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Beaumont C. J.

costs of the next friend. There also the defendant is placed exactly in the same position as he would have been in if the plaintiff had never been a minor. No doubt he is losing the liability of the next friend but in place of that there is substituted the personal liability of the former minor who may or may not be more solvent than the next friend. In my opinion it is only in a case of misconduct by the next friend, which falls within r. 14, that any order for payment of costs can be made against the next friend after the minor has attained his majority. That seems to me the scheme of the Code which is founded on the English law. In my view the order which the learned Judge made was not only right, but was the only order which he could properly have made in the circumstances of this case.

The appeal must, therefore, be dismissed with costs.

KANIA J. I agree.

Attorneys for appellants: Messrs. *Kantilal & Co.*

Attorneys for respondents: Messrs. *Mulla & Mulla.*

Appeal dismissed.

N. K. A.

APPELLATE CIVIL.

Before Mr. Justice Divatia.

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October 9

BAI RATANGAVRI w/o RAO BAHADUR GUNWANTRAI HIRALAL DESAI, AS HEIR AND LEGAL REPRESENTATIVE OF THE DECEASED RAO BAHADUR GUNWANTRAI HIRALAL DESAI AND OTHERS (ORIGINAL PLAINTIFF NO. 1'S HEIR AND PLAINTIFFS NOS. 2 AND 3), APPELLANTS *v.* MANILAL MAHIPATRAM MEHTA (ORIGINAL DEFENDANT), RESPONDENT.*

Party wall—Wall cannot be joint where there is no raising—Wall can be joint if subsequently raised or agreed to be treated as joint—Onus.

The appellants and the respondent owned adjoining houses. There was admittedly a common wall up to the roof of the respondents' house. Above that there was a wall containing two apertures which the appellant claimed to be exclusively his. The respondent began reconstructing and raising his house in such a way that the apertures were likely to be blocked.

*Second Appeal No. 465 of 1937.

The appellants having sued for a declaration that the upper part of the wall of their house which contained the apertures from which they enjoyed light and air was of their exclusive ownership, and for an injunction restraining the respondent from blocking up the apertures :—

Held, reversing the decree founded on *Imambhai's* case,[1] that the appellants were entitled to the declaration and injunction in respect of the easement of light and air.

Imambhai Kamruddin v. *Rahimbhai*,[1] explained.

Rajubhai v. *Lalbhai*,[2] distinguished.

SECOND APPEAL from the decision of E. Weston, District Judge, Ahmedabad, confirming the decree passed by H. R. Jetly, Third Joint Subordinate Judge, Ahmedabad.

Suit for declaration and injunction.

On January 25, 1889, one Hiralal purchased certain house property in Ahmedabad from one Jani Chhotalal and Bai Kashi for Rs. 3,445. The deed of sale contained the following recital :—

"The wall to the west abuts on the house of Mehta Harilal Gangaji and it is joint till the roof of their house and the said wall higher up therefrom is the sole property of the owners of this house."

On October 10, 1908, Manilal (respondent) purchased an adjoining house for Rs. 1,949 from one Bai Vasant, widow of Dave Amritlal. The sale deed contained the following recital :—

"The wall to the east is joint up to the roof of the house of Harilal Sakerlal."

In 1933, the appellants (sons of Hiralal) brought the present suit for a declaration that the upper part of the wall of their house containing the apertures was of their exclusive ownership and for an injunction restraining the respondent from blocking up the apertures, on the ground that the respondent was reconstructing and raising his house.

The respondent contended, *inter alia*, that the western wall of the appellants' highest storey was also a joint wall and that the appellant could not have any right by way of easement through the apertures in the wall and that, without prejudice to this contention, the appellants had

[1] (1925) 49 Bom. 587. [2] (1925) 28 Bom. L. R. 1000.

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agreed to close the apertures when the respondent raised his house so that the appellants could not acquire any easement.

The trial Judge dismissed the suit, holding that the appellants did not prove the alleged right of easement of air and light.

On appeal, the learned District Judge confirmed the decree.

Plaintiffs appealed. Pending the appeal, the first appellant died and his wife was brought on the record as his heir.

