

(1950) 03 MAD CK 0034

Madras High Court

Case No: Second Appeal No. 866 of 1947

S.K. Murugesu Mudaly

APPELLANT

Vs

Baruda Arunagiri Mudaly and
Others

RESPONDENT

Date of Decision: March 24, 1950

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 91

Citation: AIR 1951 Mad 498 : (1950) 2 MLJ 770

Hon'ble Judges: Raghava Rao, J

Bench: Single Bench

Advocate: S. Ramachandra Iyer, for the Appellant; K. Srinivasan, for the Respondent

Final Decision: Allowed

Judgement

Raghava Rao, J.

This second appeal arises out of a suit for a declaration of the plaintiffs-right of way across a public street, for a direction

to the defendants to remove the obstructions put up by them on the street, and for a permanent injunction to restrain the defendants from

obstructing the plaintiff in using the public street as such. The only answer to the suit which requires consideration in this second appeal is that it

was not maintainable without the consent of the Advocate General in the absence of any special damage sustained by the plaintiff. The defence was

rejected by the District Munsif of Sholinghur and the suit decreed on his finding that the plaintiff had suffered special damage. This finding was

reversed on appeal by the learned Subordinate Judge of Chittoor who accordingly dismissed the suit. The plaintiff appeals.

2. The plaintiff and certain others are residents of the Big Street in Narasingapuram. Arkonam taluk. The backyards of their house reach up to the Othavadai street of the same place marked ABCD in the plan attached to the plaint. Some owners have doorways leading to Othavadai street from their backyards and some others have not. Likewise, some of them have pits in that street for their backyard drainage water. The defendants who are owners of houses situate to the south of and facing Othavadai street happened to have constructed mud walls and put up fences and caused obstruction to the plaintiff and others owning houses with their backyards reaching up to Othavadai street in the matter of their taking cattle, manure, hay etc. from their backyards to their fields. The plaintiff on these allegations filed the suit for the reliefs mentioned above without obtaining the sanction of the Advocate General or framing a suit as one in a representative capacity under Order 1, Rule 8, Civil P. C. The learned District Munsif took the view that the action complained of against the defendants caused special damage to the plaintiff for the reasons which he gives in para. 8 of his judgment. Says the learned District Munsif:

... I am Satisfied that the plaintiff has been using this street to take hay and manure from his backyard and that he has also used the same to take his cart, and for other purposes spoken to by him and his witnesses. There is little doubt that similarly other persons in the plaintiff's row have used the suit street and plaintiff has undoubtedly suffered by the obstruction caused by the defendants inasmuch as he is prevented from using the suit street to go from his backyard towards east to his lands. To take manure from his backyard to the land to the east of the suit street, plaintiff must take a detour, which certainly would justify him in saying that he has suffered special damage. The defendants' case is that the plaintiff can still use his backyard through Ediga street, but it depends upon how far defendant 1 is going to remain without enclosing that portion of the street into his backyard and it must put the plaintiff to a lot of inconvenience. I have no hesitation in coming to the conclusion that by defendants' action, plaintiff has suffered something that is special to him and not shared by others or common to all. It is well known that in the villages, if their backyards abut

a street, the owners use their backyards freely only from that street, and it is a very valuable right which is curtailed by the defendants' action.

Further if the plaintiff wants to construct a small building in the backyard with frontage along the suit street, he cannot do so and it would be very serious loss to him. I therefore hold that the plaintiff has proved special damage.

In the result, the learned District Munsif decreed the suit as above stated.

3. On appeal taken by the defendants to the Subordinate Judge of Chittoor, it was held by him that on the facts found by the learned District

Munsif the plaintiff must be taken to have suffered no more or further damage than the other residents of the same row in the locality and that

therefore he had failed to prove special damage to entitle him to institute the suit otherwise than in a representative capacity under Order 1, Rule 8,

Civil P. C., or with the sanction of the Advocate General u/s 91, Civil P. C. The learned Subordinate Judge has observed that "it is true that the

defendants have high-handedly converted grama-natham public street into their backyards," but has dismissed the suit in the view that he has taken

of its unmaintainability.

