

**IN THE HIGH Court OF HIMACHAL PRADESH, SHIMLA**

CMPMO No.389 of 2023
Reserved on: 02.12.2025
Decided on: 29.12.2025

Bir Singh ... Petitioner

Versus

Tirath Raj & another ... Respondents

Coram

Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting?¹ Yes

For the petitioner : Ms. Madhurika Sekhon, Advocate.

For the respondents : Mr. Sanjeev Kuthiala, Senior Advocate, with Ms. Tamanna Sharma, Advocate.

Ajay Mohan Goel, Judge

By way of this petition, the petitioner has assailed judgment dated 18.07.2023 (Annexure P-6), passed by the learned Appellate Court, in terms whereof, learned Appellate Court while allowing the appeal filed by the respondents herein, set aside the order passed by the learned Trial Court, in an application filed under Order 39, Rule 1 and 2 of the Civil Procedure Code, in terms whereof, learned Trial Court had directed the parties to maintain status-quo, qua the construction, nature and possession of the suit land.

2. Brief facts necessary for the adjudication of the present

¹ Whether reporters of the local papers may be allowed to see the judgment?

petition are that the petitioner/plaintiff filed a Civil Suit before the learned Trial Court, seeking permanent prohibitory injunction, to restrain the defendants from raising any construction over the suit land etc. A relief of mandatory injunction has also been sought in the same. In terms of the pleadings, the plaintiff claims that the suit land is jointly owned and possessed by the parties and that the defendants forcibly and illegally started raising unauthorized construction thereupon and thus, causing interference and obstruction upon the suit land. As per the plaintiff, the defendants were trying to damage the residential house as also the boundary wall of the plaintiff and were making an endeavour to change the nature and possession of the suit land. Along with the Civil Suit, the plaintiff also filed an application under Order 39, Rule 1 and 2 of the Civil Procedure Code and the learned Trial Court, in terms of order dated 28.03.2023 (Annexure P-5) directed the parties to maintain status-quo, qua construction, changing nature and possession of the suit land till final disposal of the suit.

3. Feeling aggrieved, the defendants filed an appeal and in terms of the impugned order, learned Appellate Court allowed the appeal.

4. Learned Counsel for the parties were heard at length by

me and this Court has also carefully gone through the judgments passed by the learned Trial Court as well as the learned Appellate Court.

5. In terms of the order passed by the learned Trial Court, it held that the plaintiff had approached the Court feeling aggrieved by damage caused to the residential house as well as the boundary wall of the plaintiff, as also against the act of the defendants of changing the nature and possession of the suit land, with the intention to occupy the vacant portion. It held that there was no invariable rule that until and unless the partition is carried out, a co-sharer cannot be permitted to raise construction over suit land which is joint in nature, subject to certain exceptions. Learned Trial Court, thereafter, went on to hold that the application rested on three points, particularly damage and obstruction to the boundary wall, by encroaching upon six feet of land towards the house of the applicant, secondly damage caused to the residential house by digging land under boundary wall of the house as there were big rocks underneath the boundary wall, all of which amounted to nuisance and thirdly, changing nature of the suit land. It, thereafter, held that the applicant had pleaded that the respondents intended to cause damage to the residential house of the applicant and from the

pleading it seemed to be the case of the applicant that prejudice was likely to be caused as the respondents were digging beneath the boundary wall. It held that the case of the respondents was that they were not raising any construction over the suit land. It also held that it was settled that where a co-owner is in possession of separate parcel of land, as was there in the present case in terms of Jamabandi for the year 2018-2019, it was not open to any party to disturb the arrangement without the consent of the parties. It further held that damaging the boundary of the residential house of the plaintiff had the effect of causing damage to the property and, therefore, it was the duty of the Court at the said stage to preserve the property. On these basis, it allowed the application by directing the parties to maintain status-quo.

6. Learned Appellate Court, in terms of its judgment dated 18.07.2023, set aside the order passed by the learned Trial Court. While setting aside the order, learned Appellate Court, *inter alia*, held that in the present case there was no material on record that indeed a family partition had taken place between the parties and the factum of alleged oral partition was not supported by the revenue records. Learned Appellate Court further held that in this backdrop, the plea of family partition could not be relied upon. It, thereafter,

held that the revenue record did not reflect that the parties were residing separately on account of partition, but they were recorded separately in the capacity of co-sharer and mere occupation of the property separately by a co-sharer did not amount to partition. Learned appellate Court placed reliance upon the judgment of this Court in *Janku and other Versus Nagnoo and others*, AIR 1986 HP 10, while returning these findings. By placing reliance upon the judgment of this Court in *Leetho Versus Chamelo and others*, 2001 (2) Shim. LC 238, learned Appellate Court held that this Court had laid down the law that when no particular family partition was there and oral partition was not supported by the revenue record, the plea of family partition could not be relied upon. The partition should be such which may conclusively establish the respective share of the parties to stop a further dispute between them. Mere arrangement regarding the continuation of land cannot be termed as a partition. Thereafter, while relying upon the judgment of this Court in *Mangat Ram Versus Gulat Ram (since deceased) through his LRs. Jagdeep Kumar and others*, Latest HLJ 2011 (1) (HP) 274, learned Appellate Court held that mere arrangement between the parties for cultivation of the land does not amount to a formal partition, especially when the same was not reported in the Revenue record.

