

(1956) 01 AP CK 0010

In the Andhra Pradesh High Court

Case No : Second Appeal No. 829 of 1953

Kuchibotha Kanakamma and Another

APPELLANT

Vs

Tadepalli Ptanga Rao and Others

RESPONDENT

Date of Decision : 11-01-1956

Acts Referred:

Easements Act, 1882 — Section 37, 47
Limitation (Amendment) Act, 1871 — Article 142, 144, 31, 37
Limitation Act, 1963 — Section 23, 24, 28, 3

Citation : (1956) 01 AP CK 0010

Hon'ble Judges : Viswanatha Sastri, J

Bench : Single Bench

Advocate : G. Venkatarama Sastry, for the Appellant; M.S. Ramachandra Rao, M. Krishna Rao for Respondent Nos. 2, 3 and 6, A. Balakoteswara Rao and B. Bhima Raju, for the Respondent

Judgement

Viswanatha Sastri, J.—Defendants, husband and wife, are the Appellants in this second appeal which is preferred against a decree granting a mandatory injunction directing them to remove a cross-wall and certain other structures from the portion ABNM of the pathway marked ABCD in the plan attached to the decree and a permanent injunction restraining them obstructing the free passage of the Plaintiffs through the lane ABCD. The lane AB CD was originally a part of a large block of land belonging to one Cherukuru Subba Rao who divided it into several plots and sold them as building sites to different individuals some of whom have subsequently built houses thereon". The lane ABCD is 9 feet wide and runs between and along the whole length of the backyards of two rows of sites and houses situated to the north and south. The lane ABCD opens into a public road both on the east and the west, at the places indicated as CD and AB respectively.

The Defendants" house PNBB1 is situate north of the lane at its westernmost extremity. The portion of the lane just behind the house PNBB1, is marked as ABNM and it is on this plot ABNM. that the structures complained against are

found. The finding of the Courts below, which I accept, is that when Subbarao the original owner of the - entire block of land divided it into parcels and sold them as building sites, the lane ABCD was set apart for serving as a common pathway for the owners of the plots on either side, particularly for their servants, sweepers and scavengers. The Plaintiffs, as owners of the sites and buildings on either side of the lane ABCD brought the present suit on 2nd May, 1949, for an injunction, both mandatory and prohibitory, against the Defendants alleging that the latter had, four years before suit, put up a cross-wall across the lane, along the line MN thereby obstructing Plaintiffs' access through the lane to the public road lying to the west and had also started the erection of some structures at the points A and B so as to close the lane at one end along AB. According to the Defendants, the portion of the lane ABNM lying next south of their house NBB1.P belonged to them that even otherwise their predecessors in title had effectively blocked the passage through ABNM as early as 1934 by the construction of a motor garage and that the Defendants had therefore acquired a prescriptive title to the portion of the land marked ABNM. The suit was stated to be barred by limitation.

2. The only point argued before me was whether the suit was barred by limitation. The Courts below have held, after an examination of some reported decisions, that the invasion of the Plaintiffs' right of way by the Defendants and their predecessor in this was a continuing wrong that a fresh cause of action arose de die in diem to the Plaintiffs and that the suit was not barred by limitation having regard to Section 23 of the Limitation Act. In this view, the suit was decreed.

3. At the outset it is necessary to state a few relevant facts. Exhibit A-1 dated 26th February, 1929, was the" sale of the site BB1PN by the original owner Subbarao to Venkata Krishna Rao the Defendants" predeceessor in title. Exhibit A-1 does not include the portion of the lane ABNM now encroached upon by the construction of a motor garage but refers, on the other hand, to the lane as the southern boundary of the site sold. The sons of the vendee under Exhibit A-1 who had built a house on the site BB1PN sold the house to one venkatappayya under Exhibit B-I dated 4th November, 1938. This sale deed included not only the house and the site BB1PN conveyed under Exhibit A-1 but also that portion of the lane adjacent to the house on the south marked as ABNM. The length and breadth of the property sold given in Exhibit B-I as well as the description of the southern boundary clearly show that the portion of the lane marked ABNM on which a motor garage stood, was included in the sale.

