Master Des Raj v. The Punjab State

Kapur, J.

It may be, as was observed in that case, that there has been a serious and complete failure to adhere to important and indeed fundamental rules, but that by itself is not a ground for the Courts to interfere with the orders of the Education Department. Without expressing any opinion on whether there has been any breach or not, I would dismiss this appeal following the judgment of their Lordships of the Privy Council, R. *Venkata Rao* v. *The Secretary of State for India in Council* (1), which was followed in *Naubat Rai* v. *Union of India* (2), but in the circumstances of this case I leave the parties to bear their own costs throughout.

APPELLATE CIVIL

Before Kapur, J.

DURGA PARSHAD,—*Defendant-Appellant*

versus

JHEETAR MALL,—*Plaintiff-Respondent*

Regular Second Appeal No. 847 of 1951

1953

Nov. 19th

Specific Relief Act (I of 1877)—Section 55—Party wall-owners of—Position of—Construction on party wall by one owner to the exclusion of the other—Excluded owner —Remedy of—Whether entitled to claim removal of the obstruction.

Held, that the adjoining owners of a party wall are tenants-in-common and the wall cannot be treated as a wall divisible longitudinally into two strips, one belonging to one neighbour and the other to the other. If one of the two tenants-in-common excludes the other from the use of it by placing an obstruction on it, the excluded owner is entitled to a mandatory injunction for the removal of the obstruction.

Ganpat Rai v. *Sain Dass* (3), *Watson* v. *Gray* (4) *Kanakayya* v. *Narainmhulu* (5), and *Shivputtarappa* v. *Shivrudrappa Kalappa* (6), followed; Daood *Khan* v. *Chandu Lal* (7), not followed.

(1) I.L.R. 1937 Mad. 532
(2) A.I.R. 1953 Pb. 137
(3) I.L.R. 12 Lah. 542
(4) L.R. 14 Ch. D. 192
(5) I.L.R. 19 Mad. 38
(6) A.I.R. 1926 Bom. 387
(7) A.I.R. 1923 Bom. 370

Second Appeal from the decree of Shri M. L. Vijh, IInd Additional District Judge, Delhi, dated the 16th August, 1951, modifying that of Shri A. N. Bhanot, Sub-Judge 1st Class, Delhi, dated the 14th April 1950 (dismissing the plaintiff's suit and leaving the parties to bear their own costs) to the extent of granting the plaintiff a decree for a declaration that the wall existing on the north of the house in both the storeys and the Pardah *wall on the top storey with the land under it belongs jointly to the parties and for a mandatory injunction ordering the defendant to remove the wall of his room built on the wall of the plaintiff and shown red in the plan attached to the plaint, but allowing half the costs to the plaintiff of both the courts.*

A. R. KAPUR, for Appellants.

K. L. GOSAIN, for Respodent.

JUDGMENT

Kapur, J

KAPUR, J. This is a defendant's appeal against an appellate decree of Additional District Judge, M.L. Vijh, dated the 16th August 1951, modifying the decree of the trial Court and giving a mandatory injunction against the defendant.

The plaintiff owns the house No. 3210 in Kucha Baqaullah Khan and the defendant purchased the adjoining house which is on the north of the plaintiff's house. The defendant started raising the northern wall of the porch of this house to which objection was taken by the plaintiff on the ground that the wall was his. He, on the 22nd June 1946, made a report to the Police complaining about this alleged unauthorised construction. He also sent a telegraphic notice to the defendant warning him not to build and to remove the structures that he had already built. The defendant has also stated as D.W. 9 that after the wall had been built some persons on behalf of the plaintiff came to see him in regard to the wall. The plaintiff then brought a suit on the 20th of July 1946, for a declaration that the wall in dispute was his and for a mandatory injunction against the defendant to remove the disputed wall of his room built on the northern wall.

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On the 2nd August 1947, the plaintiff made an application for the temporary injunction which was granted and the next day or the day following he made an application for the appointment of a commissioner to see as to how much construction had already been made, but the Court did not agree with this. On the 29th August 1947, the plaintiff asked for action being taken for disobedience of the injunction and a local commissioner was appointed on the following day, and he made a report that the wall had been built but the rafters of the roof had not yet been put.

The appellant Court as well as the trial Court have found that it has not been proved that the wall belongs either to the plaintiff or the defendant and that it is, therefore, a joint or a party-wall. It is in these circumstances that it has to be determined as to what is the consequence of the defendant's building on this wall. The learned Judge has directed a mandatory injunction for the removal of the wall of the room which has been built.

