

(1935) 04 MAD CK 0033
In the Madras High Court

Ponnu Nadar and Others

APPELLANT

Vs

Kumar Reddiar and Others

RESPONDENT

Date of Decision : 05-04-1935

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 147
Limitation Act, 1963 — Section 23

Citation : AIR 1935 Mad 967 : (1935) 42 LW 599

Hon'ble Judges : Madhavan Nair, J;Curgenvan, J

Bench : Full Bench

Judgement

Madhavan Nair, J.—Plaintiffs are the appellants. They are Nadars by caste living permanently in the village of Mela Seithalai situated within, the Zemindari of Ettiyapuram. In the" suit out of which this second appeal arises, they claim for themselves individually and for their castemen the right to take marriage procession along the streets marked A, C, D, E, E, F(1), F(2) and G in the plaint plan. The defendants who are other eastemen of the village, namely, the Naickers, Reddies and Acharies, denied them such right and stated that the exercise of the right is barred by limitation. The plaintiffs allege in the plaint that when they attempted to take a procession they were threatened that they would be murdered, and it may be taken for the purposes of this case that the procession did not start owing to the defendant's hostile attitude. The streets in question have been found by the lower appellate Court to be public streets. In 1900, when the plaintiffs' castemen living in the same village attempted to carry a shanar Corpse through the streets, an order was passed by Mr. Lionel Vibert, Joint Magistrate, apparently u/s 147, Criminal P.C., directing that:

No organised procession of shanars, or Christians shall pass through these streets unless and until they have got an order from a civil Court affirming their right to do so.

2. This order was passed on 19th July 1900. This order not having been set aside, and six years having passed from the date of the order, the defendants

now state that the plaintiffs' suit for a declaration of their right and for a perpetual injunction to restrain the defendants from objecting to the exercise of the right, is barred by limitation under Article 120, Lim. Act. The appellants were not parties to those orders, nor are they representatives of the persons who were parties to them. The short question for determination in this second appeal is, whether in the circumstances mentioned above the plaintiffs' suit is barred by limitation under Article 120, Lim. Act. This point was decided against the plaintiffs-appellants by the lower Courts; if their cause of action started on the date of the order passed by the Joint Magistrate, Ex. 9, it is clear that the suit is barred by limitation. But it is argued by the appellants' learned Counsel that the article applicable to the case is not Article 120; according to him the proper article that should govern the case is Section 23, Limitation Act, according to which

in the case of a continuing breach of contract and 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 breach or the wrong, as the case may be, continues.

3. The learned Counsel argues that every moment the defendants continued to threaten the plaintiffs, the acts complained of create what may be called a, continuing source of injury and a fresh cause of action arises *de die in diem* so long as the threats or obstruction continue and that the suit is not therefore barred by limitation. The question is whether in the circumstances there may be said to be a continuing wrong in the present case. It is by no means easy to decide the point. A case very similar to the present one, but with reference to a dispute likely to cause a breach of the peace concerning land, arose in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410, and was decided by Benson and Bashyam Ayyangar, JJ. In that, case

certain lands were attached by a Magistrate in 1886, u/s 146, Criminal P.C., in consequence of disputes relating to their possession. The Magistrate continued in possession of the lands, and realised some income from them. Both claimants instituted, in 1897, suits in. which each claimed the lands as his own, and sought to obtain a declaration of title to them....

4. It was held that in so far as the suits-were for declaration of title to Immovable property and the profits therefrom,, they were governed by Article 120, Schedule 2, Limitation Act. They further held that only the relief or remedy by way of declaration being barred the title still subsisting, the owner's right or remedy in respect of rents and profits derived from the property remained unaffected. It was argued in that case that at every moment of time during which the attachment by the Magistrate continued a fresh starting point of limitation arose in favour of the plaintiffs and that the attachment would be a continuing wrong within the meaning of Section 23, Limitation Act. This argument was met by the learned Judges in the following manner.

5. They said:

The criterion is not whether the right is a continuing one but whether the wrong is a continuing one.

