LAHORE HIGH COURT

Khair Mohd. Khan

Vs

Jannat

(Tek Chand, J.)

07.06.1940

JUDGMENT

Tek Chand, J.

1. The suit which has given rise to this reference was instituted by Khair Mohammad and Abdul Majid, plaintiffs of Jhajjar, District Rohtak, against Mt. Janat and Mt. Milk-ul-nisa, defendants, for issue of a perpetual injunction directing the defendants to demolish a chabutra (platform) constructed by them on a portion of a courtyard which, it was alleged, was the joint property of the mohalladars and has been reserved for their common user. The plaintiffs complained that the chabutra obstructed the passage of carts and other vehicles from the outer thorough-fare into the courtyard and caused great inconvenience to them and other persons living in the mohalla. They therefore prayed that the defendants be directed to demolish it. The defendants denied that the land on which the chabutra had been constructed belonged to the mohalladars collectively. They alleged that it was their exclusive property and they could use it in any way they liked. In the alternative, they pleaded that even if the land underneath the chabutra were found to be the common property of the mohalladars the suit was barred by limitation as the chabutra had been in existence for more than six years before the institution of the suit.

2. The trial Judge found against the defendants on both these points and decreed the suit. On appeal the District Judge affirmed the finding that the chabutra had been constructed on a portion of the courtyard which was the common property of the mohalladars. After an examination of the evidence he came to the conclusion that only a part of the chabutra had been constructed in 1925, that the plaintiffs had extended it to its present dimensions about two years before the institution of the suit and that this recent extension obstructed the passage of carts and carriages to the courtyard. He held that the suit was governed by Article 120, Limitation Act, under which the plaintiff had six years to sue from the date of the construction. He therefore found that the suit was barred by time qua the portion of the chabutra which had been constructed in 1925, but it was with in limitation as regards the extension which had been made within six years of the suit. He accordingly modified the decree of the trial Court restricting the injunction to the demolition of that portion of the chabutra which bad been constructed recently and dismissing the suit as regards the portion which had been in existence since 1925. On second appeal before the Single Bench the findings of fact arrived at by the District Judge were not questioned but it was contended that the suit had been erroneously held to be barred by limitation with regard to that

portion of the chabutra which had been found to have been constructed in 1925. It was urged that the structure in question was in the nature of an encroachment upon common property and thus constituted a "continuing wrong" and therefore the suit was governed by Section 23, Limitation Act, which lays down that in such cases a fresh period of limitation begins to run at every moment of the time during which the wrong complained of continues. As the rulings bearing on the point appeared to be conflicting the learned Judge referred the case to a Division Bench who in turn have referred it to the Full Bench.

3. In considering whether the particular Act complained of constitutes a "continuing wrong" within the meaning of Section 23 for which the cause of action arises de die in diem it is necessary to keep in mind the distinction between an "injury" and the "effects of that injury." Where the injury complained of is complete on a certain date, there is no "continuing wrong" even though the damage caused by that injury might continue. In such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the aggrieved person on subsequent occasions, intermittently or even continuously, does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If however the act is such that the injury itself is continuous then there is a "continuing wrong" and the case is governed by Section 23. As observed by Mookerjee J., in *Brojendra Kishore Roy v. Bharat Chandra Roy*[1], the essence of a continuing wrong is that the act complained of creates a continuing source of injury and is of such a nature as to render the doer of it responsible for the continuance; in such cases a fresh cause of action arises de die in diem. To put the matter in another way, where the wrongful act produces a state of affairs every moment's continuance of which is a new tort, a fresh cause of action for the continuance lies.

4. The question in each case therefore is whether the "injury," which is the basis of the grievance of the aggrieved party is itself "continuing," or whether the injury was complete when it was committed but the damage flowing from it has continued or is continuing. If the former, the case falls within the purview of Section 23, Limitation Act, and the cause of action arises de die in diem; if the latter, the terminus a quo is the date on which the wrongful act was done. For an instance of a "continuing wrong," reference may be made to *Raj Rup Koer v. Abul Hossein*[2] where some 40 or 50 years before the suit the plaintiff's ancestors, after making compensation to the defendants, had constructed a pain or artificial watercourse on the defendants' land to take water from a natural stream to the plaintiff's land. Some years before the suit the defendants, without authority, had obstructed the flow of water along the pain by making dams and cuts in the channel and thus drew off continuously, from day to day, water from the plaintiff's channels and diverted it to their own fields. In a suit by the plaintiff for a declaration of his sole right to the pain and an injunction directing the defendants to close the openings and restraining them from draining off the water in future, it was held by their Lordships of the Privy Council that the dams, outs and other modes of obstructing or diverting the water from the watercourse were in the