On the issue that the co-sharer had no right to raise construction over the suit land and other co-sharer was entitled to seek an injunction for restraining the defendants from raising construction, learned appellate Court by placing reliance upon the judgment of this Court in *Ashok Kapoor Versus Murthu Devi, 2016 Volume (i), Shimla Law Cases 207*, held that a co-sharer cannot be restrained from raising construction on the joint land, on the ground that he has no right to raise construction on the joint land. Learned Single Judge referred to the subsequent judgments also of this Court, in which the same view has been reiterated. On these basis, learned Appellate Court allowed the appeal.

7. In light of the fact that learned Appellate Court has taken into consideration considerable number of judgments of this Court and other Hon'ble Courts on the issue, the relevant portion of the judgment of the learned Appellate Court is quoted hereinbelow:-

“13. Smt. Nirja Thakur learned counsel for the appellants-defendants submitted that the separate possession of the co-sharer establishes the plea of the defendants that suit land was partitioned between the predecessor of the parties. The learned trial Court had rightly pointed out that mere separate enjoyment of the property does not amount to partition as is

understood in law. In **Janku and others Versus Nagnoo and others, AIR 1986 HP 10** no deed of partition was produced. It was not proved that the property was put in hotch-pot in the partition and which portion of the property was allotted to which party. No report was given to the revenue authorities. No mutation was sanctioned. The entry in the revenue record did not show that the parties were residing separately on account of partition but they were recorded separately in the capacity of a co-sharer, mere occupation of the property separately by a co-sharer does not amount to partition. It was observed:

“14. In the written statement the defendants allege that a private partition took place about 47 years back, that is, in or about 1921. No deed/writing of partition was produced by the defendants and there is also no evidence to prove as to when this private partition took place between them or their ancestors. It is also not proved as to what property was put in the hotch-pot in the partition and which portions of the property were allotted to each of the co-sharers/co-owners. No report was given to, the revenue authorities with the result that no mutation of partition was sanctioned. There is also no entry in the revenue records

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to prove that any co-sharer is in possession of a separate parcel of land on account of partition the entries on the contrary show that separate possessions are recorded in the capacity of a co-sharer.

15. In the case of co-sharers, every co-sharer has an interest in the whole property and also in every parcel of it and possession of the joint property by one-sharer is, in the eyes of the law, possession of all even if all but one are actually out of possession. A mere occupation of a larger portion or even of an entire joint property cannot necessarily amount to an ouster as the possession of one co-sharer is deemed to be the possession on behalf of all. If, however, the co-sharers are in possession of separate parcels of land under some arrangement, then such an arrangement cannot be disturbed except by filing proceedings for partition and during these proceedings, the proper mode of partition can be framed and respective possession of the parties/co-sharers can be respected to the extent to which it is possible.”

14. This question was again considered by the Hon'ble High Court in **Leetho Versus Chamelo and Others 2001(2) Shim.LC 238** and it was held that

when no particulars of family partition were given and the oral partition was not supported by the revenue record, the plea of family partition cannot be relied upon. The partition should be such, which may conclusively establish the respective shares of the parties to stop a further dispute between them. Mere arrangements regarding the cultivation of the land cannot be termed as a partition. It was observed:

“12. So far second substantial question of law is concerned, the learned Counsel for the plaintiff has taken this Court through the pleadings and evidence on record, oral as well as documentary, but has not been able to show that any part thereof has been misread and misinterpreted by the first appellate Court to come to the conclusion that the land in dispute stood already partitioned. In para 7 of the plaint, there is mention of family settlement without giving further particulars thereof, whereas, the oral evidence pertains to partition, which is not supported by the revenue record produced by the plaintiff. Partition, whether by way of family settlement or family arrangement or by the Revenue Officer by giving effect to the family partition or settlement by metes and bounds should be such which may

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conclusively establish the respective shares of the parties so as to stop further dispute in between them. Vague assertions in regard to the share of one party and that too which is not proved from the evidence, cannot be said to be sufficient to hold that a partition had taken place. Further, mere arrangement in regard to the cultivation of the land cannot be termed as partition though such arrangement at the time of final partition by the Revenue Officer should be given due consideration in order to maintain possession of the parties intact. Therefore, the first appellate Court has rightly set aside the findings of the trial court to hold that the land in dispute was not partitioned as alleged by the plaintiff. The Substantial Question of Law No. 2 is answered accordingly.”

15. This judgment was followed by Hon'ble High Court in **Mangat Ram Versus Gulat Ram (since deceased) through his LRs Jagdeep Kumar and others Latest HLJ 2011(1) (HP) 274** and it was held that mere arrangement between the parties for the cultivation of the land does not amount to a formal partition, especially when the same is not reported to the revenue authorities. It was observed:

“19. Prior to the passing of the order by the competent authority, no partition by metes and bounds ever took place between the parties. The court below rightly came to the conclusion that private partition was actually an arrangement for the purpose of cultivation of land. It was not a final partition of the land by metes and bounds so as to effect severances of joint holdings. Had it been so, parties would have definitely got this fact recorded in the revenue record and resorted to the mandatory provisions of Sections 35 and 135 of the Act. The act is a complete code in itself. It provides a procedure for preparing revenue records. Under Section 35, any person acquiring right in an estate as a landowner is required to report the same to the Patwari of the estate, who in turn, is obliged to enter this fact in the register of mutations maintained by him. Whenever there is partition without the intervention of the Revenue Officer, the Private party is required to apply to the Revenue Officer for an order of confirmation/affirmation of partition. The Act provides that in such like cases Revenue Officer is mandatorily required to

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inquire the fact as to whether in fact partition was ever effected upon or not. Revenue Officer is required to comply with the statutory provisions laid down under Chapter 9 of the Act. Admittedly in the instant case, parties have not resorted to such measures. Partitions entered into in the year 1961 and 1972/74 is no partition in the eyes of the law.

