5/9/2019

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

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NOTE ON CONTINUOUS WRONG

BY

DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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ORIGINAL

CONTINUOUS WRONG

I. **On Arguments made:**

1. On the basis of an interpretation of Section 9 and 23, of the Limitation Act 1908, the Nirmohi Akhara (through Mr. Jain) has asserted that since their management and property related rights have been taken over and are the subject matter of Suit 3 of 1989 a continuing wrong as long as they are not restored. This is done to support the view that the Nirmohi Akhara's Suit No.3 was within limitation. As Mr. Jain put it in his written submission to the Supreme Court.

> *"(g) Obstruction of prayer and worship has been held to be a continuing wrong (See Hukum Chand Vs. Maharaj Bahadur, AIR 1933 P.C. 193 at pg. 197; **(1933) 60 IA 313**) and hence obstruction of the Plaintiffs right to manage the Bhog and Prayers independently by appointment of a receiver has been denied which is a continuing wrong under section 23 of the Limitation act 1908 and hence every obstruction provides a fresh cause of action and fresh starting point for the limitation."*

2. In that submission he relied upon *Hukum Chand (1933). [Jain compilation pg. 35-46 as (1933) 12 Patna 681.]*

3. This was without prejudice to his argument claiming that Nirmohi Akhara's Suit No. 3 is within limitation because they claim an ownership and possession.

4. Mr. Parasaran (*for the deity*) responded to this assertion by stating that after a definitive moment and a final order is made, the causal sequence of a wrong "*snaps*".

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II. Hukum Chand v Maharaj Bahadur Singh, AIR 1933 P.C. 193

5. In *Hukum Chand (1933),* the facts were: Parasnath Hill of 25 square miles was allegedly regarded as sacred by both Swetambaris and Digambaris, no building could be constructed on it and no impediment could be made to the manner of Digambara worship who filed a suit against the Swetambaris and in their suit presented their stance that the entire hill was not sacred, that buildings can be constructed but the site be kept immaculate and not defied. As far as title was concerned the High Court reversed the Lower Court to hold that the Hill was not debutter property but of the Raja of Palgung and was sold to the Swetambaris on 9 March 1918. The Privy Council refrained from deciding whether the property was debutter property. It eventually decided that most of the acts complained off did not interfere with Digambari rights, but there was a right to claim injury of some aspect.

6. The Privy Council held that Section 120 applies to the case to interpose a six year limitation but charan worship of the feet (which the Digambari's refused to worship as a detached part of the human body) was a continuing wrong until removed just as in *Maharani Rajroop Koer v Syed Abul Hossein (1880) 7 LA 240* as long as water supply was cut off. The continuing wrong persisted to extend the period of limitation.

   This will be elaborated in argument.

III. Other Applications

7. Since this is a matter of general application, it is useful to examine how the courts have dealt with it.

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8. In *State of Bihar v Deokaran Nenshi (1972) 2 SCC 890* (*at pg. 892, pr. 5*), the Court was concerned with failure to file a return under Section 66 of the Mines Act which was an offence of which a complaint had to be filed within 6 months which was not done. The Court held that after this a continuance of disobedience by mining was not an offence, but independent future infructuous arising from the original act. The Court reasoned as follows *(at pr.5)*.

> *"5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance, occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."*

9. *Commissioner of Wealth Tax v Suresh Seth, (1981) 2 SCC 790* was a case of failure to file a Wealth Tax Return. In this case, there was a penalty and the Wealth Tax Officer took the view of failure to file the return was a continuing offence and computed the penalty beyond a particular year. The decision of the High Court rejecting this view was upheld by the Supreme Court.

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"11. A liability in law ordinarily arises out of an act of commission or an act of omission. When a person does an act which law prohibits him from doing it and attaches a penalty for doing it, he is stated to have committed an act of commission which amounts to a wrong in the eye of law. Similarly, when a person omits to do an act which is required by law to be performed by him and attaches a penalty for such omission, he is said to have committed an act of omission which is also a wrong in the eye of law. Ordinarily a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or of omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefore gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion.

And

'The distinctive nature of a continuing wrong is that the law that it violated makes the wrong doer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. In the instant case whenever the question of levying penalty arises what has to be first considered is whether the assessee has failed without reasonable cause to file the return as required by law and if it is held that he has failed to do so then penalty has to be levied in accordance with the measure provided in the Act. When the default is the filing of a delayed return the penalty may be correlated to the time lag between the last

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day for filing it without penalty and the day on which it is filed and the quantum of tax or wealth involved in the case for purposes of determining the quantum of penalty but the default however is only one which takes place on the expiry of the last day for filing the return without penalty and not a continuing one. The default in question does not, however, give rise to a fresh cause of action every day."

"17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of the way, obstruction to the right of a person to the unobstructed flow of water, refusal by a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability. as the case may be, de die in diem."

10. In *Smt. Maya Rani Punj v Commissioner of Income Tax, Delhi, (1986) 1 SCC 445,* there was a default in filing a return for the year 1961-62 which was due on 28 September 1961 but filed on 3rd May 1962 which entailed a penalty which was imposed to the extent of Rs.4,060 on 30th June 1964. It was held that non-payment of penalty was a continuing wrong because a penalty continued on every month. Apart from some aspects relating to Tax law, the Supreme Court relied on the *Suresh Seth (1981) 2 SCC 290*; *Deo Karan Nenshi (1972) 2 SCC 890* and cases on statutory provisions where such default entails a daily penalty *(mentioning Ajit Kumar Sarkar v*

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Asst Registrar of Companies (1979) Tax Reporter 2001 (Calcutta); United Savings v Deputy Chief Officer RBI (1980) Cr. L.J. 607 (Cal) and G.D. Bhattar v State: AIR 1957 Cal 483. The Court favoured with the revenue by holding that this was a continuing offence. It observed:

> *"19. The imposition of penalty not confined to the first default but with reference to the continued default is obviously on the footing that noncompliance with the obligation of making a return is an infraction as long as the default continued. Without sanction of law no penalty is impossible with reference to the defaulting conduct. The position that penalty is impossible not only for the first default but as long as the default continues and such penalty is to be calculated at a prescribed rate on monthly basis is indicative of the legislative intention in unmistakable terms that as long as the assessee does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law.*

11. Thus, '*continuing wrong*' depended on the determination of the wrong and its recurrence.

12. *Union of India v Tarsem Singh (2008) 8 SCC 648* concerned a person who was declared as invalid on 13 November 1983, but asked for disability pension in 1999 which the army granted for 38 months. The HC granted disability pension for all the years from 1983 with 6% per annum. The Supreme Court held *(at pr. 4)*

> *'The principles underlying continuing wrong and recurring/ successive wrongs have been applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injuring. 'Recurring/ successive wrongs are those which occur periodically, each wrong giving rise to a distinct and separate cause of action".*

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In this context, *Savalram Pujari's v Shree Dnyaneshwar AIR 1959 SC 798* (*on the Limitation Act*); and *M.R. Gupta v Union of India (1995) 5 SCC 628* (*on service law*) was referred to. The reasoning of the Supreme Court was:

> *"7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/ limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/ successive wrongs will apply. As a consequence, the High Courts will restrict the consequent relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."* . . *Tarsem Singh (2008)*

Clearly, this reduction was on equitable grounds.

13. The direct judgment of the Supreme Court on the Limitation Act is *Balakrishna Savalram Pujari Waghmare Vs. Shree Dhyaneshwar Maharaj*

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Sansthan AIR 1959 SC 798. In this, the Trustees of the Sansthan dismissed some pujaris for misconduct. The pujaris took possession of the Temple in 1922. The trustees obtained a decree for possession which was duly executed. In 1932, the pujaris claimed a declaration of their rights and a preventive injunction without impleading the persons appointed as pujaris in their place who were performing pujari functions. It was held that residuary Article 120 of the Limitation Act applied and that there was no "continuing wrong" under Section 23 of the Limitation Act.

The Court held *(at pr.31)*

> *'Does the conduct of the trustees amount to a continuing wrong under S. 23 ? That is the question which this contention raises for our decision. In other words, did the cause of action arise de die in deim as claimed by the appellants? In dealing with this argument 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 Guravs 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*

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injured effectively and completely the appellants' rights 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, the 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, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application of S. 23 in such a case. That is the view which the High Court has taken and we see no reason to differ from it."

14. Thus, where the law has interfered to take away possession under the order of District Magistrate Section 145 of the Cr.P.C. or as a Receiver in a Civil Suit, the period of six years started on those dates and there was no scope for involving a continuous wrong, because the action was complete and the remedies lay elsewhere.

15. *Ellappa Naicken Vs. K. Lakshmana Naicken (1948) 61 Law Weekly 365,* the magistrate was unable to satisfy himself on the issue of possession and appointed a third receiver. But, the suit filed was dismissed for default. But the Court held that suit for possession from the magistrate would not lie, as an independent cause of action could be maintained for recovery of profits which could entail issues of title.

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16. A further submission was based on the doctrine of merger in the following circumstances.

(a) In *Chandi Prasad V Jagdish Prasad (2004) 8 SCC 724*, the Court held that since the decree of the Trial Court was merged with the final order of High Court of 18 April 1985 and the formal decree was drawn up 30th October 1986, the execution application of 20th March 1997 was not time barred *(See pr. 23-26)*.

(b) In *Union of India v West Coast Paper Mills Ltd. (2004) 2 SCC 747* concerned the reason of freight which was adjudicated by the Railways Tribunal and the Supreme Court. The hearing before the Supreme Court *(into which the lower courts tribunals merged)* was the starting point of Limitation to file a suit to recover the excessive freight charged was from the date of the appellate decree.

(c) *Shanthi v T.D. Viswanathan (2018) SCC Online SC 2196* concerned a tenancy and the only question concerned whether an execution application was filed within 12 years. The Trial Court decided on 14th August 1981. The High Court decided the issue on 30th December 2013. The Limitation would be from the date of the High Court order.

17. However, it is important to refer to an earlier Calcutta High Court judgment in *Brojendra Kishore Roy Chowdhury v Bharat Chandra Roy AIR 1916 Cal 751* on Section 23 of the Limitation Act 1908 with reference to Art. 120 and an attachment order under section 145 of Cr.P.C. The Court held that a suit for possession under Art. 134 would not lie. Since this is a wrong independent of contract, a continuing wrong could be filed against each other, but no action can be brought against the Magistrate.

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18. Mention may also be made of *Sankar Dastidar Vs. Smt. Banjula Dastidar, AIR (2005) Cal 121* on section 23 with reference to continuing wrong; *Sociedade De Formento Industrial Ltd., Goa Vs. Gurudas G. Pai, (2016) 5 Mh.L.J. 143.*

IV. Concluding Submission:

19. It is submitted that these varied fact and legal situations yield the following circumstances:

(i) Was the definitive event stand alone or did it give rise of recurring duties on subsequent dates.

(ii) Causality is both factual and legal in the sense used in proposition No.1.

(iii) The presence of an alternative remedy to the definition event will defeat the plea of a continuing wrong.

(iv) Where a decree is passed, the action for execution is a separate action for the purposes of limitation.

(v) Where there is a merger in the final appeal, a cause of action will arise on the determination in the final appeal. But where an independent cause of action arises earlier in relation to the suit, the earlier date will be taken into account as being unconnected with the cause of action to which gave rise to the merger with the final appeal.

(vi) Thus, as one counsel put, the question is when limitation snaps.

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SIR SETH HUKUM CHAND AND OTHERS (PLAINTIFFS) . . . . . } APPELLANTS ;

AND

MAHARAJ BAHADUR SINGH AND OTHERS (DEFENDANTS) . . . . . } RESPONDENTS.

J. C.*
1933
May 12.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Jains—Rights of Worship—Parasnath Hill—Works executed by Swetambaris—Suit by Digambaris—Limitation—Suit for Declaration—Continuing Wrong—Specific Relief Act (I. of 1877), s. 56—Indian Limitation Act, (XI. of 1908), s. 23 ; Sch. I., art. 120.

Parasnath Hill, which is regarded as sacred by both the Swetambari and the Digambari sects of the Jain community, is not debattar property of the Jain deities installed thereon, but the property of the Swetambaris by purchase in 1918 from the zamindar with whose ancestors it was permanently settled. The Swetambaris in erecting on the hill buildings for the accommodation of temple servants and dharmasalas for the use of pilgrims, and in putting sentries and night watchmen thereon, have not unlawfully interfered with the rights of worship of the Digambaris. But alterations made by the Swetambaris in the character of the charans in certain shrines was an interference with those rights. A suit for a declaration brought by Digambaris more than six years after the alterations was not barred as to that matter by art. 120 of the Indian Limitation Act, 1908, because the alterations were a continuing wrong within s. 23 of that Act; the plaintiffs had not, by acquiescence or otherwise, disentitled themselves under s. 56 of the Specific Relief Act, 1877, to the relief prayed.

Decree of the High Court varied.

APPEAL (No. 121 of 1930) from a decree of the High Court (August 8, 1928), which modified a decree of the Subordinate Judge of Ranchi (May 26, 1924).

The appellants, representing the Digambari sect of the Jain community, instituted a suit against the respondents, representing the Swetambari sect of that community, alleging that various acts done or threatened to be done by the Swetambaris on Parasnath Hill were an unlawful interference with the rights of worship of the Digambaris.

* *Present :* LORD THANKERTON, SIR JOHN WALLIS, and SIR LANCELOT SANDERSON.

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J. C. 1933 HUKUM CHAND v. MAHARAJ BAHADUR SINGH.

The trial judge made certain declarations and granted injunctions prayed for; upon appeal the High Court (Ross and Wort JJ.) set aside certain of the declarations, and corresponding injunctions, but otherwise affirmed the judgment.

The facts of the case, and the grounds of the judgments in the High Court appear from the judgment of the Judicial Committee.

1933. March 10, 13, 14. *De Gruyther K.C.*, *Hyam* and *Champat Rai Jain* for the appellants.

Dunne K.C. and *Wallach* for the respondents.

May 12. The judgment of their Lordships was delivered by

SIR JOHN WALLIS. This case is the result of further disputes between the two sects of Jain as to their rights of worship on Parasnath Hill. As so much turns on the beliefs now entertained by the whole Jain community with reference to the sacred character of this hill, their Lordships will begin by citing the opening paragraphs of the judgment delivered by Lord Phillimore a few years ago in *Maharaj Bahadur Singh* v. *Hukum Chand* (1), in which this subject is most felicitously dealt with.

"The Jains recognize 24 highly saintly personages—men who have attained salvation or nirvana, who are called tirthankars (finders of the ford, across the river of death). These four and twenty are counted in many respects as higher than the gods or some of the gods in the Hindu pantheon. Twenty of them are believed to have attained nirvana in the present cycle of the world's history upon the Hill Parasnath in the district of Hazaribagh in Bengal, with the result that the hill is held in reverence by Jains. The hill itself has some remarkable natural features, and rises into several peaks. Twenty spots apparently marked out by natural features, are believed to be places from which the 20 tirthankars quitted earth; and at each of these spots, a footprint of the saint is worshipped. There is a small

(1) (1925) 24 All. L. J. 100 (P. C.).

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enclosure covered with a cupola, which at the present moment is made of white marble. These spots have been set apart from remote antiquity. The four remaining tirthankars quitted earth in other parts of India. In respect of them conventional spots have been since the year 1868 set apart and treated in a similar way. Upon the hill there are also a shrine to a lesser saint called Gautama Swami, an important temple in one of the highest parts of the mountain called Jalmandil, certain platforms set apart for religious contemplation, and two dharmasalas or rest-houses for pilgrims. The hill is much frequented by pilgrims, who take the 24 shrines or tonks in regular order, worshipping at each. According to the tenets of the Digambara, this worship must be performed fasting, and the whole hill is so sacred that from the moment they set foot on it, they must abstain from any office of nature, even spitting."

These practices are observed on their pilgrimages by the Swetambaris as well, but the Digambaris in the present case go much further and take up the position that any course of action inconsistent with their due observance, such as the regular and continuous employment of human beings on the hill or the building thereon of dwellings for them, necessarily involves a sacrilegious pollution and desecration of the sacred hill which they have a right to restrain. These are matters for the Jains themselves, and the Civil Courts are only concerned with them in so far as they are relevant to questions of civil right such as an alleged interference with the plaintiffs' rights of worship on the hill, and in that case the issue must be, not whether the acts complained of are in accordance with orthodoxy or with previous practice, but whether they do in fact interfere with the plaintiffs' rights of worship.

In 1918 the Swetambaris, who have all along been in management of the shrines, acquired by purchase the proprietary rights of the Raja of Palgunj in the hill, and in 1920, not long before the institution of the present suit, they availed themselves of the greater freedom of action so acquired by posting sentries and night watchmen on the top of the hill and by beginning to erect dwellings there for them and

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for the pujaris and other temple servants in daily employment on the hill, and also dharmasalas or rest-houses for the accommodation of the pilgrims. They also proposed to erect a gate at the top of the winding pilgrim way which, starting from the village of Madhuban at the foot of the hill, provides a six mile ascent to the hill top. This gate the Digambaris alleged was intended to obstruct the Digambaris' access to the hill. These are some of the acts complained of in the present suit, which is a representative one instituted on behalf of the Digambaris against the Swetambaris pursuant to Order I., r. 8, of the Code of Civil Procedure, and their Lordships will dispose of them in the first instance.

In paras. 5 and 9 of the plaint the plaintiffs alleged that the entire hill and every stone of it is held sacred and is an object of adoration and worship for both sects of the Jain community, and that on account of its special sanctity no building for human habitation can be erected on it, and the very idea of such a thing is considered sacrilegious.

The first defendant, in para. 10 of his written statement, did not admit that the Digambaris regarded every part and parcel of the hill as sacred, and denied that they had any rights in the hill, except as thereinafter stated. The ideas of sanctity conveyed in the plaint were highly exaggerated, and the Jain tenets were not opposed to buildings for human habitation on the hill, nor were they regarded as sacrilegious, provided that they were not unconnected with religious purposes. The Subordinate Judge at Ranchi, to which Court the case had been transferred from Hazaribagh, acting mainly on the large body of oral evidence as to the sanctity attached by Jains to the hill, held that it was the endowed or debattar property of the Jain deities thereon, and that the plaintiff Digambaris were entitled to see that the hill—their most sacred tirth—was kept immaculate and not defiled or desecrated; and he accordingly granted an injunction, with corresponding declarations, restraining the defendants from posting sentries and night watchmen on the hill or proceeding with the building of the proposed dwellings and dharmasalas,

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and also from erecting the gate which he found was intended to obstruct the Digambaris' access to the hill.

On appeal to the High Court, both the learned judges, in separate but concurring judgments, reversed this part of the lower Court's decree, holding that the hill was not the debattar property of the Jain deities thereon, but was the property of the Raja of Palgunj, whose title, it is now finally settled by the recent decision of this Board, passed to the Swetambaris by the sale deed of March 9, 1918. They further held that the acts complained of were not shown to have interfered with the Digambaris' rights of worship of the twenty-one ancient shrines as confirmed to them by the judgment of the Board delivered by Lord Phillimore in the case already mentioned, and that the proposed gate was not shown to be intended to obstruct their access to the hill.

As regards the question of the hill being debattar property, as pointed out in the High Court judgments, it cannot be said that this issue was very clearly raised in the pleadings, but it has been dealt with by both the lower Courts on all available evidence, and, in their Lordships' opinion, it is desirable that it should now be finally decided, so as not to give occasion for further litigation between the two sects. Their Lordships will therefore proceed to consider it.

The Jain shrines on Parasnath Hill are undoubtedly of great antiquity, but very little is known of their past history or as to the time when the now prevailing views as to the sanctity of the whole hill first obtained acceptance. The early work referred to in the argument for the appellants merely extols the superior efficiency of the abishekam or ablution ceremony when performed at the shrines as compared with the same ceremony when performed in ordinary temples. From the 16th to the 18th century, the Jagat Seths, a wealthy and powerful family of bankers at Murshidabad, who belonged to the Swetambari sect, appear to have maintained the shrines, but on the cession to the East India Company in 1765 they removed to Calcutta.

At the decennial settlement in 1790, and afterwards at the permanent settlement, the hill was included in the zamindari

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of the Raja of Palgunj, which raises a legal presumption that it was his property. During the greater part of last century, the Raja of Palgunj, failing any one better qualified, bore the expenses of the shrines, and recouped himself by taking a share of the pilgrims' offerings.

The hill itself is twenty-five square miles in extent, and rises to a height of nearly 4500 feet at top of the highest peak. According to the report of Lieut. Beadle, who visited it in 1846, it was covered, except at the very top, by forest trees and by dense jungle infested by wild beasts and was uninhabited by man, the few Santhal hamlets on the lower ranges being apparently overlooked. Since the coming of the British Raj, he said the number of pilgrims had been increasing annually. They were mostly of a wealthier class as compared with the Hindu pilgrims to Jagannath, but owing to the construction of the Grand Trunk Road, which passes underneath the hill at a distance of 200 miles from Calcutta, he thought it bade fair to become a very popular shrine. The advent of the railway, and the construction of sixteen miles of metalled road from the nearest railway station to Madhuban, now make access easy, and pilgrims visit the hill in thousands every year. Otherwise the conditions are not much altered. In 1861, a military sanatorium was opened near the top of the hill, not far from some of the shrines, on a site acquired from the Raja, but was discontinued four years later. A dak bungalow and a branch of the Dublin Mission now occupy the site. In 1876 the Raja granted a permanent lease of 2000 acres more than half-way up the hill, and abutting on the pilgrim's way, to an English planter named Boddam, who opened a tea plantation there, and there is now another plantation in the same neighbourhood. At the beginning of this century, the Swetambaris began the construction of a large white marble temple over the Parasnath shrine at the top of the highest peak. The Digambaris were strongly opposed to this as affecting the unique and most impressive characteristics of the place, and so it is said to have been the beginning of the quarrel between the two sects about the hill.

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Their Lordships will now refer as briefly as possible to the evidence which shows, in their opinion, that the Raja's title, which has now passed to the Swetambaris, is unassailable. In the first place, the fact that the Jains are not shown to have taken any objection to the military sanatorium and the tea plantation, both of which, in the light of the evidence in this case, must have been most distasteful to them, tells strongly against their present claim. In a suit filed by the Raja in 1867 against a member of the Swetambari sect, to establish his title to the hill and a share of the offerings, the lower Court found that he was the proprietor of the whole hill except the shrines themselves, but the decree was reversed by the High Court on the ground that the plaintiff had not established any cause of action against the defendant. In 1872, these disputes were settled by an ekranama between the Raja and the Swetambari sect by which he undertook among other things to grant them land, stones, and timber for any new shrines. This stipulation involved a clear admission of the Raja's title to the hill.

In 1888, in consequence of the action of the lessee of the tea plantation in starting a lard factory which involved the slaughtering of pigs, a thing peculiarly offensive to the Jain religion, the Swetambaris filed a suit against the Raja and the lessee alleging that they were trespassers, and also that the lessee's action was a breach of one of the Raja's covenants in the ekranama, of which the lessee had notice when he entered into the lease. In the plaint they claim title under an alleged ancient grant from the Emperor at Delhi which has always been rejected whenever put forward, but the case of debattar now set up was distinctly raised by additional issues as to whether the hill was dedicated to the religious purposes of the Jain religion, and as such vested in, and the property of, the Jain community. These claims of title were examined and rejected in elaborate judgments by the lower Court and the High Court, which hold that the property was in the Raja, but that the acts complained of were a breach of an implied restrictive covenant by the Raja in the ekranama of which the lessee had notice.

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In 1900, the Digambaris are found joining with the Raja in successfully suing the Swetambaris for removing certain stairs which they had erected under licence from the Raja. In that suit the Swetambaris merely denied that the hill was the exclusive property of the Raja, and alleged that the plaintiffs had no right to interfere with the pilgrim way, but it was held that the defendants were not entitled to remove the stairs which had become annexed to the soil and were vested in the Raja as owner.

In 1903 the Digambaris filed another suit about the new temple, which however was discontinued. In the plaint it was admitted that the hill was the property of the Raja, subject to the Jains' rights of worship.

For the last twenty years the two sects have been engaged in a struggle to acquire the Raja's title for their own sect which has now been finally determined by the judgment of the Board in favour of the Swetambaris.

The Subordinate Judge has discounted much of this evidence on the ground that one or other sect was not a party to the particular suit, but it is not a question of res judicata, but of repeated admissions and of the successful assertion of the Raja's title whenever challenged. Nor is there, in their Lordships' opinion, any foundation for the further suggestion that the Jains were not in a position to assert their rights. They are a wealthy community and must have incurred enormous costs in the litigation already mentioned, and in the twenty years' further litigation arising out of their efforts to acquire the Raja's title, whereas in 1903 the Raja was driven to seek relief under the Chota Nagpur Encumbered Estates Act, largely owing to the heavy expenses he had already incurred in litigation with them about the hill.

The Subordinate Judge has based his finding that the whole hill is the debattar property of the Jain deities on the belief in its sanctity now entertained by both sects. As observed by Ross J., that evidence undoubtedly establishes beyond a doubt that in the belief of the Jain community a spiritual quality in some way attaches to the hill, but this is a matter of faith and cannot in itself determine the physical ownership

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of the hill. On this part of the case their Lordships agree with the learned judges of the High Court that the hill was not the debattar property of the Jain deities but the property of the Raja.

On this basis, the learned judges rightly proceeded to consider whether the acts complained of interfered with the Digambaris' rights of worship on the hill. Now eating and drinking, spitting and the offices of nature, and many other things which are unseemly and irreverent acts in a place of worship, are naturally and properly prohibited in the ancient "Ashatana of Jain temples"; but, as observed by Ross J., these rules can only be applied by analogy to a vast expanse like Parasnath Hill, and must be subject to reasonable modifications in practice, and this is what is shown by the evidence to have happened.

No serious objection seems to have been taken to the military sanatorium while it existed, or to the plantations with their cooly lines lower down, though they involved a complete disregard of these rules. Further, writing in 1846, Lieut. Beadle says that a religious meeting or mela was held on the hill every year for a fortnight in January, and that shopkeepers ascended with grain and other provisions for the wants of the worshippers, and there is evidence that a Hindu mela is still held on the hill every year.

In a suit in 1910 it was proved that by immemorial custom the primitive and backward Santhals in the neighbourhood are entitled to hold a hunt on the hill enjoined on them by their religion on one particular day in the year. Eight to sixteen thousand Santhals take part in the hunt, working round the hill and across the pilgrim way, and the day ends with sacrifices to their gods and their annual caste meeting.

None of these things, however distasteful, appear to have interfered with the Jains' worship on the hill.

The objection to the erection of buildings on the hill seems to have been put forward prominently for the first time by the Digambari pundits in opposition to the erection of the Parasnath temple. According to their teaching, as deposed to by some of the witnesses, it is an act of ashatana to build

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a temple on the sacred hill, and it is also an act of ashatana to pull it down or to leave it standing, in the latter case because it involves the daily presence of pujaris on the hill to worship the images in the temple. Even so, it was not attempted to stop the building on this ground in the suit filed in 1903 and afterwards discontinued.

Coming now to the acts complained of, owing to the increase in the number of pilgrims, pujaris and other temple servants have for some time been employed in daily attendance on the hill without objection being taken. Whether spending the night there was allowed or tolerated is a matter of controversy. All that is now proposed is to erect dwellings for them on the top of the hill instead of requiring them to make the long ascent and descent every day, to build dharmasalas or rest-houses for pilgrims, and to station sentries and night watchmen on the hill. Their Lordships agree with the learned judges that it is not proved that any of these acts will interfere with the Digambaris' rights of worship. As to the proposed gateway, the Courts cannot assume that it will be used to obstruct the Digambaris' rights of access to the hill; if it should be, they will have their remedy. For these reasons their Lordships are of opinion that as to this part of the case the appeal fails.

The remaining question as to the alterations in three of the shrines may be dealt with more briefly, as both the lower Courts are in substantial agreement about the facts and have only differed on the question of limitation. The charans in the old shrines were impressions of the footprints of the saints, each bearing a lotus mark. The Swetambaris, who prefer to worship the feet themselves, have evolved another form of charan, not very easy to describe accurately in the absence of models or photographs, which shows toe nails, and must be taken to be a representation of part of the foot. This the Digambaris refuse to worship as being a representation of a detached part of the human body. Both the lower Courts have held that the action of the Swetambari in placing charans of the description in three of the shrines is a wrong of which the Digambaris are entitled to complain.

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As regards limitation the Subordinate Judge held on rather insufficient grounds that the acts complained of took place within six years of suit, so that this part of the claim could not be barred by art. 120, but he also held that it could not be barred under that article as it was a continuing wrong, as to which, under s. 23 of the Indian Limitation Act, a fresh period begins to run at every moment of the day on which the wrong continues. The High Court, on the other hand, were of opinion that it was not a continuing wrong and that the claim was barred under art. 120. In their Lordships' opinion the Subordinate Judge was right in holding that the acts complained of were a continuing wrong and consequently that this part of the claim is not barred. This question is covered by the decision of this Board in *Rajroop Koer* v. *Abul Hossein* (1), a case of diverting an artificial watercourse and cutting off the water supply of the plaintiff's lower lying lands.

The fact that there is no period of limitation in suits arising out of continuing wrongs, except as regards actions for compensation which are governed by art. 36, does not however conclude the question, because under the law of India declarations and injunctions are discretionary forms of specific relief, and under s. 56 of the Specific Relief Act, 1877, the Court may refuse to grant an injunction if the plaintiff by acquiescence or other conduct has disentitled himself to such relief. No such case, however, was made in the lower Courts, and no sufficient cause has been shown for refusing to grant the reliefs prayed for as to this part of the case.

Lastly, it is not disputed that, in so far as it strikes out declaration 4 in the Subordinate Judge's decree and the direction as to the form of charan to be placed in two other shrines, the High Court's decree is not in accordance with their judgment.

In the result their Lordships will humbly advise His Majesty that this appeal ought to be allowed in part, and the decree of the High Court varied: (*a*) by deleting therefrom the directions which strike out from the decree of the Subordinate

(1) (1880) L. R. 7 I. A. 240.

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Judge (1.) declaration 4, and (2.) his direction requiring the defendants to remove from the tonks of Padam Prabhu, Sri Abhinandan Nathji and Dharam Nath the new charans placed by them therein and to put in these three tonks, as well as the tonks of Sri Subudhinath and Sri Chandra Prabhu, footprints as had originally been there; and (b) by setting aside the direction as to costs. In other respects the decree of the High Court ought to be affirmed. As regards costs, their Lordships think that justice will be done by ordering the appellants to pay two-thirds of the respondents' costs incurred in both Courts below and two-thirds of their costs of this appeal. For this purpose the direction as to costs of the Subordinate Judge should also be set aside, and any costs already paid under the orders of the Courts below will have to be adjusted to bring about the result arrived at.

Solicitors for appellants: *Barrow, Rogers & Nevill.*
Solicitors for respondents: *Hy. S. L. Polak & Co.*

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MAHARANI RAJROOP KOER . . . . PLAINTIFF;

AND

SYED ABUL HOSSEIN AND OTHERS . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Act IX. of 1871, *sect.* 27—*Second Schedule, Part V. Art.* 34—*Limitation—Prescription—Easement—Right to the flow of an Artificial Watercourse.*

In a suit to establish the Plaintiff's right to a pyne or artificial watercourse, and also to a tal or reservoir, and the water flowing from them through the Defendants' estate to his own, and to obtain the removal of certain obstructions, it appeared that the pyne was constructed by the Plaintiff's ancestors at a distant period of time, with compensation to the Defendants, and that the Plaintiff and his ancestors had had peaceable and continuous use for more than twenty years of the water flowing through it and to the overflow water of the tal, after the Defendants had used the water for the purpose of irrigating their said estate, and that all the said obstructions were unauthorized; but it was contended that the Plaintiff's right to recover in respect of them was barred by the *Statute of Limitations*:—

Held, that a grant or some other legal origin of the Plaintiff's right must be presumed, and that Act IX. of 1871, being a remedial statute, did not exclude or interfere with titles and modes of acquiring easements existing independently of the Act; and in particular with those existing independently of sect. 27 of that Act, under which a statutory title could not accrue to the Plaintiff unless a period of twenty years' enjoyment terminating within two years of suit were shewn.

Held, further, that assuming the obstructions to have existed more than two years from the date of suit, they were continuing nuisances as to which the cause of action accrued *de die in diem*, and was not barred by Act IX. of 1871, 2nd Schedule, Part V. Art. 34.

APPEAL from two decrees of the High Court (Feb. 23, 1877) reversing in special appeal two decrees of the Subordinate Judge of zillah *Gya* (Aug. 17, 1875) so far as they were adverse to the Respondents, and restoring a decree of the Court of the Sudder Moonsiff of that district (Aug. 26, 1864), which, as regards the subject of this appeal, was in favour of the Respondents.

The facts appear in the judgment of their Lordships.

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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The judgment of the High Court (*L. S. Jackson*, and *McDonnell*, JJ.), was as follows :—

" The questions before the Court in this case are not unlike those which came before this Bench—at least before myself and my colleague Mr. Justice *Glover*—in 1870, which is reported in 14 Suth. W. R., p. 349, with this exception, that the position of parties is reversed. The Plaintiff here is the owner of a pyne which traverses the land of the Defendants. It appears to me that it is scarcely an adequate description of the Plaintiff's right in this case to say that he has a bare easement, or right, to pass water over the Defendants' land for the purpose of irrigating his own. The evidence shews, and the Courts appear to have found, that the pyne was constructed by the ancestors of the Plaintiff a great many years ago, possibly fifty or sixty years, certainly more than twenty years, for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the Defendants which compensated them for any injury or inconvenience caused by the construction of the pyne. In that state of things, it seems that the Defendants have at various times within the last few years made a number of openings in that pyne for the purpose of drawing water, to the injury of the whole village. In this state of the facts what we stated in 14 Suth. W. R. would apply, and we think that if the Defendants were to be at liberty without the Plaintiff's consent to construct a number of openings, and thereby seriously diminish the supply of water carried through the pyne to the Plaintiff's mouzah, that would cause serious disturbance, and Plaintiff would be most wrongfully injured thereby. But to this state of the rights of the parties we have to apply the provisions of the Limitation Act; and we find that the Plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time that such infringement took place. The Moonsiff found, and it appears to us on very good grounds, that as regards two of the openings from which the Plaintiff complained that he sustained injury they were in existence much more than two years before the commencement of the suit. Of course the Subordinate Judge might, if the evidence permitted it, come to a different conclu-

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sion upon that part of the case, and the Plaintiff's vakeel suggests that he did intend to do so by the use of these words—'With reference to the dhonga and khund, the Moonsiff has referred to the papers filed by the Plaintiff, but those papers do not refer to the dhongas and khund in particular;' but we do not think that, in these words, the Subordinate Judge meant to reverse the finding of the Moonsiff on a question of fact, for, after the remark which he there makes, he goes on to dispose of part of the case on different grounds by, as is admitted before us to-day, a misapplication of the law of limitation. If we thought that there was any ground for coming to a different conclusion upon this fact, we should have been inclined to remit the case back; but we are satisfied that the Moonsiff's finding on this point is unassailable. Concurring, therefore, in the general view taken by the Court below of the rights of parties, and being of opinion that the decision of the Moonsiff is correct as regards the khund and the dhonga mentioned by him, and being also of opinion that the cross appeal filed by the Plaintiff in regard to the use of the tal has no force, we think that the judgment of the Lower Appellate Court, so much as varies the judgment of the Moonsiff, must be set aside, and that the Moonsiff's decision must be restored. The Defendants' appeal is allowed, and the Plaintiff's appeal dismissed. Each party will pay his own costs of this appeal."

