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**(1977) 11 RAJ CK 0004**  
**In the Rajasthan High Court**  
**Case No : Civil Second Appeal No. 179 of 1967**

Abdul Gani

APPELLANT

Vs

Saduram and Others

RESPONDENT

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**Date of Decision :** 28-11-1977

**Acts Referred:**

Specific Relief Act, 1963 — Section 41  
Transfer of Property Act, 1882 — Section 11

**Citation :** (1978) RLW 13 : (1977) WLN 641

**Hon'ble Judges :** M.L. Jain, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## Judgement

M.L. Jain, J.—The facts of this case are that inside Sojati Gate Jodhpur Tejdan and Chain Singh had lands in a big Nohra out of which 25-30 plots were carved out and sold by them. On 18-6-1952 the defendant pannalal since then dead, purchased a plot from the said Tejdan and Chainsing. One of the conditions of the purchase was that Pannalal shall not open any window opening, Jali, balcony, Toda, Chhajja, Nali or Nal towards south of the plot so purchased. Another piece of land was purchased by one Champalal Darji on 15-6-57. Yet another plot was purchased by plaintiff Abdul Gani on 21-6-57. In between the plots so sold by Tejdan and Chain Singh there is a "gali" 27" 8" in length and 3" in width. Since then it appears that houses have been raised on the plots. The plaintiff Abdul Gani complains that the defendant has opened on 30-10-1956 a sp(SIC)ut in his house which discharges filthy water and urine in the said "gali," passing on the "Kawali" of the latrine of the plaintiff which is also in the said "gali". The plaintiff lodged a complaint in the Municipality on November 7, 1959 but no action was taken. On 15-6-1961, the plaintiff purchased the "gali" from Tej Dan and Chain Singh. This "gali" was kept for the passage of the plaintiff and Champa Lal and the plaintiff was to keep it uncovered. The plaintiff then brought this suit on 10-8-61 & prayed for a perpetual injunction directing the defendants to refrain from discharging any filthy water on the "gali" owned by the plaintiff and also to

prevent him from creating nuisance. It was also prayed that the defendant be directed to remove the spout.

2. The defendant stated that the "gali" became a khalsa "gali" in 1957. The house of Champalal also opens on it. The defendant had opened or built the spout in 1953. The "gali" also has the latrine of the plaintiff and filthy water of the laterine also spreads in the same "gali". The sale of the "gali" in favour of the plaintiff was collusive and fraudulent to deprive him and Champalal of the lawful use thereof

3. The learned Munsiff by his judgment dated 25-5-1964 held that the plaintiff was not entitled to have the spout removed on account of acquiescence of nuisance. He, however, directed that the defendant shall fix at least 2 inch wide pipe right from his Mori down to the pucca Khaliya so that the discharges from the Mori do not spread on the land. The defendant was called upon to fix up the said pipe at his (SIC)st within a month.

4. On appeal the learned Senior Civil Judge, Jodhpur, by his judgment dated 18th February, 1967, dismissed the appeal. It is against this decision that the present appeal has been filed. I have heard arguments at considerable length.

5. Both the courts below have held that the lane was left open for use of the purchasers of the plots, that the Municipality had constructed a Khaliya & provided scavenging services and that the spout was opened in the year 1953. I do not find any good reason for disturbing the findings of facts so arrived at by the two courts below.

6. Now, so far as the appellant's case for nuisance is concerned what I feel is that by construction of the pipe for carrying the dirty water through the Khaliya there would hardly remain any ground for complaining of nuisance because in a common "gali" and in urban areas, such inconvenience has to be put up with, specially when the plaintiff has his own latrine in the "gali", But the questions that still require consideration are whether the plaintiff Abdul Gani can enforce the covenant which deceased Pannalal undertook while purchasing the house, that he shall not open any spout in the "ga!i", whether the discharge of any kind through the spout amounts to a-trespass on the "gali" which in virtue of sale has vested in the plaintiff and whether the plaintiff is entitled to an injunction in such a case.

