

(1960) 09 KL CK 0025
In the High Court Of Kerala
Case No : S.A. No. 507 of 1956

Sankarnarayana Vadhyar alias Appathura	APPELLANT
Vs	
Arunachalam and Others	RESPONDENT

Date of Decision : 09-09-1960

Acts Referred:

Limitation Act, 1963 — Article 120, 23

Citation : (1960) KLJ 1486

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : T.S. Venkiteswara Iyer and C.S. Ananthakrishna Iyer, for the Appellant; T.S. Venkitachala Iyer and V. Sankara Menon for Respondents 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

Madhavan Nair, J.—The plaintiff, whose suit for an injunction has been dismissed by both the courts below, is the appellant. The plaintiff and his brothers Subramonia Vadhyar and Sundara Vadhyar entered into a partition evidenced by Ext. A dated 20-3-1926. In Ext. A the properties were divided and allotted in three schedules; Schedule A was allotted to the plaintiff, Schedule C to Sundara Vadhyar, and Schedule B, with the "Eri" described in the schedule appended to the plaint and its adjoining lands, was allotted to Subramonia Vadhyar. "Eri" is a low-lying land which may be used either as reservoir for storing water or as a field for cultivation of paddy as suits the landlord. It was provided in clause 11 of Ext. A that, since there is no reservoir in the properties allotted to the plaintiff, he will be entitled to take water to his fields from the Eris in the B and C schedules, as used to be done before, through the channel by the side of the Eris, and that, for the purpose of irrigating the fields in A, B and C schedules the Eri in C schedule should never be cultivated but always be stored with water and the Eri in B schedule should be stored with water in the second cultivation season (after having been cultivated for the first season). Subramonia Vadhyar has

cultivated the Eri in his B schedule for the second crop in the year 1950 contrary to the above agreement and has thereby caused shortage of water for plaintiff's crops resulting in a loss of 200 paras of paddy to him that season. The plaintiff, having come to know of the contract for sale between Subramonia Vadhyar and the 1st defendant, issued notices requiring them to observe the above said covenants but they refused the same by their reply and had the conveyance executed in favor of defendants 1 and 2. With these averments the plaintiff has instituted this suit to compel the defendants to keep the Eri stored with water in the second cultivation season every year. Subsequently, the 3rd defendant, who is a lessee under defendants 1 and 2, has also been impleaded in this suit. Subramonia Vadhyar was not made a party to the suit. As stated before, the property scheduled in the plaint is the Eri in the B schedule of Ext. A; but its extent is mentioned in the plaint as 1 acre and 60 cents. It has been concurrently found by the courts below that the Eri was only 200 koles in perimeter or $31\frac{1}{4}$ cents in area. The appellant therefore submitted that in this Second Appeal the Eri scheduled to the plaint be taken as only of 200 koles in perimeter or $31\frac{1}{4}$ cents in area. The contentions of the defendants are that Subramonia Vadhyar has never kept the Eri stored with water in any season since the partition of 1926, that he had converted the parambas (lands) at the east and west of the Eri into double crop paddy fields and was raising two crops every year since 1926 in all the area including the suit Eri, that there was no channel by the side of the suit Eri, that the plaintiff has been raising successfully two crops in his fields with the water supplied by the Eri in Sundara Vadhyar's possession and the Government irrigation channel, that the covenant in Ext. A in regard to the suit Eri was never put to operation but was abandoned by the parties and that this suit is actuated by mala fides on account of the assignment of the property by Subramonia Vadhyar in favor of defendants 1 and 2.

2. The trial court found that there was admittedly no channel by the side of the suit Eri and that there being no prayer to restore the channel through which alone the plaintiff, even according to his averments, would be entitled to take the water from the suit Eri to his fields, no useful purpose can be served by the issuance of an injunction as prayed for in the plaint, which will only be to the prejudice of the defendants with no corresponding advantage to the plaintiff. Relying on the Irrigation Registers, Exts. II to XV, Subramonia Vadhyar was found to have raised the second crop of paddy every year in the suit Eri till 1948 (1123 M. E.). The plaintiff had lost his right, if any, in the suit Eri by abandonment and acquiescence. The plaintiff's crops never suffered for want of irrigation by the suit Eri. The suit is not actuated by bona fides. In view of these findings the learned Subordinate Judge dismissed the suit with costs. The plaintiff took the matter in appeal before the Additional District Judge of Trichur, who only agreed with the findings of the trial court and dismissed the appeal with costs. This Second Appeal is by the plaintiff against the above-said decree.

