

We think that the Court was perfectly right in coming to the conclusion that that mistake was remedied by the order made giving leave to the plaintiff's guardian to continue the suit. Therefore I think the order of the Court below was correct and the appeal must be dismissed with costs.

HEATON, J. :—I agree, but I should like to add this. The directions contained in an Act of the Legislature are intended to be followed, and it seems to me that it cannot be said that a suit of this kind is rightly filed when it is filed without leave previously obtained of the Court. But it does not follow that if this is not done the plaint must be handed back to the plaintiff to be redated and again handed back to the Court after leave is obtained. I think that everything that the section requires is obtained if you regard the suit as effectively filed on the day on which leave is given by the Court. This might be a very material matter if a question of limitation arose. In this case, however, there is no such question and I think the appeal must be dismissed with costs.

Decree confirmed.

J. G. R.

APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and
Mr. Justice Heaton.*

SOMESHWAR JETHALAL AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS v. CHUNILAL NAGESHWAR (ORIGINAL DEFENDANT), RESPONDENT.*

Easement—Tree growing on the boundary between two fields—Right of one proprietor to cut off projecting branches and roots—Injunction.

* Second Appeal No. 489 of 1918.

1919.

MAINA

v.

SHANKAR
MORU.

1919.

December 2.

1919.

SOMESHWAR
JETHALAL

v.

CHUNILAL
NAGESHWAR.

Where a tree belonging to the defendant has been growing partly on his land and partly on plaintiff's land for a number of years past, it is not permissible to the plaintiff to cut off the overhanging branches or the penetrating roots of the tree.

Vishnu Jagannath v. Vasudeo Raghunath⁽¹⁾ and *Hari Krishna Joshi v. Shankar Vithal*⁽²⁾, distinguished.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by M. M. Bhatt, Second Class Subordinate Judge at Nadiad.

Suit for injunction.

The plaintiffs and defendant owned fields which were situated adjacent to each other. On the boundary between those fields grew a mango tree belonging to the defendant. It grew partly on plaintiffs' land and partly on defendant's land, for nearly fifty years past. In its growth, it sent its branches to overhang the plaintiffs' land and its roots encroached upon the plaintiffs' land.

The present suit was for an injunction to remove the overhanging branches and penetrating roots.

The lower Courts dismissed the suit.

The plaintiffs appealed to the High Court.

R. J. Thakor for *C. N. Pandya*, for the appellant:—
The tree in dispute is on the boundary line of the plaintiffs' field and the adjoining field. It has encroached upon my land in the course of its growth. A person is entitled to cut off the roots and branches encroaching upon his land in the case of trees growing on his neighbour's land. The mere accident that the tree is on the boundary line of his neighbour's land and has during its growth encroached upon some of my land should not deprive me of my right to do so. The owner of the field can acquire no right of easement for

⁽¹⁾ (1918) 43 Bom. 164.

⁽²⁾ (1894) 19 Bom. 420.

the roots and branches. This has been held in *Hari Krishna Joshi v. Shankar Vithal*⁽¹⁾. In *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee*⁽²⁾, a mandatory injunction was granted for the removal of the nuisance. In *Vishnu Jagannath v. Vasudeo Raghunath*⁽³⁾ the trees overhanging were joint trees. There too it was held that the plaintiff was entitled to cut off the overhanging branches.

There was no appearance for the respondent.

MACLEOD, C. J. :—The plaintiffs sued for the removal of such of the roots, stem and branches of the plaintiff mango tree as encroached upon and overhung their land and thereby caused damage to the crop in the plaintiff land. The suit has been dismissed in two Courts, and in this Court we have not had the advantage of hearing counsel for the respondent. The facts of this case show that this tree, subject matter of the suit, grows partly on the plaintiffs' land and partly on the defendant's land, and for certainly fifty years it has been considered to be the defendant's tree, and the defendant has enjoyed the fruits of it. These being the facts the question arises whether the plaintiffs are entitled to cut off the branches and roots of the tree which overhang and grow on his land respectively. We have been referred to the decisions in *Vishnu Jagannath v. Vasudeo Raghunath*⁽³⁾; and *Hari Krishna Joshi v. Shankar Vithal*⁽¹⁾. No doubt in those cases it was held that an owner of land whose neighbour's tree overhangs his land is entitled to cut away the branches which overhang his own land, although they may have done so for more than forty years. But it seems to us that the facts in this case can be distinguished from the facts in those cases. In *Vishnu*,

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Jagannath v. Vdsideo Raghunath⁽¹⁾ the facts were exactly the same as in the earlier case of *Hari Krishna Joshi v. Shankar Vithal*⁽²⁾; whereas in this case the tree stands on the lands of both parties, and it has been admitted that the defendant is the owner of the tree and is entitled to all the fruits of his tree, although he may thereby trespass on the plaintiffs' land. But to hold on these facts that the plaintiffs are entitled to cut off the roots and stem and branches (which are on the side of a line drawn upwards from the boundary) would be most unfair and also inconsistent with any law to which we have been referred on the subject. This is a special case which stands on its own facts. The facts show that defendant is the owner of the tree, and that the plaintiffs must, therefore, put up with the disadvantages which exist owing to the tree putting its roots through their land, and owing to its branches overhanging their land. It must be remembered that in this country it often happens that a tree though standing in the middle of the land of A yet belongs to B. I think, therefore, the decision of the lower Court was right and the appeal must be dismissed.

HEATON, J. :—I concur.

Appeal dismissed.

R. R.

(1) 1918) 43 Bom. 164.

(2) (1894) 19 Bom. 420.