Woodroffe, for the Appellant, contended that as regards the two obstructions, No. 3 and No. 10, the Lower Appellate Court had rightly reversed the Moonsiff's finding that they were in existence more than two years before the date of suit, and that the High Court was in error in holding that the Lower Appellate Court had not meant to do so. As regards the evidence and the findings of the Moonsiff and Subordinate Judge, it was not established that the Defendants had a proprietary right in the tal and to the use of the water therein; while it appeared that the Plaintiff was entitled to such water, and was not limited in his rights to the overflow thereof. The tal formed part of a system of irrigation used as of right by the Appellant. The Respondent's predecessors in estate had on the evidence consented to the storing of the water therein for the use of the Appellant's predecessors.

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Under these circumstances a grant must be presumed: see *Gooroo-pershad Roy and Others* v. *Bykanto Chunder Roy* (1); *Mahomed Ali and Others* v. *Joogool Ram Chunder* (2). The title so derived was independent of the Indian *Limitation Act* IX. of 1871. So long as there had been peaceable and continuous user for twenty years, whether the obstruction complained of had existed more than two years or not, there was a good title in the Appellant, independently of sect. 27 of the Act. As regards clause 34 of the second schedule, that must be read with reference to sect. 24, and is inapplicable. This was a continuing injury giving a continuous cause of action; though under the Act it may be that only two years' damages can be obtained: see *Whitehouse* v. *Fellowes* (3); *Gillon* v. *Boddington* (4). Moreover, whether for purposes of limitation, or as affecting title under sect. 27, the obstruction or interruption of the Appellant's enjoyment must be shewn to have been acquiesced in by him: see *Flight* v. *Thomas* (5).

C. W. Arathoon, for the Respondents, relied upon the judgment of the High Court and upon the statement of the law of limitation therein contained. He referred to *Juggessur Singh* v. *Nund Lall Singh* (6). He contended that the openings and obstructions were of old standing, and were shewn on the survey map, more particularly No. 10. The Appellant had failed to prove that the easement had been peaceably enjoyed within the meaning of sect. 27 of the Act of 1871. There had been litigation extending over a number of years, and the injury in this case was not a continuing one. Further, as to No. 3 obstruction, the Appellant was bound so to use the same as not to injure the Respondents' land by inundation or otherwise.

Woodroffe replied.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

This was a suit brought by Maharajah *Ram Kissen Singh Bahadur* to establish an asserted right to a pyne or artificial

(1) 6 Suth. W. R. 83.
(2) 14 Suth. W. R. 124.
(3) 30 L. J. (N.S.) (C.P.) 305.
(4) 1 Ry. & Mood. 161.
(5) 10 Ad. & E. 590; S. C. 8 Cl. & F. 231.
(6) 20 Suth. W. R. 283.

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watercourse, and also to a tal or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the pyne. The Maharani, the present Appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the *Statute of Limitations* upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharajah and his ancestors were the owners of mehal *Sunout Purwurya*, in the district of *Gya*; and the Defendants were the owners of an estate called mouzah *Mora*. The system of irrigation claimed by the Plaintiff embraces an artificial pyne which is fed by a natural river at a point to the south of the Defendants' mouzah. The pyne, which runs from the south in a northerly direction, after traversing other estates, enters mouzah *Mora*, and runs through it, and afterwards through other lands to the Defendants' mehal. There is, branching from the main pyne, a channel or smaller pyne which helps to feed the tal claimed by the Plaintiff. The tal lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the pyne, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the tal which runs from it and joins the pyne at a point near a bridge, described in the Moonsiff's map. It is said there were doors or sluices in the bridge by which the flow of the water had been to some extent regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the pyne.

The general result of the litigation below is, that the Plaintiff succeeded in establishing his right to the pyne as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel, but failed to establish his right to the water in the tal, except to the overflow after the Defendants, as the owners of mouzah *Mora*, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the Plaintiff.

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It was found in the Courts below that all the obstructions were unauthorized; and the Plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a khund or channel cut in the side of the pyne at a point below the bridge which has been spoken of. No. 10 is a dhonga, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the pyne for the purpose of irrigating the Defendants' land. No question arises here as to the fact that those two works are an interruption of the Plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the *Statute of Limitations*.

The Moonsiff has found that the statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Moonsiff's decree. On special appeal to the High Court, the Judges of that Court concurred with the Moonsiff, and, reversing the decree of the Subordinate Judge, affirmed the Moonsiff's judgment.

Before adverting to the statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Moonsiff found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found that the two obstructions were recently made; and it may be inferred, from his disagreeing with the inferences which the Moonsiff drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Moonsiff that the obstructions had existed for two years. If they had not existed for that period, no question on the statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Moonsiff on the question of fact, and, therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Moonsiff upon the fact of the length of time during which these obstruc-

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tions had existed; but, assuming the fact to be as the Moonsiff and the High Court have regarded it, namely, that these obstructions had existed for more than two but for less than twenty years, they think that no provision of the *Statute of Limitations* interferes with the Plaintiff's right to recover in respect of them.

The *Limitation Act*, No. IX. of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part 4 of the Act, and are introduced under the heading "Acquisition of Ownership by Possession." They enact a mode of acquiring ownership by possession or enjoyment. Sect. 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light- or air-way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Moonsiff certainly proceeded; though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

On the assumption of fact made by the Moonsiff that these obstructions had existed for more than two years before the suit he might be right in finding that the Plaintiff had not had peaceable enjoyment for twenty years, ending within two years before the institution of the suit, and, therefore, that the Plaintiff had acquired no title by virtue of this statute. The object of the statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title

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under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that in this case there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Moonsiff and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shews, and the Courts appear to have found, that the pyne was constructed by the ancestors of the Plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the Defendants, which compensated them for any injury or inconvenience caused by the construction of the pyne." This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the Plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the Plaintiff's mehal and the Defendants' land by which the right was created. That being so, the Plaintiff does not require the aid of the statute: and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Moonsiff decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. *Woodroffe* upon the effect of the clause in the same 27th section under the head "explanation," which defines what is to be considered an interruption. Nor is it necessary to consider the doctrine laid down in *Flight* v. *Thomas* (1) in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the *English Prescription Act*.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment

(1) 10 Ad. & E. 590; S. C. 8 Cl. & F. 231.

2019-09-03 (Page 8 of 10) MANU/PR/0014/1880 Advocate Ejaz Maqbool

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J. C. 1880

MAHARANI RAJROOP KOER v. SYED ABUL HOSSEIN.

on the part of the statute which relates to limitation properly so called; namely, on Article 34 of Part V. of the Second Schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the Plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringment took place." If the Judges really meant to apply the limitation of Article 34 above referred to, their decision is clearly wrong; for the obstructions which interfered with the flow of water to the Plaintiff's mehal 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. Indeed, sect. 24 of the statute contains express provision to that effect. For these reasons their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

There remains to be noticed the contention raised as to the tal. Mr. *Woodroffe* has strongly argued that the findings as to the tal in favour of the Defendants are wrong, and he further endeavoured to shew by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find that there are distinct judgments of the Moonsiff and of the Subordinate Judge to the effect that the Defendants had a proprietary right in the tal and to the use of the water in the tal, and that the Plaintiff had no right to the tal or to the water in it, except to so much as flows out of it in a natural course to the Plaintiff's pyne. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the Appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Moonsiff be modified in accordance therewith.

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Mr. *Woodroffe* desired that the language of the Moonsiff's decree with regard to the enjoyment of the water in the tal should be modified. Their Lordships, having considered what was addressed to them on the subject and the language of the Moonsiff's decree, are not disposed to interfere with it. The Plaintiff having claimed the whole of the water in the tal, they think that the Moonsiff had to determine upon that claim; and that, having given only a qualified enjoyment of the water to the Plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the Defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible. The Moonsiff having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially, it amounts to a declaration that the Defendants are entitled to use the water of the tal for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships having considered the question of costs, and the Plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

Solicitors for the Appellant: *Henderson & Co.*
Solicitor for the Respondents: *T. L. Wilson.*

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insurance. In such a case, therefore, the insurer, by virtue of the transfer of assignment in his favour will be in a position to maintain a suit in his own name against third parties. (22 Halsbury's Laws of England, Simond Edn., paras 512-513 and Shawcross on 'Motor Insurance').

Normally, an assignment of a right of action for a tort is not valid under Section 6(*e*). But cases of subrogation as applied to insurance for indemnity are an exception to the rule and assignments by the assured to the insurer of his rights and remedies being more than a transfer of a mere right to sue are permissible and are valid. But express assignment by the assured of all his rights is necessary and subrogation by itself will not enable the insurer to sue in his own name [1896 AC 250; (1883) 11 QBD 380]."

It is regrettable that the attention of the High Court was not drawn to the above decision.

54. I think the reasoning in the decisions above referred to is correct, that the assignment conveyed to the insurance company, the entire right in respect of the subject-matter of the insurance, including the right of the assured to sue in its own name and that, after the assignment, the assured had no cause of action to institute the suit against the Railway Administration for recovery of damages.

55. I would allow the appeal and set aside the judgment and decree of the High Court and restore the decree passed by the Subordinate Judge, Coimbatore, dismissing the suit, without any order as to costs.

(1972) 2 Supreme Court Cases 890

(From Patna High Court)

[BEFORE J. M. SHELAT AND H. R. KHANNA, JJ.]

STATE OF BIHAR ... Appellant;

Versus

DEOKARAN NENSHI AND ANOTHER ... Respondents.

Criminal Appeal No. 208 of 1969†, decided on August 24, 1972

Mines Act, 1952—Sections 66 and 79 read with Metalliferous Mines Regulations, 1926—Period of limitation for filing complaint—Continuing offence—Meaning.

Words and Phrases—Continuing offence.

Held:

(*i*) Section 79 lays down that no court shall take cognizance of any offence under this Act unless a complaint thereof has been made within six months from the date on which the offence is alleged to have been committed or within six months from the date the alleged commission of the offence came to the knowledge of the Inspector, whichever is later. The Explanation to the section provides that if the offence in question is a continuing offence, the

†Appeal under Article 134(1)(*c*) of the Constitution of India from the Judgment and Order, dated April 17, 1969, of the Patna High Court in Government Appeal No. 28 of 1967, under Section 417(1), Cr. P. C.

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period of limitation shall be computed with reference to every point of time during which the said offence continues. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. (Paras 1 and 5)

(*ii*) Regulation 3 of the India Metalliferous Mines Regulations, 1926, read with Section 66 of the Mines Act makes failure to furnish annual returns for the preceding year by January 21 of the succeeding year an offence. In other words, Regulation 3 does not render a continued disobedience or non-compliance of it an offence. (Para 9)

Best v. *Butler and Fitzgibon*, (1932) 2 KB 108; *Verney* v. *Mark Fletcher and Sons Ltd.*, (1909) 1 KB 444; *Rex* v. *Taylor*, (1908) 2 KB 237; *London County Council* v. *Worley*, (1894) 2 QB 828; *Emperor* v. *Karsandas*, AIR 1942 Bom 326; *State* v. *Bhiwandiwala*, ILR 1955 Bom 192; *Bihar* v. *J. P. Singh*, 1963 BLJR 782, and *State* v. *Laxmi Narain*, AIR 1957 All 343, *referred*.

Appeal *dismissed*.

Advocates who appeard in this case:

S. C. Agarwala, Advocate for Appellant;

G. L. Sanghi, *D. N. Mishra* and J. B. Dadachanji & Co., Advocates for Respondent.

The Judgment of the Court was delivered by

Shelat, J.—Section 66 of the Mines Act, 1952, provides that any person omitting inter alia to furnish any return, notice etc. in the prescribed form or mannar or at or within the prescribed time required by or under the Act to be made or furnished shall be punishable with fine which may extend to Rs. 1,000/-. Section 79, however, lays down that no court shall take cognizance of any offence under this Act unless a complaint thereof has been made within six months from the date on which the offence is alleged to have been committed or within six months from the date on which the alleged commission of the offence came to the knowledge of the Inspector, whichever is later. The Explanation to the section provides that if the offence in question is a continuing offence, the period of limitation shall be computed with reference to every point of time during which the said offence continues. Under Regulation 3 of the India Metalliferous Mines Regulations, 1926, an owner, agent or manager of every mine is required to forward to the District Magistrate and to the Chief Inspector annual returns in respect of the preceding year in the forms prescribed therein and on or before January 21, in each year.

2. The respondents are the owners of a stone quarry situate in Chandiwali in Greater Bombay. They failed to furnish to the Chief Inspector the annual returns for the year 1959, by the January 21, 1960. On March 28, 1960, the Chief Inspector drew their attention to the said failure and warned the respondents that if they failed to furnish the returns within two weeks from the date of the said letter, that is, by April 11, 1960, proceedings would be instituted against them under the Act. On their failure to do so despite the said warning, a complaint was filed in the Court of the Magistrate, Dhanbad on April 12, 1961.

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3. Two questions were agitated in the Trial Court in the High Court and also before us. One was regarding the jurisdiction of the Court at Dhanbad, and the other was whether the complaint was barred by limitation, it having been filed more than a year after the default, which occurred on January 21, 1960. Both the questions go to the root of the matter, but in the view we take of the second question, it would not be necessary for us to go into the first question.

4. The failure to furnish the annual returns either in the prescribed forms or within the time prescribed for it, that is, by January 21, in the succeeding year, is undoubtedly an offence punishable under Section 66 of the Act. A complaint in respect of such an offence has, under Section 79, to be filed within six months from the date of such default, in the present case January 21, 1960. The question then is whether the offence in question is covered by the substantive part of Section 79, or whether it is covered by the Explanation thereto. If the offence is of the former kind, the complaint in regard to it would be clearly time barred. It would not be so if the offence is of the kind, often called a continuing offence, in which event the Explanation to Section 79, would operate.

5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

6. A few illustrative cases would help to bring out the distinction between the two types of offences.

7. In England, the Trade Union Act, 1871, by Section 12 provided that if any officer, member or other person being or representing himself to be a member of trade union, by false representation or imposition obtained possession of any moneys, books etc. of such trade union, or, having the same in his possession wilfully withheld or fraudulently misapplied the same, a court of summary jurisdiction would order such person to be imprisoned. The offence of withholding the money referred to in this section was held to be a continuing offence, presumably because every day that the moneys were wilfully withheld an offence within the meaning of Section 12 was committed. *Best* v. *Butler and Fitzgibbon.*[1] In *Verney* v. *Mark Fletcher & Sons Ltd.*,[2] the question again was whether the offence for which the information was lodged therein was a continuing offence. Section 10(1) of the Factory and workshop Act, 1901, inter alia provided that every fly-wheel directly connected with steam, water or other mechanical power must be securely fenced. Its sub-section (2) provided that a factory in which there was contravention of the section would be deemed not to be kept in conformity with the Act. Section 135 provided penalty for an occupier of a factory or workshop if he

1. (1932) 2 KB 108. 2. (1909) 1 KB 444.

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failed to keep the factory or workshop in conformity with the Act. Section 146 provided that information for the offence under Section 135 shall be laid within three months after the date at which the offence came to the knowledge of the Inspector for the district within which the offence was charged to have been committed. The contention was that in May 1905, and again in March 1908 the fly-wheel was kept unfenced to the knowledge of the Inspector and yet the information was not laid until July 22, 1908. The information, however, stated that the fly-wheel was unfenced on July 8, 1908, and that was the offence charged. It was held that the breach of Section 10 was a continuing breach on July 10, 1908, and therefore, the information was in time. The offence under Section 135 read with Section 10 consisted in failing to keep the factory in conformity with the Act. Every day that the fly-wheel remained unfenced, the factory was kept not in conformity with the Act, and therefore, the failure continued to be an offence. Hence the offence defined in Section 10 was a continuing offence. (See also *Rex* v. *Talor*[3]). Section 85 of the Metropolis Management Amendment Act, 1862, prohibited the erection of a building, on the side of a new street of less than fifty feet in widh, which shall exceed in height the distance from the front of the building on the opposite side of the street without the consent of the London County Council and impose penalties for offences against the Act and a further penalty for every day during which such offence should continue after notice from the County Council. The Court construed Section 85 to have laid down two offences: (1) building to a prohibited height, and (2) continuing such a structure already built after receiving a notice from the County Council. The latter offence was a continuing offence applying to any one who was guilty of continuing the building at the prohibited height after notice from the County Council. *The London County Council* v. *Worley*.[4]

8. In *Emperor* v. *Karsandas*,[5] the question was as to the proper construction of Section 390, sub-section (1) of the Bombay City Municipal Act, 1888. That sub-section provided that no person shall newly establish in any premises any factory, in which it was intended that steam, water or other mechanical power should be employed, without the previous permission of the Commissioner, nor shall any person work or allow to be worked any such factory without such permission. The sub-section thus laid down two distinct offences: (1) establishing a new factory in which mechanical power was intended to be used without the permission, and (2) working such a factory in which mechanical power was intended to be used without permission. The High Court held that the first offence would be completed when a new factory was established without permission, an offence completed once and for all, while the other offence would be committed whenever such a factory without the permission was worked, that is, on every day that it was worked without the permission. The High Court observed that though the expression 'continuing offence' was not a very happy expression, it was very often used. A person may not continuously work such a factory. He might work it one day and not work it the next day, and then resume its working once again. Therefore, the proper meaning to be attached to such an offence was that whenever he worked such a factory he committed an offence. The distinction between the two kinds of offences lay between an act which constituted an offence once and for all and an act which continued, and therefore, constituted a fresh offence every time on which it continued. Similarly, in *State* v.

3. (1908) 2 KB 237.
4. (1894) 2 QB 826.
5. AIR 1942 Bom 326: 203 IC 592: 44 Cr LJ 120.

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Bhiwandiwala,[6] three offences were charged against the respondent: (1) failure to submit a written notice of occupation of his factory as required by Section 7(1) of the Factories Act, 1948, (2) failure to submit an application for registration and grant of licence as required by Section 6 of the Act read with Rule 4 of the Bombay Factories Rules, 1950, and (3) for using the premises as a factory without a licence. The High Court held that the first two offences were offences completed on failure to submit the notice and the application for registration and licence, and a complaint in respect of them would be barred if it was lodged beyond the period of three months from the date of the offence under Section 106 of the Act. But a prosecution in respect of the third offence would not be so barred as that offence was a continuing offence in the sence that using the premises as a factory without registration and licence was an offence committed every time that the premises were used as a factory. Likewise, in *Bihar* v. *J. P. Singh*,[7] the High Court of Patna held that conducting a restaurant without having it registered and without maintaining registers required by the Bihar Shops and Establishments Act, VIII of 1954, and the Rules framed thereunder were continuing offences as every time a restaurant was run without its being registered and without maintaining the requisite registers was an offence, and therefore, the period of limitation under Section 36 of the Act would being to run from the date of the occurrance of each of the defaults. See also *State* v. *Laxmi Narain*.[8]

9. Regulation 3 read with Section 66 of the Mines Act makes failure to furnish annual returns for the preceding year by the January 21, of the succeeding year an offence. The language of Regulation 3 clearly indicates that an owner, manager etc. of a mine would be liable to the penalty if he were to commit an infringement of the Regulation and that infringement consists in the failure to furnish returns on or before January 21, of the succeeding year. The infringement, therefore, occurs on January 21, of the relevant year and is complete on the owner failing to furnish the annual returns by that day. The Regulation does not lay down that the owner, manager etc. of the mine concerned would be guilty of an offence if he continues to carry on the mine without furnishing the returns or that the offence continues until the requirement of Regulation 3 is complied with. In other words, Regulation 3 does not render a continued disobedience or non-compliance of it an offence. As in the case of a construction of a wall in violation of a rule of a bye-law of a local body, the offence would be complete once and for all as soon as such construction is made, a default occurs in furnishing the returns by the prescribed date. There is nothing in Regulation 3 or in any other provision in the Act or the Regulations which renders the continued non-compliance an offence until its requirement is carried out.

10. The High Court, in our view, was right in holding that the complaint was time barred as the offence in question fell within the substantive part of Section 79 of the Act and not under the Explanation attached to it. The appeal, therefore, must fail and is dismissed.

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6. ILR 1955 Bom 192: AIR 1955 Bom 161: 56 Cr LJ 666.
7. 1963 BLJR 782.
8. AIR 1957 All 343: 1957 Cr LJ 615: 1958 All WR (HC) 281.

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of his advocate. If we reject this appeal, as Mr. A. K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned Advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to Rs. 200 should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A. K. Sanghi.

4. Appeal allowed to the extent indicated with costs in the manner indicated.

(1981) 2 Supreme Court Cases 790

(BEFORE R. S. PATHAK AND E. S. VENKATARAMIAH, JJ.)

COMMISSIONER OF WEALTH TAX, AMRITSAR .. Appellant;

Versus

SURESH SETH .. Respondent.

Civil Appeals Nos. 768-69 of 1978†, decided on April 7, 1981

Wealth Tax — Penalty for default in not filing return within time — Held, Section 18(1)(a) of Wealth Tax Act does not contemplate a continuing offence and penalty to be determined in accordance with the provisions prevailing on the last day on which the return is required to be filed — Amendments of Section 18(1)(a) made in 1964 and 1969 do not operate retrospectively — General Clauses Act, 1897 (10 of 1897), Section 6, applicable — Wealth Tax Act, 1957 (27 of 1957), Section 18(1)(a) [as stood prior and subsequent to its amendments by Wealth Tax (Amendment) Act, 1964 and Finance Act, 1969]

Jurisprudence — Offence — Completed and continuing offences — Concepts of — Liability in completed offence, when arises — Liability in cases which are not criminal in nature can be enhanced by express or implied words used in subsequent legislation — Constitution of India, Article 20(1)

†Appeals by special leave from the Judgment and Order dated January 28, 1977 of the Punjab & Haryana High Court in Income Tax Reference No. 29 of 1975

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The assessee-respondent was required by Section 14(1) of the Wealth Tax Act to file his return of wealth tax for the assessment years 1964-65 and 1965-66 on or before June 30, 1964 and 1965 respectively but he filed the returns in March 1971. The Wealth Tax Officer took the view that the default or failure to file the return in time was a continuing default and that the penalty had to be computed for the period prior to April 1, 1965 in accordance with Section 18 as it stood prior to its amendment in 1964, for the period between April 1, 1965 to March 31, 1969, in accordance with Section 18 as amended by the Wealth Tax (Amendment) Act, 1964 and for the period between April 1, 1969 to March 18, 1971 (on which date the returns were filed) in accordance with Section 18 as amended by the Finance Act, 1969. The Wealth Tax Officer therefore levied the penalties accordingly and the Appellate Assistant Commissioner and the Tribunal upheld the same. But the High Court rejected the above view of the Revenue and held in favour of the assessee. Dismissing the appeals filed under Article 136 with costs, the Supreme Court

Held:

A liability in law ordinarily arises out of an act of commission or an act of omission. Ordinarily a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or of omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefrom gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion. In the case of acts amounting to crimes the punishment to be imposed cannot be enhanced at all under the Constitution by any subsequent legislation by reason of Article 20(1) of the Constitution. In other cases, however, even though the liability may be enhanced it can only be done by a subsequent law (of course subject to the Constitution) which either by express words or by necessary implication provides for such enhancement. (Para 11)

The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. The court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. Where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that Act. (Paras 11 and 17)

Non-performance of any of the acts mentioned in Section 18(1)(*a*) gives rise to a single default and to a single penalty, the measure of which, however, is geared up to the time-lag between the last date on which the return has to be filed and the date on which it is filed. The default, if any committed is committed on the last date allowed to file the return. The default cannot be one committed every month thereafter. The words 'for every month during which the default continued' indicate only the multiplier to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one. Nor do they make the amended provisions modifying the penalty applicable to earlier

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defaults in the absence of necessary provisions in the amending Acts. The principle underlying Section 6 of the General Clauses Act is clearly applicable to these cases. Thus where the default complained of is one falling under Section 18(1)(*a*), the penalty has to be computed in accordance with the law in force on the last day on which the return in question had to be filed. Neither the amendment made in 1964 nor that made in 1969 has retrospective effect. (Paras 19 and 20)

[The decision of the High Court insofar as the default committed by the assessee in not filing the return in respect of the assessment year 1964-65 is not erroneous. And in view of the above position of law the High Court's decision in respect of default committed by the assessee in not filing the return due on June 30, 1965 for the assessment year is not liable to be interfered with under Article 136.] (Para 9)

Hole v. *Chard Union*, (1894) 1 Ch D 293 : 63 LJ Ch 469 : 70 LT 52 ; *State* v. *A. H. Bhiwandiwalla*, AIR 1955 Bom 161 : 1955 Cri LJ 666 : ILR 1955 Bom 192 : 56 Bom LR 1172 and *State* v. *Kunja Bihari Chandra*, AIR 1954 Pat 371 (FB) : ILR 1954 Pat 507 : 55 Cri LJ 1187, *approved*

Balkrishna Savalram Pujari v. *Shree Dnyaneshwar Maharaj Sansthan*, 1959 Supp 2 SCR 476 : AIR 1959 SC 798 : 1960 SCJ 1203, *relied on*

C. W. T. v. *V. Pathummabi* (1977) 108 ITR 689, *referred to*

Emperor v. *Chhotalal Amarchand*, AIR 1937 Bom 1(FB) : ILR 1937 Bom 183 : 38 Cri LJ 156 : 38 Bom LR 1164, *cited*

R-M/5331/CT

Advocates who appeared in this case :

B. B. Ahuja and *Miss A. Subhashini*, Advocates, for the Appellant ;
G. C. Sharma, Senior Advocate (*E. D. Helms*, *R. S. Sharma* and *K. B. Rohtagi*, Advocates, with him), for the Respondent.

The Judgment of the Court was delivered by

Venkataramiah, J.—The Commissioner of Wealth Tax, Amritsar has filed the above appeals by special leave against the judgment of the High Court of Punjab & Haryana in a reference made under Section 27(1) of the Wealth Tax Act, 1957 (hereinafter referred to as 'the Act') answering in favour of the assessee the following two questions :

1. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the offence relating to the commission to file the wealth tax returns was a continuing offence?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the penalties of Rs. 5382 and Rs. 7759 levied by the department on the assessee under Section 18(1)(*a*) of the Wealth Tax Act, 1957, for the assessment years 1964-65 and 1965-66 respectively?

2. The assessee, the respondent in these appeals filed his wealth tax returns for the assessment years 1964-65 and 1965-66 on March 18, 1971 while he was required by Section 14(1) of the Act to file the return for the assessment year 1964-65 on or before June 30, 1964 and the return for the assessment year 1965-66 on or before June 30, 1965. The Wealth Tax Officer completed the assessments for the aforementioned years on March 22, 1971 determining the total wealth at Rs. 1,45,800 for the assessment year 1964-65 as against the declared wealth of Rs. 1,38,550 and at Rs. 1,65,200 for

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the assessment year 1965-66 as against the declared wealth of Rs. 1,59,127 and also commenced proceedings for levying penalty under Section 18(1)(*a*) of the Act for late submission of returns. Ultimately the penalties were levied as follows:

Assessment year 1964-65:

(*i*) For the period from July 1, 1964 to March 31, 1969:

Penalty at 2 per cent p.m. subject to maximum of 50 per cent of the wealth tax payable under Section 18(1)(*a*) before its amendments on April 1, 1969 by the Finance Act, 1969: Rs. 115·00

(*ii*) For the period from April 1, 1969 to March 18, 1971:

Penalty at 1/2 per cent of the net wealth for each month of the default under Section 18(1)(*a*) as amended by the Finance Act, 1969: Rs. 5,267·00

Rs. 5,382·00

Assessment year 1965-66:

(*i*) For the period from July 1, 1965 to March 31, 1969:

Penalty at 2 per cent p.m. subject to maximum of 50 per cent of the wealth tax payable under Section 18(1)(*a*) before its amendment on April 1, 1969 by the Finance Act, 1969: Rs. 163·00

(*ii*) For the period from April 1, 1969 to March 18, 1971:

Penalty at 1/2 per cent of the net wealth for each month of default under Section 18(1)(*a*) as amended on April 1, 1969 by the Finance Act, 1969: Rs. 7,596·00

Rs. 7,759·00

3. The above orders levying penalties were upheld in appeal by the Appellate Assistant Commissioner and the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar. At the instance of the assessee a consolidated reference was made by the Income Tax Appellate Tribunal to the High Court referring the above two questions for its opinion. The High Court answered the said questions in favour of the assessee after rejecting the contention of the department that the default or failure to file the return in time was a continuing default and that the penalty had to be computed for the period prior to April 1, 1965 in accordance with Section 18 as it stood prior to its amendment by the Wealth Tax (Amendment) Act, 1964, for the period between April 1, 1965 to March 31, 1969 in accordance with Section 18 of the Act as amended by the Wealth Tax (Amendment) Act, 1964 and for the period between April 1, 1969 to March 18, 1971 (on which date the returns were filed) in accordance with Section 18 of the Act as amended by the Finance Act, 1969. Aggrieved by the decision of the High Court, the Department has filed these appeals under Article 136 of the Constitution.

4. Before dealing with the contentions of the parties, it is appropriate

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to set out the provisions of the Act which have a bearing on the question involved in the present appeals as they stood during the relevant periods:

5. Prior to April 1, 1965, sub-sections (1) and (3) of Section 14 of the Act stood as follows:

> 14. *Return of wealth.*—(1) Every person whose net wealth on the valuation date was of such amount as to render him liable to wealth tax under this Act shall, before the thirtieth day of June of the corresponding assessment year, furnish to the Wealth Tax Officer a return in the prescribed form and verified in the prescribed manner setting forth his net wealth as on the valuation date;
>
> (3) The Wealth Tax Officer may, if he is satisfied that it is necessary so to do, extend the date for the delivery of the return under this section.

After April 1, 1965

> 14. (1) Every person, if his net wealth or the net wealth of any other person in respect of which he is assessable under this Act on the valuation date was of such an amount as to render him liable to wealth tax under this Act, shall, before the thirtieth day of June of the corresponding assessment year, furnish to the Wealth Tax Officer a return in the prescribed form and verified in the prescribed manner setting forth the net wealth as on the valuation date.
>
> (3) The Wealth Tax Officer may, if he is satisfied that it is necessary so to do, extend the date for the delivery of the return under this section.

6. Section 15 of the Act which has not undergone any change since the commencement of the Act reads:

> 15. *Return after due date and amendment of return.*—If any person has not furnished a return within the time allowed under Section 14, or having furnished a return under that section discovers any omission or a wrong statement therein, he may furnish a return or a revised return, as the case may be, at any time before the assessment is made.

7. The relevant parts of Section 18 of the Act as they stood during the three periods referred to above read as follows:

Prior to April 1, 1965

> 18. (1) If the Wealth Tax Officer, Appellate Assistant Commissioner, Commissioner or Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person—
>
> (*a*) has without reasonable cause failed to furnish the return of his net wealth which he is required to furnish under sub-section (1) or sub-section (2) of Section 14 or Section 17 or has without reasonable cause failed to furnish it within the time allowed and in the manner required; or
>
> (*b*) & (*c*) .....
>
> he or it may, by order in writing, direct that such person shall pay by way of penalty—
>
> (*i*) in the cases referred to in clause (*a*), in addition to the amount of wealth tax payable by him, a sum not exceeding one and a half times the amount of such tax, and . . .

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Between April 1, 1965 and March 31, 1969

18. (1) If the Wealth Tax Officer, Appellate Assistant Commissioner, Commissioner or Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return of his net wealth which he is required to furnish under sub-section (1) of Section 14 or by notice given under sub-section (2) of Section 14 or Section 17 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 14 or by such notice, as the case may be; or

(*b*) & (*c*).....

he or it may, by order in writing, direct that such person shall pay by way of penalty—

(*i*) in the cases referred to in clause (*a*), in addition to the amount of wealth tax, if any, payable by him, a sum equal to two per cent of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent of the tax; . . .

After April 1, 1969 and as on March 18, 1971 on which date the returns were filed

18. (1) If the Wealth Tax Officer, Appellate Assistant Commissioner, Commissioner or Appellate Tribunal in the course of any proceedings under this Act is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return which he is required to furnish under sub-section (1) of Section 14 or by notice given under sub-section (2) of Section 14 or Section 17, or has without reasonable cause failed to furnish within the time allowed and in the manner required by sub-section (1) of Section 14 or by such notice, as the case may be; or

(*b*) & (*c*).....

he or it may, by order in writing, direct that such person shall pay by way of penalty—

(*i*) in the cases referred to in clause (*a*), in addition to the amount of wealth tax, if any, payable by him, a sum, for every month during which the default continued, equal to one-half per cent of—

(*A*) the net wealth assessed under Section 16, as reduced by the amount of net wealth on which in accordance with the rates of wealth tax specified in Paragraph A of Part I of the Schedule or Part II of the Schedule, the wealth tax chargeable is nil; or

(*B*) the net wealth assessed under Section 17, where assessment has been made under that section, as reduced by—

(1) the net wealth, if any, assessed previously under Section 16 or Section 17, or

(2) the amount of net wealth on which in accordance with the rates of wealth tax specified in Paragraph A of Part I of the Schedule or Part II of the Schedule, the wealth tax chargeable is nil,

whichever in greater,

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but not exceeding, in the aggregate, an amount equal to the net wealth assessed under Section 16, or, as the case may be, the net wealth assessed under Section 17, as reduced in either case in the manner aforesaid; . . .

