
(1915) 08 CAL CK 0038
In the Calcutta High Court

Brojendra Kishore Roy Chowdhury and Baikuntha Nath
Sharma and Others

APPELLANT

Vs

Bharat Chandra Roy and Others

RESPONDENT

Date of Decision : 02-08-1915

Acts Referred:

Limitation Act, 1963 — Article 120, 23
Specific Relief Act, 1877 — Section 42

Citation : 31 Ind. Cas. 242

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. The events antecedent to the litigations, which have culminated in the present appeals, are no longer in controversy and may be briefly recited. The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants, and a breach of the peace became imminent. Proceedings were consequently instituted u/s 145 of the Criminal Procedure Code; but as the Magistrate was unable to satisfy himself as to which of the parties was in possession of the subject of dispute, he attached it u/s 146 of the Criminal Procedure Code, until a competent Court should determine the rights of the parties thereto or the person entitled to possession thereof. This order was made on the 25th April 1902. On the 3rd July and 11th October 1909 these suits were instituted by the two sets of plaintiffs who claim respectively an eight-annas and a five-annas share of the property, for declaration of their title and for recovery of possession. The Courts below have concurrently found that the plaintiffs have fully proved their title, and that the defendants have no case on the merits. The Courts below have also found that the plaintiffs were in possession when on the 25th April 1902, the property was attached by order of the Magistrate. But while the trial Court held that the claims were not barred by limitation, as the plaintiff's were in possession within twelve years of the suit, the lower Appellate Court has concluded on the authority of the decision in *Rajah of Venkataqiri v. Isakapalli*

Subhiah 26 M. 410 that the suits are barred by limitation, as they have been instituted more than six years after the order of the Magistrate. The result of this divergence of opinion has been that the District Judge has reversed the decrees of the Subordinate Judge and has dismissed the suits, although he has found that the plaintiffs have established their title. The plaintiffs have now appealed to this Court and have impugned the correctness of the view adopted by the District Judge. The question, consequently, arises, what is the period of limitation, if any, applicable to a suit for determination of the rights of the parties to an order u/s 146 of the Criminal Procedure Code, where it is found that the party who is the rightful owner was in possession when the property was attached by the Magistrate. Three alternative views have been placed before us for consideration, viz., first, that the suit is in essence for recovery of possession of Immovable property, and must under Article 142 of the Schedule to the Indian Limitation Act be instituted within twelve years from the date of the order of the Magistrate; secondly, that the suit is in substance for declaration of title to Immovable property, and must, under Article 120, be instituted within six years from the date of the order of the Magistrate when the right to sue accrues; and thirdly, that the suit is for declaration of title to land, but that there is no bar of limitation applicable, as u/s 23 a fresh period of limitation begins to run at every moment of the time during which the attachment continues. If the first or the third view is adopted, these suits are not barred by limitation, while the suits must be deemed barred if the second alternative is accepted.

2. As regards the first possible point of view, it is clear that no action can be brought against the Magistrate for recovery of possession. In the words of Lord Morris in *Khagendra Narain Chowdhry v. Matangini Debi* 17 C. 814 : 17 I.A. 62 : 5 Sar. P.C.J. 528 the Magistrate is in the position of a stake-holder, or, as was said in *Ramaswamy Aiyar v. Muthusamy Aiyar* 30 M. 12 : 16 M.L.J. 541 : 1 M.L.T. 397 when the property is attached, it passes into legal custody, and during the continuance of the attachment, such custody must be held to be for the benefit of the true owner: *Beni Prasad v. Shnhzada Ojha* 32 C. 856 *Kara Singh v. Bakar Ali Khan* 9 I.A. 99 : 5 A. 1 : 4 S. P.C.J. 382. It is further plain that there is no cause of action against the Magistrate, as he has acted in the exercise of his statutory powers. The suit must, consequently, be brought against the rival claimant, but obviously the suit cannot be framed as one for recovery of possession of the disputed land from him, as he is admittedly not in possession. The plaintiff may have been deprived of possession, but he cannot aptly be said to have been dispossessed, or, to have discontinued possession within the meaning of Article 142 of the Indian Limitation Act. Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another. These elementary principles are deducible from the decision of the Judicial Committee in *Trustees and Agency Co. v. Short* 13 App. Cas. 793 : 58 L.J.P.C. 4 : 59 L.T. 677 : 37 W.R. 433 : 53 J.P. 132 and *Secretary of State v. Krishnamoni Gupta* 29 I.A. 104 : 29 C. 518 : 6 C.W.N. 617 :