20. This Court in **Leetho vs. Chamelo & Ors. 2001 (2) Shim. L.C. 238**, while dealing with the question of jurisdiction of the Civil Court to entertain a suit filed by the plaintiff, assailing the order, of partitioning the land, passed by the competent authority, has specifically held that partition, whether by way of family settlement or family arrangement or by Revenue Officer by giving effect to the family partition or settlement by metes and bounds, should be such which may conclusively establish the respective shares of the parties so as to stop further dispute in between them. Mere arrangement in regard to the cultivation of land cannot be termed as partition though such arrangement at the time of final partition by Revenue Officer should be given due

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consideration in order to maintain possession of the parties intact.”

16. *Therefore, the plea of the defendants does not amount to a formal partition as is understood in law and the learned trial Court had rightly held the parties to be co- owners.*

17. *The plaintiff asserted that a co-sharer has no right to raise construction over the joint land and the other co- sharer is entitled to seek an injunction for restraining the defendant from raising construction. This submission is not acceptable. The law relating to the co-sharers was considered by the Hon'ble High Court in **Ashok Kapoor Versus Murtu Devi 2016 (1) Shimla Law Cases 207** and it was held that a co-sharer cannot be restrained from raising construction on the joint land on the ground that he has no right to raise construction on the joint land. After an exhaustive review of the case law, it was held as under:-*

“46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

(i) A co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such an

act, which is detrimental to his interest.

(v) Before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury, which materially would affect his position or his enjoyment, or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and the exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.”

18. This judgment was followed by the Hon'ble High Court in **Piar Chand and others Versus Sandhya Devi and others 2017 (2) Shim.LC 1040** and it was held after quoting the above para that where the plaintiff had failed to lead evidence to prove that the proposed construction of the defendants will diminish the value or utility of property or the same is detrimental

to the interest of other co-owners, including the plaintiff, the suit could not have been decreed.

19. Similar is the judgment of the Hon'ble High Court in **Ramesh Kumar vs. Sheetal and others 2021(1) Shim.LC 377** wherein, it was observed:

17. It is quite apparent from the aforesaid exposition of law that a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession. The mere making of construction or improvement in the common property does not amount to ouster rather, if by any act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property. If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can

seek an injunction to prevent such an act which is detrimental to his interest.

20. Therefore, a co-sharer cannot be restrained from raising construction over the joint land unless it is shown that such an act would constitute prejudice and the mere raising of construction does not amount to any prejudice as laid down by the Hon'ble High Court.

21. The plaintiff pleaded that the construction of the defendants will damage the retaining wall and the residential house of the plaintiff. It clearly shows that the plaintiff has raised the construction of the house. It was laid down in **Hussan Lal vs. Krishan Devi 1996 PLR 528** that where a co-sharer had raised the construction himself, he cannot restrain the other co-owners from raising construction. This position was reiterated in **Lal Chand vs. Jagdish Kumar 2001 HLJ 777**, wherein it was observed:

“13. The other conclusions arrived at by the learned District Judge and already set out here-in- above are prima facie permissible on the basis of the record. It is not in dispute that the petitioner has constructed a six-storeyed building on a portion of the joint land. Prima facie, it is also not in dispute that such a building is on an area of 10 Biswas and different other

constructions have also been raised on the joint land including one by a co-sharer over an area in excess of her share. The sales of the plots by co-sharers in the total joint land on which such constructions have been raised are prima facie not disputed. Thus, in view of the aforesaid express and implied admissions, the conclusions under reference as arrived at by the learned District Judge cannot be said to be wholly unwarranted or illegal or perverse.”

22. Similar is the judgment of the Hon'ble High Court in **Smt. Kalawati vs. Netar Singh AIR 2016 HP 85** wherein it was held:

“10. It would be evident from the decision, the mere fact that the parties are co-owners and joint owners etc. is not the sole criterion for granting or refusing the injunction, the conduct of the parties too plays an important role and in such like cases, the plaintiff conduct has to be free from blame so as to enable the court to conclude that the plaintiff has approached the Court with clean hands. But here is a case where the petitioner though claims herself to be a joint owner with the respondents after having already raised

construction over the suit land seeks an injunction against the respondents without even disclosing this fact.

11. The injunction being an equitable relief, the person seeking an injunction must come with clean hands. The well-known mechanism that applies in such a matter is "he who seeks equity must do equity". Since the petitioner has admittedly raised construction of her house(s) on a portion of the suit land, she is estopped and has waived her right to assail and question the construction being raised by the respondents. The fact that the petitioner has not approached the court with clean hands in itself is sufficient ground for not granting the relief of injunction."