Exhibit B-2 dated 1st June, 1947, is the sale in favour of the first Defendant and the property conveyed thereunder is described in the same manner as in Exhibit B-I, that is to say as including the portion of the lane ABNM and the motor shed thereon. The evidence of Shri Vepa Krishnamurthy (D.W, 1) Superintending Engineer, Bez-wada, shows that he was a tenant of the Defendants' house in 1934, that when he took the house on rent there was no motor garage, that in

April 1934, he erected a motor shed on the site of the land with a gate and doors at the point A and B, that a short wall was put up in the north along the length of the garage and that the roof of the motor shed rested on this wall and on the wall of the house situated south of the lane.

He stated that he recovered the cost of the garage from the owner of the house. D.W.2, a retired Assistant Engineer and a tenant from 1940 to 1946 of the house opposite to the house now in question stated that the Defendants' house was then in, the occupation of Gannon Dunkerly & Co., and that there was a garage to the south-west of the house filled with a gateway and galvanised iron shutters during the time he was living there. D.W. 3, an employee of "Ganon Dunkerly & Co., stated that the company was a tenant of the Defendants' house from 1934 to 1948, though the house changed hands during that period. He spoke to the existence of a garage to the south of the house from 1934 and to its gate being in the west, that is to say, at the place marked AB in the plan. He also spoke to a wall across the lane at MN, as having been in existence even before the company began to occupy the house in 1934, D.W.3, the son of the vendor under Exhibit B-2 gave similar evidence. The lower appellate Court observed as follows:

We find in Exhibit B-I reference made to the existence of a motor shed in the plot, Exhibit B-I dated 4th November, 1938. Therefore at least prior to that date there must have been a motor garage in the portion marked ABNM. So, the case of the Plaintiffs that the interference with the lane took place only 4 years ago does not stand" scrutiny.

4. It is clear that the portion of the lane marked as ABNM in the plan was trespassed upon by the Defendants predecessor-in-title in 1934, that a motor garage was constructed on the site trespassed upon, that walls and gates with shutters had been put up across the lane as part of the garage and that the owners of the houses on either side of the lane were thereby prevented from passing through that portion of the lane marked ABNM. This state of affairs continued from 1934 till the date of suit and all that the Defendants did in 1949 was to replace two old pillars by new ones at the points A and B in order to support the gate of the garage.

5. Sri G. Venkatarama Sastry, the learned advocate for the Appellants, argued that there was here a case of a trespass by the Defendants' predecessor-in-title on the portion of the lane AB NM in 1934, that as a result of the construction¹ of a motor shed on the encroached site in 1934, the site had been in the exclusive possession and enjoyment of the Defendants and their predecessors-in-title adversely to the Plaintiffs for 15 years and that the Defendants had acquired an absolute title to the site by prescription free from the claims of the Plaintiffs to a right of way. According to him, there was a completed trespass in 1934 and an acquisition of title, by prescription by 1946 and there was no case of a continuing wrong within the meaning of Section 23 of the Limitation Act so as to give the Plaintiffs a recurring cause of action. He relied on the decisions reported in *The Municipal Commissioner v. Sarnngapani Mudaliar*. ILR 19 Mad 154 (A), Sundaram

Iyer v. Municipal Council of Madura, ILR 25 Mad 635 (B), Basaweswara-swami v. Bellary Municipal Council, ILR 38 Mad 6 : AIR 1916 Mad 613) (C), in support of his contention.

Reference was also made to Khair Mohamed Khan v. Mt. jannat, ILR 1941 Lah 22 : AIR 1940 Lah 359 (FB) (D), and Muthalagappa Chettiar (deceased) and Others Vs. Navanestheswara Gurukkal, , in support of the contention that the principle of continuing wrong could not be applied to an obstruction to a right of way by the erection of a permanent structure and |to Ponnu Nadar and Others Vs. Kumaru Reddiar and Others, for the proposition that where there are successive invasions of a right, time will in general, run from the first of the series. It was also argued on the strength of the decisions in ILR 1941 Lah 22 : AIR 1940 Lah 359 (FB) (D), and Ambadas v. Dattatraya, ILR (1944) Nag 753 : AIR 1945 Nag 78 (G), that where there is a dispossession and ouster or an encroachment on land by the erection of a permanent structure it is not a case of a continuing wrong within the meaning of Section 23 of the Limitation Act and that the trespasser would acquire absolute title to the land encroached upon by reason of his adverse possession for 12 years.