8. Now let us analyse the above provisions of law. Section 14 of the Act which has not undergone any material change from the commencement of the Act insofar as the question involved in these appeals is concerned requires a person the value of whose wealth is such as would attract the liability to pay tax to file a return on his wealth as on the valuation date in the prescribed manner before the Wealth Tax Officer on or before the thirtieth of June of the assessment year or on or before any date up to which the Wealth Tax Officer has extended the time to file the return. Section 15 of the Act, however, enables such a person to file a return at any time before the assessment is made. The distinction between Section 14 and Section 15 of the Act lies in the fact that whereas under Section 14 a duty is imposed on the assessee to file a return within the prescribed date, Section 15 enables him to file a return before the assessment is made even though the last date prescribed by Section 14(1) is over. Section 18 of the Act deals with three types of penalties for certain specified acts or omissions on the part of the assessee referred to in clauses (*a*), (*b*) and (*c*) of sub-section (1) thereof. We are concerned in this case with the question of levy of penalty in respect of omissions referred to in clause (*a*) of Section 18(1) of the Act. There are four kinds of omissions referred to in that clause— (*i*) failure to furnish the return which the assessee is required to furnish under sub-section (1) of Section 14; (*ii*) failure to furnish the return as required by a notice issued under Section 14(2) or Section 17; (*iii*) failure to furnish the return as required by Section 14(1) within the time allowed and in the prescribed manner and (*iv*) failure to furnish the return as required by a notice issued under Section 14(2) or Section 17 within the time allowed and in the prescribed manner. Each one of these omissions expose the assessee to the levy of penalty unless reasonable cause is shown for not performing the duty. In clause (*i*) of Section 18(1) of the Act, the penalty leviable for any of the omissions referred to in Section 18(1)(*a*) is set out but the measure of penalty imposable has varied from time to time. Prior to April 1, 1965 the penalty imposable was a sum not exceeding one and a half times the amount of wealth tax payable by the assessee during the assessment year in question. Within the outer limit referred to above, the officer concerned or the Tribunal as the case may be could impose any amount as penalty having regard to all the relevant circumstances of the case including perhaps the time that had elapsed from the last day allowed to file the return. Between April 1, 1965 and March 31, 1969 the measure of penalty was regulated by Section 18 of the Act as amended in 1964. During that period the penalty imposable was a sum equivalent to two per cent of the tax for every month during which the default continued but not exceeding in the aggregate fifty per cent of the tax. The penalty leviable during this period was less onerous than it was before April 1, 1965. Then came the amendment made by the Finance Act

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of 1969. After April 1, 1969 by reason of the amendment introduced by the Finance Act of 1969 the penalty imposable was altered to a sum for every month during which the default continued equal to one-half per cent of the net wealth calculated in accordance with the amended provisions in Section 18. The penalty leviable during this period was more drastic than what it was before. One significant difference between the law as it existed prior to April 1, 1965 and the law as it existed during the subsequent two periods is that whereas during the period prior to April 1, 1965 there was no specific reference in sub-clause (*i*) of Section 18(1)(*a*) to the time lag between the last date on which the return had to be filed and the date on which it was actually filed, the said factor was expressly required to be taken into consideration after April 1, 1965 while determining the penalty payable by the assessee. Another significant factor which requires to be borne in mind is that neither the Wealth Tax (Amendment) Act, 1964 nor the Finance Act, 1969 by which Section 18 of the Act was amended expressly stated that the amended provisions of Section 18 would be applicable to an assessee who had failed to file the return in respect of any preceding assessment year and the said default had continued after the amendment came into force except using the phrase "for every month during which the default continued", in that part of Section 18 which prescribed the measure of penalty.

9. The contention of the department is that whatever may have been the position of law before April 1, 1965, on and after that date the default committed by an assessee in not filing a return as required by Section 14(1) of the Act amounted to a continuing wrong which attracted the penalty as provided by the law in force at the time when such default continued. In other words it is contended that in this case since the assessee who had to file a return after April 1, 1965 for assessment year 1965-66 had not filed the same till March 13, 1971 penalty had to be computed for the period up to April 1, 1969 under the provisions of Section 18 of the Act as it stood during that period and for the subsequent period additional penalty should be levied in accordance with Section 18 as amended by the Finance Act, 1969. Relying upon the decision of the Kerala High Court in *C. W. T., Kerala* v. *Pathummabi*[1] it is argued that amendments made in 1964 and 1969 brought about a qualitative change in the nature of the default contemplated under Section 18 and that what could have been a completed default before April 1, 1965 became a continuing default. Even assuming that this argument is correct it has to be held that the decision of the High Court insofar as the default committed by the assessee in not filing the return in respect of the assessment year 1964-65 is concerned is not erroneous. What remains to be considered is whether the decision in respect of the default committed by the assessee in not filing the return due on June 30, 1965 for the assessment year 1965-66 is liable to be interfered with.

10. To repeat, the relevant part of Section 18 of the Act can be divided

1. (1977) 108 ITR 689 (Ker HC)

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into two parts – the first part contained in clause (*a*) of Section 18(1) setting out the gist of the default and the second part prescribing the measure of penalty. The former part has more or less remained the same from the commencement of the Act and it is only the latter part which has undergone changes. The question is whether by reason of the changes in the latter part, there has been a change in the nature of the wrong referred to in Section 18(1)(*a*) of the Act.

11. A liability in law ordinarily arises out of an act of commission or an act of omission. When a person does an act which law prohibits him from doing it and attaches a penalty for doing it, he is stated to have committed an act of commission which amounts to a wrong in the eye of law. Similarly when a person omits to do an act which is required by law to be performed by him and attaches a penalty for such omission, he is said to have committed an act of omission which is also a wrong in the eye of law. Ordinarily a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or of omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefrom gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion. In the case of acts amounting to crimes the punishment to be imposed cannot be enhanced at all under our Constitution by any subsequent legislation by reason of Article 20(1) of the Constitution which declares that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. In other cases, however, even though the liability may by enhanced it can only be done by a subsequent law (of course subject to the Constitution) which either by express words or by necessary implication provides for such enhancement. In the instant case the contention is that the wrong or the default in question has been altered into a continuing wrong or default giving rise to a liability *de die in diem*, that is, from day to day. The distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the legislature. In the instant case whenever the question of levying penalty arises what has to be first considered is whether the assessee has failed without reasonable cause to file the return as required by law and if it is held that he has failed to do so then penalty has to be levied in accordance with the measure provided in the Act. When the default is the filing of a delayed return the penalty may be correlated to the time-lag between the last day for filing it without penalty and the

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day on which it is filed and the quantum of tax or wealth involved in the case for purposes of determining the quantum of penalty but the default however is only one which takes place on the expiry of the last day for filing the return without penalty and not a continuing one. The default in question does not, however, give rise to a fresh cause of action every day. Explaining the expression 'a continuing cause of action' Lord Lindley in *Hole* v. *Chard Union*[2] observed:

> What is a continuing cause of action? Speaking accurately, there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.

12. In the same decision, Lord Justice A. L. Smith who concurred with the above view said:

> If once a cause of action arises, and the acts complained of are continuously repeated, the cause of action continues and goes on *de die in diem*. It seems to me that there was a connection in the present case between the series of acts before and after the action was brought; they were repeated in succession, and became a continuing cause of action. They were an assertion of the same claim — namely, a claim to continue to pour sewage into the stream — and a continuance of the same alleged right. In my opinion, there was here a continuing cause of action within the meaning of the rule.

13. The distinction between a continuing offence and an offence which is not a continuing one is well brought out in the decision of the High Court of Bombay in *State* v. *A. H. Bhiwandiwalla*[3]. In that case, the accused-respondent had been charged with two offences namely, (*a*) failure to apply for registration of his factory and to give notice of occupation and (*b*) running the factory without a licence issued under the Factories Act, 1948. The accused had raised a plea of limitation against the prosecution. In that context the High Court observed:

> In civil law, we often refer to a continuing or recurring cause of action. Similarly, even in criminal law the expression "continuing offence" is frequently used. As observed by Beaumont, C. J. in *Emperor* v. *Chhotalal Amarchand*[4] the expression "continuing offence" is not a very happy expression. It assumes, says the learned Chief Justice,—
>
> > . . . that you can have a continuing offence in the sense in which you can have a continuing tort, or a continuing breach of contract, and I doubt, myself whether the assumption is well-founded, having regard to the provisions of the Criminal Procedure Code as to the framing of charges and as to the charges which can be tried at one and the same trial. It is quite clear that you could not charge a man with committing an offence 'de die in diem' over a substantial period . . . .
>
> Even so, this expression has acquired a well-recognised meaning

2. (1894) 1 Ch D 293: 63 LJ Ch 469: 70 LT 52
3. AIR 1955 Bom 161: 1955 Cri LJ 666: 56 Bom LR 1172
4. AIR 1937 Bom 1 (FB): 38 Cri LJ 156: 38 Bom LR 1164

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in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.

14. Accordingly the High Court of Bombay held in *Bhiwandiwalla* case[3] that the failure to apply for registration of the factory under the Factories Act and to give notice of occupation thereof was not a continuing offence but the running of the factory without a licence issued thereunder was a continuing offence.

15. Section 39 of the Indian Mines Act, 1923 which came up for consideration before the Patna High Court in *State* v. *Kunja Behari Chandra*[5] on which reliance was placed by the Revenue is a case of continuing offence. Section 39 provided:

> 39. Whoever contravenes any provision of this Act or of any regulation, rule or bye-law or of any order made thereunder for the contravention of which no penalty is hereinafter provided shall be punishable with fine which may extend to one thousand rupees, and in the case of a continuing contravention, with a further fine which may extend to one hundred rupees for every day on which the offender is proved to have persisted in the contravention after the date of the first conviction.

16. In this case the language of the section itself made it obvious that its violation resulted in a continuing offence.

17. The true principle appears to be that where the wrong complained of is the omission to perform a positive duty requiring a person to do a certain act the test to determine whether such a wrong is a continuing one is whether the duty in question is one which requires him to continue to do that act. Breach of a covenant to keep the premises in good repair, breach of a continuing guarantee, obstruction to a right of way, obstruction to the right of a person to the unobstructed flow of water, refusal by a man to maintain his wife and children whom he is bound to maintain under law and the carrying on of mining operations or the running of a factory without complying with the measures intended for the safety and well-being of workmen may be illustrations of continuing breaches or wrongs giving rise to civil or criminal liability, as the case may be, *de die in diem*.

18. In *Balkrishna Savalram Pujari* v. *Shree Dnyaneshwar Maharaj Sansthan*[6] Gajendragadkar, J. (as he then was) observed:

> 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

5. AIR 1954 Pat 371 (FB): ILR (1954) Pat 507: 55 Cri LJ 1187
6. 1959 Supp 2 SCR 476: AIR 1959 SC 798: 1960 SCJ 1203

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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. . . .

19. Section 18 of the Act with which we are concerned in this case, however, does not require the assessee to file a return during every month after the last day to file it is over. Non-performance of any of the acts mentioned in Section 18(1)(*a*) of the Act gives rise to a single default and to a single penalty, the measure of which, however, is geared up to the time-lag between the last date on which the return has to be filed and the date on which it is filed. The default, if any committed is committed on the last date allowed to file the return. The default cannot be one committed every month thereafter. The words 'for every month during which the default continued' indicate only the multiplier to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one. Nor do they make the amended provisions modifying the penalty applicable to earlier defaults in the absence of necessary provisions in the amending Acts. The principle underlying Section 6 of the General Clauses Act is clearly applicable to these cases. It may be stated here that the majority of the High Courts in India have also taken the same view.

20. In the result we hold that where the default complained of is one falling under Section 18(1)(*a*) of the Act, the penalty has to be computed in accordance with the law in force on the last day on which the return in question had to be filed. Neither the amendment made in 1964 nor the amendment made in 1969 has retrospective effect.

21. The appeals therefore fail and are dismissed with costs. Hearing fee one set.

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45. I have, however, persuaded myself to agree with the order proposed by my learned brother because the promoter of lottery in the cases involved before us is the State and the grant is in derogation of the rights of the State. The State, in my opinion, can create such right for the first time, and such transfer of the right by the State as a promoter would amount to a transfer of property and being in consideration of a price can be sale of goods.

46. I should, however, not be understood to accept the position that if private lotteries are permissible and legal, a point which need not be decided in these cases, in such cases sale of goods was involved or not.

47. I, however, agree with my learned brother that the right to participate in the draw under a lottery ticket remains a valuable right till the draw takes place and it is for this reason that licensed agents or wholesalers or dealers of such tickets are enabled to effect sales thereof till the draw actually takes place and therefore lottery tickets, not as physical articles but as slips of paper or memoranda evidencing the right to participate in the draw can be regarded as dealer's merchandise and therefore goods which are capable of being bought or sold in the market. With these observations, I respectfully agree with the conclusion reached by my learned brother and concur with the order proposed by him.

(1986) 1 Supreme Court Cases 445

(BEFORE V.D. TULZAPURKAR, SABYASACHI MUKHARJI AND RANGANATH MISRA, JJ.)

SMT. MAYA RANI PUNJ .. Appellant ;

Versus

COMMISSIONER OF INCOME TAX, DELHI .. Respondent.

Civil Appeal No. 1943 of 1974†, decided on December 11, 1985

Income Tax — Penalty — Default in filing return within stipulated time — Whether penalty proceedings under Section 28 of 1922 Act or Section 271(1)(a) of 1961 Act applicable — Determination of, in terms of Section 297(1)(f) and (g) of 1961 Act — Relevant date for such determination would be after completion of assessment when ITO decided to initiate penalty proceedings — Default occurring on September 28, 1961, being the date when return was due — Return filed after more than seven months on May 3, 1962 — Penalty proceedings thereafter initiated by ITO under Section 271(1)(a) of 1961 Act instead of under Section 28 of 1922 Act, held, proper — Income Tax Act, 1922, Section 28(1)(a) — Income Tax Act, 1961, Sections 271(1)(a) and 297(2)(f) and (g)

†From the Judgment and Order dated December 21, 1972 of the Delhi High Court in Income Tax Reference No. 50 of 1968

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Held :

Though the default occurred in September 1961 the date relevant for the purpose of initiating proceedings for imposition of penalty is when, following the assessment made, the ITO decided to initiate penalty proceedings. The proper provision to apply for dealing with the situation relating to penalty is as provided in Section 271(1)(a) of the 1961 Act. (Para 12)

Jain Brothers v. Union of India, (1969) 3 SCC 311 : (1970) 77 ITR 107 : AIR 1970 SC 778, affirmed and applied

ITO v. M. Damodar Bhat, (1969) 71 ITR 806 : (1969) 2 SCR 29 : AIR 1969 SC 408, relied on

Income Tax — Penalty — Default in filing return within stipulated time — Rate of penalty — Penalty under Section 271(1)(a)(i)(b) of 1961 Act not violative of Article 20(1) on ground of being a greater penalty than that imposable under Section 28(1)(a) of 1922 Act which was in operation when default first occurred — Constitution of India, Article 20(1) — Income Tax Act, 1961, Section 271(1)(a)(i)(b) (Paras 9 to 11)

K. Satwant Singh v. State of Punjab, (1960) 2 SCR 89 : AIR 1960 SC 266 : 1960 Cri LJ 410, applied

Jain Brothers v. Union of India, (1969) 3 SCC 311 : (1970) 77 ITR 107 : AIR 1970 SC 778 and ITO v. M. Damodar Bhat, (1969) 71 ITR 806 (1969) 2 SCR 29 : AIR 1969 SC 408, followed

Income Tax — Penalty — Default in filing return within stipulated time — Held, a continuing default under Section 271(1)(a)(i)(b) of 1961 Act — Meaning of continuing default or offence — Income Tax Act, 1961, Section 271(1)(a)(i)(b) — Words and Phrases

Held :

As long as the default continues the offence is deemed to repeat and, therefore, it is taken as a continuing offence. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong. The imposition of penalty not confined to the first default but with reference to the continued default is on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. Accrual of penalty depends upon the terms of the statute imposing it. (Paras 17, 19 and 20)

State of Bihar v. Deokaran Nenshi, (1972) 2 SCC 890 : (1973) 1 SCR 1004 : 1973 SCC (Cri) 114 : AIR 1973 SC 908 and State v. A.H. Bhiwandiwaila AIR 1955 Bom 161 : 56 Bom LR 1172 : ILR 1955 Bom 192 : 1955 Cri LJ 666, referred to

The legislative scheme under Section 271(1)(a) of the 1961 Act in making provision for a penalty coterminus with the default to be raised provides for a situation of continuing wrong. The wrong for which penalty is to be visited, commences from the date of default and continues month after month until compliance is made and the default comes to an end. The rule of **de die in diem** is applicable not on daily but on monthly basis. (Paras 17 and 20)

Jain Brothers v. Union of India, (1969) 3 SCC 311 : (1970) 77 ITR 107 : AIR 1970 SC 778, affirmed

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CWT v. Suresh Seth, (1981) 2 SCC 790 : 1981 SCC (Tax) 168 : (1981) 129 ITR 328 : (1981) 3 SCR 419, overruled

Ajit Kumar Sarkar v. Assistant Registrar of Companies, 1979 Tax Law Reports 2001; United Savings and Finance Co. Pvt. Ltd. v. Deputy Chief Officer, Reserve Bank of India, 1980 Cri LJ 607 (Cal HC); Oriental Bank of Commerce v. Delhi Development Authority, 1982 Cri LJ 2230 (Del HC) and G.D. Bhattar v. State, AIR 1957 Cal 483 : 61 CWN 660 : 1957 Cri LJ 834, approved

In the instant case assessment was made on June 30, 1964, and proceedings for imposition of penalty were directed to be initiated that day. Provisions of Section 271(1)(a) of the 1961 Act were fully applicable and the demand of penalty was thus justified being within the limits of law. (Para 21)

[**Ed.** In **Bhagirath Kanoria** v. **State of M.P.**, (1984) 4 SCC 222 the Court said that the expression 'continuing offence' has no fixed connotation or a static import so as to put the concept in a strait-jacket. The Court further observed : "The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by continuing the particular act as an offence." The above view thus seems to be in consonance with that taken in the present case wherein the Court stated that "accrual of penalty depends upon the terms of the statute imposing it".

In the present case as well as in **Bhagirath Kanoria** the Court quoted a passage from the judgment in **Deokaran Nenshi case** to show the distinction between continuing offence and offences which take place when an act or omission is committed once and for all. But while in the present case the Court justified and distinguished the decision in **Deokaran Nenshi case** saying that there was no scope for applying the rule of **de die in diem** inasmuch as under Regulation 3 read with Section 66 of the Mines Act failure to file the annual return by the appropriate date becomes an offence, in **Bhagirath Kanoria** the Court limited that decision with the following observations : "The decision of this Court in **State of Bihar** v. **Deokaran Nenshi** to the effect that failure to furnish returns before the due date is not a continuing offence must be confined to cases of failure to furnish returns. It cannot be extended to cases like those before us in which, the contravention is not of a procedural or formal nature and goes against the very grain of the statute under consideration." However, instead of deriving a general statement of law from **Deokaran Nenshi** that default in furnishing return within time would in no case be a continuing offence, it would perhaps be more appropriate to distinguish that decision on facts as has been done in the present case.]

Appeal dismissed R-M/7178/CT

Advocates who appeared in this case :

S K. Dholakia, Senior Advocate (R.C. Bhatia and P.C. Kapoor, Advocates, with him), for the Appellant ;

S.C. Manchanda, Senior Advocate (M.N. Tandon and Miss A. Subashini, Advocates, with him), for the Respondent.

The Judgment of the Court was delivered by

SABYASACHI MUKHARJI, J.—The assessee is in appeal by special leave challenging the decision of the Delhi High Court reported in 92 ITR 394.

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2. The year of assessment is 1961-62. The return was due by September 28, 1961, but the same was neither filed within that time, nor was any extension asked for. The assessee filed the return on May 3, 1962 — beyond more than seven months of the due date. With effect from April 1, 1962, the Income Tax Act of 1961 ('1961 Act' for short) had come into force. The Income Tax Officer took proceedings under Section 271(1)(*a*) of the 1961 Act and imposed a penalty of Rs 4060 for failure to furnish the return within the time on a finding that the assessee had not been prevented by any reasonable cause for not complying with the statutory obligation to make the return. The assessee challenged the imposition of penalty by preferring an appeal to the Appellate Assistant Commissioner who refused to interfere and dismissed the appeal. On further appeal, the Appellate Tribunal held that penalty was leviable under the 1961 Act but the amount of penalty had to be quantified according to the provisions of Section 28 of the Income Tax Act, 1922 ('1922 Act' for short). Applying the provisions of the 1922 Act, the Tribunal reduced the penalty to Rs 400. At the instance of the Revenue the following question was referred to the High Court under Section 256(1) of the 1961 Act :

> Whether, on the facts and in the circumstances of the case, the Tribunal was in law competent to reduce the penalty levied under Section 271(1)(*a*) to a figure lower than the sum equal to 2% of the tax for every month during which the default continued but not exceeding in the aggregate 50% of the tax ?

The High Court answered the reference in favour of the Revenue and against the assessee.

3. Though the quantum of penalty is small, the question of law is of substantial importance, and covers an aspect which often arises for determination before the tax authorities and the High Courts.

4. Provisions of three sections, one of the 1922 Act and two of the 1961 Act, are relevant for the decision of the point at issue. Section 28 of the 1922 Act, as far as relevant, provided :

> *Penalty for concealment of income or improper distribution of profits.*—(1) If the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act, is satisfied that any person—
>
> (*a*) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of Section 22 or Section 34 or has without reasonable

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cause failed to furnish it within the time allowed and in the manner required by such notice, or

(*b*) * * *

(*c*) * * *

he or it may direct that such person shall pay by way of penalty, in the case referred to in clause (*a*), in addition to the amount of the income tax and super tax, if any, payable by him, a sum not exceeding one and a half time that amount,...

5. The two sections relevant to the point of the 1961 Act are Sections 271 and 297. Section 271 is the corresponding provision of Section 28. Sub-section (1)(*a*) thereof is the relevant provision. It provides :

If the Income Tax Officer is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of Section 139 or by notice given under sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 139 or by such notice, as the case may be, or

(*b*) * * *

(*c*) * * *

he may direct that such person shall pay by way of penalty,—

(i)(*a*) * * *

(*b*) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to 2% of the assessed tax for every month during which the default continued.

Section 297(1) repealed the 1922 Act. Sub-section (2), as far as relevant, provided :

Notwithstanding the repeal of the Indian Income Tax Act, 1922 (hereinafter referred to as the repealed Act),—

(*a*) to (*e*) * * *

(*f*) any proceeding for the imposition of a penalty in respect of any assessment completed before the first day of April 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed ;

(*g*) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on March 31, 1962, or any earlier year, which is completed on or after the

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first day of April 1962, may be initiated and any such penalty may be imposed under this Act ;. . .

6. It is sufficient to take note of the position that under the 1922 Act liability to make a return was contingent upon service of notice under Section 22 while under the 1961 Act every person having a taxable income has under Section 139 the liability to make a return within the time provided by the Act. On the facts of the case before us, clause (*j*) of Section 297(2) of the 1961 Act is not attracted because the return was filed on May 3, 1962, and assessment was made subsequent to April 1, 1962.

7. The Income Tax Officer found that there was default for a little more than seven months. He imposed penalty at the rate of 2% as provided in Section 271(1)(*a*) of the 1961 Act and raised a demand of Rs 4060. That demand had been upheld in appeal. The Tribunal did not refer to the provisions of Section 271(1)(*a*) while reducing the penalty to Rs 400 but the reduction was directed on the basis that the assessee was ill and had been absent from headquarters on that account. Before the High Court the Revenue had taken the stand that there was statutory prescription in the matter of imposition of penalty and the Act having provided that the penalty shall be a sum equal to 2% of the assessed tax for every month during which the default continued, a sum equal to the prescribed rate had to be imposed and could not be reduced. The High Court accepted the stand of the Revenue and found support for its conclusion by relying upon Section 297(2)(*j*) of the 1961 Act and holding that Section 271(1) of that Act was applicable to the levy of penalty for defaults committed under the 1922 Act. According to the High Court the words "such penalty" occurring in clause (*c*) of Section 297(2) of the 1961 Act related to penalty which was referred to in the earlier part of that clause, namely, penalty imposable under Section 271 of the 1961 Act and had no reference to penalty under Section 28 of the 1922 Act. It was of the further view that the word 'may' under Section 297(1) of the 1961 Act vested in the Income Tax Officer discretion either to levy or not to levy a penalty but if he did decide to levy one, he had no option but to levy penalty at the prescribed rate. In the instant case, the Income Tax Officer was, therefore, obliged to levy penalty at the rate of 2% per month subject to a maximum of 50% of the demanded tax. Exercising the same powers as the Income Tax Officer did, the Appellate Tribunal had no jurisdiction to reduce the penalty to a sum lesser than the prescribed rate. Support for the conclusion of the High Court was drawn from a Constitution Bench decision of this Court in *Jain Brothers* v. *Union of India*[1].

1. (1970) 77 ITR 107 : (1969) 3 SCC 311 : AIR 1970 SC 778

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8. In *Jain Brothers case*[1] this Court mainly examined and decided about the vires of Section 297(1)(*g*) as also the justification of fixing the commencement of the Act of 1961 with effect from April 1, 1962. Challenge was on the basis of Article 14 of the Constitution. This Court took the view that it was for the legislature to fix the date when a particular statute would come into force and with the repealing of the 1922 Act Parliament was fully competent and it was within its legislative jurisdiction to fix April 1, 1962, as the date of commencement of the 1961 Act. The validity of Section 297(2) and in particular clauses (*f*) and (*g*) thereof was upheld. The Court held that penalty proceedings were not necessarily a continuation of the assessment proceedings. It was well settled that in fiscal enactments the legislature has a larger discretion in the matter of classification so long as there was no departure from the rule that persons included in a class are not singled out for special treatment. It was not possible to say that while applying the penalty provisions contained in the Act of 1961 to cases of persons whose assessments were not completed after April 1, 1962, any class has been singled out for special treatment. It was obvious that for the imposition of penalty it was not the assessment year or the date of the filing of the return that was important but it was the satisfaction of the income tax authorities that a default had been committed by the assessee which attracted the provisions relating to penalty. Whatever be the stage at which the satisfaction was reached, the scheme of Sections 274(1) and 275 of the Act of 1961 was that the order imposing penalty must be made after the completion of the assessment. The crucial date, therefore, for the purpose of penalty is the date of such completion, and the satisfaction of the authority that proceedings for levy of penalty be initiated.

9. Under Section 28 of the 1922 Act the upper limit of penalty only was provided and there was no prescription of any particular rate as found in Section 271(1)(*a*) of 1961 Act. That penalty contemplated under the respective sections of the two Acts is quasi-criminal in character is not disputed. Mr Dholakia for the appellant canvassed before us that in *Jain Brothers case*[1] the challenge raised by the assessee was not examined with reference to the provisions of Article 20(1) of the Constitution. Under sub-article (1) of Article 20 no person is to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. According to counsel, when there was default in furnishing the return within September 28, 1961, the breach had occurred and the assessee had exposed himself to be visited with penalty. That was a time when the Act of 1922 was in force. Therefore, for levying penalty on the assessee resort should have been made to

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the provisions of Section 28 of the 1922 Act and not to Section 271(1)(*a*) of 1961 Act. If the 1922 Act applied, in the absence of a prescription of any particular rate or the minimum, it was open to the Tribunal to reduce the penalty in the manner it has done and no objection could be raised to the reduction of the quantum of penalty. In *Jain Brothers case*[1] the conclusions of a three Judge Bench in *ITO* v. *M. Damodar Bhat*[2], were quoted with approval. In *Damodar Bhat case* this Court had said :

> In other words, the procedure of the new Act will apply to the cases contemplated by Section 297(2)(*j*) of the new Act mutatis mutandis.

In *Jain Brothers case*[1] the Court held that "similarly the provisions of Section 271 of the Act of 1961 will apply mutatis mutandis to proceedings relating to penalty initiated in accordance with Section 297(2)(*g*) of that Act".

10. Learned counsel for the appellant has taken the stand that the observations in *Damodar Bhat case*[2] which were approved by the five Judge Bench in *Jain Brothers case*[1] related only to the procedural part of it and this Court did not decide the question of quantum.

11. The contention of Mr Dholakia that in providing a prescribed rate of penalty for imposition under Section 271(1)(*a*) of the 1961 Act there has been breach of Article 20(1) of the Constitution cannot be accepted. A five Judge Bench of this Court in *K. Sa'want Singh* v. *State of Punjab*[3], examined a similar submission at great length keeping Article 20 of the Constitution in view. In the matter before the Constitution Bench this question arose for consideration in view of the fact that no minimum sentence of fine had been provided under Section 420 of the Indian Penal Code which was the law in force at the time of the occurrence but the provisions of Ordinance No. 29 of 1943 made imposition of a minimum fine compulsory. Imam, J. who spoke for the Constitution Bench, at page 113 of the report stated :

> In the present case even if it be assumed that Section 10 of the Ordinance was an ex post facto law in that in the matter of penalty a minimum sentence of fine was directed to be imposed by a court whereas at the time that the appellant committed the offence, Section 420 contained no such provision, what is prohibited under Article 20 of the Constitution is the imposition of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The total sentence of fine — 'ordinary' and 'compulsory' — in the

2. (1969) 71 ITR 806 (1969) 2 SCR 29 : AIR 1969 SC 408
3. (1960) 2 SCR 89 : AIR 1960 SC 266 : 1960 Cri LJ 410

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present case cannot be said to be greater than that which might have been imposed upon the appellant under the law in force at the time of the commission of the offence, because the fine which could have been imposed upon him under Section 420 was unlimited. A law which provides for a minimum sentence of fine on conviction cannot be read as one which imposes a greater penalty than that which might have been inflicted under the law at the time of the commission of the offence where for such an offence there was no limit as to the extent of fine which might be imposed.

12. Mr Dholakia candidly accepts that his submission is contrary to the ratio of the decision. It is conceded that under Section 28 of the 1922 Act in the facts of the case a fine of more than Rs 4060 (being within the limit of ½ times of the tax amount) could have been levied. While conceding to that extent, Mr Dholokia submits that the decision of the Constitution Bench of this Court in *Satwant Singh case*[3] requires reconsideration as it has not taken into account the ratio of an important decision of the United States Supreme Court in the case of *Elbert B. Lindsay* v. *State of Washington*[4]. We are bound by the decision of the Constitution Bench. It has held the field for a quarter of a century without challenge and non-consideration of an American decision which apparently was not then cited before this Court does not at all justify the submission at the Bar for a reconsideration of the decision of this Court in *Satwant Singh case*[3]. On the ratio of *Jain Brothers case*[1], the following conclusions are reached :

(*a*) Though the default occurred in September, 1961 the date relevant for the purpose of initiating proceedings for imposition of penalty is when, following the assessment made, the Income Tax Officer decided to initiate penalty proceedings ;

(*b*) The proper provision to apply for dealing with the situation relating to penalty is as provided in Section 271(1)(*a*) of the 1961 Act.

13. The question that remains for consideration now is as to whether the default of non-filing of the return within the time stipulated by law is not a continuing offence. This aspect is relevant in the matter of imposition of penalty and its quantification. In the decision of his Court in *CWT* v. *Suresh Seth*[5], the default related to non-filing of the return under Section 18(1)(*a*) of the Wealth Tax Act. The law relating

4. (1937) 81 L Ed 1182
5 (1981) 129 ITR 328 : (1981) 3 SCR 419 : (1981) 2 SCC 790 : 1981 SCC (Tax) 168

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to penalty under that Act was amended in 1964 and again in 1969. These amendments were not retrospective. With reference to the application of these amendments the question as to whether the default was a single one or a continuing one fell for consideration. The amended Wealth Tax Act provided for imposition of penalty with reference to every month during which the default continued. This Court took the view that such a provision indicated the legislative intention that a multiplier had to be adopted for determining the quantum of penalty and did not have the effect of making the default a continuing one. The default having already occurred prior to the enforcement of the amendments, the amending provisions had no application. Dealing with the point this Court observed : [SCC p. 798, para 11, SCC (Tax) pp. 175-6, para 11]

> A liability in law ordinarily arises out of an act of commission or an act of omission. When a person does an act which law prohibits him from doing it and attaches a penalty for doing it, he is stated to have committed an act of commission which amounts to a wrong in the eye of law. Similarly, when a person omits to do an act which is required by law to be performed by him and attaches a penalty for such omission, he is said to have committed an act of omission which is also a wrong in the eye of law. Ordinarily a wrongful act or failure to perform an act required by law to be done becomes a completed act of commission or omission, as the case may be, as soon as the wrongful act is committed in the former case and when the time prescribed by law to perform an act expires in the latter case and the liability arising therefrom gets fastened as soon as the act of commission or of omission is completed. The extent of that liability is ordinarily measured according to the law in force at the time of such completion. In the case of acts amounting to crimes the punishment to be imposed cannot be enhanced at all under our Constitution by any subsequent legislation by reason of Article 20(1) of the Constitution which declares that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

There can be no dispute to what has been stated above. In *Suresh Seth case*[5] this Court proceeded to say : [SCC pp. 798-9, para 11, SCC (Tax) p. 176, para 11]

> In other cases, however, even though the liability may be enhanced it can only be done by a subsequent law (of course subject to the Constitution) which either by express words or by necessary implication provides for such enhancement. In the

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instant case the contention is that the wrong or the default in question has been altered into a continuing wrong or default giving rise to a liability *de die in diem*, that is, from day to day. The distinctive nature of a continuing wrong is that the law that is violated makes the wrong doer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default. It is reasonable to take the view that the court should not be eager to hold that an act or omission is a continuing wrong or default unless there are words in the statute concerned which make out that such was the intention of the Legislature. In the instant case whenever the question of levying penalty arises what has to be first considered is whether the assessee has failed without reasonable cause to file the return as required by law and if it is held that he has failed to do so then penalty has to be levied in accordance with the measure provided in the Act. When the default is the filing of a delayed return the penalty may be correlated to the time lag between the last day for filing it without penalty and the day on which it is filed and the quantum of tax or wealth involved in the case for purposes of determining the quantum of penalty but the default however is only one which takes place on the expiry of the last day for filing the return without penalty and not a continuing one. The default in question does not, however, give rise to a fresh cause of action every day.

