**Kapoor Chand and anr. Vs. Kailash Chand**

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**Court** : Allahabad

**Decided On :** Mar-16-1972

**Reported in** : AIR1973All170

**Judge** : T.S. Misra, J.

**Acts** : Specific Relief Act, 1877 - Sections 54

**Appeal No.** : Second Appeal No. 1725 of 1965

**Appellant** : Kapoor Chand and anr.

**Respondent** : Kailash Chand

**Advocate for Def.** : K.C. Agarwal, Adv.

**Advocate for Pet/Ap.** : Kamini Mohan, Adv.

**Disposition** : Appeal partly allowed

**Judgement** :

T.S. Misra, J.

1. This appeal has arisen in a suit for demolition and injunction. The plaintiff alleged that he was the owner of a pucca Haveli, which was also known as Bailkhana. The defendants were the owners of a house situate towards the east of the ahata but they did not own the western wall of their house. The wall between their house and the ahata of Musaddi Lal was owned by the latter, Musaddi Lal sold the ahata to Chater Sen on 31st August, 1945, whereupon two suits Nos. 420 and 421 of 1946 were filed for pre-emption by Benarsi Das, who was the father of the plaintiff, and by the defendant Kapoor Chand. These suits were decided in terms of a compromise as a result of which Benarsi Das became the owner of the two north faced kothas and the vacant piece of land lying to their west and Kapoor Chand became the owner of a Dukariya and the Sahan lying in front thereof as well as the northern exit. A dispute subsequently arose between Benarsi Das and Kapoor Chand and the defendants in respect of the joint Sahan and the exit as well as the eastern wall of the ahata and two suits Nos. 284 and 421 of 1948 were filed. These suits were also decided in terms of a compromise between the parties. The joint Sahan of the ahata was partitioned and the southern portion as well as a part of the western portion shown as KLAEFBCD in the site plan were allotted to Benarsi Das whereas the portion shown by letters KPEF excluding the southern abchak as well as the land MNUC were allotted to the defendants. The remaining portion of the Sahan shown by letters OPEBMNG and the exit to dahleez and chabutra QOGTSR remained joint. It was also

alleged that the Haveli of the defendant-appellant was separate from the ahata of Musaddi Lal and the rain water of the Haveli flowed inside that house and not towards the ahata of Musaddi Lal. The defendants had, therefore, no right to flow the water in the Sahan or dahleez of Musaddi Lal's ahata. They, however, began to carry out small alterations in their Haveli to the east of Musaddi Lal's ahata in June 1963 and a water pipe was fixed in the Haveli after taking over upon the chabutra. The defendants also put the lintel roof of their Haveli on the joint eastern wall. The plaintiff protested against the aforesaid actions of the defendants and served a notice dated 10th July, 1963, on them but the defendants paid no heed to the same, hence the plaintiff filed the suit for injunction.

2. The suit was contested, inter alia, on the grounds that the entire wall SR was part of the Haveli belonging to the defendants and that it did not form part of the ahata of Musaddi Lal. It was also alleged that the decree passed in civil suit No. 284 of 1948 was not binding upon defendant No. 2, who was not a party to the same. It was also alleged that there existed a latrine near the northern portion of the said wall and water from the latrine always flowed through the disputed drain in the joint Sahan. The southern portion of the wall was in a demolished condition at the time of compromise and as such the same was built by Benarsi Das. However, as the wall was in a dilapidated condition the defendants feeling unsafe raised the height of the wall. The disputed latrine was constructed by the defendants at its original place and no damage was caused by the defendants by placing lintel upon the disputed wall. The projection upon the wall MN was raised with a view to protect the door and it did not amount to an encroachment upon the joint Sahan. The defendants had fixed the water pipe in their northern wall and the pipe line passed through the chabutra which belonged to them. Even if any portion of the pipe line passed through the joint chabutra the defendants had right to take pipe line as co-sharer. The wall RS and TS belonged exclusively to them and as such they had a right to open a window and use the same in any manner they liked. The water from the eastern portion of the defendant's house flowed through a nali in the joint Sahan and the defendants had a right to do so.

