

The State
of Delhi
v.
Shri S. Y.
Krishna-
swamy, I.C.S.,
etc.
Bhandari, C. J.

to the accused in taking their counsel from Delhi to Nainital would be much greater than the inconvenience which is likely to be occasioned to Mr. Munshi in undertaking the journey to Delhi. In cases like the present in which facts are disputed and in which it is of the utmost importance that the witness should be examined in the presence of the Court a heavy burden lies on the party who wishes to examine him on commission to show clearly that he cannot be reasonably expected to appear in Court in person. This burden has, I fear, not been discharged in the present case.

For these reasons I am of the opinion that the balance of convenience lies in Mr. Munshi being examined in the presence of the learned Special Judge in Delhi. In any case, I can see no reason for overruling the discretion which has been exercised by the Court below, after taking into consideration all the circumstances of this case. The petition must be dismissed.

I have ascertained from the Solicitor-General that it would be convenient for Mr. Munshi to be examined at Delhi on Monday the 19th July, 1954. The learned Special Judge should take steps to issue a letter of request to Mr. Munshi to appear in his Court in Delhi on the said date.

Bishan Narain,
J.

BISHAN NARAIN, J. I agree.

APPELLATE CIVIL.

Before Harnam Singh, J.

SITA RAM,—Defendant-Appellant

versus

NAUBAT RAI,—Plaintiff-Respondent.

Regular Second Appeal No. 449 of 1953.

Party-wall—Meaning of—Partition—Whether permissible—Rule in such cases stated.

1954

June, 9th

Held, that a party-wall means—

(i) a wall of which the two adjoining owners are tenants in common;

- (ii) a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners;
- (iii) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as dividing wall between the two tenements.

Held further, that a claim by co-owner to the partition of a *party-wall* cannot be resisted even where the claim caused inconvenience and difficulty of partition, though it will not be allowed to affect easements that exist in favour of one party against the other party.

Second Appeal from the decree of Shri Mohindar Singh, Senior Sub-Judge with enhanced appellate powers, Hoshiarpur, dated the 10th July, 1953 affirming that of Shri Ved Parkash, Sub-Judge, III Class, Hoshiarpur, dated the 8th June 1953, granting the plaintiff a preliminary decree for possession by partition of the wall in suit but making no order as to costs. The appellate Court allowed costs of its Court.

I. D. DUA, for Appellant.

M. C. SUB, for Respondent.

JUDGMENT

HARNAM SINGH, J. In Civil Suit No. 429 of 1952 Harnam Singh, Naubat Rai claimed, *inter alia*, possession of the half share of the 'party-wall' by partition. In deciding that suit the court of first instance decreed the claim for possession of the half share of the 'party-wall' by partition of that wall. J.

Sita Ram, defendant, appealed from the decree passed in Civil Suit No. 429 of 1952, under section 96 of the Code of Civil Procedure. That appeal failed and was dismissed with costs.

Sita Ram, defendant, appeals under section 100 of the Code of Civil Procedure from the decree passed on appeal.

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In *Watson versus Gray*, (1), Fry, J., in considering the meaning of the expression *party-wall* said :—

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“They may mean, first, a wall of which the two adjoining owners are tenants in common, as in *Wiltshire v. Sidford* (2), and *Cubitt v. Porter* (3). I think that the judgments in those cases show that that is the most common and the primary meaning of the term. In the next place the term may be used to signify a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners, as in *Matts v. Hawkins* (4). Then, thirdly, the term may mean a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as dividing wall between the two tenements. The term is also used in some of the Building Acts. Lastly, the terms may designate a wall divided longitudinally into two moieties, each moiety being subject to a cross easement in favour of the owner of the other moiety.”

In considering the question of the partition of a *party-wall* Fry, J., said in *Watson v. Gray* (1) :—

“In the case of longitudinal division between the two neighbours, each of them, as was said in *Cubitt v. Porter*, (3), has a right to pare away one moiety of the wall, and if this was done the moiety of the other owner might be of

(1) (1880) 14 Ch. D. 192.
(2) 1 Man and Ry. 404.
(3) (1828) 8 B. and C. 257
(4) 5 Taunt. 20.

very little use to him. Again, if the wall belongs to the adjoining owners as tenants in common, it may become the subject of a partition, and then exactly the same difficulty would arise. To meet this difficulty the fourth meaning of the term 'party-wall' was suggested by the learned author of the note to *Wiltshire v. Sidford*, (1)".

