

(1993) 07 DEL CK 0011

In the Delhi High Court

Case No : Regular Second Appeal No. 165 of 1974

Faqir Chand (through L.Rs.)

APPELLANT

Vs

Laila Ram (through L.Rs.)

RESPONDENT

Date of Decision : 15-07-1993

Acts Referred:

Citation : (1993) 3 AD 168 : AIR 1994 Delhi 161 : (1993) 51 DLT 505

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : L.B. Adlakha and Ms. Ripu Adlakha, for the Appellant; Ishwar Sahai and Ms. Tasneem Ahmadi, for the Respondent

Judgement

1. This regular second appeal has been brought against the judgment and decree dated August 9, 1974, of a Additional District Judge by which he Had allowed the appeal of respondent-Lila Ram against judgment and decree dated January 31, 1974, of a Sub-Judge and had dismissed the suit brought by the appellant against the respondent wherein reliefs of mandatory injunction, perpetual injunction and rendition of accounts were claimed.

2. The dispute pertains to property bearing municipal No. 1152 (Old No. 272) situated in Gali Samosan, Fresh Khana, Delhi. Admittedly this property was owned by Bhola Ram, father of the appellant, Lila Ram --respondent and one Kishan Lal. In 1921 Kishan Lal brought a suit for partition and decree for partition was made and portion which is in brown colour in map Ex. PW 3/2 had fallen to the share of Kishan Lal and ultimately that portion also had been purchased by Lila Ram -- respondent. In 1933 the partition deed was executed between Bola Ram and Lila Ram Ex. PW 3/1 which was duly registered and the map duly signed by the parties was also registered which is Ex. PW 3/2. The portion which fell to the share of Bhola Ram is shown in light blue colour while the portion which fell to the share of Lila Ram is shown in dark Blue colour. A portion in red colour is shown as joint passage for the parties and beyond the joint passage shown in red colour, there exists a courtyard which is located in

front of the constructed portion which fell to the share of Bhola Ram. The portion in brown colour is located on the western side of the said courtyard.

3. The case set up in the plaint by the appellant is that this particular courtyard or compound, which is marked as ABC & D in the plan Ex. P1 filed along with the plaint, in accordance with the partition deed and the map partitioning the property which was duly registered, fell to the share of appellant's father and the respondent has started bringing drums in the said open courtyard for storing the same in the brown portion of the property and he had no right to use the courtyard at all and thus, a perpetual injunction was sought restraining the respondent from in any manner using the courtyard.

4. It was also the case of the appellant that the common passage which was shown in red colour in the said map has been also encroached upon by the respondent in the manner that he had constructed a tin-shed at the end of the said common passage just adjacent to the said courtyard and has been letting out the said tin shed to the different persons for storing their goods and he sought mandatory injunction for demolishing the said tin-shed which is constructed in the portion kept for joint user of the parties. The said tin-shed has been marked DHKJ in plan Ex. P1. He has also alleged in the plaint that the said common passage shown in red colour in the partition deed as well as in the map was open to sky but the defendant-respondent had covered that passage at point REFG which had the effect of blocking the light and air in that common passage and thus, he prayed for relief of mandatory injunction for demolishing the said roof which covered the said common passage.

5. It was pleaded in the plaint specifically that the said tin-shed and the said roof had been constructed about 32 months prior to the institution of the suit. The suit was instituted on December 12, 1970. The 32 months would take up back to about March-April, 1968.

6. The respondent contested the suit pleading that in fact the said courtyard was kept for common use of both the parties and has been since used commonly and it was further pleaded that the tin-shed had been constructed in a portion of the property which had fallen to his share and had not been constructed in any joint passage but he remained silent with respect to the covering the common passage. He took some preliminary objections that the suit was liable to be stayed u/s 10 read with Section 151 of the Civil P.C. as he had also filed a suit for injunction against the appellant with regard to the user of the said courtyard and also took the plea that the suit is bad for misguide of causes of actions and is not properly valued for purposes of court-fee and jurisdiction.

