add anything to what has been written in the judgment of the lower Court.

We accordingly decree this appeal. The cross-objection taken by the first defendant on the ground that he should be allowed his costs necessarily fails and is dismissed. The plaintiff will be granted a decree setting aside the revenue auction sale of Estate No. 9299 of the Dacca Collectorate, held on the 22nd September 1919, and for declaration of his title to this estate and for recovery of possession and for mesne profits which will be assessed in the lower Court.

The plaintiff will get his costs both in this and the lower Court from Defendant No. 1. Defendant No. 2, who did not appear in this Court, will bear his own costs in the lower Court.

A. S. M. A. *Appeal allowed.*

APPELLATE CIVIL.

Before Suhrawardy and Chotzner JJ.

BHOLA NATH DUTT

v.

RADHA NATH BISWAS.*

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Feb. 28.

Partition—Family dwelling house--Separating walls—Easement.

Where under a partition decree two contiguous rooms were allotted to two brothers and the separating walls between the said rooms were given to one of them and on a transfer being made of the portion containing the said separating walls, the transferee applied for getting exclusive possession

* Appeal from Order, No. 397 of 1923, against the order of Kunjo Behari Biswas, Subordinate Judge of 24-Parganas, dated Sep 20, 1923.

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of the walls by removing the beams and rafters of the other room resting upon the walls :—

Held, that the applicant was not entitled to the exclusive possession claimed as a *quasi*-easement of lateral support had arisen upon a division of the joint property.

Bolye Chander Sen v. *Lalmani Dasi* (1), *Sarojini* v. *Krishna* (2), relied upon.

Suffield v. *Brown* (3), *Amutool Russool* v. *Jhoomuck Singh* (4), *Delhi and London Bank* v. *Hem Lal Dutt* (5) referred to.

APPEAL by Bhola Nath Dutt, the applicant.

On a partition decree being made two contiguous rooms under one roof were allotted respectively to two brothers, Gopi Nath Biswas and Radha Nath Biswas; the walls between the rooms fell to the share of Gopi Nath, Gopi Nath sold this portion to the present appellant. The appellant then applied to deliver to him exclusive possession of the walls by removing the beams and rafters of the respondent resting upon the walls; the Subordinate Judge dismissed this application and against the dismissal the applicant preferred this appeal to the High Court.

Babu Provas Chander Mitter (with him *Babu Narain Chandra Kar* for *Babu Satyendra Nath Mitter*), for the appellant. The easement claimed is not a case of absolute necessity, the decree ought to have been executed as it stands, no declaration was obtained by the respondent safeguarding the interest which is now claimed.

Babu Sarat Chandra Roy Chowdhury (with him *Babu Gour Mohon Dutt*), for the respondent. A "*quasi*-easement" right of resting the beams and rafters on the walls in question has accrued to the respondent, the appellant cannot, therefore, pull down the aforesaid walls.

(1) (1887) I. L. R. 14 Calc. 797.
(2) (1922) 36 C. L. J. 406.
(3) (1864) 4 De G. J. & S. 185.
(4) (1875) 24 W. R. 345.
(5) (1887) I. L. R. 14 Calc. 829, 853.

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SUHRAWARDY AND CHOTZNER JJ. This is an appeal against the order of the Court below dated the 15th September, 1923, passed in the execution of a decree. Gopi Nath Biswas, a brother of the respondent, brought a suit for partition of the family dwelling house which was in the joint occupation of all the co-sharers. There was a decree for partition and a Commissioner was appointed to effect it. By consent of parties, the Commissioner made the allotments by which two contiguous rooms under one roof were allotted to Gopi Nath and the respondent respectively. There are walls between the two rooms which fell to the share of Gopi Nath who had to pay some money to the other co-owners as compensation. Thereafter Gopi Nath sold the portion allotted to him to the appellant who applied for execution of the decree. Possession of the room allotted to Gopi Nath was delivered to the appellant by Court. The appellant, however, was not satisfied with the delivery of the possession of the walls between the two rooms as the beams and rafters of the roof of the respondent's room were resting on them and applied to the Court below to deliver to him 'exclusive possession' of the walls by removing the beams and rafters of the respondent as he said he was going to demolish the walls and rebuild his portion of the house. The learned Subordinate Judge disallowed the appellant's prayer remarking that the walls form the support of the respondent's roof and that the removal of the walls would mean the collapse of the respondent's room. The learned Judge has given no other reason for rejecting the appellant's application except that it would be a great hardship to the respondent if the appellant was allowed to remove the walls. This appeal is against that order and it is argued that as the respondent has no right to the walls which have

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been allotted to the appellant, the prayer for exclusive possession should not have been refused on the ground of hardship to the respondent.

A point by way of preliminary objection was raised by the respondent, namely, that as full delivery of possession had been effected and certified by the Court the question now raised by the appellant cannot be agitated in the execution proceedings though it may form the subject of a separate suit. But as the question has been raised in execution of the decree between parties to it, we think it is rightly raised under section 47, Civil Procedure Code.

