ORIGINAL CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Bayley.

1885
February 20.

COVERJI LUDDHA AND KESSERBA'I HIS WIFE (ORIGINAL DEFENDANTS), APPELLANTS, *v.* MORA'RJI PUNJA' (ORIGINAL PLAINTIFF), RESPONDENT.*

Party wall—Liability of adjoining owners—Agreement—Surveyor's certificate, a condition precedent to plaintiff's right to sue—Appeal—Civil Procedure Code (XIV of 1882), Sec. 2—Meaning of "decree"—Meaning of "order directing accounts to be taken".

Under separate agreements made by them respectively with Government the plaintiff and defendant held adjoining plots of land for building. The agreements contained the same terms and stipulations, among which were the following :—"(*a*) The buildings to be continuous, with party walls common to both adjoining houses. (*b*) All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on both parties." The plaintiff employed a contractor to erect a house upon his plot of land. The house was completed in 1870, the north wall of which was built as a party wall in pursuance of the condition contained in the agreement with Government. Disputes subsequently arose between the plaintiff and his contractor, which were not settled until the 26th August, 1878, on which date the plaintiff paid the contractor a sum of Rs. 20,515-4-11, which included the cost of the party wall. After the plaintiff's house had been completed, the defendant built his house upon the adjoining land, and in so doing he used a large portion of the party wall as the southern wall of his house. He paid the plaintiff half the cost of the portion so used by him. The rear portion of the said wall was not used by the defendant, as his house did not extend so far to the rear as the house of the plaintiff. The plaintiff demanded payment of half the cost of that part of the wall not used by the defendants, but the defendants refused to pay. The plaintiff then claimed that part of the wall as his own property, and proceeded to open windows in it. The defendants objected. The plaintiff subsequently filed the present suit, claiming from the defendants payment of half the cost of the said portion of the wall not used by the defendants, and, in the event of such payment not being awarded, he prayed for a declaration that he was the sole owner of the said portion of the wall, and for an injunction restraining the defendants from disturbing him in the sole enjoyment thereof. The brother (Khatáv Luddha) of the first defendant was originally made the second defendant of the suit. He, however, disclaimed all interest in the premises ; and it appeared that in 1876 the first defendant had sold the property to him (Khatáv Luddha), who in 1879 sold it to Kesserbái, the first defendant's wife. Kesserbái accordingly was made the second defendant in the place of Khatáv Luddha.

Both the defendants pleaded limitation, and denied their liability to pay any part of the cost of that part of the wall which they did not use. The first defendant further alleged that he had paid the whole cost of the foundation and

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other parts of the said wall, and claimed to set off this payment against the claim of the plaintiff. At the original hearing, Scott, J., held, (1) that the part of the wall in dispute although not used by the defendants was a party wall, having regard to the terms of the agreement under which the said wall was erected; (2) that Kesserbái was liable, equally with the first defendant, to pay for this part of the wall, having purchased the property subject to the terms of the original agreement of which she presumably had notice; (3) that the suit was not barred, but that there was no right of action for the cost of the party wall independently of the award of the Government surveyor, in whose decision lay all disputes as to such cost; and that until his decision was given there was no complete cause of action. Scott, J., accordingly on 11th December, 1882, decreed that the defendants were severally liable to pay the half of whatever sum the Government surveyor might certify to be due for the cost of the disputed part of the said wall, and that the defendants were entitled to set off, in the calculation of what was due from them, the cost of any work or materials, which the Government surveyor might find, had been contributed by the first defendant. The case was thereupon adjourned in order that the certificate of the Government surveyor might be obtained.

The Government surveyor subsequently gave his certificate as to the cost of the unused portion of the said wall, but stated that on the evidence before him he was unable to decide as to the ownership of the foundations, &c., of the wall. The case came on again before Scott, J., who decided to take evidence on the points left undetermined by the Government surveyor. Witnesses were, accordingly, examined, and on 11th December, 1883, the Court disallowed the defendant's claim of set off, and gave judgment for the plaintiff for half the sum certified by the Government surveyor as the cost of the disputed part of the wall.

The defendants appealed.

