

**(1939) 09 PAT CK 0022**

**In the Patna High Court**

Choudhury Bibhuti Narayan Singh and Others

APPELLANT

Vs

Maharaja Sir Guru Mahadev Asram Prasad Sahi Bahadur

RESPONDENT

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**Date of Decision :** 26-09-1939

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 91  
Limitation Act, 1963 — Section 23

**Citation :** AIR 1940 Patna 449

**Hon'ble Judges :** Meridith, J; Fazl Ali, J

**Bench :** Full Bench

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## Judgement

Meridith, J.—It has been deemed advisable to take these three appeals together, as similar questions arise for decision in each. They are questions of considerable importance, and in regard to which there is not only no authoritative decision of the Patna High Court but the case-law in India appears to be in a state of confusion. All three appeals are by defendants and arise out of suits for removal of encroachments on village roads.

No. 786 is an appeal from a decision of the Additional Subordinate Judge of Arrah, dated 23rd July 1937, confirming a decision of the Munsif, First Court, Arrah, dated 26th September 1935. The respondent, the Maharaja Bahadur of Hathwa, sued the appellants for recovery of possession over certain parcels of land situated in mauza. Kurmurhi, after a declaration that the defendants had no right to cultivate those lands, and praying for a permanent injunction restraining the defendants from encroaching upon the lands in question.

2. The plaintiff sued as 16 annas proprietor of mauza Kurmurhi, and the suit was in respect of portions of plots Nos. 1600, 1422 and 708. All these plots were recorded in the gair mazrua am khata, 1600 being entered as daggar, 1422 as rasta and 708 as karha (water channel). It was alleged that the defendants, in Asarh 1340 F. had unlawfully amalgamated certain portions of these plots with their own lands, and had brought them under cultivation. Subsequently to the filing of the plaint, the plaintiff asked for permission of the Court to sue in a

representative capacity under the provisions of Order 1, Rule 8, Civil P.C., and the Court, having-granted permission, issued notice, as required by that rule, by publication in the Provincial Official Gazette.

3. The plaintiff's case in this regard was that by obstruction of the daggar, rasta and karha much mischief had been done to the plaintiff and to the public at large. He sought to sue not only in his capacity as landlord, but also as representing the public.

The appellants, in defending the suit, claimed that it was not maintainable by the plaintiff, and that the claim was also barred by limitation, as they had been in cultivating possession of the disputed lands for much more than twelve years. Other pleas were also taken, which are not now material. The first Court held that the lands in question had been formerly daggar, rasta and karha but the defendants had been in cultivating possession of them for more than twelve years before the suit.

4. The plaintiff's claim as landlord must therefore fail. It held however that as the plaintiff had sued in a dual capacity, he was entitled to maintain the suit under Order 1, Rule 8 in a representative capacity, and as the encroachment amounted to the obstruction of public paths and ways, the plaintiff, as a member of the public, had a right to have the encroachments re-moved irrespective of the length of user by the defendants, because the encroachments were continuing nuisances, and Section 23, Limitation Act, was applicable. He purported to base his finding on the decision in *Bhagwan Dutt v. Asharfi Lal* AIR (1984) Pat 34 and accordingly decreed the suit.

In appeal the Subordinate Judge upheld these findings. He also held that the plaintiff was entitled to sue under Order 1, Rule 8 and . that as the encroachments amounted to obstruction of public pathways, Section 23, Limitation Act, was applicable, and the suit was not barred by limitation.

5. It was argued before him that on his findings the obstruction amounted to a public nuisance and consequently the plaintiff could not sue, except in accordance with the provisions of Section 91, Civil P.C., after obtaining the consent of the Advocate-General. The learned Subordinate Judge however thought that this was not necessary in view of the provisions of Clause (2) of Section 91, as the plaintiff had an independent right of suit in view of his dual capacity as landlord of the village, he having filed the suit, because the encroachments interfered with his rights as landlord as well as with those of the entire public. So far as the first right was concerned, all that was necessary was compliance with the provisions of Order 1, Rule 8, and that had been done. He held that the fact that the plaintiff was not a resident of the village, did not prevent him from maintaining the suit on behalf of the public of the village. In this second appeal we are no longer concerned with the karha plot 708, as the appeal is confined to the lands forming part of plots 1600 and 1422, which were both roads. The same two points, and those two only, are again raised in second

appeal, namely that the suit was not maintainable by the Maharaja as framed, and that the claim was in any case barred by limitation.

6. Second Appeal No. 217 of 1938 is from a decision of the learned Additional District Judge of Shahabad, dated 23rd December 1937, confirming a decision of the Munsif, Second Court, Arrah, dated 2nd September 1936. The suit was for removal of an alleged encroachment on a village lane, said to have been made by the defendants on 10th February 1935 by erecting compound walls thereby narrowing the lane and causing inconvenience to the public. Here again the plaintiff asked that the suit should be treated as one under Order 1, Rule 8, Civil P.C. This was allowed, and notice was issued by publication in the Provincial Gazette. The contesting defendant claimed that the land belonged to him, had been in his possession for a long time, and the compound walls had been in their present position, for more than twelve years. It was denied there had been any encroachment on the lane or any inconvenience caused to the public.

7. The first Court held that the defendants had encroached upon the village lane to the extent of 6 dhurs and 8 1/2 dhurkis, and the disputed walls had been constructed on 10th February 1935, as alleged by the plaintiffs. It held that the lane in question was a "village public lane" and carts used to pass through it. It was settled law that in a village lane, as distinguished from a public highway, special damage need not be proved. Moreover, the suit was properly framed under Order 1, Rule 8, Civil P.C. The suit was not barred by limitation on the findings and moreover the encroachment upon a public lane was a continuing wrong. On appeal by defendant 1 the Additional District Judge upheld these findings, although with regard to the question of special damage he expressed himself somewhat differently as follows:

The suit having been brought by the plaintiffs under Order 1, Rule 8, Civil P.C., as residents of village Gidha, and the encroachment upon the public lane being necessarily a cause of inconvenience to all villagers, there is special damage to the plaintiffs, and so they are entitled to bring the suit.

Second Appeal No. 355 of 1938 is an almost precisely similar case. It is an appeal by defendants 1 to 4 from a decision of the Additional District Judge of Shahabad, dated 25th November 1937, affirming a decision of the Munsif of Arrah, dated 30th September 1936. This also was a suit under Order 1, Rule 8, Civil P.C., brought by the plaintiffs, as representing the public, for removal of an alleged encroachment on a portion of plot No. 2085 in Mauza Khadaon Bujrug, which was said to be a public thoroughfare. A permanent injunction was asked for restraining the defendants from encroaching upon the thoroughfare.

8. The defendants contended *inter alia* that there was no encroachment, that the plaintiffs had no *locus standi* to bring the suit without the permission of the Advocate-General u/s 91, Civil P.C., and that the suit was barred by limitation. The house of the defendants being old and built of mud fell down. They therefore demolished it and reconstructed a brick house on the old site confining

themselves to the limits of the old house. The finding was that plot No. 2085 was a public rasta, and the defendants had encroached upon that rasta. Reliance was once more placed on AIR 1934 Pat 341 for a finding that the encroachment was a continuing wrong, and so no question of limitation arose. In appeal the Subordinate Judge also held that there had been an encroachment on the gair mazrua am pathway, plot No. 2085, and observed that no other point had been pressed in the appeal which was therefore dismissed with costs.

9. The points that arise in these cases are (1) the exact nature, scope and application of Section 91 and Order 1, Rule 8, Civil P.C., (2) the application of the doctrine of special damage to India; (3) the nature and scope of representative suits regarding obstructions to highways, village ways and pathways; and (4) the law of limitation applicable to such suits. I propose to consider first the question of limitation. *Makhu Sahu and Another Vs. Kamta Prasad Sahu and Others*, is a single Judge case, and no Division Bench case of the Patna High Court, in which the question has been considered, has been cited at the Bar. In the case cited, *Kulwant Sahay J.* held that no length of user can justify an encroachment into a public way, as such encroachment is a continuing wrong, and, as Section 23, Limitation Act, is applicable, no question of limitation arises. He noticed the decision of the Madras High Court in *Municipal Commissioners v. Sarangapani Mudaliar* (1896) 19 Mad 154, where it was held that the defendant, who had encroached upon a public highway adjoining his house, had acquired a right by adverse possession, and the plaintiff's action was barred by limitation. But he pointed out that the Calcutta High Court, in *Nazimullah v. Wazidulla* AIR (1916) Cal 733 had held that wrongful interference with a right of way constitutes a nuisance and is a continuing wrong u/s 23, Limitation Act, and in that decision the Calcutta High Court was following the decision of the Privy Council in *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394.

