

Moolchand and ors. Vs. Chhoga and ors.

Moolchand and ors. Vs. Chhoga and ors.

SooperKanoon Citation : sooperkanoon.com/751037

Court : Rajasthan

Decided On : Nov-07-1960

Reported in : AIR1963Raj25

Judge : I.N. Modi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 91, 91(1) and 91(2); Indian Penal Code (IPC) - Sections 268; General Clauses Act - Sections 3; Limitation Act, 1908 - Sections 26; Specific Relief Act, 1877 - Sections 55

Appeal No. : Second Appeal Nos. 44 and 45 of 1955

Appellant : Moolchand and ors.

Respondent : Chhoga and ors.

Advocate for Def. : M.L. Joshi, Adv.

Advocate for Pet/Ap. : Than Chand, Adv.

Disposition : Appeal allowed

Judgement :

I.N. Modi, J.

1. These are two appeals by different sets of plaintiffs in two different suits, one of the plaintiffs being common to both of them, and arise out of a dispute relating to

an identical piece of land, and, therefore, I propose to dispose of them by a single judgment.

2. The dispute pertains to a piece of land which has been marked as ABCD in plan Ex. 1 and is situate in village Beda which was at the relevant time in the Jagir of the Jagirdar of rhikana Beda. The plaintiffs in suit No. 532 of 1952 which has given rise to appeal No. 45 of 1955 are Moolchand and his son Jawarmal, and one other person Dharamchand. The houses of Moolchand and Dharamchand are admittedly situate to the south and north respectively of the disputed land. The house of Moolchand and Jawarmal is marked A in the plan and that of Dharamchand as K therein. The defendants in this suit were in the first instance Chhoga and his 5 sons Kapura and Jawana, and the Kamdar of rhikana Beda.

The case of the plaintiffs in this suit as disposed in the amended plaint, briefly put, was that in between the two houses of Moolchand and Dharamchand there was a common way the exact phrase used in Hindi is ^{^^}vkejkLrk** over the and A.B.C.D. and that the defendants had raised a construction on it on the 18th September, 1949. The result of this, according to the plaintiffs, was that two ventilators in the first storey and two big windows and a nali (spout to drain out water) in the second storey of plaintiffs Nos. 1 and 2 had been blocked. With respect to the house of plaintiff No. 3, it was similarly alleged 'that two windows and two ventilators in the' first storey and Two, big windows and a spout in the second storey had been closed. The case of the plaintiffs Nos. 1 and 2 further was that they had been in enjoyment of light and air from the windows and the ventilators aforesaid and so also they had been using the spout for draining out water from their house; for a period of 80 years without interruption while the case of plaintiff No. 3 was that he had been in similar use and enjoyment of the windows and ventilators and the spout in his house (this house having been purchased by the ancestors of this plaintiff in Section 1969 corresponding to 1912 A. D.) for the last 35 years although these also had been in existence for So years prior to the filing of the suit and that the defendants had no right to obstruct the use and enjoyment thereof as thereby the plaintiffs' houses had become useless and almost uninhabitable.

It was also alleged both in the original and the amended plaint that the land in dispute constituted a public way and that defendants NOS. 1 and 2 had obtained a patta surreptitiously from defendant Thikana Beda which the latter had no right to give. It was alleged in the original plaint that defendant Chhoga and his companions had collected building material and were bent upon building on the land in dispute and that the Thikana was fully supporting them, and consequently the plaintiffs were compelled to file the present suit. This suit was thus originally filed on the nth September, 1949, with a prayer that the patta which defendants had obtained from Thikana Beda be cancelled and that a perpetual injunction be granted restraining them from raising any kind of construction on the land in dispute. A prayer for ad interim injunction was also made and this was granted by the trial Court.

It is common ground however that although Chhoga defendant had originally purchased this land from the Thikana and had applied for a patta of this land from the Thikana it later transpired that the said Chhoga transferred his rights in this land to what is called the Vaishnava public of Beda by an unregistered writing soon after the purchase and these persons put up some construction on this land which is said to be used for some sort of religious purposes. Therefore, defendants Anandrarn, Koopa, Narayan and Galba were also impleaded as defendants as representatives of Vaishnava community by an amendment of the plaint and the suit was allowed to be brought against the last-mentioned persons as representatives of the Vaishnava community under the provisions of Order 1, Rule 8 C. P. C. and a prayer for the demolition of this construction, which had been raised on the land after the filing of the suit, was also allowed to be added. These are the allegations on which the first suit was brought by the plaintiffs Moolchand, his son Jawarmal and Dharam Chand who are immediate neighbours of the suit land.

3. A second suit with respect to this very land was also filed subsequently by Girdhari Lal and three others as representatives of the residents of Mohallas Sisodiya, Nawapura and Gogajikigali and Gogaji-ka-bas and this was suit No. 648 of 1952 which has given rise to appeal No. 44 of 1955. It may 'be pointed out that Moolchandwho was plaintiff in the first suit is also a plaintiff in the second suit. The

case of the plaintiffs in this suit was that the land ABCD was being used by the residents of the aforesaid Mohallas for purposes of way from time immemorial and that they had also been making use of this way on occasions of marriages, deaths etc. without interruption and obstruction of any kind. This suit was brought against n defendants and of these Chhoga and his sons were defendants Nos. 1 to 3 and Thakur Jagajitsingh of Beda was defendant No. 4 and the remaining defendants from 5 to 11 were the other residents of Beda who were sued as representatives of Vaishnava community under Order 1, Rule 8 of the Code of Civil Procedure.