Several cases have been cited before me. On behalf of the defendant-appellant it is argued that the removal of the wall should not be ordered but the order should be, as was made by the Bombay High Court in *Daood Khan* v. *Chandu Lal* (1) that the portion of the wall which goes beyond the middle line of the wall belonging to the plaintiff should be declared to belong to the plaintiff. But, I with very great respect, am unable to agree that this lays down a correct law because it seems to be contrary to the weight of opinion of other Courts. Besides, in this Bombay case the encroachment was very small and according to the finding the building of the wall gave support to the wall of the plaintiff. The correct rule, in my opinion, has been laid down by a Division Bench of the Lahore High Court presided over by Sir Shadi Lal, C.J., in *Ganpat Rai* v. *Sain Das* (2), where it was held that paties are in such cases

(1) A.I.R. 1923 Bom. 370
(2) I.L.R. 12 Lah. 542

tenants-in-common and the wall cannot be treated as a wall divisible longitudinally into two strips, one belonging to one neighbour and the other to the other and the plaintiffs in that case were held entitled to the use of the whole width of the top of the wall subject to similar rights of the defendants and the construction on the wall amounted to an ouster. The learned Chief Justice followed an English judgment in *Watson* v. *Gray* (1), where it was held that the ordinary meaning of the term "party-wall" is a wall of which the two adjoining owners are tenants-in-common, and if, one of the two tenants-in-common excludes the other from the use of it by placing an obstruction on it, the only remedy of the excluded tenant is to remove the obstruction. In another English case, *Steadman* v. *Smith* (2), Crompton, J., observed :—

> "You certainly had no longer the use of the same wall; you could not put flower-pots on it, for instance. Suppose he had covered it with broken glass, so as to prevent your passing along it, as you were entitled to do."

The learned Judge went on to say :—

> "the plaintiff is excluded from the top of the wall; he might have wished to train fruit trees there, or to amuse himself by running along the top of the wall."

As was observed by Sir Shadi Lal, C.J., in the Lahore case these observations apply as much to the present case as they did to the cases cited there.

In an earlier case in Madras, *Kanakayya* v. *Narasimhulu*, (3) one of two tenants-in-common of a party-wall raised the height of the wall with a view to building a superstructure on his own tenement. The other tenant objected although he suffered no inconvenience and he brought a suit

(1) L.R. 14 Ch. D. 192
(2) 8 E. & B. 1.
(3) I.L.R. 19 Mad. 38
(1) A.I.R. 1953 Punjab 101

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to enforce the removal of the newly-erected portion, and it was held that he could get the relief sought. I would refer to the observations of Subramania Ayyar, J., where the learned Judge said :—

> "On further consideration, however, I have arrived at the conclusion that the better rule to lay down is the simpler one enunciated in *Watson* v. *Gray* (1) since it will compel such of the owners of party-walls as are desirous of adding to, or otherwise materially interfering with, the common property to obtain beforehand the consent of the others interested in it to the change being effected, and consequently is the one less likely to lead to disputes among joint holders of party-walls."

The later view of the Bombay High Court in *Shivputrappa Parappa Kamshetti* v. *Shivrudrappa Kalappa Huli* (2), is also the same as that which was taken by Sir Shadi Lal, C.J., in Lahore. It was there held that if a party-wall is built upon without the consent of one of the parties he can get the obstruction removed. Reference was in this case made to the Madras case, *Watson* v. *Gray* (1), and several other cases, and particularly to the observation of Bayley, J., in *Cubitt* v. *Porter*. (3), where the learned Judge had said :—

> "There is no authority to show that one tenant-in-common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy-in-common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction; the object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made. But

(1) L.R. 14 Ch. D. 192
(2) A.I.R. 1926 Bom. 387
(3) [1828] 8 B and C 257=6 L.J. (O.S) K.B. 306

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then it is said the wall here is much higher than the wall was before. What is the consequence of that? One tenant-in-common has, upon that which is the subject-matter of the tenancy-in-common, laid bricks and heightened the wall. If that be done further than it ought to have been done, what is the remedy of the other party? He may remove it. That is the only remedy he can have."

In yet another case which is much more recent, the Nagpur High Court has also taken the same view in *Mithoobhai* v. *Omprakash* (1), where Mudholkar, J., has reviewed all these cases and has taken the same view as was taken by the Lahore High Court. The weight of authority, therefore, is in favour of the view which was taken by the learned District Judge, and I am in respectful agreement with the view which has been taken by the learned Judges in cases which I have quoted above. I would, therefore, dismiss this appeal with costs.

APPELLATE CRIMINAL

Before Khosla and Harnam Singh, JJ.,

PRITAM SINGH AND ANOTHER —*Convict-Appellants*

versus

THE STATE—*Respondent*

Criminal Appeal Nos. 592 and 593 of 1953

Indian Evidence Act (I of 1872)—Section 114, Illustration (a)—Presumption under—Whether applicable to cases other than of theft.

Held, that though illustration (a) appended to section 114 of the Indian Evidence Act refers to cases of theft, that provision of law is no more than an illustration and the presumption arising thereunder extends to all charges, however penal, including murder. Where it was proved that the deceased with his 14 goats was seen with the accused immediately before the murder, that the accused were found in possession of the goats of the deceased

(1) A.I.R. 1951 Nag. 389