14. This conclusion has been seriously disputed by learned counsel for the Revenue and according to him the amended Wealth Tax Act and Section 271(1)(*a*) of the 1961 Act provides for a continuing default. A bench of this Court in *State of Bihar* v. *Deokaran Nenshi*[6], while examining the provisions of Section 66 of the Mines Act, very appropriately drew the distinction between continuing offence and offences which take place when an act or omission is committed once and for all. Shelat, J. speaking for the court stated : [SCC p. 892, para 5, SCC (Cri) p. 116, para 5]

> A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between

6. (1973) 1 SCR 1004 : (1972) 2 SCC 890 : 1973 SCC (Cri) 114

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> the two kinds of offences is between an act or omission which constitutes an offeuce once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

Under Regulation 3 read with Section 66 of the Mines Act failure to file the annual return by the appropriate date becomes an offence. There was no scope for applying the rule of *de die in diem*.

15. Venkataramiah, J. in *Suresh Seth case*[5] quoted Lord Lindley in *Hole* v. *Chard Union*[7], where the following observation had been made : [at SCC p. 799, para 11, SCC (Tax) p. 176, para 11]

> What is a continuing cause of action ? Speaking accurately, there is no such thing ; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought.

16. Some decisions of different High Courts were also quoted with approval by Venkataramiah, J. in support of the conclusion that the default had been committed on the last day allowed to file the return and there was no case of a continuing default. We are inclined to agree with counsel for the Revenue that the conclusion reached in *Suresh Seth case*[5] is contrary to law. *Jain Brothers case*[1] was not referred to at all in *Suresh Seth case*[5]. On the facts found in *Suresh Seth case*[5] where the returns for the assessment years 1964-65 and 1965-66 had been filed on March 18, 1971, and for which assessment was made on March 22, 1971, the ratio of *Jain Brothers case*[1] would have been fully applicable. Though *Jain Brothers case*[1] was with reference to the Income Tax Act, 1961, the provisions of Section 18(1)(*a*) of the Wealth Tax Act, as amended, brought in a similar provision and a sum equal to 2% of the tax for every month during which the default continued with an optimum of 50% of the tax due become payable. As rightly pointed out in *Jain Brothers case*[1], the question of imposition of penalty would arise only after assessment of tax is made and, therefore, in *Suresh Seth case*[5] on the analogy of the ratio accepted by this Court in *Jain Brothers case*[1] the amended provisions would become applicable.

17. In *Words and Phrases*, Permanent Edition, under the head 'Continuing Offence', instances have been given which indicate that as long as the default continues the offence is deemed to repeat and,

7. (1894) 1 Ch D 293

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therefore, it is taken as a continuing offence. As has been appropriately indicated in Corpus Juris Secundum, Vol. 85, p. 1027, accrual of penalty depends upon the terms of the statute imposing it and in view of the language used in Section 271(1)(*a*) of the 1961 Act, the position is beyond dispute that the legislature intended to deem the non-filing of the return to be a continuing default — the wrong for which penalty is to be visited, commences from the date of default and continues month after month until compliance is made and the default comes to an end. The rule of *de die in diem* is applicable not on daily but on monthly basis.

18. In *State* v. *A.H. Bhiwandiwalla*[8], (a decision referred to in *Suresh Seth case*[9]), Gajendragadkar, J. (as he then was), after quoting the observations of Beaumount, C.J. in an earlier Full Bench decision of that Court observed :

> Even so, this expression has acquired a well-recognised meaning in criminal law. If an act committed by an accused person constitutes an offence and if that act continues from day to day, then from day to day a fresh offence is committed by the accused so long as the act continues. Normally and in the ordinary course an offence is committed only once. But we may have offences which can be committed from day to day and it is offences falling in this latter category that are described as continuing offences.

19. The imposition of penalty not confined to the first default but with reference to the continued default is obviously on the footing that non-compliance with the obligation of making a return is an infraction as long as the default continued. Without sanction of law no penalty is imposable with reference to the defaulting conduct. The position that penalty is imposable not only for the first default but as long as the default continues and such penalty is to be calculated at a prescribed rate on monthly basis is indicative of the legislative intention in unmistakable terms that as long as the assessee does not comply with the requirements of law he continues to be guilty of the infraction and exposes himself to the penalty provided by law.

20. There are several statutory provisions where such default is stipulated to be visited with daily penalty. For instance, see *Ajit Kumar Sarkar* v. *Assistant Registrar of Companies*[9], where the Calcutta High Court dealing with the provisions of Sections 159 and 162 of the Companies Act of 1956, held the liability to be a continuous one : *United Savings and Finance Co. Pvt. Ltd.* v. *Deputy Chief Officer,*

8. AIR 1955 Bom 161 : 56 Bom LR 1172. ILR 1955 Bom 192 : 1955 Cri LJ 666
9. 1979 Tax Law Reports 2001

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Reserve Bank of India[10], where referring to Section 58-B(2) of the Reserve Bank of India Act it was held that refusal to comply with the terms of the said section created an offence and continued to be an offence so long as such failure or refusal persisted ; *Oriental Bank of Commerce* v. *Delhi Development Authority*[11], where referring to the provisions of the Delhi Development Act of 1957, the Court held that the offence was a continuous one. In *G.D. Bhattar* v. *State*[12], it was pointed out that a continuing offence or a continuing wrong is after all a continuing breach of the duty which itself is continuing. If a duty continues from day to day, the non-performance of that duty from day to day is a continuing wrong. We are of the view that the legislative scheme under Section 271(1)(*a*) of the 1961 Act in making provision for a penalty coterminus with the default to be raised provides for a situation of continuing wrong.

21. In the instant case assessment was made on June 30, 1964, and proceedings for imposition of penalty were directed to be initiated that day. Provisions of Section 271(1)(*a*) of the 1961 Act were fully applicable and the demand of penalty was thus justified being within the limits of law. In our opinion the High Court had taken the right view and the appeal has, therefore, to be dismissed. In the facts of the case we direct parties to bear their own costs.

(1986) 1 Supreme Court Cases 458

(BEFORE A.P. SEN AND D.P. MADON, JJ.)

UNION OF INDIA AND ANOTHER .. Petitioners :

Versus

R.G. KASHIKAR AND ANOTHER .. Respondents.

Special Leave Petition (Civil) No. 12335 of 1985†,
decided on December 20, 1985

Labour and Services — Transfer of Central Government establishment to State Governments proposed — Status till actual transfer — National Fitness Corps, a Central Government undertaking actually transferred to administrative control of State Governments eleven years after the proposal — Held, the proposal by itself would not have the effect of rendering the Instructors working thereunder surplus at the Centre — Till completely absorbed in State Governments, the Instructors would continue to be Central Government employees and entitled to the benefits — Distingnishing them as a separate class and

10. 1980 Cri LJ 607 (Cal HC)
11. 1982 Cri LJ 2230 (Del HC)
12. AIR 1957 Cal 483 : 61 CWN 660 : 1957 Cri LJ 834
†From the Judgment and Order dated April 11, 1985 of the Karnataka High Court in Writ Petition No. 5450 of 1980

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9. For the foregoing reasons the appeal partly succeeds. The impugned order is set aside. During the pendency of the petition before the High Court, the appellants are permitted to complete the incomplete construction work done by them at their own risk and cost. The High Court is requested to dispose of the matter on merits without being inhibited by this order granting interim relief to the appellants as early as possible and without any avoidable delay.

10. No costs.

(2008) 8 Supreme Court Cases 648

(BEFORE R.V. RAVEENDRAN AND L.S. PANTA, JJ.)

UNION OF INDIA AND OTHERS .. Appellants;

Versus

TARSEM SINGH .. Respondent.

Civil Appeals Nos. 5151-52 of 2008†, decided on August 13, 2008

Limitation — Continuing wrongs — Recurring/successive wrongs — Difference explained — Continuing wrong is a single wrong causing continuing injury — Recurring/successive wrong on the other hand occurs periodically giving rise to distinct and separate cause of action — Service matter claims, held, normally are rejected either on limitation where limitation period is prescribed, or on the ground of delay/laches where there is no limitation — An exception to this principle is however the cases of continuing wrong which can be entertained despite delay — The exception however does not apply where interests of a third party, as in the case of seniority or promotion, are affected — In the case of consequential reliefs like arrears for the past period, principles relating to recurring/successive wrongs apply — Delayed claim relating to disability pension — Held, arrears should have been restricted to three years prior to filing of writ petition — Administrative Tribunals Act, 1985 — S. 21 — Limitation — Pension — Disability pension — Arrears should be restricted to three years prior to filing of writ petition (Paras 4 to 8)

The respondent was declared invalid from army service on 13-11-1983. He however approached the High Court as late as in 1999 for grant of disability pension. His writ petition was allowed by the Single Judge but grant of arrears was restricted to a period of three years and 2 months (total 38 months) prior to filing of writ petition. The Division Bench however allowed the respondent arrears from 13-11-1983 itself.

The question was whether relief could be granted to the respondent from 13-11-1983 itself despite the fact that there was considerable delay on his part in approaching the High Court.

Allowing appeal, the Supreme Court held as above.

† Arising out of SLPs (C) Nos. 3820-21 of 2008. From the Final Judgments and Orders dated 6-12-2006 and 23-2-2007 of the High Court of Punjab and Haryana at Chandigarh in LPA No. 573 of 2002 in CM No. 99 of 2007

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Balakrishna Savalram Pujari Waghmare v. *Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798; *M.R. Gupta* v. *Union of India*, (1995) 5 SCC 628 : 1995 SCC (L&S) 1273 : (1995) 31 ATC 186; *Shiv Dass* v. *Union of India*, (2007) 9 SCC 274 : (2007) 2 SCC (L&S) 395, *relied on*

Appeals allowed K-M/38908/CL

Advocates who appeared in this case :
B. Datta, Additional Solicitor General (Ashok K. Srivastava and B. Krishna Prasad, Advocates) for the Appellants;
Neeraj Kr. Jain and Ugra Shankar Prasad, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. (2007) 9 SCC 274 : (2007) 2 SCC (L&S) 395, *Shiv Dass* v. *Union of India* 651*a*
2. (1995) 5 SCC 628 : 1995 SCC (L&S) 1273 : (1995) 31 ATC 186, *M.R. Gupta* v. *Union of India* 650*c-d*
3. AIR 1959 SC 798, *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan* 650*a*

The Order of the Court was delivered by

R.V. RAVEENDRAN, J.— Leave granted. Heard learned counsel for the parties.

2. The respondent while working in the Indian Army was invalidated out of army service, in medical category, on 13-11-1983. He approached the High Court in 1999 seeking a direction to the appellants to pay him disability pension. A learned Single Judge by order dated 6-12-2000 allowed the writ petition and directed the appellants to grant him disability pension at the rates permissible. Insofar as arrears are concerned, the relief was restricted to thirty-eight months prior to the filing of the writ petition. The respondent was also directed to appear before the Re-survey Medical Board as and when called upon by the appellants. The appellants did not contest the said decision and granted disability pension to the respondent and also released the arrears of disability pension for 38 months.

3. The respondent however was not satisfied. According to him the disability pension ought to be paid from the date it fell due on 13-11-1983. He therefore filed a letters patent appeal. The said appeal was allowed by the Division Bench of the High Court by judgment dated 6-12-2006. The Division Bench held that the respondent was entitled to disability pension from the date it fell due, and it should not be restricted to a period of three years and two months prior to the filing of the writ petition. By a subsequent modification order dated 23-2-2007, the Division Bench also granted interest on the arrears at the rate of 6% per annum. The said judgment and order of the Division Bench is challenged in this appeal. The only question that therefore arises for our consideration is whether the High Court was justified in directing payment of arrears for a period of 16 years instead of restricting it to three years.

4. The principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/

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successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*[1] explained the concept of continuing wrong (in the context of Section 23 of the Limitation Act, 1908 corresponding to Section 22 of the Limitation Act, 1963): (AIR p. 807, para 31)

> "*31.* ... 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."

5. In *M.R. Gupta* v. *Union of India*[2] the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1-8-1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held: (SCC pp. 629-30, para 5)

> "*5.* ... The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time-barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion, etc., would also be subject to the defence of laches, etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1-8-1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this

1 AIR 1959 SC 798
2 (1995) 5 SCC 628 : 1995 SCC (L&S) 1273 : (1995) 31 ATC 186

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limited extent of proper pay fixation, the application cannot be treated as time-barred...."

6. In *Shiv Dass* v. *Union of India*[3] this Court held: (SCC p. 277, paras 8 & 10)

"*8.* ... The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

* * *

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. ... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of sixteen years would affect the consequential claim for arrears. The High Court was not justified in directing payment of

3 (2007) 9 SCC 274 : (2007) 2 SCC (L&S) 395

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arrears relating to sixteen years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances.

9. In view of the above, these appeals are allowed. The order of the Division Bench directing payment of disability pension from the date it fell due, is set aside. As a consequence, the order of the learned Single Judge is restored.

(2008) 8 Supreme Court Cases 652

(BEFORE TARUN CHATTERJEE AND H.S. BEDI, JJ.)

MANJUL SRIVASTAVA .. Appellant;

Versus

GOVERNMENT OF UTTAR PRADESH AND OTHERS .. Respondents.

Civil Appeals Nos. 1758-59 of 2002†, decided on August 29, 2008

A. Competition Law — Monopolies and Restrictive Trade Practices Act, 1969 — S. 36-A — Unfair trade practice — Only one of the two conditions/guarantee of plot allotment satisfied — Effect of — Scheme of GDA plot allotment dependent upon timely payment of amount reserved for allotment as well as being successful in the draw of lots — Appellant though complying with the condition of timely payment, being unsuccessful in the draw of lots — Appellant aggrieved as GDA cancelled the allotment and refunded reserved amount — MRTP Commission rejecting the claim of the appellant for allotment, held, justified — Contract Act, 1872 — Ss. 31 to 33 — Contingent contract

B. Town Planning — Allotment/Auction of Flats/Plots/Houses/Shops by Housing Board/Development Authority — "Plot reserved" if amounts to "plot allotted" — Ghaziabad Development Authority's Govindpur Housing Scheme of 1988 — Letter dated 10-2-1989 intimating reservation of Category D plot in the name of the appellant and stipulated conditions — Interpretation of the words "plot reserved" and "plot allotted" — Money was paid for "plot reserved" — "Plot allotted" was to be finally done after a draw of lots — Held, "plot reserved" and "plot allotted" are different aspects altogether — Therefore, money paid for "plot reserved" would not mean that the plot has been allotted

The appellant applied for allotment of a residential plot pursuant to an advertisement of GDA (Ghaziabad Development Authority) after depositing registration fees for an amount of Rs 7210 on 10-2-1989. GDA issued a reservation letter to the appellant reserving plot, Category D in her name and further requiring her to deposit the entire balance amount of Rs 62,240 towards the estimated cost. After the lapse of almost nine years, more particularly on

† From the Final Judgments and Orders dated 9-5-2001 and 7-12-2001 of the Monopolies and Restrictive Trade Practices Commission, New Delhi in CA No. 154 of 1998 and RA No. 37 of 2001 in CA No. 154 of 1998 respectively

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1959 Supp (2) SCR 476 : AIR 1959 SC 798

In the Supreme Court of India

(BEFORE P.B. GAJENDRAGADKAR, A.K. SARKAR AND K. SUBBA RAO, JJ.)

1. BALAKRISHNA SAVALRAM PUJARI WAGHMARE AND OTHERS (In CA No. 220/53).
2. DATTATRAYA GANGARAM PUJARI WAGHMARE AND ANOTHER (In CA No. 221/53).
3. MADHAV TUKARAM PUJARI AND OTHERS (In CA No. 222/53). and
4. BABU TUKARAM PUJARI WAGHMARE AND OTHERS (In CA No. 223/53) ... Appellants;

Versus

SHREE DHYANESHWAR MAHARAJ SANSTHAN AND OTHERS ... Respondents.

Civil Appeals Nos. 220 to 223 of 1953, decided on March 26, 1959

Advocates who appeared in this case :

V.P. Rege & Naunit Lal, Advocates, for the Appellants;

N.C. Chatterjee, Senior Advocate (K.V. Joshi, K. Sundararajan & Ganpat Rai, Advocates, with him), for Respondents 1 to 6 (In all the Appeals).

The Judgment of the Court was delivered by

P.B. GAJENDRAGADKAR, J.— These four appeals represent the last stage of a long and tortuous litigation between the appellants Waghmares (also called Gurays) who claim the rights of hereditary worshippers in the Shree Dhyaneshwar Maharaj Sansthan, Alandi, and Respondents 1 to 6 who are the trustees of the said Sansthan. Alandi, which is a small town situated on the bunks of the river Indrayani at a distance of about 14 miles from Poona, is regarded as a holy place of pilgrimage by thousands of Hindu devotees. In the last quarter of the 13th century Shree Dhyaneshwar Maharaj, the great Maharashtra Saint and Philosopher, lived at Alandi. He was a spiritual teacher and reformer; by his saintly life and his inspiring and illuminating commentary on the Bhagvad Gita, known as Dhyaneshwari, he helped to create a popular urge and fervour for religious and social revolution which led to the foundation of a devotional cult; the followers of this cult are known as Warkaris in Maharashtra. They refuse to recognise any barriers of caste or class; and amongst them prevails a feeling of real and genuine spiritual brotherhood. Every year, in the months of July and November, thousands of them proceed on pilgrimage on foot and accompany the annual palanquin procession from Alandi to Pandharpur. Pandharpur is the chief centre of pilgrimage in Maharashtra and it is regarded by devotees as the Banares of Southern India. About 1300 A. D). Shree Dhyaneshwar Maharaj took *Samadhi* at Alandi and since then Alandi also has become a place of pilgrimage.

2. In or about 1500 A.D. a big temple was erected in front of the idol of Shiva called Siddheshwar where the said Shree Dhyaneshwar Maharaj took his *Samadhi*. In due course the Mahratta Kings and the Peshwas of Poona granted the village of Alandi in *inam* for the upkeep of the temple and the *Samadhi*. About 1760 A.D. Peshwa Balaji Baji Rao framed a budget called *Beheda* or *Taleband* in order to regulate the management and worship of the shrine and provided for proper administration of its annual revenue amounting to Rs 1725. The appellants claim that their ancestors were then in possession of the temple and management of its affairs especially the worship

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of the shrine. The budget framed by the Peshwa shows that out of the sum of Rs 1725 an amount of Rs 361 was as signed to the worshippers for some of their services.

3. After the fall of the Mahratta power the management of Alandi passed into the hands of the East India Company which continued the old arrangement without any interference. In 1852, under orders from the Government of Bombay the Collector of Poona drew up a yadi or memorandum, appointing six persons as Punchas (trustees) with directions to them for the management of the temple in accordance with the old tradition and practice as well as for the administration of the revenue of the village subject to the control and sanction of the Collector. This arrangement came to be described as "the scheme of 1852".

4. In 1863 the Religious Endowment Act was passed, and in consequence, in 1864 the Government of Bombay withdrew their superintendence over the affairs of the Alandi Sansthan; and the trustees continued to manage the affairs of the temple without any supervision on the part of the Government. It was during this period that the appellants' ancestors began to assert that they were the owners of the shrine while the trustees insisted on treating them as the servants of the shrine. This conflict inevitably led to several disputes between the worshippers and the trustees.

5. Matters appear to have come to a crisis in 1911 when the trustees dismissed eleven Guravs from the temple service on the ground that they were found guilty of gross misconduct. The Guravs nevertheless asserted that they were the owners of the shrine and that the trustees had no authority or power to dismiss them. Taking their stand on their ownership of the shrine some of the dismissed Guravs filed Civil Suit No. 485 of 1911 in the Court of the Subordinate Judge, Poona, against the trustees and this was the beginning of the long drawn out litigation which followed between the parties. In that suit the Guravs claimed a declaration that they were the owners of the temple and not the servants of the temple committee; and as owners they were entitled to perform the worship at the shrine and to appropriate the offerings made to the idol of the Saint. This claim was resisted by the trustees who pleaded that the Guravs were merely the servants of the temple committee and not the owners at all. On April 20, 1917, the learned trial judge dismissed the suit because he held that the Guravs were not the owners of the shrine and were not entitled to the declarations, claimed by them. Against this decision the Guravs preferred several appeals but these appeals were dismissed on August 3, 1921. While dismissing their appeals the High Court incidentally expressed the view that it was open to the Guravs to come to terms with the temple committee an in that the terms on which the Guravs could be reinstated can be decided appropriately in a suit filed under Section 92 of the Code of Civil Procedure. It was also observed by the High Court in its judgment that the temple committee did not dispute the fact that the Guravs were the hereditary pujaris and that they had some rights in that capacity. No doubt the committee claimed that under the scheme framed in 1852 it was competent to dismiss hereditary servants for a substantial cause such as gross misconduct.

6. It appears that instead of adopting the course indicated in the judgment of the High Court and filing a suit under Section 92 of the Code, the Guravs chose to take the law into their own hands, and obtained forcible possession of the temple premises on July 25, 1922, and began to perform the puja and to take the offerings placed before the deity as they had been doing prior to their dismissal. This was foliowed by a suit filed by the trustees on September 12, 1922 (Suit No. 1075 of 1922) under Section 9 of the Specific Relief Act. This suit terminated in a decree in favour of the committee on November 4, 1922. In pursuance of this decree the committee recovered possession of the temple on November 16, 1922. Thus the Guravs had occupied the temple precincts for about three and a half months.

7. When the Guravs were thus dispossessed by the committee in execution of the

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decree obtained by it, some of them proceeded to file Suit No. 19 of 1922 in the District Court of Poona; this suit purported to be one under Section 92 of the Code but it claimed the same reliefs as had been claimed by the Guravs in their earlier suit of 1911. On April 25, 1927, the District Court dismissed this suit on the ground that the Guravs could not reagitate the same questions over again. It was held that their claim was barred by the decision of the earlier Suit No. 485 of 1911. Against this decision the Gvravs appealed to the High Court (First Appeal No. 507 of 1927); but the High Court agreed with the conclusion of the District Court and dismissed the Guravs' appeal on June 20, 1933. It was held by the High Court that the suit as framed was not properly constituted under Section 92 of the Code.

8. It was at this stage that a properly constituted suit No. 7 of 1934, was filed under Section 92 of the Code by the general public of Alandi along with two Guravs in the District Court at Poona. This suit claimed that a proper scheme should be framed for the management of the temple. Even, so, one of the allegations made in the plaint referred to the Guravs' rights as hereditary worshippers. It was apparently apprehended that this allegation would be treated as outside the scope of a scheme suit under Section 92 and so the Guravs took the precaution of filing four separate suits on behalf of four branches in the Waghmare family one after the other. These suits were numbered as 1202 of 1933, 392 of 1935, 875 of 1936 and 900 of 1937; the plaintiffs in these suits were respectively the members of the third, the fourth, the first and the second branch of the Waghmare family. It appears that the hearing of these suits were stayed by an order of the District Judge pending the final decision of the scheme suit which was being tried by him.

9. The scheme suit was taken up for hearing in 1937. As many as 22 issues were framed in this suit and voluminous evidence was recorded. In the result the learned judge substantially confirmed the original scheme of 1852, though he issued certain directions modifying it. This decree was passed on December 11, 1937. The trustees felt aggrieved by this decree and challenged its propriety by preferring an Appeal No. 92 of 1938, in the Bombay High Court. On November 16, 1939, the High Court dismissed the appeal though it made some amendments in the scheme framed by the District Judge by consent of the parties.

10. After the scheme suit was thus disposed of by the High Court, the four suits filed by the pujaris were taken up for trial by the learned Subordinate Judge, First Class, Poona. In all these suits the appellants claimed their rights as hereditary vatandar Pujari Gurav Servants of the *Sansthan*. They alleged that they were under a duty to perform worship according to certain rites in Shree Dhyaneshwar *Sansthan*, and that they were also under an obligation to perform other incidental duties enumerated by them in their plaints. Likewise they claimed that for remuneration they were entitled to receive coins and perishable articles offered by the devotees and the committee as well as yearly emoluments from the committee. On these allegations the appellants claimed a declaration about their respective rights and an injunction permanently restraining the trustees from obstructing the appellants in the exercise of the said rights. They also claimed accounts from the trustees in regard to the offerings prior to the institution of the suit as well as those made after the institution of the suit and before the passing of the decree.

11. These allegations were denied by Respondents 1 to 6. Their case was that the appellants were the servants of the temple committee and as such had no hereditary rights set up by them. In the alternative, it was pleaded by them that even if the appellants had any hereditary rights the same had been lost by their misconduct and had been otherwise extinguished by limitation. Against the appellants' claim pleas of *res judicata* and *estoppel* were also raised.

12. On these pleadings as many as 21 issues were framed in the trial court, The

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trial court found in favour of the appellants on all the issues. The learned judge held that the Guravs had established the hereditary rights set out by them. and he was inclined to take the view that the respondents could not deprive the appellants of their hereditary rights of service because of the misconduct of some of their ancestors. He also found that there was no substance in the plea of estoppel or res judicata and that the suits were not barred by limitation. In the result the appellants' suits were decreed on February 16, 1942.

13. Thereupon the respondents challenged these decrees by preferring appeals against them in the Bombay High Court. The four suits accordingly gave rise to First Appeals Nos. 183, 184, 185 and 186 of 1942 respectively. In these appeals the high Court agreed with the trial court in holding that on the merits the appellants had established their case and that their claim was not barred either by res judicata or by estoppel. However, on the question of limitation the High Court took the view that the appellants' suits were governed by Article 120 of the Limitation Act and that they had been filed beyond the period of six years prescribed by the said article. That is why the High Court set aside the decrees passed by the trial court, allowed the respondents' appeals and dismissed the appellants' suits. However, in view of the special facts of the case the High Court directed that each party should bear its own costs throughout. This judgment was pronounced on April 14, 1943. Like the trial court the High Court also dealt with all the four cases by one common judgment.

14. It appears that after this judgment was pronounced by the High Court but before it was signed, the appellants moved the High Court on July 2, 1943 for a rehearing of one of the appeals (No. 186 of 1942). It was urged before the High Court that even if Article 120 applied the claim made by the appellant in the said appeal (which arose from Suit No. 1202 of 1933) could not be held to be barred by limitation. The High Court was not impressed by this plea and so the motion for rehearing was discharged.

15. Subsequently a Civil Application No. 1039 of 1944, was made by the appellant in the said appeal seeking to raise the same point over again but this application was rejected by the High Court on September 12, 1944.

16. The appellants then applied for leave to appeal to the Privy Council on August 15, 1944. Their applications were heard together and were disposed of by an order passed on March 26, 1946, whereby leave was granted to them to appeal to the Privy Council and their prayer for consolidating all the appeals was also allowed. These appeals could not, however, be disposed of by the Privy Council before the jurisdiction of the Privy Council to deal with Indian appeals came to an end and so they ultimately came to this Court and were numbered as Appeals Nos. 220 to 223 of 1953. It may be convenient to state that these appeals arise respectively from Suits Nos. 907 of 1937, 392 of 1935, 875 of 1936 and 1202 of 1933. It would thus be seen that the litigation which began between the parties in 1911 has now reached its final stage before us in the present appeals.

17. As we have already indicated, both the courts below have found in favour of the appellants on most of the issues that arose in the present litigation; but the appellants have failed in the High Court on the ground of limitation. In the trial court the respondents had urged that the present suits were governed by Article 124 of the Limitation Act and that since the Guravs had been dismissed from service in 1911 and other Guravs refused to serve in 1913 and 1914 limitation began to run against them at least from 1914 and so the suits were beyond time. The learned trial judge held that Article 124 was inapplicable. He also found alternatively that, even if the said Article applied, the trustees did not have continuous possession of the suit properties from 1911 or 1914 for twelve years and so the suits were not barred by time. According to him the case was really covered by Section 23 of the Limitation Act, and

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so the plea of limitation, could not succeed.

18. The High Court has agreed with the trial court in holding that Article 124 is inapplicable. It has, however, come to the conclusion that the suits are governed by Article 120 of the Limitation Act, and, according to its findings, limitation began to run against the appellants either from September 12, 1922, when the trustees filed their suit under Section 9 of the Specific Relief Act, or, in any case from November 1922, when, in execution of the decree passed in the said suit, the appellants were driven out of the temple precincts by the trustees. The High Court has also held that Section 23 can have no application to the present case. That is how the High Court has reached the conclusion that the appellants' suits are barred by time under Article 120. The question which arises for our decision in the present appeals, therefore, is one of limitation; it has to be considered in two aspects: Was the High Court right in holding that Article 120 applies and that the cause of action accrued more than six years before the dates of the institution of the present suits?; Was the High Court also right in holding that Section 23 does not apply to the suits?

19. On behalf of the appellants Mr Rege has contended that in substance, in their present suits the appellants have made a claim for possession of an hereditary office and as such they would be governed by Article 124 of the Limitation Act. In this connection he has referred us to the relevant allegations in the plaint to show that the appellants' prayer for a declaration about their hereditary rights and for a consequential permanent injunction amount to no more and no less than a claim for possession of the said hereditary office. In support of this argument reliance has been placed on the decision of the Bombay High Court in *Kunj Bihari* v. *Keshavlal Hiralal*[1]. In that case the plaintiff had made a claim to the gadi of the Swaminarayan temple at Ahmedabad and had asked for a declaration that the will of the last Acharya which purported to appoint Defendant 14 as his adopted son and successor was null and void. As a consequence a perpetual injunction was also claimed restraining the defendants from offering any obstruction to the plaintiff in occupying the said gadi. The principal point which was decided in the case had reference to the effect of the provisions of Section 42 of the Specific Relief Act. The plaintiff's suit had been dismissed, in the courts below on the ground that he had omitted to ask for further relief as he was bound to do under Section 42 of the said Act and the High Court held that the section did not empower the court to dismiss the suit under the said section. In considering the nature of the claim made by the plaintiff' Jenkins C.J. observed that "in the plaintiff's view the suit was not one of possession of land appertaining to the gadi but to determine who was to occupy the gadi and thus as gadinishin become the human agent of the deity. If that was so, then the injunction restraining all interference with the occupancy by the plaintiff of the gadi secures in the most complete manner to him the rights he claims". The learned Chief Justice also observed that "the plaintiff might in terms have asked for possession of the office he said was his", but he asked "how would practical effect be given to an award of possession of office otherwise than by preventing interference with the rights of which it was made up". Even so, having reversed the decree passed by the courts below, when the High Court remanded the case for retrial, the plaintiff was advised to amend his plaint and to define more precisely the terms of the injunction he sought. It is urged that, in the present appeals also, by asking for a declaration of their rights and for an appropriate injunction against the respondents, the appellants were in effect asking for possession of the hereditary office. It is doubtful if the claims made by the appellants in their respective suits are exactly analogous to the claim made by the plaintiff in *Kunj Bihari Prasad case*[1]. The appellants have not only asked for an injunction but also for an account of the income received by the trustees from July 23, 1933, up to the date of the suit as well as for similar account from the date of the suit until the date of the decree. A claim for accounts in the form in which it is made may not be quite

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consistent with the appellants' contention that their suits are for nothing more than possession of the hereditary office; but in dealing with the present appeals we are prepared to assume that they have in substance claimed possession of the office. The; question which then arises is: Does this claim for possession attract the application of Article 124 of the Limitation Act?

20. Article 124 governs suits for possession of an hereditary office. The period of limitation prescribed by the Article is twelve years and the said period begins to run when the defendant takes possession of the office adversely to the plaintiff. This is explained to mean that the hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed. It is clear that before this Article can apply it must be shown that the suit makes claim for possession of an office which is hereditary; and the claim must be made against the defendant who has taken possession of the said hereditary office adversely to the plaintiff. Unlike Article 142 the fact that the plaintiff is out of possession of the hereditary office for more than twelve years before the date of his suit would not defeat his claim for possession of the said office. What would defeat his claim is the adverse possession of the said office by the defendant for the prescribed period. As the explanation makes it clear usually the receipt of the profits may amount to the possession of the office; but if the defendant merely receives the profits but does not perform the duties which are usually performed by the holder of the office, the receipt of the profits by itself may not amount to the possession of office. The cause of action for possession in suits falling under Article 124 is the wrongful dispossession of the plaintiff and the adverse possession by the defendant of the office in question. Claims for possession of hereditary offices which attract the application of this Article are usually made by holders of the said offices against persons who claim adverse possession of the said offices; in other words, in suits of this kind, the contest is usually between rival claimants to the hereditary office in question.

21. In the present appeals the claim for possession is made by the appellants against the trustees of the *Sansthan*. It is significant that the persons who are actually performing the duties of the worshippers are not impleaded; and they do not claim to hold office as hereditary officers either. They have been appointed by the trustees as servants of the institution and they perform the duties of worship as such servants. The trustees, on the other hand, cannot be said to have taken possession of the office themselves adversely to the appellants. They do not take the profits themselves nor do they perform the duties associated with the said office. They have, in exercise of their authority and power as trustees, dismissed the appellants' predecessors from office and have made fresh appointments of servants to perform the worship at the *Sansthan;* and, in making the said appointments, have in fact destroyed the hereditary character of the office. The dispute in the present appeals is between the worshippers who claim hereditary rights and the trustees of the institution who claim to have validly terminated the services of some of the predecessors of the appellants and to have made valid appointments to the said office. It is, therefore, impossible to accept the argument that the claim made by the appellants in their respective suits attracts the provisions of Article 124. It is conceded by Mr Rege that if Article 124 does not apply, the suits would be governed by Article 120 which is a residuary article. It may prima facie appear somewhat strange that whereas a suit against a person claiming to hold the hereditary office adversely to the plaintiff is governed by a period of twelve years, a claim against the trustees like the respondents in the present appeals who have dismissed the hereditary worshippers should be governed by a period of six years. It may be possible to suggest that there is a substantial difference in the nature of the two disputes; but apart from it, it is well known that the artificial provisions of limitation do not always satisfy the test of logic or equity.