6. In their opinion the wrong was not a continuing one because there could not have been any wrong done at all as the Magistrate's order was a legal order when it was passed and the continuance of it cannot therefore be called a continuing wrong. Holding this view they overruled the contention that Section 23 would apply to the case and held that the suit was barred by limitation. Strong reliance is placed by the learned Counsel for the respondents on this decision. Mr. Yenkatarama Sastri seeks to distinguish the present case from this decision on the ground that here we are concerned with the assertion of a right of procession along a highway and not with the assertion of title to property as in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410. Having regard to the principle on which the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 is based, I think, the distinction pointed out by the learned Counsel does not affect the question of limitation decided in that case. Whether it be the right of way that is concerned or a right to property, the Magistrate's order passed u/s 147, Criminal P.C., was a legal order in each case and according to the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 the continuance of that order cannot be said to be a continuing wrong so far as the application of Section 23, Limitation Act is concerned. No doubt the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 results in this anomaly, that while a party cannot get a declaration of title to property he can ask for the recovery of the profits from the Magistrate, who, if that decision is followed to its logical conclusion, will for ever remain as the custodian of that property, looking after it, so to speak, for the purposes of the parties concerned. Mr. Sastri argues that this very anomaly shows that that decision cannot be applied to the present case, for once the right of procession is barred, the party asking for a declaration of that right is barred for ever from asserting it and cannot ask for anything else as a token of the recognition of his right as the party in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 could ask for profits arising from the land. To this the answer is given that if the complaining party is not allowed to take processions through the streets, his right to use it for other purposes is not taken away. But I do not think it is necessary to discuss this, line of distinction, as, in my opinion, having regard to the principle which is the basis of the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410, the two cases are indistinguishable.

7. The next argument of Mr. Sastri is. that the case in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 has not been correctly decided. The argument is not without considerable force as it is, supported by a judgment of the Calcutta High Court reported in *Brojendra Kishore v. Sarojitii Ray* 1916 Cal. 751. That case was decided by Mookerji and Beachcroft, JJ. With respect to the point under consideration the facts of that case were precisely similar to the facts

of the case in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410. The defendants in *Brojendra Kishore v. Sarojitii Ray* 1916 Cal. 751 attempted to interfere with the plaintiff's possession of the disputed property and a breach of the peace becoming imminent, proceedings u/s 145, Criminal P.C., were instituted and resulted in an order of attachment u/s 146, Criminal P.C. The plaintiff sued for a declaration of his title and for recovery of possession.

8. It was held:

That it was a case of continuing wrong independent of contract, and consequently, u/s 23, Limitation Act, a fresh period of limitation under Article 120, began to run at every moment of the time the wrong continued.

9. After pointing out the anomalies involved by a logical application of the decision in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410, the learned Judges state their view thus:

In the case before us, the view may reasonably be maintained that there is a continuing, wrong independent of a 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 needless 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 the 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, are these circumstances, that the case may aptly be treated as one of continuing wrong within the meaning of Section 23, Limitation Act. From this point of view, no question of limitation arises.

10. In the light of these remarks, I think with the greatest respect to the learned Judges, the argument of Mr. Sastri that the legal position enunciated in *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 would require re-consideration, is not without force. There can be no doubt that the point of law involved in this case is very important as it affects the rights of a community to take processions along the King's highway in the exercise of their undisputed

rights to use the highway, which nobody can question. Can it be said that because a law people some years ago were prohibited by a Magistrate on a particular occasion from taking a procession along a public street for reasons which then existed, persons now living, who were not even born at that time, should be prohibited from taking processions because the Magistrate's order which was then passed was not set aside? Should not a distinction be made as pointed out by the learned Judges of the Calcutta High Court, between continuance of a legal injury and continuance of the injurious effects of a legal injury? In the circumstances, having regard to the importance of the question involved, I refer the case to the decision of a Bench.

11. This Second Appeal coming on for hearing in compliance with the above order on Monday, Tuesday and Wednesday, the 25th, 26th and 27th days of March 1935, respectively and having stood over for consideration till this day, the Court delivered the following:

Curgenven, J.

12. This second appeal arises out of a suit brought by three Nadars, who are brothers, to establish their own right and the right of their castemen to pass in procession over a certain route in their village of Mela Seithalai. The defendants are other castemen of the village, such as Naickers, Reddies and Acharies, who deny that the plaintiffs enjoy this right. The occasion for the suit was provided by two attempts, on 8th November and 13th December 1918, made by the plaintiffs to take marriage processions over the route in question, these attempts, it is said, being met by obstruction and intimidation on the part of the defendants' party. The route over which it is claimed to exercise the right has been found by the lower appellate Court to be composed of public streets.

13. The question which we have to decide is one of limitation. The dispute has had a somewhat long history, and we have to go back to 1900, when the Nadars of Mela Seithalai village attempted to carry a corpse in procession over the same route. The police reported that there was likely to be resistance on the part of the other caste people, and a breach of the peace, and accordingly the Joint Magistrate, Mr. Vibert, I.C.S., passed an order directing that no organized procession of Shanars or Christians should pass along those streets until a civil Court had declared that there was a right to do so. It is not disputed that this order was passed u/s 147, Criminal P.C., although it may be open to some question whether the occasion was really appropriate for an order of this character, nor is it contended that the order was without jurisdiction and therefore a nullity. The contention of the defendants in the present suit is in brief that this order being still in force and no suit having been filed within the prescribed period by the Nadars to establish the right in question the present claim is time-barred. This point has been decided against the plaintiffs by the Courts below and the plaintiffs accordingly appeal.