Their case was that the passage over the land ABCD of which they had been in use for several generations had been completely destroyed by the construction which had been raised on this land by the defendants and thereby the residents of the aforesaid Mohallas had suffered substantial damage. It was also mentioned in this plaint that the Thikana had sold the land in dispute for a sum of Rs. 801/- to defendant No. 1 Chhoga bat Chhoga having assigned his rights to the Vaishnavas of Beda, the patta had been made by the Thikana in the name of the Vaishnava public of Beda. It was further stated that the defendants had raised the construction on the land in dispute on the 19th September, 1949, and called it by the name of Anopmandal, and that the same was being looked after by the Vaishnava public of the village and, therefore, defendants Nos. 5 to 11 were being impleaded as representatives of that section of the public. It was prayed that a declaration be granted in favour of the plaintiffs that the land ABCD was Rasta and that the plaintiffs had a customary right dnheh gd to use this lurid for purposes of passage. It was further prayed that the patta which had been made by the Thikana in the name of Vaishnava public be cancelled, and that the construction that had been raised on the land be demolished, and a further injunction be granted against the defendants restraining them from erecting any kind of structure on the land in dispute in future.

4. The defence in the first suit was a complete denial of the right of way claimed by the plaintiffs from over the disputed land as also a denial of their easementary rights of light, air and drainage. The defence in the second suit was a denial of any right of way over the land ABCD. It was contended that the land in dispute was not used for passage at all, nor did it provide a way between Sisodiya ka Bas,

Nayapura, Gogaji-ki-gali and Gogajika-bas, and the allegation that it was being used by the residents of these Mohallas as passage on occasions of marriages or deaths or similar other matters was entirely repudiated. It was further pleaded that this was an open plot of land which was the milkiyat of the Thikana and that the latter had a right to sell it to whomsoever it liked, and, therefore, it was sold to Chhoga in the first instance, and later as Chhoga had assigned his rights in favour of the Vaishnava community of the village Beda, a patta had been granted by the Thikana in the name of the latter, It was further contended that when the defendants raised the construction which they did on the land ABCD, and this construction had been intended for religious purposes, the plaintiffs or the other residents of the Mohallas aforesaid did not raise any objection whatsoever and, therefore, they were estopped from bringing the present suit.

Yet another plea was raised to the effect that as the plaintiffs' case was with respect to an obstruction on an alleged public high-way by the defendants, the Advocate General was a necessary party and the present suit could not have been brought save by him or at any rate without his consent in accordance with the provisions of Section 91 C. P. C., and, therefore, the present suit was not maintainable. Finally, it was contended that even if the Court came to the conclusion that the plaintiffs' right of way over this land was established and that some kind of injury or damage was caused to them by the sale of this land, even then as the defendants had started their religious activities in the building which was objected to, and any interference with the same was likely to wound their religious susceptibilities and those of their co-religionists, a decree for demolition should not be passed, but instead, appropriate damages may be awarded to the plaintiffs.

5. The trial court in both the suits decreed the plaintiffs' claim in toto. The defendants then went in appeal to the learned Senior Civil Judge Sirohi who allowed the appeals and dismissed the plaintiffs' suits. Consequently, the plaintiffs have come up in second appeal to this Court in both the suits.

6. At the very outset I should like to observe that, having regard to the over-all circumstances of these cases, I thought it meet and proper to advise both the

parties to reach an amicable settlement, if they could, as this would have been obviously in their common interest, and I even granted two adjournments to them for this purpose, but it is very much to be regretted that no such settlement could be reached. In these circumstances, there is no alternative for this Court but to decide the appeals on the merits and in accordance with law.

7. The first and the most important question in these appeals is whether the finding of the learned Senior Civil Judge that the land ABCD was just an open plot of land, without more, which belonged to Thikana Beda and as to which it was solely at its sweet-will and pleasure whether it would sell it or not, and it had not been proved that it was a thoroughfare for the use of the persons who lived in the Mohallas around this land is well-founded.

8-11. (After discussion of the evidence His Lordship proceeded) : This is the entire oral evidence led by the parties in this connection, and I have no hesitation whatsoever in holding, on a balance of this evidence, that the plaintiffs' case that the land in dispute was being used for purposes of passage and repassage for the people who lived in the four Mohallas around this land is established to the hilt.

12. The learned Judge of the court below has not given any clear finding as respects the veracity of this evidence or otherwise. All that he was content to say was that the plaintiffs' evidence did not amount to more than that of user of the land and that such user had not been proved as of right. The learned Judge went on so far as to say that the evidence of user given on behalf of the plaintiffs was consistent with the case of permissive enjoyment. With all respect for the learned Judge, I emphatically disagree with this finding for the simple reason that it was never the case of the defendants that the use which the plaintiffs, or those whom they represented, made of the land in question was permissive. It was not open to the court below to make out an entirely new case for any of the parties which they themselves did not put forward. As respects the question whether such long user was as of right or not, it is a matter which would primarily depend on the facts and circumstances of each case and of course no universal rule can be laid down that long user by itself must necessarily be as of right or inexplicable on any other reasonable hypothesis.

13. And this brings me to the consideration' of very important evidence consisting of the two documents, namely, Exs. 2 and 3 which throw a flood of light on the whole question. Ex. 2 is a patta relating to the house of Kapoorchand Poonamchand, Kapoorchand being the father of Dharamchand plaintiff No. 3 in the first case. There is no valid reason to suppose that this patta does not relate to Dharamchand's house although it would have been certainly preferable if Dharamchand himself had come and produced' it instead of leaving it to be produced by Moolchand the other plaintiff who clearly deposed that it related to Dharam Chand's house. This patta was definitely put to Bhailal, D. W. 4, an employee of the thikana and he admitted that it bore the seal of the thikana. It was also put to Thakur Jagjitsingh himself, and all that he said was that he could not say whether it was issued by his Thikana as it had been given before he was born. This patta is dated the 22nd November, 1928, i.e., about 21 years before the present suits were brought. The southern boundary of this house was mentioned in this as ^?kjksa dk fudkl** (that is passage for houses); this covers the land in dispute, and in my opinion is of very great significance.