Held that, having regard to the terms of the agreements under which the plaintiff and defendants respectively held their property, the Court was not competent to determine the question of the defendant's set off or the other points raised by the pleadings. These were matters to be decided by the Government surveyor, whose certificate was a condition precedent to the plaintiff's right to sue, and upon which the Court might give judgment.

Held, also, that the decree of the 11th December, 1882, was not a decree or an "order directing accounts to be taken" within the meaning of section 2 of the Civil Procedure Code (XIV of 1882), and that the defendants, although they had not filed an appeal against it within the period allowed by the Limitation Act, were entitled to appeal against it when appealing against the decree of 11th December 1883.

IN this suit the plaintiff sought to recover from the defendants, or one of them,—

(1) the sum of Rs. 2,324-6-1, with interest, being the amount of half the cost of so much of the party wall between the house of the plaintiff and the defendants' house situated in Hornby Row as had not been paid for by the defendants, or either of them;

(2) in the alternative the plaint prayed for a declaration of the sole right of the plaintiff to the said portion of the party wall in the event of the defendants not being ordered to pay the said half cost;

(3) and for an injunction restraining the defendants from obstructing the plaintiff in his use and enjoyment of such portion of the party wall.

The plaint stated that by an agreement dated the 29th August, 1868, made between the Secretary of State for India and one *Dámodhar Hirji*, the said Dámodhar Hirji became a lessee, for the term of 999 years, of certain premises in Hornby Row, known as Lot 3, on the terms and conditions in the said agreement mentioned, and *(inter alia)* on the conditions that the said premises should be built upon and in such a manner that the said building to be erected should be continuous with the houses to be erected by other lessees from Government on the plots adjoining the said premises, and with party walls common to the adjoining houses.

On the 25th July, 1868, the northern portion of the said premises was conveyed and assigned by the said Dámodhar Hirji to the plaintiff.

In 1869 the plaintiff employed a contractor to erect certain buildings on the said land. The erection of the said buildings was completed in 1870, and in the course of erecting them the plaintiff caused the north wall of the building to be erected as a party wall in pursuance of the conditions in the above-mentioned lease from Government.

Disputes subsequently arose between the plaintiff and the contractor with reference to the payment of the latter. The contractor brought a suit (No. 930 of 1870) against the plaintiff, which on the 20th October, 1876, was referred to arbitration. The arbitrators made their award on the 16th February, 1878, whereby they awarded the contractor a sum of Rs. 20,515-4-11. Judgment was passed, in terms of the said award, on the 26th July 1878.

On the 26th August 1878, the plaintiff paid the amount of the said decree, which included the cost of the said party wall.

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At the time the plaintiff erected the said buildings the first defendant was lessee of the plot (Lot No. 2) immediately to the north of the plaintiff's premises under an agreement of lease from Government containing the same stipulations and conditions as the above-mentioned agreement of lease between the Secretary of State and Dámodhar Hirji.

After the plaintiff had erected his buildings as above stated, the first defendant built upon his (the defendant's) plot of ground, and in so doing he used a large portion of the party wall as the southern wall of his house. He paid the plaintiff half the cost *of the portion so used.* The rear portion of the said wall (81 feet 9 inches in length) was not used by the first defendant, as his house did not extend to the rear so far as the plaintiff's house.

The plaintiff demanded from the defendants payment of half the cost of the unused portion of the wall, but the defendants refused to pay. The plaintiff claimed to be entitled either to recover from the defendants half the said cost, or to use that part of the wall as his own property. The defendants contended that the plaintiff was not entitled to open windows in that portion of the wall.

The plaintiff prayed for a declaration that he was entitled to be paid by the defendants, or one of them, the sum of Rs. 2,324-6-1, being the half cost of the said unused part of the wall, and for an order for the payment of that sum, with interest from the date on which he had paid the cost of building to the contractor. He also prayed that, in the event of such payment not being awarded, it might be declared that he was the sole owner of the said portion of the wall, and that an injunction should issue restraining the defendants from obstructing him in opening windows in the wall, or disturbing him in the sole enjoyment thereof.

In the suit as originally filed, the brother (Khatáv Luddha) of the first defendant was the second defendant. He, however, disclaimed all interest in the premises, and alleged that he had conveyed his interest to Kesserbái, the wife of the first defendant. She was, therefore, made a defendant in his place.