3. The material question that arises in this Second Appeal is whether the plaintiff is now entitled to enforce his right to take water from the suit Eri.

4. On the side of the plaintiff, he alone has been examined in this case. He has deposed in the course of his cross-examination that he was attending to all the agricultural operations of the family at the time of Ext. A partition, that there was no channel at that time by the side of the suit Eri through which water could be taken from the Eri to his lands, and that his fields were irrigated only from the Eri in the properties allotted to Sundara Vadhyar.

It is very clear from these statements that the right reserved in the plaintiff's favor in Ext. A to take water from the suit Eri was never exercised. The channel through which water was to be taken from the Eri to the plaintiff's fields never existed as a water-way even according to the plaintiff. It was at all material times remaining closed and filled up with earth. In that condition it was being cultivated by Subramonia Vadhyar every season along with the surrounding lands. It follows that the right claimed in the plaint was never exercised after the date of Ext. A. This is therefore a case of disuse or non-exercise of the right, right from its very inception. It was negative even in the first season when it ought to have been exercised according to the terms of Ext. A.

5. Since admittedly the plaintiff was obstructed in the exercise of his right under Ext. A at all times by Subramonia Vadhyar and his vendees, the defendants, the plaintiff's Cause of action arose on the first occasion when he ought to have exercised his right but was obstructed from doing so, that is, in the second cultivation season that first came after the date of Ext. A. That season was in 1926/27 the exact period being between October 1926 and February 1927. The suit, being one for an injunction or for the enforcement of the plaintiff's right to take water from the defendant's reservoir, must come under the residuary article 120 of the Limitation Act, and ought to have been instituted by February 1933 at the latest. The present suit was filed only on 22-8-1951. Prima facie, it is, therefore, barred by limitation.

6. According to the learned counsel for the appellant-plaintiff, the right reserved in clause 11 of Ext. A is still available to the plaintiff. The non-user or non-exercise of the right will not extinguish the right. The obstruction caused by the raising of second crop in the suit Eri year by year constitutes "a continuing breach of contract" within the meaning of Section 23 of the Limitation Act giving rise to a fresh cause of action for plaintiff at every such cultivation of second crop in the suit Eri.

7. In support of this claim, the learned counsel for the appellant relied on *Maharani Rajroop Koer v Syed Abdul Hossein* (6 Calcutta 394 P. C). That was a suit to establish a right to a continuous flow of water in a watercourse constructed by the plaintiff's ancestors across the defendant's lands through which water was taken to the plaintiff's lands for over 50 years, and to remove the obstructions to the continuous flow of water caused by the defendants' cutting channels in the sides of the watercourse and diverting the water through them to their own lands. The High Court held that the obstructions having "existed for more than two, though less than twenty, years", the plaintiff's claim

to enforce the right was barred by limitation. The Privy Council, on appeal, held that, the right having been established, the obstructions by diversions of the water were "in the nature of continuing nuisances, 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".

8. The facts of that case bear no parallel to the facts of the present case. There was no exclusion or ouster of the plaintiff from his user of the watercourse or of the water flowing through it. The plaintiff continued to enjoy his rights, and the defendants used to steal away, at times, the water for irrigating their fields. The Privy Council held in the circumstances that the defendants' acts amounted to a continuing wrong. The land being the defendants', their cutting of channels at the side of the watercourse was not a wrong in itself. The wrong consisted only in drawing off the plaintiff's water and every moment some water was so drawn a wrong was committed by the defendant and so it was characterised as a "continuing wrong". (See the observations of the Supreme Court in *Balakrishna v Sree D. M. Sansthan* (A. I. R. 1959 Supreme Court 798 at 808).

9. Here, Subramonia Vadhyar and the defendants have consistently excluded the plaintiff from exercising his rights to take water from the suit Eri to his fields. Having effectively ousted the plaintiff, Subramonia Vadhyar went on cultivating the sites of the Eri and the channel for both cultivation seasons every year along with the surrounding lands. Here the injury done to the plaintiff lay in the closing and filling up of the channel through which alone the plaintiff was entitled to take water from the suit Eri to his fields and merging the same in the paddy fields around. Even if the Eri was filled with water, the plaintiff could not avail of the same, because there was no channel for leading the water from the Eri to the fields. So long as the channel remained closed and filled up, it could not matter to plaintiff whether the Eri was used as a reservoir or as a paddy field. That would not affect him. So, the real act of injury, or the wrong, done to the

plaintiff was the conversion of the channel and the inclusion of it in the paddy fields around. That act was complete and became known to the plaintiff in 1926/1927. Thereafter no further act of wrong was done by Subramonia Vadhyar or the defendants. Only the consequences of that wrong done in 1926/1927 continued to the prejudice of the plaintiff. So this was not a "continuing wrong," but a completed wrong. This is really a case of exclusion of the plaintiff from the exercise of his rights by an act of the defendants' assignor which was completed in 1926/1927 and was of a permanent nature.