The learned Judge brushed aside this important documentary evidence merely on the ground that it had not been proved that this patta and the other patta Ex. 3 were of the houses on either side of the disputed land. It may be pointed out in this connection that Moolchand definitely stated in the witness-box that the two pattas produced by him related to the houses in question -- Ex. 2 being the patta of Dharamchand's house and Ex. 3 of his own. No cross-examination was levelled at him as regards this version of his, and, therefore, I see no valid reason why Ex. 2 should not be taken to relate to the house of Dharamchand. Even if this patta were left out of account for a moment because Dharamchand himself did not come and prove it, there is the other patta which relates to the houses of the plaintiff Moolchand Ex. 3. This is dated Fagun Vadi 7 Smt. 1925. This was produced by Moolchandplaintiff himself. Obviously this patta was granted So years before the present suits were brought. Moolchand stated that this patta related to his house and again this statement of his was not challenged in cross-examination. There is, therefore, no reason to doubt the genuineness of this patta in any case. It is mentioned in this that the entrance of the house was towards the east and that is undoubtedly so as far as Moolchand's house was concerned, and then it is further

mentioned that on one side there is the house of Shah Unianath and on the other a Seri. The word 'sen', it is common knowledge in this part of the country, means a 'rasta'. This, to my mind, is clearly referable to the land ABCD which is in dispute in the present case.

These pattas were obviously granted by the Thikana Beda. The mention of a rasta over the land which is in dispute in this case constitutes therefore an important admission on the part of the Thikana that the land lying to the northern side of Moolchand's house and the southern side, of Dharam Chand's with which we are concerned in the present case was a rasta. This admission is a very strong piece of evidence, and it cannot but bind all those who derived their title from the Thikana as the other defendants did in the present case. The oral evidence, therefore, led by the plaintiffs receives valuable support from these two documents. I am, therefore, unhesitatingly of the opinion that the view of the learned Judge that the plaintiffs have failed to prove that they were making use of the land in question as passage as of right is an entirely mistaken one. The learned Judge seems to have laboured under the impression that this description of boundaries in the pattas was not enough to show 'that it was a dedication for the public at large or that the inhabitants of the four Mohallas had been using it as of right'.

Now it clearly seems to me that the approach of the learned Judge to this aspect of the matter is altogether wrong. The question to decide in these suits is whether the plaintiffs have succeeded in proving a right of passage from over the land in dispute either qua the plaintiffs in the first suit, or qua the residents of the Mohallas living around the area in dispute in the second suit. As discussed above, there is abundant oral evidence on the side of the plaintiffs, which I see no reason to doubt as to the existence of the passage since time immemorial. The same conclusion is greatly strengthened by the mention of this very land in the pattas Exs. 2 and 3 as land for passage. In these circumstances I see no reason why this passage which has been in existence for something like so years should not be considered to have been used as a matter of right. The Thikana itself granted the right of passage and it does not lie in its mouth now to say that this right does not exist for that it had not given it at all. The evidence led by the defendants in this connection

is altogether insufficient to rebut the case of the plaintiffs.

A point also seems to have been made in the judgment of the court below to the effect that the plaintiffs should have objected to the sale of the land in question at the public auction allegedly held by the Thikana with respect to it, and it appeared surprising to the learned Judge that the plaintiffs should not have filed any objections in the patta proceedings. With all respect, this argument seems entirely unconvincing to me. The patta proceedings are not meant to decide or have decided questions of civil rights, and the failure of the plaintiffs to file an objection on this score in the patta proceedings cannot legitimately be used as an argument to stifle such a right of the plaintiffs if they really possess one.

14. I may also take this opportunity of dealing with the rather sweeping statement which has been made by the learned Judge in his judgment in the first case that 'open Khalsa land is used sometimes by people as a way, but that does not convert that land into public way unless there is dedication, explicit or by necessary implication.' There is authority for holding that dedication may be presumed where so far as living memory goes a passage has been proved to be used as a public way. See *Ardeshir v. Aimai*, AIR 1929 Bom 94. In any event, dedication, to my mind, is not the only method by which the acquisition of a right of way on open Khalsa land can be rendered possible. Such a right, for instance, is capable of being acquired by grant from the owner of the land by the persons living in the close proximity thereof, and if it is established that a right of way was so granted, then it cannot be any legitimate argument to hold that it does not exist in the case of such land because no dedication was pleaded or proved. Again, a right like this may also be acquired as a customary right or as a prescriptive easement. So also, where a long open user of a public way is proved, a presumption does seem to me to arise in the absence of circumstances negating it that the user was of right.

As I have shown above, there is overwhelming evidence, direct as well as circumstantial, to show that the people living alongside the land in dispute, and, in the surrounding area, have been using this land as a passage since time immemorial, and this use in the circumstances of the case, in my considered

opinion, clearly amounts to use as a matter of right, and there is no legitimate foundation for the argument that it was permissive. For these reasons, I find myself in complete disagreement with the learned Judge in the court below on this aspect of the case and hold that the plaintiffs have succeeded in establishing in both cases on a balance of the relevant considerations that the land ABCD had been in use of the plaintiffs either by themselves or by those whom they represent as passage for going from Sisodiya-ka-Bas to Gogaji-ka-Bas or Gogaji-ki-Gali or Nawapura or vice versa, and this way was enjoyed by them as a matter of right.