10. The argument put forward on behalf of the appellants is, first, that a distinction must be made between encroachments upon public highways and upon village pathways. In the first case, we are dealing with full public rights which have their origin in dedication, or upon the principle of a lost grant. In the second case, the right is of a semi public nature, commonly having its origin in custom and being of the nature of an easement. It is said that this difference was not considered by *Kulwant Sahay J.* and must give rise to a distinction, for where an easement can be acquired, it can also be extinguished. Secondly Section 23, Limitation Act, is clear in its terms. It runs as follows;

In the case on a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Upon its terms it can only apply where the wrong is really a continuing one, and this cannot be the case where the encroachment is by an act such as the building of a wall, which is over and done with once completed. A distinction must be

made between the continuance of a legal injury and the continuance of its injurious effects. There is nothing in Section 23 upon which a distinction can be made between the case of encroachment upon private land and upon public land, and if in the one case limitation will run, there is no reason why it should not also run in the case of a precisely similar act committed upon public land, there being, in short, nothing in Section 23 upon which to base a distinction between public and private rights.

11. Whether the wrong is continuing or not must depend upon the nature of the wrong itself and not upon the nature of the land over which it is committed. It must be conceded that there is considerable force in this argument. The distinction sought to be made has in fact received judicial recognition from the Calcutta High Court itself in *Brojendra Kishore v. Sarojini Roy* AIR (1916) Cal 751 20 CWN 481 where it was observed:

Where the wrongful act produces a state of affairs every moment's continuance of which is a new tort a fresh action for the continuance lies, for there is a real distinction between continuance of a legal injury and continuance of the injurious effects of a legal injury.

In *Ashutosh Sadhukhan v. Corporation of Calcutta* AIR 1919 Cal 807, where a portion of a street vested in the Calcutta Municipal Corporation, and a platform had been built by the plaintiffs about half a century before the suit as an integral part of their building, it was held that the right of the Municipal Corporation to that portion of the street, which was occupied by the wall of the platform, was barred by the provisions of Article 146-A to Schedule 1, Limitation Act. The erection of the platform was not a continuing wrong, and limitation was not saved by the provisions of Section 23, Limitation Act, as the injury was complete on the erection of the platform.

12. It is to be noted that the decision in that case was based on the finding that the Municipal Corporation had been dispossessed; as the land, upon which the wall of the platform stood, had formerly belonged to the Municipality as the owner thereof, the injury was found to be complete on the erection of a wall, and so there was no continuing injury within the meaning of the statute. The effect might continue, but that could not extend the time of limitation.

In *Sarat Chandra Mukherjee Vs. Nerode Chandra Mukherjee and Others*, , a case of 1935, it was held that where the plaintiff had a right to use certain land as a passage, and sheds had been erected obstructing his passage way, there was a continuing wrong, and Section 23, Limitation Act, was applicable in the case of a suit for removal of the sheds. It should be noted that in this Case there was no question of any public way. Section 23 was found applicable despite the fact that it was a private way, the passage way being jointly owned by the parties.

13. The learned Judges referred to the Privy Council decision in *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394 and the decision in *Nazimullah v. Wazidulla* AIR (1916) Cal 733 the very cases which were relied upon by Kulwant Sahay J. in the

Case in *Bhagwan Dutt v. Asharfi Lal* AIR 1984 Pat 34. They distinguished the case in *Ashutosh Sadhukhan v. Corporation of Calcutta* AIR 1919 Cal 807 on the ground that the real reason of the decision appears to have been that the platform having been in existence for fifty years, the Municipality had lost their right to the land on which it stood, and there was therefore no continuing wrong.

This decision is a little difficult to follow, since if the Municipality could lose its rights in the land, apparently so could the plaintiff his rights in the common passage way. No doubt where a right is completely extinguished there is no question of any wrong continuing. The matter was considered by the Lahore High Court in 1935 in *Moti Ram v. Hansraj* AIR (1936) Lah 334. A house had been built by the defendants so as to interfere with the plaintiff's right of light and air, and this was held to be a continuing wrong, as every day the building obstructed the flow of light and air. Reliance was once more placed upon the Privy Council decision in *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394 and upon *Nazimullah v. Wazidulla* AIR (1916) Cal 733.

14. In a Madras case, *Muthalagappa Chettiar (deceased) and Others Vs. Navanestheswara Gurukkal*, where the plaintiffs had a right to a flow of water as an easement, and the defendants obstructed the channel preventing the plaintiffs from irrigating their lands, it was held that whether the principle of continuing wrong could be applied to obstruction of a right of way or not, there could be no doubt that it did apply to cases of interference, with a water course, and once more reliance was placed upon *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394. The learned Judge observed:

It has no doubt been sometimes stated generally that whenever a permanent state of things has been brought about there is no scope for the application of Section 28, Limitation Act.

He pointed out that this theory could not apply where, (as in that Case) even if a permanent state of things had been brought about, it had been done on the defendant's own land, so that there was no scope for the applicability of the doctrine of title by adverse possession.

15. It should be observed that here also there was no question of any public right but only of an interference with the right of the plaintiffs. *Sreemati Soojan Bibi v. Shamed Ali* 1 CWN 96 is another case where it was held that an obstruction of the plaintiffs' private right of way was a continuing wrong and Section 23 was applicable. This case simply followed *Punja Kuviri v. Bai Kovar* (1881) 6 Bom 20, which in turn was based on the Privy Council case, *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394. The other case so frequently referred to in the decisions, *Nazimullah v. Wazidulla* AIR (1916) Cal 733, was also based upon *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394. It was not in respect of a public road. The plaintiffs merely alleged interference with their right of way, which was the only means of access to their land. In this case it was expressly held that, what their Lordships of the Privy Council had laid down with regard to obstruction

of a watercourse, must apply to an obstruction to a right of way, and that wrongful interference with a right of way equally constituted a continuing nuisance.

16. Thus, all these cases really base themselves on the authority of the Privy Council in *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394. But it has never been stated clearly anywhere, even in *Nazimullah v. Wazidulla* AIR (1916) Cal 733, on what basis of principle the obstruction of a right of way is held to be a continuing wrong, and how what was laid down with reference to the flow of water must also apply to a right of way. At best these cases all seem to have proceeded merely upon the principle of analogy. Unfortunately, if the Privy Council decision be closely studied it is seen that there is no strict analogy; for, in *Rajrup Koer v. Abdul Hossein* (1881) 6 Cal 394 there was manifestly and patently a continuing wrong. In that case the plaintiff was found to have a right to take water flowing through a channel on the defendant's land. The defendant had interfered with that right by making a number of dams and cuts in the channel, and diversions from it.

17. The plaintiff succeeded in the Courts below with regard to all of these interferences, except two channels cut in the side of the water course to draw off water: some hollow palm trees were placed to draw off water to the defendant's land. It was only in respect of these two interferences that the case came before their Lordships of the Privy Council. Neither of them was obstruction strictly speaking and by both of them the defendants were continuously drawing off, from day to day, the plaintiff's water, so that in fact, whenever the defendant drew off water through these diversions, he was in fact stealing plaintiff's water and committing a fresh wrong. It was in such circumstances merely that their Lordships observed that the obstructions, which interfered with the flow of water to the plaintiff's mahal, were in the nature of continuing nuisances as to which the cause of action was renewed *de die in diem*, so long as the obstructions causing such interferences were allowed to continue, and indeed, they said, Section 23 of the Statute contained express provision to that effect.

18. The case was therefore actually not analogous with the case of obstruction to a right of way, and it was moreover a case where what the defendant had done was done on his own land, so that there was no question of his acquiring any title by adverse possession. It is not at all clear therefore on what legal basis the decisions with regard to rights of way have proceeded. They may be right or they may be wrong, but they are not supported by the Privy Council decision upon which they all profess to rely.

