme* (with him *Bartholomeusz*), for plaintiff, respondent.

May 31, 1922. DE SAMPAYO J.—

This is an action in respect of an alleged encroachment. The parties are owners of two lands adjoining each other situated at Piachaud's lane. On the plaintiff's land, which is to the south of the other, there is a house occupying the whole breadth of the land. On the defendant's land to the north it would seem that there were some old buildings which the defendant broke down to build a new house. He took the wall of the plaintiff's house as the common boundary, and he built the wall of the new house right against it. The plaintiff brought this action alleging that there was a small

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strip of unbuilt land between his wall and the real boundary, and that, therefore, the defendant by building his new house right up to the plaintiff's wall encroached on that unbuilt portion of land. He also complained that the defendant by the same work blocked a door which existed at point "Y" on the plaintiff's wall. Now the District Judge has found that this small strip of land is really part of the plaintiff's land, and that therefore there was an encroachment. I should say that the strip was so tiny that the District Judge was quite justified in his remark that if the parties had been more sensible they would not have gone to the expense of an action, which is quite out of proportion to the value of any interest on either side. There is no encroachment on the side of the Piachaud's lane, because it would seem that the defendant built just on the line now claimed by the plaintiff. But further in there is a very small strip, at one end forming a very acute angle and at the other end forming a base 14 inches wide. As regards the door it is said that it was used to go to a water closet in the back compound along the strip which the plaintiff calls a passage. Now with regard to that, it is quite plain that the water closet can easily be reached without the use of this strip. In fact, one should say that the entrances from the back of the house into the yard behind would be very much more convenient and decent than the one claimed. However, this is the extent of the injury suffered by the plaintiff. He claimed, however, an injunction to compel the defendant to remove the building and restore the strip of land. The District Judge, apparently with some reluctance, gave the relief which the plaintiff had claimed. It is not quite possible for us to interfere with the District Judge's finding as to the existence of the encroachment. But I question whether the District Judge ought under the circumstances to have granted the specific relief claimed. For it has been pointed out in the course of this 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 plaintiff himself valued the damage he suffered by the unlawful acts of the defendant at a certain figure. Mr. Samarawickreme, for the plaintiff, says that this is not the real assessment of the damages in consequence of the building of the wall and the blocking of the door, but damages arising in some other way, which I cannot follow. He also says that we ought not in this appeal to alter the decree as to the breaking down of the defendant's building, because the point was not considered and fully gone into in the Court below. Perhaps that much may be conceded to the plaintiff in the circumstances. In my opinion, so far as the record stands, there is nothing to show that the plaintiff cannot be compensated adequately by way of damages for any wrong which the defendant committed. But it may be, as Mr. Samarawickreme suggests, that the plaintiff, if he had a further opportunity, may show in what respect he cannot be compensated

adequately. I would therefore, set aside the judgment appealed from, and send the case back to the District Court for the purpose of the District Judge considering the question of compensation to the plaintiff in damages in lieu of the specific order to break down the building that he has made, and also for assessing, if he came to that conclusion, the proper amount of damages that are due to the plaintiff.

I would make no order as to costs of appeal. The order as to costs hitherto incurred in the District Court may stand.

PORTER J.—I agree.

*Set aside.*

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