23. Similar is the judgment in **Raj Kumar versus Rakesh Kumar 2022 2 ShimLC 1083** wherein it was observed:

5(a) It is not in dispute that the plaintiff had already raised construction over the suit land alleged by him to be the joint land of the parties along with other co-sharers. This fact was not disclosed by the plaintiff in the manner it ought to have been stated in the plaint. The plaintiff in a round about manner averred that the

defendant was trying to block the air and light of the house of the plaintiff existing over the suit land. Prima facie observation of both the learned courts below that the plaintiff had himself raised construction on the best and most valuable portion of the suit land also assumes significance. It is well settled that when a person seeks equity, he must come with clean hands.

5(b) It is admitted fact that Sh. Kartar Chand brother of the petitioner/plaintiff and one of the co-sharer had also raised construction over the suit land in the year 2010. It is not the case of the petitioner/plaintiff that he had objected to the construction work done by his brother over the suit land or that the plaintiff had instituted any civil suit for restraining his brother from raising construction over the suit land. It is apparent that the petitioner/plaintiff has selectively chosen the respondent/defendant for filing the suit for injunction. At this stage, it will be relevant to notice the following references:-

In (2010) 3 Shimla L.C. 205, titled Payar Singh Vs. Narayan Dass and others, the respondents pleaded

themselves to be in settled separate possession of joint land in family partition over which they were raising construction. They also took up a stand that the petitioner had also constructed his house over the land in his possession. The Court upheld the contentions of the respondents. The following observations made in the judgment are material :

“12. The respondents in the written statement have specifically pleaded that parties are in separate possession under the family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that respondents are raising construction in an area which is more than their share. The case of the respondents is that the petitioner has constructed his house on a better portion of the land. The under-construction house of the respondents is away from National Highway 21 whereas the house of the petitioner abuts N. H.21. The respondents have placed on record on the file of revision photographs construction of an under- construction house of the respondents. The

photographs indicate the sufficient gap between the already constructed house of the petitioner and the under-construction house of the respondents over which even a slab has been placed. It is the case of the respondents in the written statement that they are in separate possession of the land in the family arrangement. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established a prima facie case, balance of convenience, and irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision, the scope is limited as held in **The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76**. The suit is for permanent prohibitory and mandatory

injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record.”

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In a judgment dated 03.09.2021, delivered in CMPMO No. 555 of 2018, Ajay Kumar Vs. Ishwar Dutt, it was held that when a co-sharer himself raises a construction over the joint land when a co-sharer does not object to the raising of construction over the joint land by some other co-owners, then, he cannot seek to restrain one specific co-owner from raising construction over part of the suit land, more so, when the construction being raised by that particular co-owner is over a portion, which, as per the revenue record, is in his possession along with others and when the plaintiff has not been shown in possession of this specific portion of land.

*Placing reliance upon various authorities, defendants in **CMPMO No. 77 of 2021, titled Smt. Vyasa Devi Vs. Harish Kumar** were permitted to undertake*

construction inter-alia on the ground that the plaintiff had also carried out construction on the joint land. Material observations made by the Court on facts are as under:-

“10. The facts involved in the case have been narrated by me hereinabove and the same are not being repeated for the sake of brevity. It is not in dispute that the parties are co-sharers of the suit land but the petitioners herein are recorded to be in possession of the portion of the suit land in issue along with other co-sharers. It is further not in dispute that the respondents herein are not recorded to be in possession of the suit land. It is also not in dispute that the respondents herein have also carried out construction activities by raising constructions over the joint land, as is evident from the record. In these circumstances, this Court is of the considered view that the petitioners herein, who besides being the co-owners of the suit land are also recorded to be in possession thereof, cannot be estopped from raising

construction pending the adjudication of the civil suit. It is settled law that injunction cannot be granted against a co-sharer and further as the respondents herein themselves have constructed their houses over the joint suit land, in these circumstances, they cannot be permitted to restrain other co-sharers, i.e. present petitioners, from doing so. The construction, which is being carried out by the petitioners, however obviously shall be subject to the final adjudication of the suit as also partition proceedings, if any, and if the area upon which construction being carried out by the present petitioners ultimately falls in the share of the plaintiffs in partition proceedings, then, of course, consequences will ensue. However, this does not mean that till the suit land is partitioned, the petitioners herein should be restrained from raising construction over the parcel of the suit land in their possession.”

CMPMO No.522/2017, decided on 29.11.2018 titled Chanchal Kumar Vs. Prem Parkash & Anr. was a case where

the plaintiff was one of the co-sharers over the suit land. He raised construction and filed suit for a prohibitory injunction to restrain the respondents from raising construction on the vacant portion of land. The Court held that:-

“.....Once, the plaintiff himself raised construction over one portion of the land, it is not understood, how he could raise an objection, if any, qua the construction on the other portion of land, by the defendants, who are admittedly co-owners of the suit land to the extent of one-half share. Needless to say, the applicant, while seeking relief of injunction is required to show that he/she has a prima facie case in his/her favour and balance of convenience also lies in his/her favour, but, in the instant case, aforesaid basic ingredients/conditions are totally missing, rather, very conduct of the plaintiff suggests that he wants to take advantage of the situation.”