7. In replication the appellant while controverting the preliminary objections reiterated his plea on the merits. Before framing of issues the court examined defendant-respondent under Order 10 of the Civil P. C. and he made a statement that the said tin-shed and the said roof over the passage are old constructions since the time of the partition of the property. Following issues were framed :

1. Is the suit liable to be stayed u/s 10 or Section 151 of the Civil P.C.?
2. Is the suit bad for multifariousness ?
3. Is the suit not correctly valued for the purposes of court-fee and jurisdiction ?
4. Did the defendant construct any tin-shed on any portion jointly owned by the parties ?
5. Was the Chowk reserved for joint use of the parties at the time of partition ? If so, has the defendant any right to use it?
6. Did the defendant construct chhatta on the part of the joint passage? If so, when and to what effect?
7. Relief.

8. The learned Sub Judge decided issues 1 & 2 against the defendant and in issue No. 3 he required the appellant to pay additional court fee on the separate reliefs of mandatory and perpetual injunctions and he held that the defendant had constructed the tin-shed on a portion jointly owned by the parties and that the said chowk-court yard had fallen to the share of the plaintiff-appellant exclusively and the defendant-respondent has no right to sue the same and the defendant-respondent had covered the common passage. He, however, declined to grant the relief of mandatory injunction in respect of the tin-shed and the said chhatta on the ground that the plaintiff-appellant had been guilty of laches which amount to acquiescence on the part of the plaintiff-appellant and he proceeded to grant relief of damages in place of reliefs of mandatory injunctions both with regard to tin-shed and the said chhatta coverage. He, however, granted relief of perpetual injunction restraining the defendant-respondent from using the said courtyard in any manner. Thus, he partly decreed the suit for grant of perpetual injunction and declining the reliefs of mandatory injunctions, he awarded damages of Rs. 2,000/- to the plaintiff-appellant for the construction raised by the defendant-respondent on point DJHK i.e. chhatta covering the common passage and Rs. 7500/- for the said construction of tin-shed in the common passage. He also awarded the costs to the plaintiff-appellant.

9, The defendant-respondent filed an appeal. The Additional District Judge, however, held that the suit in respect of the reliefs claiming mandatory injunction was barred by limitation. He repelled the contention of the plaintiff-appellant that as no plea has been raised with regard to suit being barred by limitation such a plea could not be raised for the first time before the first appellate court and he held that in view of Section 3 of the Limitation Act as the fact stood admitted by the plaintiff in evidence the court was duty bound to look into the plea of limitation raised for the first time in appeal. He gave the finding that the said tin-shed as well as chhatta had been constructed more than three years prior to the filing of the suit and in view of Art. 113 of the Limitation Act, 1963, the reliefs of mandatory injunction were barred by limitation. In the alternative he held that the Lower Court was not legally right in granting the alternative relief of damages

inasmuch as no such prayer has been made by the plaintiff in the plaint and during the course of arguments before the first appellate court the plaintiff had declined to claim any such relief of damages by seeking amendment of the plaint. He also gave the finding that in fact, the courtyard has been in joint user of both the parties and thus, relief of perpetual injunction could not be granted against the defendant. So, he set aside the judgment and decree of the trial court and dismissed the suit of the plaintiff with costs.

10. Findings on issues 1, 2 & 3 were not challenged before the first appeal at court and thus, they were confirmed. They are also not challenged before me in this appeal.

11. Bare reading of the partition deed and the map Ex. PW 3/2 which depict the portions falling to the shares of the two owners which was also duly registered make it self-evident that the courtyard had gone to the share of appellant's father in the partition. It is not understood why the first appellate court has not given any importance to this very material document in his judgment. The learned counsel for the respondent has not been able to show from the partition deed as well as map that this courtyard was kept as joint by the two owners and that this courtyard had not fallen to the share of the appellant's father.

