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causing such interference was allowed to continue. I can draw no distinction from the phrase " date of misuse " and the phrase " date of obstruction " where both user and obstruction are continuing wrongs. It appears to me that this Court is bound to hold that the " date of misuse or breach complained of " in section 233, Chota Nagpur Tenancy Act, does not mean the actual commencement of the misuser. A period of two years can be calculated from any day during which the misuser or breach complained of continued.

HARRIES, C. J.

For the reason which I have given, I am satisfied that the suit in this case was within time, and I entirely agree with the order proposed by Agarwala, J. in his judgment.

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Order accordingly.

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Nov. 20, 21. April, 4.

APPELLATE CIVIL.

Before Harries, C. J. and Dhavle, J.

AKHAURI HALIWANT SAHAY.

v.

DEO NARAIN MALI.*

Limitation Act, 1908 (Act IX of 1908), section 23—" continuing wrong ", meaning of—construction of chabutra *on public land more than twelve years before suit—case of continuing wrong or complete ouster—suit for removal of obstruction, whether barred by limitation.*

A trespass or nuisance may or may not be a continuing wrong, according to circumstances. 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, the wrong would be a continuing wrong within the meaning of section 23 of the Limitation Act, 1908.

*Appeal from Appellate Decree no. 639 of 1938, from a decision of Mr. Nidheshwar Chandra Chandra, Additional District Judge of Shahabad, dated the 30th May, 1938, confirming a decision of Babu Hargobind Prasad Singh, Munsif at Sasaram, dated the 20th September 1937.

But where, under section 28 of the Act, the owner's title to the portion encroached upon and built over is extinguished at the end of twelve years, the period limited for instituting a suit for possession of the land, the extinction of the owner's title operates to give a good title to the wrong-doer, and section 23 of the Act would cease to have operation from the moment when the wrong ceases to be such by virtue of the title conferred by statute upon the wrong-doer.

Where, therefore, it was found as a fact that the defendants had built a *chabutra* on a public *ahar* (which was recorded as *gairmazrua-am*) more than twelve years before the suit and they had been in wrongful possession of the site on which the encroachment had been made,

Held, (*i*) that the injury was complete on the erection of the *chabutra*, and that section 23 of the Limitation Act, 1908, had no application on the ground that the present was a case not of a continuing wrong but of complete ouster;

(*ii*) that the suit was, therefore, barred by limitation.

Konskier v. *B. Goodman, Limited*(1), *Gossain Das Chunder* v. *Issur Chunder Nath*(2), *Ramphal Sahoo* v. *Misree Lall*(3), *Municipal Commissioners for the City of Madras* v. *Sarangapani Mudaliar*(4), *S. Sundaram Ayyar* v. *The Municipal Council of Madura*(5), *Basavaswaraswami* v. *The Bellary Municipal Council*(6) and *Ashutosh Sadukhan* v. *The Corporation of Calcutta*(7), followed.

Bhagwan Dutt Kamat v. *Asharfi Lall Mahtha*(8), not followed.

Rajrup Koer v. *Abul Hossein*(9), *Hukum Chand* v. *Maharaj Bahadur Singh*(10), *Nazim* v. *Wazidulla*(11), *Jagroshan Bharthi* v. *Madan Pande*(12), and *Sarat Chandra Mukherjee* v. *Nerode Chandra Mukherjee*(13), distinguished.

(1) (1928) 1 K. B. 421.
(2) (1877) I. L. R. 3 Cal. 224.
(3) (1875) 24 W. R. 97.
(4) (1895) I. L. R. 19 Mad. 154.
(5) (1901) I. L. R. 25 Mad. 635.
(6) (1912) I. L. R. 38 Mad. 6.
(7) (1916) 28 Cal. L. J. 494.
(8) (1934) A. I. R. (Pat.) 34.
(9) (1880) I. L. R. 6 Cal. 394, P. C.
(10) (1933) I. L. R. 12 Pat. 681, P. C.
(11) (1915) 21 Cal. L. J. 640.
(12) (1926) I. L. R. 6 Pat. 428.
(13) (1935) A. I. R. (Cal.) 405.

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Dawes v. *Hawkins*(1) and *Kanaksabai* v. *Muttu*(2), referred to.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Dhavle, J.

