

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

THE HON'BLE JUSTICE HARISH TANDON

&

THE HON'BLE JUSTICE PRASENJIT BISWAS

**F.M.A. 433 of 2023
IA CAN 1 of 2023
IA CAN 2 of 2023**

**Sri Tarak Nath Roy & Anr.
Vs.
Smt. Kusum Roy & Ors.**

Appearance:

For the Appellants :	Mr. Kushal Chatterjee, Adv. Mr. Debrup Chaudhury, Adv. Mr. Rishav Manna, Adv. Mr. Oishik Chatterjee, Adv.
For the Respondents :	Mr. Ayan Banerjee, Adv. Ms. Debasree Dhamali, Adv. Mr. Suman Banerjee, Adv.

Judgment On : **14.07.2023**

PRASENJIT BISWAS, J.:

The Appellants/Plaintiffs claim to be co-owners filed a suit for declaration, partition and permanent injunction in respect of the suit

property before the trial court coupled with a petition praying for temporary injunction against the defendants no(s). 1 to 6.

The said injunction application has been rejected by the learned trial court on contest by passing the impugned order dated 07.01.2023. The said impugned order is challenged by the appellants by preferring this instant appeal.

It is the contention of the appellants that the suit property still remains joint and undivided and no partition ever took place between the co-sharers. Taking advantage of no demarcation of property amongst the co-sharers the defendants are trying to construct the boundary wall by making encroachment into the plaintiffs' property. So, the appellants under compelling circumstances have filed application praying for injunction against the defendants no(s). 1 to 6 in that suit pending before the learned trial court.

The defendants denied the fact of encroachment of the plaintiffs' property and construction of boundary wall. It is the contention of the defendants that the appellants/plaintiffs have new three storied residential building in L.R. Plot No. 640/952 and these respondents/defendants have made new construction in the northern side of the said plot after getting the plan sanctioned by the concerned Gram Panchayat. It is further stated that the dwelling houses of both the parties are well demarcated. It is further stated by the defendants that both the parties jointly have an old dwelling house in the L.R. Plot No. 640/952 and some portion of Plot No. 640.

Learned Advocates for the parties were heard in the matter.

Admittedly there is no written partition deed. The case of the appellants is that the suit property was never partitioned by meets and bounds but the case of the defendants is that the residential units of the plaintiffs and defendants are well demarcated and it is being enjoyed by them separately. Of course, in order to settle the controversy, evidence will be required and at this stage we have to proceed on the assumption that the appellants and the respondents are co-sharers. The normal rule is that a co-owner in possession of joint property has no right to change the user of that property without the consent of other co-owners.

When a co-owner is in exclusive possession of joint property or part of joint property in his exclusive possession would have to be certainly guarded, subject, of course to restrictions that the co-owner does not carry out any improvements of permanent measure and does not change the nature of the property so as to put the other party at disadvantage at the time of partition.

Our attention is drawn by the learned counsel appearing for the respondents that the appellants have already made construction of three storied residential unit at L.R. Plot No.640/952 and these respondents have also made construction in the year 2022. The said submission on behalf of the respondents is denied by the plaintiffs/appellants by submitting that the house constructed on the southern portion of the plot does not have any boundary wall and it was all along accessible to the other co-sharers. It is strenuously submitted on behalf of the appellants that the respondents have erected the boundary wall during the pendency of the suit denying the

access to the property which is still now joint and undivided. The petitioner submits that if such a construction was allowed to continue in the undivided property then serious prejudice will be caused to the petitioner.

After considering the rival submissions advanced by both the parties this court feel a clear picture is required to be placed before this court and accordingly a special officer was appointed by this court on previous occasion who inspected the properties in question. After inspecting the scheduled property the special officer submitted his report before this court.

It appears from the report along with photographs submitted by the special officer that these appellants/plaintiffs have three storied building in the southern portion of L.R. Plot No. 640/952 which is partly covered by an old wall from the front side entry. It further appears from the said reports and photographs that on the same plot there is one recent origin brick boundary wall of the defendants/respondents adjacent to the house of the appellants and the most portion of the said boundary wall is without plaster. We have gone through the report submitted by the special officer.

At the midst of hearing learned counsel appearing for the respondents submitted that both the boundary walls as erected by the parties may be demolished. Per contra learned counsel appearing for the appellants submitted that there is a gap in the boundary wall and it is accessible to the co-sharers/co-owners and they will keep it open for easy ingress and egress of the other co-sharers/co-owners of the property.

After considering the report submitted by the special officer we are of the considered opinion that both the parties have carried out construction over the undivided portion of land although the property in dispute is joint and never partitioned by meets and bounds. If several owners are in possession of an undivided property none of them has a right to his exclusive use of any portion of the property of his will and in his own favour according to his own choice.

In view of discussion made above the respondents are hereby directed to demolish the boundary wall as constructed by them at their own cost within 30 days from the date of this order.

Appellants/plaintiffs are directed that they should not put any gate/obstruction in the boundary wall as constructed by them so that it can be easily accessible to the other co-sharers/co-owners. They should not claim any equitable right over the said boundary wall until the learned trial court comes to a logical conclusion of the suit pending before it.

The observations made in this order are only for the purpose of disposal of this appeal. The learned court below will proceed on the merits of the case upon recording evidence, if necessary. Learned trial court is further directed to dispose of the suit preferably within six months from the date of communication of this order without giving unnecessary adjournments to either of the parties.

Thus, the instant appeal is hereby disposed of. Connected applications are also disposed of accordingly.

There will be, however, no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)