15. It was next strenuously argued that even if I came to the conclusion to which I have above, the present suits must fall to be dismissed as they were filed without the consent of the Advocate General in compliance with the provisions of Section 91 C. P. C. The argument of learned counsel for the defendants was that the right claimed by the plaintiffs in these cases was really a public right of way and an interference with such a right of way would amount to a public nuisance within the meaning of Section 91(1) and so these suits were not maintainable having not been filed by the Advocate General or with his consent as required by Section 91. The question which therefore arises for determination is whether the obstruction caused in the instant cases amounts to a public nuisance within the meaning of Section 91(1) C. P. C.

15a. Now so far as this aspect of the matter goes, I may state at once that the first of these two suits was certainly brought by the plaintiffs not merely on the ground of a public nuisance but on a right of suit which existed independently of the provisions of Sub-section (1) of Section 91 C. P. C. Sub-section (2) of this Section provides as follows :

'Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.'

From the narration of facts as respects the first suit, it is manifest that the plaintiffs filed that suit on the ground of interference with their right of public way as also on the ground of interference by the defendants with their rights of easement with respect to light and air and drainage. That suit is therefore undoubtedly competent and learned counsel for the defendants later conceded that this was so. Even as

regards the second suit, it was contended by learned counsel for the plaintiffs that the suit was competent though it had not been brought with the consent of the Advocate General.

16. In support of his argument, learned counsel has strenuously contended that the dispute between the parties relates to a common village pathway and not to a public highway and that an obstruction to the former does not amount to a public nuisance within the meaning of that expression as used in Section 91 C. P. C. I have been referred in this connection to a large body of rulings which have taken that view. Thus in *Chuni Lall v. Ram Kishen Sahu*, ILR 15 Cal 460 (FB) and *Harish Chandra v. Harish Chandra*, AIR 1923 Cal 622, it was held that it is only in the case of a public highway that the question of special damage arises; but where the case is one of a village pathway, no such question of a Special damage would arise. See also *Harihar v. Chandra Kumar*, AIR 1919 Cal 123, *Pran Nath Kundu v. Emperor*, AIR. 1930 Cal 286, *Bibhuti Narayan v. Mahadev Asram*, AIR 1940 Pat 449, *Dalgobinda Mahatha v. Khatu Mahatha*, AIR 1948 Pat 183, *Faqir Chand v. Sooraj Singh*, AIR 1949 All 467, *Subbamma v. Narayanmurthi*, AIR 1949 Mad 634, *Murugesu v. Arunagiri*, AIR 1951 Mad 498 and *Nagireddy v. Lingareddi*, AIR 1956 Andhra 235, in support of this view.

The principle deducible from these cases seems to be that where the wrong complained against relates to a village pathway, as contradistinguished from a public highway, then a village pathway being open merely to a comparatively small number of people or a limited section of the public, an obstruction to it does not fall within the meaning of 'public nuisance' as used in Section 91 C. P. C. on the reasoning that a public nuisance can only be caused by an interference with a public highway which a village, pathway is not. With very great respect for this view, there is one aspect of the matter which does not seem to have been considered in these cases and that is this. A public nuisance has not been defined by the Code of Civil Procedure and we have to go to the General Clauses Act for finding out what it means. That Act lays down that a public nuisance means a nuisance as defined by Section 268 of the Indian Penal Code.

Now a 'public nuisance' as defined in Section 268 of the Penal Code means 'an act.....or an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasions to use any public right. Again, the word 'public' is defined in section 12 of the Penal Code as including any class of the public or any community. Now as to a village pathway, I am prepared to assume that an interference with it may not amount to a public nuisance under the last-part of this definition (to wit, injury, obstruction, danger or annoyance to persons who may have occasion to use any public right I am also prepared to accept for the purposes of this argument that such interference may not fall within the introductory part of the definition namely an act or omission which causes injury, danger or annoyance to the public. There-is however, a part of this definition which speaks of an injury to the people in general who dwell or occupy property in the vicinity that is neighbours as distinct from the public, and I find it very difficult to hold that this clause will not apply to those who live or occupy property in the vicinity of a village pathway. If, therefore, the expression 'public nuisance' has to be interpreted in the light of the definition given in section 268 of the Penal Code, then the view that there cannot possibly be a public nuisance within the meaning of section 91 read with Clause 48 of Section 3, of the General Clauses Act with respect to the infringement or injury to a village pathway seems to me, with utmost respect, for the eminent Judges who have taken that view, to be not free from a certain amount of doubt or difficulty having regard to the state of law as it exists in our country. I shall, therefore, not pursue the above line of argument further and will proceed on the assumption for the purposes of this case that the way claimed by the plaintiffs was a public right of way and, therefore, a substantial interference with it would amount to a 'public nuisance' within the meaning of section 91 Civil Procedure Code.

17. Even so, the question has to be answered whether the second suit could have been brought by the plaintiffs without the consent of the Advocate General. Section 91 of the Code of Civil Procedure is in these terms: -

'91. (r) In the case of a public nuisance the Advocate General or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.'