4. It is urged for the plaintiff in this appeal that he sustained a special damage by the action of the defendants because in his capacity as agriculturist

the amenities that he had all along enjoyed over the street for carrying his manure, fuel, hay etc., to his fields stood hampered by such action. It is

said that the damage is nonetheless special, because other persons who also pursue the calling of agriculture may suffer the same inconvenience as

the plaintiff as the result of the defendants' action. I accept this contention as well-founded and hold that although not instituted with the leave of the

Court under Order 1, Rule 8, Civil P. C., or with the consent of the Advocate-General u/s 91, Civil P. C., the present suit is maintainable.

5. My attention has been drawn in the course of the argument to the ruling of this Court in Kodavalur Subbamma Vs. Lota Narayanamurthi and

Others, which holds that:

It is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance

without the sanction of the Advocate-General u/s 91, Civil P. C., and even without proof of special damage." In that case, however, the suit was

one instituted under Order 1, Rule 8, Civil P. C., and while it is true that the learned Judge who decided that case points out that very often Courts have to deal with the infringement of the rights of the residents of a village or a section of the community in pathways, wells and banks of rivers and so on, and that the infringement of such rights cannot be deemed to constitute a public nuisance within the meaning of Section 91, Civil P. C., or Section 268, Penal Code, his conclusion is that a member of such a class can file a representative suit under Order 1, Rule 8, Civil P. C., for relief in respect of infringement of such rights. That is not the kind of suit which we have here and the ruling in question may not consequently appear to assist the appellant before me.

6. It will be seen, however, on a careful scrutiny of that decision that in holding as it does that it is open to an individual member of the public to maintain a suit for removal of obstruction to a public highway which constitutes a nuisance without the sanction of the Advocate-General u/s 91, Civil P. C., and even without proof of special damage, it founds itself upon a prior decision--that of Wadsworth J. to the same effect reported in *Munuswami v. Kuppusami*, I. L. Rule (1939) Mad. 870 : AIR 1939 Mad. 691. The case before Wadsworth J. was not itself a case of a suit instituted under Order 1, Rule 8, Civil P. C., but only in the individual capacity of the plaintiff who was entitled to maintain the suit. After all, the provision of Order 1, Rule 8, is only an enabling provision, and there is no reason why merely because the plaintiff happens to share the same inconvenience by the obstruction to the highway as other people do he should be debarred of his right to seek relief, when once in view of the Privy Council decision in AIR 1925 36 (Privy Council) it is realised that the distinction between indictment and action in regard to what is done on a highway which is a distinction peculiar to English law ought not to be applied to India. I am of opinion therefore that even if the damage suffered by the plaintiff in the present case is one which is shared by other residents of the same locality he is still entitled to maintain the present suit. I am also of opinion that the ruling in *Kodavalur Subbamma Vs. Lota Narayanamurthi and Others*, governs the present case in so far as it lays down

that even if proof of special damage is otherwise necessary in a case of this kind, it becomes unnecessary because the wrong complained of in the present case does not constitute a public nuisance. As pointed out in that decision, once it is appreciated that infringement of the rights of the residents of a village in respect of a public street does not constitute a public nuisance in the sense of a nuisance caused to the public in general, such infringement can well be sued upon by any member of the public who suffers from the wrong complained of. The case cannot, in that view, be regarded as one of public nuisance within Section 91, Civil P. C., and the sanction of the Advocate-General accordingly is not required. Nor is it necessary to compel a person that suffers from such wrong to have recourse to the procedure prescribed by Order 1, Rule 8, which, as already stated, is after all only an enabling and not a compulsory provision.

7. It has also been argued before me for the appellant that this case may well be regarded as one of trespass by the defendants in the sense of their obstruction to his right of passage over the public street which would fall within the rulinga in Pakkiri Taragan v. Subbayan Samban, 42 Mad. 271 :

A. I. R. 1919 Mad. 674 and AIR 1925 36 (Privy Council) or as one of the infringement of a village customary right such as the Privy Council

has recently dealt with in AIR 1950 56 (Privy Council) . It is unnecessary for me to consider these contentions in the view that I have taken that

there has been, as rightly found by the learned District Munsif, such damage caused to the plaintiff as is sufficient to support his present suit, and

that even in the absence of any such special damage the present suit is maintainable.

8. This second appeal is accordingly allowed with costs here and in the Courts below. No leave.