

CALCUTTA HIGH COURT

Sarat Chandra Mukherjee

Vs.

Nerode Chandra Mukherjee

(Jack, J.)

24.01.1935

JUDGMENT

Jack, J.

1. This appeal has arisen out of a suit for declaration of the plaintiffs' right to use the land described in the plaint as a common passage way and for a decree against the defendant Sarat Chandra Mukherjee for the removal of 2 tin sheds erected by him thereon and for damages. The land in suit was included in the premises described as 134 Jan Bazar Street in a partition between those parties along with others in 1901. The total area of these premises was found to be 5 bighas and 16 cottas. Of this 9 cottas was deducted as common passage leaving 5 bighas 7 cottas to be divided. The learned Judge has decided that the land in suit is included within this 9 cottas of passage land (as shown in map No. 5) annexed to the plaint separating the four parts into which the premises were then divided being a portion of the land separating part 1 from Part 4 of that award running east and west and terminating on the west in Grant Street.

2. By an award in a subsequent partition suit between the plaintiffs and defendants in 1917. Part 1 of the award of 1901 was divided into 6 blocks (vide map No. 1) blocks 2 and 3 coloured red on the map being given to the plaintiffs, blocks 1 and 4 to defendant 1 and blocks 5 and 6 to defendant 2. The plaintiffs allege that in 1925 the two tin sheds in question were erected by defendant 1 on the common passage in extension to the north of his building on block 1, the eastern one measuring 14'-6" x 5'-9" and the western one 25'-1" x 6'-11". The finding of the learned Judge that the land on which those sheds were erected was a common passage under the partition of 1901 and was also shown as such in the partition of 1917, is not now seriously disputed between the parties, and defendant 1 appellant has mainly disputed the decree which the plaintiff obtained for the declaration asked for and the removal of the sheds, on the ground of limitation.

3. The appellant maintains that since, admittedly, the sheds were erected as long ago as 1925, whereas this suit was not instituted until 21st August 1931, the suit is time barred inasmuch as it is a suit to which the provisions of Article 32, Lim. Act, apply. Even if it be taken that the suit comes under Article 120, Lim. Act, the onus was on the plaintiff to show that the period of six years under that Article was not exceeded and that onus he has failed to discharge. In support of their contention that Article 32 applies, the appellants have cited a number of decisions of the

Lahore High Court in which Article 32, Lim. Act, was held to apply where co-owners had set apart land for a common purpose and the defendant had diverted it to an unauthorised purpose and so excluded the plaintiff from using it for the common purpose. These decisions were however overruled in the Full Bench case of *Mastan Singh v. Santa Singh*¹ in which it was stated by Tek Chand, J. that in suits of this kind the real cause of action is the ouster of the plaintiff from property jointly owned by him and the defendant and reserved for their common use for a specific purpose and not the perverted user of such property by the defendant. In such cases the presumption of law is that the possession of one is the possession of all and it was not the intention of the legislature to reduce the period of limitation for such suits to two years simply because the attack by the defendant on the plaintiff's title was accompanied by a perversion of the user of the property from its original specific purpose.

4. He held however that Article 32 would apply where the defendant, while perverting joint property from its specific common purpose, admits the plaintiff's right to share the perverted user. But that is not the case here. It was held that in suits between co-owners inter se where the title of one is denied by the other, Article 144 or Article 120 would apply according as the relief claimed is one for possession or injunction. That was a case in which the defendant encroached upon common land by cultivating it as part of their holding so that the plaintiff co-owner was prevented from exercising a common right of way in the land. Article 120, Limitation Act, was held to apply. In that case there was no reference to Section 23, Limitation Act, which lays down that:

In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

5. Section 3, Limitation Act, makes the provisions of Schedule 1, Limitation Act, subject to the provisions contained in Section 23, so that, if it can be shown that in this case there is a continuing wrong, a fresh period of limitation begins to run at every moment during which the wrong continues.

6. It has been established that the plaintiff in this case has a right to use the land on which those sheds have been erected as a passage and that those sheds are obstructing his passage way. The learned Judge has held that in these circumstances there was a continuing wrong and in this he appears to be correct. If authority is needed it is to be found in the case referred to by the learned Judge, *Dwarka Nath Sen v. Tara Prosanno Sen*² a case similar to the present case in which land reserved as a common passage by long usage and agreement was obstructed by the erection of a verandah to a house. Such an obstruction was found to be a continuing nuisance relying on the principle on which the Privy Council acted in *Rajrup Koer v. Abdul Hossain*⁴ Other cases which have been referred to are (1) the case of *Nazim v. Wazidulla*³ in which it was held that obstructions which interfere with a right of way are in the nature of continuing nuisance as to which cause of action is renewed de die in diem so long as the obstructions causing such interference are allowed to continue; (2) the case of *Ashutosh Sadukhan v. Corporation of Calcutta*⁵ in which it was held that Section 23, Limitation Act, had no application in case of a Rowak or platform built over municipal land inasmuch as the injury was complete in

¹1933 Lah 705

³1916 Cal 733

⁵1919 Cal 807

²1923 Cal 356

⁴(1881) 6 Cal 394

the erection of the wall and the mere fact that the effect continued could not extend the time of limitation. But the real reason of the decision appears to have been that the Rowak having been in existence for 50 years the municipality had lost their right to the land on which it stood and there was therefore no continuing wrong; (3) another case referred to is the Full Bench case of *Dhanjibhoy Bomanji v. Hirabai*⁶ in which it was held that a suit for restitution of conjugal rights under Act 15 of 1865 was barred under Article 35, Limitation Act, and Article 23 had no application. Jenkins, C.J., held that even if the conduct of the husband be regarded as a continuing cause of action since Article 23 is general in its terms, whereas Article 35 provides a special remedy and where there is a repugnancy the special provision should prevail. With all due respect to the learned Chief Justice he appears to have left out of account Section 3, Limitation Act, by which all the Articles of Schedule 1, Limitation Act, are subject to the provisions of Section 23. No doubt the effect of this appears to be to nullify certain provisions of the Limitation Act, but we have to take the law as it stands and the learned Judges who concurred with the decision recognized the difficulty caused by the application of Section 23 of the Act

7. Inasmuch as it was held that Section 23, Limitation Act, applies in this case, there is no need to consider the question of onus arising as to the proof of the elapse of the full period of six years under Article 120, Limitation Act. We find that the suit is not barred by limitation and this appeal must be dismissed with costs.

Lort-Williams, J.

8. I agree.

⁶(1902)25 Bom 644