

APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice Norris.

BOLYE CHUNDER SEN (DEFENDANT) v. LALMONI DASÍ (PLAINTIFF.)*

1887
May 2.

Partition—Family dwelling-house—Partition wall—Open space of ground—Easement.

Upon partition of joint property in Calcutta by mutual conveyances, whether under the direction of a Court of law or otherwise, it is implied that the parties take their respective shares with easements of light and air as between themselves in accordance with the existing state of the premises.

In a suit for the partition of a family dwelling-house, it was directed that the parties should take their respective shares by *mutual conveyances* with liberty to the plaintiff to *raise a partition wall*. The shares were allotted but no conveyances executed.

Held, that in equity the parties must be deemed to have taken as if under mutual conveyances, in so far as concerned easements of light and air.

LALMONI DASÍ brought a suit for the declaration of her right to the access and use of light and air through the openings, courtyards and verandahs on the east side of her house and premises No. 8/1, Gopikishen Pal's Lane, in the town of Calcutta, and to have certain walls, which had been erected by Bolye Chunder Sen in his premises No. 8, Gopikishen Pal's Lane, pulled down by reason of such walls blocking up the said openings, courtyards and verandahs. Various objections were raised by the defendant, Bolye Chunder Sen. It appeared on the trial that the premises Nos. 8/1 and 8 originally formed one family dwelling-house; that, upon a suit for partition by one Soshimukhi Dasi against Brojo Nath Pal, it was, among other things, ordered on the 14th March, 1871, that "the plaintiff and defendant do, at the request of either party and at the expense of the party requiring the same, execute mutual conveyances to each other of their respective shares, such conveyances to be settled by one of the Judges or the Registrar of this Court in case the parties differ about the same, and after the Commissioners shall have made such partition and returned the same;" and it was further ordered on the 19th of December, 1872, that "the plaintiff be at liberty to take exclusive

* Original Civil Appeal No. 27 of 1886, against the decree of Mr. Justice Trevelyan, dated the 5th of April, 1886.

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possession of such portions of the properties as have been allotted to her by the said Commissioners, and to raise partition walls." Lalmoni Dasi and Bolye Chunder Sen derived their title respectively from Brojo Nath Pal and Soshimukhi Dasi. The judgment of the Court of first instance (Trevelyan, J.) was materially as follows: " * * * * As I said in the beginning of my judgment the whole question turns upon the meaning of the order of the 19th day of December, 1872. There is, I think, no doubt that, apart from any special provision, the owners of a joint family dwelling-house would, after partition, be entitled to so much light and air as would be necessary for the reasonable use and enjoyment of the premises allotted to them respectively. The question then is * * * to what extent has the liberty given to Soshimukhi to erect a partition wall affected the plaintiff's rights. It seems to me the liberty to erect a partition wall must be viewed differently in the case where the line of partition cuts a room in two, and where that line merely divides a courtyard or open space. In the former case I think that a partition wall means a wall from floor to ceiling; a partition wall between two rooms means a wall which separates the one room from the other completely, and secures its privacy to each, thus making two rooms of the one room. Where the line of partition divides a courtyard or open space, it is not, I think, so easy to determine what a partition wall means. On the best consideration I can give to it, I think that a partition wall, under these circumstances, means a wall not only high enough to demarcate the partitioned property, but high enough to secure either side from intrusion or annoyance. In fact such a wall as a man would build round his compound. * * * * The result of these observations is, that I think that the defendant is entitled to retain the wall built by him over against those portions of the plaintiff's rooms which were exposed at the time that No. 8 was pulled down. The wall which runs along the line which cuts the courtyards must be reduced to a height of six feet. The plaintiff must also be restrained from building the wall beyond six feet from the floor of that portion of the third story which was in existence at the time of the partition."

From this decision Bolye Chunder Sen appealed, and a memorandum of objections was put in on behalf of the plaintiff.

Mr. *Kennedy* (with him Mr. *E. Anerjee*) for the appellant.— There is no prescriptive right to light and air with regard to a family dwelling-house; no such easement where property is joint. Here the partition took place under the direction of the Court. There can be no presumption as to a grant of easement. The case of a partition by act of parties is distinguishable. No conveyances were ever executed.

The following authorities were discussed: *Wheeldon v. Burrows* (1); *Allen v. Taylor* (2); *Blanchard v. Bridges* (3); *Holland v. Worley* (4); *Scott v. Pope* (5).

Mr. *Pugh* (with him Mr. *O'Kinealy*), for the respondent, was not called upon.