I have read the rulings cited for the Appellant and many others which disclose a difference of opinion not only among the different High Courts but among judges of the same Court with regard to the scope and effect of section 23 of the Limitation Act. I shall endeavour to state the principles applicable to cases of this kind.

6. By virtue of Section 3 of the Limitation Act the periods of limitation prescribed for suits in schedule I of the Act are subject to Section 23 which, so far as it is now material, runs as follows:

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 wrong continues.

7. One has to reconcile the provisions of Section 23 with the articles of schedule I of the Limitation Act, though the difficulty of the task was felt as early as *Rajrup Koer v. Abul Hossein*, ILR 6 Cal 394 (PC)(H) a case of an obstruction to a water-way which arose under Article 31 of the Limitation Act, 1871, couched in the same terms as Article 37 of the Act of 1908 except that the period was then 2 years and is now 3 years. The period of limitation for a suit for damages for obstruction of a water-course commenced to run from "the date of the obstruction", a phrase which was construed by the Calcutta High Court as meaning the date on which the obstruction became effective.

The Judicial Committee upset the decision and held that as the obstruction was a continuing wrong there was a fresh starting point of limitation every moment the wrong continued. There has been considerable discussion in the decided cases as to the meaning of the expression "continuing wrong" in Section 23 of the Limitation Act. As pointed out in *Raja cf Venkatagiri v. Isakappalli Subbiah*, ILR

26 Mad 410 (416) (I), and accepted in ILR 1941 Lah 22 : AIR 1940 Lah 359 (FB) (D), and Mohabharat Saha v. Abdul Hamid, 1 Cal LJ 73 (78) (J) the criterion u/s 23 of the Limitation Act is not, Whether the right is a continuing one, but whether the wrong is a continuing one.

If A tortiously causes bodily injury to B, the wrong is complete the moment the injury is done, though the effect of the injury might last during the life-time of B. This is plainly not a case of a continuing wrong. The distinction between an injury which itself continues and an injury whose effect alone continues is often found to be a subtle refinement. In Brojendra Kishore Roy v. Bharat Chandra Roy 20 Cal WN 481 : AIR 1913 Gal 751 (K), Mookerjee, J, pointed out that 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, for there is a real distinction between continuance of a legal injury and of the injurious effects of a legal injury. In other words, -the continuance of the effects of a wrong is not the same thing as a continuing wrong. Where the Plaintiff has the right to take water through a channel running through the Defendants' land, an obstruction to the flow of water or unauthorised diversion of the water by the Defendant through a pipe is, according to the decision of the Judicial Committee, a continuing wrong to which Section 24 of the Limitation Act of 1871 corresponding to Section 23 of the Act of 1908 would apply.

Though an attempt has been made in some cases to differentiate a right of way from a right to the flow of water I am unable to see any rational basis for such differentiation so far as the applicability of Section 23 is concerned. The difference between continuous and discontinuous, easements is not here material. Indeed Article 37 of the Limitation Act deals with obstruction to a right of way and a water course on the same footing. In my opinion Section 23 of the Limitation Act would apply to an obstruction to a right of way and the cause of action would be renewed de die in diem so long as the obstruction continues subject to an important limitation to which reference will be made later; in this judgment. See Masooma Bibi v. Mahaminad Said Khan AIR 1942 All 77 (L); Dwarakanath Sen v. Taraprasanno Sen AIR 1923 Cal 56 (M); Jurawan Singh and Others Vs. Ramsarekh Singh and Others, , Nazimulla v. Wazidulla 21 Cal LJ 640 : AIR 1916 Cal 733 (2) (O) and Ponnu Nadar and Others Vs. Kumaru Reddiar and Others, .