[1] AIR (1916) Cal 751

[2](1881) 6 Cal 394

nature of a "continuing nuisance" as to which the cause of action was renewed de die in diem so long as the obstructions causing such interference were allowed to continue and the suit was held to fall within Section 24, Limitation Act 9 of 1871 (which corresponded to Section 23 of the present Act 9 of 1908). Other instances of "continuing wrongs" are continued pollution of a stream, *Hole v. Chord Union*[3] obstruction caused to immemorial egress of rain water from the

plaintiff's house through a drain on the defendant's land, *Punja Kuvarji v. Rai Kuvar*[4] obstruction of discharge of surface water, *Kaseswar Mukerjee v. Annoda Prosad*[5] obstruction of light and air through ancient windows, *Shadwell v. Hutohinson*[6] *Ponnu Nadar v. Kumaru Reddiar*[7] and *Moti Ram v. Hans Raj*[9] In all such cases the "injury" is continuous and therefore limitation runs every moment of the time, during which the injury continues.

5. The present case however stands on an entirely different footing. Here, so far as the portion of the platform which was constructed in 1925 is concerned, the injury was completed at the time of the construction. The act of the defendants by constructing the chabutra on the common land and thus appropriating it to their exclusive use, amounted to a complete dispossession and ouster of the plaintiffs and the other mohalladars. It was not a "continuing" wrong, but a wrong which was completed at the time the construction was put up; it was not an "injury" which, to use the classical words of Blackstone "had been committed by continuation from one given day to another" (Book III, Ch. 12, p. 211), The cause of action to the aggrieved mohalladars arose once and for all at the date of the ouster. It does not arise afresh every day that the structure exists and to such a case the provisions of Section 23 do not apply. There is a large number of cases decided by the Chief Court and this Court in which this view has been taken, and with which I am in respectful agreement. In *Achar Singh v. Badhawa Singh*[8] the plaintiff, acting on behalf of the village proprietary body, sued for the removal of a structure which had been constructed by the defendant in a specific field in the shamilat which had been reserved as a thoroughfare. It was held that the act complained of was not a continuing wrong and Section 23 did not apply. The case was held governed by Article 120.

6. In *Ganda Singh v. Nathu Ram (1912) 151 1912 LR 1912(Supra)* the suit had been instituted for a perpetual injunction directing the defendants to restore to its original condition certain land, which had been originally reserved for the common use of the proprietors but which had been encroached upon by the defendants. It was held that the case was governed by Article 120 and as the structures complained of had been constructed more than six years before the institution of the suit, the claim was barred by time. In *Lal Singh v. Hira Singh*[10] the plaintiffs, claiming to be joint owners of a certain courtyard, had sued for the issue of a mandatory injunction to the defendants to remove certain chappers which they had constructed, and to restore the courtyard to its former condition. It was found that the chappers were constructed more than six years before the suit, which was dismissed as barred under Article 120. It was further held that Section 23 had no application, as the moment the chappers were erected the injury complained of, and sought to be removed by the issue of an injunction, was complete. There was no "continuing"

[3](1894) 1 Ch 293 [5] AIR (1918) Cal 422 [7] AIR (1935) Mad 967
[4](1881) 6 Bom 20 [6](1831) 2 B & Ad 97 [8](1912) 124 PR 1912
[9] AIR (1936) Lah. 334 [10] AIR (1921) Lah 242

injury within the meaning of the statute, even though the effect of the injury continued.

7. In *Kalian Singh v. Fazal Din*[11] a suit for a perpetual injunction for the removal of an encroachment made on common land was held barred under Article 120, as the suit had been instituted more than six years after the encroachment. Other instances of similar cases will be found in *Wadhawa v. Allah Ditta*[12] and *Jai Narain v. Municipal Committee, Delhi*[13] Reference may also be made to the decision of the Calcutta High Court in *Ashutosh Sadukhan v. Corporation of Calcutta*[14] where a rowak had been constructed on common land and it was held that the injury was completed on the erection of the rowak and there was no continuing wrong

within the meaning of Section 23. Similarly, in *Municipal Commissioners for the City of Madras v. Sarangapani Mudaliar*[15] a suit by a Municipality to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than forty-five years before the suit, was dismissed on the ground that there was no evidence that the strip in question had been used by the public as a part of the street for many years. In all these cases the obstruction was of a permanent nature and the injury had been completed when the structure complained of was built and it was held that Section 23 had no application.

