

**(1993) 12 KL CK 0031**

**High Court Of Kerala**

**Case No:** S.A. No. 1049 of 1988

Mathew Mathew

APPELLANT

Vs

Uthuppu Thomman and Others

RESPONDENT

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**Date of Decision:** Dec. 9, 1993

**Hon'ble Judges:** M.M. Pareed Pillay, J

**Bench:** Single Bench

**Advocate:** P. George William and T.N. Sreedharan Nair, for the Appellant; T.R. Ramachandran Nair, for Respondents 1, 3 and 4, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

M.M. Pareed Pillay, J.

Appellant-Plaintiff filed the suit for mandatory injunction for cutting and removing overhanging branches of trees standing in the property of Defendants 1 to 5. Plaintiff resides in the plaint schedule property. Defendants 1 to 3 have property on the northern side of the plaint schedule property and Defendants 4 and 5 have property on the western side. Contention of the Plaintiff is that as a result of the overhanging of the branches of the trees income from his property is very much reduced and his request to Defendants to cut and remove overhanging branches has gone unheeded. Defendants denied the allegations in the plaint and contended that no injury has been caused to the Plaintiff as a result of the overhanging of the branches of the trees. Learned Munsiff dismissed the suit holding that though the shade from the trees of the Defendants has spread towards the plaint schedule property there is no evidence of any actual injury sustained by the Plaintiff. The Munsiff held that Plaintiff has not succeeded in proving that he is either damnified or inconvenienced due to the overhanging of the branches of the trees into his property. Plaintiff's appeal was dismissed by the learned Additional District Judge reserving him the right to have a similar suit filed as and when necessity arises and if he chooses to do so. The Additional District Judge held that since there is no imminent cause of action Plaintiff cannot obtain mandatory injunction.

2. In Ext. C-1 commission report Commissioner stated that branches of the trees standing in the property of the Defendants are overhanging into the property of the Plaintiff to a distance of nearly 19 1/2 feet. In view of the commission report which has not been objected to by the parties, the Additional District Judge held that there is clear evidence to show that the branches of the trees standing inside the property of the Defendants overhang into the plaintiff schedule property and thus creating shade there. In view of the shade it would not be possible for the Plaintiff to enjoy his property to the maximum and it would not be possible for him to raise any cultivation or agricultural operations. Defendants' contention that coconut trees in the plaintiff schedule property stand beyond 20 feet from its boundary and so there is no likelihood of any damage or injury being caused to the Plaintiff is no answer to the grievance of the Plaintiff.

3. The question that arises for consideration is whether the Plaintiff is entitled to a decree for mandatory injunction directing the Defendants to cut and remove the overhanging branches of trees in the plaintiff schedule property. The Courts below though found that branches of trees in the Defendants' property overhang in the plaintiff schedule property, Plaintiff was non-suited as he did not succeed in establishing actual damage or injury or inconvenience as a result of it. The Additional District Judge relying on the commission report held that the Plaintiff has not cultivated his land with any catchcrops or seasonal crops in any portion close to the boundary of Defendant's properties and as the coconut trees standing near the boundary are much taller than the protruding branches of trees relief of mandatory injunction cannot be granted in favour of the Plaintiff.

4. In a case where there is evidence, of overhanging of branches of trees standing in Defendant's property to Plaintiff's property latter can always seek for mandatory injunction and it cannot be denied on the ground that there is no evidence of any damage to the Plaintiff. Proof of actual damage is not necessary and whenever the Court finds that overhanging of the branches of trees causes nuisance to the Plaintiff or as a result of it Plaintiff would not be in a position to enjoy his property to the optimum he can always seek mandatory injunction for cutting and removing of the branches of the trees protruding into the plaintiff schedule property.

5. In *Batcha Rowther v. Alagappan Servai* AIR 1959 Mad 12 the Madras High Court held thus:

The owner of a tree has no right to allow its branches to overhang the land of his neighbour. If he does so the neighbour can cut the branches so long as he could do so without entering upon the land of the owner of the tree. He need not even give a notice to the owner. The owner of the tree cannot acquire any right by prescription to allow its branches to overhang because an old nuisance cannot by passage of time become a respectable nuisance. Merely because the previous owner did not object, perhaps due to his relationship with the owner of the tree it cannot be said that there has been acquiescence and therefore the succeeding owner is estopped

or prevented from claiming relief against the nuisance.

Merely because the Plaintiff has not so far undertaken any cultivation in that portion of the plaint schedule property, the nuisance as a result of the overhanging of the branches of trees into the plaint schedule property cannot be allowed to continue. Defendants cannot obviously contend that so far the Plaintiff has not made any cultivation in that portion of the property and as he has not sustained any injury or damage he is not entitled to seek the mandatory injunction. Proprietary right of the Plaintiff cannot be infringed by anyone unless it is sanctioned by law. Allowing branches of the trees in Defendants' land to overhang into the plaint schedule property affects the Plaintiffs enjoyment and reasonable use of his property so long as the overhanging continues to cause nuisance to the Plaintiff as well as abridgement of his right of enjoyment. Though Plaintiff has the right to abate the nuisance by cutting the branches of the trees protruding into his property, he can very well approach the Court to obtain necessary order for abating the nuisance. Merely because the overhanging of the branches of the trees was there for some time and Plaintiff did not take immediate action to get it cut and removed Defendants cannot resist the suit on the ground that hitherto it remained so and the Plaintiff has not suffered any actual damages. It is apposite to refer to [Putraya Vs. Krishna Gota](#), where the Madras High Court held:

Injunction may be granted for cutting off portion of the trees overhanging the Plaintiff's lands where although no actual damage is proved, the trees are likely to cause damage to the Plaintiff and where money compensation is not appropriate relief.

6. Fifth Defendant examined as D.W. 1 deposed that on receipt of notice from the Plaintiff Defendants have actually cut and removed overhanging branches of the trees and that they are prepared to cut and remove any overhanging branch. The above evidence of D.W. 1 cannot be true in view of the commission report which reveals the overhanging of the branches of the trees into the plaint schedule property. D.W. 1's admission that Defendants are prepared to cut off the overhanging branches of the trees was not considered by the Court below. The Courts below overlooked the admission of D.W. 1 and the evidence disclosed from the commission report with regard to the overhanging of the branches of the trees into the plaint schedule property. They were not justified in holding that Plaintiff is not entitled to the mandatory injunction on the ground that no injury has been caused to him on account of the overhanging of the branches of trees into his property.

7. The judgment and decree of the Courts below are set aside and the suit is decreed in favour of the Plaintiff granting him mandatory injunction as prayed for. Second Appeal stands allowed. No costs.