4 Bom. L.R. 537. To the same effect is the observation of Baron Parke in *Smith v. Lloyd* 9 Exch. 562 : 96 R.R. 837 : 2 Com. L.R. 1008 : 23 L.J. Ex. 194 : 2 W.R. 271 : 22 L.T. (o.s.) 289 that to make the Statute of Limitation applicable, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected. It follows that if the seisin or legal possession is, during the attachment, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession. We must accordingly hold, as was done in *Rajah of Venkatagiri v. Isakapalli Subbiah* 26 M. 410 that Article 142 has no application to a suit of this description, and we are unable to accept the contrary opinion on this point as formulated in *Goswami Ranchor Lalji v. Sri Girdhariji* 20 A. 120 : A.W.N. (1897) 214. We are not unmindful that in *Khagendra Narain v. Chowdhry Matangini Debi* 17 C. 814 : 17 I.A. 62 : 5 Sar. P.C.J. 528 the suit was framed as one for recovery of possession and that the Judicial Committee ordered that each of the parties be decreed to be put into possession of an equal moiety of the disputed property. It is clear, however, that the question now under consideration was not raised before the Judicial Committee, for the obvious reason that the suit there was in time, whether the six years" or the twelve years" rule was applied; the record shows that the order of attachment was made on the 10th December 1877 and the suit was commenced on the 14th December 1880. It may also be observed that the language of the order by the Judicial Committee is consistent with the view that the parties were to be put into possession by the Magistrate. It may be added that the decision in *Nasir Ali Sheikh v. Adelnddi Shana* 16 Ind. Cas. 620 : 16 C.W.N. 1073 to which reference was made in the course of argument, is clearly distinguishable. There the Magistrate had, after the attachment, placed a stranger in possession, contrary to the provisions of Section 146, Criminal Procedure Code; a suit against such stranger for recovery of possession is clearly governed by Article 142 or Article 144 We need not refer in detail to the case of *Chujmull v. Khyratee* 3 Agr H.C.R. 65 *Goswami Ranchor Lalji v. Girdharji* 20 A. 120 : A.W.N. (1897) 214 *Akilandammal v. Periasami Pillai* 1 M. 309 *Rajah of Venkatagiri v. Isakapalli Subbiah* 26 M. 410 *Deo Narain Chowdhury v. Webb* 28 C. 86 : 5 C.W.N. 160 in so far as they merely recognise the doctrine that Article 47 of the Indian Limitation Act is restricted to cases where an order for possession has been made in favour of one of the parties and has no application when the land has been attached u/s 146. We hold accordingly that the suits before us, though framed as suits for possession, cannot be treated as such and are not governed by Article 142 of the Indian Limitation Act.

3. As regards the second and third possible points of view, it is clear, from what has already been stated, that the suits must be treated as suits for declaration of title u/s 42 of the Specific Relief Act. What then is the period of limitation, if any, applicable to these suits? We have been pressed, on the one hand, to adopt the view-propounded in *Rajah of Venkatagiri v. Isakapalli Subbiah* 26 M. 410 that Article 120 is applicable and that the suit is required to be instituted within six