8. There are some cases decided in Calcutta which contain observations supporting the opposite view (*Sreemati Soojan Bibi v. Shamed Ali*[16] *Nerode Kanta v. Bharat Chandra*[17] *Nazimulla v. Wazidulla*[18] *Dwarka Nath v. Rash Behari Guha*[19] and *Sarat Chandra v. Nirode Chandra*[20], All these decisions purport to be based on *Raj Rup Koer v. Abul Hossein*[21] above referred to and in some of them it has been broadly stated that there is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a continuing nuisance (*Nazimulla v. Wazidulla AIR (1916) Cal 733(Supra)*). With great deference, it must be said that this proposition is too widely expressed and cannot be accepted as correct in all cases, regardless of the nature and extent of the encroachment or obstruction. There is, for instance, no analogy between the case decided by the Privy Council and a case in which a right of way has been obstructed by the construction of a wall or a building of a more or less permanent character, which has completely blocked the way of the plaintiff. As has been stated above, in *Raj Rup Koer v. Abul Hossein (1881) 6 Cal 394(supra)* the defendants by making dams and cuts in the water channel, which had been constructed by the plaintiff on the defendants' land, were diverting, continuously and day by day the water from the water channel to their own lands. They were thus committing a fresh wrong every time that the water was so diverted. In *Nazimulla v. Wazidulla AIR (1916) Cal 733(supra)*, reference was made to two English cases. But the facts of those cases were materially different. Indeed, one of them, *Thorpe v. Brumfitt*[22] brings out prominently the distinction between obstructions which are permanent and those which are not. There, the way to the yard of the owner of an inn was obstructed by the loading and unloading of heavy waggons, of the defendant who owned the adjoining property. The obstruction was not permanent; it was caused whenever the waggons

[11] AIR (1926) Lah 455 [13](1935) 37 160 LR 160 [15](1896) 19 Mad 154
[12] AIR (1932) Lah 220 [14] AIR (1919) Cal 807 [16](1892) 1 CWN 96
[17](1909) 2 IC 410 [19] AIR (1923) Cal 365 [21](1881) 6 Cal 394
[18] AIR (1916) Cal 733 [20] AIR 1935 Cal 405 [22](1873) 8 Ch A 650

were loaded and unloaded and each such obstruction gave a fresh cause of action to the plaintiff. In the other English case referred to, *Lane v. Chapsey*[23] a mandatory injunction to remove the obstruction to a right of way had been refused, the defendant had then become insolvent, and the plaintiff applied to the Insolvency Court for leave to take proceedings for the abatement of the nuisance. Chitty J. granted leave to take such proceedings for this purpose but took care to say (page 416) that "he was not deciding the point in favour of the applicant." It may be noted that no question of limitation appears to have arisen or decided in that case.

9. Some cases decided by the Patna High Court were cited before us. But the course of decisions in that Court does not appear to be uniform. In *Bhagwan Dutt v. Asharfi Lal*[24] the Calcutta cases, mentioned above, were followed and it was held that a suit for declaration that certain pathways were lands on which the plaintiff and the public had a right is governed by Section 23, Limitation Act, and the wrong being a continuing wrong, no question of limitation arose. This case was

disapproved in *Bibhuti Narayan v. Mahadeo Asram Prasad*[25] where the Calcutta cases were criticized at length, and it was laid down that where the wrong amounts to dispossession of the plaintiff, then although it may be a continuing wrong, the plaintiff cannot recover possession after twelve years, because under Section 28, Limitation Act, he himself has got no right left. With great deference to the learned Judges who decided that case, while agreeing with their criticizm of the Calcutta decisions, I find myself unable to accept their ultimate conclusion. If the wrong is really a "continuing wrong" it is difficult to see how the plaintiff's right will be lost by lapse of 12 years from the date when it was first committed. Ex hypothesi, the cause of action to the plaintiff arises de die in diem, so long as the obstruction exists, and if this be so, Section 28 will not apply so as to extinguish his title.

10. The learned Counsel for the appellant also referred to the recent decision of their Lordships of the Privy Council in *Hukam Chand v. Maharaj Bahadur Singh,*[26] and to a case decided by the Chief Court reported in *Muhammad Ahmad v. Muhammad Fazal*[27] But both these cases are clearly distinguishable. In the former case, certain structural alterations had been made by the defendants in the character of the charans (footprints) of Jain Saints in certain shrines on the sacred hill of Parashnath in Bihar; and in the latter, a balakhana had been constructed on a mosque and was used for his residence by the defendant. These acts of sacrilege, resulting in interference with the plaintiffs' right of worship, were held to be "continuing wrongs" which afforded them a recurring cause of action to have the offending obstructions removed. The principle of these cases, therefore, does not apply to this case, which stands on an entirely different footing. After careful consideration, I see no reason to doubt the correctness of the view taken in this Court in the oases cited above, that where the act complained of amounts to complete ouster of the plaintiff, the injury is complete at the date of the ouster. To such cases Section 23 does not apply, and the plaintiff has six years from the date of obstruction to sue for declaration or injunction and 12 years for possession. I would accordingly hold that the learned District Judge came to a correct conclusion in holding that this case is governed by Article 120 and that the plaintiffs' claim relating to that portion of the platform which had been constructed in 1925 was