The judgment of the Court (PRINSEP, WILSON and NORRIS, JJ.), so far as it is material to this report, was as follows:—

WILSON, J.—In this case the plaintiff, as owner of the house No. 8/1, Gopikishen Pal's Lane, sued the defendant, the owner of adjoining premises, in respect of infringements, actual and threatened, of her alleged right to the free access of light and air, by the erection of a wall. The plaintiff claimed damages and an injunction. Of the written statement it is enough to say that, amongst other things, it denied the right of the plaintiff to the light and air claimed. The plaintiff's house and the defendant's were formerly one property, forming a family dwelling-house, No. 8, Gopikishen Pal's Lane. In 1871 the defendant's predecessor in title, who was entitled to a three-fourths share of the property, sued the plaintiff's predecessor in title (he is also her husband), the owner of the other one-fourth, in this Court for partition. On the 14th March, 1871, a decree was made by which the shares were declared, partition was ordered, and a commission issued, with the other directions usual in partition decrees. The decree contains these words: "It is ordered that the plaintiff and defendant do, at the request of either party, and at the expense of the party requiring the same, execute mutual conveyances to each other of their respective shares, such conveyances to be settled by one of the Judges or the Registrar

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(1) 12 Ch. Div., 31.

(3) 4 Ad. & E., 176.

(2) 16 Ch. Div., 355.

(4) 26 Ch. Div., 578.

(5) 31 Ch. Div., 554.

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of this Court in case the parties differ about the same." The Commissioners effected a partition and made their return. On the 19th December, 1872, an order was made by which the certificate of the Commissioners was confirmed, and it was "further ordered that the plaintiff be at liberty to take exclusive possession of such portions of the properties as have been allotted to her by the said Commissioners and to raise partition walls." The parties took possession of their respective shares, and they and their successors in interest have so continued down to the date of the suit. No conveyances have been executed. The share allotted to the plaintiff's predecessor formed the western portion of the premises partitioned, and was covered with buildings. The share allotted to the defendant's predecessor, where it adjoined the other share, consisted partly of buildings in immediate contact with and forming one block with the buildings on the share of the plaintiff's predecessor, and partly of open courtyards. These old buildings have been pulled down, and the defendant was proceeding to erect a wall along the whole western edge of this land, the effect of which was, it has been found, to interfere materially with the access of light and air to the plaintiff's house. The case was heard before Trevelyan, J. The learned Judge refused to give the plaintiff any relief in respect of those portions of his premises, which were exposed by the demolition of the buildings on the defendant's land, in other words, he has left the defendant free to build on the old sites and to the old height; and so far there can, we think, be no doubt that he was right. With this exception he has enjoined the defendant from erecting anything to obstruct the plaintiff's light save by a wall of not more than six feet in height. Against this decree the defendant has appealed. No serious exception was taken to the details of the injunction ordered, if an injunction ought to issue at all, but two questions were raised: First, it was contended that, on the evidence in the case as it stands, the plaintiff had shown no title to the access of light and air as against the defendant; and, secondly, that the learned Judge had rejected evidence which ought to have been admitted. As to the first question it was contended that, although in the case of a sale or other transfer *inter partes* a

grant of the easement claimed by the plaintiff would be properly implied, no such right can be implied in the case of a partition by the act of a Court of law. The question so suggested appears to us one of considerable difficulty; but it is not, we think, necessary to decide it in the present case. The defendant's predecessors in title entered upon the share allotted to her, on the strength of the original partition decree of the 14th March, 1871, and the order of the 19th December, 1872. By the decree either party could insist upon mutual conveyances; she was, therefore, bound to execute a conveyance whenever required, and she could not in equity be allowed to deal with the land in such a way as would defeat any conveyance called for. And the present defendant who takes through her, and from the very nature of the case with full notice, is in no better position, so that, for the present purpose, the case is the same as if there had been conveyances. And the terms of the subsequent order very much strengthen the case. It expressly authorised the then plaintiff, the now defendant's predecessor, to "raise partition walls." That goes far to negative the right to raise any other obstruction; and we agree with the learned Judge in thinking that, when open spaces are spoken of, "partition walls" do not mean blocks of building, but such walls as are used for partitioning open spaces. The first objection to the decree therefore fails.

[The other contention as to the rejection of evidence was also decided against the appellant.]

Attorney for the appellant: Baboo *Bolye Chunder Dutt*.

Attorney for the respondent: Mr. *M. Dover*.

K. M. C.

Appeal dismissed.

PRIVY COUNCIL.

MYLAPPORE (YASAWMY VYAPOOR) MOODLIAR (PLAINTIFF)

YEO. KAY AND OTHERS (DEFENDANTS.)

[On appeal from the Court of the Recorder of Rangoon.]

Limitation Act, 1877, s. 19 and Art. 140—Claim to share in immovable property under will—Acknowledgment of liability—Basis of decision of case.

The right to property left by will (assuming that the testator had power to dispose of it) falls into possession, by Hindu law, immediately upon the

* *Present*: LORD HOBHOUSE, SIR B. PEACOCK, SIR R. BAGGALLAY, and SIR R. COUCH.

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