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SADIR ALI v. YAD RAM.

EDGE, C. J.—I think this case is governed by *Guneshee Lal* v. *Zaraut Ali* (1). This case will have to be remanded under s. 562. The appeal is allowed.

STRAIGHT, J.—I agree with the learned Chief Justice that the Judge and the Subordinate Judge were in error in dismissing the plaintiffs' claim preferred on the basis of the right of pre-emption, on the ground that, under the terms of the *wajib-ul-arz*, they had no such right. Looking to the language of that document, and more particularly to the clause that "in case of dispute as to price, it will be settled by appointment of arbitrators before the *hakim*, and that if the co-sharers do not take at the amount fixed by the arbitrators, then he may transfer it to a stranger," I agree with the learned Chief Justice that the case of *Guneshee Lal* v. *Zaraut Ali* (1) is directly applicable, and from the language of the *wajib-ul-arz* before us, it is reasonable to infer that a mere co-sharer is entitled to the refusal after own brothers and co-sharers *ek jaddi*, and to have the preference over strangers. As we are informed that all the necessary evidence is on the record, the proper course, therefore, is to reverse the Judge's decree, he having disposed of the case on a preliminary point, and to direct him to restore the appeal to his file of pending appeals and determine the questions of fact between the parties. Costs to abide the event.

Cause remanded.

Before Mr. Justice Mahmood.

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April 16.

PARAS RAM AND OTHERS (DEFENDANTS) *v.* SHERJIT AND OTHERS (PLAINTIFFS). *

Co-sharers—Right to deal with joint property—Building by one co-sharer against the wish of others—Suit for demolition of building—Discretion of Court.

The mere fact of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as could not be remedied in a suit for partition of the joint land. *Lala Biswambhar Lal* v. *Raja Ram* (2), *Nocury Lall Chuckerbutty* v. *Bindabun Chunder Chuckerbutty* (3),

* Second Appeal, No. 1349 of 1886, from a decree of Maulvi Syed Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 26th April, 1886, confirming a decree of Maulvi Nazar Ali, Munsif of Mahaban, dated the 27th November, 1885.

(1) N. W. P. H. C. Rep., 1870, p. 343.
(2) 3 B. L. R., App. 67.
(3) I. L. R., 3 Calc. 703.

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Girdhari Lal v. *Vilayat Ali* (1), *Wahid Ali Khan* v. *Ghansham Narain* (2), and *Joy Chundr Rukhit* v. *Bippro Churn Rukhit* (3), referred to.

THE plaintiffs and the defendants in this case were joint owners of a courtyard between their two houses. In this courtyard the defendants commenced the building of a *katha* or hall, without obtaining the consent of the plaintiffs; and the object of the present suit was to have this building demolished on the ground that the defendants had no right to erect it against the wishes of the plaintiffs, and that it caused inconvenience by shutting out light and air, and otherwise. The defendants pleaded, among other things, that the building had existed for a long time without any objection being made, and that no inconvenience was in fact caused by it.

The Court of first instance (Munsif of Mahaban) decreed the suit. In the course of its judgment it said:—"Seeing that the courtyard belongs to the plaintiffs and defendants jointly, there is no reason why it should remain in the defendants' exclusive use. The plaintiffs' witnesses fully prove that the two parties have equally been in possession of the courtyard, and that the defendants have unjustly built the *kotha* wall, and in spite of the issue of an injunction the defendants have completed the *kotha* with a roof. ..... The house has been newly built, and the plaintiffs' passage way has also been narrowed, so that the plaintiffs have cut off a portion of their platform and added it to the way, which has thus been widened. The defendants, who own a moiety, have taken a much greater portion of the courtyard than a moiety. The plaintiffs' passage way at this time, after the cutting of their platform, is six feet to the south and eight feet to the north. Four feet of the plaintiffs' platform to the south and six feet to the north have been annexed to the way. Had the part of the plaintiffs' platform not been added to the way, the way would have remained two feet wide to the south and two feet to the north. This way is certainly not sufficient for cattle to pass. The defendants had no right to build on a land which was jointly possessed."