24. This position was reiterated in **Jai Singh VS Rajeev Latest HLJ 2023 (HP) (1) 162** wherein it was observed:

“19. The fact that in past also different co-owners including the parties to suit have raised construction also weakens the case of plaintiffs. When plaintiffs had no objection when the co-owners had raised construction on different parts of the joint land in the same khata, they must come out with special reasons to raise objections against construction being raised by the defendant. Another fact, which cannot be ignored is that there is another structure on suit land being used as “Panchayat Ghar.” At the time of its construction again there was no objection. Admittedly, no other co-owners have raised any objection to the construction being raised by the defendant. The conduct of plaintiffs smacks of some ulterior purpose than the assertion of any legal right.”

25. Therefore, the plaintiff was not entitled to restrain the defendants from raising construction on the joint land.

26. Learned trial Court held that the construction of the defendants will cause damage to the residential house of the plaintiff and it is sufficient prejudice to the plaintiff. The plaintiff had not pleaded any right of easement and rightly so

because a right of easement is available on the land of others. It was laid down by Hon'ble Bombay High Court in **Marghabhai Vallabhahai Versus Motibhai Mithabhai AIR 1932 (Bom) 513**, that no right of easement can be claimed on a joint land. It was observed:

“[5] Secondly, it has now been found that this land was joint land, and it continued to be such until it was partitioned in 1923. It was held in **Chhaganlal v. Hemchand (1931) 34 Bom. L.R. 395** that the projection of eaves for dropping water is not a trespass in law, and therefore it is contended that the present plaintiff could not have prevented the defendant from making this use of the joint land. The learned advocate for the appellant has referred to **Halsbury's Laws of England**, Vol. XXVII, p. 855, in which it is stated that a joint tenant or tenant in common of land can maintain trespass against his co-tenant if the co-tenant expels him from the land or destroys the subject of the co-tenancy without the co-tenant's consent, but not otherwise, and it is not trespass for one co-tenant to use the common property in the natural and necessary course of use or enjoyment, as, for

instance, by working a coal-mine or cutting the grass of a field and making it into hay. Hence the opening of the windows was no trespass and gave no cause of action as long as the land remained joint, and therefore no easement could be acquired against him, Reference is made to the English case of **Sturges v. Bridgman (1879) 11 Ch. D. 852, 264**, where it is held that user which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement, and this is applicable both to affirmative and negative easements, There is, however, a case of this Court directly in point, and that is **Rajubhai v. Lalbhai (1925) 28 Bom. L.R. 1000** in which it was held that an easement of light and air through windows opened in a joint wall cannot be acquired by prescription. Reference is also made to **Lachimeswar Singh v. Manowar Hossein (1891) I.L.R. 19 Cal. 253, 263** as to the rights of joint tenants.

27. This position was reiterated in **M Nageswara Rao Versus S Ramachandra Rao 1973 AIR (AP) 86** wherein it was observed:

“[17] Where the property belongs jointly to two persons, there cannot be dominant and servant ownership in respect of that property. Also where there is a fusion of the dominant and servant ownership in the same person, an easement, if any, gets extinguished. This principle is recognised in various decisions.

[18] *In Halbury's Laws of England, 12th Edition, page 528, paragraph 1144, the law has been stated thus :*

” It is an essential characteristic of every easement that there is both a servant and a dominant tenement and the owner of the servant tenement must be different persons. A man cannot have an easement over his own land because all acts, which he does upon his own land are acts done in respect of his rights as the owner of the land and the law does not allow the co-existence of an easement over land with the possession of the land itself.”

[19] *In view of the provisions of the Act, the right should be only as an easement for the required period. An easement, as already defined, is a right, which the owner or occupier of the land possesses to do and to*

continue to do something in or upon or in respect of certain other land not his own. The words " not his own " clearly bring out that the property in or upon or in respect of which the easement is claimed should not belong to the dominant owner. The said principle has been recognised in various English and Indian decisions.

[20] Lord Shaw of Dunfermline also stated the law in the same terms as follows in **Attorney General of Southern Nigeria v. John Holt and Co., 1915 AC 599 at pp. 617 and 618.**

" But in their Lordship's opinion, the second contention of the Crown is correct. It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands. There was much in the nature of affairs and the legal situation to induce this opinion and it is not to be wondered that not only they, but all parties on the island, appear to have considered these operations which were clearly beneficial to the general interest in no way to be of the nature of wilful appropriation or of trespass,

but merely of making good and proper use of their rights as owners of property abutting upon the sea. An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance, the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted is the right over the property of that other. In the present case, this was not so."

In the Full Bench decision of the Madras High Court in **Subba Rao v. Lakshmana Rao, AIR 1926 Mad 728 (FB)** the same proposition has been reiterated. It was held therein thus:-

"The mere putting forward of a claim of ownership in legal proceedings is not conclusive against a right of easement, but if the acts done by the person claiming easement in respect of the property during the statutory period are only referable to a purported character of owner they cannot validate a subsequent

claim to an easement in respect of the property”.

Their Lordships say that

“We agree with the conclusion of **Shearaman, J. In Lyell v. Lord Hothfield, (1914) 3 KB 911** that acts done during the statutory period which are only referable to a purported character of an owner cannot validate a subsequent claim to an easement.”