10. The test in applying Section 23 of the Limitation Act is not whether the right is a continuing right, but whether the wrong is a continuing wrong. There is a real distinction between the continuance of a wrong and the continuance of the injurious effects of a wrong. To constitute a continuing wrong, there must not be a single wrongful act from which the injurious consequences follow; but there must be a state of affairs the continuance of which amounts to a recurrence of the wrongful act itself. Thus in the case of a bodily injury there is no continuing

wrong as the wrongful act ceased with the infliction of the injury though the injurious effects may persist. Where the wrong consists of unauthorised removal of water from the plaintiff's pond or watercourse, as in the case reported in 6 Calcutta 394 P. C., the act itself continues so long as the water continues to be removed. There the wrong is obviously a "continuing wrong." But if the act is one of exclusion of the plaintiff from the use of his pond or watercourse by the correction of a wall or dam across it, then the act or wrong is complete from the moment of such exclusion; it is not therefore a "continuing wrong" of the character contemplated in Section 23. The encroachment made by a co-owner by building on land reserved for common purposes, or the conversion of a channel reserved for common use into a pucca field for cultivation, in purported exercise of an exclusive right to the property or to the exclusion of the other co-owner to the knowledge of that other co-owner, cannot be characterised as a continuing wrong within the meaning of Section 23. Here, the act complained of amounts to an ouster of the plaintiff. The injury is complete at the date of the ouster. To such cases Section 23 has no application.

11. In *Balakrishna v Sree D. M. Sansthan* (A. I. R. 1959 Supreme Court 798 (807)), the Supreme Court held:

.....it is necessary to bear in mind that S. 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that S. 23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Gurava as hereditary worshippers and in claiming and obtaining possession from them by their suit in 1922 was a continuing wrong. The decree obtained by the trustees in the said litigation had injured effectively and completely the appellant's right though the damage caused by the said decree subsequently continued. Can it be said that, after the appellants were evicted from the temple in execution of the said decree, a continuance of their dispossession was due to a recurring act of tort committed by the trustees from moment to moment? As soon as the decree was passed and the appellants were dispossessed in execution proceedings, their rights had been completely injured, and though their dispossession continued, it cannot be said that the trustees were committing wrongful acts or acts of tort from moment to moment so as to give the appellants a cause of action *de die in diem*. We think there can be no doubt that where the wrongful act complained of amounts to ouster, a resulting injury to the right is complete at the date of the ouster and so there would be no

scope for the application of Section 23 in such a case.

12. In *Khair Mohd. Khan v Mt. Jannat* (A. I. R. 1940 Lahore 359 (FB)), Tek Chand J. has expressed this distinction succinctly as follows :

In considering whether the particular act complained of constitutes a continuing wrong within the meaning of S. 23 for which the cause of action arises *de die in diem*, it is necessary to keep in mind the distinction 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 that injury might continue. In such a case the cause of action to the person injured arises, once and for all, at the time when the injury is inflicted, and the fact that the effects of the injury are felt by the 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 occasion. If however the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by S. 23.

13. Where the property in dispute was set apart for a specific use as a pond which both parties had a common right to use but which the defendants had wrongfully appropriated by including it in their own fields in the circumstances which amounted to an ouster of the plaintiff's; and the suit was for an injunction restraining the defendant from using the land for a purpose other than for which it had been reserved and directing him to remove the obstruction and restore it to its original condition so that it might be available for the joint use of the parties according to the original arrangement, a Full Bench of five Judges of the Lahore High Court in *Mastan Singh v Santa Singh* (A. I. R. 1933 Lahore 705 and 798-9) unanimously held that the real cause of action is the ouster of the plaintiff from the property jointly owned by him and the defendant and reserved for the common use for a specific purpose, and that the suit is governed by the six years" rule under Art. 120 of the Limitation Act.