It seems to me therefore that in determining whether the doctrine, which as I have noticed, has not been universally adopted, (as for instance in the decision in *Ashutosh Sadhukhan v. Corporation of Calcutta* AIR (1919) Cal 807,) is right or wrong, it is necessary to go back to the Limitation Act itself and endeavour to find some logical principle upon which the matter can be determined. One thing is clear: whatever that principle may be, it has nothing to do with the question

whether the right interfered with is public, quasi public or private.

19. There is nothing in Section 23 which would justify any such distinction, and, as I have noticed, many of the cases, where Section 23 has been held applicable, are cases of private right. Is there then any justification for holding that if I trespass upon and cultivate a man's land, I can acquire title by adverse possession, but for some reason if I trespass upon land over which another man has a right of way it is a continuous wrong so long as the trespass continues? Certain points occur to the mind at once. Trespass or obstruction may in some cases be continuing wrongs and in some cases they may not be. Under Article 37, Schedule I, Limitation Act, three years' limitation from the date of obstruction is provided for suits for compensation for obstructing a way or watercourse. Similarly, under Article 39, Schedule I, three years' limitation is provided for suits for compensation for trespass upon immovable property. Manifestly it is here contemplated that obstruction and trespass are not continuing wrongs. Presumably these Articles contemplate single acts of obstruction or trespass which are not continued.

20. If however the trespass or obstruction is continued by the wrong doer in the sense that it is not abandoned--where for instance the trespasser goes on asserting acts of possession, over the land by cultivation, or the obstructionist continues inhabiting the house built or using the water diverted, and so on--then clearly the case is quite different: the wrong continues, and Section 23, Limitation Act, gives rise continuously to fresh periods of limitation. Is there then a perpetual right of suit u/s 23? The answer is clearly, no, when the trespass or obstruction by lapse of time themselves give rise to rights under Part IV of the Act which would thereby put an end to the wrong. For, if the wrong ceases to be a wrong it cannot be said any longer to continue. Such rights may arise by way of easement u/s 26(1) in twenty years, or against Government u/s 26(2) in sixty years. Or they may arise in the case of trespass after twelve years u/s 28 read with Arts. 142 and 144, or after sixty years in the case of Government under Article 149.

21. After the expiry of these periods the defendant himself has acquired a right of easement, or the plaintiff's right to possession has become extinguished u/s 28, and there is no further right of action for possession or for removal of the obstruction despite the provisions of Section 23.

The position now becomes quite clear. Where the wrong amounts to dispossession of the plaintiff, then, although it may be a continuing wrong, the plaintiff cannot recover possession after twelve years, because u/s 28, Limitation Act, he himself has got no right left which he can enforce. Where the plaintiff is Government or is representing Government, as in the case of the Advocate-General suing in respect of public land in the full sense, this period will be sixty years under Article 149, Limitation Act. Where the plaintiff is a local authority suing in regard to a public road, the period will be thirty years under Article 146-A, Limitation Act. Where the obstruction does not amount to dispossession of the

plaintiff, either because it is not on the plaintiff's land, or because the plaintiff himself has only a right of easement, as in the case of rights of way of villagers originating in custom, then in such cases, even though the wrong be a continuing one, there would be no right of action after twenty years (or sixty years in the case of Government) where the defendant's wrong has itself ripened into an easement, and this right of the defendant is one subsisting within two years next before the date of the suit.

It will be observed that all this is quite in accord with the doctrine that obstruction of a public or village path is a continuing wrong just so long as the wrong doer is associated with the obstruction, but it is so only unless and until the wrong doer has himself acquired a right which renders his action no longer a wrong. Though this is so, there will clearly be no right of suit where the continuing wrong has ceased to be a wrong.

22. After that happens, there can be no right of suit, except perhaps for compensation for the last injury suffered while the act was still wrongful, if brought within three years of that injury, u/s 24, Limitation Act, read with Article 37 or Article 39. It is impossible on the materials before us to come to any finding as to whether upon these principles the plaintiff's rights are barred by limitation in the present cases, because the matter has not been considered in this aspect by the Courts below and the necessary findings of fact are not there. No remand is however necessary, because, as I shall presently show, all the suits must fail and the appeals succeed upon the other grounds with which I am about to deal.

23. I now turn to these other points. It has been pointed out in Second Appeal No. 786 of 1937 that the learned Subordinate Judge was guilty of confusion of thought in applying the provisions of Clause (2) of Section 91, Civil P.C., because of the plaintiff's dual capacity as landlord, for though he might have sued also as landlord, that claim was clearly barred by the twelve years' rule of limitation. Therefore the suit could succeed, if it succeeded at all, only in virtue of the plaintiff's claim in his representative capacity whatever that might be. It is next argued on the pleadings that the plaintiff had sued as representative of the public generally, and not as representative of the villagers alone, and as having, some exclusive common interest with the villagers within the meaning of Order 1, Rule 8, Civil P.C. The references in the plaint were to the rights of the public generally and not to any particular rights of the villagers, as distinct from the rights of the public at large.

24. Further it is argued that even had the plaintiff sued as representative of the villagers, he had no common interest with them in the subject-matter of the suit as necessitated by Order 1, Rule 8, and the suit must fail on that ground. With this last contention I cannot agree, because it seems to me that, if there are any special rights in these tillage pathways existing in the villagers, as distinct from the public generally, the landlord of the village may well be said to share this special interest, even though he be not a resident of the village, for as owner of

the village he will share the villagers' interests in the public lands of the village.

25. Upon the view that the plaintiff in this case sued as a member of the public, and not as a member of a limited class or community, it is said that Section 91(1) is clearly applicable, and the suit can only lie in accordance with its provisions and with the consent of the Advocate-General. Having regard to the definition of "public nuisance" in the Penal Code, which is applicable under the terms of the General Clauses Act, the obstructions being to public paths, are public nuisances irrespective of the fact whether these paths are used by the public generally or only by people in the locality. The plaintiff as a landlord has no subsisting right of suit, since limitation must defeat that claim. On the other hand, if he sues as a member of the public for the removal of a public nuisance, Section 91 provides a bar, and Order 1, Rule 8 gives no separate right of suit in itself. There being no separate right of suit, Clause (2) of Section 91 cannot help the plaintiff. Order 1, Rule 8 gives no right of suit, but only a right of representation where there is already a right of suit, and in any case Order 1, Rule 8 cannot override Section 91. Clause (2) of Section 91 might give the plaintiff a right of suit if he had pleaded and proved special damage, but he has neither pleaded it nor sought to prove it.

26. The findings of the lower Courts with regard to damage are clearly expressed as being damage to the rights of the public at large. On the pleadings and findings the paths in question must be held to be available to anyone wanting to use them, no matter what his residence.

For the respondent it is argued, on the point of maintainability, that Section 91, Civil P.C., has no application in the case of a village path, as opposed to a public high-way, and a large number of rulings has been cited in support of this contention. It is said therefore that a suit under Order 1, Rule 8 is maintainable. It is further argued that in any case the plaintiff has sued as representing the villagers, not the public generally, and the villagers have special rights in these paths as distinct from the rights of the general public.

27. The doctrine of special damage does not apply in India, and in these circumstances it is unnecessary for the plaintiff to prove special damage. The arguments in the other two appeals have followed similar lines. The questions raised are obviously of considerable importance, and it becomes necessary to examine very carefully the exact significance and application of Section 91 and Order 1, Rule 8, Civil P.C. Section 91 reads as follows:

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 reliefs as may be appropriate to the circumstances of the case.

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

The provisions of Order 1, Rule 8 are:

Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued or may defend, in such suit, on behalf of or for the benefit of all persons so interested.

But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

Any person on whose behalf or for whose benefit a suit is instituted or defended under Sub-rule (1) may apply to the Court to be made a party to such suit.