D. N. Varma and *Kanhaiyaji*, for the appellants.

M. Rahman, for the respondents.

DHAVLE, J.—This is an appeal by the plaintiffs against the dismissal of their suit for recovery of possession of a certain portion of plot no. 230 after removal of a *chabutra* erected thereon by the defendants for sitting and for tying their cattle. The plot was recorded as gairmazrua-am and is an *ahar*. Plaintiffs are the sixteen-anna proprietors of the tauzi, and their case was that the land is public land and was used for storing the irrigation water of the plaintiffs, and that the act of the defendants in erecting the *chabutra* after filling a part of the *ahar* had put the plaintiffs, the other residents of the mauza and the public to loss and caused difficulty in irrigation, etc. According to the plaintiffs, the defendants' encroachment on the *ahar* was effected in 1343 Fasli, about a year before the suit. The defendants denied any encroachment and claimed to have erected the *chabutra* and been in possession of it for more than twelve years. They also urged that the suit was barred under Order I, rule 8, Civil Procedure Code. A pleader commissioner found that there had been an encroachment over the *ahar* to the extent of 1 katha 2 dhurs and 8 dhurkis. The trial Court dismissed the suit, holding that the plaintiffs had been out of possession for more than twelve years, whether as landlords or as members of the public. As to the objection based on Order I, rule 8, the learned munsif held that though the plaintiffs had obtained permission to proceed under that provision of the law, the

(1) (1860) 8 C. B. (N. S.) 848.
(2) (1890) I. L. R. 13 Mad. 445.

case was one of a private nuisance, in the removal of which the plaintiffs were interested as they had zerat lands in the village to irrigate from the *ahar*, and that, therefore, the plaintiffs were entitled to maintain the suit in their " own personal capacity ".

Plaintiffs appealed, and the lower appellate Court upheld the finding of encroachment. The finding that the *chabutra* was erected more than twelve years before the suit was not assailed, but it was urged on behalf of the plaintiffs that the suit should have been decreed because there is " no limitation in the case of an encroachment upon a public *ahar* under section 23 of the Limitation Act ". The learned Judge below held that this section of the Limitation Act had no application as the suit had been brought by the plaintiffs in their individual capacity and the prayer was for recovery of khas possession, so that the suit could not properly be regarded as one for removal of an encroachment from public property. Action had been taken under Order I, rule 8, but the plaint was not framed as for a representative suit, and the permission given under Order I, rule 8, could not alter the character of the suit. The learned Judge, therefore, held that the suit had been rightly dismissed on the ground of limitation.

It has been contended on behalf of the plaintiffs-appellants that the lower appellate Court fell into an error as regards section 23 of the Limitation Act and also as regards Order I, rule 8. The former section only provides that 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. It certainly makes no distinction between private suits and public or representative suits; but does the section apply to the case? A trespass or nuisance may or may not be a continuing wrong, according to circumstances. 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, the wrong would be a

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continuing wrong. A good instance is found in a recent English decision—*Konskier* v. *B. Goodman, Limited*(1). In pulling down the upper storeys of a certain house the defendants had a license from the neighbouring owner to pull down part of his chimney stack on an undertaking to make good any damage caused. They omitted to remove a quantity of rubbish which they had allowed to fall on the roof. The rubbish was in course of time carried down by a drain pipe from the roof and choked a gulley in the basement. A heavy storm of rain in consequence flooded the basement after the plaintiff had taken a lease of the house. Plaintiff sued for damages. Salter, J. gave him a decree on the ground that the defendants' was an act of continuing negligence. The Court of Appeal held that there could be no continuing negligence without a continuing duty, but that the plaintiff was entitled to a decree, upon a different ground—the continuing trespass, which arose on the undisputed facts of the case. The learned advocate for the appellants began with *Rajrup Koer* v. *Abdul Hossein*(2) where the defendants had cut a khund or channel, besides making another diversion, in the side of a *pain* constructed by the plaintiff on defendants' land; their Lordships of the Judicial Committee held that these obstructions to the flow of water were in the nature of continuing nuisances, as to which the cause of action arose *de die in diem*. A similar view was taken in *Hukum Chand* v. *Maharaj Bahadur Singh*(3) as regards the action of the Swetambari Jains in placing *charans* of a certain description in place of older *charans* of a different description in certain temples on the Parasnath Hill. But the present is not a case of mere trespass and obstruction, for the owner of the *ahar*—be it the plaintiffs as sixteen-anna landlords, or be it the public—has been completely dispossessed of the site covered by the *chabutra*. Under section 28 of the Limitation Act