14. In an earlier case in *Ghulam Muhammad v Abdul Satar* (A. I. R. 1925 Lahore 653) where the plaintiff's instituted a suit for an injunction restraining the defendant from cultivating a piece of land on the allegation that it was part of a pond set apart for the common use of all the villagers and the defendant-owner was not entitled to do anything on it so as to interfere with such common use, the question was whether the suit was governed by Article 32 or Article 120 of the Limitation Act. Jai Lal J., held that it was a case within Article 32 of the Limitation Act, where the defendant having a right to use the property for specific purposes has perverted it to other purposes, and in that view the suit which has been instituted two years after the encroachment and bringing under cultivation of the land by the defendant was dismissed as barred by limitation. This learned Judge was also in the Full Bench who decided *Mastan Singh v Santa Singh* (supra). There the plaintiff and defendants were co-proprietors of a piece of land which had been set apart for common use as a pond but on which the defendants have built their buildings. The plaintiff sued for a mandatory

injunction directing the defendants to remove the building. The question posed before the Full Bench was one of limitation in cases "in which both the plaintiff and defendant were co-owners of a plot of land and had set it apart for their common use for a specific purpose, but which the defendant had diverted to an unauthorised purpose and excluded the plaintiff from using it for the purpose for which it was originally intended." The Full Bench held unanimously that Article 32 of the Limitation Act was not applicable to the case since the plaintiff's were "fully cognisant of the true nature and import of the defendants' acts, and are in substance suing to have it established that the property in dispute is jointly owned by the parties and for removal of the unauthorised encroachment made by the defendants on it, so that it may be restored to its original condition and made available for the particular purpose for which it had been set apart." As the finding was that "the defendants had appropriated the property in dispute to their exclusive use" Article 120 was held to be applicable. It was also pointed out in that decision : "To suits between co-owners or co-tenants inter se where the title of one is denied by the other, Article 144 or Article 120 would apply, according as the relief claimed is one for possession or injunction." I am in respectful agreement with the views expressed by the above-said Full Bench and adopt the same for the decision of this case.

15. In the present case the suit Eri is allotted to the share of the defendants' vendor, Subramonia Vadhyar. There is no pretension of any claim of joint ownership in the plaintiff. All that he claims is a right to take water from this Eri to his fields for the second paddy-crop every year. Whether the case comes within Article 32 or Article 120 is immaterial for the purpose of this case in that it is very clear from the evidence that the ouster of the plaintiff from the use of the Eri and the channel began in 1926/1927 when the defendants, vendor brought them under cultivation for his exclusive use and that state of affairs continued uninterrupted till 1947/1948 (1123 M. E.). The right of the plaintiff must be held to have been barred long before 1947. Even if the plaintiff's case that the suit Eri was not cultivated in the second crop season of 1948/1949 be true, the right that was lost before 1947 cannot be said to have revived in 1948. It may be noted here that the plaintiff has no case that he took water from the suit Eri to his fields in 1948 or 1949. The suit is clearly barred by limitation.

16. It was submitted on behalf of the plaintiff-appellant that the closure or non-existence of the channel is immaterial for the exercise of plaintiff's right and that even without a channel he can lead water from the Eri to his lands, through the fields of the defendants. This is not what is provided in Ext. A. Ext. A purports to reserve a right only to take water from the Eri to the plaintiff's lands by a particular channel. The defendants have led evidence to show that taking water through the fields would affect the crops on their land. It is common knowledge that if water is allowed to spread over the field and then flow to another, the manure on the former will be washed away and that must necessarily prejudice the interests of the cultivator thereof. Further, there is no case that the plaintiff ever took water from the suit Eri to his fields through the fields of the

defendants. This new claim cannot therefore be countenanced now.

17. In *Bacharam Chatterjee v Benode Bihari Chatterjee* (A.I.R. 1929 Cal. 510) it has been held that a mandatory injunction, being only an equitable relief, cannot be granted unless the plaintiff shows diligence and is not guilty of laches.

In the instant case, the plaintiff has been guilty of laches consistently from 1926 to August 1951.

18. The law of limitation is imperative in its operation as per the provisions of Section 3 of the Limitation Act. Since the suit is clearly barred by limitation, the plea of abandonment accepted by the courts below, though founded on good evidence, need not be adverted to here. The plaintiff is not entitled to any relief in this suit and the decree passed by the two courts below dismissing the suit is correct. The Second Appeal fails and it is dismissed with costs.