22. Mr Rege, however, argued that in determining the scope of Article 124 we need

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not consider the provisions of col. 3 to the said Article. His contention appears to be that once it is shown that the suit is for possession of an hereditary office. Article 124 must apply though the claim for possession may not have been made against a person who has taken possession of the office adversely to the plaintiff. He also urged alternatively that the trustees should be deemed to have taken possession of the office adversely to the appellants. We have already held that the conduct of the trustees shows that they have not taken possession of the office adversely within the meaning of col. 3 of Article 124; and we do not think it is possible to ignore the provision of col. 3 in deciding whether or not Article 124 applies. It is true that in *Jalim Singh Srimal* v. *Choonee Lall Johurry*[2], while holding that the adjustment on which the plaintiff's claim was based in that case was in time both under Articles 115 and 120, Jenkins C.J. has observed that the function of the third column of the second schedule is not to define causes of action but to fix the starting point from which the period of limitation is to be counted; but this observation does not support the appellants' case that Article 124 would govern the suit even though the third column is wholly inapplicable to it. That obviously is not the effect of the observations made in *Jalim Singh's case* (supra)[2].

23. The question about the nature and scope of the provisions of Article 124 has been considered by the Madras High Court in *Thathachariar* v. *Singarachariar*[3]. "If we take into consideration the terminology used in the three columns of Article 124", observed Srinivasa Ayyangar J., in that case, "it is clear that the nature of the suit intended to be covered by that article must be a suit filed by a plaintiff who claims the office from a person who at that time holds the office himself". In our opinion this view is correct.

24. We may also refer to another decision of the Madras High Court in which this question has been considered. In *Annasami* v. *Adivarachari*[4], a Full Bench of the Madras High Court was dealing with a suit in which the plaintiff had claimed an injunction restraining the trustee and the archakas of the Sri Bhuvarahaswami temple at Srimushnam from interfering with the performance of the duties of his office of *mantrapushpam* of the temple. This suit had been filed in 1929. The office of *mantrapushpam* was a hereditary office and the plaintiff had succeeded to it on the death of his father in 1906. The emoluments of the office consisted of a ball of cooked rice per diem and twelve annas per month. It appears that the plaintiff was a Vadagalai while the archakas of the temple were Thengalais and there was animosity between them; and as a result of this animosity the plaintiff had never been able to perform the duties of his office. It was common ground that the plaintiff was the lawful holder of the office and that he had been receiving its emoluments month by month until 1927. The archakas who resisted the plaintiff's claim did not claim that they were in possession of the office or that they had performed the duties of the said office. The Full Bench held that, where a person is admittedly the lawful holder of the office and he is enjoying its emoluments, he must in law he regarded as being in possession of the office itself, especially where no one else is performing the duties of the said office; and so under Article 124 it was enough for the plaintiff to show that he had been in receipt of the emoluments of the office to save his claim from the bar of limitation. The Full Bench also rejected the contention that under Article 120 the suit was barred because it was held that every time the trustee and the archakas prevented the plaintiff from performing his duties as a hereditary officer a fresh cause of action arose and so there can be no bar of limitation under Article 120. It would be noticed that the basis of this decision was that, in the eyes of law, The plaintiff was in possession of the hereditary office since he was receiving the emoluments of the said office month by month, and so every act of obstruction on the part of the archakas and the trustee was in the nature of a continuing wrong which gave rise to a fresh cause of action to the plaintiff from time to time. In other words, on the facts the Full Bench held that Section 23 helped the plaintiff and saved his suit from the bar of limitation.

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As we will presently point out there is no scope for applying Section 23 to the facts of the present cases, and so the decision in *Annasami Iyengar case*[5] cannot assist the appellants.

25. In this connection it is relevant to consider the decision of the Privy Council in *Jhalandar Thakur* v. *Jharula Das*[6] in which it was held that Article 124 was inapplicable. The defendant Jharula Das had obtained a decree for money on a mortgage which had been executed in his favour by Mst Grihimoni. the widow of the shebait of the temple. In execution of the said decree the defendant had caused 3½ as. share of the judgment-debtor including her right in the nett income of (the daily offerings made before the idol to be put up for sale and had himself purchased it at the auction sale. As such purchaser he was in possession of the income of the said share. The judgment-debtor attempted to challenge the said sale by two suits but her attempts failed and the auction purchaser continued to be in possession of the income. On the death of Mst Grihimoni, Bhaiaji Thakur, who succeeded to the office of the shebait, sued the defendant for possession of certain lands and claimed a declaration that he was entitled to receive the 3½ as. share of the nett income from the offerings to the temple with other reliefs. This claim was resisted by the defendant Jharula Das. In regard to the plaintiff's claim in respect of the said 3 ½ as share, the High Court had held that Article 124 applied and that the claim was barred under the said Article. That is why the decree passed by the trial court in favour of the plaintiff in respect of the said income was reversed by the High Court. This decision was challenged by the plaintiff before the Privy Council and it was urged on his behalf that Article 124 did not apply. The Privy Council upheld this contention. It was clear that the office of the shebait of the temple was a hereditary office which could not be held by anyone who was not a Brahmin Panda. Jharula Das was not a Brahmin Panda. He was of an inferior caste and was not competent to hold the office of the shebait of the temple, or to provide for the performance of the duties of that office. On these facts the Privy Council held that the appropriation from time to time by Jharula Das of the income derivable from the said 3½ as. share did not deprive Mst Grihimoni, and after her death, Bhaiaji Thakur, of the possession of the office of the shebait although that income was receivable by them in right of the shebaitship. The basis of this decision is that, on each occasion on which Jharula Das received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, he committed a fresh actionable wrong in respect of which a suit could be brought against him by the shebait; but it did not constitute him a shebait for the time being or affect in any way the title of the office. Thus this decision emphasises that for the application of Article 124 it is essential that the defendant to the suit must be in adverse possession of the hereditary office in question. We must, therefore, hold that Article 124 does not apply to the suits filed by the appellants; and as we have already observed, if Article 124 does not apply. Article 120 does.

26. The next point which arises for our decision is whether under Article 120 the suits are barred by limitation. Under Article 120 time begins to run against the plaintiff's when the right to sue accrued to them, and that naturally poses the question as to when the right to sue accrued to the appellants? In deciding this question it would be necessary to recall briefly the material facts in regard to the past disputes between the appellants and the trustees. These disputes began in 1911. On January 31, 1911, the trustees wrote a vadi (memorandum) to the Collector of Poona asking his permission to dismiss eleven Guravs from service. They set out in detail several items of misconduct of which the said Guravs were guilty; and they expressed their opinion that for the proper management of the affairs of the institution it was necessary to terminate the services of the offending Guravs (Ex. 407). On April 1, 1911, the Collector sent a reply to the trustees and told them that, as a result of the Government Resolution No. 4712 passed on November 29, 1864, it was unnecessary

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for the trustees to obtain the Collector's sanction because it was competent to the trustees to settle their own affairs without any such sanction. The trustees then met in a committee on September 18, 1911, and decided to dismiss from service the said eleven Guravs. In its resolution the committee stated that the Guravs were violent and arrogant and it was likely that they may commit riot at the time when the committee would seek to take charge from them. The committee also apprehended that the rest of the Guravs would make a common cause with those who had been dismissed from service and would refuse to serve the *Sansthan*. Even so the committee decided to appoint six Brahmins temporarily to perform the service, because the committee was prepared to allow the rest of the Guravs to render service to the *Sansthan* if they were ready to act according to the orders of the committee and were willing to enter into a formal agreement in that behalf. In accordance with this resolution the committee served notice on the eleven Guravs on October 13, 1911, terminating their services and calling upon them to hand over to the committee all articles in their charge and forbidding them from entering the temple in their capacity as servants. Notice was likewise served on the rest of the Guravs calling upon them to agree to serve the *Sansthan* on conditions specified in the notice. These terms were not acceptable to the Guravs and so, on behalf of two Guravs Eknath and his brother Ramchandra, notice was served on the trustees on October 26, 1911, complaining against the trustees' conduct in forcibly removing the Guravs from the temple and thereby wrongfully denying their rights. The notice warned the trustees that unless they retraced their steps and gave possession to the Guravs as claimed in the notice legal steps would be taken against them.

27. This notice was followed by the Guravs' Suit No. 485 of 1911. In the suit the plaintiffs claimed declaration about their rights of ownership and asked for consequential reliefs. This claim was denied by the trustees who claimed the right to dismiss the Guravs. It was alleged on their behalf that some of the plaintiff's had been dismissed and others had resigned their employments and so all of them had lost their rights. This suit was seriously contested but in the end the Guravs lost and their suit was dismissed on January 31, 1918.

28. The Guravs then preferred appeals in the High Court but these appeals were also dismissed on August 3, 1921. We have already pointed out that, while dismissing the said appeals, the High Court made certain observations about the Guravs' hereditary rights of worship and suggested that these rights could be adjudicated upon in a suit filed under Section 92 of the Code. Thus at the time when the Guravs' appeals were dismissed the position was that the claim of ownership set up by them had been rejected; but the question as to whether they were entitled to the lesser rights of hereditary worshippers was left open.

29. The Guravs then obtained forcible possession of the temple and that led to the trustees' suit under Section 9 of the Specific Relief Act, No. 1075 of 1922, on September 12, 1922. In this suit the trustees specifically alleged that the relationship of the defendants as servants of the *Sansthan* had ceased as from September 1911, and they averred that the defendants had therefore no right to obtain possession of the temple. The defendants no doubt disputed this claim and pleaded that they were the hereditary vatandar pujari servants but their claim was negatived and a decree for possession was passed on November 4, 1922. In execution of this decree the defendants were dispossessed.

30. On these facts the High Court has held in favour of the appellants, and rightly we think, that it "was difficult to accept the respondents' contention that the cause of action for the present suits which were expressly based upon the status of the Guravs as hereditary servants arose in 1911. But, the High Court felt no doubt that the cause of action to file the present suits had accrued either on September 12, 1922, when the trustees filed their suit under Section 9 of the Specific Relief Act or in any event on

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November 4, 1922, when the said suit was decreed and the Guravs were consequently dispossessed. In our opinion this conclusion is also right. One of the Guravs who was examined in the present litigation has stated that, "if in any year when it is the turn of any takshim to serve, if a person outside the Gurav family is appointed by the trustees, all the takshims have a right to object". There is also no dispute that since the dismissal of eleven Guravs in 1911 till the institution of the present suits none from the Gurav family has served the temple except for 3 ½ months in 1922 when the Guravs had wrongfully obtained possession of the temple. In 1922 the Ciuravs knew that their claim of ownership had been rejected and that the only right which they could set up was as hereditary worshippers of the temple and not its owners. This right was specifically denied by the trustees in their plaint while it was specifically set up in defence by the Guravs in their written statement; and the decree that followed upheld the trustees' case and rejected the defendants' claim. On these facts the conclusion is irresistible that the right to sue accrued to the Guravs at the latest on November 4, 1922, when a decree was passed under Section 9 of the Specific Relief Act. If not the plaint in the suit, at least the decree that followed clearly and effectively threatened the Guravs' rights as hereditary worshippers and so the cause of action to sue on the strength of the said rights clearly and unambiguously arose at that time. If that be the true position it follows that the present suits which have been filed long after the expiration of six years from 1922 are barred by time under Article 120.

31. It is then contended by Mr Rege that the suits cannot be held to be barred under Article 120 because Section 23 of the Limitation Act applies; and since, in the words of the said section, the conduct of the trustees amounted to a continuing wrong, a fresh period of limitation began to run at every moment of time during which the said wrong continued. Does the conduct of the trustees amount to a continuing wrong under Section 23? That is the question which this contention raises for our decision. In other words, did the cause of action arise *de die in diem* as claimed by the appellants? In dealing with this argument it is necessary to bear in mind that Section 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 Section 23 can be invoked. Thus considered it is difficult to hold that the trustees' act in denying altogether the alleged rights of the Guravs 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 appellants' rights 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, the 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, the resulting injury to the right is complete at the date of the ouster and so there would be no scope for the application

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of 23 in such a case. That is the view which the High Court has taken and we see no reason to differ from it.

32. We would now like to refer to some of the decisions which were cited before us on this point. The first case which is usually considered in dealing with the application of Section 23 is the decision of the Privy Council in *Maharani Rajroop Koer* v. *Syed Abul Hossein*[6]. In order to appreciate this decision it is necessary to refer, though briefly, to the material facts. The plaintiff had succeeded in establishing his right to the pyne or an artificial watercourse and to the use of the water flowing through it except that which flowed through the branch channel; he had, however, failed to prove his right to the water in the tal except to the overflow after the defendants as owners of mouzah Morahad used the water for the purpose of irrigating their own land. It was found that all the obstructions by the defendants were unauthorised and in fact the plaintiff had succeeded in the courts below in respect of all the obstructions except two which were numbered No. 3 and No. 10. No. 3 was a khund or channel cut in the side of the pyne at a point below the bridge whereas No. 10 was a dhonga also below the bridge and it consisted of hollow palm trees so placed as to draw off water in the pyne for the purpose of irrigating the defendants' lands. It was in regard to these two obstructions that the question about the continuing wrong fell to be considered; and the Privy Council held that the said obstructions which interfered with the flow of water to the plaintiff's mohal wore in the nature of continuing nuisance as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. That is why the Privy Council allowed the plaintiff's claim in respect of these two obstructions and reversed the decree passed by the High Court in that behalf. In fact the conduct of the defendant showed that whenever he drew off water through the said diversions he was in fact stealing plaintiff's water and thereby committing fresh wrong every time. Thus this is clearly not a case of exclusion or ouster.

33. Similarly, in *Hukum Chand* v. *Maharaj Bahadur Singh*[7] the Privy Council was dealing with a case where the defendants' act clearly amounted to a continuing wrong and helped the plaintiff in getting the benefit of, s. 23. The relevant dispute in that case arose because alterations had been made by the Swetambaris in the character of the charans in certain shrines and the Digambaris complained that the said alterations amounted to an interference with their rights. It had been found by the courts in India that the charans in the old shrines were the impressions of the footprints of the saints each bearing a lotus mark. "The Swetambaris who preferred to worship the feet themselves have evolved another form of charan not very easy to describe accurately in the absence of models or photographs which shows toe nails and must be taken to be a representation of part of the foot. This the Digambaris refused to worship as being a representation of a detached part of the human body". The courts had also held that the action of the Swetambaris in placing the charans of the said description in three of the shrines was a wrong which the Digambaris were entitled to complain. The question which the Privy Council had to consider was whether the action of the Swetambaris in placing the said charans in three of the shrines was a continuing wrong or not; and in answering this question in favour of the plaintiffs the Privy Council referred to its earlier decision in the case of *Maharani Rajroop Koer*[6] and held that the action in question was a continuing wrong. There is no doubt that the impugned action did not amount to ouster or complete dispossession of the plaintiffs. It was action which was of the character of a continuing wrong and as such it gave rise to a cause of action *de die in diem*. In our opinion, neither of these two decisions can be of any assistance to the appellants.

34. On the other hand the decision of the Patna High Court in *Choudhury Bibhuti Narayan Singh* v. *Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur*[8] as well as that of the Full Bench of the Punjab High Court in *Khair Mohammad Khan* v. *Mst*

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Jannat[2] support the respondents' contention that where the impugned act amounts to duster there is no scope for the application of Section 23 of the Limitation Act. We are, therefore, satisfied that there is no substance in the appellants' contention that Section 23 helps to save limitation for their suits.

35. The result no doubt is unfortunate. The appellants have succeeded in both the courts below in proving their rights as hereditary worshippers; but their claim must be rejected on the ground that they have filed their suits beyond time. In this court an attempt was made by the parties to see if this suits beyond time. In this court and attempt was made by the parties to see if long drawn out litigation could be brought to an end on reasonable terms agreed to by them, but it did not succeed. In the result the appeals fail and are dismissed. We would, however, direct that the parties should bear their own costs throughout.

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* Appeals from the Judgment and Decrees dated 14th April 1943 of the Bombay High Court in Appeals Nos. 183, 184, 185 and 186 of 1942, arising out of the Judgments and Decrees dated 16th February, 1942 of the Court of the 1st Class Sub-Judge, Poona in Suits Nos. 900/37, 392/35, 875/36 and 1202/33.

[1] (1904) ILR 28 Bom 567

[2] (1911) 15 CWN 882

[3] AIR 1928 Mad 377

[4] ILR 1941 Mad 275

[5] (1914) ILR 42 Cal 244

[6] (1880) LR 7 IA 240

[7] (1933) LR 60 IA 313

[8] (1939) ILR 10 Pat 208

[9] (1940) ILR 22 Lah 22

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JUDGMENT.

This is a petition to revise the order of the Subordinate Judge of Tanjore confirming the order of the Rent Controller, Tanjore, evicting the petitioner. By S. 12 (1) (a) of the Madras Buildings (Lease and Rent Control) Act, 1946, " the Provincial Government may, by general or special order notified in the Fort St. George Gazette, confer on such officers and authorities as they think fit, the powers of appellate authorities for the purposes of this Act ....." In exercise of this power Provincial Government have appointed District Judges in some places and Subordinate Judges in other places as " appellate authorities ". In the Tanjore district the Subordinate Judge has been so appointed.

A preliminary point arises as to whether this Court has jurisdiction to interfere in revision. Clearly such jurisdiction can arise only if the case is one falling within the provisions of S. 115 of the Civil Procedure Code. The question then is whether the Subordinate Judge of Tanjore acting as an "appellate authority" under this Act is properly to be regarded as a Court subordinate to the High Court. Counsel for the petitioner has referred me to the following relevant authorities of this Court on this very interesting point: *Abdul Satar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition* (1), *Parthasarathi Naidu* v. *Kotiswararao* (2), *Ramaswami Gounder* v. *Muthuvelappa Goundar* (3), *Lakshmana Chetti* v. *Kannappar* (4), *Rajah of Venkatagiri* v. *Shaik Mahaboob Saheb* (5), and *Abdul Wahid Sahib* v. *Abdul Khader Sahib* (6). In view of these authorities I find it impossible to regard the Subordinate Judge of Tanjore in this matter as a Court subordinate to the High Court. Had the Subordinate Judge been appointed in the Act as the appellate authority the position might well have been different; for then there would have been an indication of intention on the part of the Legislature to give jurisdiction in such matters to an existing Court, I say "might have been different", because even so, I am inclined to the view that the remaining provisions of S. 12 of the Act would negative any such intention, as clause 3 of S. 12 directs that in hearing an appeal the appellate authority shall send for the records of the case from the Controller and after giving the parties an opportunity of being heard and, if necessary, after making such further inquiry "as he thinks fit either personally or through the Controller, shall decide the appeal." Thus the appellate authority is entitled to make enquiries himself apart from hearing the parties and to take the results of those enquiries into account in arriving at his decision. This provision is entirely inconsistent with the accepted rules which would govern a Court. Again it is noteworthy that the Act empowers the Provincial Government to confer the power of appellate authorities "on such officers and authorities as they think fit." There is here no indication of intention to leave these matters for consideration by any Civil Court. Any officer or authority could be appointed. In *Abdul Wahid Sahib* v. *Abdul Khader Sahib* (6), my learned brother, Yahya Ali J. has decided this same point. He came to the conclusion that the language of S. 12 makes it clear that a District Judge or Subordinate Judge notified as the appellate authority is appointed as a *persona designata* and not as a Court, and I am in complete agreement with that conclusion.

Accordingly the petition is dismissed with costs. C. M. P. No. 7268 of 1947 is dismissed.

N. R. R.

(1) 47 Mad. 357=19 L.W. 445 (F.B.).
(2) 47 Mad. 369=19 L.W. 402 (F.B.).
(3) 44 M. L. J. 1=16 L.W. 848.
(4) 50 Mad. 121=24 L.W. 773 (F.B.).
(5) (1943) 2 M. L. J. 615=56 L.W. 683.
(6) (1947) 1 M. L. J. 207=60 L.W. 199.

ELLAPPA NAICKEN *v.* K. LAKSHMANA NAICKEN (dead) and others.

Govinda Menon, J.

Crl. R. C. No. 211 of 1947
(Crl. R. P. No. 201 of 1947)

Petition (disposed of on 20—2—1948) under Ss. 435 and 439 Cri. P. C., 1898 praying the High Court to revise the order of the Court of the Sub Divisional Magistrate of Karur dated 30—11—1946 in M. C. No. 70 of 1941.

Criminal Procedure Code. Ss. 145, 146—Appointment of receiver under S. 146—Suit by a party dismissed for default under O. 9, R. 9,

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prevents the plaintiff from bringing a suit on the same cause of action, but his rights to the properties, if any, have not been extinguished under S. 28 of the Limitation Act. For the purpose of the present case I do not wish to decide the vexed question as to whether the order of dismissal amounts to a determination by a competent Court of the rights of the parties or as to the person entitled to possession thereof, for the reason, that according to my reading of the decision in *Rajah of Venkatagiri* v. *Isakkapalli Subbiah* (1), the parties herein have got a further remedy. The learned Counsel for the petitioner contends that this Court in *Raja of Venkatagiri* v. *Isakkapalli Subbiah* (1), has decided that suits of the nature contemplated under S. 146 of the Code of Criminal Procedure should be filed within six years of the date of the order under Art. 120 of the Limitation Act. No doubt the learned Judges have held that either of the parties to a decision under S. 146 of the Code of Criminal Procedure has to file a suit within six years for a declaration of title and a suit brought thereafter will be dismissed *in limine* on the ground that it is barred by limitation. But even so the learned Judges have held that either party is entitled to bring a suit for the recovery of the profits of the land for the reason that the profits received by the Magistrate within six years before the date of suit will not be barred as the right to sue will accrue only from time to time as the profits were received. In such a suit for the recovery of profits the question as to who is entitled the same will have to be decided with the result that the question of title will also be finally adjudicated. Such a finding in the judgment on the issue of title will have the force of *res judicata* for the purpose of S. 146 of the Code of Criminal Procedure and it would practically operate as a determination of the right of the successful plaintiff to the land under attachment as well as the amount in deposit. That being so it is not as if the parties here have no further remedy resulting in the property remaining in the *custodia legis* for all time. Either of the party is at liberty to bring a suit for the recovery of profits received by the receiver within a period of limitation and the civil Court will then adjudicate as to who is entitled to the profits of the land. The adjudication of the rights to the profits will finally determine the title to the property also and thereafter the Criminal Court will be bound to recognise this determination of the right of the successful plaintiff and hand over the property to whomsoever has succeeded in the civil suit. Therefore there is no reason for interference with the order of the learned Sub Divisional Magistrate and this petition is dismissed.

N. R. R.

(1) 26 Mad. 410.

M. A. C. ARUNACHALA MUDALI and another v. RAJAGOPALA CHETTI and another.

Satyanarayana Rao, J.

A. A. A. O. 147 of 1946.

Appeal (disposed of on 10—11—1947) against the order of the District Court of North Arcot dated 7—1—1946 and made in A. S. 222 of 1945 preferred against the order of the Court of the District Munsif of Tirupattur dated 12—4—1945 in E. P. 940 of 1944 in O. S. 337 of 1934.

Limitation Act, Art. 182 (5)—Application in accordance with law—Application to the decree-court for transmission of the decree to another Court for execution—Mistake that the latter and not the former Court has territorial jurisdiction—Application is one in accordance with law.

Where the holder of a mortgage decree applied to the Court which passed the decree for the transmission of the decree to another Court for execution under a *bona fide* mistake that the latter and not the former Court had territorial jurisdiction to execute the decree, the mistake is one of fact and not of law, and the application cannot be said to be one not in accordance with law for the purpose of saving limitation as a step-in-aid under Art. 182 (5) of the Limitation Act.

(1939) 1 M. L. J. 827 and 58 L. W. 300 : Relied on.

Mr. *A. Sundaram Ayyar* for Appts.

Mr. *A. V. Viswanatha Sastri* for Respts.

JUDGMENT.

The plaintiffs - decreeholders have preferred this appeal against the order of the District Judge of North Arcot at Vellore dismissing the execution petition filed by them on the ground that it was barred by limitation after setting aside the order of the learned District

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amendment, the expression "under the management of the State Government" stood deleted. Therefore, it was argued on behalf of the appellant that the Karnataka Rent Control Act, 1961 has no application. As held by the High Court, this plea was not taken by the appellant in the courts below. Further, Section 2(7)(*bb*)(*iii*) states that the Act will not apply to any premises belonging to a religious or charitable institution. However, there is no material placed on record by way of pleadings to show whether the appellant is a religious or charitable institution. The plaint was never amended. The appellant seeks exemption. Exemption needs to be alleged and proved. Opportunity is required to be given to the respondent to meet the plea of exemption. In the circumstances, we are in agreement with the view expressed by the High Court that the said plea was not open to the appellant at the stage of second appeal, particularly in the absence of any material available to substantiate such plea.

14. For the aforestated reasons, we do not find any merit in this civil appeal and the same is dismissed, accordingly, with no order as to costs.

(2004) 8 Supreme Court Cases 724

(BEFORE N. SANTOSH HEGDE, S.B. SINHA AND TARUN CHATTERJEE, JJ.)

CHANDI PRASAD AND OTHERS .. Appellants;

Versus

JAGDISH PRASAD AND OTHERS .. Respondents.

Civil Appeal No. 599 of 2003†, decided on October 1, 2004

A. Limitation Act, 1963 — Art. 136 — Execution of decree — Twelve-year limitation period — Starting point of — Effect of statutory appeal — Doctrine of merger — Applicability of — Held, once a decree is sought to be enforced for the purpose of execution thereof irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment of money or delivery of any property at a certain date would be considered to be the starting period of limitation — Partition suit — Final decree prepared by trial court on 7-5-1968 — High Court deciding the second appeal on 18-4-1985 and drawing up a formal decree pursuant thereto on 30-10-1986 — Thus, the decree of the court below merged with that of the High Court — In view thereof, the execution application filed on 26-3-1997, held, not time-barred — *Ratansingh case*, (2001) 1 SCC 469, distinguished — Limitation Act, 1908, Art. 182 — Civil Procedure Code, 1908, Ss. 48 (now repealed) and 2(2)

B. Appeal — Effect of — Held, when the appellate forum is invoked and entertained, for all intent and purport, the suit continues — Civil Procedure Code, 1908, Ss. 96, 100 and 109

C. Doctrines — Doctrine of merger — Applicability — Held, when an appellate court passes a decree, the decree of the trial court merges with the

† From the Judgment and Order dated 30-3-2001 of the Allahabad High Court in CMWP No. 8954 of 2001

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decree of the appellate court irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court — The said doctrine applies when a higher forum entertains an appeal and passes an order on merit — Not applicable when the appeal is dismissed on the ground that delay in filing the same is not condoned — Civil Procedure Code, 1908, Ss. 96, 100 and 109

D. Civil Procedure Code, 1908 — S. 2(2) — "Decree" — Meaning of

What would be the date from which a decree becomes enforceable for execution thereof within the meaning of Article 136 of the Limitation Act, 1963 was the question involved in the instant appeal.

A suit for partition was filed by the respondents against the appellants wherein a preliminary decree was passed on 25-4-1962. A final decree proceeding was thereafter initiated whereupon the final decree was prepared on 7-5-1968. On or about 6-8-1968, an execution case was filed in respect thereof. As against the said final decree, however, in the meanwhile a first appeal had been filed which was dismissed by an order dated 21-3-1969. A second appeal thereagainst was preferred by the appellants which was allowed and the matter was remitted back to the appellate court for determining the merit of the appeal afresh. The first appellate court again dismissed the appeal on 4-1-1974. In the meanwhile, the said execution petition was dismissed, presumably because the second appeal filed by the appellants was allowed. Against the judgment and decree dated 4-1-1974 passed by the first appellate court, the appellants preferred a second appeal before the High Court. The said appeal was dismissed by the High Court on 18-4-1985. A formal decree pursuant thereto was drawn on 30-10-1986. An application for execution of the decree was filed by the respondents on 26-3-1997. Contending that the said execution application was barred by limitation, the appellants filed an application under Section 47 CPC which was allowed by the executing court by an order dated 1-5-1999. The respondents preferred an appeal against the order of the executing court before the Additional District and Sessions Judge which was allowed holding that the said execution application was not barred by limitation. The appellants filed a writ petition before the High Court questioning the correctness of the said order. The said writ petition was dismissed by the impugned order dated 30-3-2001. Hence this appeal.

Before the Supreme Court, the appellants contended that in terms of Article 182 of the old Limitation Act of 1908 the date of the final decree or order of the appellate court or the withdrawal thereof would be the starting point for limitation for computing the period in terms thereof but the very fact that now instead and in place of seven different dates specified therefor for filing an execution petition only one date viz. where the decree or order becomes enforceable, is substituted, it must be held that in the absence of any order of stay granted by the appellate court, the date of decree of the trial court/first appellate court would be the enforceable date for the purpose of Article 136 of the Limitation Act, 1963. As by reason thereof the period of limitation has been enhanced from 3 years to 12 years, Parliament thus intended to provide that the date of the decree of the first appellate court would be the starting period of limitation. It was further submitted that in any event, a second appeal against an appellate decree being entertainable only on limited ground, namely, on a substantial question of law, doctrine of merger will have no application in relation thereto and in that view of the matter, limitation to file an execution

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application will be deemed to have been running only from 4-1-1974 and not with effect from 18-4-1985.

Dismissing the appeal, the Supreme Court

Held :

In terms of Article 136, Limitation Act, 1963, a decree can be executed when it becomes enforceable. A decree is defined in Section 2(2) CPC, 1908 to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. A decree within the meaning of Section 2(2) CPC would be enforceable irrespective of the fact whether it is passed by the trial court, the first appellate court or the second appellate court. Once a decree is sought to be enforced for the purpose of execution thereof irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment of money or delivery of any property at a certain date would be considered to be the starting period of limitation. (Paras 18, 9 and 20)

It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (Para 21)

U.J.S. Chopra v. *State of Bombay*, AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410, *relied on*

When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues. When a higher forum entertains an appeal and passes an order on merit, the doctrine of merger applies. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time. When an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply.(Paras 22, 10, 23, 24 and 28)

V.M. Salgaocar and Bros. (P) Ltd. v. *CIT*, (2000) 5 SCC 373 : AIR 2000 SC 1623; *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359, *relied on*

Raja Mechanical Co. (P) Ltd. v. *CCE*, ILR (2002) 1 Del 33, *approved*

Union of India v. *West Coast Paper Mills Ltd.*, (2004) 2 SCC 747, *referred to*

Corpus Juris Secundum, Vol. LVII, pp. 1067-68, *cited*

In the instant case, the High Court upon dismissal of the second appeal had drawn up a formal decree on 30-10-1986. Hence, *Ratansingh case*, (2001) 1 SCC 469, has no application in this case. For the reasons aforementioned, no case has been made out for interference with the impugned judgment. (Paras 31 and 32)

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Ratansingh v. *Vijay Singh*, (2001) 1 SCC 469, *distinguished*

E. **Limitation Act, 1963 — Art. 136 — Law governing limitation for execution under the old Limitation Act as well as reasons for introduction of Art. 136, taken note of — Limitation Act, 1908, Arts. 182 and 183 — Civil Procedure Code, 1908, S. 48 (now repealed) (Paras 13 to 15, 12 and 17 to 19)**

Lalji Raja v. *Hansraj Nathuram*, (1971) 1 SCC 721 : AIR 1971 SC 974, *referred to*

F. **Limitation Act, 1963 — S. 15(1) — Word "execution" used in — Scope of — Held, includes all processes and proceedings in aid to or supplemental to execution — Limitation Act, 1908, S. 15(1) (Para 16)**

Anandilal v. *Ram Narain*, (1984) 3 SCC 561 : AIR 1984 SC 1383, *relied on*

G. **Constitution of India — Arts. 136 and 133 — Doctrine of merger — Applicability — Held, when a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does — Doctrines — Doctrine of merger (Para 24)**

V.M. Salgaocar and Bros. (P) Ltd. v. *CIT*, (2000) 5 SCC 373 : AIR 2000 SC 1623, *relied on*

W-M/TZ/30655/C

Advocates who appeared in this case :

M.N. Krishnamani, Senior Advocate (K.V. Mohan, N.M. Varghese, Ms Tessy Paul and Soumyajit Pani, Advocates, with him) for the Appellants;

Ms Sandhya Goswami, M.P. Shorawala and P.K. Chakravarti, Advocates, for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2004) 2 SCC 747, *Union of India* v. *West Coast Paper Mills Ltd.* 732*d-e*
2. ILR (2002) 1 Del 33, *Raja Mechanical Co. (P) Ltd.* v. *CCE* 732*e*
3. (2001) 1 SCC 469, *Ratansingh* v. *Vijay Singh* 728*e*, 732*e*, 732*e-f*, 732*g*
4. (2000) 6 SCC 359, *Kunhayammed* v. *State of Kerala* 731*c-d*, 732*b-c*
5. (2000) 5 SCC 373 : AIR 2000 SC 1623, *V.M. Salgaocar and Bros. (P) Ltd.* v. *CIT* 731*c*
6. (1984) 3 SCC 561 : AIR 1984 SC 1383, *Anandilal* v. *Ram Narain* 730*b-c*
7. (1971) 1 SCC 721 : AIR 1971 SC 974, *Lalji Raja* v. *Hansraj Nathuram* 729*h*
8. AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410, *U.J.S. Chopra* v. *State of Bombay* 730*g-h*

The Judgment of the Court was delivered by

S.B. SINHA, J.—

Introduction

1. What would be the date from which a decree becomes enforceable for execution thereof within the meaning of Article 136 of the Limitation Act, 1963 (the Act) is the question involved in this appeal which arises out of a judgment and decree dated 30-3-2001 passed by the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 8954 of 2001.

Facts

2. A suit for partition was filed by the respondents herein against the appellants wherein a preliminary decree was passed on 25-4-1962. A final decree proceeding was thereafter initiated whereupon the final decree was prepared on 7-5-1968. On or about 6-8-1968, an execution case marked as Execution Case No. 279 of 1968 was filed by the respondents. As against the

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said final decree, however, in the meanwhile a first appeal had been filed which was marked as Civil Appeal No. 502 of 1968. It was dismissed by an order dated 21-3-1969. A second appeal thereagainst was preferred by the appellants which was allowed and the matter was remitted back to the appellate court for determining the merit of the appeal afresh.