On appeal by the defendants, the Subordinate Judge of Agra affirmed the Munsif's decree. He recorded no finding as to whether the building had caused material injury to the plaintiffs, or

(1) Weekly Notes, 1885, p. 277. (2) Weekly Notes, 1887, p. 116.
(3) I. L. R., 14 Calc. 236.

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whether it had been built in spite of any protest from them or any attempt on their part to prevent its erection.

The defendants appealed to the High Court.

Babu *Baroda Prasad Ghose*, for the appellants.

Pandit *Moti Lal Nehru*, for the respondents.

MAHMOOD, J.—The parties to this litigation have been found to be joint owners of the land in suit, upon which the defendants erected certain buildings the demolition of which is the main object of the suit. It has also been found that the said buildings have been recently constructed, and upon these findings the lower Courts have concurred in decreeing the claim and ordering demolition of the buildings.

The principal contention urged before me in second appeal on behalf of the defendants is whether, upon the facts found, such a suit was rightly decreed, and with due regard to the rules of equity which apply to suits of this kind between joint proprietors of land. Mr. *Moti Lal*, whilst conceding on behalf of the plaintiffs-respondents that the land built upon is the joint property of the parties, contends that the building was constructed in spite of the objections of the plaintiffs-respondents to such building going on, and that they were therefore entitled to a decree for demolition of the building in order to have the land restored to its original condition.

As a pure question of law as distinguished from the rules of equity this contention may have considerable force, but Courts in India exercise the combined jurisdiction of law and equity, and cannot disregard equitable doctrines in enforcing remedies. The present case is not one in which a stranger has, with knowledge of the plaintiff's exclusive title, trespassed upon land by building thereon, nor is it a case to which the equitable doctrine of estoppel by acquiescence referred to in *Uda Begam* v. *Imamuddin* (1) would be applicable. This is a case in which one joint owner of land commenced building thereon without the permission of his co-owners, the plaintiffs-respondents; and it has not been found by the lower appellate Court whether the building was commenced in spite of the protest of the plaintiffs-respondents, or that the latter took reasonable steps in time to prevent the erection of the building.

(1) I. L. R., 1 All. 82.

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I have already said enough to indicate that a distinction must be drawn between cases in which the building has been erected by a pure trespasser upon the land of another, and cases in which the building has been erected by a joint proprietor on joint land without the permission of his joint co-owners or in spite of their protest. The rules of equity applicable to the former class of cases have been set forth by Turner, Offg. C. J., in the case of *Uda Begam* to which I have already referred, and in the rule therein laid down I concur. But to the latter class of cases somewhat different doctrines of equity are applicable, and they have been the subject of consideration in many of the reported cases, to some of which I wish to refer here.

The most important case, so far as India is concerned, is *Lala Biswambhar Lal* v. *Raja Ram* (1), where, the parties being joint owners of land, one of them erected a wall upon the land, without obtaining the consent of his co-owner, and it was held by Peacock, C. J., that the Court would not interfere to order the demolition of the wall, when there was no evidence to show that injury had been done to the co-tenant of the builder by its erection, and in the course of his judgment that eminent Chief Justice said:—"It appears to me that even if the defendant had not a strict legal right to build the wall upon the joint land, this is not a case in which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights, but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights." This ruling was followed in *Massim Mollah* v. *Panjoo Ghoramee* (2), and in other cases to which I need not refer, because the effect of the rulings of the Calcutta High Court has been well summarised in *Nocury Lall Chuckerbutty* v. *Bindabun Chunder Chuckerbutty* (3), where Field, J., in delivering the judgment of the Court, said: "There is no considerable difference between a case in which the other co-sharers, acting with diligent watchfulness of their rights, seek by an injunction to prevent the erection of a permanent building, and a case in which, after a permanent building has been erected at considerable expense, he seeks to have that building removed. In a case such as that last