The first and second defendants by their written statement pleaded limitation, and denied their liability to pay any part of the cost of that part of the wall which they did not use. The first defendant further alleged that the whole cost of the foundation and other parts of the said wall, amounting to Rs. 3,799-12, were paid by him alone, and he claimed to set off the said sum with interest against the claim of the plaintiff.

The above-mentioned agreement of the 29th August, 1868, between the Secretary of State and Dámodhar Hirji contained the terms on which the Government let the land in question. It set forth the description of the building to be erected by the lessee on the land, the minimum sum to be expended on such building, &c., &c. The following are the clauses material to this report :—

(1) "The building to be continuous with party walls common to both adjoining houses. The party walls to be carried above the roofing, and furnished with a coping projecting over each face as per marginal sketch."

(7) "All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on both parties. Toothing to be left in all cases where the adjoining building is not commenced, to admit of the work being properly bounded."

Latham (Advocate General) and *Farran* for the plaintiff.—The whole wall is a party wall, and the defendants are liable for half the cost. As to the plea of limitation, the plaintiff only settled his dispute with the contractor as to the cost of the wall on the 26th August, 1878. It was not until long after that date that the defendants denied our right to payment. It was then our cause of action arose. The liability runs with the land, and binds Kesserbái, who subsequently obtained an interest in the land.

Lang and *Jardine* for the defendants.—Clause 7 of the agreement reserves all question of cost and maintenance of the wall for the Government surveyor. The Court can only declare that the plaintiff is entitled to such sum as may be certified by him.

SCOTT, J.—"The defendant Coverji was lessee and the plaintiff was assignee of adjoining building plots under agreements made with the Secretary of State for India as lessor.

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"The terms of the two agreements and of the specification, which was a part of the agreement, were the same, and, as far as they bear upon the present question, ran as follows :—

"'The buildings to be continuous with party walls common to both adjoining houses.

"'All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on the parties.'

"The plaintiff and Coverji erected their respective buildings, and one of the walls was a party wall. The contractor was the same for the two buildings. Coverji's building, in spite of the term in the specification above quoted, was not continuous along the whole of the party wall. Coverji paid in 1875 (the building having been completed in 1870) for the party wall *so far as he used it*. The present suit concerns the remainder of the wall, for which Coverji refuses to pay on four grounds, *viz.*, (1) that it is not a party wall; (2) that he contributed to the erection of the whole, and is entitled to a set off for the work and materials; (3) that the property no longer belongs to him; (4) that all claim is barred by lapse of time.

"Since the commencement of this suit two other actions, arising under similar circumstances and raising similar issues, have been heard, and in both judgment has been given by Chief Justice Sargent and Mr. Justice West respectively. I shall follow these decisions so far as they are applicable, and it follows from them that this suit is not barred, but that there is no right of action concerning the cost of the party wall independently of the valuation and award of the Government surveyor, in whose decision lie all disputes concerning such cost, and, until that decision is given, no complete cause of action can arise.

"For this I would cite, in addition to the cases quoted by Mr. Justice West, the case of *Scott* v. *The Corporation of Liverpool*[1], which lays down that 'when a contract provides for the determination of the contractor's claims by a particular person, everything depends on his decision, and until he has spoken, no right arises which can be enforced either in law or equity.'

[1] 28 L. J., Eq., 230.

"It only remains for me to decide, first, whether the portion of the wall in dispute comes within the term "party wall," and, secondly, whether both of the defendants are liable to pay what the Government surveyor may decide is due, or which of them. I am of opinion that the wall in question is a party wall. The terms of the agreement were that 'the buildings were to be continuous, with party walls to be common to both houses'. Although Coverji stopped short, and did not make his building continuous, it was contemplated in the words and meaning of the contract, that he should do so. He always can do so, and I think he is liable as if he had done so. He did not repudiate his liablity on this ground when the plaintiff demanded payment; and the appeal to the Government engineer made by Coverji's brother from Coverji's house to prevent the plaintiff from using the wall as his own, is also somewhat in favor of the theory that Coverji had viewed the wall as a party wall. At any rate, a fair interpretation of the agreement, under which the adjoining houses were built, makes this a party wall.