(1) (1928) 1 K. B. 421.
(2) (1880) I. L. R. 6 Cal. 894, P. C.
(3) (1933) I. L. R. 12 Pat. 681, P. C.

the owner's title to the portion encroached upon and built over was extinguished at the end of twelve years, the period limited for instituting a suit for possession of the land; and the extinction of the owner's title operates to give a good title to the wrong-doer—*Gossain Das Chunder* v. *Issur Chunder Nath*(1). The suit is actually one for recovery of khas possession; but even if it had been a suit for an injunction in respect of irrigation rights, the owners could not have been allowed to circumvent the law of limitation by doing so when they could have sued for possession—*Kanaksabai* v. *Muttu*(2). The interference with the right to the flow of water in *Rajrup Koer's* case(3) was a wrong of which the continuing character could not be denied; it was indeed within the illustration to section 24 of the Limitation Act of 1871: "*A* diverts *B's* water-course. At every moment of the time from which the diversion continues and *B* retains his right of re-entry, a fresh right to sue arises and a fresh period of limitation begins to run." I have referred to this illustration, though it is not to be found in the present Act, because the Limitation Act, as was pointed out by their Lordships of the Judicial Committee in *Rajrup Koer's* case(3), not only deals with the limitation of suits, but also contains in Part IV (sections 26 to 28) a set of provisions relating to acquisition of ownership by possession, and the illustration indicates how the injury continues only as long as "*B* retains his right of re-entry". The distinction between a mere continuing trespass and dispossession has been referred to in several cases. Thus in *Ramphul Sahoo* v. *Misree Lall*(4) Mitter, J., in dealing with the question whether the suit which was for the removal of a drain built by the defendant upon plaintiff's land was barred by time, observed, "If the plaintiff had been dispossessed from any portion of his land by an adverse possession having

(1) (1877) I. L. R. 3 Cal. 224.
(2) (1890) I. L. R. 13 Mad. 445.
(3) (1880) I. L. R. 6 Cal. 394, P. C.
(4) (1875) 24 W. R. 97.

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been taken by the defendant, the case would then fall within clause (*12*); but, if on the other hand, no adverse possession had been taken by the defendant, then each act of trespass on the plaintiff's land would constitute a fresh cause of action, and whether the period be six years or twelve years, the plaintiff would be competent to rely upon the last act of trespass as constituting a cause of action, unless the defendant had acquired an indefeasible right of easement by user." From this point of view the Privy Council decisions in *Rajrup Koer* v. *Abul Hossein*(1) and *Hukum Chand* v. *Maharaj Bahadur Singh*(2) (already referred to), which have been cited by the learned advocate for the appellants, are not in point at all; they were not cases of dispossession. The learned advocate has also cited *Bhagwan Dutt Kamat* v. *Asharfi Lall Mahtha*(3), in which Kulwant Sahay, J., sitting singly, held, following the two Privy Council decisions, *Nazim* v. *Wazidulla*(4) and the decision of Jwala Prasad, J. in *Jagroshan Bharthi* v. *Madan Pande*(5), that section 23 of the Limitation Act applied to an encroachment on public pathways running over gairmazrua-am lands which had been made more than twelve years before the date of the suit. Now, it is true that in *Nazim* v. *Wazidulla*(4) it was held that an obstruction to a way is no less a continuing nuisance than an obstruction to a water-course; but it does not appear how far any question of adverse possession by the defendants after the ouster of the plaintiffs arose on the pleadings in that case, though the observations of the learned Judges do seem to imply that no such question can arise in the case of a continuing wrong. In *Jagroshan Bharthi* v. *Madan Pande*(5) Jwala Prasad, J. was dealing with a case under section 133 of the Code of Criminal Procedure, and observed that no length of

(1) (1880) I. L. R. 6 Cal. 394, P. C.
(2) (1933) I. L. R. 12 Pat. 681 P. C.
(3) (1934) A. I. R. (Pat.) 34.
(4) (1915) 21 Cal. L. J. 640.
(5) (1926) I. L. R. 6 Pat. 428.