3. The trial court, on a consideration of the evidence, held that the walls RS and ST were joint walls of the plaintiff and defendant No. 1 and that the same were not the exclusive properties of the defendants. It also held that the water of the defendants' Haveli used to flow through their own Haveli and not towards the west thereof through the ahata of Musaddi Lal. It further held that the action of the defendants in raising a projection in front of the kotha was wrongful and the defendant No. 2 had no right of ownership in respect of the land shown by letters NMBEPOG. The defendants bad also no right to put a lintel of their eastern house over the common wall TN and to carve out niches (taqs) in the common wallThe trial court also held that the defendants had no right to fix a water pipe in the common wall or to lay the pipe line on the joint chabutra. In view of these findings the trial court decreed the suit. Against the said decision the defendants filed an appeal. Before the appellate court below it was conceded that the disputed walls RS and ST shown in the site plan annexed to the plaint belonged jointly to the plaintiff respondent and defendant appellant No. 1. The appellate court below, however held that the defendants appellants could open a niche (taq) and also take a water pipe line in the joint wall and upon the joint land but they had no right to open window in the joint wall nor could raise its height or construct any projection upon the joint wall. It was observed by the Court below that if a co-sharer took water pipe line upon a joint land or joint wall such an act did not amount to substantial injury and that it was a reasonable use

by a co-sharer inasmuch as no extra burden was placed upon the joint wall nor any material change was effected by such an act. Niche (Taq) and water pipe would not interfere in the joint use of the wall and the land by the plaintiff respondent. In regard to the other alterations and constructions carried out by defendant appellant No. 1 the appellate court below concurred with the findings of the trial court and held that a construction of a projection on the space belonging jointly to another person was wrongful and that a co-sharer had no right to raise the height of a common wall In regard to the defendant's right to flow water of the roof of their house to the east of us through drain N towards the west in the joint Sahan and to flow water of their latrine to the south east of point T towards north in the joint Sahan and through the abchak to the west of OQ the appellate court below concurred with the findings of the trial court and observed that a perusal of the report prepared by the commissioner would be to show that the water of the latrine flowed towards West and that Kapoor Chand had been given the right vide compromise decree passed in suits Nos. 284 and 421 of 1948 to flow water only of the kurras which were allotted to him and that he was prohibited to carry out any construction of any sort over the joint land. The Court below, therefore, allowed the appeal in so far as the opening of niches (taqs) in the joint wall TN and carrying of a water pipe line upon the joint land were concerned. The decree of the trial court was confirmed in other respects. The defendants have now filed this second appeal from the said decision.

4. It was urged on behalf of the defendants appellants that both the courts below have misconstrued the terms of Ex. 16, being the compromise decree passed in Suit No. 421 of 1948 referred to above whereby the defendants had acquired a right to discharge water in pucca and covered drain. There in force in this submission.The compromise decree Ex. 16 gave a right to Kapoor Chand to discharge water through abchak and the drain OQ from those portions which were allotted to him in terms thereof. Clause six of the compromise decree provided that if any party to that suit desired to discharge water through the joint Sahan he would do so by constructing pucca closed drains therein. The defendants had alleged that they were discharging water through pucca covered drains through the joint Sahan. This being in consonance with the terms of the decree was not liable to be objected to. The parties, by agreeing to such a term, had considered it to be a reasonable user. As laid down by the Supreme Court in the case of Jahuri Sah v. D. P. Jhunjhunwala : AIR1967SC109 co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. The defendants were, therefore, not liable to be restrained from discharging their water through pucca covered drains through the said joint Sahan.