Now, the doctrine of the English law of Torts is that there can be no private action for public wrong unless there is special damage to the party aggrieved, and the principle underlying this rule is that no man should stand to be harassed by a multiplicity of suits in respect of a single wrong. This principle being a matter of justice, equity and good conscience has been accepted by the Courts in our country and acted upon. Section 91, however, provides an exception to this doctrine and that is that such a suit can be maintained even without proof of special damage provided the Advocate General brings such a suit or any two persons or more aggrieved by a public nuisance bring it with the consent of the Advocate General. But where there is an invasion of a special right belonging to a particular individual or group of people the suit can be brought even without proof of special damage. There is a special limitation provided under Sub-section (2) of section 91, the effect of which is that the section does not deprive any person of any right which he may have independently of a general right as contemplated under Sub-section (1) of section 91. Thus it was held by the Privy Council in *Manzur Hassan v. Md. Zaman*, AIR 1925-PC 36 that there was a right for the followers of a particular creed or religion to conduct a religious procession along a highway and resolving a conflict of decisions between the Bombay High Court on the one side and the Madras on the other their Lordships held in favour of the latter view that a suit for such a declaration could be brought in law without proof of special damage.

18. I now propose to refer to *Surendra Kumar Basu v. District Board, Nadia*, AIR 1942 Cal 360 on which learned counsel for the respondents relies very strongly in support of his contentions. The leading judgment in this case was delivered by

B.K. Mukherjee, J., (as he then was). The facts in this case were that the plaintiff brought an action for removal of an alleged encroachment made by the defendant upon a public thoroughfare in front of the former's house. The suit was dismissed by both courts below on the ground that it was not maintainable at the instance of the plaintiff without proof of special damage.

In second appeal it was strongly contended before the High Court on behalf of the plaintiff that after the decision of the Privy Council in AIR 1925 PC 36 (supra) it was not necessary for an individual bringing a suit in respect of a public nuisance to allege and prove special damage, and it was further contended that in any case special damage had been proved. Both these contentions were repelled by the High Court. The ratio of the judgment of his Lordship was that the case before him was not properly governed by the judgment of the Privy Council inasmuch as it related to the right of the members of a particular sect or religion to prevent obstruction by a rival group to use a highway for religious processions. There was a conflict of opinion on this point as already stated between the decisions of the Bombay High Court which took the line that to sustain a suit by a body of persons for the establishment of their right to use the highway in such cases, proof of special damage was necessary while the decisions of the Madras High Court favoured the view that, such a right to use the highway was a right inherent in every person provided he did not invade a similar right of others or cause a public nuisance and a person or persons whose such right, was obstructed would have a cause of action to bring a suit without special damage.

Mukherjee, J., went on to hold however that the aforesaid decision of the Privy Council did not govern the case before him, and if I may say so with profound respect, correctly. The nature of the right contended for before the Privy Council was, in its dominant aspect, a far broader one than the mere removal of a public nuisance and the central question raised there was as to the plaintiff's right to carry a religious procession on a public highway which right, if I may say so, is inherent in every individual or body of individuals and, the right to carry a procession after the advent of our Constitution is a fundamental right within the meaning of Article 19 thereof. The element of 'public nuisance' is subordinate in this class of cases, if at all, it enters into them.

I respectfully agree, therefore, that the decision of the Privy Council cannot be held as an authority for the broad proposition for which it was-sought to be used in the Calcutta case that in suits relating to obstruction to a public way without more it was no longer necessary to allege or prove special damage. As to the second contention raised on behalf of the plaintiff it was held by His Lordship that there was no allegation of special damage in the whole body of the plaint nor was any evidence adduced on the point. The other learned Judge Sen, J., pointed out in his judgment that para 8 of the plaint made it quite-clear that no special damage was suffered, and as for the argument that the Court should presume special damage as the roadway in front of the plaintiffs house had been narrowed, the learned Judge pointed out that the encroachment was very slight indeed. The dismissal of the suit was for these reasons upheld by the High Court.

19. At first sight,, the above case may seem to support the defendants' case; but on closer consideration, it appears to me that it does not, and' is perfectly distinguishable from the case before me. The distinction lies in this that while in the Calcutta case, the element of a public nuisance was the predominant factor involved and no special damage had either been alleged or proved, the present case is not a case of a mere public nuisance as such and the injury in the suits before me even if it affected the rights of the public generally, essentially amounted to something more than a public nuisance and special damage has been clearly alleged and sought to be proved. The Calcutta case can therefore be of no help to the defendants.

20. I would next refer to the Full Bench decision of the Bombay High Court in Chandu Sajan v. Nyahalchand, AIR 3950 Bom 192 (FB). The question before the Full Bench was whether a civil suit could be brought without the consent of the Advocate General to establish a right to carry a non-religious procession through a public street. The suit in which this question arose had been brought for a declaration without any allegation as to special damages. Chagla, C. J., who delivered the judgment of the Full Bench after discussing a large number of cases to which I need not refer laid down that it was difficult to see any distinction on principle between the right of conducting a religious procession along a public thoroughfare as upheld in AIR 1925 PC 36 (supra), and the right of conducting a

non-religious procession, as the right in either case depended on the lawful and reasonable user of a highway. The learned Chief Justice, therefore, held that a citizen or community or a section of a community possesses an inherent right to the user of a highway and must be held to be capable of maintaining a suit for declaration of that right without proof of special damage.

21. I may now briefly refer to a few other cases which were cited before me.

22. In *Pahlad Maharaj v. Gauri Dutt*, AIR 1937 Pat 620 the facts were that the plaintiff and the defendant lived on the opposite sides of narrow road through a village, and the defendant built on the thoroughfare a structure containing a platform and a privy, and this was held to amount to a public nuisance. It was held by the High Court of Patna that a person in the position of the plaintiff in this case had a special cause of action, irrespective of whether he had proved special damage or not, the principle being that the plaintiff here was in a particular position to suffer loss and must be deemed to have suffered loss from the inconvenience and nuisance committed by the defendant.