28. The application of the doctrine of special damage to India seems to have been first considered in a Bombay case, *Satku v. Ibrahim Aga* (1877) 2 Bom 457, where the whole subject was exhaustively discussed. This case was one where the plaintiffs, who were Musulmans, sued to establish their right to carry tabuts in procession along a certain road to the sea, and alleged that the defendants (also Musulmans)" obstructed them in doing so. The plaint however did not allege any personal loss or damage to the plaintiffs, arising from the obstruction. It was held that the plaintiffs could not maintain a civil suit in respect of such obstruction unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The mere absence of religious or sentimental gratification arising from carrying tabuts along a public road was not any such particular loss or injury as would be sufficient, according to English and Indian precedents, to sustain a civil action.

29. This case was followed by the Madras High Court in *Adamson v. Arumugam* (1886) 9 Mad 463 where the nature of Section 30, Civil P.C., which then contained the provisions now embodied in Order 1, Rule 8, was also examined. It was a case similar in many respects to those with which we are now concerned. The plaintiffs as representatives of the villages of Podiamputhur sued the defendant to obtain a declaration that certain land enclosed by him was public property, to recover possession thereof, and to remove an obstruction placed on a certain road. It was treated as an action for the removal of an obstruction from a public highway. The plaintiff proved no special damage. The learned Chief Justice of the Madras High Court observed that the English law upon the subject was that no action can be maintained by an individual against another for obstruction to a highway without proof of special damage and that rule was founded on adequate reasons of public policy and had been generally adopted in the Indian Courts.

30. The rule that a man who may have committed some public injury shall not be harassed by innumerable actions by persons who have not sustained any damage embodies equitable doctrine," he said,

and should be enforced in India as a rule of equity and good conscience. As there was no proof of special damage the plaintiffs must fail.

Section 30, Civil P.C., could not help them. That Section was designed rather to allow one or more persons to represent a class having special interests than to allow such persons to sue on behalf of the general public, to which the notices prescribed by that procedure would be inapplicable. It was observed that the High Courts at Calcutta and Allahabad had come to the same conclusion and he referred with particular approval to the examination of the matter in *Adamson v. Arumugam* (1886) 9 Mad 463.

31. These principles were more or less uniformly followed until 1924 when a somewhat similar case came before the Privy Council in *Manzur Hasan v. Muhammad Zaman* AIR (1926) PC 36. This was a case where the Shia Muhammadans of a certain town brought a suit for a declaration of their right to take procession bearing religious emblems along a public street immediately behind a Sunni Mahomedan mosque and make pauses from time to time for religious observances. Their Lordships of the Privy Council observed that the case raised for authoritative decision the question as to the right of religious processions to proceed along the roads in India practising their religious observances. With regard to this question they observed that the decided authorities in India were conflicting. They remarked that there was an obvious discrepancy between Bombay and Madras, and Calcutta upheld Madras. They noticed the leading Bombay case, *Satku v. Ibrahim Aga* (1877) 2 Bom 457.

32. They observed that the judgment in that case proceeded entirely on English authorities which laid down the difference between proceedings by indictment and by civil action. In their Lordships' opinion such a way of deciding the case was inadmissible. The distinction between indictment and action in regard to what is done on a highway is a distinction, they observed, peculiar to English law and ought not to be applied in India. In the Madras cases on the other hand, in none of them was the idea entertained of special damage other than the obstruction of procession being needed. They noticed that in *Muhammad Abdul Hafiz v. Latif Husain* (1897) 24 Cal 524 the Calcutta High Court had taken the Madras view. Their Lordships were of opinion that the views of the Madras High Court were right and those of the Bombay judgment were wrong and they thought that the plaintiffs were entitled to the declaration asked for.

33. It is to be noted that the cases considered by their Lordships were all suits for declaration of the right to take religious-processions along roads; they were not for removal of public nuisances. And their Lordships in speaking of the idea of special damage were careful to say that no proof of special damage was needed "other than the obstruction of the procession." Nevertheless this decision gave rise to a train of cases in which it was held that no proof of special damage of any sort was necessary, or even that the doctrine of special damage was not at all applicable to India. As a matter of fact, before this Privy Council case, although the Calcutta High Court might have followed Madras with regard to the

rights of religious processions, the Bombay view that in the case of obstruction to a public road a suit was not maintainable without proof of special damage had been adopted. Thus, in 1919 in *Batiram Kollta v. Sibrum Das* AIR (1921) Cal 271, Newbould J. and Panton J., of the Calcutta High Court held that an action for obstructing a public road was not maintainable, unless the plaintiff proved some injury or damage peculiar to himself and different from damage that would be suffered by other people who used the road. Special damage, they observed, did not mean serious damage, but meant a damage of a special nature, that is, damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling. And their Lordships, besides referring to *Satku v. Ibrahim Aga* (1877) 2 Bom 457, also cited another Calcutta case, *Mahomed Alam v. Dilbar Khan* 5 CWN 285, in which the same view had been adopted.

34. Moreover, in Bombay the distinction had been drawn between suits for the removal of public nuisances and suits such as that in *Baslingappa v. Dharmappa* (1910) 34 Bom 581, for declaration of a right to take a religious procession along a road. For example, in *Manilal Jibhai Vs. Ishvarbhai Samalbhai*, the distinction was clearly drawn, and it was held that the plaintiff Could not sustain a suit for an injunction directing the defendant to remove an obstruction from a road in the absence of evidence to show that as a consequence of the encroachment he was unable to use the road; nor could he seek assistance of the Court merely because he wanted to walk over that portion of the road occupied by the obstruction, unless he proved special damage.

Another important point which it is necessary to notice is that in the Calcutta High Court a distinction had been drawn at a very early stage between the case of public roads, in which every member of the public has a right of way, and village roads in which the inhabitants of the particular village have special interests, and a distinction had been drawn in the two classes of cases in applying the doctrine of special damage and. in considering the application of Section 91 and Order 1, Rule 8, Civil P.C.

35. This distinction was first drawn in 1888 by Wilson J., in the Full Bench case, *Chuni Lal v. Ramkishan Sahu* (1888) 15 Cal 460. Wilson J. observed that by the common law of England there were three distinct classes of rights of way and other similar rights:

First, there are private rights in the strict sense of the terms vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freeman of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects; and the source of these is ordinarily dedication.

He said it was important to remember that these three classes of rights exist in

India just as in England. The first and third classes, strictly private rights and public rights, were of frequent occurrence but the second class of rights belonging to a portion of the public, were also to be found in India and were expressly recognized by the Legislature in Section 42, Ill. (a) and Section 54, Ill. (p), Specific Relief Act. "It is specially important," he said,

that this class of rights should be clearly understood and borne in mind in a country like India, where interests of the most essential importance depend so largely upon custom. And I am not sure that the existence of this class of rights has not sometimes been overlooked. I think there is reason to suspect that, in some cases, ways and other claims of a like nature have been treated as public rights when perhaps they might have been both more correctly and more conveniently regarded as village ways and village rights; more correctly; because I think there is reason to suppose that such village roads as distinguished from public roads are of very common occurrence; more conveniently, because, as I shall show later, there may be more easy civil remedies for treating questions of village roads than questions relating to public roads.

36. He went on to say that in the case of rights of the second class, i.e., the quasi-public rights, there were some additional remedies open. Where, for example, such a right was claimed, it would seem that a member of the class entitled might, by taking the proper steps u/s 30, Civil P.C., obtain permission to sue, on behalf of himself and the other members of the class, any one who disturbed or sought to disturb the right of way. Following this, in 1912, it was held by the Calcutta High Court in *Kali Charan v. Ram Kumar* 17 CWN 73 that, where the suit relates not to a public highway but to a village road, a suit is maintainable u/s 30, Civil P.C., even in the absence of proof of special damage. This case is a very instructive one.

37. It was a suit brought by the plaintiff on behalf of the inhabitants of a village to establish their right to use a certain path obstructed by the defendants. The lower Appellate Court found that the land was part of the public road and had been obstructed by defendants. It also found that the plaintiff had suffered no special damage. When the case came before the Calcutta High Court, Coxe J. held that on these findings the suit must be dismissed. He observed:

As pointed out by Woodroffe J. in *Monmotha Hath v. Harish Chandra Das* (1906) 83 Cal 905, "under the substantive law no action can be maintained by a private individual in respect of an infringement of the right of the general public, unless he has suffered special damage...In a case therefore of infringement of a right of the general public no suit can be brought u/s 30 or at all unless on proof of special damage.