"To decide the respective liabilities of the defendants I must refer again to the facts of the case:—Coverji was adjoining owner at the time of the building of the wall in 1870, and remained owner up to 1875. He was liable, as such adjoining owner, to pay for one-half of the cost of the party wall. He has admitted his liability by paying in 1875 for such portion of the wall as he acknowledged to be a party wall. He could not divest himself of this liability by mere sale or assignment of the property. He remains liable on the original agreement, although a complete right of action against him does not accrue until the Government surveyor has decided the dispute as to costs.

"I am of opinion that Kesserbái is also liable to pay for this disputed portion of the party wall. Perhaps the obligation might be held to be of the nature of a covenant which runs with the land, but it is not necessary for me to decide that question. I hold Kesserbái liable on more special grounds. In 1876 Coverji's property was sold to his brother, who in 1879 again sold it to Kesserbái, Coverji's wife. Kesserbái's purchase was a

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purchase of the property and all rights under the original agreement, of which and of its terms and conditions she must be presumed to have had notice, one of those conditions rendering the adjoining owner, whoever he might be, liable to pay what the Government surveyor decided to be the cost of the party wall.

"Kesserbái, therefore, is liable as adjoining owner with notice of this obligation. The case of *Western* v. *Macdermott* is in point. There the facts were that "each of the original owners of houses in a row entered into covenants with the original owner of all the land on which they stood, as to what should be done in the garden attached to the house," and it was held by the Court of Appeal that "a purchaser of one of the houses with notice of the covenants concerning the gardens would be bound by them in equity." Both defendants are, therefore, severally liable,—the one on his original contract, the other on the liability she assumed in taking over the property.

"The decree of the Court will be of a declaratory nature to the effect that the portion of the wall in dispute is a part of the party wall contemplated by the agreement of 26th August, 1867; that the defendants are severally liable to pay the half of whatever sum the Government surveyor may certify to be due for the cost of the portion of the party wall still in dispute; that the defendants are entitled to set off, in the calculation of what is due from them, the cost of any work or materials which the Government surveyor finds that the defendant Coverji has contributed in the erection of the party wall, or any portion of it.

"Costs will abide the decision of the surveyor. They will fall on the defendants if money is found to be due from them, and on the plaintiff if no sum found to be due from them."

After the above judgment was delivered the case was adjourned in order that the certificate of the Government surveyor might be obtained.

On the 5th April he furnished a certificate, stating that, in his opinion, "the share of cost to be borne by the lessees of Lot No. 2 (the defendants) for the superstructure of that portion of the

(1) L. R., 2 Ch. App., 72.

party wall under dispute between that house and the one standing in Lot No. 3 was Rs. 44." In his letter enclosing his certificate he stated that he was unable, on the evidence before him, to decide who was the owner of the foundation of the wall. In the course of correspondence, which subsequently passed between the defendants' solicitor and the Government surveyor, the latter stated that the above certificate was "only for that portion of the party wall at present used by the defendants." He was thereupon informed that the certificate required was one certifying the costs incurred in building the *unused* portion of the party wall. Ultimately on the 2nd May, 1883, a certificate was obtained from him, stating that, in his opinion, the cost of the whole of the *unused* portion of the party wall was Rs. 2,078. In a letter of the same date he repeated that he was unable, on the evidence before him, to come to any decision as to the ownership of the foundation.

The case came on again before Scott, J., and after discussion the Court decided to take evidence on the following points :—*viz.* (1) who built and paid for the foundation of the wall ; (2) who built and paid for the arcade and pillar. Subsequently on the 11th December, 1883, Scott, J., gave judgment, of which the following is the material portion :—

"I decide, therefore, that the foundations were not done as alleged by the defendant. At any rate, the burden of proof was upon them, and they have not proved their set-off to my satisfaction.

"I am of the same opinion as regards the arcade and pillar. I believe Rámji Sittobá, the contractor, who stated that he constructed the arcade and pillar, and that the plaintiff paid his share of them.

"As regards the small portion of the party wall which the plaintiff admits the defendants to have built, it appears, on the uncontradicted evidence of the plaintiff, to be a part of the used, and not the unused, wall, and is not within the present inquiry.