7. The. learned Counsel for the respondents contended, that the vendors of the parties had sold their lend into several parcels and had left the "gali" for common use and benefit which was a restrictive covenant running with the "gali" and therefore the sale of the "gali" by the vendor to the plaintiff which results in depriving the defendant of such benefit, was fraudulent and collusive. The defendant could ignore such sale and can only not enforce the obligation of common benefit against the plaintiff but can refuse to refrain from any common user thereof such as discharge of filthy water over or through it. To my mind, the question cannot be simplified in that manner. The learned lower appellate Court

has held that the services provided by the Municipality do not amount to conversion of the "gali" into a Khalsa Land. There is also no evidence which establishes the obligation that the "gali" was reserved for mutual benefit of the seller and the purchasers or their representatives in title. The sale of the "gali" cannot therefore be described as collusive and not binding upon the defendant. On the other hand, the vendee Pannalal had taken it upon himself that he will not open any spout on the side of the "gali" and he and his successors can be called upon by the plaintiff to abide by that condition. Section 11 of the Transfer of Property Act, 1882, provides that where a direction that the interest in the property transferred shall be enjoyed in a particular manner, has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, such direction or any remedy which may be available in respect of a breach thereof, may be enforced. Generally, speaking covenants are always personal in character but if it is a covenant restricting the enjoyment of the property, then such a covenant is annexed to the land, binds the land in its inception, or affects the nature, quality or value of the land. Such a covenant runs with the land for the benefit of that land for which it is expressed to be made. There is no doubt that the deceased Panna Lal had undertaken a covenant was annexed with the land. It was a covenant imposed by the vendor owner of other land of which that sold land formed a part, & intended to protect the benefit of the unsold land. Such a restricted covenant is enforceable by the owner for the time being of the land for the benefit of which it was imposed. Such a covenant is also enforceable by any person in whom an interest in the property of the covenantee is vested irrespective of the notice. If my authority for this proposition is needed, then, one may profitably refer to *Dhannu Lal Marwari Vs. Bansidhar Marwari*,

8. But the limitation for a suit to enforce any such right is six years which shall be counted from the date of its infringement. The learned trial Court had gone into the question as to when the spout was constructed. It came to the conclusion that the spout was constructed in the year 1953 when the house was built. The learned Senior Civil Judge appears to have agreed with those findings with which, as I said earlier, I have no reason to differ. The plaintiff lost the remedy founded upon the ground of breach of the covenant as the period of six years had expired when the suit was filed. One more fact of the problem, however, requires consideration. The two courts below appear to have treated it purely a case of nuisance, while according to its facts, it was a case of trespass. There is no doubt that jurists do differ on the relation of nuisance to trespass. Some hold that these two torts may possibly coincide, some kinds of nuisance being also trespass to land. According to another view, they are mutually exclusive; nothing is to be rightly classed as a nuisance if it is really a trespass. But according to Winfield on Torts 8th Ed. (1967) at p. 395 396, "upon the whole it would appear that nuisance and trespass are distinct torts." Nuisance is usually created by acts done by the defendant on the land in occupation or in some place of public resort, adjoining or in the neighbourhood of the land in occupation of the

plaintiff, trespass occurs by entry upon or remaining upon the land in possession of the plaintiff or by placing or projecting any material object upon it in each case without lawful jurisdiction. The present case would have been a pure case of nuisance if the discharge of filthy water had collected on the land of the defendant and caused an unlawful interference with the plaintiff's use or enjoyment of his "gali" or other property such as by emitting foul smell etc. But since the spout throws water on the plaintiff's land, it amounts to trespass and the tortious act continues as long as the discharge of filthy water or otherwise continues. It is a continuing wrong and until it repairs into a right by prescription, the cause of action continues and though it cannot be defeated by sufferance or delay as was held in *Moonshee Mohammed V. Mohini Mohan* (1975) 24 WR 97, and though he may be able to get any other redress, yet on account of the provisions of Section 41(h)(Section 56(g(SIC)old) of the Specific Relief Act, no relief by way of injunction can be granted to prevent the continuing breach in which the plaintiff has acquiesced.