The case came up in Letters Patent Appeal and Jenkins C.J. in the Letters Patent Appeal observed:

Had the judgment of Wilson J. in *Chuni Lal v. Ramkishan Sahu* (1888) 15 Cal 460 been brought to his notice, he would have been able to give effect to what

evidently was his view as to the justice of the case. But that case apparently was not cited to him, nor did the argument bring to his notice the distinction between a public highway and a road over which a section of the public, as for instance, the inhabitants of a particular locality, might have a right of way. To my mind it is clear...that the ultimate decision was...that the particular pathway was a village road. That conclusion completely meets the difficulties raised by the defendants and the result is that, in my opinion, the judgment and decree of Coxe 3. must be set aside.

38. The important point to notice here is that the doctrine of special damage was in no way disapproved in its application to India, but having regard to the distinction between public rights and quasi-public rights it was implied that it was applicable only to the former and not to the latter. Two years later, in 1914, in *Heyat Bakhsh v. Lachminia* AIR (1916) Cal 276 Coxe and Chatterjee JJ. once more affirmed that no suit would lie for the removal of an obstruction to a public road except upon proof of special damage to the plaintiff. It was a suit by eleven persons on behalf of the public for a declaration that a certain way was a public or common way for the egress and ingress of the people of a mahalla. It purported to be under Order 1, Rule 8, Civil P.C. Their Lordships referred to Wilson's decision in *Chuni Lal v. Ramkishan Sahu* (1888) 15 Cal 460 and observed that if the right was one of the second class, that is quasi-public class, no special damage need be proved : but if it were one of the third class, that is to say, public in the full sense, the suit must be dismissed in the absence of proof of special damage.

39. In 1918 *Fletcher J. and Sir Syed Shamsul Huda* of the Calcutta High Court held in *Nagendra Nath v. Banwari Lal* AIR (1918) Cal 212 that the public at large are not affected by the obstruction of a pathway which only the inhabitants of a particular village have the right to use, so that a suit for a declaration of the rights of the inhabitants of a village to the use of a pathway is not governed by Section 91, Civil P.C.

In the same year in *Harihar Das and Others Vs. Chandra Kumar Guha and Others*, the same two Judges once more laid down that obstruction of a village pathway, in which plaintiff had got a right with other villagers by reason of a grant implied from long user, does not require proof of special damage to give, the plaintiff a cause of action. At the same time they approved by implication the doctrine that in the case of a public way, in the full sense, proof of special damage would be necessary, and observed that proof by the plaintiff that he and his servants had been compelled to go by a longer route and thereby incurred additional expense was sufficient proof of special damage. In another Calcutta case, in 1921, namely *Harish Chandra Saha Vs. Pran Nath Chakraverty and Others*, 5 Panton J, in a case, where the plaintiff had sued for a declaration that a village path was a public way and sought relief for himself and his fellow villagers and the permission of the Court had been taken under Order 1, Rule 8, Civil P.C., held that the question of whether the plaintiff suffered special damage or not did

not arise, because a suit for a declaration that a pathway is a village pathway can succeed without proof of special damage. Such a suit was one to which Order 1, Rule 8, Civil P.C., was appropriate and the Court's permission having been obtained under that rule recourse to the Advocate-General was not necessary.

40. In 1929 there was a useful discussion of the position with regard to village ways and public ways by Mukerji J. in *Pran Nath Kundu Vs. Emperor*, . The learned Judge pointed out that a pathway, which lies over private land and which is used by the villagers and perhaps by the inhabitants of some other villages also, but with regard to which there is no evidence of such universal user as to raise an inference of dedication to the public in general, is not a public way such as is contemplated by Section 283, I.P.C. Ways permitted to be used by a section of the public are private ways, generally having their origin in custom, but such ways can be converted into ordinary highways after user by the public sufficient to raise a presumption of dedication to the public in general. Evidence in support of public claim must be cogent; but the fact that a path-way does not join a public thoroughfare at either end does not militate against its public character. The material question is whether the public in general use the way as a pathway, or only the inhabitants of the village and of some of the other neighbouring villages. Where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages, and not by others, the road is not a public road, *Sham Soondar v. Monee Ram* (1876) 25 WR 233 and *Fattehyeb Khan v. Mahmood Yusuf* (1887) 9 All 434. "Where there is the intention to allow not the public generally, but merely visitors to or traders with the people of the village," or where ways are "allowed to be used by villagers to go to a church or a market or the common fields of a village," such ways are not regarded as public ways but private ways, and they generally have their origin in custom *Brooklebank v. Thompson* (1903) 2 Ch 344. Such a customary way can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication, *Farquhar v. Newbury Rural District* (1909) 1 Ch 12. But the evidence in support; of the public claim must be cogent *Vestry of Bermondsey v. Brown*, (1865) 1 Eq 204.

41. The Calcutta cases so far dealt with all take a clear, logical and consistent view of the law. It will be noticed that the doctrine, that proof of special damage is necessary in suits relating to public rights and public wrongs in the full sense, is nowhere dissented from, nor is it anywhere held that the doctrine of special damage does not apply to India. The view taken in these cases is merely that it is a doctrine which does not apply to suits on behalf of limited sections of the public for infringement of their special rights, as for example, suits for removal of obstructions and other nuisances from village pathways, which are only quasi-public and in which the public as a whole have not the same interest as the people of the locality.

42. There are however some Calcutta oases where this distinction does not appear to have been fully appreciated and, as I mentioned previously, the Privy

Council ruling in *Manzur Hasan v. Muhammad Zaman* AIR (1926) PC 36 was wrongly made the basis for a proposition that an individual member of the public has the right to maintain a suit for removal of obstruction on a public highway, if his right of passage through it is obstructed, without proving special damage, and that the principle of English law which requires proof of special damage in such cases is not applicable to India. Such a case is *Mandakinee Debee Vs. Basantakumaree Dabee*, where Jack J. observed:

That no proof of special damage is necessary appears to be established on the authority of the case in *Manzur Hasan v. Muhammad Zaman* AIR 1926 PC 36 in which their Lordships of the Privy Council overruled the contrary view held in *Satku v. Ibrahim Aga* (1877) 2 Bom 457.

43. This ruling does not support the general proposition that a plaintiff merely as a member of the public, can maintain a suit for removal of obstruction from a public highway without proving special damage. I have dealt fully with the Privy Council case and pointed out the distinction which their Lordships drew between a suit for the declaration of the rights of a special sect or community, and a suit for the removal of a public nuisance; and I have also noted that the expression used by their Lordships was "no special damage other than the obstruction of the procession." Moreover, Jack J. really proceeded on a finding that there was special damage. The suit was for the removal of an alleged encroachment made by the defendant on a passage leading to the plaintiff's house and the decision was based on an express finding to the effect that the plaintiff had suffered special damage. It is to be noted too that the other Judge in the case, Mallik J. though he agreed with Jack J. in the order made in the case, observed:

The finding was that the passage was a public pathway and that the obstruction resulted in plaintiff's inability to carry large articles into her house. Regard being had to the peculiar situation of her house, this inability to carry large articles into her house was "special damage"--damage beyond what is suffered by her in common with other persons affected by the nuisance, viz., inconvenience in passing along the pathway.

44. The respondents rely strongly on another Calcutta case, *Beer Bikramkishore Manikya v. Chairman Comilla Municipality* (1935) 62 Cal 692. Nasim Ali J. who decided that case, observed incidentally in holding that the plaintiff was not entitled to any relief:

The plaintiff in the present suit, being one of the members of the public, is equally affected by the obstruction with the other members of the public.

He has suffered no special damage. His claim is not in respect of a wrong to him individually. He is one of the numerous persons affected by the obstruction and therefore having the same interest in the matter. Consequently, the proper course for him was to bring a representative suit in conformity with the provisions of Order 1, Rule 8, Civil P.C. See 25 CWN 96" and *Kumaravelu Chettiar v. Ramaswami Ayyar* AIR 1938 PC 188.

