

## APPELLATE CIVIL.

*Before Mr. Justice Munro and Mr. Justice Pinhey.*

SUNDARASASTRIAL (PLAINTIFF), APPELLANT,

*v.*

GOVINDA MANDARAYAN (DEFENDANT), RESPONDENT.\*

*Limitation—Adverse possession, elements of—Party wall.*

Where two adjoining houses belonging to a single owner are sold to two different persons *A* and *B*, and the partition wall between the two houses which is included in the sale to *A* is, at the time of sale, used as a support for the rafters of the house sold to *B*, the wall passes to *A* subject to such easement right.

The plastering and repairing by *B* of his side of the wall do not amount to adverse possession and can be referred to the easement right.

To constitute dispossession there must, in every case, be positive acts which can be referred only to the intention of acquiring exclusive control.

Where the acts do not amount to dispossession of the true owner, possession follows the title.

SUIT for possession of a wall and strip of land.

The facts are sufficiently stated in the judgment.

The Munsif passed a decree in favour of the plaintiff.

The Subordinate Judge, on appeal, found that the defendant and his predecessors were allowed to plaster and repair their side of the wall without any interference by the plaintiff, and he held that the wall thus became the joint property of plaintiff and defendant. He accordingly declared that the plaintiff and defendant were jointly entitled to the wall.

The plaintiff appealed to the High Court.

*T. M. Krishnaswami Ayyar* for *T. Subrahmania Ayyar* for appellant.

*T. R. Ramachandra Ayyar* for respondent.

JUDGMENT.—The dispute relates to the possession of a boundary wall on which the rafters of both the adjoining houses rest. The District Munsif decreed for the plaintiff declaring his title to the wall and the strip of land in continuation thereof. The

---

\*Second Appeal No. 230 of 1906, presented against the decree of *M. E. Ry. I. L. Narayana Rao Nayudu*, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 1036 of 1905, presented against the decree of *M. R. Ry. S. C. Ramaswamy Aiyar*, District Munsif of Tiruvalur, in Original Suit No. 317 of 1903.

Subordinate Judge modified the decree by declaring the joint title of the plaintiff and the defendant to the suit property.

SUNDARA-  
SASTRIAL  
v.  
GOVINDA  
MANDA;  
RAYAN.

We have no doubt that the decision of the Subordinate Judge is based on an erroneous view of the law.

The two properties of the plaintiff and the defendant respectively, belonged, formerly, to a single owner who alienated the eastern portion in 1868 to the plaintiff's predecessor in title under exhibit C, and the western portion to the defendant's predecessor in title in 1871. Exhibit C shows that the plaint wall was expressly conveyed under it along with the eastern house. The mere fact that subsequent documents under which the eastern house was transferred do not expressly mention the suit wall can not be taken as any indication of the fact that the suit wall did not also pass under those documents: for, the first of these transfers was in execution of a Court decree and the decree-holder presumably had no access to the title-deed when describing the property. In 1868 when the wall was expressly conveyed the western house roof also rested on it. The wall was therefore conveyed subject to *that easement right*.

The fact that the defendant may have plastered his side of the wall, or repaired the wall itself occasionally does not affect the question of possession. Such acts which can be referred to the easement right, are not adverse to the existing title or rather are not acts of possession at all. To constitute a dispossession there must in every case be positive acts which can be referred only to the intention of acquiring exclusive control. See "Possession in the Common Law" Pollock and Wright, pages 85 and 86. The joint title decreed by the Subordinate Judge was not the case of either party. Possession in such a case is with him who has title.

The decree of the Subordinate Judge must be set aside and that of the District Munsif restored. The appellant will have his costs in this and the lower Appellate Court.