9. According to Salmond, *Law of Torts*, 16th Edn. (1973) p. 603. it is no doubt possible to say that every tort is redressible by an injunction except an assault and battery, false imprisonment and malicious prosecution, vide *Maitland, Equity*, 2nd Edn. (1936) p. 320. It is observed by Jessel M.R. in *Smith v. Smith* 20 Eq 500 the discretion to grant an injunction must be a judicial discretion exercised to something like a settled rule and in such a way as to prevent the defendant doing a wrongful act and thinking that he would pay damages for it. It is of great importance to see if the defendant knew he was doing wrong and was taking the chance about being disturbed in doing it. In *Noor Mohammed v. Gauri Shanker* (1920)56 IC 1003 it was said (in the first paragraph of the report) that to prevent a discharge of drain water injunction was proper remedy. The learned Counsel for the appellant also submitted that where the trespass is coupled with a breach of obligation, then, injunction can be granted under the Specific Relief Act. On the other hand, the learned Counsel for the respondent contends that in a case of trespass to immovable property, possession of the plaintiff and disturbance by the defendant are required to be established. In the present case the plaintiff was not in the sole possession of the "gali" because Champalal also had a right of passage therein. The Municipal Committee had even constructed a Khalia on it and Municipal sweepers were allowed to clean in He further urged that there is no pleading, there is no issue, there is no evidence and there is no finding of trespass in the case. As a matter of fact the case was not fought on the basis of trespass in the courts below and a new case cannot be made out in favour of the plaintiff. Moreover, since the sale of the "gali" in favour of the appellant is fraudulent, this is yet another reason for refusing a decree of an injunction. The learned Counsel for the respondent also relied on *Dhannalal v. Banshidhar*(1) where injunction was refused in the case of breach of a restrictive covenant as the plaintiff had constructively acquiesced in the breach; & also on *Hazi Seyed Mahammed v. Gulab Bai* AIR 1916 Cal 242 where the plaintiff had no right of possession but only a right of user over a particular piece of land over

which the defendant raised construction 2 years ago, and following *Pahalwan Singh and Others Vs. Lala Jiwan Das and Others*, mandatory injunction was refused because no special circumstances was shown to exist.

10. Now, the plaintiff had alleged that the defendant was throwing filthy water on the "gali" owned by him and this is nothing but a plea of trespass on the land. The evidence and finding is also of these facts but the legal inferences were limited to nuisance only. No new case is being made out in favour of the plaintiff if proper legal inferences are deduced, nor can any relief be refused because the plaintiff purchased the "gali" which act as held above is not an act of fraud. The difficulty arises because of the provisions of the Specific Relief Act according to which injunction must not be given wherein a case for continuing breach, the plaintiff has acquiesced in the wrong. A person "acquiesces" when he abstains from interfering while a violation of his legal right is in progress. He is also said to acquiesce though not properly if he refrains from seeking prompt redress when a violation of his right, of which he did not know at the time it took place is brought to his notice. In the former case, it means such acquiescence as assent may reasonably be inferred from it and is no more than an instance of estoppel by word or conduct disentitling him to an injunction. In the latter mere submission to the injury for any time short of the period limited by statute for the enforcement of the right of action or even an express promise unaccompanied by consideration, cannot take away such right, *De Bussche v. Alt* (7), as there can only be acquiescence where there is knowledge. While delivering the 1906 Tagore Law Lectures on the law of Specific Relief in British India, Satish Chandra Banerji (see the first edition at p. 820) observed that delay in itself short of limitation period, whether in objecting or in suing is of scarcely any consequence where the defendant has not been prejudiced thereby but delay may also be evidence of acquiescence & in the case of a continuing breach, acquiescence will bar the ground of an injunction of any kind whatsoever. "Mere lapse of time as evidencing acquiescence is not to be measured by any cycle of the heavenly bodies, but must depend upon the circumstances of each particular case."

11. The two courts below have found that there has been acquiescence on the part of the plaintiff. There is nothing to show that the defendant continued his wrongful act and was taking a chance with it. Considering all the circumstances, I see no reason to disturb their findings and this being a case of continuing breach, and the plaintiff having suffered injury while it was being done for eight years, the plaintiff disentitled himself to an injunction being granted in his favour.

12. I, therefore, dismiss this appeal with costs.