45. This was a single-Judge case, and this obiter dictum of the learned Judge was certainly not in conformity with the view generally taken by the Calcutta High Court. Moreover, the two cases referred to as authority do not support any such proposition. *Kumaravelu Chettiar v. Ramaswami Ayyar* AIR 1938 PC 188 was a Privy Council case in which their Lordships were considering merely the question whether in a representative suit instituted under Order 1, Rule 8, Civil P.C., the decision in a former suit, not under Order 1, Rule 8, would or would not operate as *res judicata*. The suit had been instituted under Order 1, Rule 8, by certain persons as representatives of the *veniyas* or oilmongers of Tiruchendur for a declaration of their right to worship in the inner shrine of a Hindu temple at Tiruchendur; that is to say the suit was not on behalf of the public in respect of a public right, but on behalf of a limited section of people. Their Lordships held that the previous suit, not having been properly constituted under Order 1, Rule 8, would not operate as *res judicata*. They never anywhere in the course of their judgment made any observation, even as obiter, which could lend support to the proposition put forward by Nasim Ali J. in *Beer Bikramkishore Manikya v. Chairman Comilla Municipality* (1935) 62 Cal 692. On the other hand, their Lordships did say that it has been deemed essential that in a representative action the class of persons, on behalf of whom relief was sought, should be clearly defined : the requirement being that the judgment in such an action (properly constituted under Order 1, Rule 8) is binding on all the members of the class represented, it is essential that the range of the estoppel be defined somewhere on the face of the proceedings.

46. In the other case referred to, *Bati Ram Kolita and Others Vs. Sibram Das and Another and Sheoram Kolita and Others*, there was also nothing to support the proposition of Nasim Ali J. I have already discussed this case and pointed out that on the contrary it was therein held that an action for obstructing a public road is not maintainable, unless the plaintiff proved some injury or damage peculiar to himself and different from the damage that would be suffered by other people who used the road. Indeed in that case the learned Judges held that the mere fact that the plaintiff in common with others would have to go a long way round was not special damage to the plaintiff sufficient to give a right to sue and different from the damage that would be suffered by other people who had hitherto used this road. The object of the rule requiring special damage was to prevent the defendants being harassed by separate suits from every individual member of the public whose right of way had been obstructed. Another ruling relied upon for the respondents is *Suresh Chandra Dutta and Others Vs. Jaminikantata and Others*, . That also was a single Judge case and all that was laid down was that obstruction of a village pathway which is not a public pathway in which the plaintiffs have a right along with other villagers does not require proof of special damage to give rise to a cause of action. The learned Judge in that Case did not discuss the question at length, but merely followed *Harihar Das and Others Vs. Chandra Kumar Guha and Others*, and *Harish Chandra v. Pran Nath* AIR 1921 Cal 405 which I have already discussed.

47. There is one Allahabad case which needs consideration, namely Mahomed Hasan v. Amba Prasad AIR 1931 All 911. In that case Sulaiman C.J. held that if there is a right to take out a procession along a particular route and the defendants' action causes an obstruction with the result that the processionists are compelled to change the route or are prevented from following the usual route, that amounts to special damage. This ruling is really consistent with the majority view in the Calcutta High Court, though the matter is somewhat differently expressed. According to both views the suit for obstruction of a religious procession can succeed without proof of special damage other than the obstruction of the procession. It seems to me that it matters little whether it is said that such a suit succeeds because it is one to which the doctrine of special damage does not apply or because special damage, if necessary, may be inferred from the obstruction of the procession itself. The former mode of expression is perhaps more in accord with the general view which regards the expression "special damage" as a legal phrase connoting only damage peculiar to the plaintiff himself. It is of course merely a question of definition whether the expression "special damage" shall have that limited meaning or may be used in the wider sense of damage to the special interests of a whole class or section who may be re-presented by the plaintiff in a representative suit and as such not strictly speaking peculiar to the plaintiff himself, but peculiar only to the class along with which the plaintiff has a common interest. The narrower connotation is perhaps more in accord with English usage and therefore to be preferred.

48. There is another point which may be noticed in connexion with this ruling. Sulaiman C.J. laid down certain propositions with regard to Section 91, Civil P.C. He said:

Section 91, Sub-section (1) authorizes two or more persons to sue with the previous consent of the Advocate-General in respect of a public nuisance, but it does not compel them to do so nor is there anything in Section 91 which confers a new right. If a right exists independently of that Section that right is not taken away. Obviously therefore Section 91 confers no new right and it does not take away any pre-existing right.

Having regard to the terms of Clause (2), it is indeed clear that Section 91 takes away no existing right but I most respectfully dissent from the proposition that it confers no new right. It does confer a new right, and in express terms, namely the right with the consent of the Advocate-General to sue for the removal of a public nuisance without proof of special damage. That was a right which could not exist independently of that Section. The proposition that it takes away no right really needs no ruling to support it having regard to the clear wording of Clause (2). But it may be noted that it has been laid down in Peary Lal Mullik Vs. Surendra Nath and Others, that Section 91 does not control or restrict the provisions of Order 1, Rule 8, Civil P.C., and therefore does not take away any right of plaintiffs to sue which may exist independently of its provisions.

49. In a few Patna cases the question of the application of the doctrine of special

damage to suits regarding obstructions to pathways and roads has been considered, though not exhaustively. In *Ramghulam Khatik and Others Vs. Ramkhelawan Ram and Another*, Wort J., sitting singly, commented on *Mandakinee Debee Vs. Basantakumaree Dabee*, as follows:

Two learned Judges of the Calcutta High Court are reported to have held that individual member of the public has the right to maintain a suit for removal of obstruction of a public highway, if his right of passage through it is obstructed, without proving special damage. If the learned Judges intended to hold that a, single member of the public might bring an action, without the consent of the Advocate-General and without proving special damage, in respect of a public nuisance, I most respectfully disagree with them. A very long line of decisions in India has established the proposition that the law with regard to this matter in India is the same as in England; and, indeed in my judgment, it would be quite impossible to hold a contrary view having regard to the provisions of Section 91, Civil P.C., which, by necessary implication, state that to be the position....Had the facts of that case been brought to the notice of the learned Judges of the Calcutta High Court, they would have seen...that this Court. has not laid down any proposition which is not in conformity with the law as laid down by a large number of decisions of the Indian High Courts, and it would have been observed that the decision of their Lordships of the Judicial Committee of the Privy Council in *Manzur Hasan v. Muhammad Zaman* AIR 1926 PC 36 did not (as is suggested) reverse the decisions of the Indian High Courts to the effect that an action with regard to a public nuisance, to be maintained, must establish special damage, or be brought under the provisions of Section 91, Civil P.C. There Lord Bunedin, delivering the judgment of their Lordships of the Privy Council, and referring to a number of cases, accepted the Madras view as against the Bombay view on a very limited question relating to the conduct of religious processions through the streets and over the public highway, and it is with regard to that matter and that matter alone that their Lordships" decision was directed in *Manzur Hasan v. Muhammad Zaman* AIR 1926 PC 36." If the matter ever comes up for decision before their Lordships of the Privy Council, I have no doubt that it will be pointed out that their decision was limited to the narrower and not to the wider question whether an action with regard to a public nuisance could be maintained without the proof of special damage...In my judgment the law in India is precisely the same in this regard as it is in England and it does not depend on the technical question of whether in the circumstances of the case an indictment could be maintained. Technical objections of that kind do not obtain in India. But the main principle upon which this question is to be discussed and upon which the whole matter rests is that where all members of the public have suffered inconvenience or damage, an action by an individual will not lie excepting as indicated by Section 91, Civil P.C. The law in England in this respect has never been altered, but with regard to the case in hand the principle laid down in the well-known Case in *Harrop v. Hirst* (1869) 4 Ex 43 applies. There is no doubt with regard to the facts of this case in spite of the loose pleadings and it is quite clear that the

plaintiff is one, of the limited members who enjoys the use of a certain well. The user of that well has been obstructed by the action of the defendants, and the short question is whether an action in those circumstances would lie at the instance of the plaintiff alone. Order 1, Rule 8, Civil P.C., has nothing to do with the matter at all. Order 1, Rule 8, as has been pointed out by a number of decisions, is an enabling Section which entitles one party to represent many who have a common cause of action; but it does not fore one to represent many if his action is maintainable without the joinder of other persons.

