

1931

MEHRAJ DIN

v.

GHULAM  
MUHAMMAD.GORDON-  
WALKER J.

second appeal, *vide Irshad Hussain v. Makut Manohar and others* (1).

The appeal is accordingly dismissed with costs.

GORDON-WALKER J.—I agree.

A. N. C.

*Appeal dismissed.*

### APPELLATE CIVIL.

*Before Shadi Lal C. J. and Gordon-Walker J.*

GANPAT RAI AND OTHERS (DEFENDANTS) Appellants

*versus*

SAIN DAS AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2493 of 1929.

*Injunction—Party-wall—Erection on wall by one tenant-in-common—Suit by co-tenant—whether lies.*

The plaintiffs and defendants were owners of two adjoining houses separated by a wall which belonged to both the parties as owners-in-common. The defendants raised the height of the wall, with a view to building a superstructure on their tenement, and did so without the permission of the plaintiffs. It was contended for the defendants, that, as they had not occupied the whole of the width of the top of the wall, but confined themselves to that moiety of it which is on the side of their own house and left the other moiety to the plaintiffs, the latter had no cause for complaint.

*Held*, that as the parties were "tenants-in-common," the wall could not be treated as a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. The plaintiffs were, therefore, entitled to the use of the whole width of the top of the wall subject to a similar right of the defendants, and the construction of the new wall on half the width, amounted to an ouster, in so far as the width occupied by the defendants was concerned.

*And*, that the plaintiffs had been rightly granted a mandatory injunction requiring the defendants to demolish the structure raised on the joint (or "party") wall.

*Kanakayya v. Narasimhulu* (1), *Ikram Ullah Khan v. Muhammad Yunis Ali Khan* (2), *Basant Singh v. Shibba Mal* (3), *Watson v. Gray*, per Fry J. (4), and *Steadman v. Smith*, per Crompton J. (5), followed.

*Second appeal from the decree of Khan Sahib Sheikh Abdul Aziz, Additional District Judge, Hoshiarpur, dated the 17th July 1929, affirming that of Malik Fateh Khan, Subordinate Judge, 4th Class, Hoshiarpur, dated the 29th April 1929, decreeing the plaintiffs' suit.*

JAGAN NATH AGGARWAL, for Appellants.

MEHR CHAND MAHAJAN, for Respondents.

SHADI LAL C. J.—The facts relevant to the ques- SHADI LAL C.J.  
tion of law involved in this appeal may be shortly stated. The plaintiffs and the defendants are owners of two adjoining houses separated by a wall which belongs to both the parties as owners in common. The defendants have raised the height of the wall with a view to building a superstructure on their tenement, but they have done it without the permission of the plaintiffs.

The question arises whether the action of the defendants constitutes a violation of the plaintiffs' rights, and whether the plaintiffs can ask for a mandatory injunction. The facts warrant the finding that the plaintiffs have been ousted by the defendants from the possession of the common wall and are entitled to remove the obstruction. The leading authority on the subject is the judgment in *Watson v. Gray* (4), in which Fry J. laid down the rule that, if one of the two

(1) (1896) I. L. R. 19 Mad. 38.

(3) (1928) 107 I. C. 481.

(2) (1915) 30 I. C. 33.

(4) (1880) L. R. 14 Ch. D. 192.

(5) S E. & B. 1.

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tenants in common of a wall between two adjoining houses 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. This rule has been followed by the High Courts in India, *vide, inter alia*, *Kanakayya v. Narasimhulu* (1); *Ikram Ullah Khan v. Muhammad Yunis Ali Khan* (2); and *Basant Singh v. Shibba Mal* (3). We are not concerned in the present case with the question whether a wall built on the top of a common wall by one co-owner with the consent or acquiescence of the other co-owner should be treated as the Joint property of both the parties or the sole property of the person who built it; and it is unnecessary to refer to the decisions dealing with that question.

The learned counsel for the appellants, however, contends that, as the defendants have not occupied the whole of the width of the top of the common wall, but have confined themselves to that moiety of the wall which is on the side of their own house and left the other moiety to the plaintiffs, the latter have no cause for complaint. To this contention I am unable to accede. As pointed out above, this is a case of a party-wall of which the two adjoining owners are, to use the phraseology of the English law, tenants in common; and the wall cannot be treated as a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners. The plaintiffs are, therefore, entitled to the use of the whole width of the top of the wall subject to a similar right of the defendants, and the construction of the new wall on half the width amounts to an ouster in so far as the

(1) (1896) I. L. R. 19 Mad. 38.

(2) (1915) 30 I. C. 33.

(3) (1923) 107 I. C. 481.

width occupied by the defendants is concerned. As observed by Crompton J. in *Stedman v. Smith* (1), "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 further says "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." These observations apply to the present case, and there can be no doubt that the defendants have excluded the plaintiffs from the use of one-half of the top of the wall, to which they were entitled.

The Courts below have rightly granted the mandatory injunction. The appeal preferred by the defendants is, therefore, dismissed with costs.

GORDON-WALKER J.—I concur.

*N. F. E.*

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*Appeal dismissed.*

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(1) S E. & B. 1.