

**D. Thomas Vs. N. Thomas and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/823807](http://sooperkanoon.com/823807)

**Court :** Chennai

**Decided On :** Feb-12-1999

**Reported in :** (1999)2MLJ260

**Appellant :** D. Thomas

**Respondent :** N. Thomas and ors.

**Judgement :**

ORDER

**S. S. Subramani, J.**

1. Second defendant in O.S.No. 141 of 1998 on the file of Principal District Munsif cum-Judicial Magistrate Court, Eraniel is the revision petitioner herein. This revision is filed under Article 227 of Constitution of India.

2. Respondents 1 and 2 herein are plaintiffs in the suit and they filed the suit in representative capacity under Order 1, Rule 8 of Code of Civil Procedure for a decree for permanent prohibitory injunction restraining petitioner and first defendant from starting or conducting liquor shop both Indian made foreign liquor and country made liquor in 'B' schedule property for proposed and anticipated reasons and apprehended injury and also to restrain other defendants from issuing licence for defendants 1 and 2 for starting liquor shop.

3. It is the case of plaintiffs that they are residents of thickly populated area and if any liquor shop is conducted in 'B' schedule property, that will cause private and public nuisance to the people nearby. Breach of peace also occur and there will also be law and order problem. Residents of area also moved representation before District Collector not to grant any licence to run liquor shop in that area and they apprehend second defendant would start liquor shop, which will affect peaceful residence.

4. Along with the suit, plaintiffs also moved for injunction, A rough plan was also produced to show that location and how far starting of liquor shop will affect the locality.

5. A detailed counter was filed by petitioners both on facts and law. On facts, it is contended that starting of liquor shop in B schedule property will not create nuisance and on question of law it is argued that the suit is not maintainable before civil court. The argument was that the suit is barred under Section 56 of Tamil Nadu Prohibition Act.

6. By the impugned order, lower court held that the suit is maintainable and there is no bar for instituting suit. It is further held that there is prima facie evidence that conduct of shop will be an actionable nuisance. Temporary injunction was granted till the disposal of suit.

7. The order of lower court is challenged in this revision under Article 227 of Constitution of India.

8. Even at the time of admission I asked learned Counsel for petitioner why he should not exhaust statutory remedy of filing appeal before appellate court under Order 43, Rule 1 of Code of Civil Procedure.

9. Learned Counsel for petitioner submitted that only point he is going to argue is regarding jurisdiction of court and that can be considered by this Court. He also submitted that he does not want any leave for filing appeal.

10. In view of the said submission of petitioner's counsel, only question that requires consideration is whether civil court has jurisdiction to entertain suit i.e., a

suit for permanent prohibitory injunction restraining defendants from conducting any shop in the 'B' schedule property which will be cause of nuisance to the residents of locality.

11. Main argument of learned Counsel for the petitioner was on the basis of Section 56 of Tamil Nadu Prohibition Act, taken along with Rule 18 of Tamil Nadu Liquor Retail Vending Rules. Relevant provisions relied on by learned Counsel read thus,

Section 56: No action lies against the Central or State Government or against any Prohibition, Police or other Officer, for damages in any civil court for any act bona fide done or ordered to be done in pursuance of this Act. Rule 18: Location of shop: (1) No shop shall be established in Municipal Corporations and Municipalities within a distance of 50 (fifty) metres and in other areas 100 (hundred) metres from any place of worship or educational institutions;

Provided that the distance restriction shall not apply in areas designated as 'Commercial' or 'Industrial' by the Development of Town Planning Authorities;

Provided further that if any place of worship or educational institution comes into existence subsequent to the grant of licence, it shall not disentitle the licensee for continuance and further renewal.

(2) Every shop shall be housed in a pucca building and no part of the shop shall be thatched either on the sides or on the roof.

(3) There shall be provision for keeping the liquor under lock and key, accessible only to the licensee or his authorised employees.

12. Before considering the scope of this Act, I will have to consider Section 9 of Code of Civil Procedure also. Section 9 of Code of Civil Procedure says,

The court shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

There are two explanations, which are not material for our purpose and hence omitted.

13. What is the scope of 'suit of civil nature' came for consideration before the Honourable Supreme Court in the decision reported in *Most Rev. P.M.A. Metropolitan v. Moran Mar Marthoma* (1995) 4 S.C.C. 286, paragraphs 28 and 29 of the judgment read thus,

28. One of the basic principles of law is that every right has a remedy. *Ubi Jus ibi remediem* is the well-known maxim. Every civil suit is cognizable unless it is barred, 'there is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue' *Ganga Bai v. Vijay Kumar*. The expansive nature of the section is demonstrated by use of phraseology both positive and negative. The earlier part opens the door widely and latter debar entry to only those which are expressly or impliedly barred. The two explanations, one existing from inception and latter added in 1976 bring out clearly the legislative intention of extending operation of the section to such religious matters where right to property or office is involved irrespective of whether any fee is attached to the office or not. The language used is simple but explicit and clear. It is structured on the basic principle of civilised jurisprudence that absence of machinery for enforcement of right renders it nugatory. The heading which is normally key to the section brings out unequivocally that all civil suits are cognizable unless barred. What is meant by it is explained further by widening the ambit of the section by use of the word 'shall' and the expression 'all suits of a civil nature' unless 'expressly or impliedly barred'.