His Lordship went on to deal with the case in *Harrop v. Hirst* (1869) 4 Ex 43 at some length and to point out that on the authority of that case the doctrine of special damage even in England does not apply where the plaintiff is one of a limited number whose special right has been infringed, and therefore in a case of that nature the plaintiff can succeed without proof of special damage. But that in no way conflicts with the general principle, for

the law considers that the light of the commoner is injured....and therefore allows him to bring an action for it to prevent a wrong doer from gaining a right by repeated acts of encroachment. For wherever any act injures another's right and would be evidence in future in favour of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury.

50. I have quoted from this decision of Wort J. at some length, because, if I may say so with respect, it appears to me to state the true position correctly and clearly; and it is to be observed that it is entirely consistent with the doctrine laid down in so many rulings of the Calcutta High Court, that while it is necessary to prove special damage in cases where the plaintiff sues merely as a member of the public in respect of a public right in the full sense, it is not necessary to prove it in the case of quasi-public rights, where the plaintiff sues as a member of the limited class whose special rights have been infringed. In a later case *Ramdahin Pande v. Parmeshwar Singh* AIR 1940 Pat 160 Wort J. again sitting singly, stated the same principles. He again referred to *Harrop v. Hirst* (1869) 4 Ex 43 and observed that, though under the general rule the consent of the Advocate-General was required in a suit with regard to a public right, an action brought by a particular class of persons as regards their right of way over a plot of land, which they alleged to be a village pathway, was an exception, and such an action was maintainable without proof of special damage.

51. There appears to be only one Division Bench case of the Patna High Court at all bearing on the question, namely *Pahlad Maharaj and Others Vs. Gauri Dutt Marwari and Another*, . According to the placitum of that ruling their Lordships laid down that

a person In the immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action and that irrespective of whether he has proved special damage or not. The principle is that a person of an immediate community or Section of the public who is deprived of the amenity provided for

that particular Section may be deemed to have suffered loss without proof of such loss.

The placitum however is misleading. What Courtney-Terrell Order J. in delivering the judgment, did say was somewhat different. It was a case in which the plaintiff and the defendant lived on opposite sides of a narrow road through a village, and the defendant had built on to the thoroughfare a structure containing a platform and a privy constituting a nuisance not only to persons passing through the thoroughfare but particularly to the plaintiff who lived on the opposite side of the road. His Lordship observed that the dimple point was that the person living on the opposite side of the road, that is to say the plaintiff, suffered special damage. The Court of first instance seemed to be under the impression that the plaintiff had to prove special damage in the matter of financial loss: that was of course wrong.

52. The finding was that the plaintiff living on the opposite side of the road had suffered particular inconvenience and in such circumstances the right to bring a suit on the part of the plaintiff was indisputable. His Lordship went on to observe:

It is perfectly true that in the case of public thoroughfares generally a mere stranger to a district cannot on the ground that he is a member of the general public bring a suit for the removal of an obstruction unless he can prove some particular damage; if for example smoke is emitted in undue quantity in the streets of Calcutta, it will hardly be in the power of an inhabitant of Patna to say that whereas he is a member of the public and pays occasional visits to Calcutta he is interested as of right to bring a suit for the removal of the nuisance.

He wound up by saying that

the plaintiff was in a peculiar position to suffer loss and must be deemed to have suffered the loss from the inconvenience and nuisance committed by the defendant.

53. Thus, this ruling offers no support for the proposition that an individual member of the public, suing either by himself or as representing the public generally, can have a right of suit without proof of special damage. What it does lay down is that in some cases the necessary special damage can be inferred from the circumstances. In my view there is no real doubt as to what the law is. The doctrine of special damage is based on the principle of English common law that there can be no private action for a public wrong. To give a right of suit the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. English law has never departed from that principle, and it has been adopted by the Courts in India as a matter of equity and good conscience and must govern their procedure in the absence of any specific provision of law giving a special right of suit in derogation of the general principle. That the doctrine of special damage is sound law in England cannot be doubted. It was clearly affirmed in the House of Lords in Metropolitan Board of

Works v. Owen McCarthy (1875) 7 HL 243 31 L T 182. In this case Lord Penzance expressed himself as follows:

But being a public right, it is said that the only remedy at law is by indictment. This is a well-known rule, but governed and limited by an equally well known exception...It is well, therefore, to look back to the other cases in which this exception was first established to ascertain the exact terms in which it is expressed. In *Iveson v. Moore* 1 Ld. Raym 486 the language of the Judges in the Exchequer Chamber affirming the exception and establishing the right of action was that "the plaintiff did necessarily suffer an especial damage more than the rest of the King's subjects." In *Ashby v. White* 1 Sm LC (Edn. 10) 231 the language was "still if any person have sustained a particular damage beyond that of his fellow citizens" &c. The Judges do not say a damage of a different kind or description from that suffered by other subjects, but "more than" or "beyond" their fellow citizens. The question then, is, whether when a highway is obstructed, the owners of those lands which are situated in a sufficient degree of proximity to it to be depreciated in value by the loss of that access along the highway which they previously enjoyed, suffer especial damage "more than" and "beyond" the rest of the public. It surely cannot be doubted but that they do...And if so, the owner of such lands appears to me to fall within the rule under which an action is maintainable, though the right interfered with is a public one.

54. It is, however, a doctrine which has got two very definite limitations, and in English law it has been rigidly narrowed in these two ways: first, it applies only to cases regarding public rights in the full sense. This followed in English law from the fact that it was only in such cases that there must be an indictment, and the doctrine was held applicable only to cases where the procedure was by indictment and not by civil action. This was stated very clearly by Channell B., in *Harrop v. Hirst* (1869) 4 Ex 43, who said: It is conceded that where an indictment may be maintained there is no remedy by action without proof of individual damage. But the same principle does not apply where the injury complained of is not one affecting the public generally, but only a particular class or section of persons.

Secondly, an invasion of special rights [will provide a cause of action without special proof of damage, for in such a case the law will presume damage. This principle also has been recognized by the House of Lords in *McCartney v. Londonderry and Loughswilly Railway Co. Ltd.* (1904) AC 73. Lord Lindley there observed:

This has been long well settled. In the note to *Mellor v. Spateman* 1 Wm. Saund 346a it is said: "Wherever any act injures another's right, and would be evidence in future in favour of the wrong doer, an action may be maintained for an invasion of the right without proof of any specific injury." This principle has been repeatedly recognized and acted upon in cases involving water rights.

55. There is no reason why the doctrine of special damage, subject to these

limitations, should not apply also in India, and it is clear from the wording of Section 91, Civil P.C., that the Legislature itself contemplates that it should. For there would be no point otherwise in providing a special right of suit in the absence of Special damage, and the use of these words constitutes an implied recognition of the existence of the rule. It is clear also from the general trend of the rulings, which I have examined, that the doctrine has been applied subject to the two limitations I have mentioned. It is by reason of these limitations that it has been held not to apply to cases of quasi-public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under Order 1, Rule 8, Civil P.C., for infringement of those rights. So much for, the doctrine of special damage in its application to India.

56. Now with regard to Order 1, Rule 8. As I have noticed it was clearly laid down in the old case already referred to, *Adamson v. Arumugam* (1886) 9 Mad 463, as long ago as 1886, that Section 30, Civil P.C., (Order 1, Rule 8) was not intended to allow individuals to sue on behalf of the general public, but to enable some of a class, having special interests, to represent the rest of the class. No case has been cited at the Bar in which the ruling has been considered and dissented from, and in my view it correctly states the position on that point. This view has received implied recognition from the Privy Council itself in *Kumaravelu Chettiar v. Ramaswami Ayyar* AIR 1938 PC 188. There their Lordships observed:

It has been deemed essential that in a representative action the class of persons on behalf of whom relief is sought should be clearly defined...The gist of the requirement is that as the judgment in such an action is binding on all the members of the class represented, it is of the essence that the range of the estoppel be defined somewhere on the face of the proceedings.