[21] In his Full Bench decision, the Bombay High Court in **Raychand v. Maneklal AIR 1946 Bom 266(FB)** also held that the person claiming the right of an easement must have been conscious that the property belongs to another. The claim to property as owner during the prescriptive period precluded him from claiming easement over it.

[22] Their Lordships of the Supreme Court, while dealing with the case of a tenement acquiring a right to an easement over the leased land considered this position in **Chapsibhai v. Purushottam**. While quoting with approval the Full Bench

decision of the Bombay High Court their Lordships held as follows :

"Therefore, if the owner of the dominant tenement has, during the period of prescription, exercised rights on the footing that he is the owner but which he later on claims as an easement over a servient tenement, then, his exercise of those rights is not exercised as an easement and he must fail in a claim for an easement. As already stated, a party to a suit can plead inconsistent pleas in the alternative such as the right of ownership and a right of a easement. But, where he has pleaded ownership and has failed, he cannot subsequently turn around and claim that right as an easement by prescription. To prove the latter, it is necessary to establish that it was exercised on someone else's property and not as an incident of his own ownership of that property. For that purpose, his consciousness that he was exercising that right on the property treating it as someone else's

property is a necessary ingredient in the proof of the establishment of that right as an easement.”

[23] *In view of those clear authorities, it must be held that the person claiming an easement in or over a property should establish that the property, over which he is exercised the right, is someone else's property and not his own. If it happens to be a joint property, as in this case, a joint wall, he cannot acquire an easement in or over that property or in respect of it or through it.”*

28. *It was laid down by the Kerala High Court in **Gopalakrishna Panicker Versus Thirunakkara Devaswom AIR 1959 Kerala 202** that in the absence of any right of easement, any damage to the house of the plaintiff is not actionable in law. It was observed:-*

10. *We see a very great force in this contention of Mr Sivasankara Panicker. In fact, the trial Court has stated that an extreme contention was advanced on behalf of the defendants' counsel that a person putting up a wall at the extremity of his compound, does so at his own risk and that he cannot be heard to complain of any*

damage if the neighbour digs in his own land in the absence of an easement of support acquired by prescription or grant.

11. Again the learned Judge has stated that the question, which was canvassed at the bar namely, that the natural right of lateral support extends only to land in its unburdened state and not to any artificial pressure put upon it, is only of academic interest in that case.

12. No doubt, the position contended for may be very extreme, but it does get some support in law and we get useful guidance from the provisions of the Indian Easements Act. Section 7 of the Act gives an exclusive right to every owner of immovable property to enjoy and dispose of the same etc. The said section also gives a right to every owner of immovable property to enjoy without disturbance by another natural advantages arising from its situation. In this case, the finding of the learned Judge on the evidence is that the defendant's land is about 10 feet lower than that of the plaintiff.

13. Illustration (e) to Sec. 7 and the Explanation is as follows :

"The right of every owner of the land, that such land in its natural condition shall have the support naturally rendered by the subjacent and adjacent soil of another person.

EXPLANATION. : Land is in its natural condition when it is not excavated and not subjected to artificial pressure, and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.

It is clear that the plaintiffs land in its natural condition will have the support naturally rendered by the defendants' land. The explanation makes it also clear that land, to have this right, should not have been subject to artificial pressure. There is evidence in this case that the compound wall, which is now stated to be affected, was only constructed about 10 years prior to the suit, that is, about 1114. If so, we will have to see whether the plaintiff has got any further rights.

There again we have to look up to Sec. 15 of 'the Act which provides that lands,

subject to artificial pressure, receiving support from another person's land, should have had that benefit without interruption for 20 years and that 20 years must expire 2 years before the institution of the suit. It is not certainly the plaintiff's case that he has acquired any such right. Therefore, in view of these provisions, the learned Judge was not right in disposing of the legal contention in the summary way indicated above.

14. In view of the fact that the plaintiff, even on his own case, has not been able to satisfy the provisions of sections 7 and 15 of the Easements Act, the plaintiff's suit must fail. In this view, we think it unnecessary to consider the other contentions of the appellant.

29. Similarly, Orissa High Court held in **Bauribandhu Patra And Another Versus Sagar Malla 1966 Orissa 86** that damage caused to the house is not actionable in the absence of any right of easement. It was observed:-

2.... The submission made by the learned counsel appearing for the defendants is that the court below in relying on the quotation from the Law of Torts by R.L. Ananda and Sastri has erred in not

appreciating that the law as stated therein relates to a condition where the land is in its natural state and is not encumbered or burdened by any structure or building. Therefore, in a case, as the one here where the land of the plaintiff was burdened by the structures, the rule of law as laid down in those quotations will have no application. In my opinion, this submission made by the learned counsel for the defendants is both on principle and authority correct. In the present case both the Courts below have proceeded on the footing that the plaintiff has not acquired any right of easement or prescription in respect of the lateral support from the lands of the defendants, nor has he founded his claim on the basis of any easement or prescription. As such the action of the plaintiff can at best be supported only on the ground of the natural right of property. In that regard, it has been rightly stated by Brindaban Katiar in his *Law of Easement and Licenses* that,

"A man in the exercise of his rights to property can build even to the very extremity of his land and his

neighbour has no cause for complaint. If his neighbour also in exercise of his natural right of property digs to the very extremity of his land and his building slips into the pit, he has only to thank himself."