G. N. Thakor, with *V. N. Chhatrapati*, for the appellants.

P. A. Dhruva, for the respondent.

DIVATIA J. This is a plaintiffs' appeal in a suit for declaration that the upper part of the wall of their house containing two apertures was of their exclusive ownership and for injunction restraining the defendant from blocking them up. The houses of the parties are situated adjacent to each other in Ahmedabad. The plaintiffs' father purchased their house in the year 1889, the sale-deed of which contains a recital that the western wall of that house (the wall in dispute) was a joint wall only up to the roof of the house of Harilal, who was the defendant's predecessor-in-title, and above the height of the defendant's house it belonged exclusively to the plaintiffs' house. The defendant purchased his house in 1908, and it is recited in his sale-deed that the eastern wall, which is the same as the western wall of the plaintiffs' house, was joint up to the roof of the house with the plaintiffs' house, but it is silent about the ownership of the upper part of the wall. It is material to note that the two apertures in the upper part of the wall in dispute were in existence before 1908, but there is no evidence of the particular time when they were put up. It is also material to note that there is no

evidence that the height of the wall in dispute was originally only up to the roof of the defendant's house and that it was subsequently raised by the plaintiffs or their predecessors. We have the fact that in 1889 when the plaintiffs' father purchased this house, the whole of the western wall was in existence as it is today.

The defendant intended to raise the height of his house and the plaintiffs apprehended that they would be deprived of the light and air which they had enjoyed through the two apertures in the upper part of their wall on account of the defendant raising his house. They, therefore, brought the present suit for the declaration and injunction as stated above. The defendant's case was that the whole wall to the west of the plaintiffs' house was a joint wall, and that the plaintiffs, therefore, could not acquire any easement of light and air through any apertures in that joint wall.

Both the lower Courts have dismissed the plaintiffs' suit relying on the decision of this Court in *Imambhai Kamruddin* v. *Rahimbhai*.[1] The main ground on which the decision of the lower appellate Court is based is that it was probable that the upper part of the wall was constructed by the plaintiffs' father at his own expense and was also subsequently repaired by him, that in the absence of any agreement between the owners of the two houses that a part only was to be treated as joint and the rest exclusive, it must be taken on the principle of the decision in *Imambhai Kamruddin* v. *Rahimbhai*,[1] that the whole wall was a joint wall, because where one of the two neighbouring owners raises a party wall, the other owner giving his consent or acquiescence, the raised portion of the wall assumes the same character as the old party

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wall on which it stands, and that neither party has a right to commit a trespass on the party wall so raised in height by opening windows in it.

It is true that the decision in *Imambhai* v. *Rahimbhai*[1] lays down the proposition that where a joint wall is raised by one co-owner with the consent or acquiescence of the other co-owner, the whole wall becomes joint. But I think that decision is to be applied where it is proved that the joint wall had been raised by one co-owner and that it had been raised with the consent or acquiescence of the other co-owner. Where these two facts are not proved, I do not think that that decision would have any application. It is conceivable that the whole wall might be in existence before the house of the other co-owner was built and when the latter began to build his house by the side of that wall, there might have been an agreement between the owners of the two houses to treat the lower part of the wall in so far as it extends to the roof of the new house as joint, so that both the co-owners might treat that part of the wall as a common wall and the remaining upper part of the wall might be allowed to remain the exclusive property of the owner of the house of which it is a part. Such an agreement is possible in thickly populated cities where party walls are very common. The ground of the decision in *Imambhai's* case[1] is that the wall must have been raised with the consent or acquiescence of the other co-owner. But there is no question of the consent or acquiescence of the other co-owner where there is no raising of the wall at all, and therefore the legal inference of the whole wall becoming joint would not arise in a case where there is no raising of a party wall but a part of the wall is to be treated as joint by agreement. The lower Court has recognised the possibility of such an agreement because

[1] (1925) 49 Bom. 587.

it says, " Nor is there evidence of any agreement between the two owners relating to any part of the wall." The fact that the defendant's sale-deed is silent about the ownership of the upper part of the wall although it does recite that the lower part was joint is more consistent with an agreement to treat the lower part only as joint than to treat the whole wall as joint. The party, who wants the whole wall to be treated as a joint wall, must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built, they cannot be blocked up unless there is an agreement to close them when the other house is raised, and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already acquired easement of light and air through the windows in the upper wall. The decision in *Rajubhai* v. *Lalbhai*[1] that easement of light and air through windows opened in a joint wall cannot be acquired by prescription would not, therefore, apply to the present case where the upper wall is not proved to be joint.

I think, therefore, that the decree of the lower appellate Court should be reversed and the appeal allowed with costs throughout. The plaintiffs are entitled to the declaration and injunction as prayed for in respect of the easement of light and air.

Appeal allowed.

Y. V. D.

[1] (1925) 28 Bom. L. R. 1000.