14. We have in the first place to decide whether, in view of what took place in

1900, the plaintiffs can derive a cause of action from the alleged occurrences in 1918. Where there are successive invasions or denials of a right, time will in general run from the first of the series. For this proposition ample authority will be found in *Thirurnala Rao v. Kadakar Durgi Shettethi* 1914 Mad. 429, *Sultan Moidean Sahib v. Secy. of State* 1919 Mad. 545, *Kanniyalli Ratha v. Neelakandhan* 1922 Mad. 191 and *Krishnaji Anajee v. Anajee Dhondajee* 1930 Bom. 61. In special cases, where for instance the later invasion is of a different and more serious kind, as a sale following an attachment of property, *Anantharaju v. Narayanarazu* (1913) 36 Mad. 383, or where the enjoyment, though disputed, is not actually interfered with *Muhammad Hanif v. Ratan Chand* 1922 Lah. 94, an exception to this rule may be admitted. We think that the general rule must be applied in the present case because in 1900 not only were the Nadars prevented from going in procession but an order was obtained disallowing all further processions until the right had been established. This latter circumstance affords, we think, another and a different ground for declining to accept the contention that the subsequent occurrences created a valid cause of action.

15. At the time that these later processions were attempted, the Magistrate's order was in force, and the Nadars had no right to go in procession in disobedience of it. It can scarcely be said therefore that they were obstructed in the exercise of a subsisting right, nor ought the Court to recognize as affording a cause of action conduct which involves the infringement of a lawful order. For the application of this principle in somewhat similar circumstances reference may be made to *Ram Sahai v. Binode Behari* 1923 All. 151. In that case the plaintiffs against whom an order had been made u/s 145, Criminal P.C., forcibly evicted the defendant from the land and it was decided that they could not enlarge the period of limitation prescribed by law by taking the law into their own hands. The plaintiffs must accordingly relate back their suit to the order of 1900, by which whatever right they and their fellow castemen had to go in procession was suspended. Can they escape the apparently unavoidable conclusion that the suit is barred by Article 120, Lim. Act? Mr. T.R. Venkatarama Sastri for the appellants argues in the first place that to a claim of this character no rule of limitation will apply.

16. He has cited authorities to show that the right to use public streets, including the right to go in procession, is a natural right inherent in every member of the public, and cannot be prescribed against or lost as other rights may be prescribed against or lost. This is no doubt true. But that is not to say that where a suit has to be brought in order to obtain a declaration that such a right exists the Limitation Act has no application. Section 3 of that Act lays down that subject to the provisions contained in Sections 4 to 25, every suit instituted after the period of limitation prescribed therefor by Schedule 1 shall be dismissed. We have been referred to no provision of the Limitation Act which would exempt a suit of this character, and the argument, we think, cases sight of the fact that although a right may exist the civil remedy available to the party if the right is

denied or infringed may be lost by lapse of time. It has not been disputed that if the Limitation Act applies the appropriate article is Article 120. The appellants then take up the further position that the order of 1900 constituted "a continuing wrong," so that the case is governed by Section 23, Lim. Act, which says:

In the case of a continuing breach of contract and 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 breach or the wrong, as the case may be, continues.

17. We have been referred to two cases one of which supports while the other is against this position : Brojendra Kishore v. Sarojitii Ray 1916 Cal. 751 and Rajah of Venkatagiri v. Isakapalli Subbiah (1903) 26 Mad. 410. Both these cases related to an attachment of land by the Court u/s 146, Criminal P.C., ensuing upon a dispute likely to cause a breach of the peace. No suit was brought within the six years allowed by Article 120, Lim. Act, which it was agreed, is the correct article applicable, and when a suit for a declaration of title was eventually brought the question of limitation arose. In the Madras case, the learned Judges, criticising the Calcutta judgment in Chukkun Lal Roy v. Lalit Mohan Roy (1893) 20 Cal. which appears to have been based on the view put forward here, as we have said, by Mr. Venkatarama Sastri, that so long as the right to the property is not extinguished a suit for a declaration will not be barred, the learned Judges observe:

The criterion is not whether the "right" is a "continuing" one but whether the "wrong" is a continuing one.