But the difficulty in the present case for the plaintiff is that his land, as it now stands, is not in its natural state, but is burdened by the boundary wall and also by the building. Therefore, the natural right of property as enunciated above in the aforesaid passage of the Law of Easement and License by Brindaban Katiar can have no application to his case. The plaintiff can therefore succeed only if he establishes that the additional burden that has been thrown on his land as a result of the construction of the building and the boundary wall thereon has been in existence for more than 20 years and as a result, thereof he has acquired by now a right of easement or a prescriptive right. Unfortunately, that is not the case either set up or pleaded by him in the plaint. Therefore on the facts of this case, the claim made in the plaint cannot succeed. The leading authority on the

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subject is the case of **Dalton v. Henry Angus and Co; (1881) 6 AC 740**. This has been uniformly followed by the courts in India as is evident from the decisions in **Gopalkrishna Panicker v. Thirunakkara Devaswom, AIR 1959 Kerala 202, Rasiklal v. Savai Lal, (s) AIR 1955 Bom 285, Ramgopal v. Gopikrishna AIR 1957 M.P. 227; Abdul Raheman v. Mulchand AIR 1928 Nag 91 (1), and In re Athi Ayyar, AIR 1921 Mad 322**. Therefore, in my opinion, the court below in taking the view that it is a case, which can be founded on tort for nuisance has erred in law.

30. Calcutta High Court also considered the question **Panchanan Mondal And Another versus Sm. Sulata Roy Mondal AIR 1980 Calcutta 325** and held that the mere fact that there are buildings upon the land does not prevent their adjacent owner to withdraw the right of support in the absence of any right of easement. It was observed:-

4. It has been contended on behalf of the appellants that the pleader commissioner's report and deposition proved the plaintiffs' version. Reference has been made to p. 273 of **Gale on Easements, 13th Edn.**, to show that

there is no natural right to the support of a building per se. Support to that which is artificially imposed upon land cannot exist ex jure naturae because the thing supported does not itself so exist. If, however, land has been affected by the withdrawal of support and a building on it has also been affected and it is shown that the withdrawal of support would have affected the land in its natural state, in other words, that the land has been deprived of its natural right of support, damages may be recovered for the consequent injury to the building. Halsbury's Laws of England, 3rd Edn., Vol. 12, p. 606, has been referred to show that the owner of land has no natural right to support buildings or of the additional weight which the building cause. Support to that which is artificially imposed upon land cannot exist ex jure naturae, because the thing supported does not itself so exist. The mere fact that there are buildings upon the land does not preclude an owner from his right against a neighbour of the subjacent owner, who acts in such a manner as to deprive the land of support, so long as

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the presence of the buildings does not materially affect the question, or their additional weight did not cause the subsidence, which followed the withdrawal of support. Section 7(b) of the Indian Easements Act speaks of the right of every owner of immovable property to enjoy without disturbance by another the natural advantages arising from its situation. Illustration

(e) thereof says that the owner of land has the right that such land, in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person. The principles of that Section apply to West Bengal. The evidence given by the P.Ws. supports the plaintiffs' version of damage to the plaintiffs' land, wall and building by the defendant's action.

*5. The learned Advocate appearing on behalf of the respondent has referred to the case of **Ram Gopal v. Gopi Krishna, AIR 1957 Madh Pra 227**, where it has been stated that there is a distinction between a natural right of support to one's land in an unburdened and natural state from the adjacent and*

subjacent land of the neighbouring owners and the right of support for buildings or structures standing on the land. While the former right is a natural incident of one's ownership of the land, the right for the support building or structure on the land is an easement and can be claimed only as an easement. If the owner of a building has not acquired such a right of easement of lateral support for his building from his neighbour's land, the neighbour would be within his rights in carrying on the excavation on his soil even if by so doing damage is caused to the building of his neighbour, provided, of course, there is no negligence in the excavation operations.

6. Both sides referred to the leading case of **Dalton v. Angus in (1881) 6 AC 740**. A question arose in that case whether a building could acquire a right to lateral support from adjacent land by 20 years' uninterrupted enjoyment. It has been held that such a right could be acquired by prescription. A right to receive lateral support may be acquired by building by 20 years

user openly, continuously and without interruption.

7. In the case of **Bengal Provincial Ry. Co. v. Rajani Kanta AIR 1936 Cal 564**, the allegation was that the defendant company had burrow pits on their own land for a long time and the plaintiffs had their hut near those pits. In 1927 or 1928 they replaced their hut by a masonry building, which was raised close to the pits. In February 1930, the defendant company deepened the pit. But at that time no damage was caused to the plaintiffs' building. After the rains had set in July 1930, cracks appeared in the building. So damages were asked for from the railway company on account of damage caused to the plaintiffs' building. It has been stated that the natural right of support from a neighbour's land is available only in respect of land in an unburdened and natural state. An owner has no right for the support his building or of his land burdened with the additional weight of his building unless such a right has been acquired as an easement. If there is no easement to have such lateral

support, the neighbour is within his rights to make excavation provided that he does not act negligently. If there is no negligence, the plaintiff is not entitled to any damages caused to his building.

8. In this case, the facts are almost identical because the plaintiffs have alleged that after the defendant deepened the ditch, no immediate damage was caused to their land, wall or building.