3. The first appellate court again dismissed the appeal on 4-1-1974. In the meanwhile, the said execution petition was dismissed, presumably because the second appeal filed by the appellants was allowed. Against the judgment and decree dated 4-1-1974 passed by the appellate court in Civil Appeal No. 502 of 1968, the appellants herein preferred a second appeal before the High Court which was marked as Second Appeal No. 481 of 1974. The said appeal was dismissed by the High Court on 18-4-1985. A formal decree pursuant thereto was drawn on 30-10-1986. An application for execution of the decree was filed by the respondents on 26-3-1997. Contending that the said execution application is barred by limitation, the appellants filed an application under Section 47 of the Code of Civil Procedure (the Code) which was dismissed (*sic* allowed) by the executing court by an order dated 1-5-1999. The respondents preferred Misc. Appeal No. 32 of 1999 against the order of the executing court before the Additional District and Sessions Judge, Hapur which was allowed holding that the said execution application was not barred by limitation. The appellants herein filed a writ petition before the High Court questioning the correctness of the said order. The said writ petition has been dismissed by the impugned order dated 30-3-2001. Hence this appeal.

Reference

4. When the matter was placed before a two-Judge Bench of this Court, the decision in *Ratansingh* v. *Vijay Singh*[1] was relied upon by the appellants. Doubting the correctness thereof, the said Division Bench by an order dated 9-1-2003 referred the matter to a three-Judge Bench.

Submissions

5. Mr M.N. Krishnamani, learned Senior Counsel appearing on behalf of the appellants submitted that the High Court as also the first appellate court committed a manifest error in passing the impugned orders insofar as they failed to take into consideration the purport and object of amending old Article 182 by reason of Article 136 of the Act.

6. The learned counsel would contend that in terms of old Article 182 of the Act the date of the final decree or order of the appellate court or the withdrawal thereof would be the starting point for limitation for computing the period in terms thereof but the very fact that now in stead and place of seven different dates specified therefor for filing an execution petition only one date viz. where the decree or order becomes enforceable, is substituted, it must be held that in the absence of any order of stay granted by the appellate court, the date of decree of the trial court/first appellate court would be the enforceable date for the purpose of Article 136 of the Act; as by reason thereof the period of limitation has been enhanced from 3 years to 12 years,

1 (2001) 1 SCC 469

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Mr Krishnamani would contend, Parliament thus intended to provide that the date of the decree of the first appellate court would be the starting period of limitation.

7. In any event, the learned counsel would contend that a second appeal against an appellate decree being entertainable only on limited ground, namely, on a substantial question of law, doctrine of merger will have no application in relation thereto and in that view of the matter, limitation to file an execution application will be deemed to have been running only from 4-1-1974 and not with effect from 18-4-1985.

8. Ms Sandhya Goswami, learned counsel appearing on behalf of the respondents, however, supported the impugned judgment.

Change in law

9. A decree is defined in Section 2(2) of the Code to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. As against a judgment and decree unless otherwise restricted, a first appeal would be maintainable under Section 96 of the Code and a second appeal under Section 100 thereof. A decree within the meaning of Section 2(2) of the Code would be enforceable irrespective of the fact whether it is passed by the trial court, the first appellate court or the second appellate court.

10. Where a statutory appeal is provided for, subject, of course to the restrictions which may be imposed, it is a continuation of suit. It is also not in dispute that when a higher forum entertains an appeal and passes an order on merit, the doctrine of merger applies.

11. Before, however, adverting to the aforementioned doctrine, Article 136 of the Act vis-à-vis Article 182 of the old Limitation Act may be noticed.

12. In the old Limitation Act, not only the date of disposal of the appeal or the withdrawal thereof, but the date of the review of the judgment, the date when the decree which has been amended or other factors specified therein were also considered to be the starting period of limitation. The period provided for execution of a decree under the Act is a statutory one.

13. Under the old Limitation Act, law relating to limitation for execution was to be found in Section 48 of the Code (since repealed) and Articles 182 and 183 thereof.

14. Section 48 of the Code and Article 182 of the old Limitation Act applied to the execution of decrees or orders passed by courts other than those established by Royal Charter and of the Supreme Court whereas Article 183 applied to execution of decrees and orders of courts established by Royal Charter and the Supreme Court. Section 48 of the Code provided for a maximum period of 12 years before the expiry of which any fresh application for execution had to be made. The period of limitation provided under Section 48 of the Code used to be controlled by Articles 182 and 183 of the old Limitation Act. (See *Lalji Raja* v. *Hansraj Nathuram*[2].)

2 (1971) 1 SCC 721 : AIR 1971 SC 974

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15. Section 48 of the Code of Civil Procedure also used to be controlled by Section 15(1) of the old Limitation Act.

16. The substance of Section 48, thus, continues to be the law. It is also trite that the provisions of the Code of Civil Procedure as also the Act have all along been considered to be supplemental to each other. It is also well settled that execution of the decree would mean the enforcement of the decree by what is known as process of execution. All processes and proceedings in aid to or supplemental to execution would come within the meaning of the word "execution" within the meaning of Section 15(1) of the Limitation Act. (See *Anandilal* v. *Ram Narain*[3].)

17. Keeping in view the fact that the first execution petition was maintainable at different stages of same proceedings but the same used to be filed within a period of 12 years under the Code of Civil Procedure and such application was required to be made in a period of 3 years from various points of time as specified in Article 182 of the old Limitation Act, Parliament thought it expedient to carry out an amendment.

18. The reasons for bringing on the statute-book, the present Article 136 may be noticed. By reason of the said amendment, the filing of the execution petition has been simplified and the difficulties faced for computation which used to arise for grant of stay or not have become immaterial. In terms of Article 136 of the Act, thus, a decree can be executed when it becomes enforceable.

19. Article 136 substantially reproduces the provisions of Section 48(1) of the Code of Civil Procedure which by reason of the Act stands repealed. In that view of the matter, Parliament thought it fit to provide for one period of limitation for an application for execution in stead and place governing each of the several execution applications which the decree-holder can make within a period of 12 years.

20. It is not disputed that all decrees, be they original or appellate, are enforceable. Once a decree is sought to be enforced for the purpose of execution thereof irrespective of being original or appellate, the date of the decree or any subsequent order directing any payment of money or delivery of any property at a certain date would be considered to be the starting period of limitation.

21. It is axiomatic true that when a judgment is pronounced by a High Court in exercise of its appellate power upon entertaining the appeal and a full hearing in the presence of both parties, the same would replace the judgment of the lower court and only the judgment of the High Court would be treated as final. (See *U.J.S. Chopra* v. *State of Bombay*[4].)

22. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intent and purport, the suit continues.

3 (1984) 3 SCC 561 : AIR 1984 SC 1383
4 AIR 1955 SC 633 : (1955) 2 SCR 94 : 1955 Cri LJ 1410

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Merger

23. The doctrine of merger is based on the principles of propriety in the hierarchy of the justice-delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject-matter at a given point of time.

24. It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a special leave petition is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does. [See *V.M. Salgaocar and Bros. (P) Ltd.* v. *CIT*[5].]

25. The concept of doctrine of merger and the right of review came up for consideration recently before this Court in *Kunhayammed* v. *State of Kerala*[6] wherein this Court inter alia held that when a special leave petition is disposed of by a speaking order, the doctrine of merger shall apply stating: (SCC p. 383, paras 41-43)

> "*41.* Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.
>
> *42.* 'To merge' means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve

5 (2000) 5 SCC 373 : AIR 2000 SC 1623
6 (2000) 6 SCC 359

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a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. LVII, pp. 1067-68.)

43. We may look at the issue from another angle. The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding a petition for special leave to appeal. What is impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

26. In *Kunhayammed*[6] it was observed: (SCC p. 370, para 12)

"*12*. ... Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

27. The said decision has been followed by this Court in a large number of decisions including *Union of India* v. *West Coast Paper Mills Ltd.*[7]

28. However, when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply. [See *Raja Mechanical Co. (P) Ltd.* v. *CCE*[8].]

***Ratansingh*[1]**

29. In *Ratansingh*[1] possession of a property was obtained on 14-12-1970. The first appeal thereagainst was dismissed on 1-8-1973. Execution petition was filed on 24-3-1988 i.e. beyond the time fixed by the Act. The second appeal preferred by the judgment-debtor was rejected having regard to the fact that the delay in filing the said appeal was not properly explained.

30. Upon analysing when a decree or order becomes enforceable vis-à-vis the definition of "decree" in Section 2(2) of the Code, this Court observed that when a dismissal of an appeal takes place on the ground of its being time-barred, no decree is passed.

31. *Ratansingh*[1] therefore, has no application in this case as admittedly herein the High Court upon dismissal of the second appeal had drawn up a formal decree on 30-10-1986.

32. For the reasons aforementioned, we are of the opinion that no case has been made out for interference with the impugned judgment. There is no merit in this appeal which is dismissed accordingly. No costs.

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7 (2004) 2 SCC 747
8 ILR (2002) 1 Del 33

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29. In this instant case, the charge of conspiracy has not been proved to bring home the charge of conspiracy within the ambit of Section 120-B IPC. It is also settled law that for establishing the offence of cheating, the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or misrepresentation. From his making failure to keep up promise subsequently, such a culpable intention right at the beginning, that is, at the time when the promise was made cannot be presumed. As there was absence of dishonest and fraudulent intention, the question of committing offence under Section 420 IPC does not arise.

30. The High Court without adverting to the above important questions of law involved in this case and examining them in the proper perspective disposed of the revisions in a summary manner and hence the impugned orders passed by the High Court and the learned Magistrate warrant interference.

31. It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable.

32. For the aforesaid discussions and reasons adduced, the questions of law formulated above are answered accordingly and the appeals stand allowed.

(2004) 2 Supreme Court Cases 747

(BEFORE V.N. KHARE, C.J. AND S.B. SINHA AND S.H. KAPADIA, JJ.)

UNION OF INDIA AND OTHERS .. Appellants;

Versus

WEST COAST PAPER MILLS LTD. AND ANOTHER .. Respondents.

Civil Appeals Nos. 1061-62 of 1998†, decided on February 5, 2004

A. Limitation Act, 1963 — S. 3 — Starting point of limitation — Railway Rates Tribunal holding the revised rate of freight to be unreasonable — Special leave granted but ultimately appeal dismissed — In such circumstances, notwithstanding the finality of the Tribunal's decision in terms of S. 46-A, Railways Act, 1890, the starting point of limitation for filing a suit to recover the excess amount of freight paid, held, was the date of the Supreme Court's order and not the date of the Tribunal's judgment — Doctrine of merger and the principle that an appeal is in continuation of suit, taken into consideration — Stay of judgment appealed against inconsequential once Supreme Court grants special leave — *F.K. Kutty Anuja Raja case*, (1996) 2 SCC 496, held, not good law — Constitution of India — Art. 136 — Grant/Dismissal of SLP — Grant of SLP — Effect — Civil Procedure Code, 1908, Ss. 96 and 100 — Railways Act, 1890, S. 46-A — Administrative Law — Administrative bodies — Administrative Tribunal — Merger of decision of, in appellate order

† From the Judgment and Order dated 26-2-1996 of the Karnataka High Court in RFAs Nos. 1450-51 of 1986

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B. **Constitution of India — Art. 136 — Generally — Nature and scope of jurisdiction under Art. 136 — Once special leave is granted and the appeal is admitted, held, the correctness or otherwise of the impugned judgment is in jeopardy — In such an appeal the Supreme Court, held, is entitled to go into both questions of fact as well as law**

C. **Constitution of India — Art. 136 — Questions of fact — Supreme Court's power to go into**

D. **Limitation Act, 1963 — S. 3 — Manner of interpretation of — Notwithstanding the rigours of S. 3, held, it should be construed in a broad-based and liberal manner — Interpretation of Statutes — Basic rules — Liberal interpretation — Applicability**

E. **Limitation Act, 1963 — Ss. 14 and 15 — Applicability — Railway Rates Tribunal declaring the enhanced rate of freight to be illegal — Freight-payer company filing a writ petition seeking refund of the excess freight charged from it — High Court relegating the Company to the remedy of suit — Company filing a suit accordingly — In such circumstances the courts below rightly held the plaintiff Company to be entitled to benefits of Ss. 14 & 15**

F. **Limitation Act, 1963 — Art. 113 or Art. 58 — Suit for recovery of excess amount of freight on the basis of Railway Rates Tribunal's judgment declaring that the amount of freight charged from the plaintiff was illegal — Such suit whether governed by Art. 113 or Art. 58**

The respondent herein used to transport its goods by rail. The rate of freight was revised w.e.f. 1-12-1964. At the instance of the respondent, the Railway Rates Tribunal, by a judgment dated 18-4-1966, declared the revised rates as unreasonable. The Supreme Court while granting special leave to the Railways to appeal, refused to grant stay and passed a limited interim order. Ultimately, it dismissed the special leave petition. On 5-1-1972, the respondent filed a writ petition which was dismissed on the ground of availability of the remedy of suit. The respondent then filed two suits on 12-12-1973 and 18-4-1974 for refund of the excess amount collected by the defendant Railways for the period 24-6-1963 to 1-2-1964 and 1-2-1964 to 18-4-1966 with interest accrued thereupon. Under the provisions of the Railways Act as then existing, the Tribunal was entitled only to make a declaration to the effect that the freight charged was unreasonable or excessive. It did not have any jurisdiction to execute its own order. Before the trial court, the defendant Railways contended that since despite the pendency of SLP no stay had been granted by the Supreme Court, the suits filed beyond the three years' limitation period under Article 58, Limitation Act, 1963 from the date of the Tribunal's judgment, i.e., 18-4-1966, were time-barred. However, taking the view that the plaintiff-respondent was entitled to benefit of Sections 14 and 15 of the Limitation Act, the trial court held that the suits were within limitation. The High Court affirmed that view. The Union of India then filed the instant appeal, which came up before a Division Bench. Doubting the correctness of the decision in *P.K. Kutty Anuja Raja case*, (1996) 2 SCC 496, the Division Bench referred the matter to the present three-Judge Bench. Before the present Bench the appellant reiterated the plea of limitation. It added that since in terms of Section 46-A of the Railways Act, the judgment of the Tribunal was final, the starting period of limitation for filing the suit would be three years from the date of the Tribunal's judgment. On the other hand, the respondent-plaintiff submitted

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that having regard to the fact situation of the present case, Article 113 and not Article 58 of the Limitation Act was applicable. That in view of grant of special leave and passing of the interim order by the Supreme Court, the judgment of the Tribunal was in jeopardy and had not attained finality. The respondent-plaintiff added that applying the doctrine of merger, the period of limitation would begin to run from the date of passing the appellate decree and not from the date of passing of the original decree.

Overruling *P.K. Kutty case*, and directing the matter to be placed before an appropriate Bench for disposal of the appeals on merits, the three-Judge Bench

Held :

Although by reason of Section 46-A of the Railways Act the judgment of the Tribunal might be final but by reason thereof the jurisdiction of the Supreme Court to exercise its power under Article 136 was not and could not have been excluded. (Para 13)

Once special leave is granted under Article 136 and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy. (Para 14)

Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal. (Para 15)

The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by the Supreme Court. The respondent herein filed a writ petition which was not entertained on the ground of availability of the remedy of suit. The respondents were, thus, also entitled to get the period during which the writ petition was pending, excluded for computing the period of limitation. Therefore, the civil suit was filed within the limitation period. (Para 16)

The trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefit of Sections 14 and 15 of the Limitation Act, 1963. There is no reason to take a different view. (Para 18)

As regards the applicability of Article 58 or 113, the present case was not one where the respondent sought a declaration of its rights. The declaration sought for by it as regards unreasonableness in the levy of freight was granted by the Tribunal. (Para 20)

Moreover, the distinction between Article 58 and Article 113 is apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose. The fact that the suit was not filed by the plaintiff-respondent claiming existence of any legal right in itself is not disputed. The suit for recovery of money was based on the declaration made by the Tribunal to the effect that the amount of freight charged by the appellant was unreasonable. Therefore, a cause of action arose only when its right was finally determined by the Supreme Court and not prior thereto. The Supreme

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Court not only granted special leave but also considered the decision of the Tribunal on merit. (Paras 21 and 22)

Despite the rigours of Section 3 of the Limitation Act, 1963, the provisions thereof are required to be construed in a broad-based and liberal manner. (Para 26)

In *P.K. Kutty case*, (1996) 2 SCC 496 and *Mohinder Singh Jagdev case*, (1996) 6 SCC 229 no argument was advanced as regards the applicability of doctrine of merger. The ratio laid down by the Constitution Benches of the Supreme Court had also not been brought to the Court's notice. In the said cases, the Supreme Court failed to take into consideration that once an appeal is filed before the Supreme Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject-matter of the lis unless determined by the last court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once the Supreme Court grants special leave and decides to hear the matter on merit. (Paras 40 and 41)

Even under the ordinary civil law the judgment of the appellate court alone can be put to execution. Having regard to the doctrine of merger as also the principle that an appeal is in continuation of suit, it is held that the decision of the Constitution Bench in *S.S. Rathore*, (1989) 4 SCC 582 was to be followed in the instant case. (Para 42)

Therefore, it is held that *P.K. Kutty* does not lay down the law correctly and is overruled accordingly. (Para 44)

P.K. Kutty Anuja Raja v. *State of Kerala*, (1996) 2 SCC 496, *overruled*

S.S. Rathore v. *State of M.P.*, (1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913; *Kunhayammed* v. *State of Kerala*, (2000) 6 SCC 359, *followed*

Secy., Ministry of Works & Housing v. *Mohinder Singh Jagdev*, (1996) 6 SCC 229, *overruled on this point* and *also distinguished on facts*

Juscurn Boid v. *Pirthichand Lal*, (1918-19) 46 IA 52 : AIR 1918 PC 151, *limited*

Maqbul Ahmad v. *Onkar Pratap Narain Singh*, AIR 1935 PC 85 ; 62 IA 16, *distinguished*

Madan Gopal Rungta v. *Secy. to the Govt. of Orissa*, AIR 1962 SC 1513 : 1962 Supp (3) SCR 906; *Collector of Customs* v. *East India Commercial Co. Ltd.*, AIR 1963 SC 1124 : (1963) 2 SCR 563; *Somnath Sahu* v. *State of Orissa*, (1969) 3 SCC 384; *Mohd. Quaramuddin* v. *State of A.P.*, (1994) 5 SCC 118 : 1994 SCC (L&S) 1039 : (1994) 27 ATC 814; *Raja Mechanical Co. (P) Ltd.* v. *CCE*, (2002) 4 AD (Del) 621; *STO* v. *Kanhaiya Lal Makund Lal Saraf*, AIR 1959 SC 135, *referred to*

Sita Ram Goel v. *Municipal Board, Kanpur*, AIR 1958 SC 1036 : 1959 SCR 1148; *State of U.P.* v. *Mohd. Nooh*, AIR 1958 SC 86 : 1958 SCR 595, *held, not good law*

Corpus Juris Secundum, Vol. 57, pp. 1067-68, *referred to*

Suggested Case Finder Search Text (*inter alia*) :

limitation near (start* or commence*)

H-M/AETZ/29613/C

Advocates who appeared in this case :

P.P. Malhotra, Senior Advocate (S.A. Matoo, S. Wasim A. Qadri, S.N. Terdal and Arvind Kr. Sharma, Advocates, with him) for the Appellants;

Harish N. Salve and Kailash Vasdev, Senior Advocates (Prateek Kumar, Ms Gayatri Goswami and Ms V.D. Khanna, Advocates, with them) for the Respondents.

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2. (2000) 6 SCC 359, *Kunhayammed* v. *State of Kerala* 753*d-e*, 755*a-b*, 757*b*
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14. (1918-19) 46 IA 52 : AIR 1918 PC 151, *Juscurn Boid* v. *Pirthichand Lal* 753*b*, 757*b-c*

The Judgment of the Court was delivered by

S.B. SINHA, J.— Doubting the correctness of a two-Judge Bench decision of this Court in *P.K. Kutty Anuja Raja* v. *State of Kerala*[1] a Division Bench of this Court has referred the matter to a three-Judge Bench.

2. The factual matrix required to be taken note of is as under:

The respondents herein were transporting their goods through the branch line to the appellants from Alnavar to Dandeli wherefor the common rate fixed in respect of all commodities on the basis of weight was being levied as freight. However, a revision was made in the rate of freight w.e.f. 1-2-1964.

3. Aggrieved thereby and dissatisfied therewith, the respondents herein filed a complaint petition before the Railway Rates Tribunal (hereinafter referred to as "the Tribunal") challenging the same as unjust, unreasonable and discriminatory as the standard telescopic class rates on three times of inflated distance were adopted for levy of freight on goods traffic. The Tribunal by a judgment dated 18-4-1966 declared the said levy as unreasonable whereagainst the appellants herein filed an application for grant of special leave before this Court.

4. While granting special leave, this Court also passed a limited interim order which is in the following terms:

> "The Railways may charge the usual rates without inflation of the distance, and the respondent will give a bank guarantee to the satisfaction of the Registrar of this Court for rupees two lakhs to be renewed each

1 (1996) 2 SCC 496 : JT (1996) 2 SC 167

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year until the disposal of the appeal. One month's time allowed for furnishing the bank guarantee. The stay petition is dismissed subject to the above."

5. Eventually, however, the said special leave petition was dismissed by this Court on 14-10-1970†.

6. A writ petition was filed by the respondent herein on 5-1-1972 which was marked as WP No. 210 of 1972, and the same was disposed of by the High Court on 29-10-1973 observing:

> "All these matters, in my opinion, cannot be properly adjudicated upon in a writ petition filed under Article 226 of the Constitution. If so advised the petitioner could avail of the ordinary remedy of filing a suit for appropriate relief. If such a suit is filed, it will be open to the respondents to raise all available contentions in defence just as it is open to the petitioner to raise all available contentions in support of its claim. Having considered all relevant aspects, I am of the opinion, that this is a case where I should decline to exercise my discretion under Article 226 of the Constitution.
>
> Subject to the aforesaid observations, this writ petition is dismissed."

7. Two suits thereafter were filed by the respondents on 12-12-1973 and 18-4-1974 which were renumbered later on as OSs Nos. 38 and 39 of 1982.

8. A contention that the said suits were barred by limitation was raised by the appellants herein stating that the cause of action for filing the same arose immediately after the judgment was passed by "the Tribunal" on 18-4-1966 and, thus, in terms of Article 58 of the Limitation Act, 1963, they were required to be filed within a period of three years from the said date, as despite the fact that the special leave petition was preferred thereagainst, no stay had been granted by this Court and, thus, the period, during which the matter was pending before this Court, would not be excluded in computing the period of limitation. Having regard to the plea raised by the plaintiff-respondent in the aforementioned suits as regards the applicability of Sections 14 and 15 of the Limitation Act, 1963, the trial court held that the suits had been filed within the stipulated period. The High Court in appeal also affirmed the said view.

9. Mr P.P. Malhotra, learned Senior Counsel appearing on behalf of the appellant, at the outset drew our attention to the fact that the Union of India has already complied with the direction of "the Tribunal" by refunding the excess freight charged from the respondent for the period 18-4-1966 to 25-9-1966. The learned counsel, however, would contend that the suit for refund of excess amount of the freight for the disputed periods (*a*) 24-6-1963 to 1-2-1964, and (*b*) 1-2-1964 to 18-4-1966 was barred by limitation in terms of Article 58 of the Limitation Act, 1963, as the cause of action for filing the suit had arisen on the date on which such declaration was made by "the Tribunal".

† *Union of India* v. *West Coast Paper Mills Ltd.*, (1970) 3 SCC 606

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10. Mr Malhotra would further contend that in absence of an order staying the operation of the judgment, it became enforceable and, thus, the plaintiff-respondent was required to file the suit within the period of limitation specified therefor. Furthermore, the learned counsel would urge that in terms of Section 46-A of the Indian Railways Act, the judgment of the Tribunal being final, the starting period of limitation for filing the suit would be three years from the said date. Strong reliance in this behalf has been placed on *Juscurn Boid* v. *Pirthichand Lal*[2], *P.K. Kutty*[1], *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*[3] and *Secy., Ministry of Works & Housing* v. *Mohinder Singh Jagdev*[4].

11. Mr Harish N. Salve, learned Senior Counsel appearing on behalf of the respondents, on the other hand, would submit that having regard to the fact situation obtaining in this case Article 113 of the Limitation Act shall apply and not Article 58 thereof. The learned counsel would urge that as admittedly this Court granted special leave to appeal in favour of the appellants and passed a limited interim order, the judgment of the Tribunal was in jeopardy and, thus, cannot be said to have attained finality. Furthermore, the learned counsel would submit that when the doctrine of merger applies, the period of limitation would begin to run from the date of passing the appellate decree and not from the date of passing of the original decree. In support of the said contention, reliance has been placed on a decision of this Court in *Kunhayammed* v. *State of Kerala*[5].

12. The plaintiff in this case has filed a suit for refund of the excess amount collected by the defendant Railways for the period 24-6-1963 to 1-2-1964 and 1-2-1964 to 18-4-1966 with interest accrued thereupon. It is not in dispute that in terms of the provisions of the Indian Railways Act, as thence existing "the Tribunal" was only entitled to make a declaration to the effect that the freight charged was unreasonable or excessive. It did not have any jurisdiction to execute its own order.

13. It may be true that by reason of Section 46-A of the Indian Railways Act the judgment of the Tribunal was final but by reason thereof the jurisdiction of this Court to exercise its power under Article 136 of the Constitution of India was not and could not have been excluded.

14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a court or tribunal. Once a special leave is granted and the appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

2 (1918-19) 46 IA 52 : AIR 1918 PC 151
3 AIR 1935 PC 85 : 62 IA 16
4 (1996) 6 SCC 229
5 (2000) 6 SCC 359

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15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal.

16. The starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of the order passed by this Court. It is also not in dispute that the respondent herein filed a writ petition which was not entertained on the ground stated hereinbefore. The respondents were, thus, also entitled to get the period during which the writ petition was pending, excluded for computing the period of limitation. In that view of the matter, the civil suit was filed within the prescribed period of limitation.

17. The trial Judge as also the High Court have recorded a concurrent opinion that the respondents were entitled to the benefits of Sections 14 and 15 of the Limitation Act, 1963. We have no reason to take a different view.

18. It is beyond any cavil that in the event the respondent was held to have been prosecuting its remedy bona fide before an appropriate forum, it would be entitled to get the period in question excluded from computation of the period of limitation.

19. Articles 58 and 113 of the Limitation Act read thus:

	Description of suit	*Period of limitation*	*Time from which period begins to run*
58.	To obtain any other declaration.	Three years	When the right to sue first accrues.
	*	*	*
113.	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

20. It was not a case where the respondents prayed for a declaration of their rights. The declaration sought for by them as regards unreasonableness in the levy of freight was granted by the Tribunal.

21. A distinction furthermore, which is required to be noticed is that whereas in terms of Article 58 the period of three years is to be counted from the date when "the right to sue first accrues", in terms of Article 113 thereof, the period of limitation would be counted from the date "when the right to sue accrues". The distinction between Article 58 and Article 113 is, thus, apparent inasmuch as the right to sue may accrue to a suitor in a given case at different points of time and, thus, whereas in terms of Article 58 the period of limitation would be reckoned from the date on which the cause of action arose first, in the latter the period of limitation would be differently computed depending upon the last day when the cause of action therefor arose.

22. The fact that the suit was not filed by the plaintiff-respondent claiming existence of any legal right in itself is not disputed. The suit for recovery of money was based on the declaration made by "the Tribunal" to the effect that the amount of freight charged by the appellant was

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unreasonable. It will bear repetition to state that a plaintiff filed a suit for refund and a cause of action therefor arose only when its right was finally determined by this Court and not prior thereto. This Court not only granted special leave but also considered the decision of the Tribunal on merit.

23. In *Kunhayammed*[5] this Court held: (SCC p. 370, para 12)

> "*12.* The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way — whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view."

It was further observed: (SCC p. 383, paras 41-42)

> "*41.* Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.
>
> *42.* 'To merge' means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve

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a loss of identity and individuality. (See *Corpus Juris Secundum*, Vol. 57, pp. 1067-68.)"

[See also *Raja Mechanical Co. (P) Ltd.* v. *CCE*[6].]

24. The question as regards applicability of merger with reference to the provisions for departmental appeal and revision had first been considered by this Court in *Sita Ram Goel* v. *Municipal Board, Kanpur*[7] stating: (AIR p. 1040, para 19)

"*19.* The initial difficulty in the way of the appellant, however, is that departmental enquiries even though they culminate in decisions on appeals or revision cannot be equated with proceedings before the regular courts of law."

25. However, the said view was later on not accepted to be correct.

26. Despite the rigours of Section 3 of the Limitation Act, 1963, the provisions thereof are required to be construed in a broad-based and liberal manner. We need not refer to the decisions of this Court in the matter of condoning delay in filing appeal or application in exercise of its power under Section 5 of the Limitation Act.

27. In *State of U.P.* v. *Mohd. Nooh*[8] Vivian Bose, J. held that justice should be done in a common-sense point of view stating: (AIR pp. 95-96, para 17)

"*17.* I see no reason why any narrow or ultra-technical restrictions should be placed on them. Justice should, in my opinion, be administered in our courts in a common-sense liberal way and be broad-based on human values rather than on narrow and restricted considerations hedged round with hair-splitting technicalities."

28. However, in that case also a distinction was sought to be made between a judgment of a "court" and "tribunal".

29. In *S.S. Rathore* v. *State of M.P.*[9] noticing the earlier Constitution Benches' decisions of this Court in *Mohd. Nooh*[8], *Madan Gopal Rungta* v. *Secy. to the Govt. of Orissa*[10], *Collector of Customs* v. *East India Commercial Co. Ltd.*[11] as well as the three-Judge Bench of this Court in *Somnath Sahu* v. *State of Orissa*[12] this Court observed: (SCC p. 589, para 14)

"*14.* The distinction adopted in *Mohd. Nooh case*[8] between a court and a tribunal being the appellate or the revisional authority is one without any legal justification. Powers of adjudication ordinarily vested in courts are being exercised under the law by tribunals and other constituted authorities. In fact, in respect of many disputes the

6 (2002) 4 AD (Del) 621
7 AIR 1958 SC 1036 : 1959 SCR 1148
8 AIR 1958 SC 86 : 1958 SCR 595
9 (1989) 4 SCC 582 : 1990 SCC (L&S) 50 : (1989) 11 ATC 913
10 AIR 1962 SC 1513 : 1962 Supp (3) SCR 906
11 AIR 1963 SC 1124 : (1963) 2 SCR 563
12 (1969) 3 SCC 384

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jurisdiction of the court is now barred and there is a vesting of jurisdiction in tribunals and authorities. That being the position, we see no justification for the distinction between courts and tribunals in regard to the principle of merger. On the authority of the precedents indicated, it must be held that the order of dismissal made by the Collector did merge into the order of the Divisional Commissioner when the appellant's appeal was dismissed on 31-8-1966."

30. *Rathore case*[9] was followed in *Mohd. Quaramuddin* v. *State of A.P.*[13] and noticed in *Kunhayammed*[5].

31. We may now, keeping in view the law laid down by this Court, as noticed hereinbefore, consider the decisions relied upon by Mr Malhotra.

32. In *Juscurn Boid*[2] the question which arose for consideration was as to in a suit for recovery of the purchase money paid for sale of a *patni taluk* under Bengal Regulation 8 of 1819, which had been set aside, what would be the date when cause of action therefor can be said to have arisen?

33. In that case several suits were filed. The sale was reversed in its entirety in the first suit. Stay was not granted in the other suits. In the peculiar fact situation obtaining therein it was held that under the Indian law and procedure when an original decree is not questioned by presentation of an appeal nor is its operation interrupted, where the decree on appeal is one of dismissal, the running of the period of limitation did not stop.

34. In *Maqbul Ahmad*[3] the question which arose for consideration was as to whether subsequent to the passing of a preliminary decree in the mortgage suit, an application to obtain execution under the preliminary decree can be dismissed. In that case a preliminary mortgage decree was obtained on 7-5-1917 which was amended in some respects on 22-5-1917. Some of the mortgagors who were interested in different villages comprised in the mortgage, appealed to the High Court against the preliminary decree. Two such appeals were filed. One appeal succeeded while the other failed. The decrees of the High Court disposing of those appeals were made on 7-6-1920 whereafter the decree-holder proceeded to seek execution under the preliminary decree. In the aforementioned situation, it was held: (AIR p. 87)

> "It is impossible to say, apart from any other objection, that the application to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. That being so, it is not permissible, on the basis of Section 14 in computing the period of limitation prescribed, to exclude that particular period."

35. The question which falls for consideration in this case did not arise therein.

36. Before we advert to *P.K. Kutty*[1] we may notice another decision of this Court in *STO* v. *Kanhaiya Lal Makund Lal Saraf*[14]. In that case an order

13 (1994) 5 SCC 118 : 1994 SCC (L&S) 1039 : (1994) 27 ATC 814
14 AIR 1959 SC 135

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of assessment was in question which came up before this Court. The question which arose for consideration therein was as to whether Section 72 of the Indian Contract Act had any application. This Court held that cause of action for filing the suit for recovery would arise from the date when such payment of tax made under a mistake of law became known to the party.

37. In *P.K. Kutty*[1] an order of assessment under the Agricultural Income Tax was set aside by the High Court by a judgment dated 1-1-1968. A civil suit was filed in the year 1974. The suit was held to be barred by limitation. A contention was raised therein that the appellant had discovered the mistake on 5-10-1971 when the Court dismissed the appeal filed by the State against the order passed by the High Court dated 1-1-1968. This Court negatived the said plea stating: (SCC p. 497, para 3)

> "3. ... We are unable to agree with the learned counsel. It is not in dispute that at his behest the assessment was quashed by the High Court in the aforesaid OP on 1-1-1968. Thereby the limitation started running from that date. Once the limitation starts running, it runs its full course until the running of the limitation is interdicted by an order of the Court."

38. Distinguishing *Kanhaiya Lal*[14], it was observed: (SCC pp. 497-98, para 5)

> "5. ... We do not have that fact situation in this case. The appellant is a party to the proceedings and at his instance the assessment of agricultural income tax was quashed as referred to hereinbefore and having had the assessment quashed the cause of action had arisen to him to lay the suit for refund unless it is refunded by the State. The knowledge of the mistake of law cannot be countenanced for extended time till the appeal was disposed of unless, as stated earlier, the operation of the judgment of the High Court in the previous proceedings were stayed by this Court."