12. The learned first appellate court gave importance to the fact that there was admission made by the appellant that the portion which went to the share of Kishan Lal in the earlier partition had a door opening in this courtyard but no question was put to the appellant whether that door was kept open or not when the portion which is shown in brown colour had fallen to the share of Kishan Lal. Even in the written statement no such fact has been pleaded that the portion which fell to the share of Kishan Lal and had ultimately been purchased by the respondent had any door opening in the said courtyard at the time the first partition of the property took place. The map Ex. PW 3/2 did not show any such door opening in the courtyard from the said portion. So, it has to be held that the courtyard is exclusive property of the plaintiff-appellant, and the learned first appellate court was not right in displacing the well considered finding of the trial court in this regard. The finding of the first appellate court is vitiated in law inasmuch as the same has been arrived at ignoring the document of title, the partition deed and the map attached to that partition deed. In view of this, I set aside the finding of the first appellate court on issue No. 5 and hold that this courtyard (chowk) was not kept for joint use of the parties at the time of the partition and the defendant-respondent has no right to use that courtyard in any manner. Issue No. 5 is, hence, decided in favor of the appellant.

13. Now coming to issue No. 4, even assuming for the sake of arguments that the appellant's suit was not barred by limitation and the construction of the tin shed had obstructed the common passage of the parties and there is recurring cause of action arising in favor of the appellant, even then the relief of mandatory injunction could not have been granted to the plaintiff-appellant in view of the plaintiff-appellant being guilty of laches inasmuch as admittedly the

plaintiff-appellant had not taken any objection to the construction of the said tin-shed in the joint passage for more than 5-6 years before filing the present suit. It is evident from the aforesaid map by which the partition of the property took place that a joint passage was kept for the parties shown in red colour and this tin-shed is located at the far end of the said joint passage.

14. In *Krothapalli Satyanarayana Vs. Koganti Ramaiah and Others*, , the facts, in brief, were that the defendant in that case had constructed a wall in the passage used as a lane for passing and re passing by the plaintiff and also by dumping some earth in the passage he obstructed the plaintiff from passing and re passing with cattle and carts from the lane. The plaintiff in that case had approached the court for grant of mandatory injunction after about 9 years of such construction. The trial court in that suit refused to grant relief of mandatory injunction for removal of the wall on the ground of laches but had granted the relief of injunction requiring the defendant to stop spreading of tandu in portion of lane to the west of the wall which was an encroachment on the right of way of the plaintiff. In the appeal the High Court also did not grant the discretionary relief of mandatory injunction for removal of the wall as the plaintiff was held to have acquiesced in the construction of the said wall. The Supreme Court also endorsed the judgment of the High Court on this point.

15. The learned Sub-Judge in the present case has also declined to grant this relief of mandatory injunction on the ground that this tin-shed had been constructed more than three years before the filing of the suit without any objection from the plaintiff-appellant and he has relied upon *Ata Muhammad v. Nur Ahmad*, AIR 1925 Lah 642, where also the relief of mandatory injunction for demolishing the construction over a common wall was refused as the court had been approached by the plaintiff belatedly after 8 years of such construction.

16. Section 40 of the Specific Relief Act, 1963, debars the court from granting any relief of damages in lieu of injunction unless and until the plaintiff has claimed such a relief in his plaint. An opportunity was provided to the appellant for amending the plaint to claim such damages by the first appellate court but for reasons unknown the plaintiff-appellant had chosen not to avail of such opportunity. Even in this appeal the appellant has not chosen to have this opportunity.