The respondent bases his claim to rest his beams and rafters on the appellant's walls on a right which is known in law as a '*quasi*-easement'. "The term '*quasi*-easements' has been applied to those easements, which, not being easements of absolute necessity, came into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly united in the sole or joint possession, or ownership, of one or more persons." Peacock on Easements, Third Edition, page 343. Such easements will not come into existence where they are expressly excluded by the terms of the grant or are inconsistent with the intention of the parties. They generally arise on severance of tenements held under sole possession or one ownership or on division of a tenement held under joint ownership or possession. They are conveniences to which the law subjects one part of the property for the benefit of the other part. Such easements, therefore, arise on a partition of joint property as they do in the case of the division of a tenement possessed or owned by a single person under grants by him. The difference in the two cases is that, according to the law obtaining in places where the Indian Easements Act is not in force, while in the

former case a division of joint property gives rise to reciprocal easements in favour of coparceners, in the latter case such rights do not ordinarily accrue to the grantor except by express reservation by the terms of the grant. But the law relating to *quasi*-easements, arising on a division of joint property, is based upon the same principle which governs the conveyance of a part of the tenement held by a single owner or possessor. The principle is that on the grant by the owner of an entire property or part of that property as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, termed *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant in use for the benefit of the part granted: *Suffield* v. *Brown* (1), *Amutool Russool* v. *Jhoomuck Singh* (2), *Delhi and London Bank* v. *Hem Lal Dutt* (3). Such easements arise in favour of the grantee on several principles as observed in the case of *Sarojini* v. *Krishna* (4). Applying the above principle, which is well established, to the case of partition of joint property, the law may be thus stated:—"As between coparceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of Court of law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted:" Peacock on Easements, page 393, *Bolye Chander Sen* v. *Lalmani Dasi* (5), *Sarojini* v. *Krishna* (4). One of such easements is the right of support (including lateral support) which passes by

(1) (1864) 4 DeG. J. & S. 185.
(2) (1875) 24 W. R. 345.
(3) (1887) I. L. R. 14 Calc. 839, 853.
(4) (1922) 36 C. L.J. 406.
(5) (1887) I. L. R. 14 Calc. 797.

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implication of law to a grantee [*Dalton* v. *Angus* (1)] and it is applicable to the case of a party wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements: *Watson* v. *Grey* (2).

The learned vakil for the appellant maintains that the easement claimed by the respondent places an onerous burthen on his client's property, that it is not a case of absolute necessity, and that the respondent may erect a wall on his own property to support his portion of the roof. As we have observed, a *quasi*-easement need not be of absolute necessity but is one which is reasonably necessary, *i.e.*, necessary for the occupation of the severed tenement in the same condition as it was at the time of the transfer. In this connection reference may be made to section 13 of the Indian Easements Act. Though the Act is not in force in this part of the country, it may serve as a useful guide for ascertaining the rule of law on which the doctrine of lateral support is founded. See the first portions of illustrations (*h*), (*i*) and (*j*) to section 13 and *Krishna Marazu* v. *Marraju* (3), *Ratonji* v. *Edalji* (4) and *Purshotam* v. *Durgoji* (5). No doubt the easement claimed by the respondent to some extent affects appellant's property, but that fact is not in itself sufficient to annul a right founded upon a well recognised principle of law whether such right is claimed as one attached to property or under a presumed contractual relation between the grantor and the grantee or among coparceners. As to the suggestion that the respondent may erect a wall to support his portion of the roof, the same argument

(1) (1861) L. R. 6 A. C. 740.
(2) (1880) 14 Ch. D. 129.
(3) (1905) I. L. R. 28 Mad. 495.
(4) (1871) 8 Bom. H. C. (O. C. J.) 181.
(5) (1890) I. L. R. 14 Bom. 452.

may be advanced against all *quasi*-easements which are not easements of necessity, and appears to us to be without substance.

On a consideration of the authorities on the subject and of the facts of the present case we are of opinion that the easement of lateral support claimed by the respondent arises by necessary implication on a partition of joint property and is well founded in law.

The partition suit was between brothers and it may fairly be presumed that in consenting to the allotments made by the Commissioner, it was not the intention of the respondent to surrender his right to such *quasi*-easements as legally accrued upon a division of the joint property, nor at that time was a controversy such as the present within the contemplation of the parties; and the intention of the parties is an important element in such matters: *Sarojini* v. *Krishna* (1). The mere fact that the price of the walls which were valued at Rs. 15 by the Commissioner, was taken into account in adjusting the value of the allotments and was included in the value put upon the appellant's portion does not in any way affect the applicability of the law as above stated.

The result is that the appeal fails and is dismissed with costs.

A. S. M. A. *Appeal dismissed.*

(1) (1922) 36 C. L. J. 406.