

1922.

Present : De Sampayo J.

BISOHAMY v. JOSEPH *et al.*

37—C. R. Colombo, 81,751.

Building of boundary wall—Encroachment—Small strip—Action for declaration of title—Order to pay compensation rather than break down wall.

Defendant built a boundary wall, and in doing so encroached upon a very small strip of land belonging to the plaintiff. The plaintiff who was aware of the building raised no objection at the time. In the circumstances the Court instead of giving judgment for the actual portion encroached upon, as prayed for by plaintiff, ordered defendant to pay compensation for the encroachment.

“The strip is so narrow that it would be inequitable to compel the defendant to break down the wall.”

THE plaintiff instituted this action for a declaration of title to two narrow strips of land marked X and Y depicted on plan A, alleging that the defendants had encroached on same.

The defendants denied the allegations, and further stated that the boundary wall had been put up with the knowledge and consent of the plaintiff, and that she was estopped from denying the correctness of the same.

The Commissioner of Requests (F. Roberts, Esq.), held that—(1) Plaintiff was owner of lots X and Y in plan A ; and that (2) plaintiff was not estopped from denying the correctness of the present boundary wall.

Nagalingam, for the appellants.

H. V. Perera, for the respondent.

May 12, 1922. DE SAMPAYO J.—

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The plaintiff has brought this action asserting title to very small strips of land marked X and Y in the plan marked A, and stating that the defendant had encroached on the plaintiff's land by appropriating the two strips in question. It would be observed that the encroachment Y is part of what is described in that survey as "Reserved road approach." Now the plaintiff herself derived title to the land, of which these two strips are said to be portions, upon deed No. 830 dated January 24, 1912. To that deed was annexed survey marked P 1 dated December 17, 1911. According to the boundaries stated in the deed and in the survey, it is quite clear that the passage or road reservation in question was excluded from the conveyance, for the eastern boundary of what was conveyed was stated to be "Crown land and passage." The passage indubitably is this reservation. This is made more clear by a later survey produced by the plaintiff, namely, that marked P 2 dated September 24, 1916, in which the passage or road is described as Crown-reservation. Consequently, the plaintiff, I do not think, can succeed on the first issue as regards encroachment Y. The encroachment marked X stands on a different footing. That portion may be a part of the land belonging to the plaintiff. There is evidence which the learned Commissioner accepts that the boundary between the plaintiff's and the defendants' land was a line of arecas and wild apple trees, and that the defendant ignoring that boundary has recently built a boundary wall taking in the trees or some of the trees which really form part of the boundary between the two lands. The evidence does show that the conclusion of the Commissioner on that point is right. Even so, what remedy should the Court allow to the plaintiff? It appears that the wall in question was not built in a day, but took some time in the building, and the plaintiff was aware of it. But there was no objection to it until the defendant, after completing the building of it, sent a letter of demand claiming half the expenses from the plaintiff. In a case of encroachment like this, it does not necessarily follow that the plaintiff should get judgment for the actual portion encroached on, with the result that any building should be broken down. The case of *Miguel Appuhamy v. Thamel*¹ is an authority for saying that under 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. Apart from the fact that the plaintiff was apparently aware of the building of the wall, the strip at point X is so narrow that it would be inequitable to compel the defendant to break down the wall. It would, on the contrary, be more beneficial for both parties if the plaintiff were given some compensation for the strip at point X, and the defendant

¹ 2 *Cur. L. R.* 209.

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allowed to retain the wall. There is no material in the case to enable me to assess the proper amount of compensation which should be paid, and I think the case must go back for further proceedings on that point.

There is another objection pointed out, namely, that the decree has awarded damages at the rate of Rs. 5 a month from March, 1921, which is the date of the alleged encroachment. Now, from the nature of the land, no damage could have arisen from loss of profits or income, and there is no particular evidence showing in what way the plaintiff could have suffered any damage. The fact of the matter appears to be that the decree was framed upon the prayers contained in the claim without any consideration being paid as to the actual result of the trial on evidence. I think the award of damages should be deleted. I accordingly set aside the decree in respect of the matters I have dealt with, and send the case back in order that the Commissioner might award to the plaintiff reasonable compensation in respect of the encroachment at X in the plan. The defendant, I think, is entitled to the costs of this appeal. The costs of the trial already had will be borne by the parties respectively.

Sent back.