8. Reliance has been placed on behalf of the Appellant on the following observations of Varadachari, J., in Muthalagappa Chettiar (deceased) and Others Vs. Navanestheshwara Gurukkal,

Whether the principle of continuing wrong can be applied to obstruction to a right

of way or not there can be no doubt that it does apply to cases of interference with a water course.....

It has no doubt been sometimes stated generally that whenever a permanent state of things has been brought about, there is no scope for the application of Section 23 of the Limitation Act.

9. These observations of learned Judge do not amount to a decision and merely suggest possible lines of argument. The mere fact that obstruction to the enjoyment of an easement of way or of light and air is caused by a wall or other permanent structure does not mean that the wrong is not a continuing one. It makes no difference to the Plaintiff whether the Defendant puts up a temporary obstruction *de die in diem* or whether he puts it up once for all. In either case, the wrong is a continuing one.

In my opinion, there is no justification for holding that if the Defendant puts up a fence or a screen every day so as to obstruct the Plaintiffs right of way or right to access of light and air, it is a continuing wrong within the meaning of Section 23 of the Limitation Act, but it ceases to be such if a permanent obstruction in the shape of a wall is erected by him. The Appellants' learned advocate placed strong reliance on the judgment of the Full Bench of the Lahore High Court in ILR (1941) Lah 22 : AIR 1940 Lah 359 (D), holding that the question whether an obstruction to a right of way amounted to a continuing wrong or not depended upon whether the obstruction was of a permanent nature or not.

Tek Chand, J., who delivered the leading judgment in the case referred to the decision of the Calcutta High Court dealing with the applicability of Section 23 of the Limitation Act to a wrongful obstruction to a right of way and observed:

All these decisions purport to be based on ILR 6 Cal 394: LR 7 1A 240 (PC) (H), 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 continuous nuisance 21 Cal LJ 640 :AIR 1916 Cal 733 (2) (O).

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.

10. There is nothing in Section 23 of the . Limitation Act, to warrant a distinction between a permanent obstruction and an impermanent one. both of which are *ex hypothesi* wrongful. So long as a wall, building or other . obstacle to the Plaintiffs enjoyment of an easement of way stands, the wrong continues and Section 23 of the Limitation Act gives rise continuously to fresh periods of limitation. This is not to say that there is a perpetual right of suit, a point which will be considered

later. All that I wish to point out, is that the fact that the obstruction to a right of way or to a right to access of light or air is caused by the erection of a permanent wall, or structure one for all, does not make it any the less a continuing wrong within the meaning of Section 23 of the Limitation Act.

The Defendant who by his wrongful act has brought a state of affairs the continuance of which every moment is a new tort and who, though, in a position to terminate it at his will, causes the state of affairs to continue, commits a continuing wrong within the meaning of section 23 of the Limitation Act. The continuance of a state of affairs originally brought about by the defence might well be continuing wrong. Explaining the words "continuance of injury or, damage" Buckley, J., observed:

The words do not mean or refer to damage " Inflicted once and for all which continues unrepaired but to a "new damage recurring day "by day in respect of an act done. It may be once and for all at some prior time" (italics are mine here in or repeated, it may be, from day to day." 1- Harrington v. Corporation of Derby, LR (1905) 1 Ch. 205 (P,).

11. In Clerk and Lindsell on Torts, 11th Edition, page 240 the law is thus stated:

If the act complained of creates a continuing source of injury and is of such nature as to render the doer of it responsible for the continuance thereof 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*.

12. The case of a dispossession of an owner of land stands on a different footing from an obstruction to a right of way. An owner of land dispossessed by a trespasser must sue for recovery of possession within 12 years of his dispossession under Article 142 of the Limitation Act. If he fails to do so and the trespasser continues in possession for 12 years, the title of the owner is extinguished u/s 28 of the Limitation Act. The extinguishment of the title of the rightful owner results in the acquisition of a good title by the trespasser.

It is unnecessary to cite authority for these elementary propositions. Co-owners are entitled to joint possession and enjoyment of the common! property and the possession of one co-owner is presumed to be on behalf of all. Where however one co-owner is openly in hostile and exclusive possession for 12 years or more of the common property in denial of the rights of the other co-owners and there is thus an ouster of the other co-owners to their knowledge, a suit for possession by the other co-owners will have to be brought under Article 144 of the Limitation Act within 12 years of their ouster. If no such suit is brought, the title of the other co-owners would be extinguished u/s 28 of the Limitation Act and the co-owner in such possession would acquire an exclusive title.