"The present suit is not barred by the lapse of time. The cause of action was not complete until 1878, when it was settled

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how much the plaintiff had to pay his contractor, and the plaint was filed in 1880.

"In the correspondence before the suit, no demand of interest was made; the plaintiff's first letter is dated 27th February, 1880, and contains no notice that interest will be claimed. The other letter, annexed to the plaint, is in date 1st April, 1880, and is equally silent on the point.

"The first claim in respect of interest is contained in the plaint which was filed on the 25th November, 1880.

"The plaintiff is entitled to judgment for half the cost of the unused portion of the party wall,—that is to say, half of the Rs. 2,078, the sum fixed by the Government engineer, with interest at nine per cent. from the 25th November, 1880, the date of the plaintiff's first demand of interest, and with costs."

The defendants appealed.

B. Tyabji and *Jardine* for the appellants.—We appeal from the two decrees passed in this suit, one dated the 11th December, 1882, and the other dated the 11th December, 1883. An objection will be taken, that we cannot now appeal against the first decree, not having done so within twenty days. We submit, that that decree was not an adjudication which decided the suit, and does not fall within the definition in section 2 of the Civil Procedure Code (XIV of 1882). As to the meaning of the term "party wall", see Webster's Dictionary; *Weston* v. *Arnold*(1); *Watson* v. *Gray*(2). Under the agreements with the Secretary of State it was necessary for the plaintiff to obtain a certificate from the Government surveyor before he could bring a suit. It was a condition precedent to his right to sue. This suit should have been at once dismissed, no certificate having been obtained, and the Court below was wrong in taking evidence upon any of the questions raised. If it be contended, that a certificate has now been procured, then we say that the certificate of the 5th April, which awarded only Rs. 44, is the proper certificate. Once having given that certificate the surveyor was *functus officio*. He had no power to give the second certificate of the 22nd May. The second certificate is incomplete, and the matter must go back to the surveyor. As to our claim of set-off, the

(1) L. R., 8 Ch. Ap., 1084. (2) 14 Ch. Div., 192.

Judge had no right to decide it. It must be decided by the Government surveyor.

Latham (Advocate General), *Inverarity* and *P. M. Methá* for the respondents.—The decree of the 11th December, 1882, was an order directing accounts to be taken, and was, therefore, a decree within the meaning of section 2 of the Civil Procedure Code (XIV of 1882). The appeal should have been brought within twenty days, and is now barred. They relied on *Weston* v. *Arnold*[1] and *Watson* v. *Gray*[2].

SARGENT, C. J.—The plaintiffs in this suit are the owners of a house situate in Hornby Row on land held by them under an agreement made with the Secretary of State for India. The defendants are the owners of an adjoining-house built on land which they also hold under an agreement with the Secretary of State, the terms and stipulations of which are precisely the same as those contained in the agreement made with the plaintiff. Under these agreements the plaintiff and defendants were required to erect buildings of a specified description within a certain prescribed time, and it was provided that the buildings to be erected should be "continuous, with party walls common to both adjoining houses".

Both parties accordingly proceeded to build the houses which now stand on the two plots of land mentioned in the agreements, and they employed the same contractor.

The wall in question in this suit is the wall to the north of the plaintiff's house. The defendants have made use of a portion of this wall as the southern wall of their house; but, as their house is not so deep as that of the plaintiff, a considerable portion of the wall, which separates the two properties, has not been required by the defendants in building their house, and has not been used by them for that purpose. In 1870 a dispute arose between the plaintiff and his contractor as to the amount to be paid for the work. That dispute was not finally settled until the month of August in the year 1878, when the plaintiff paid the contractor the sum found to be due.

(1) L. R., 8 Ch. Ap., 1084. (2) 14 Ch. Div., 192.

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Until 1880 the plaintiff and the defendants appear to have been on friendly terms, but in that year the plaintiff desired to make openings in the part of the wall which extended beyond the defendants' house. This was objected to by the defendants, and the dispute has resulted in this suit, in which the plaintiff claims either to be paid by the defendants half the cost of the portion of the wall unused by the defendants, or to be declared the owner of that part, with an injunction restraining the defendants from interfering with him in the enjoyment of it. The defendants deny their liability, and plead limitation, and the first defendant claims a set-off.