23. In *Dasrath Mahto v. Narain Mahto*, AIR 1941 Pat 249, Harries, C. J., followed the same view and observed that the underlying principle was that a person of an immediate community or section of the public who was deprived of the amenity provided for that particular section might 'be deemed to have suffered loss without proof of such loss, and, therefore, the plaintiffs in this case were held entitled to seek the removal of the obstruction on the public way without proving special damage.

24. Earlier in *Municipal Committee, Delhi v. Mohammad Ibrahim*, AIR 1935 Lah 196 it was held that there could be no question that for the owners of houses, abutting on a public highway, the question or montage means a great deal and if anything is done by those in whom the highway vests which interferes with the rights of the owners with regard to the highway and which tends to diminish the comforts of the occupants of the house, the owners will undoubtedly have an actionable claim against them and that in such cases it was not necessary to prove that any special injury had been caused. It seems to me that the principle which has been laid down in this case as to, the diminution of comforts on the

frontage will equally apply to the cases where such discomfort is caused by an encroachment on the side of a house also.

25. Again in AIR 1948 Pat 183 (*supra*), it was held that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section should be deemed to have suffered loss without proof of such loss and that no special damage need be proved in such a case, and it would suffice if it is shown that a particular section of the public has been deprived of certain advantages which it has enjoyed for a long time.

26. Now from the aforesaid review of case law, the principle deducible is this, and, with all respect, it seems to me that the various decisions to some of which reference has been made above and there are undoubtedly others to which I have not referred can all be more or less reconciled on this principle. The real test as to whether a suit of this or similar nature is maintainable without proof of special damage is to find out whether the suit pertains essentially to the removal of a public nuisance only, that is, of a common injury which the plaintiff or plaintiffs suffers or suffer as much as the rest of the community or the public and no more substantially over and above the injury or inconvenience caused generally or on the other hand in its quintessence the suit has been brought for the vindication of a right which is not a mere public nuisance but is independent of it and it is such a right which the plaintiff seeks to claim and get decided. If it is predominantly a case of the former kind, and does not involve the determination of any right independent of subsection (r) of Section 91, then it seems to me that the plaintiff cannot file a suit on his own and he must invoke the assistance of the Advocate-General so that either he brings the suit himself or permits two or more persons aggrieved to bring the suit, unless of course the plaintiff alleges and proves special damage, in which case no consent of the Advocate General would be necessary. If, however, the case is not merely a case of public nuisance but is in addition a case of private nuisance such as a grave trespass on the rights of the plaintiff on a public highway or involves the determination of any independent right such as the inherent right of an individual to use a highway for the carrying of a procession religious or otherwise, or any other similar right, then I am clearly disposed to hold the view that the plaintiff in such a case would be within his rights to bring a suit by himself,

and this is exactly what Sub-section (2) of section 91 provides and the plaintiff in such a case need 'neither allege nor prove special damage. It is hardly necessary to point out that where the case does not relate to a public nuisance at all, then section 91 Civil Procedure Code is not at all called into play and no question of special damage or of the intervention of the Advocate General can possibly arise.

27. Let us test the instant suits now in the light of the principles that I have formulated above. I shall assume, as already stated, that they relate to a public thoroughfare. These suits, in my considered judgment, do not exemplify a case of simple public nuisance without more. In the first suit the plaintiffs claimed not only a general right of way, which apart from a public way, is bound to affect in a special manner passage from and to their houses and the amenities enjoyed by them, arising in the very nature of things, over and above the public at large, but they also claimed rights of light, air and drainage. These are plainly rights which transcend that arising from a mere public nuisance as such. This suit therefore falling as it does under Sub-section (2) of section 91 Civil Procedure Code was and is certainly competent without the consent of the Advocate General. And the only pertinent question is whether the plaintiffs have proved their case on the merits. Having regard to the discussion of the evidence in this suit made above, I am clearly of the opinion that the plaintiffs in this suit are immediate neighbours of the land in dispute and could not but be put to palpable inconvenience and serious discomfort because of the encroachment on their customary right of way alongside their houses -- a right which had been vouchsafed to them by the Thikana itself, vide pattas Exs. 2 and 3 and therefore could not be taken back at its sweetwill and pleasure.

Next as to the right of drainage: (After discussion of evidence in this respect His Lordship proceeded:) That being the real state of evidence, I am surprised that the learned Judge below should have felt persuaded to conclude that there was no evidence whatever to show that the obstruction to the spouts was or would be a source of damage. The evidence on the other hand definitely was that by the obstruction to the spouts a substantial injury had been and would continue to be caused and I see no valid reason to hold to the contrary. It only remains to determine how far the plaintiffs have established their right of easement of light

and air, and whether the obstruction thereto amounts to a substantial deprivation of these amenities. The plaintiff Moolchand has undoubtedly supported his case that by the closure of the windows in his house he has been deprived of light and air, and his house has become uninhabitable. Unfortunately Dharamchand did not enter the witness-box. On a careful appraisal of the entire evidence relating to this aspect of the case which seems to me to have been allowed to go down on the record rather perfunctorily in the trial Court, I do not think it safe to come to any definite conclusion about this, and, therefore, I would leave this aspect of the case at that. Be that as it may, I am firmly of the opinion that the plaintiffs have succeeded in establishing their case on the other aspects thereof as discussed above.