17. Although the question of limitation in the present case is of only now academic importance yet as the point has been argued in detail I would like to express my view on the said point as well. It is true that in the written statement no plea has been taken that the cause of action in respect of seeking relief of mandatory injunction stood time barred. It appears that before framing the issues the court had chosen to record the statement of defendant-respondent in which he categorically stated that the said tin-shed was an old construction and had been in existence since the time of the partition of the property. No issues were framed by the learned trial court with regard to the point of limitation. However, in evidence not only the plaintiff-appellant but his witnesses also

admitted that this tin-shed was in existence for more than three years before the filing of the suit. The first appellate court taking resort to Section 3 of the Limitation Act held that as the fact stands admitted by the plaintiff-appellant the court has no option but to examine the point of limitation which was a question of law necessarily arising from the admission of fact made by the plaintiff-appellant.

18. In the plaint it was averred that this construction was made about 32 months prior to the filing of the suit. There was no specific denial of this particular fact in the written statement but still the court thought it advisable to examine the defendant-respondent in order to clarify his plea with regard to the date in the construction of the aforesaid tin-shed. At any rate, as the plaintiff-appellant himself had admitted in his testimony about the existence of this tin-shed for more than 3 years prior to filing of the suit the first appellate court was not wrong in taking notice of this admission of fact and then drawing the legal inferences available flowing from such facts.

19. Section 22 of the Limitation Act lays down that in the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues. It is the contention of the learned counsel for the plaintiff-appellant that the tin-shed which had obstructed the common passage is a continuing tort and thus, till this obstruction remains the cause of action arises at every moment. He has referred to a number of judgments in support of this contention. However, I may mention that this tin-shed although construction in a joint passage still it has not fully blocked the passage of the plaintiff-appellant in any manner. The question which arises for consideration is when such a construction had been put on the common joint property, could it give rise to continuous tort so as to be covered by Section 22 of the Limitation Act?

20. Section 23 of the Limitation Act, 1908, which is similar to Section 22 of the Limitation Act, 1963, came up for consideration before the Full Bench of the Lahore High Court in *Khair Mohd. Khan v. Mt. Jannat*, AIR 1940 Lah 359. In the said case perpetual injunction was sought requiring the defendant to demolish a chabutra (platform) constructed on a portion of a courtyard which obstructed the passage of carts and other vehicles from the outer thoroughfare into the courtyard and the plaintiff complained that it caused a lot of inconvenience to them and other persons living in the mohalla. The question which arose for decision was whether it was a continuing wrong so as to give cause of action *de die in diem* as per Section 23 of the Limitation Act or it was covered by Art. 120 of the Limitation Act. Six years period was prescribed under Art. 120 of the old Limitation Act which has been curtailed to three years by similar Art. 113 of the new Limitation Act. The leading judgment was given by Tek Chand, J. and it was observed by him that a distinction has to be kept in view 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 the injury

might continue .In such a case, the cause of action to the person injured arises once for all at the time when the injury is inflicted and the fact that the effects of the injury are felt by 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. It was observed that if however, the act is such that the injury itself is continuous, then there is a continuing wrong. The observation of Mookerjee, J. in *Brijendra Kishore Roy v. Bharat Chandra Roy*, (1915) 31 IC 242 : AIR 1916 Cal 751 to the following effect were quoted with approval :

"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."