A decree was made on the 11th December, 1882, by which it was declared that the defendants were severally liable to pay the half of whatever sum the Government surveyor might certify to be due for the construction of the disputed portion of the wall, and that the defendants were entitled to set off, in the calculation of what was due from them, the cost of any work or materials the Government surveyor might find that the first defendant had contributed to the erection of the said wall, and the case was adjourned in order that the decision of the Government surveyor might be obtained.

On the 5th April, 1883, Mr. Adams, the Government surveyor, furnished a certificate to the plaintiff's solicitors which certified that, "in his opinion, the share of the cost to be borne by the defendants (after crediting to them the cost of Porebunder stone work in the front arcade) for the superstructure of that portion of the party wall under dispute was Rs. 44." In a letter accompanying the certificate he stated that, "with reference to the foundation, he was unable to decide who was the owner", and he requested that this question might be settled by a Court of law. A correspondence then took place between the plaintiff's solicitors and the Government surveyor, in which it appears that this certificate related to that part of the wall which was used by the defendants. He was thereupon informed that it was with reference to this *unused* portion of the wall that his certificate was required, and ultimately on the 2nd May he certified the cost of the whole of that part to be Rs. 2,078. In

forwarding this certificate he again stated that he was unable, from the documents produced to him by the plaintiff and the defendants, to come to any decision as to the ownership of the foundation.

The Government surveyor having thus declared his inability, upon the materials before him, to decide one of the matters referred to him by the decree of the 11th December, 1882, the case came again before the Court in December, 1883; and evidence was tendered by the defendents, and received upon the points left undecided by the Government surveyor. That evidence failed, in the opinion of the Court, to support the defendants' contention, and a decree was passed on the 11th December in favour of the plaintiff.

The first question raised before us is, whether the defendants are now entitled to appeal against the decree of the 11th December 1882. If that decree comes within the definition contained in the second section of the Civil Procedure Code (XIV of 1882), the defendants are precluded from appealing by the Limitation Act, which requires an appeal to be lodged within twenty days. The question is, therefore, whether this order is a "decree" within the meaning of that section. We think it is not. It clearly was not an adjudication, which, so far as regards the Court making it, decided the suit. It reserved to that Court the further consideration of the case when the plaintiff should produce the surveyor's certificate. But it was contended, that this order was analogous to an "order directing accounts to be taken," and that the particular cases mentioned at the close of the definition of a "decree" were not exhaustive, but only explanatory. In that case we should have expected that illustrations would have been given. Moreover, the words "directing the accounts to be taken" are precise and technical; and as the order of the 11th December, 1882, does not fall within that description, we must hold that it is not a decree within the meaning of section 2, and that the defendants are, therefore, at liberty to appeal.

The next question which arises is, whether the Court had power to determine the questions raised by the pleadings in the suit, or whether it could do more than pass a decree on the certificate of the

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Government surveyor as to what might be due from one of the parties to the other. The question is not free from difficulty; but, we think, upon the proper construction of clause 7 of the agreement the certificate of the Government surveyor was a condition precedent to the right to sue. In construing the clause it is to be borne in mind that the object the Government presumably had in view was to provide a speedy solution for disputes which were tolerably sure to arise out of the term in the agreement requiring the adjacent owners to build with party walls, and, therefore, it is a fair inference that in using the term "party wall" in clause 7 they are speaking of walls built in pursuance of the provisions of clause 1. If that be so, the reference of "disputes as to the cost" of such walls must, we think, have been intended to include all questions as to how such cost should be borne in the event of their being built. Now the wall in question was undoubtedly built as a party wall under the provisions of clause 1; otherwise it could not have been built equally on Lots 2 and 3, and it is clearly intended to be used by the owner of Lot 2 as a party wall. We think, therefore, that the real question raised by this suit, *viz.*, as to how the cost of this wall should be borne, was intended to be referred to the Government surveyor by clause 7 of the agreement.