(1) 3. B. L. R., App. 67. (2) 21 W. R., 373.
(3) I. L. R., 8 Calc. 708.

mentioned, the principle which seems to have been settled by the decisions of this Court is this, that though the Court has a discretion to interfere and direct the removal of the building, this is not a discretion which must necessarily be exercised in every case; and, as a rule, it will not be exercised unless the plaintiff is able to show that injury has accrued to him by reason of the erection of the building, and perhaps further, that he took reasonable steps in time to prevent the erection." This view was followed by my brother Brodhurst, with the concurrence of my brother Tyrrell, in *Girdhari Lal* v. *Vilayat Ali* (1), and I remember that on more than one occasion I have given expression to the same view, the last being the case of *Wahid Ali Khan* v. *Ghansham Narain* (2) in which I concurred with the learned Chief Justice of this Court in adopting the principle of the rule laid down by Sir Barnes Peacock in the case to which I have already referred.

These cases have the effect of laying down the rule that when a joint owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners, unless they prove that the action of their joint owner in building upon joint land has caused them a material and substantial injury such as cannot be remedied by partition of the joint land. But those cases leave the question open whether when a joint owner of land builds thereon in spite of his co-owners' protest, such co-owners can obtain demolition of the building without showing that such building has caused material and substantial injury to them such as I have already mentioned. This question was, however, recently considered by a Division Bench of the Calcutta High Court in *Joy Chunder Rukhit* v. *Bippro Churn Rukhit* (3), where the learned Judges, after considering the earlier rulings of their Court, held that even in cases where joint land has been dealt with in an exclusive manner by one joint owner in spite of the protest of his co-owners, before a Court will make an order directing that a portion of the joint property alleged to have been dealt with by one of the co-sharers without the consent of the others should be restored to its former condition (as, for instance, where a tank has been excavated), a plain-

(1) Weekly Notes, 1885, p. 277. (2) Weekly Notes, 1887, p. 116.
(3) I. L. R., 14 Calc. 236.

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tiff must show that he has sustained by the act he complains of some injury which materially affects his position.

I agree in the rule laid down in this last case, and I hold that the mere circumstance of a building being erected by a joint owner of land without the permission of his co-owners, and even in spite of their protest, is not sufficient, *in itself*, to entitle such co-owners to obtain the demolition of such building, unless they can show that the building has caused such material and substantial injury as a Court of equity could not remedy in a suit for partition of the joint land.

Holding these views I do not think I can dispose of this case finally, without distinct findings on the following points :—

1. Has the building sought to be demolished in this suit caused such material and substantial injury to the plaintiffs-respondents as cannot be remedied by partition of the joint land, and, if so, to what extent of the area covered by the building?

2. Did the plaintiffs-respondents object to the building at the time when it was commenced, and did they take due steps in time to prevent the continuance of such building?

I remand the case under s. 566 of the Code of Civil Procedure for clear findings upon these points, and upon receipt of the findings ten days will be allowed to the parties for objections under s. 567 of the Code.

Issues remitted.

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April 18.

CRIMINAL REVISIONAL.

Before Mr. Justice Mahmood.

QUEEN-EMPRESS *v.* MURPHY.

Criminal Procedure Code, s. 203—"*Examining*"—*Written complaint attested by complainant on oath*—*Irregularity*—*Criminal Procedure Code, s.* 537—*Act XLV of* 1860 (*Penal Code*), *s.* 405.

Where a deposition in the shape of a complaint is made orally or in writing and is sworn to, the requirements of s. 203 of the Criminal Procedure Code in regard to the examination of the complainant, are sufficiently satisfied.

Held therefore, where a Magistrate dismissed a complaint of criminal breach of trust without examining the complainant on oath, but after the complainant had sworn to the truth of the matters alleged in the complaint, that the provisions