39. In *Mohinder Singh Jagdev*[1] also this Court held: (SCC p. 232, para 7)

> "7. The crucial question is whether the suit is barred by limitation? Section 3 of the Limitation Act, 1963 (for short, 'the Act') postulates that the limitation can be pleaded. If any proceedings have been laid after the expiry of the period of limitation, the court is bound to take note thereof and grant appropriate relief and has to dismiss the suit, if it is barred by limitation. In this case, the relief in the plaint, as stated earlier, is one of declaration. The declaration is clearly governed by Article 58 of the Schedule to the Act which envisages that to obtain 'any other' declaration the limitation of three years begins to run from the period when the right to sue 'first accrues'. The right to sue had first accrued to the respondent on 10-9-1957 when the respondent's services came to be terminated. Once limitation starts running, until its running of limitation has been stopped by an order of the competent civil court or any other competent authority, it cannot stop. On expiry of three years from the date of dismissal of the respondent from service, the respondent had lost his right to sue for the above declaration."

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40. Unfortunately in *P.K. Kutty*[1] and *Mohinder Singh Jagdev*[4] no argument was advanced as regards the applicability of doctrine of merger. The ratio laid down by the Constitution Benches of this Court had also not been brought to the Court's notice.

41. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject-matter of the lis unless determined by the last court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit.

42. It has not been and could not be contended that even under the ordinary civil law the judgment of the appellate court alone can be put to execution. Having regard to the doctrine of merger as also the principle that an appeal is in continuation of suit, we are of the opinion that the decision of the Constitution Bench in *S.S. Rathore*[9] was to be followed in the instant case.

43. The facts obtaining in *Mohinder Singh Jagdev*[4] being totally different, the same cannot be said to have any application in the facts obtaining in the present case.

44. We, therefore, are of the opinion that *P.K. Kutty*[1] does not lay down the law correctly and is overruled accordingly.

45. The matter may now be placed before an appropriate Bench for disposal of the appeals on merits.

(2004) 2 Supreme Court Cases 759

(BEFORE V.N. KHARE, C.J. AND S.B. SINHA AND G.P. MATHUR, JJ.)

RAM PHAL KUNDU .. Appellant;

Versus

KAMAL SHARMA .. Respondent.

Civil Appeal No. 4262 of 2003†, decided on January 23, 2004

A. Election — Nomination — Two candidates claiming to have been set up by the same political party — Whether candidature of one of them was validly rescinded and the other candidate was substituted by the party and as such nomination of the other candidate was rightly accepted — Held, must be determined strictly in accordance with paras 13 and 13-A of Election Symbols (Reservation and Allotment) Order, 1968 — Any extrinsic evidence (oral or documentary) adduced subsequent to the last date of filing nomination papers, held, cannot be accepted, except where it is pleaded that signature of the authorised person in Form B showing rescission and substitution had been obtained under threat or by fraud — Election

† From the Judgment and Order dated 8-5-2003 of the Punjab and Haryana High Court in EP No. 15 of 2000 : (2003) 3 Recent Civil Rulings 478

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Civil Appeal No. 10442 of 2011

Shanthi v. T.D. Vishwanathan

2018 SCC OnLine SC 2196

IN THE SUPREME COURT OF INDIA

(BEFORE N.V. RAMANA AND MOHAN M. SHANTANAGOUDAR, JJ.)

Shanthi ..... Appellant;

v.

T.D. Vishwanathan and Others ..... Respondents.

Civil Appeal No. 10442 of 2011

Decided on October 24, 2018

ORDER

1. This appeal is directed against the judgment dated 22.01.2007, passed by the learned Single Judge of the High Court of Judicature at Madras in C.R.P. (NPD) No. 1829 of 2006. By the impugned judgment, the High Court while dismissing the revision petition has confirmed the orders of the Executing Court dated 1.11.2006 in E.A. No. 3570 of 2006 in E.P. No. 249 of 2006 in O.S. No. 649 of 1977.

2. The suit was filed by the plantiffs/respondents for recovery of possession and arrears of rent against the defendant/appellant herein.

3. The appellant was a tenant of the respondents. The property in question is a residential house. The Trial Court, the first Appellate Court and the High Court have concurrently concluded that the plantiff is entitled to get possession of the suit property and arrears of rent. Thus, the suit was decreed against the tenant by such concurring judgments. Thereafter, an execution petition was filed in 2006 for executing the decree.

4. The only question raised by the learned advocate for the appellant in this appeal is that the execution petition filed in the year 2006 is barred by limitation inasmuch as the same was not filed within 12 years from the date of the judgment of the Trial Court, i.e., dated 14.08.1981.

5. In sum and substance, the case of the appellant is that the execution petition ought to have been filed within 12 years from the date of the judgment of the Trial Court without waiting for the decision of the First Appellate Court or the Second Appellate Court. He has also submitted that there is no interim order granted by the First Appellate Court and the Second Appellate Court. There was no hurdle for the respondents to file the execution petition within the prescribed period of limitation after the judgment of the Trial Court. It is submitted by the decree holder that the decree of the Trial Court and the first Appellate Court have merged in the decree of the High Court passed in second appeal. It is further submitted that the order of stay was operating in favour of the judgment debtor/debtor during the pendency of the appeals and hence the judgment debtor continued in possession.

6. It is not in dispute that the execution petition has been filed within time from the date of the judgment of the High Court. The High Court dismissed the second appeal on 30.12.2003. The execution petition was filed in July 2006. Thus, undisputedly, the execution petition was within the period of limitation from the date of the judgment of the High Court.

7. The aforementioned question raised by the learned advocate for the appellant is no more *res-integra*, inasmuch as the very question is decided by a Three Judge Bench

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of this Court, in the case of *Chandi Prasad* v. *Jagdish Prasad*, (2004) 8 SCC 724, wherein it was observed that in terms of Article 136, Limitation Act 1963, a decree can be executed when it becomes enforceable. A decree is defined in Section 2(2) CPC, 1908 to mean the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. A decree within the meaning of Section 2(2) of the CPC would be enforceable irrespective of whether it is passed by the Trial Court, the First Appellate Court or the Second Appellate Court. When an appeal is prescribed under a statute and the appellate forum is invoked and entertained, for all intents and purposes, the suit continues. When a higher forum entertains an appeal and passes an order on merit, the doctrine of merger would apply. The doctrine of merger is based on the principles of the propriety in the hierarchy of the justice delivery system. The doctrine of merger does not make a distinction between an order of reversal, modification or an order of confirmation passed by the appellate authority. The said doctrine postulates that there cannot be more than one operative decree governing the same subject matter at a given point of time.

8. Since the judgment of the Trial Court was affirmed by the First Appellate Court and was further affirmed by the Second Appellate Court, the decree passed by the High Court becomes enforceable in view of the doctrine of merger. Hence, in our considered view, the execution petition filed by the plantiffs/respondents is within time, consequently the appeal fails and stands dismissed.

———

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raiyat and the rent is payable in kind, as indicated in S. 40 of the Bengal Tenancy Act.

V. B./R. K.

Appeal partly allowed; Case remanded.

A. I. R. 1916 Calcutta 751

MOOKERJEE AND BEACHCROFT, JJ.

Brojendra Kishore Roy Chowdhury and *others*—Plaintiffs—Appellants.

v.

Bharat Chandra Roy and *others*—Defendants—Respondents.

Second Appeals Nos. 1748 and 2023 of 1912, decided on 2nd August, 1915, against the Decrees of Dist.-Judge, Sylhet, dated 19th April, 1912.

(a) Limitation Act (9 of 1908), S. 23 and Sch. I, Arts. 120 and 142—Property attached under S. 146, Criminal P. C.—Suit for possession and declaration of title—Continuing wrong—Limitation.

The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants. Proceedings were instituted under S. 145 of the Criminal Procedure Code and the Magistrate being unable to satisfy himself as to which of the parties was in possession of the subject of dispute, attached it under S. 146 of the Criminal Procedure Code on the 25th April, 1902. In 1909 two suits were instituted by two sets of plaintiffs for declaration of their title and for recovery of possession. The plaintiffs were found to have been in possession, when, on the 25th April, 1902, the property was attached by order of the Magistrate:

Held, that the suits, though framed as suits for possession, could not be treated as such and were not governed by Art. 142 of the Limitation Act. [P. 753, C. 1]

Held, further that the suits were for declaration of title under S. 42 of the Specific Relief Act and there was continuing wrong independent of contract within the meaning of S. 23 of the Limitation Act and that consequently a fresh period of Limitation under Art. 120 of the Limitation Act began to run at every moment of the time the wrong continued, and the suits were, therefore, not barred by time.

[P. 753, C. 2 & P. 754, C. 1.]

(b) Words and phrases—Dispossession—Meaning of.

Semble.—Dispossession implies the coming in of a person and the depriving out of another from possession. [P. 752, C. 2.]

(c) Words and phrases—Discontinuance of possession—Meaning of.

Discontinuance of possession implies the going out of the person in possession and his being followed into possession by another.

[P. 752, C. 2.]

(d) Limitation Act (9 of 1908), S. 142—Property attached under S. 146, Criminal P. C.—Attachment does not amount to either dispossession or discontinuance of possession—Criminal P. C. (1898), S. 146.

If the seisin or legal possession is, during the attachment of a property under S. 146 of the Criminal Procedure Code, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession within the meaning of Article 142 of the Limitation Act.

[P. 752, C. 2.]

(e) Civil P. C. (5 of 1908), O. 2, R. 2—Cause of action—Continuing injury—Fresh cause of action *de die in diem*.

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*.

[P. 754, C. 1 & 2.]

(f) Specific Relief Act (1 of 1877), S. 42—Property attached by Magistrate under S. 146, Criminal P. C.—Suit against Magistrate not maintainable—Criminal P. C. (1898), S. 146.

No action can be brought against a Magistrate for recovery of possession of a property attached by him under S. 146, Criminal Procedure Code. [P. 752, C. 2.]

Dwarka Nath Chakrabarty, Ramani Mohan Chatterjee Tara Kishore Chaudhuri and *Broja Lal Chakrabarty*—for Appellants.

Gopal Chandra Das—for Respondents.

Judgment.—The events antecedent to the litigations, which have culminated in the present appeals, are no longer in controversy and may be briefly recited. The plaintiffs claimed title to the disputed property by purchase at a sale in execution of a mortgage-decree. They took possession, but were resisted by the defendants, and a breach of the peace became imminent. Proceedings were consequently instituted under S. 145 of the Criminal Procedure Code; but as the Magistrate was unable to satisfy himself as to which of the parties was in possession of the subject of dispute, he attached it under S. 146 of the Criminal Procedure Code, until a competent Court should determine the rights of the parties thereto or the person entitled to possession thereof. This order was made on the 25th April 1902. On the 3rd July and 11th October, 1909 these suits were instituted by the two sets of plaintiffs who claim respectively an eight-annas and a five-annas share of the property, for declaration of their title and for recovery of possession. The Courts below have concurrently found that the plaintiffs have fully proved their title, and that the defendants have no case on the merits. The Courts below have also

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found that the plaintiffs were in possession when on the 25th April, 1902, the property was attached by order of the Magistrate. But while the trial Court held that the claims were not barred by limitation, as the plaintiffs were in possession within twelve years of the suit, the lower Appellate Court has concluded on the authority of the decision in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) that the suits are barred by limitation, as they have been instituted more than six years after the order of the Magistrate. The result of this divergence of opinion has been that the District Judge has reversed the decrees of the Subordinate Judge and has dismissed the suits, although he has found that the plaintiffs have established their title. The plaintiffs have now appealed to this Court and have impugned the correctness of the view adopted by the District Judge. The question, consequently, arises, what is the period of limitation, if any, applicable to a suit for determination of the rights of the parties to an order under S. 146 of the Criminal Procedure Code, where it is found that the party who is the rightful owner was in possession when the property was attached by the Magistrate. Three alternative views have been placed before us for consideration, *viz.*, *first*, that the suit is in essence for recovery of possession of immovable property, and must under Article 142 of the Schedule to the Indian Limitation Act be instituted within twelve years from the date of the order of the Magistrate; *secondly*, that the suit is in substance for declaration of title to immovable property, and must, under Article 120, be instituted within six years from the date of the order of the Magistrate when the right to sue accrues; and *thirdly*, that the suit is for declaration of title to land but that there is no bar of limitation applicable, as under S. 23 a fresh period of limitation begins to run at every moment of the time during which the attachment continues. If the first or the third view is adopted, these suits are not barred by limitation, while the suits must be deemed barred if the second alternative is accepted.

As regards the *first* possible point of view, it is clear that no action can be brought against the Magistrate for recovery of possession. In the words of Lord Morris in *Khagendra Narain Chowdhry* v. *Matangini Debi* (2), the Magistrate is in the position of a stake-holder, or, as was said in *Ramaswamy Aiyar* v. *Muthusamy Aiyar* (3), when the property is attached, it passes into legal custody, and during the continuance of the attachment, such custody must be held to be for the benefit of the true owner: *Beni Prasad* v. *Shahzada Ojha* (4) and *Kara Singh* v. *Bakar Ali Khan* (5). It is further plain that there is no cause of action against the Magistrate, as he has acted in the exercise of his statutory powers. The suit must, consequently, be brought against the rival claimant, but obviously the suit cannot be framed as one for recovery of possession of the disputed land from him, as he is admittedly not in possession. The plaintiff may have been deprived of possession, but he cannot aptly be said to have been dispossessed, or, to have discontinued possession within the meaning of Article 142 of the Indian Limitation Act. Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another. These elementary principles are deducible from the decision of the Judicial Committee in *Trustees and Agency Company* v. *Short* (6) and *Secretary of State* v. *Krishnamoni Gupta* (7). To the same effect is the observation of Baron Parke in *Smith* v. *Lloyd* (8), that to make the Statute of Limitation applicable, there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected. It follows that if the seisin or legal possession is, during the attachment, in the true owner, the attachment cannot be deemed to amount to either dispossession of the owner or the discontinuance of his possession. We must accordingly hold, as was done in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1) that Article 142 has no application to a suit of

(1) (1903) 26 Mad. 410.

(2) (1890) 17 Cal. 814 = 17 I. A. 62 (P. C.).
(3) (1907) 30 Mad. 12.
(4) (1905) 32 Cal. 850.
(5) (1883) 5 All. 1 = 9 I. A. 99 (P. C.).
(6) (1879) 13 App. Cas. 793.
(7) (1902) 29 Cal. 518 = 29 I. A. 104 (P. C.).
(8) (1854) 9 Exch. 562.

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this description, and we are unable to accept the contrary opinion on this point as formulated in *Goswami Ranchor Lalji* v. *Sri Girdhariji* (9). We are not unmindful that in *Khagendra Narain* v. *Chowdhry Ratangini Debi* (2), the suit was framed as one for recovery of possession, and that the Judicial Committee ordered that each of the parties "be decreed to be put into possession" of an equal moiety of the disputed property. It is clear, however, that the question now under consideration was not raised before the Judicial Committee, for the obvious reason that the suit there was in time, whether the six years' or the twelve years' rule was applied; the record shows that the order of attachment was made on the 10th December, 1877 and the suit was commenced on the 14th December, 1880. It may also be observed that the language of the order by the Judicial Committee is consistent with the view that the parties were to be put into possession by the Magistrate. It may be added that the decision in *Nasir Ali Sheikh* v. *Adeluddi Shaha* (10), to which reference was made in the course of argument, is clearly distinguishable. There the Magistrate had, after the attachment, placed a stranger in possession, contrary to the provisions of S. 146, Criminal Procedure Code; a suit against such stranger for recovery of possession is clearly governed by Art. 142 or Art. 144. We need not refer in detail to the case of *Chuimull* v. *Khyratee* (11), *Goswami Ranchor Lalji* v. *Girdharji* (9), *Akilandammal* v. *Perisami Pillai* (12), *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1), and *Dee Narain Chowdhur* v. *Webb* (13), in so far as they merely recognise the doctrine that Art. 47 of the Indian Limitation Act is restricted to cases where an order for possession has been made in favour of one of the parties and has no application where the land has been attached under S. 146. We hold accordingly that the suits before us, though framed as suits for possession, cannot be treated as such and are not governed by Art. 142 of the Indian Limitation Act.

As regards the *second* and *third* possible points of view, it is clear, from what has already been stated, that the suit must be treated as suits for declaration of title under S. 42 of the Specific Relief Act. What then is the period of limitation, if any, applicable to these suits? We have been pressed, on the one hand, to adopt the view propounded in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (1), that Art. 120 is applicable and that the suit is required to be instituted within six years from the date of the order of attachment when the right to sue accrues. We have been pressed, on the other hand, to hold that this is a case of continuing wrong under S. 23 and that the right to sue accrues from moment to moment. The first alternative, though adopted by the Madras High Court, leads to an obvious anomaly. If the suit is not instituted within six years from the date of the order of attachment, neither of the claimants can obtain a declaration of title; yet the title continues unaffected in the true owner, for under S. 28 his right is extinguished only at the determination of the period limited for the institution of a suit for possession. The Magistrate thus continues as a stakeholder for an indefinite period, as there is no statutory provision for forfeiture after the lapse of a prescribed term. According to the Madras High Court, however, the true owner, although not in a position to seek a declaration of title for purposes of recovery of the property, can obtain a declaration of title to the profits in the hands of the Magistrate; in other words the Magistrate is constituted his manager in perpetuity. The Madras High Court further seems to hold that, although a declaration of title cannot be embodied in the decree, because the prayer for declaration is barred by lapse of time, yet the finding in the judgment on the issue of title will have the force of *res judicata* and will practically operate as a determination of the question of right for purposes of S. 146, Criminal Procedure Code. With all respect, this bears the appearance of a distinction without a difference. To adopt the language of Lord Ellenborough in *Luxmore* v. *Robson* (14) "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." In our opinion, the true view of the

(9) (1898) 20 All. 120.
(10) (1914) 16 I. C. 620.
(11) (1868) 3 Agra H. C. R. 65.
(12) (1876-78) 1 Mad. 309.
(13) (1901) 28 Cal. 80.
(14) 1 B. & Add. 584.

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matter is that S. 23 of the Indian Limitation Act governs the case. To maintain this position, it is not essential to accept the broad proposition formulated in *Chukkun Lal Roy* v. *Lolit Mohan Roy* (15) [which was reversed on appeal on another point by the Judicial Committee in *Lalit Mohun Singh Roy* v. *Chukkun Lall Roy* (16)], that a suit for declaration of title to immovable property cannot be held to be barred so long as the plaintiff has a subsisting right to such property, nor is it necessary to depart in any way from the rule recognised in *Mohabharat Shaha* v. *Abdul Hamid Khan* (17), that a suit for declaration of title to immovable property is governed by Article 120. On the other hand, as was explained in the case last mentioned, and as had been previously indicated in the cases of *Brinda* v. *Kaunsilla* (18), *Anandi Razu* v. *Viyanna* (19), and *Jugalkishore* v. *Lakshmandas Raghunathdas* (20), Article 120 and S. 23 may have to be simultaneously applied to determine whether or not a suit is barred by limitation, for instance, in suits for partition of joint property.

The answer to the question, when does the right to sue accrue, must depend on the circumstances of the particular case, and very refined distinctions have, indeed, been sometimes drawn, as may be seen from *Yamuna Bai Rani Sahiba* v. *Solayya Kavundan* (21) and *Pamu Sanyasi* v. *Zemindar of Jeypur* (22). 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 S. 23 of the Indian Limitation Act. From this point of view, no question of limitation arises.

The result is that these appeals are allowed, the decrees of the District Judge set aside and the suits decreed with costs in all the Courts. The title of the plaintiffs in each case to the share claimed will be declared, and it will be further declared that they are entitled to have the property released from attachment and to be placed in possession by the Magistrate.

V.B./R.K.

Appeals allowed.

(15) (1897) 20 Cal. 906.
(16) (1897) 24 Cal. 834 = 24 I. A. 76 (P.C.).
(17) (1905) 1 C. L. J. 73.
(18) (1891) 13 All. 120.
(19) (1892) 15 Mad. 492.
(20) (1899) 23 Bom. 659.
(21) (1901) 24 Mad. 339.
(22) (1902) 25 Mad. 540.

A. I. R. 1916 Calcutta 754

WALMSLEY, J.

Biswessor Sen and *another*—Plaintiffs—Appellants.

v.

Imamuddi Chowdhuri and *others*—Defendants—Respondents.

Second Appeal No. 660 of 1914, decided on 18th March, 1915, against the Decree of Sub-Judge, 1st Court, Backergunj, dated 16th December, 1913.

Limitation—Applicability—Law of limitation in force on day of institution applies.

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2005 SCC OnLine Cal 26 : AIR 2005 Cal 121 : (2005) 2 CHN 387 : (2005) 28 AIC 378 (Cal) : (2005) 2 ICC 692 (Cal) (DB) : (2006) 1 AIR Kant R (NOC 142) 54 : (2005) 2 Cal LT 360 : (2005) 2 Cal LJ 378 : (2005) 3 CCC 437

Calcutta High Court . .

BEFORE DILIP KUMAR SETH AND RAJENDRA NATH SINHA, JJ.

Sankar Dastidar ... Appellant;

Versus

Smt. Banjula Dastidar and another ... Respondents.

F.A. No. 71 of 2002

Decided on January 19, 2005

Limitation — Limitation Act, 1963 — S. 22 — Continuing wrong — Extension of limitation on such ground — Held, the issue to be decided on facts is as to whether the cause of action is complete and it is the damage out of the injury or the cause of action that is continuing or the cause of action is not complete but is continuing and it is not the damage that was continuing — However, the damage may continue along with the cause of action, but the same would not have the effect of cessation of the continuation of the cause of action — In the instant case, the act of locking of the room and the almirah inside by the appellant, such that the respondent was denied access to the same, resulted in a tort, which continued so long as the room remained locked — Locking of room on 16.3.1987 continued till 24.6.1992, when the counter-claim was set up, thus, the counter-claim could not be said to be barred by limitation, as the cause of action was renewed *de die in diem* so long as access to the room was denied or till the time it remained locked — Thus, applying the principle contained in S. 22, the suit arising out of the counter-claim cannot be said to be barred by limitation — Civil Procedure Code, 1908, Or. 8 R. 6-A and 6-B

(Paras 5.1, 5.2, 5.5 and 6)

D.K. SETH, J.:— A very interesting point on the question of maintainability of the suit, emanating from a counter-claim pleaded in the written statement and out of an order dated 6th September 1994 passed by the, Division Bench of this Court in CO No. 1637 of 1993, was dealt with by the learned Court below conceivably in a cryptic manner without any reasoning to support the ultimate finding on the face of the questions raised. The questions:

2. The questions that are to be decided in this case principally are twofold. First whether the suit was barred by limitation and second whether the suit was barred by res judicata. Apart from the maintainability of the suit, the merit was also challenged. My learned brother Sinha, J. has dealt with the merit with which I do concur.

2.1 So far as the question of maintainability is concerned, the point of limitation has two aspects, one that the counter-claim was filed after the expiry of limitation and that the suit was registered on 14th of March 1995 long after the accrual of the cause of action, which, according to the defendant/appellant herein, accrued on 16th of March 1987. The other aspect is that it was based on a counter-claim, which could not have been filed on account of the expiry of the time stipulated therefor or in other words the counter-claim in the circumstances of the case could not be maintained.

Res Judicata:

3. We may first answer the question of res judicata, which, however, Mr. Sahu, in his usual fairness, though argued but did not lay much stress on it. Inasmuch as the dismissal of the money suit No. 20 of 1989 would not affect the counter-claim, if maintainable, though the question between the parties were involved in the said suit. Inasmuch as a counter-claim is maintainable even though the suit might have been

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dismissed. Even if the money suit No. 20 of 1989 was dismissed, by reason of Order 8, Rule 6D of the Code of Civil Procedure, the counter-claim can nevertheless be proceeded with. Therefore, the question of res judicata would not stand in the way of the counter-claim treated as a fresh suit being money suit No. 5 of 1995 so far as the facts and circumstances are concerned.

Limitation:

4. So far as the question of filing of the written statement is concerned, it appears to have been filed on 24th June 1992, whereas the suit was filed sometime in 1989 and the report of the Commissioner was filed on 31st May 1989. Nothing has been brought before us to show that the counterclaim was set up before the plaintiff as defendant in money suit No. 20 of 1989 had delivered her defence or before the time limited for delivery of the defence had expired.

Admittedly, the counter-claim was set up in the written statement itself and that the written statement was not rejected and was accepted. Thus, it appears that the written statement was filed or the defence was delivered before the time limited for delivering the defence had expired. At the same time, it also appears that the counter-claim was set up when the defence was delivered by the defendant No. 3 in money suit No. 20 of 1989. Thus, the counter-claim appears to have been filed within time and cannot be said to be not maintainable for the purpose of registering the same as a fresh or cross-suit within the scope and ambit of Order 8, Rule 6-A of the Code of Civil Procedure (CPC). From a plain reading of the written statement treated as plaint in this money suit No. 5 of 1995, it appears that the counter-claim had since been stated specifically in the written statement as required under Order 8, Rule 6-B, CPC.

4.1 In *Mahendra Kumar* v. *State of M.P.*, AIR 1987 SC 1395, relied upon by Mr. Sahu, it was held that Order 8, Rule 6-A of the CPC does not, on the face of it, bar the filing of a counter-claim by the defendant after filing of the written statement. But the filing of the written statement within time stipulated, as was held in the said decision, would not save limitation if on the date of setting up of the counter-claim, the limitation had already set in. The question is still open to be decided as to whether the matter is barred by limitation or not. Admittedly, the counter-claim would not have been barred by limitation if it was filed after three years from the date when the cause of action arose. It was so held in the said decision. True it is, the decision dated 6th September 1994 could not decide the question of limitation and it was to be decided in the suit itself.

4.2 He next relied on the decision in *Pandurang Dhondi Chougule* v. *Maruti Hari Jadhav*, AIR 1966 SC 153 wherein it was held that in exercise of Section 115, the High Court has jurisdiction only to correct the illegalities and material irregularities within the scope of revisional jurisdiction and as such the order dated 6th September 1994 could not have decided any issue between the parties as it appears from the said order. This proposition also does not seem to bear any doubt. We have already observed that the said order did not decide any issue and all issues were open to be examined and decided in the suit itself.

4.3 The learned counsel below did not deal with those questions simply on the ground that the suit was registered pursuant to the order dated 6th of September 1994 passed by the Division Bench of this Court in CO No. 1637 of 1993. But the said order simply directed the Trial Court to proceed with the counter statement treating the same as a fresh suit. Such order cannot be treated to be an order deciding the

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question of limitation or otherwise. It was only a direction with regard to the procedure to be followed. It did not decide any questions or issues involved between the parties in the counterclaim. Section 3 of the Limitation Act prescribes that whether the question of limitation has been raised or not, it is the duty of the Court to dismiss the suit/claim if barred by limitation. The Court has no alternative but to dismiss the suit if barred by limitation, although the question of limitation has not been set up as a defence. Therefore, the Court below could not rest its order simply on the foundation of the order dated 6th of September 1994 passed by the Division Bench, but ought to have gone into all the questions at issue between the parties in the counter-claim/suit.

4.4 Mr. Sahu relied on the decision in *Maqbul Ahmad* v. *Onkar Pratap Narain Singh*, AIR 1935 PC 85, which lays down that Section 3 of the Limitation Act is peremptory and the duty of the Court is to notice the Act and give effect to it even though does not referred to in the pleadings. This is a settled proposition of law by reason of Section 3 of the Limitation Act and there is no second opinion with regard thereto.

4.5 The question of limitation, therefore, is also to be looked into as to whether the counter-claim was barred by limitation on the date when the written statement was filed or the counter-claim was set up, namely on 24th of June 1992. It was argued by Mr. Sahu that the counter-claim should be treated to have been filed on 14th of March 1995 when it was registered as a suit on 14th of March 1995. However, in his usual fairness, Mr. Sahu did not lay much stress on this contention. In our view the registration of the counter-claim as a suit, pursuant to the order dated 6th of September 1994 passed by the Division Bench, on 14th of

March 1995 is wholly immaterial since the counter-claim was supposed to be proceeded with in View of Order 8, Rule 6D, CPC, which was recognized in the order dated 6th September 1994 by treating the counter-claim filed on 24th of June 1992 as a plaint for a cross-suit, since procedurally registered on 14th of March 1995 without affecting the date of filing of the counterclaim set up in the written statement on 24th of June 1992, which, in law, remained pending till it was registered on 14th of March 1995 as a plaint of a cross-suit.

4.6 But then, in the facts and circumstances of the case, it appears that the cause of action arose when the defendant No. 3, plaintiff herein, was denied access to or prevented from entering into the said room and opening the almirah in order to obtain release of the articles inside the same. However, the cause of action did not end with the locking of the room and the almirah, but it continued from day-to-day. It was not the continuance of the damage but of the injury or the cause of action.

Continuing wrong:

5. Therefore, it is necessary to examine whether the counter-claim was barred by limitation when the defence was delivered in which the counter-claim was set up on 24th of June 1992. Admittedly, the entire foundation of the counter-claim is based on the cause of action that arose for the first time on 16th of March 1987 by the locking of the room and the almirah inside, which was a subject-matter of the earlier suit being title suit No. 22 of 1987 in which the defendant No. 3 in money suit No. 20 of 1989/plaintiff in money suit No. 5 of 1995, was not a party; and an attempt by the plaintiff therein to obtain release of the claim of the defendant No. 3/plaintiff herein had failed by reason of order dated 30th of April 1991 passed in the said title suit No. 22 of 1987 on the ground that she was not a party in that suit. Thus, it can very well be said that the ultimate cause of action arose on 30th of April 1991 and the injury

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that continued thereafter was not the continuation of the cause of action, but the continuation of the sufferance or the damage resulting from the cause of action. If it is so, in that event, it is clear that the cause of action continued till 30th of April 1991, which is admittedly within three years of filing the written statement setting up the counterclaim.

5.1 Section 22 of the Limitation Act prescribes that "In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run on every moment of the time during which the breach or the tort, as the case may be, continues". In the present case, the locking of the room and the almirah inside denied the access of defendant No. 3, plaintiff herein, to the room and the almirah. Denial of such access resulting from the locking of the room is a tort. So long the room remains under lock, the tort continues attracting the principle of Section 22 of the Limitation Act and as such the locking of the room that started on 16th of March 1987 continued till 24th of June 1992 when the counter-claim was set up and at the latest till 30th of April 1991 and as such it could not be contended that the counterclaim was barred by limitation.

5.2 In *Sarat Chandra Mukherjee* v. *Nerode Chandra Mukherjee*. AIR 1935 Cal 405, cited by Mr. Bera, Counsel for the plaintiff/respondent, it was held that obstruction of the passage by erection of a shed is a continuing wrong so long the obstruction continues in terms of Section 23 of the Limitation Act, 1908, now Section 22 of the Limitation Act, 1963. The existence of the obstruction interfering with the right of the plaintiff was a continuing nuisance the cause of action whereof is renewed de die in diem so long the obstruction continues to interfere with the right of the plaintiff. Applying the said principle in the present case, it is apparent that the obstruction by reason of the lock put on the room interfering with the access of the plaintiff herein is a continuing nuisance or tort for which the cause of action is renewed de die in diem so long the access to the room continues to be denied or until the same is unlocked.

5.3 In *Shanti Rani Das Dewanjee (Smt.)* v. *Dinesh Chandra Day (dead) by LRs.* (1997) 8 SCC 174 : (AIR 1997 SC 3985), relied on by Mr. Sahu, the same principle was enunciated that the counter-claim could be filed till the cause of action continues or till the extended date of filing of written statement. If on the date of filing of the written statement setting up counter-claim, the claim stands ex facie barred by limitation, then such counter-claim cannot be maintained. There cannot be any doubt with regard to

the proposition with which we are in agreement.

5.4 In *Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*, AIR 1959 SC 798 relied upon by Mr. Sahu, the distinction between a continuation of the cause of action and the continuation of the damage was elaborated. In the said case, the cause of action was alleged to have been complete in 1911, but the suit was filed in 1922 after a decree was passed, denying their ownership pursuant to which they were ousted, which was alleged to complete the cause of action with the passing of the decree in 1922 and as such the cause of action was alleged to continue till the date the decree was passed. In the said case, the Guravs claimed ownership of the temple, which was denied by the decree. Guravs were ousted in 1911 and did not serve the temple except for three and half months in 1922 when they had wrongfully obtained possession of the temple. Therefore, it was held that Section 23 of the 1908 Act could not be applied in respect of the suit filed in 1922 in order to establish the claim of hereditary servants, which was denied since

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1911 and it was only the damage that was continuing not the cause of action.

5.5 The damage may continue even after the cause of action is complete. This is dependent on facts of each case. The question is to be decided on facts as to whether the cause of action is complete and it is the damage out of the injury or the cause of action that is continuing or the cause of action is not complete but is continuing and it is not the damage that was continuing. In fact, the damage may also continue along with the cause of action, but the continuation of the damage would not have the effect of cessation of the continuation of the cause of action. Locking of the room in the present case may be complete at the time when the lock is put. But it is not the locking of the room that is the cause of action. Cause of action is a bundle of facts. The locking of the room is one amongst the bundle. The cause of action is not the putting of the lock alone. It is the denial of access, which is the cause of action. So long the denial of access continues, the cause of action continues. In the facts and circumstances of the present case, examined in the light of the decision *Balakrishna Savalram Pujari Waghmare* (AIR 1959 SC 798) (supra), it appears that the continuation of denial of access is the continuation of the injury or the cause of action, though it might combine with it the damage arising thereout.

5.6 A Full Bench of the *Lahore High Court in Khair Mohd. Khan* v. *Mt. Jannat*, AIR 1940 Lahore 359, dealing with the question of continuing wrong arising de die in diem under Section 23 of the 1908 Act, laid down 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 and in such a case the cause of action arose when the injury is inflicted and the fact that the effect of the injury was continuing, that would not make the injury a continuing wrong so as to attract the principles of Section 23 of the 1908 Act. Relying on this distinction, in this case, we may safely hold that it was the cause of action or the injury was a continuing wrong so long the tort continued namely the access was denied. The decision in *Banshi* v. *Goverdhan*, AIR 1976 Madh Pra 125 by a learned single Judge, relied upon by Mr. Sahu, supports the view we have taken. In the said case the detention of the goods, which the defendant was supposed to return, was held to be a continuing wrong. In the present case, the goods were wrongfully detained by reason of putting the lock in the; room and the denial of access and as such the wrong/tort in the present case continued, attracting the principle of Section 22 of the 1963 Act.