5. It was further argued that the defendants had a right to raise the height of the common wall, put lintel thereon and make almirahs and niches (taqs) therein. In this connection reliance was placed on Ex. 15, which is also a compromise decree passed in Suit No. 284 of 1948 (All) Lala Benarsi Das v. Kapoor Chand. It would appear from the said decree that the plaintiff of that suit viz., Benarsi Das, was authorised to raise the height of the wall UN upto 3 feet or above it to the extent he liked at his own cost within three months and the defendant of that suit, Kapoor Chand, would have no objection to it. Benarsi Das was the father of the plaintiff-respondent to this appeal. Thus the plaintiff-respondent's father and not the appellants had been given a right to raise the height of the disputed wall UN by 3 feet or above it. The plaintiff has complained in the suit, out of which this appeal has arisen, that the defendants had wrongfully raised the height of the wall above six feet, put a lintel roof of their

eastern house upon the disputed wall GN and had carved out niches (taqs) in the eastern side of the wall. Both the courts below have held that the walls RS and ST are common walls belonging jointly to the plaintiff and defendant No. 1, and that the defendants had no right to raise the height of the disputed walls and put lintel over it The learned counsel for the appellants while urging that the defendants had a right to raise the height of the common wall and put a lintel thereon and that they could not be restrained by an injunction from using the common wall in the manner complained of placed reliance on the case of Chhedi Lal v. Chhotey Lal : AIR1951All199 . In the case of Chhedi Lal (supra) it was held as follows:--

'The question of the right of co-sharers in respect of joint land should be keptseparate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers either by exclusively appropriating and cultivating land or by raising constructions thereon. While a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the Court according to the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary, if material and substantial injury will be caused to the defendant by granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. Each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused.'

6. It was clearly laid down that the right to the relief for demolition and injunction would be granted or withheld by the Court according as the circumstances established in the case justify and that the Court might feel persuaded to grant both the reliefs if from the evidence it is established that the plaintiff could not be adequately compensated at the tune of the partition and that greater injury would result to him by the refusal of the relief than by granting it. It was also observed therein that it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused. In the second Civil Appeal No. 282 of 1943 with which the Full Bench was concerned the plaintiffs had set up an untrue case that they were the sole owners and both the courts below had found that the defendants had a subsisting interest in the land in the suit and had a right to build and that the plaintiffs had made no oral protests. In view of those circumstances the Court refused the reliefs asked for by the plaintiffs. In the instant case both the courts below have found that the walls in dispute were owned jointly by the plaintiff and the defendants and that the defendants had unauthorisedly raised the height of the said walls and put a lintel of their room on the common wall. The protest of the plaintiff in that behalf remained unheeded by the defendants. Ex. 15 did not confer any right on the defendants to raise the height of the common wall and put a lintel thereon. In these circumstances both the courts below ordered for the demolition of so much portion of the wall in

dispute which had been constructed above the height of 6 feet from the ground level and for the removal of that portion of the lintel which rested on the said wall.

In the case of Baij Nath v. Janki Prasad : AIR1930All318 the plaintiff sought an injunction to restrain the defendant from opening an Almirah in the wall between the two houses and from placing certain beams on his side of the common wall. The defendant wished to add one storey more to his house. The lower appellate court refused to grant an injunction. The defendant in that case did not propose to increase the height of the party wall. It was, therefore, observed that different considerations would arise where there is increase in the height of the party wall and that an injunction would issue where there is an alteration, such as an increase in the height of the party wall.

7. In the case of Ikramullah Khan v. Muhammad Yunis Ali Khan, (1915) 13 All LJ 473 = (AIR 1915 All 440) it was decided that one of the two tenants in common was not entitled to build upon a party wall without the consent of the other tenant in common. This case was referred to in the case of Baij Nath : AIR1930All318 (supra) and distinguished on the ground that in the case of Baij Nath the defendant did not propose to increase the height of the party wall. The principle laid down in the case of Ikramullah Khan (supra) was not dissented. It was rather held that co-ownership implies that each co-owner should have a reasonable user of the thing owned in common, and so long as each co-owner used a wall reasonably without interfering with the enjoyment of that wall by the other party, or without doing anything which would weaken, damage or increase or diminish the wall enjoyed in common, he was entitled to do what he liked. The same principle was laid down in the case of Paduman Das v. Smt. Parbati : AIR1935All649 .