That being so, does the agreement to refer, oust the jurisdiction of the Court? Was the certificate of the Government surveyor an antecedent condition to the right to sue? We think it was. In *Dawson* v. *Fitzgerald*[1] the principle, which determined whether the plea to the action that it was agreed to refer the question to arbitration could be successful, is stated by Jessel, M. R., with his usual lucidity. "I take the law as settled by the highest authority, the House of Lords, to be this. There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrator; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action."

Here there is no express covenant or agreement to contribute to the cost of the party wall, but it is left to be implied from the

(1) L. R., 1 Ex. Div., 257.

agreement to refer all disputes as to the cost of the party walls to arbitration. In other words, the reference to arbitration was intended to be a condition precedent to a right of action.

This view of the clause would appear to have been taken by West, J., in his judgment in *Cooverji Ludha* v. *Bhimji Girdhar*[1]. We must hold, therefore, that the Court could only pass judgment for Rs. 44 (as certified on the 5th April, 1883, by the Government surveyor) against Coverji Luddha, who was the lessee of Lot 2 when the wall was built.

It appears, however, from Mr. Adams' letter of the 5th April, 1883, accompanying the certificate, that this certificate was confined to the cost of the superstructure and defendant's claim for Porebunder stone in the front arcade, and that, as to the foundations, Mr. Adams desired that before giving a certificate it should be determined by a court of law who was the owner of the foundations—meaning, I presume, who built them.

In our view of clause 7 of the agreements Mr. Adams was the person to decide this question as best he could, and as this action has already been suspended at the plaintiff's desire to obtain a certificate, it should be again suspended to allow the defendants to obtain a certificate from Mr. Adams after this expression of our opinion.

It remains to consider the plaintiff's claim to make openings in the part of the wall to the cost of which the Government surveyor has not made the defendants contribute by his certificate. It was said that if the defendants do not share in the cost, it must be regarded as the plaintiff's wall in which he may make any openings he pleases. Although the materials, of which it is composed, may be his, still the wall was erected under the provisions of the agreement; and although the owner of Lot 2 was obliged to allow it to be built partly on his land, it was only for the purpose of its being used as a party wall. That it should be used for a purpose inconsistent with the idea of its being a party wall, would be opposed to what must be understood to have been the true intention of the parties to the agreement, whether of Government or of the lessees. It would be contrary

(1) I. L. R., 6 Bom., 528.

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to the reasonable intention of the parties that the plaintiff should acquire the full right of ownership over the wall as if it had been built on his own ground.

We must, therefore, refuse to make the declaration prayed for, or grant an injunction against the defendants.

Attorneys for the appellants.—Messrs. *Hore, Conroy and Brown.*
Attorneys for the respondents.—Messrs. *Bomanji and Hormasji.*

FULL BENCH.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball, Mr. Justice West, and Mr. Justice Nánábhái Haridás.

1885 *January* 13.

RA'DHA'BA'I AND RA'MCHANDRA KONHER (ORIGINAL DEFENDANTS NOS. 1 AND 4), APPELLANTS, *v.* ANANTRA'V BHAGVANT DESHPA'NDE (ORIGINAL PLAINTIFF), RESPONDENT. *

Vatan—Service vatan—Adverse possession against one holder how far a bar against a succeeding holder—Judgment against one holder how far res judicata against succeeding holder—Alienability of lands when services are abolished—Bombay Act II of 1865*—Bombay Act VII of* 1863.

Held (1). that, in the absence of fraud and collusion, adverse possession for twelve years during the life-time of one holder of service *vatan* lands is a bar to succeeding holders.

(2). In the absence of fraud and collusion, judgment against one holder of service *vatan* lands is *res judicata* as regards a succeeding holder.

(3). Such lands become alienable when the services are abolished, except in cases where there is a concurrent family custom operating similarly to keep the *vatan* estate together. Such a custom may continue and may singly bind the hands of the successive holders of the property after the former restriction has failed or been removed. The abolition of the public duty does not alter the nature of the estate. If the family custom forbids alienation beyond the life-time of the alienor, the custom will operate equally after the patrimony has ceased to be a *vatan*, as before. Where, however, such a concurrent custom does not affect an estate, then when it is freed from its connection with the public office the reason arising from that connection for the preservation of the estate necessarily fails, and the lands become subject to the ordinary law of descent and disposal.

* Second Appeal, No. 49 of 1883.