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argument which has been again renewed in this Court that because his father, the mortgagor, was liable to be sued on his personal covenant, the plaintiff was also liable to be sued, so that he could not seek to recover the mesne profits. That question is irrelevant to the present suit. We think that it is clear that the plaintiff was entitled to succeed, and consequently the appeal will be dismissed with costs.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

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January 30.

IMAMBHAI KAMRUDDIN AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* RAHIMBHAI USMANBHAI AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS*.

Party wall—Wall raised by one of the owners with consent or acquiescence of the other—Raised portion also a party wall—Neither owner can open windows in the raised portion.

Where one of the owners of a party wall, raises its height, with the consent or acquiescence of the other owner, such raised portion is also a party wall. Neither owner is at liberty to open windows in the portion so raised.

Kanakayya v. *Narasimhulu*[1], dissented from.

THIS was an appeal against the decision of F. X. De-Souza, District Judge at Ahmedabad, confirming the decree passed by B. N. Shah, Joint Subordinate Judge at Ahmedabad.

The plaintiffs and defendants were the owners of adjacent houses which were divided by a party wall.

Nearly twelve or fifteen years before the suit the defendants' ancestor had raised the party wall at his own expense and had built an upper storey. In the

* Appeal No. 487 of 1923 from Appellate Decree.

[1] (1895) 19 Mad. 38

portion of the wall which was so raised the defendants opened two *jalis* or windows.

The plaintiffs instituted the present suit for an injunction against the defendants directing them to close up the windows which they had opened in the joint wall belonging to the plaintiffs and the defendants, and for permission to the plaintiffs to do so at the defendants' cost if they failed to close up the widows, and to restrain the defendants from making any new openings in the said common wall.

The lower Courts dismissed the suit chiefly on the ground that the opening of windows in a party wall did not amount to trespass or ouster.

The plaintiffs appealed to the High Court.

M. H. Mehta, for the appellants.

H. V. Divatia, for the respondents.

MACLEOD, C. J. :—The plaintiffs sued for an injunction against the defendants directing them to close up the windows which they had opened in the plaint joint wall, and for permission to the plaintiffs to do so at the defendants' costs if they failed to close up the windows, and to restrain the defendants from making any new openings, &c., in the said common wall.

The defendants contended that the wall in which the windows in the suit were opened had not been of joint ownership; that the plaintiffs were not prejudiced in any way; and lastly that the plaintiffs filed the suit about twelve years after the windows had been opened.

The 1st issue in the trial Court was whether the wall between the two houses had been proved to be of joint ownership. The Judge found on the facts that the wall up to the roof of the plaintiffs' house was old, and was of joint ownership, but that the plaintiffs had to admit that some years ago the wall had been raised by

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the defendants' ancestors at their own expense. The owner of the plaintiffs' house not only acquiesced in the raising of that wall but had knowledge of it and did not protest. The suit having been filed after his death and that of Usmanbhai, nobody was in a position to say what arrangement there was between them, when Usmanbhai raised the wall above the roof at his own expense. The learned Judge continued :—

"The old wall is a common wall. Thus assuming that the new wall is also a party wall, it could not be said that there is an ouster by the opening of the windows. At the same time, *Watson* v. *Gray*[1] quoted with approval in *Kanakayya* v. *Narasimhulu*[2] would show that the raised portion could not be called a party wall of joint ownership. The ruling in *Motilal* v. *Maganlal*[3] is based on a specific agreement on defendants' part not to pay his share of expenditure which was not proved. There is nothing to show that there was consent of Ismailji or that this raising of the wall was necessary for the benefit of his house. From any point of view I find that plaintiffs should not be allowed any injunction."

The Judge, therefore, dismissed the suit.

In appeal the District Judge said :—

"The first question that arises is whether the raised portion of the wall becomes a common party wall. It was erected by the defendants at their own expense. There is no evidence whether there was any arrangement between the defendants' ancestors and the plaintiffs' when the wall was raised or whether they consented to the defendants' ancestor raising the wall. At the outset it may be said that there was an acquiescence on the part of the plaintiffs in standing by. In these circumstances what is the character of the portion of the wall thus raised? No doubt under the rule enunciated in *Watson* v. *Gray*[1] the plaintiffs could have compelled the defendants' ancestor to demolish the raised portion of the wall. But they did not do so. The result is, as stated by Parker J. in *Kanakayya* v. *Narasimhulu*[2], that the newly erected portion will not be a common or party wall, but will be the exclusive wall belonging to the defendants. The ruling in *Motilal* v. *Maganlal*[3] does not militate against this view. All that it lays down is that the old party wall, even though re-built by a tenant-in-common at his own expense, does not cease to be a common party wall. That ruling says nothing about the portion of the wall newly raised by a tenant-in-common at his own expense. If then the raised

(1) (1880) 14 Ch. D. 192. (2) (1895) 19 Mad. 38.
(3) (1888) P. J. 297.

portion of the wall did not become a common or party wall, the defendants have acquired an exclusive right to it by adverse possession for more than twelve years. There was, therefore, no trespass or ouster when the defendants opened the windows in the wall."