5.7 Mr. Sahu had stressed much on the ground that the Commissioner's report was filed on 31st of March 1989 when the materials were disclosed to be inside the almirah and the room; and that was the date when the cause of action was complete and it was only the damage that continued thereafter. This proposition does not seem to be sound. Inasmuch as the cause of action/the injury was the denial of access to the room by reason of its being locked. Even without the Commissioner's report the plaintiff had the knowledge of the contents inside the almirah. Therefore, the Commissioner's report would not have any effect of completing the cause of action nor the putting of the lock would amount to completion of the cause of action/the injury. So long the lock

continues, the case conies within the purview of Section 22 of the Limitation Act, namely, a tort that continues. Conclusion:

6. Thus, I am of the view that the suit arising out of the counter-claim was neither

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barred by the principles of res judicata nor by limitation on any of the aspects urged by Mr. Sahu, as discussed above.

6.1 So far as the question on the merit of the suit is concerned, I fully concur with the view taken by my learned brother Sinha, J. and which I need not elaborate.

Order:

7. The appeal, therefore, is disposed to accordingly. The judgment and decree, appealed against, is modified as indicated hereafter in the judgment of brother Sinha, J.

R.N. Sinha, J.:— 8. The Dastidar siblings are in the fray of litigation and counter litigations for quite a long time (since 1987).

9. Now the facts:

The Dastidar family consisted of two brothers namely, Kamakha, Sankar, Banjula together with parents and two other sisters (one has since been married and the other a primary school teacher, since deceased). The eldest Kamakha filed a suit (Title Suit No. 22 of 1987) impleading Sankar as a defendant/appellant (herein before) seeking inter alia for a declaration with the suit property. Their residence at 824 Block No. B New Alipore belonged to him alone. The suit was resisted.

10. After the suit (T.S. 22/87) filed by the elder brother Kamakha, the appellant Sankar Dastidar, then working as Head Assistant in the office of Calcutta Police put a lock in the room where the plaintiff/respondent Banjula used to stay on 16-3-1987.

11. As Banjula Dastidar, the respondent was not a party to the suit (T.S. 22/87) she could not get herself added as party but tried to get her belonging after inventory made by advocate Commissioner through her elder brother the plaintiff who filed an application for release of those goods belonging to her. That application was, however, was rejected by the learned Court by an order dated 30-4-91.

12. Thereafter Sankar Dastidar filed a money suit No. MS. 20 of 1989 wherein Banjula filed a counter-claim in her written statement claiming damages for wrongful detention on 24-6-1992. The Counter-claim is based on an alligation of failure of renewal of the certificate (NSC certificate) on account of blocking of the south-east corner room which was inhabited by Banjula Dastidar. It is stated that the said NSC on renewal from time to time could have accrued to an amount of Rs. 88,000/- and the damages for the personal effects to the tune of Rs. 50,000/- which was mainly of garments and other personal effects which is revealed as per Inventory Commissioner's report and Rs. 7,000/- in each which was kept in her almirah. The total compensation claimed to the extent of Rs. 2,00,000/-.

13. Learned counsel below by the impugned judgment has decreed the suit on contest against the defendant/appellant without costs and decree is of Rs. 2,00,000/- as has been claimed by the plaintiff.

14. The impugned judgment has been challenged before us on the grounds amongst others that the learned Court below erred in construing the order of this Hon'ble Court dated 6-9-1994 wherein the said Written Statement containing the counter-claim was directed to be taken up as a separate suit and all the points left open.

15. That the same is barred by the doctrine of res judicata, as no appeal was preferred against the order dated 30-4-91. That the counter-claim, i.e. the suit is barred by the law of limitation as the same was filed on 24-6-1992 long after 16-3-1987.

16. Sri Sahu besides the above point of law has urged that by the impugned judgment learned Court below has decreed the suit to the extent of Rs. 2,00,000/- as has been claimed by the defendant/respondent. There is no assessment as to the extent of damages under different heads.

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17. Mr. Sahu, learned advocate for the appellant has urged that as the Hon'ble Courts direction in CO. 1637/1993 dated 6-12-1994 the counter-claim of respondent Banjula Dastidar is to be treated as a plaint and as a separate suit and no observation made about the merit of the case and all points left open, it was incumbent on the learned Court below to come to a positive finding as to the point of limitation, more so in view of the provisions of Order 8, Rule 6-A of the Code of Civil Procedure.

18. In this connection Section 3 and Article

91-A of the Limitation Act has been relied on.

19. Sri Sahu in support of his contention has relied on reported decision in (1997) 8 SCC 174 : (AIR 1997 SC 3985), *Shanti Rani Das Dewanjee (Smt.)* v. *Dinesh Chandra Day* wherein it was held that "the application for counter-claim vis-a-vis limitation—right to file counter-claim being referable to date of accrual of cause of action, if the cause of action had arisen before or after the filing of the suit, and such cause of action continued up to the date of filing of the Written Statement or extended date of filing Written Statement, such counter-claim can be filed even after filing the Written Statement—suit instituted on 15-7-1982 and an application under Order 8, Rule 6-A filed by the defendant/respondent therein was filed on 22-6-1985 which was held to be ex facie not barred by limitation. Contention that cause of action has arisen long before institution of the suit and therefore, the suit and the counter-claim were barred under the Limitation Act which was raised first before the Apex Court was not gone into but left open."

20. Shri Sahu has further relied on a reported decision in AIR 1959 SC 798 (*Balakrishna Savalram Pujari Waghmare* v. *Shree Dhyaneshwar Maharaj Sansthan*). This decision is in respect of interpretation of Article 124, 120 and Section 23 of the Limitation Act where it was held that in the event of wrongful dispossession of the plaintiff and the adverse possession by the defendant to the office in question (herein the priesthout) claims for possession of hereditary offices which attract the application of this article are usually made by holders of the offices against persons who claim adverse possession of said offices. It was further held that a continuing wrong or any wrongful act amounting to ouster do not come within the purview of Article 23 within the meaning "continuing wrong". It further appears that in such an event where the right even though subsists but the remedy is lost by virtue of Article 25/27 of the Limitation Act.

21. Sri Sahu has further relied on decision reported in AIR 1976 Madh Pra 125, *Banshi* v. *Goverdhan* wherein he has drawn the attention of this Court that in respect of the observations in para 9 of the aforesaid decision wherein it has been held amongst others that detention of properties even by a bailee the plaintiff is entitled to recover the movable property or its value besides damages for detention which is a continuing wrong. The damages accrue from day to day and therefore, the claim for damages for a period of three years before the date of the suit would be within time but in assessing damages which must be borne into mind that the object of awarding damages is to place the plaintiff in the same possession, as far as possible, in which he would have been if the wrongful act had not been committed. Thus, in other words the claim of damages must not exceed the value of the property itself.

22. Shri Sahu has also relied on another case reported in AIR 1987 SC 1395 *Mahendra Kumar* v. *State of M.P.*, which need not be elaborately discussed as this case has already been referred and relied on in (1997) 8 SCC 174 : (AIR 1997 SC 3985)

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Shanti Rani Das Dewanjee v. *Dinesh Chandra Day. Shri Sahoo* has further relied on a decision reported in AIR 1935 PC 85. In this case besides others, Section 3 of the Limitation Act has been explained and it has been held that the said Section is peremptory and the duty of the Court is to notice the act and give into effect to it even though it has not referred in the pleadings.

23. Shri Bera has relied on two decisions wherein the term continuing wrong as in Section 23 and Article 120 provides it has been held that test for determination is the encroachment by joint owner by building chabutra on common land claiming it as his own is not a continuing wrong and suit for injunction is governed by Section 120 and not by Section 23. That is not three years but 12 years for recovery of possession (reported in AIR 1940 Lahore 359 *Khair Mohd. Khan* v. *Mt. Jannat*).

24. The other case being *Sarat Chandra Mukherjee* v. *Nerode Chandra Mukherjee*, AIR 1935 Cal 405.

25. The other case referred in *Pandurang Dhondi Chougule* v. *Maruti Hari Jadhav*, (AIR 1966 SC 153). We do not propose to discuss this case as it concerns altogether a different question.

26. Sri Bera, learned advocate for the respondent has urged that the term "continuing wrong" as in Section 23 of the Limitation Act is clear and the test laid down in the case of *Khair Mohd. Khan* v. *Mt. Jannat*,

(supra) in (AIR 1940 Lahore 359), (360), wherein it has been held inter alia:

> "As observed by Mookerjee, J. in (1915) 31 Ind Cas 242 : (AIR 1916 Cal 751), 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 case 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.
> The question in each case therefore is whether the "injury", which is the basis of the grievance of the aggrieved party is itself "continuing", or whether the injury was complete when it was committed but the damage flawing from it has continued or is continuing. If the former, the case falls within the purview of S. 23, Limitation Act, and the cause of action arises de die in diem; if the latter, the terminus a quo is the date on which the wrongful act was done."

27. Mr. Sahoo has urged that no reason and/or discussion has been made by the learned trial Court as to how it saves limitation.

28. We now propose to give reasons for the aforesaid.

29. Prior to that it must be borne in mind that it is not a suit for recovery of possession for the room where the respondent resided. It is a suit for compensation for wrongful detention of her goods moveables and valuables, which were drawn out of the said almirah by the Advocate Commissioner appointed by the Court in T.S. 22(87) sometime in 1989, and admitted the keys were produced by the respondent Banjula. Keeping in view of the nature of the suit the cited decisions as above (supra) do not help Mr. Sahoo's client.

Now, the reasoning:

> "the word "wrong" in the former Section 23 was used in a restricted sense to imply something in the nature of a tort. The present Section 22 uses the word 'tort'. A

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'tort' is a wrong independent of contract. Torts are of three kinds, viz., non-feasance, or the omission of some act which a man is bound to do; misfeasance, being the improper performance of some act which he may lawfully do; and malfeasance or the commission of some act which is unlawful. A completed tort is not a continuing wrong. It is of 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 which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the injury. If the wrongful act causes an injury which is complete, there is no continuing wrong through the damage resulting from the act may continue."

30. Mr. Sahu has cited a case, *Banshi* v. *Goverdhan*, AIR 1976 Madh Pra 125 and urged that plaintiff cannot claim damages exceeding the value of the property itself, (we have mentioned the case beforehand). If the decision is relied on, then it comes to that detention of movables is a continuing wrong, thus, comes within the purview of Section 23 of the Limitation Act.

31. On perusal of the evidence on record as has been laid by both the parties, we do not find that there is no denial of the factum about the residing in the south-east corner room by Banjula Dastidar, the contesting respondent. It further transpires that both the brothers are at loggerhead with the sister Banjula. Sankar Dastidar, the appellant hereinbefore, has thrust upon as many as five criminal cases against her (she has since been acquitted from all the cases) and the other brother Kamakha has also thrust upon some money suit on her. Be that as it may it has no where been stated on behalf of the appellants as to whether the garments are valued at Rs. 50,000/- or not. There is not even any suggestion to P.W. 1 i.e., Banjula (contesting respondent) that the valuation of the aforesaid garments may be less than 50,000/-.

32. In view of the above facts and circumstances of the case as apparent from the record we hold, accordingly, that the suit is not barred by limitation as it is.

33. Accordingly, we hold that the suit is not barred by limitation, plea of res judicata not pressed and we hold that it does not suffer from the same.

34. Now the relief:

The NSCs would have fetched Rs. 88,000/- by September 1992, Cash Rs. 7000/-, detained since then, garments Rs. 50,000/-

comes to Rs. 1,45,000/-.

35. Thus, the impugned decree is modified to the extent that plaintiff/respondent do get a decree for Rs. 1,45,000/- with proportionate costs and with 12% interest from the date of 26-6-1992 till date of realisation. Appellant/respondent however, do get proportionate set of in connection with interest for 3 months on Rs. 88,000/- (as the suit filed earlier).

36. Thus, the appeal succeeds in part as indicated above without any costs whatsoever.

37. Urgent xerox certified copy of this judgment, if applies for, be given to the parties at the earliest.

Order accordingly.

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30 March, 2013 itself. The finding of fact of the arbitral tribunal that there was no such communication, though the appellant claims to have sent such communication by SMS, cannot be faulted as perverse. Besides, under the applicable provisions, the open positions are marked to market based on the closing price on that day and if the movement of the closing price results into any margin shortfall, it has to be paid by the client generally before commencement of trading on the next day (see, Risk Disclosure Document forming part of MCA, Cl. 2 b). That means the (notional) loss as a result of price movement on the trading day of 30 March, 2013 could have been marked to market only at the closing of the market on that day, based on the closing price, and thereafter the constituent would have to be put to notice of such (notional) loss and allowed to pay the margin deficit before the commencement of trading the next day. In the present case, admittedly during the day of trading itself, i.e. on 30 March, 2013, the open position of the respondent was squared up. The debit balance of ₹ 33,80,103=86 arose on that day as a result of such squaring up, the respondent suffering in the process a loss of ₹ 69,33,254=99. In the premises, the squaring up was clearly unauthorized and contrary to the MCA. The appellant has no case to recover any dues from the respondent.

6. The case of *Pankaj Goshar* (supra) was on a totally different footing. There, the statement of account showing the constituent's debit balance was admittedly forwarded along with a covering letter. What was argued there was that there was no formal demand for payment of margin money. The Court held that there could be no other reason for sending the statement of account except to call for margin payment. These facts and the conclusion of the Court based thereon have no bearing on the facts of our case. In our case, the margin requirement itself is improperly assessed and there is admittedly no record of demand for margin payment or even furnishing of a statement of account.

7. Thus, there is no merit in the challenge to the arbitral award. The impugned order of the learned Single Judge inasmuch as it rejects the challenge does not suffer from any infirmity.

8. The appeal is, accordingly, dismissed. No order as to costs.

Appeal dismissed.

REJECTION OF PLAINT : VALIDITY

(S. B. Shukre, J.)

SOCIEDADE DE FORMENTO INDUSTRIAL LTD., GOA — *Petitioner.*

vs.

GURUDAS G. PAI — *Respondent.*

(a) Civil Procedure Code, O. 7, R. 11(a) and (d) — *Rejection of plaint — Plea of absence of cause of action — Must be tested for its correctness or otherwise upon consideration of all material available on record including evidence of parties and not by mere consideration of pleadings in plaint.*

Civil Rev. Appln. No. 36 of 2015 decided on 5-2-2016. (Panaji-Goa)

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The averment that there is no cause of action to file a suit would have to be tested for its correctness or otherwise upon consideration of all material available on record including evidence of parties, and whereas, the assertion that the plaint is fundamentally defective for non-disclosure of cause of action has to be examined only by going into the pleadings in the plaint and considering them as a whole, without making any additions or subtractions thereto. What has been argued on behalf of the petitioner is that the respondent being a stranger to the suit cannot have cause of action or any right to file a suit and this argument essentially belongs to the category of plea of absence of cause of action and not to the kind of non-disclosure of cause of action. This is not a case where the plaint can be rejected by considering the pleadings in the plaint as a whole under the provisions of clauses (a) and (d) of Order 7, Rule 11, Civil Procedure Code. 1996(8) SCC 377, Rel. (Paras 26 and 27)

(b) Limitation Act (36 of 1963), S. 22 — *Continuing wrong — Continuing wrong in nature of continuing activity of dumping of mining rejects in suit property and continuous refusal to remove accumulated waste — A fresh period of limitation begins to run at every moment of time during which tort or wrong continues.* AIR 1959 SC 798, (2006) 13 SCC 470 and (2011) 2 SCC 682, Rel. (Para 24)

For petitioner/applicant : *V. A. Lawande*

For respondent : *J. P. Mulgaonkar*

List of cases referred :

1. *Saleem Bhai and others vs. State of Maharashtra and others, 2003(2) Mh.L.J. (S.C.) 529 = (2003) 1 SCC 557* (Para 9)
2. *Hardesh Ores (P) Ltd. vs. Hede and Company, 2007(5) Mh.L.J. (S.C.) 577 = (2007) 5 SCC 614* (Paras 9, 12, 13)
3. *Mst. Phool Sundari vs. Gurbans Singh, (1956) 0 Supreme (Raj) 253 = (1957) 0 AIR (Raj) 97* (Paras 9, 14, 25)
4. *Balakrishna Savalram Pujari Waghmare and ors. vs. Shree Dhyaneshwar Maharaj Sansthan and others, AIR 1959 SC 798* (Paras 10, 15, 24)
5. *State of Orissa vs. Klockner and Company and others, 1996(8) SCC 377* (Paras 10, 19, 26)
6. *Sankar Dastidar vs. Banjula Dastidar (Smt.) and another, (2006) 13 SCC 470* (Paras 10, 17, 18, 24)
7. *Hari Ram vs. Jyoti Prasad and another, (2011) 2 SCC 682* (Paras 10, 17, 24)

JUDGMENT :— Heard. Admit. Heard finally by consent.

2. This Civil Revision Application challenges the legality and correctness of the order passed on 27th April, 2015 in Special Civil Suit No. 34/2011/A by Court of Civil Judge, Senior Division, Bicholim.

3. The facts leading to filing of this Revision application may be stated in brief as under :

a) The respondent is the original plaintiff who had filed a civil suit against the petitioner, which is the original defendant No. 2. The suit claims reliefs of payment of damages of ₹ 25.00 lakhs and also injunctions, both permanent and mandatory against all the defendants. Original defendants Nos. 1, 3 and 4 have

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not been impleaded as parties to this application, as the relief claimed in this application is only against the respondent.

b) It is the case of the respondent that he is a co-owner of an undivided property, surveyed under No. 24/2011 of village Pissurelem Village, hereinafter referred to as the suit property. The present petitioner as well as the original defendant Nos. 3 and 4, acting under permission from the original defendant No. 1 to operate the mining concession, by dumping mining rejects on the suit property indiscriminately, illegally and without any permission and authority obtained from the respondent, have rendered fertile land of the suit property fallow and uncultivatable and thereby caused huge loss to the respondent. Respondent has claimed that some time in the past, when he had taken up this matter with the petitioner, the dumping of mining rejects was stopped but his request for settling the issue was neglected. The respondent has further claimed that he had sent a notice dated 28-4-1998 to all the defendants including the petitioner calling upon them to stop further dumping of the mining rejects, but to no avail. He has also claimed that these illegal activities of the petitioner and other defendants are going on and the mining rejects dumped earlier on the suit property, continue to lie there rendering the land of the suit property as useless for its meaningful use. He has submitted that big heaps of the mining rejects contain silica and iron ore rich clay and these elements being harmful to soil, cause destruction of the soil texture by finding their way into it and then land is rendered fallow. As the defendants including the petitioner refused to make amends to their illegal activities, the respondent says, he filed a civil suit for damages and injunction.

c) The petitioner as the first step towards resistance of the suit, filed an application under Order 7, Rule 11 of Civil Procedure Code, 1908 praying for rejection of the plaint on the ground that the suit is barred by law of limitation, the Civil Court has no jurisdiction and that there has been no cause of action disclosed in the plaint.

d) This application came to be rejected by the learned Civil Judge after hearing both sides by the order passed on 27-4-2015. It is this order which is under challenge in the present civil revision application.

4. Mr. V. Lawande, learned counsel for the petitioner submits that the impugned order is illegal and arbitrary as well as perverse as it does not take into account pleadings in the plaint which are so clear as to unequivocally indicate that the plaint is barred by law of limitation. He submits that the learned Civil Judge has also ignored the settled principles of law in passing the impugned order. He submits that the learned Civil Judge has observed, albeit erroneously, that the application of the petitioner is vague, that it did not give necessary details to show as to how the Court lacked jurisdiction and how no cause of action has been disclosed although written statements giving all these details were filed by the petitioner. He further submits that the learned Civil Judge has only referred to various case laws relied upon by the petitioner but failed to apply their principles, which principles as a matter of fact, were squarely applicable to the facts of the case.

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5. Learned counsel for the petitioner further submits that in para 4 of the plaint, the respondent has clearly stated that after he had taken up the issue with the petitioner, some time in the past, dumping came to be stopped and he did not make any averment in the plaint that thereafter dumping activities got restarted. He further points out from the relevant paragraphs of the plaint that respondent specifically admitted that he had sent a notice dated 28-4-1998 to all the defendants and therefore, limitation period for filing the suit can be said to have commenced from the date of 28-4-1998. He also submits that there is also an admission given by the respondent that he had approached the Court of Deputy Collector and S.D.O, Taluka Bicholim, Bicholim, Goa for redressal of his grievance, but his application was dismissed by order dated 25-4-2003 for want of jurisdiction. He therefore, submits that the limitation period, at the most, could be said to have started from the date of 24-4-2003 and in view of the provision of section 9 of the Limitation Act, which lays down that once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Thus, according to him, the plaint is hopelessly barred by limitation, which is a law contemplated under Order 7, Rule 11(d) of Civil Procedure Code. Learned counsel for the petitioner has further submitted that there has been an assertion made in the plaint that respondent is the co-owner of undivided suit property and this would show that he has no title in his own rights over the suit property and as such, he would have to be termed as a stranger to the suit property having no right to sue and thus having no cause of action to file the suit.

6. Learned counsel for the petitioner has, however, not pressed the ground of jurisdiction, which the petitioner has taken in his application under consideration in this case. Thus, on the aforestated two grounds of bar of limitation and there being no cause of action, the petitioner has urged that the impugned order be quashed and set aside and its application filed under Order 7, Rule 11 be allowed.

7. Strongly, resisting the application, Mr. J. P. Mulgaonkar, the learned counsel for the respondent has submitted that it is well settled law that for exercising jurisdiction regarding rejection of plaint by virtue of the power conferred on the Civil Court by Order 7, Rule 11 of Civil Procedure Code, only pleadings in the plaint are required to be looked into and no external aids, such as, the averments in the written statement or documents filed in support of the rival claims can be considered. He submits that on bare perusal of the averments in the plaint and the plaint has to be considered as a whole, one can see that the plaint alleges continuing wrong and therefore, discloses a continuing cause of action and as such, the limitation runs on day to day and moment to moment basis, from the point the wrong is committed and is continued to be committed. This would be clear, learned counsel further submits, from section 22 of the Limitation Act, 1963.

8. Learned counsel for the respondent further submits that since there is a difference between absence of cause of action and non-disclosure of cause of action, the argument that the respondent, being a stranger to the suit property, has no right to sue in the instant case deserves to be rejected. He submits that this argument relates to absence of right to sue and whether the respondent has such a

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right or not would have to be decided on merits of the matter. He also submits that the pleadings in the plaint, when read in their entirety, would show that respondent has disclosed the cause of action, he being a co-owner and thus, an affected person.

9. In support of his argument, learned counsel for the petitioner has relied upon the following Case Laws :

1) *Saleem Bhai and others vs. State of Maharashtra and others, 2003(2) Mh.L.J. (S.C.) 529 = (2003) 1 SCC 557,* 2) *Hardesh Ores (P) Ltd. vs. Hede and Company, 2007(5) Mh.L.J. (S.C.) 577 = (2007) 5 SCC 614,* 3) *Mst. Phool Sundari vs. Gurbans Singh, (1956) 0 Supreme (Raj) 253 = (1957) 0 AIR (Raj) 97.*

10. Learned counsel for the respondent has in support of his arguments relied on the following rulings :

1) *Balakrishna Savalram Pujari Waghmare and ors. vs. Shree Dhyaneshwar Maharaj Sansthan and others, AIR 1959 SC 798,* 2) *State of Orissa vs. Klockner and Company and others, 1996(8) SCC 377,* 3) *Sankar Dastidar vs. Banjula Dastidar (Smt.) and another, (2006) 13 SCC 470,* 4) *Hari Ram vs. Jyoti Prasad and another, (2011) 2 SCC 682.*

11. In the case of *Saleem Bhai* Hon'ble Apex Court has laid down the statutory principles which must be followed while deciding an application filed under Order 7, Rule 11 seeking rejection of the plaint. The Hon'ble Apex Court has held that only relevant facts which need to be looked into for deciding an application under the said provision of the Code of Civil Procedure are the averments in the plaint and the trial Court may exercise the power at any stage of the suit, either before registering the plaint or thereafter or even after summons to the defendants are issued or at any time before the conclusion of the trial. Relevant observations of the Hon'ble Apex Court as they appear in para 9 are reproduced as follows :

> *"9. A perusal of Order 7, Rule 11, Civil Procedure Code makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power under Order 7, Rule 11, Civil Procedure Code at any stage of the suit before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7, Civil Procedure Code the averments in the plaint are germane: the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7, Rule 11, Civil Procedure Code cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court.....".*

12. So, it would have to be seen only from the averments made in the plaint and reading them as a whole as to whether the plaint is barred by law and or whether the plaint discloses cause of action or not. Now, it is well settled that the expression "barred by any law" used in clause (b) of Rule 11 of Order 7 must include the law of limitation as well and, therefore, the plaint can be rejected under this provision on the ground of bar of limitation also. This is made clear by

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Hon'ble Apex Court in the case of *Hardesh Ores P. Ltd.*, when it said in para 25 thus :

> *"25. The language of Order 7, Rule 11, Civil Procedure Code is quite clear and unambiguous. The plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law. Mr. Nariman did not dispute that "law" within the meaning of clause (d) of Order 7, Rule 11 must include the law of limitation as well."*

13. In *Hardesh Ores*, Hon'ble Apex Court also held that the averments made in the plaint as a whole have to be seen to find out whether the plaint discloses any cause of action or not and as to whether it is barred by any law, as contemplated under clauses (a) and (d) of Rule 11, Order 7, Civil Procedure Code. The Hon'ble Apex Court further held that it is the substance and not merely the form of the pleadings that has to be looked into and the pleadings have be construed as they stand without addition or subtraction of words or change of their apparent grammatical sense.

14. In *Ms. Phool Sundari*, the Division Bench of the Rajasthan High Court held that where a plaint discloses no cause of action against some of the defendants, it can be rejected under Order 7, Rule 11(a) against particular defendants only, if not all, as in such a case there would be a total rejection of the plaint against those particular defendants. While laying down so, the Division Bench made a distinction between rejection of a plaint in part so far as the subject-matter of the plaint or the relief claimed therein is concerned and complete rejection of the plaint as against some of the defendants and found that while the former is not permissible, the latter is.

15. In the case of *Balakrishna S. Pujari Waghmare and others*, while considering the scope and applicability of section 23 of the Limitation Act (1908), in the light of Articles 124 and 120 of that Act, Hon'ble Apex Court answered the question - whether the cause of action can arise de die in diem or on day to day or moment to moment basis?, and held that section 23 refers not to a continuing right but to a continuing wrong. It further held that a wrong which is a continuing one, creates a continuing source of injury and renders the doer of the act responsible and liable for the said injury. It held that when there is a continuing wrong there is a remedy to redress it under section 23 of the 1908 Limitation Act. The relevant observations of the Hon'ble Apex Court appearing in para 31 are reproduced thus :

> *"..... In dealing with this argument it is necessary to bear in mind that section 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*

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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 section 23 can be invoked."

16. It may be mentioned here that section 23 of the Limitation Act, 1908 is almost in pari materia to section 22 of the Limitation Act, 1963, which stands in the statute in following terms :

> "Section 22. ***Continuing breaches and torts.*** — In case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or tort, as the case may be, continues."

17. In *Hari Ram*, Hon'ble Apex Court relying on *Sankar Dastidar vs. Banjula Dastidar*, held that when a right of way is claimed, whether public or private over a certain land over which the tortfeasor has no right of possession, the breaches would be continuing, to which the provisions of section 22 of the Limitation Act, 1963, would apply.

18. In *Sankar Dastidar*, Hon'ble Apex Court held that a suit based on a continuing wrong stands on a different footing than the suit for damages simpliciter and therefore, the principle that once the limitation period begins to run, there is no stopping to it has no application to cases where the provisions of section 22 would apply.

19. In *Klockner and Company and others*, Hon'ble Apex Court held by approving the observations of the Orissa High Court that there is a distinction between the plea that there is no cause of action to file a suit and the one that plaint does not disclose any cause of action, for the question that there is no cause of action has to be determined on the basis of the material other than the plaint, whereas, the objection that the plaint does not disclose the cause of action has to be determined by only looking into the averments made in the plaint as a whole.

20. Now, these principles of law would have to be borne in mind while deciding the objection of the petitioner that the plaint filed in this case by the respondent is barred by law of limitation and also fails to disclose cause of action and this exercise has to be carried out by looking into the pleadings in the plaint taken as a whole and not in a disjunctive manner.

21. Learned counsel for the petitioner wants this Court to consider the averments in para 4 and also some of the admissions given by the respondent in the plaint and conclude that the plaint is barred by limitation. Para 4 of the plaint reads thus :

> "The plaintiff states that sometime earlier the plaintiff did take up the matter with the respondent No. 2 and with that the dumping has been stopped and the respondent No. 2 seen made contact with the defendant with a view to settle the matter but nothing was realized thereafter."

The admissions in the plaint are to the effect that the respondent had served a notice dated 28-4-1998 upon the defendants calling upon them to stop further dumping of the mining rejects and not to interfere in the property and that the application of the respondent filed before the Court of Dy. Collector and S.D.O., Bicholim, Goa was dismissed by the order dated 25-4-2003 for want of

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jurisdiction. These pleadings and said admissions, however, cannot be divorced from the rest of the averments in the plaint. Doing so, would be going against the settled principles of law discussed earlier. Therefore, these pleadings and admissions would have to be read together with the other averments in the plaint and when it is done, the inevitable conclusion that arises is that the plaint cannot be said to be barred by law of limitation.

22. The respondent has pleaded at different places in the plaint that although the dumping had been stopped when he had taken up the issue with the petitioner in the past, there was further dumping of mining rejects. There are also averments in the plaint that the respondent had served a notice dated 28-4-1998 upon the defendants calling upon them to stop further dumping of the mining rejects and that by this notice he had called upon the defendants including the petitioner to desist from these illegal activities. The respondent has pleaded that by carrying out the mining activities rashly and negligently, the defendants have not only damaged the crop but also destroyed fertility of the soil, which can be seen from para 8. In para 10, the respondent has averred that the defendants have neither removed the mining rejects nor stopped dumping of mining rejects in spite of all their efforts. These pleadings being of great significance are reproduced as under :

> "10. The plaintiff says that the defendants have neither removed the mining rejects nor stopped dumping of mining rejects into the suit property in spite of all efforts of the plaintiff."

23. In para 7, the respondent has submitted that the defendants are mining companies having strong financial base and are not in a mood to respond to his request for paying compensation for damage or loss to crop and also are not bothered to remove the mining rejects dumped in the suit property. He has further pleaded that the defendants have not taken any steps to remove the mining slit accumulated in the suit property in spite of repeated requests of the plaintiff.

24. All these pleadings make it crystal clear that what has been alleged by the respondent/plaintiff is a continuing wrong in the nature of continuing activity of dumping of mining rejects in the suit property and continuous refusal to remove the accumulated waste and continuous failure to restore the original status of the property. In other words, the pleadings are about continuing breach and obtuse attitude in committing the wrong de die in diem. Therefore, section 9 of the Limitation Act 1963, as sought to be canvassed by the learned counsel for the petitioner, would have no application and section 22, which lays down that in the case of a continuing wrong, a fresh period of limitation begins to run at every moment of the time during which the tort or wrong continues would have application. The principles laid down in the cases of *Balakrishna Savalram Pujari and others*, *Sankar Dastidar* and *Hari Ram* would squarely apply to these facts and therefore, the argument that the plaint is barred by law of limitation cannot be accepted.

25. The bar of limitation, however, would operate in a different way when it comes to claim of recovery of damages in terms of money made in the plaint. For such a money claim, section 9 of the Limitation Act may have its application. But, the question as to what extent section 9 of the Act, which lays down that

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once time begins to run, it runs continuously and there is no stopping to it until the claim gets time barred under relevant Articles, would have to be considered, having regard to the facts of this case, on the basis of the evidence available on record that is on merits of the case. Such a question cannot be decided by merely looking into the plaint in a case where the claim for damages arises from the averments of continuing wrong. In such a case, claim for recovery of damages in terms of money can be found to be partly time barred and partly within limitation. But, a plaint cannot be rejected partly. In *Mst. Phool Sundari*, the Division Bench of the Rajasthan High Court has held that if a plaint is to be rejected, it has to be rejected in toto in the sense that a Court cannot reject one part of the plaint against all the defendants and carry on with the rest of the plaint against them, although, there can be a total rejection of the plaint against a particular defendant, if not all. Now, this is the settled position of law. Therefore, I find no merit in the argument of the learned counsel for the petitioner that claim for damages being time barred, the plaint must be rejected.

26. The next argument of the petitioner is that the respondent admittedly being a co-owner of a property which is undivided can have no right to sue in his own right and is thus a stranger to the suit. The argument would have to be straightaway rejected as the law requires, under the provisions of clause (a) Rule 11, Order 7, that the plaint should disclose the cause of action. In the case of *Klockner and Company and others* Hon'ble Apex Court has approved the observation of Orissa High Court that there is a distinction between a plea that there is no cause of action for the suit and a plea that the plaint does not disclose the cause of action. The difference between these two pleas essentially lies in the manner in which the correctness or otherwise of the two pleas is to be ascertained. The averment that there is no cause of action to file a suit would have to be tested for its correctness or otherwise upon consideration of all material available on record including evidence of parties, and whereas, the assertion that the plaint is fundamentally defective for non-disclosure of cause of action has to be examined only by going into the pleadings in the plaint and considering them as a whole, without making any additions or subtractions thereto. What has been argued on behalf of the petitioner is that the respondent being a stranger to the suit cannot have cause of action or any right to file a suit and this argument essentially belongs to the category of plea of absence of cause of action and not to the kind of non-disclosure of cause of action. Such an argument cannot be considered at this stage in view of the law discussed earlier.

27. It is clear from the above discussion that this is not a case where the plaint can be rejected by considering the pleadings in the plaint as a whole under the provisions of Clauses (a) and (d) of Order 7, Rule 11, Civil Procedure Code. There is no merit in this application and it deserves to be dismissed.

28. The application stands dismissed. No costs.

Application dismissed.

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