years from the date of the order of attachment when the right to sue accrues. We have been pressed, on the other hand, to hold that this is a case of continuing wrong u/s 23 and that the right to sue accrues from moment to moment. The first alternative, though adopted by the Madras High Court, leads to an obvious anomaly. If the suit is not instituted within six years from the date of the order of attachment, neither of the claimants can obtain a declaration of title; yet the title continues unaffected in the true owner, for u/s 28 his right is extinguished only at the determination of the period limited for the institution of a suit for possession. The Magistrate thus continues as a stake-holder for an indefinite period, as there is no statutory provision for forfeiture after the lapse of a prescribed term. According to the Madras High Court, however, the true owner, although not in a position to seek a declaration of title for purposes of recovery of the property, can obtain a declaration of title to the profits in the hands of the Magistrate; in other words, the Magistrate is constituted his manager in perpetuity. The Madras High Court further seems to hold that, although a declaration of title cannot be embodied in the decree, because the prayer for declaration is barred by lapse of time, yet the finding in the judgment on the issue of title, will have the force of *res judicata* and will practically operate as a determination of the question of right for purposes of Section 146, Criminal Procedure Code. With all respect, this bears the appearance of a distinction without a difference. To adopt the language of Lord Ellenborough in *Luxmore v. Robson* 1 B.Ald. 584 : 19 R.R. 396 : 106 E.R. 215 the common sense, the practice, and the general convenience of mankind, require that a construction different from that in the case cited should be adopted." In our opinion, the true view of the matter is that Section 23 of the Indian Limitation Act governs the case. To maintain this position, it is not essential to accept the broad proposition formulated in *Chukkun Lal Roy v. Lolit Mohan Roy* 20 C. 906 which was reversed on appeal on another point by the Judicial Committee in *Lalit Mohun Singh Roy v. Chukhun Lall Roy* 24 I.A. 76 : 24 C. 834 : 1 C.W.N. 387 that a suit for declaration of title to Immovable property cannot be held to be barred so long as the plaintiff has a subsisting right to such property; nor is it necessary to depart in any way from the rule recognised in *Mohabharat Shaha v. Abdul Hamid Khan* 1 C.L.J. 73, that a suit for declaration of title to Immovable property is governed by Article 120. On the other hand, as was explained in the case last mentioned, and as had been previously indicated in the cases of *Brinda v. Kaunsilia* 13 A. 126 : A.W.N. (1891) 18 *Ananda Razu v. Viyanna* 15 M. 492 : 2 M.L.J. 258 *Jugalkishore v. Lakshmandas Raghnnathdas* 23 B. 359 Article 120 and Section 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation, for instance, in suits for partition of joint property. The answer to the question, when does the right to sue accrue, must depend on the circumstances of the particular case, and very refined distinctions have, indeed, been sometimes drawn, as may be seen from *Yamuna Bai Rani Sahiba v. Solayya Kavundan* 24 M. 339 and *Pamu Sanyasi v. Zamindar of Jeypur* 25 M. 540. In the case before us, the view may reasonably be maintained that there is a continuing wrong independent of contract and that consequently a fresh period of limitation

under Article 120 begins to run at every moment of the time the wrong continues. It is need lees for our present purpose to attempt an exhaustive definition of the expression "continuing wrong." But it may generally be stated that if 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, then, in cases in which damage is not of the essence of the action, as in trespass, 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 action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury. Tested from this point of view, what is the position here? The defendants attempted to interfere with the possession of the plaintiffs, and a breach of the peace became imminent. The Magistrate intervened, as it was incumbent upon him to do, and attached the property. The result was that the plaintiffs were deprived of the enjoyment of their property. This state of things has continued, though it could have been terminated if the defendants had intimated to the Magistrate that they abandoned all claim to the property and would not cause a breach of the peace by an endeavour to obtain possession by force. We think, in these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of Section 23 of the Indian Limitation Act. Prom this view, no question of limitation arises.

4. The result is that these appeals are allowed, the decrees of the District Judge set aside, and the suits decreed with costs in all the Courts. The title of the plaintiffs in each case to the share claimed will be declared, and it will be further declared that they are entitled to have the property released from attachment and to be placed in possession by the Magistrate.