28. So far as the second suit is concerned, the plaintiffs, again, claim a right of way, interference with which may of course amount to a public nuisance, but essentially and substantially it is not limited to that. It clearly amounts, in my judgment, to a grave trespass of their customary right to use a public way -- to use which, if I may say so, they have an inherent right, and this right, to my mind, is independent of their right to claim the removal of a public nuisance. It also seems to me that the residents of these Mohallas by virtue of their peculiar situation with reference to the land in question have a 'special' interest in the use and preservation thereof as a public thoroughfare and as discussed above they would inevitably stand to be specially damnified by the obstruction caused thereto, 'nay by its complete annihilation. In both the suits, therefore, as I understand them, the plaintiffs have a cause of action independently of a mere public nuisance, and they have therefore a right to bring these suits regardless of the doctrine of special damage and the intervention of the Advocate General was and is unnecessary. As discussed already, the plaintiffs have proved this part of their case to hilt and they are entitled to redress on this footing alone,

29. Now suppose for the sake of argument that the plaintiffs should have proved special damage in these cases. In that event also, I feel disposed to hold the opinion that, in the first suit, they have proved a grave violation of their right of drainage as also an equally grave breach of their right of way which was of special utility to them being neighbours in immediate vicinity thereof; and, in the second

suit, the plaintiffs have established that after this customary way has been closed, those living in the Sisodiya-ka-Bas and intending to go to the Gogaji-ki-Gali or Gogaji-ka-Bas or Nawapura Bas or vice versa have to make a very considerable detour (via Sutharon-ka-Bas), and there is authority for holding that even this would amount to special damage. See *Md. Raza Khan v. Md. Askari Khan*, AIR 1924 All 599. I may pause for a moment to point out that some attempt seems to have been made on the side of the defendants to show that an alternative way for the residents of these Mohallas is possible or has been in use from over the land shown as IJKL on the plan Ex. 1; but the plaintiffs' witnesses have clearly stated that this land belongs to private individuals and the matter has not been pursued further so as to enable the Court to give any definite finding about this. And in any case, if the plaintiffs have had two alternative ways for their use they cannot be deprived of the one without lawful authority on the mere ground that they would still have the other.

30. The whole situation may be summed up somewhat like this. The plaintiffs in both suits have proved a public right of way on the land in dispute. They have been totally deprived of 'this right of way without any rhyme or reason. 'They have a special interest in the preservation of this right of way. It can hardly admit of any reasonable doubt or dispute that this constitutes a serious violation of the rights of the persons living in the close vicinity of, or, in the Mohallas surrounding, the disputed land. There also appears no valid justification for throwing out these suits on the ground of want of consent of the Advocate General because owing to the special interest of the plaintiffs in the suit land and the benefits it affords' them in particular, as contradistinguished from the general public, either the plaintiffs were not required to prove special damage in these cases, or if they were so required, they have proved the same. Furthermore, the case of the plaintiffs Moolchand and Dharamchand in the first suit that their spouts which had been falling on the land in dispute for a very long period upwards of 20 years and have been unlawfully obstructed is fully established by all reasonable - standards of proof. In view of these conclusions at which I have firmly arrived, I have considered it unnecessary to give any definite finding on the question of easement with respect to light and air which is also alleged to have been infringed by the defendants.

31. At this stage, it would be appropriate to deal with a further contention raised on behalf of the defendants. It was thus urged that the alleged right of way and drainage in these suits, before they are held to be proved, should not only be required to be established as a matter of right, but must have been enjoyed for a period of sixty years to qualify for a prescriptive easement on the footing that the land in dispute belonged to the Jagirdar and that such user had not been clearly established. The submission was that all land in the Jagir area of a Jagirdar belonged to the State in law and no right of easement could possibly be acquired against the State among other requirements by less than sixty years' user. I have carefully considered this contention and do not feel disposed to accede to it. The short answer to this contention, in my opinion, is that, in the matter of sale of abadi lands in their Jagirs the Jagirdars in the former State of Jodhpur from which area this case arises, always claimed and were accepted to be the owners of such land, and it is on the strength of this ownership that they used to sell abadi lands in their jagirs without let or hindrance and appropriated the proceeds thereof. Call this custom or anything else you may like, this practice was notorious and too well established to admit of any controversy. And it was in pursuance of this State-wide custom that the Jagirdar here sold the land in dispute to Chhoga and then to the Vaishnava public as in countless other cases Jagirdars did the same within their Jagirs. In these circumstances, I have no doubt that the period of sixty years, which has been laid down as a sine qua non for the acquisition of a right against the Government, cannot possibly be held to be applicable to the case of a Jagirdar who most certainly could not be equated with the State, and twenty years' user should in my considered opinion be enough to claim a right of prescriptive easement against him. It further seems to me that the rights claimed in these suits and the right of way claimed in particular in the second suit did not possess the character of a prescriptive easement but they are essentially customary rights or are rights acquired by grant, or at any rate rights in respect of which a grant may be presumed from long user or ancient enjoyment. It is true that the pleadings here are not very precise but it has been laid down in innumerable cases that mufassil pleadings should be viewed liberally. It may not be inappropriate in this connection also to invite attention to the observations of the Privy Council in *Maharani Rajroop Koer v. Abdul Hossain*, 7 Ind App 240 (PC) that section 26 of

the Limitation Act which governed the case before their Lordships, as it governs the present suits, is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Apart from that however if the correct position in law is that the rights which are in controversy in these suits have been claimed as prescriptive rights, then, in that case also I am definitely disposed to hold that the plaintiffs have succeeded in establishing that they have been in peaceable enjoyment of them as of right and as easement for more than 20 years ending within two years of the institution of these suits.