21. The cases of continuous injury were considered in this judgment, one of which was *Raj Rup Koer v. Abul Hossein*, (1881) 6 Cal 394, where facts were that an artificial watercourse had been constructed on the defendants land to take water from a natural stream to the plaintiff's land. The defendants had, without authority, obstructed the flow of water by making dams and cuts in the water channel and they used to lake water from the plaintiff's channel to irrigate their own fields. The question arose whether such an act of the defendants was a continuous injury or not? The Privy Counsel held that the dams, cuts and other modes of obstructing or diverting the water from the water course were in the nature of a continuous 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. Other instances of continuous wrongs are continued pollution of stream (*Hole v. Chard Union*, (1894) 1 Ch 293, 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*, (1981) 6 Bom 20, obstruction of discharge of surface water (*Kaseswar Muker-jeev. AnnodaProsad*,(1917) 41 IC 863 : AIR 1918 Cal 422, obstruction of light and air through ancient windows and similar such wrongs *Shadwell v, Hutchinson*, (1831) 2 B & A 97 , *Ponnu Nadar and Others Vs. Kumaru Reddiar and Others*, and *Moti Ram v. Hans Rai* AIR 1936 Lah 334. In all such cases the injury was said to be continuous and, Therefore, limitation runs every moment of the time during which the injury continues. The learned Judge held that the present case stands on different footing as the injury was inflicted and completed on the construction of the Chabutra (platform). It was held that with the construction of such Chabutra on the common land there has taken place complete dispossession and ouster of the plaintiff. So, it was not a continuing wrong but a wrong which was completed at the time the construction was put up and it was not an injury which had been committed by continuation from one given day to another. The suit was held to be time barred. *Din Mohammad, J.* also agreed with the main judgment but he expressed the view that distinction drawn 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 Commissioner for the City of Madras v. Sarangapani Mudaliar*, (1896) 19 Mad 154.

However, the Supreme Court in *Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj Sansthan and Others*, , cited this judgment of Full Bench of Lahore High Court with approval. The Patna Full Bench in *Sheo Narayan Singh and Others Vs. Ambica Singh and Others*, also has laid down similar principles as enunciated by the Lahore High Court and reiterated by the Supreme Court in the aforesaid judgment.

22. The learned counsel for the appellant has placed reliance on *Bhagwan Dutt Kamat Vs. Asharfi Lal Mahtha*, . This was a case of obstruction of public way but the judgment does not show as to in what manner the obstruction was being made in the public way. It was not a case where construction has been made on the public way which could be termed as ouster of the other persons from public way. It is evident that in case the obstruction does not result in complete dispossession or ouster, such an obstruction would be a continuous one and injury would be also a continuous one.

23. Reference is then made to *Aptabuddin Khan and Another Vs. Johar Ali Kazi and Others*, . In this judgment it was held that limitation does not apply in a case of obstruction to the right of way it being a continuous nuisance. The judgment does not clarify the facts as to whether the obstruction amounted to complete ouster or not.

24. The cases of *Movva Butchamma Vs. Movva Venkateswararao and Others*, and *Damodara Naidu and Others Vs. Thirupurasundari Ammal and Another*, , relied upon by the learned counsel for the appellant are of no help to decide the present issue inasmuch as the point of limitation was not raised in these cases.

25. The learned counsel for the appellant has referred to *Bai Reva Vs. Bai Jadav*, , which is not the point which has arisen for decision before me. It is true that in order to claim adverse possession the ouster must be for 12 years but here is the question whether the suit filed by the plaintiff-appellant seeking the relief of mandatory injunction was within time.

26. Facts of the present case are in pari materia with the facts of the case decided by the Lahore High Court in the Full Bench judgment. So, following the Full Bench judgment of the Lahore High Court which stands approved by the Supreme Court, I hold that in the present case the construction of the tin-shed in the common passage amounted to complete ouster of the right of common use to that portion of the joint passage where the tin-shed stood constructed. Hence, the injury was complete when the tin shed was constructed and limitation was three years for filing the suit for seeking the relief of mandatory injunction.

27. Similar is the position in respect of the covering of the common passage which was subject-matter of issue No. 6.

28. No satisfactory evidence was led by the appellants to prove that the said tin-shed had been let out, so relief of rendition of accounts could not be granted to the appellants.

29. So, in view of the above discussion, I partly allow the appeal and set aside the judgment and decree of the first appellate court and restore the judgment and decree of the lower court granting injunction restraining the defendant-respondent from using the courtyard in question marked ABCD in map Ex. P1 in any manner which is the exclusive property of the plaintiff-appellant. The appeal with regard to other reliefs is dismissed. In view of the partial success, I leave the parties to bear their own costs throughout.

30. Appeal party allowed.