29. Each word and expression casts an obligation on the court to exercise jurisdiction for enforcement of right. The word 'shall' makes it mandatory. No court can refuse to entertain a suit if it is of description mentioned in the section. That is amplified by use of expression 'all suits of civil nature'. 'The word 'civil' according to dictionary means 'relating to the citizen as an individual, civil rights'. In *Black's Law Dictionary* it is defined as 'relating to private rights and remedies sought by civil

actions as contrasted with criminal proceedings'. In law it is understood as an antonym of criminal. Historically the two broad classifications were civil and criminal. Revenue tax and company etc. were added to it later. But they too pertain to the larger family of 'civil. There is thus no doubt about the width of the word 'civil'. Its width has been stretched further by using the word 'nature' along with it. That is even those suits are cognizable which are not only civil but are even of civil nature. In Article 133 of the Constitution an appeal lies to this Court against any judgment, decree or order in a 'civil proceedings'. This expression came up for construction in *S.A.L. Narayan Row v. Ishwarlal Bhagwandas* : [1965]57ITR149(SC) . The Constitution Bench held 'a proceedings for relief against infringement of civil right of a person is a civil proceedings'. In *Arbind Kumar Singh v. Nand Kishore Prasad* : [1968]3SCR322 . it was held, 'to extend to all proceedings which directly affect civil rights'. The dictionary meaning of the word 'proceedings' is 'the institution of a legal action, any step taken in a legal action'. In Black's Law Dictionary it is explained as:

In a general sense, the form and manner of conducting juridical business before a court or judicial officer. Regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment. Term also refers to administrative proceedings before agencies, tribunals, bureaus or the like. The word 'nature' has been defined as 'the fundamental qualities of a person or thing; identity or essential character; sort; kind; character'. It is thus wider in content. The word 'civil nature' is wider than the word 'civil proceedings'. The section would, therefore, be available in every case where the dispute has the characteristic of affecting one's rights which are not only civil but of civil nature.

14. The jurisdiction of a court to entertain and decide a suit depends upon the allegations in the plaint and not upon those which may ultimately be found true. Such allegations may, after the trial, be held to be unfounded which will in consequence result in dismissal of the suit not because the court had no jurisdiction but because the allegations on which it was based were found, to be incorrect. The question of maintainability of a suit also thus depends on the allegations made in the plaint. The plaintiff cannot, however, by merely so drafting his prayer as to exclude relief which may or may not be granted by the court

confer jurisdiction to try the suit. Hence, in all cases it is necessary to consider what the cause of action in the plaint is and what is the substantive relief sought for by the plaintiff. An exclusion of jurisdiction of civil court is not to be inferred readily.

15. Under Specific Relief Act, a suit to prevent the nuisance is maintainable under Sections 38 and 39. Plaintiff is also entitled to file a suit for perpetual prohibitory and mandatory injunction from causing any nuisance. Nuisance is an act of omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, quasi-easement, or other right used or enjoyed in connection with land, when it is a private nuisance.' Whether it is public or private, it is common law right and the suit to prevent the occurrence of nuisance is also a suit of civil nature. So the enforcement of such civil right can had through court.

16. Now I come to the contention of learned Counsel for petitioner. According to petitioner, liquor shop is located as per the directions of authorities under Tamil Nadu Prohibition Act. Authorities will have to decide whether the location of shop is suitable in that area and therefore plaintiffs have to move only the authorities to have the shop shifted from that place under Rule 17 of Tamil Nadu Liquor Retail Vending Rules. It is further argued that if the location of shop is to be decided by the Excise authorities that it is an act which has to be done only under Tamil Nadu Prohibition Act and therefore Section 56 is a bar for instituting suit.

17. I do not think that any of these submissions could be accepted.

18. Plaintiffs are not claiming any right under Tamil Nadu Prohibition Act and what they want to enforce is only a common law right. I do not find any prohibition under Tamil Nadu Prohibition Act that the common law right to prevent a nuisance is taken away by any other provisions of Prohibition Act. Plaintiffs are not claiming any right by virtue of statute which creates a right for do they want enforcement of such a right created by statute. To prevent a person from committing nuisance is all along a common law right and that could be enforced de hors the enactment of Tamil Nadu Prohibition Act.

19. As was held in *Saraswathi v. Lachanna* : (1994)1SCC611 , while considering bar of suit the court will have to see where a particular act creates a right and also provides a forum for enforcement of such right and bars the jurisdiction of the civil court then ouster of the civil court jurisdiction has to be upheld. But the situation will be different where the statute neither creates the right in question nor provides any remedy or having created any right or liability no forum for adjudication of any dispute arising out of such right or liability is provided. In such a situation, the ouster of the civil court's jurisdiction is not to be easily inferred.

20. To prevent a nuisance is not a matter to be decided by authorities under the Act. For considering location of shop, certain guidelines are given under Rule 18. Though they are not exhaustive, it is clear that authorities under Prohibition Act cannot adjudicate private rights of a citizen. So long as plaintiffs are not claiming right under the Act, nor the right to prevent nuisance is created under the Act, there cannot be bar under Section 9 of Code of Civil Procedure read with Section 56 of Tamil Nadu Prohibition Act.

21. According to petitioner, nuisance is caused consequent to the location of shop in a particular place. How far public are affected by location of a shop and how civil rights of the citizens are affected, the redressal is only a civil court and not authorities under Excise Act. The contention of learned Counsel is that if there is nuisance plaintiffs can very well move the authorities for shifting the shop without resorting to civil remedy. If plaintiffs file suit for shifting of shop in a civil court, probably argument of counsel may have to be accepted. But even that remedy can be entertained in a civil court under certain circumstances. Plaintiffs do not want shifting of shop from one place to another. They do not want defendants to conduct shop in that area. That will not come under any provisions of Tamil Nadu Prohibition Act and there is also no bar in enforcing such civil rights.

22. Lower court has rightly held that suit is not barred and such right could be enforced only through civil court. Finding of Lower court do not call for any interference.

23. Learned Counsel for petitioner did not argue anything on facts.

24. In the result, the civil revision petition is dismissed. No costs. Consequently, C.M.P.No. 1009 of 1999 is also dismissed.

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