The reason for this is plain. In a case under Order 1, Rule 8, notice is issued to all the persons represented, and the decision will bind all the persons represented. Unless, therefore, the area of representation (as one might put it) is clearly defined, it would be impossible to determine afterwards the exact extent to which the decision is *res judicata*. And all sorts of difficulty may arise. For example, if the plaintiff sues merely as a member of the public, and not as a member of a limited and defined class, what will happen if the defendant secures a verdict that he has a right to maintain the obstruction? This decision will be *res judicata* against all those having a common interest with the plaintiff and represented by him. Who then, it might be asked, would be barred from bringing a fresh suit if the area of representation is not well defined? And an even worse difficulty would arise in the case of a compromise. It could hardly be said that a compromise in such a case would be binding upon the whole world. But here again, unless the area of representation is defined in the proceedings, it would be impossible to ascertain who was and was not bound by the compromise. It is, I think, for this reason that their Lordships laid down in *Kumaravelu Chettiar v. Ramaswami Ayyar* AIR 1938 PC 188 that it was essential that the range of the

estoppel should be defined somewhere on the face of the proceedings.

57. Order 1, Rule 8, Civil P.C., is merely an enabling provision. It provides no new right of suit, but merely a right of representation where a right of suit already exists, and that right of suit is provided by the invasion of the special rights of the limited class represented. I now turn to Section 91, Civil P.C. The Section, unlike Order 1, Rule 8, does give a new right of suit, namely, a right to sue for the removal of a public nuisance, even where there is no special damage and no invasion of any special right. It gives that special right in the case of a public nuisance; and it is to be noted that the<sup>1</sup> definition of "public nuisance" in Section 268, I.P.C., which is made applicable to the CPC u/s 3(44), General Clauses Act, is wide enough to cover cases of obstruction to village path. ways, though they may not be public high-ways in the full sense. For that definitions:

A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or nuisance 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 nuisance to persons who may have occasion to use any public road.

It is possible therefore to bring a special suit u/s 91 with the consent of the Advocate-General for obstruction of a village pathway, and in the absence of any special damage.

58. It is, however, not necessary to resort to the provisions of Section 91 if there is any independent right of suit, for having regard to the provisions of Clause (2), Section 91 takes away no independent right of suit which may exist, and it does not over-rule the provisions of Order 1, Rule 8 and take away any right of suit under Order 1, Rule 8 even when it is a case of public nuisance: *Peary Lal Mullik Vs. Surendra Nath and Others*, and *Mahomed Hasan v. Amba Prasad* AIR 1931 All 911. There are clearly two modes of escape from the special restrictions of Section 91: (1) by proof of special damage and (2) by proof of the invasion of the special rights of a limited class which will give an independent right of action on the principle in *Harrop v. Hirst* (1869) 4 Ex 43. This right, as I have noticed, is a right of suit independent of both the provisions of Section 91 and Order 1, Rule 8, Civil P.C. It is not Order 1, Rule 8 that gives that right of suit, and Order 1, Rule 8 enables no individual to sue on behalf of the public at large for a public wrong where he would otherwise have no right of suit. It does give a right to sue in a representative capacity upon an existing right of suit, and that is a right to represent any particular defined section of the public with whom the plaintiff has a special common interest, but not to represent the public generally as a whole. It does not contemplate the issue of notice to the whole world or that the whole world should be bound by the decision in a suit under its provisions.

59. It follows from all this that in the case of suits such as those with which we are concerned in these appeals, relating to obstructions to village ways, if the plaintiff does not utilize the special provisions of Section 91, or prove special

damage, but purports to sue under Order 1, Rule 8, he must plead and show (1) that he sues not on behalf of the public generally, but on behalf of a, limited and clearly defined class with which he has a common interest and a common right of suit; (2) he must plead and show that the pathway in question is not a public highway in the full sense, in which all members of the public who happen to go to the place have equal interest; he must show that it is a way or path of the quasi-public type recognized long ago by Wilson J. in 15 Cal 460,20 in which the class he represents has got special rights as distinct from those of the public generally.

60. It is now necessary to apply these principles to the cases before us. We have carefully examined the pleadings in all three cases, and it must be held that in none of them has either of these conditions been satisfied. Thus, in Second Appeal No. 786 of 1937 the plaintiff sets out that the lands contain daggar, pathway and karha for the use of the public. By their obstruction the plaintiff and other members of the public have been put to great loss and each member of the public has been put to inconvenience. The plaintiff brings the suit as sixteen annas malik, and on behalf of the public. In his petition under Order 1, Rule 8, the plaintiff asks that he may be permitted to bring the suit under Order 1, Rule 8 as a member of the public and asks for the issue of a notice or advertisement. The only notice that was issued was by publication in the Official Provincial Gazette in the following terms:

Whereas the plaintiff has instituted the above suit against the defendants mentioned above on his own behalf as well as on behalf of the public to remove encroachments on survey plot Nos. 1600, 708, 1422 in village Kurmurhi, thana Piro, thana No. 199, pargana Piro, District Shahabad, it is notified, hereby that whoever desires to join as a plaintiff in the said suit should appear on or before 27th day of March 1935 and signify to this Court whether he consents to be so added as a plaintiff.

61. There was no special notice of any kind to the villagers, though there could have been no difficulty in issuing notice in the village by beat of drum or by hanging up, or by special notice on the village headman or some principal villagers. Thus, in this case, there is not only no question of any definition of a limited class represented) but there is not even a claim that the plaintiff represents the villagers or any limited class having a common interest with himself. There was no special notice on the villagers; and with regard to the second point it was not pleaded, and no evidence was led, to show that the villagers had any special rights in these pathways in any way distinct from the rights of the general public. Exactly the same remarks apply to Second Appeal No. 217 of 1938. The plaintiffs do not say that they reside near the scene of the obstruction or that they suffer any particular inconvenience beyond that suffered by the general public. The obstruction is stated in the plaint to be upon a public lane which has been in existence from time immemorial, and the obstruction is said to have caused great difficulty and inconvenience to the public in using the lane,

and finally it is stated that as the lane is a public one and the obstruction has caused inconvenience to the public, the plaintiffs have sued in a representative capacity for the benefit of the public. In the relief portion the lane is spoken of as a thoroughfare. Here again the only notice issued was by publication in the Provincial Gazette.

62. In Second Appeal No. 355 of 1938 the pleadings are the same. The land encroached upon is said to be a public thoroughfare and recorded as such in the survey. The encroachment has caused difficulty to carts passing through it and, as all the members of the public are interested in the pathway, the plaintiffs ask to be permitted to sue under Order 1, Rule 8 on behalf of the members of the public. Here again it is not stated in which portion of the village the plaintiffs reside or that they are in any way particularly or peculiarly affected by the encroachment beyond other members of the public, nor is it said that it is a way in which the villagers have got any special rights. Once more the only notice was by publication in the Official Gazette.

63. In such" circumstances it can only be held that none of the suits satisfy either of the two requirements which I have indicated as being essentially necessary for such suits. In Second Appeal No. 355 of 1938 Mr. Syed Ali Khan for the respondents, realizing the difficulty in which the plaintiffs had been placed by the fact that they have not claimed to sue on behalf of any limited and defined section of the public, has asked that we should ignore the fact that the suit was framed under Order 1, Rule 8 and assume that the plaintiffs had sued in their individual capacity, and that then on the authority in Pahlad Maharaj and Others Vs. Gauri Dutt Marwari and Another, we should presume from the circumstances that there has been special damage to the plaintiffs individually. But apart from the fact that the pleadings clearly show that the plaintiffs are not suing in their individual capacity in this case, no circumstances have been stated either in the pleadings or in the evidence on which any such assumption could be made. As I have said, we are not even told in what portion of the village the plaintiffs reside; whether their houses are situated near the obstruction or even anywhere on the road obstructed. Nor has it been claimed that they have any special necessity to use that road other than as members of the general public. Manifestly this is not a case where there can be any presumption of special damage or infringement of a special right.

All three appeals must succeed. In Second Appeal No. 786 of 1937 the plaintiff sued primarily as landlord, and it was only on realizing his difficulties owing to limitation that the expedient was adopted of asking to sue under Order 1, Rule 8, Civil P.C., as representing the public.

64. I consider therefore that this appeal Should be allowed with costs throughout, the suit being dismissed in part with proportionate costs, as one of the plots has not been made the subject of appeal. In the other two cases the plaintiffs do appear to have sued in the public interest and not on their own behalf, and I would therefore allow these two appeals without costs.

Fazl Ali, J.

65. I agree.