[23](1891) 3 Ch D 411 [25] AIR (1940) Pat 449
[24] AIR (1934) Pat 34 [26] AIR 1933 PC 193 : 1933 AWR (P.C.) 2 154
[27] AIR (1917) Lah 160

time barred. I would accordingly dismiss the appeal, but would leave the parties to bear their own costs throughout.

Bhide, J.

11. The facts of the case have been fully given in the judgment of my learned brother Tek Chand J. Shortly stated, the question for decision is whether an encroachment made by a joint owner by building a chabutra on land reserved for common purposes, claiming it as his own, constituted a 'continuing wrong' within the meaning of Section 23, Limitation Act. Unfortunately, the expression 'continuing wrong' has not been defined in the Limitation Act and its precise meaning is not easy to ascertain. According to the test laid down in *Brojendra Kishore Roy v. Bharat Chandra Roy*[28] there is a 'continuing wrong' when the wrongful act complained of produces a state of affairs every moment 'a continuance of which is a new tort.' There seems to be good authority for the proposition that in the case of a 'trespass' there is a fresh injury and a fresh cause of action at every moment during the period during which the trespass continues: see Pollock on

Torts, Edn. 12, p. 393, Clerk and Lindsell on Torts, Edn. 9, p. 401, also *Holmes v. Wilson*[29] But where there is a complete dispossession and ouster by building a permanent structure in assertion of an adverse title as in this case, can the case be properly treated as one of "trespass" only? The real wrong complained of in this case was the dispossession of the plaintiffs by the defendants in assertion of a hostile title. This took place when the chabutra was built. I am therefore inclined to agree that the injury in this case was completed and the cause of action, whether for the removal of the chabutra or for possession of the land underneath, arose once for all when the chabutra was built, and the plaintiffs were thereby dispossessed of the land.

12. The only two rulings of their Lordships of the Privy Council cited before us were *Raj Rup Koer v. Abul Hossein*[30] and *Hukam Chand v. Maharaj Bahadur Singh*[31], but the facts of these are clearly distinguishable as pointed out by my learned brother. It seems difficult to see how the principle of these rulings could be applied to a case of the present description. The rulings of the High Courts on the question seem to be conflicting, but the current of decisions in this Court is in favour of the view that an encroachment of the kind in dispute in the present instance does not constitute a continuing wrong. It may be pointed out that according to the decision in the Full Bench case reported in ***Mastan Singh v. Santa Singh AIR (1933) Lah 705*** it would be open in such a case to sue for joint possession within 12 years. In the present instance however the plaintiffs have chosen to sue for an injunction only. For this form of relief limitation is governed by Article 120. I accordingly agree in dismissing the appeal and leaving the parties to bear their own costs as proposed by my learned brother.

Din Mohammad, J.

13. The question whether a certain case is covered or not by the principle enunciated in *Raj Rup Koer v. Abul Hossein (1881) 6 Cal 394(Supra)* is not free from difficulty.

[28] AIR (1916) Cal 751
[29](1839) 10 A & R 503
[30](1881) 6 Cal 394
[31] AIR 1933 PC 193 : 1933 AWR (P.C.) 2 154

The nearest approach to a solution of this complicated problem is found in the observations made by Mukerjee J., in this behalf in *Brojendra Kishore Roy v. Bharat Chandra Roy AIR (1916) Cal 751(supra)*. But if I may say with all respect, even the distinction drawn there between an injury which itself continues and an injury whose effect alone continues is too subtle to be of any practical use. It requires a very acute brain to distinguish between the case of a dam that diverts the flow of water and that of a permanent structure which blocks a public way as was the case in *Municipal Commissioners for the City of Madras v. Sarangapani Mudaliar*[32] or encroaches upon the common land and thus interferes with the rights of persons interested therein which is dealt with in some Lahore judgments. In spite of the difficulty involved however some working principle must be evolved from the cases so far decided, which may serve as a guide for the Subordinate Courts in future, and, as at present advised, I am of opinion that the rule enunciated by my learned brother Tek Chand J. is in accord with the bulk of authority in this Court at least. I accordingly agree that the appeal be dismissed.

[32](1896) 19 Mad 154