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In *Ganpat Rai and others v. Sain Dass and others* (2), Shadi Lal, C.J. (Gordon Walker, J., concurring) said :—

“As pointed 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.”

In the judgment under appeal the Senior Subordinate Judge basing himself on *Mansa Ram and another v. Nanak Chand and others* (3), found that a claim by a co-owner to the partition of a party-wall cannot be resisted even where the claim caused inconvenience and difficulty of partition. In deciding the point of law that arose in *Mansa Ram and another v. Nanak Chand and others* (3), Rashid, J., based himself upon *Gobind v. Narain Dass* (4), and *Hardandas v. Sundar* (5). In *Mansa Ram and another v. Nanak Chand and others* (3), no reference is to be found to *Ganpat Rai and others v. Sain Dass and others* (2).

(1) 1 Man and Ry. 404.
(2) I.L.R. 12 Lah. 542.
(3) A.I.R. 1934 Lah. 893.
(4) 29 P.R. 1882.
(5) 64 I.C. 949.

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In *Gobind v. Narain Dass* (1), the dispute was between two joint-owners for partition of shop and for separate possession by plaintiff of his share. In second appeal the defendant maintained that the plaintiff was not entitled to enforce partition of the shop to the injury of the defendant and that the shop was not capable of partition. In deciding the case Smyth and Elsmie, JJ., said :—

“ We consider that it is practicable to make a partition of the shop and that the plaintiff is legally entitled to have a partition effected, and therefore that no injury in the legal sense will be caused to defendant by the partition. He may be put to inconvenience, but that is incidental to the nature of his interest in the shop; and he cannot reasonably complain because, being a joint owner, he is subject to inconveniences from which a sole owner of property is free.”

Plainly, *Gobind v. Narain Dass* (1), has no application to the facts of the case.

In *Hardandas v. Sundar* (2) the defendant-appellant maintained that the plaintiff was not entitled to partition of the *party-wall*. In deciding that appeal Saunders, J. C., found that the plaintiff was entitled to partition of the *party-wall*. In that case the claim of the plaintiff for the partition of the staircase was refused on the ground that partition of the staircase would reduce the width of the staircase to one foot four inches.

As pointed out hereinbefore, in *Mansa Ram and another v. Nanak Chand and others* (3), no reference is to be found to *Ganpat Rai and other v. Sain Dass and others* (4).

(1) 29 P.R. 1882

(2) 64 I.C. 949

(3) A.I.R. 1934 Lah. 893

(4) I.L.R. 12 Lah. 542

In deciding Civil Suit No. 429 of 1952, the Court of first instance acted on the evidence given at the trial that in the *party-wall* there are *allas* on both sides and the girders of the plaintiff and the defendant rest on the *party-wall*. In the Court of first appeal the truth of that evidence was not disputed. In these circumstances, partition of the 'party-wall' cannot be allowed to affect easements that exist in favour of one party against the other party.

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For the foregoing reasons, I modify the decree passed on appeal by directing that the 'party-wall' should be divided longitudinally into two moieties, each moiety being subject to cross easements in favour of the owner of the other moiety.

In the result, I allow Regular Second Appeal No. 449 of 1953 to the extent indicated in the preceding paragraph.

Parties are left to bear their own costs throughout.

APPELLATE CIVIL

Before Harnam Singh, J.

THE STATE,—Appellant

versus

JAMNA DAS AND ANOTHER,—Respondents

Second Appeal from Order No. 17 of 1953

Limitation Act (IX of 1908)—Section 15(2)—Notice under section 80 Civil Procedure Code,—Not necessary—Period of notice whether can be excluded in computing the period of limitation from the suit under section 15(2) of the Limitation Act.

1954

June, 9th

Held, that in computing the period of limitation prescribed for the suit the period of notice can be excluded if notice was given in accordance with the requirements of any law. Section 80 of the Code of Civil Procedure provides, *inter alia*, that in the notice cause of action shall be