If the title to or ownership of the property is extinguished, rights accessory thereto or involved in it would also be extinguished. The title lost u/s 28 is a title which entitles the owner to possession and the title) acquired by the trespasser

is a title arising from possession for the prescribed period. Where therefore there is an ouster or complete dispossession of the owner, there is a wrong committed in respect of his possession. Once there is an ouster or complete dispossession by reason of which the Plaintiff is wrongfully deprived of his possession by the Defendant, the continuance of the Defendant in possession thereafter does not amount to a fresh wrong in regard to the Plaintiff's possession which he hypothesised had been lost previously. The cases cited for the Appellant holding that Section 23 of the Limitation Act has no application to cases of dispossession or ouster from land in the possession of the Plaintiff would seem to proceed on some such principle as that stated above. AIR 1949 1 (Orissa) . The principle that dispossession or ouster is not a continuing wrong has also been applied to the case of a co-owner erecting a permanent building on common land and occupying it to the exclusion of the other co-owners. ILR 1941 Lah 22 : AIR 1940 Lah 359" (D), cited by the Appellant is an instance.

The view taken in Choudhury Bibhuti Narayan Singh and Others Vs. Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur, " that a dispossession of the owner is a continuing wrong but nevertheless his right would be lost by the lapse of 12 years from the date of dispossession as a result of Section 28 of the Limitation Act appears. If it is a continuing wrong, a cause of action would arise *dedie in diem*, to the Plaintiff so long as the dispossession continues and Section 28 of the Limitation Act will not apply so as to extinguish his title. I am of the opinion that Section 23 of the Limitation Act would not apply to cases of wrongful dispossession or ouster of the Plaintiff in assertion of a hostile title in the Defendant and this dispossession or ouster might result from the construction of a building or structure of a permanent character on the encroached land and its occupation by the Defendant. I agree with the Appellant's contention to this extent.

13. The Plaintiffs here claim only an easement of a right of way over the land A B C D by a grant from the original owner and neither the ownership of the site nor the right to possession thereof rests in them. The right to possession of the site is vested either in the original owner or the municipal council. The obstruction caused by the Defendants by the erection of a motor garage on A B N M is not a dispossession or ouster of the Plaintiffs, for they themselves had no right to the possession of the land A B C D or any part of it but only a right of way thereon. The obstruction to the Plaintiffs' right of way is therefore not a dispossession or ouster but a continuing wrong which attracts Section 23 of the Limitation Act. Is there then a perpetual right of suit?

The answer is clearly, No. u/s 47 of the Easements Act, a discontinuous easement like a right of way is extinguished when for an unbroken period of 20 years, it has not been enjoyed. As such, if the easement of a right of way is itself extinguished, the obstruction to the way ceases to be wrongful and the continuing wrong thereafter ceases to be a wrong. A wrong consists in breach of a duty and a duty postulates a corresponding right in another to whom the duty

is owed.

In the present case, if the title to the site A B C D continued to vest in the original owner, his title would have been extinguished so far as the plot A B N M encroached and built upon by the Defendants is concerned. The loss of the owner's title does not however extinguish the easement right of the Plaintiffs. The easement of a right of way through A B C D granted to the Plaintiffs by the owner would not be lost by the subsequent encroachment and building by the Defendants of A B N M and their occupation of the building for 12 years.

under Section 37 of the Easements Act it is only where from a cause which preceded the Imposition of an easement, the person by whom it was imposed ceased to have any right in the servient heritage, that the easement is extinguished. The easement right of the Plaintiffs would be extinguished u/s 47 of the Easements Act only if it had not been enjoyed as such for an unbroken period of 20 years. The obstruction to the right of way in the present case was only in 1934 and assuming that the Plaintiffs did not exercise their right since then the suit which was filed in 1949 would not be barred.

14. The result is that the Second Appeal fails and is dismissed with costs. No leave.