Accordingly the appeal was dismissed.

In *Kanakayya* v. *Narasimhulu*[1] the plaintiffs and defendants were tenants-in-common of a party wall. The defendants without the consent of the plaintiffs, intending to build a superstructure on their tenement, raised the height of the party wall. A suit was brought to compel the removal of the newly erected part of the wall. The District Munsif dismissed the suit, and his decree was confirmed by the Subordinate Judge. In appeal Parker J. said:—

"Plaintiffs are entitled to the relief asked for. It is true that the refusal of plaintiffs to give the required permission may be ill-natured and that the raising of the wall will not really harm them; but, at the same time, the altered wall is no longer the same wall and the newly-erected portion will not be a common or party-wall. The erection of it might give rise to inconvenience and quarrels."

In *Watson* v. *Gray*[2] the owners in fee of two adjoining houses derived title to them from a common predecessor-in-title. The conveyances from that predecessor to the two owners respectively, contained a declaration that the wall which divided the yards at the back of the two houses should be and remain a party wall. It was held that the two owners were tenants-in-common of the wall. The plaintiff had complained that the defendant had committed trespass in that he had knocked down the new piece of wall which the plaintiff had built on the top of the party wall. The plaintiff claimed damages for the removal of the new piece of wall, and an injunction to restrain the defendant from interfering with the rebuilding of it, and it was held that the defendant's action did not amount to a trespass and the plaintiff was not entitled to any damages in the throwing down of the wall.

(1) (1895) 19 Mad. 38.

(2) (1880) 14 Ch. D. 192.

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But the real question on the facts here is, what is the nature of the wall added by the defendants' ancestor with the acquiescence of the plaintiffs' predecessor-in-title, and it seems to us that if one of two neighbouring owners raises a party wall, the other owner either giving his consent or acquiescing, then the raised portion must assume the same character as the old party wall on which it stands. Then it would follow that neither party can be allowed to commit a trespass on the party wall so increased in height, and the defendants' action in opening the windows in the raised part of the party wall would be a trespass. The plaintiffs could have objected to the windows being opened in the party wall, but not having done so within the period of six years, the suit, coming within Article 120 of the Indian Limitation Act, would be barred. With all due respect, therefore, we cannot agree with the District Judge when he says that the newly erected portion is not a common or party wall, nor with Parker J. who held in *Konakayya* v. *Narasimhulu*[1] that where one neighbour had not consented to the new erection by the other, the new erection became the exclusive property of that other. Consequently we think that the plaintiffs would have been entitled to an injunction if they had sued within time. Nor do we think that the defendants in the circumstances of this case have acquired an exclusive right to the newly erected portion by adverse possession. They are only protected against an action by the plaintiffs for trespass owing to the opening of the windows. We think, therefore, though on different grounds, that the lower appellate Court was right in dismissing the plaintiffs' suit, and this appeal must be dismissed with costs. With regard to the future it is desirable that these two neighbours should arrange their disputes and come to some amicable settlement with

[1] (1895) 19 Mad. 38.

regard to the party wall. It is clear that the plaintiffs would be entitled to block the suit windows from their own side of the premises, and if the occasion arose they would be entitled to an injunction restraining defendants from making any new openings in the common wall.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

GAFUR IMAM (ORIGINAL DEFENDANT NO. 3), APPELLANT *v.* AMIR ISAB SAUDAGAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS [*].

1925.

February 5.

Mortgage—Redemption—Redeeming Co-mortgagor—Contribution—Interest—Transfer of Property Act (IV of 1882), section 95.

Where one of several mortgagors alone redeems the mortgaged property, he is not *prima facie* entitled under section 95 of the Transfer of Property Act to claim interest against his co-mortgagors on the amount of their proportion of the expenses so incurred.

His claim, if any, to interest must be based on some ground outside the section,—as, for instance, on notice given to his co-mortgagors that he would claim interest against them on the expenses so incurred if they wished to redeem their shares.

SECOND appeal against the decision of M. H. Wagle, First Class Subordinate Judge, A. P., at Nasik reversing the decree passed by G. V. Jadhav, Joint Subordinate Judge at Nasik.

Suit to recover possession.

The property in suit, consisting of two houses in Nasik City, belonged to one Khadirkhan. He had one son Mahomedkhan and a daughter Chandubi. The son owned a two-third share and daughter the remaining one-third.

[*] Second Appeal No. 817 of 1923.