8. The leading case on the subject appears to be Watson v. Gray, (1880) 14 Ch D 192 in which it was held that if one of the two 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. Reliance was placed on the well known case of Cubitt v. Porter, (1828) 8 B and C 257 at page 265, in which it was laid down that where one tenant in common had heightened the wall, then the remedy of the other partywas to remove it. The same view was held by the Madras High Court in the case of Kanakayya v. Narsimhulu, (1896) ILR 19 Mad 38, Parker, J., in that case observed as under:--

'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.'

9. These cases were followed by the Bombay High Court in the case of Shivputrappa v. Shivrudrappa, : AIR1926Bom387 in which it was held that if it was the law that the plaintiff could himself remove the raised portion of the wall without rendering himself liable to a claim for damages, he was a fortiori entitled to come to the court and ask for an injunction in order to get the raised portion removed.

10. In the case of Ganpat Rai v. Sain Das, AIR 1931 Lah 373 the defendants had raised the height of the wall with a view to build a super-structure on their tenement without the permission of the plaintiffs. The plaintiffs, therefore, filed the suit for

mandatory injunction. It was held that the party wall could not be treated as a wall divided longitudinally into two strips, one belonging to each of the neighbouring owners and that the plaintiffs would, therefore, be 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 width occupied by the defendants was concerned. Similar view was expressed in the case of Mithoobhai v. Omprakash, AIR 1951 Nag 389, Durga Parshad v. Jheetar Mal , M. P. Philip v. C. S. Iyer, AIR 1956 Trav-Co 57 and Roopchand v. Punamchand .

11. Thus the consistent view has been that a co-owner of a joint wall is not entitled to raise its height or otherwise deprive the other co-owner of the use of such wall without the latter's consent whether express or implied, and if the evidence on the record established unauthorised interference in the common wall by a co-owner mandatory injunction would be granted against him. In the instant case both the courts below have recorded a finding that the defendants had unauthorisedly raised the height of the walls in dispute and had put a lintel of their room on the same without the consent of the plaintiff. In fact, the plaintiff objected to the same but to no avail. The plaintiff gave a notice to the defendants protesting against their unauthorised action but despite service thereof the defendants raised the heights of the walls in dispute and put a lintel thereon. In these circumstances the courts below were correct in ordering for the removal of thatmuch portion of the walls indicated by the letters RS, ST and TN in the plaint map which they had raised above the height of six feet from the ground level and in directing them to remove that portion of the lintel of the roof which they had placed on the raised portion of the wall TN to the north of point N.

12. The defendants had constructed a small projection over the door on the wall shown by letters MN in the plaint map. This door opened on the joint Sahan, Putting a small projection over the door cannot be construed to be an unreasonable user of the joint Sahan. It is not established by evidence that the plaintiff cannot be adequately compensated at the time of partition of joint Sahan and that irreparable injury would be caused to him if the projection in question is retained. It would, therefore, not be equitable to order for the demolition of the said projection.

13. In the result, the appeal partly succeeds. The decree passed by the appellate court below is modified. The decree so far as it relates to the demolition of the projection over the door in the wall shown by letters MN in the plaint map and the injunction restraining the defendants from discharging water through the joint Sahan shown by letter ORSTNMBFPO in the plaint map through pucca covered drains is set aside. The defendants are, however, restrained from discharging water through the said joint Sahan through any Kutcha drain or open drain. In other results the decree passed by the appellate court below is confirmed. The parties shall bear their own costs of this appeal.