32. The next question which in these circumstances falls for consideration is whether the plaintiffs are entitled to the reliefs prayed for, namely, demolition and perpetual injunction and cancellation of the patta granted by the Thikana to the defendants. The learned Judge of the Court below having found that the plaintiffs had failed to establish their case in the first suit (a finding with which I have substantially disagreed) felt persuaded to observe with reference to the second suit that, even assuming that the plaintiffs' case therein was proved, they were not entitled to any mandatory injunction which was an equitable relief and that the plaintiffs had disentitled themselves to the said relief by having brought the suit after a great deal of delay, and in this connection it was further pointed out that the building was erected on the 18th September, 1949, whereas the second suit was instituted on the 27th October, 1950.

This delay was sought to be explained by the plaintiffs in the second suit on the ground that the plaintiff Moolchand (who let it be remembered is a plaintiff common to both the suits) and Dharamchand had filed a suit earlier on the 12th September, 1949, when the disputed land was lying open and a temporary injunction had been issued by the Court against the original defendants in that case soon afterwards and yet construction had been raised on it. The learned Judge found that this explanation was unsatisfactory because according to him the previous suit was based on easement by prescription, and that, in any case, if that suit was sufficient, there was no necessity to bring a second suit.

With all respect, I am entirely unable to accept the approach of the learned Judge as correct. As soon as the plaintiffs Moolchand and Dharamchand apprehended an invasion of their rights they immediately brought a suit on the 12th September, 1949, and be it noted that until then nothing had been built on the land in dispute. These plaintiffs had applied for and obtained an ad interim injunction against the defendants Chhoga and his sons almost immediately and if that proved infructuous because defendant Chhoga had in the meantime adopted the device of assigning his rights to certain other persons (no document has been produced in this connection on the present record much less a registered one) I have no doubt that no blame can be fastened on to these plaintiffs for that. The said plaintiffs were vigilant enough and it is greatly to be regretted that they were dodged in their effort to stop the mischief at the very start. Confronted by such a situation the plaintiffs amended their first suit with the permission of the Court and impleaded the other defendants as representatives of the Vaishnava public, of this village and also included a prayer for the demolition of the structure that had been raised with most unseemly haste on the land in dispute.

On the conclusion at which I have arrived in the first suit it is immaterial to my mind that the second suit was brought after about one year of the first suit. In any view of the matter, I find it absolutely impossible to accept the view of the learned Judge that the plaintiffs were guilty of undue delay or laches or acquiescence or any thing of the sort. Nor do I find it possible to accept that those who were responsible for erecting the structure on the land in dispute did not know of the temporary injunction or at least of the fact that a suit had been filed with respect to this land and, therefore, they had no business to take the law into their own hands, pending the decision of the case and spend any money on it (there is nothing on the record to know even approximately how much money has been spent and therefore it seems to me that this structure is by no means substantial) and if they did so they have to thank themselves for the consequences. It clearly seems to me, above everything else, that the immediate neighbours of the suit land or a section of the public living in the area, surrounding the disputed land have been deprived in these cases of their very valuable right of passage to which they are entitled in law and justice and this cannot be disregarded simply because the Jagirdar and the other defendants or those who are represented by them acted in collusion with

each other and behaved in a most high-handed manner or having so behaved want to escape the consequences on mere sentimental grounds. To my mind, a case like this peremptorily calls for a restoration of the original position which existed before the encroachment was made.

33. I should like to point out at this place that I am fully conscious that a mandatory injunction is a discretionary relief and delay is a factor which has to be taken into account while granting it where a case for grant of this relief is otherwise made out. Such delay, however, to be a disqualifying circumstance, must amount to waiver or abandonment of the rights sought to be enforced or acquiescence in the act complained of or laches, after the act is done. There can be no question of any of these circumstances in the instant suits for the first suit had been brought by the plaintiffs there before any structure was at all built on it and the delay even in the bringing of the second suit cannot be characterised in the circumstances as amounting to any of these things in view of the fact that the first suit had already been brought and plaintiff Moolchand is a common plaintiff to both the suits and an ad interim injunction had been applied for and passed. A further principle to bear in mind is that where an injury caused to a person or persons would constitute a sort of a perennial trespass--a trespass day in and day out -- upon his or their rights, normally a mandatory injunction is the only appropriate remedy. Thus a mandatory injunction was granted to pull down even a substantial building when erected on a portion of a highway after notice from the plaintiff. See AIR 1929 Bom 94 (supra). Again the principle is well settled that a plaintiff is entitled to a mandatory injunction where the defendant despite protests from the plaintiff persists in his unlawful act and behaves in an unfair and high-handed manner. See *Murarilal v. Balkishan*, AIR 1926 Nag 416 and the cases discussed therein and in particular the English case *Krehl v. Burrell*, (1878) 7 Ch 551 where a mandatory injunction to demolish the building was issued despite the fact that it had been built at an enormous cost. I have no doubt that the suits before me clearly fall within the mischief of the principles discussed above, and pecuniary compensation can afford no just measure of damages in cases- of this type, and the only legal as well as just remedy is to order a removal of the encroachment otherwise, the rights of law-abiding people in the villages would become a mere play-thing in the hands of scheming people who may be only too prone to oppress others -- for one reason

or another, and even in the name of religion. I, therefore, unshesitatingly hold that a case for grant of mandatory injunction is fully made out in these cases The other reliefs asked for are more or less consequential or incidental and call for no particular discussion.

34. I, therefore, allow these appeals, set aside the judgment and decrees of the learned Senior Civil Judge and restore those of the trial Court. The defendants are allowed one month's time from the date of this judgment to remove the impugned structure on the land ABCD in plan Ex. 1 themselves; but should they fail to do so, the plaintiffs will have the right to have the same demolished by execution at the expense of the defendants. The plaintiffs will have one set of costs in each suit from the defendants throughout. Leave for further appeal is refused.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com