Only after the break of monsoon, i.e., in the middle of Sravan 1373 B.S., a portion of the plaintiffs' land and the western portion of their wall were engulfed by the tank. There is no finding by the courts below that the defendant's act was negligent. So on that score alone, the plaintiffs' are liable to be non-suited.

9. There is yet another defect. In the case of **Bengal Provincial Ry. Co. v. Rajani Kanta (supra)**, there was no evidence that the plaintiffs' land would have subsided even if it had been in a natural state and unburdened with their building by reason of the excavation made by the defendant company. This principle was discussed

in the case of *Ramgopal v. Gopikrishna* (supra), cited on behalf of the respondent. This case was also discussed by Gajendragadkar, J., in the case of ***Rashiklal v. Savailal*** reported in AIR 1955 Bom 285. It has been stated in that case that the effect of Illustration (e) of Sec. 7(b) of the Easements Act is that the right, which is referred to in that Section, is applicable only to the land in its unburdened and natural state.

It is not applicable to the structure built on the land unless there is a case of prescription. It may be stated that though that Act does not apply to Bengal, the principles of the Act nevertheless apply.

10. Applying the principle to the facts of the case it appears that the plaintiffs made out no case that they acquired any easement right to support their building from the defendant's land. There is no evidence on the side of the plaintiffs to show that their land would have subsided even if it had been in its natural state and unburdened with their building, by reason of the excavations

made by the defendant. Due to this defect in the plaint, the prayer for a mandatory injunction must be dismissed, and I find accordingly.

31. Therefore, the preponderance of judicial opinion is that the land in a burdened state does not enjoy a right of support in the absence of an easement of support. The plaintiff has to allege and prove that the building had acquired a right of support by way of easement in the absence of which no action can be taken for the violation of the right of easement. Hence, the learned trial Court erred in granting an injunction on the premise that the construction of the defendants would be threatened which amount to sufficient prejudice to the plaintiff.

32. It was submitted that the right or privacy of the plaintiff would be infringed by the construction of the defendants. It was laid down by Hon'ble Supreme Court in **Anguri Devi Versus Jiwan Dass AIR 1988 S.C. 2024** that a person cannot be restrained from opening doors and windows towards the house of the other in the absence of any customary right of privacy. It was observed:

7. As far as the question of opening new windows is concerned, it is open

to the defendants to use their property in any manner permitted by law; hence they cannot be restrained from opening new windows, as no customary right of privacy appears to have been pleaded or proved. This position is not disputed by the plaintiffs. It is, however, equally clear that, if the defendants open any new windows, the plaintiffs are fully entitled to block the same by raising the height of their walls and the defendants are not entitled to break or damage the said walls or any portion thereof so as to remove the obstruction to their new windows.

33. *In the present case, no custom recognizing the right of privacy was pleaded or proved. Therefore, the plaintiff cannot restrain the defendants from raising construction on the ground of violation of the right to privacy.*

34. *The plaintiff has not specified the khasra number over which the construction was being raised. He filed the suit regarding the land measuring 16-11-17 bighas. The defendants pleaded that the construction was being raised on khasra no. 284. In the absence of a specific pleading regarding the khasra number over which the construction was being raised by the*

defendants, the plea of the defendants has to be accepted as correct. It was laid down by the Hon'ble High Court in **Ajay Kumara vs. Ishwar Dutt 2021(3) Shimla Law Cases 1714** that an act of co-sharer in exclusive possession raising construction will not constitute prejudice to other co-sharers. It was observed:

“Plaintiff has not even shown as to how in the facts of the case, the raising of construction by the defendants over 6 Biswas of land falling under Khatauni Nos.37-39 which are in their possession, will cause prejudice to him or would be detrimental to his interest.”

35. Therefore, the learned trial Court had erred in directing the parties to maintain the status quo.”

8. A perusal of the judgment passed by the learned Appellate Court demonstrates that the findings that have been returned by the learned Appellate Court are not only factually correct, but are also in-consonance with the law laid down on the subject by this Court consistently.

9. As it is well settled by this Court that a co-sharer cannot seek an injunction against a co-sharer ordinarily, the

learned Trial Court in fact erred in ordering status-quo and learned Appellate Court correctly set aside the said order passed by the Learned Trial Court. This Court in *Ashok Kapoor Versus Murthu Devi* (supra) has specifically laid down the principles when an injunction can be granted in such like cases and the principles so enunciated by this Court are again reiterated by this Court which read as under:-

“46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

(i) A co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such an act, which is detrimental to his interest.

(v) Before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury, which materially would affect his position or his enjoyment, or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and the exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.”

10. In the suit and application filed by the plaintiff, as these ingredients were not met, therefore, the learned Appellate Court rightly set aside the order passed by the

learned Trial Court, in terms whereof, the parties were directed to maintain status-quo.

11. Accordingly, as this Court does not find any infirmity in the judgment passed by the learned Appellate Court, this petition is dismissed. However, it is clarified that the findings returned by this Court in this case are only for the adjudication of this petition and the learned Trial Court shall proceed with the Civil Suit uninfluenced by any observation made by this Court in this judgment. Interim order, if any, stands vacated. Pending miscellaneous application(s), if any, also stand disposed of.

(Ajay Mohan Goel)
Judge

December 29, 2025
(Rishi)