user can justify an encroachment upon a public way; but there does not seem to have been any question of limitation before the learned Judge, the point for decision being whether the Magistrate was right in refusing to proceed with the enquiry on the ground that there was no public nuisance as " a sufficient width of the road " was left for public use. The familiar common law maxim " once a highway, always a highway ", which is sometimes referred to in Indian cases, rests on the ground mentioned by Byles, J. in *Dawes* v. *Hawkins*(1) that " the public cannot release their rights, and there is no extinctive presumption or prescription "; but even in England power has been given to Justices of the Peace, under certain circumstances, to divert or extinguish highways, and there are instances of a highway ceasing to be a highway, as when access becomes impossible in consequence of the ways leading to it having been legally stopped up. We have in our Limitation Act, besides section 28, Article 146A which provides a period of 30 years for suits by or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed..... The common law maxim was, therefore, not applied in *The Municipal Commissioners for the City of Madras* v. *Sarangapani Mudaliar*(2), where the learned Judges declined to treat a pial built on a strip of land forming part of a highway as a continuing wrong, and said that there was no authority for holding in India that the public, any more than a private proprietor is to be exempted from the consequences of its own laches. The same view as regards dispossession from a highway was taken in *S. Sundaram Ayyar* v. *The Municipal Council of Madura*(3), where Bhashyam Ayyangar, J. pointed out that the operation of section 28 of the Limitation Act upon Article 146A is to extinguish the right of

(1) (1860) 8 C. B. (N. S.) 848, 858.
(2) (1895) I. L. R. 19 Mad. 154.
(3) (1901) I. L. R. 25 Mad. 635.

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highway thirty years after dispossession by encroachment, and that section 23 would cease to have operation from the moment when the wrong ceases to be such by virtue of the title conferred by Statute upon the wrong-doer. *See* also *Basaweswaraswamy* v. *The Bellary Municipal Council*(1). In *Ashutosh Sadukhan* v. *the Corporation of Calcutta*(2), it was held that the Municipality had lost its right under Article 146A to a portion of what the Municipality claimed as a public street or drain on which the plaintiff had built a wall and platform about fifty years previously, and that the erection of the wall was not a continuing wrong so as to make section 23 applicable. "The injury was complete on the erection of the wall and there was no continuing injury within the meaning of the Statute. The effect may continue, but this does not extend the time of limitation." The case before us does not relate to a highway, but the learned advocate for the appellants only cited the ruling in *Bhagwan Dutt's* case(3) because it does seem to have held that section 23 of the Limitation Act will save limitation even in cases of complete ouster. In my opinion, that is not a correct view of the section. The learned advocate also referred to *Sarat Chandra Mukherjee* v. *Nerode Chandra Mukherjee*(4), where it was held that sheds erected on a common passage were a continuing wrong. That, however, was not a case for possession, and speaking with all respect, the bearing of section 28 and Article 146A on section 23 was not considered, even though the decision in *Ashutosh Sadukhan's* case(2) was referred to and distinguished. My conclusion on this part of the appeal is that section 23 of the Limitation Act has no application, not indeed on the ground adopted by the learned Judge below that this is not a public suit, but on the ground that this

(1) (1912) I. L. R. 38 Mad. 6.
(2) (1916) 28 Cal. L. J. 494.
(3) (1934) A. I. R. (Pat.) 34.
(4) (1935) A. I. R. (Cal.) 405.

is a case not of a continuing wrong but of complete ouster in respect of the area on which the defendants have built their *chabutra* and of which, even according to the plaint, they are in wrongful possession.

The finding of fact that the *chabutra* was built more than twelve years before the suit, which was not disputed in the lower appellate Court, therefore, concludes the appeal.

In this view it is not really necessary to deal with the appellants' contention that the lower appellate Court was wrong in holding that the suit was not a representative suit, even though the plaintiffs took the permission of the Court under Order I, rule 8, and gave the required notice.

Notwithstanding the action taken by the plaintiffs, the cause title remained in the plaintiffs' individual names and the prayer was that possession may be delivered to the plaintiffs on dispossession of the defendants after removal of the *chabutra*, etc. The public is only mentioned in one paragraph (paragraph 7) of the plaint. The suit thus appears substantially to have been brought by the plaintiffs in their individual capacity; but the half-hearted resort to Order I, rule 8, would not, in my opinion, have prevented the plaintiffs from obtaining relief as members of the public, specially injured by the defendants' interference with the "public" right of irrigation, if the claim to the encroached portion had not been barred by limitation.

I would dismiss the appeal with costs.

HARRIES, C.J.—I agree.

Appeal dismissed.

S.A.K.