18. And they think it is impossible to hold that the wrongful denial by the defendant of the plaintiff's title to the possession and the procuring by such denial of the attachment by the Magistrate constituted a continuing wrong within the meaning of Section 23, Lim. Act. A contrary view has been taken in the Brojendra Kishore v. Sarojini Ray 1916 Cal. 751. The learned Judges seem to have been impressed by the anomaly that although the title to the property would not be extinguished, the suit to declare the title would be barred, and before considering the question really in issue they adopt the language of Lord Ellenborough in Luxmore v. Robson (1818) 1 B & Aid 584 and say:

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.

Passing on to consider what is a continuing wrong, they too dissociate themselves from the decision in Chukkun Lal Roy v. Lalit Mohan Roy (1893) 20 Cal. 906. Then they say:

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 needless 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, Lim. Act. From this point of view, no question of limitation arises.

19. The tests proposed by the learned Judges to discover whether a cause of action constitutes, "a continuing wrong", are, we have no doubt, correct. There must be not a single wrongful act from which injurious consequences follow, but a state of affairs every moment's continuance of which is a new tort. Further, the person who intentionally produces the state of affairs must be intentionally causing it to continue though in a position to terminate it at his pleasure. Simple illustrations of ordinary and continuing wrongs are a blow with a stick and wrongful imprisonment respectively. In the one case the injury ceases, the injurious effect may persist. In the other the injury continues and every moment a person is wrongfully imprisoned a fresh tort is committed and a fresh cause of action arises. The commonest examples of continuing wrongs are to be found in interference with water supply : *Rajrup Koes v. Abdul Mossein* (1881) 6 Cal. 394 and obstruction to rights of way *Juravan Singh v. Ramsarekh Singh* 1933 Pat. 224; *Nazim v. Wazidulla* 1916 Cal. 733; *Dwarka Nath Sen v. Tara Prasanno Sen* 1923 Cal. 356 and *Sreematl Soojan Bibi v. Shamed Ali* 1 C.W.N. 96. In such cases it is always open to the obstructing party to discontinue the obstruction. In *Hukkum Chand v. Maharaj Bahadur Singh* 1933 P.C. 193, the Privy Council applied the same principle to a case where interference with customary worship was concerned. Cases which bear some resemblance to the present circumstances are those of attachment of property. In *Jhabbu v. Mt. Batul* 1923 All. 146, it has been held that where a wrongful distraint has been levied it is a continuing wrong and time will run from the date on which the party came to know of it. The contrary view has been taken in *Venkataramier v. Vaithilinga Thambiran* 1914 Mad. 135, where after observing that the weight of authority in

Madras is against the contention, Miller, J., says:

Where the proceedings which give rise to the cause of action consist in the wrongful distraint, that distraint is not a continuing wrong, though no doubt, the injury continues.

20. In the present case it is no doubt arguable that some analogy exists between an order, which bars a right to take a procession and an obstruction which bars a right of way. Both in a sense create a state of affairs which continues to exist. What we have to find however is the existence of a "continuing wrong," a wrong, that is, originated by and kept in existence by the opposite party. What in fact appears to have given rise to the Joint Magistrate's order was a police report of an apprehended breach of the peace between the rival factions and all that the opposite party did was to adopt an attitude which gave rise to that apprehension. So far as that attitude itself is concerned, it is impossible to find in it a continuing wrong, nor do we find it easier to hold that when the Joint Magistrate passed the order with a view to prevent a breach of the peace there was a "continuing wrong" caused by the defendants' party. There is nothing to show that it was passed at their instance and, even if it were, responsibility for passing it must be taken by the Court and not laid upon the party. Again, once an order was passed, the matter was taken out of the hands of the defendant party, and it lay with the Nadars themselves to establish their right by suit.

21. From this point of view too we are not disposed to hold that even if there was a continuing wrong the defendant party was responsible for its continuance. Where the applicability of Section 23, Lim. Act, is doubtful the proper course; must be, we think, to enforce against the plaintiffs the ordinary principles of limitation, and in the present case to apply Article 120 in the same manner as Article 47 would be applied to the case of an order u/s 145, Criminal P.C., time being taken to run from the date of the order. Adopting this view, the persons affected by the order of 1900 had a period of six years within which to establish their right, and we are not greatly impressed by the argument that, if the right itself may be indestructible, the remedy ought not to have been permanently lost by their failure to take action within that time. We must hold in agreement with *Rajah of Venkatagiri v. Isakapalli Subbiah* (1903) 26 Mad. 410 that the suit is barred under Article 120, Limitation Act. The second appeal is dismissed with costs of the contesting respondents. We certify for a fee of Rs. 150 under Rule 46, Practitioners' Fees Rules.