

(1933) 07 MAD CK 0006
In the Madras High Court

Gujjula Narasimhulu

APPELLANT

Vs

Nagur Sahib and Others

RESPONDENT

Date of Decision : 31-07-1933

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 427

Citation : AIR 1934 Mad 95 : (1934) ILR (Mad) 351 : 147 Ind. Cas. 553 :
(1933) 38 LW 996 : (1934) 66 MLJ 31

Hon'ble Judges : Sundaram Chetty, J

Bench : Division Bench

Judgement

Sundaram Chetty, J.—These are two connected petitions filed by the complainants against the orders of acquittal passed in two cases by the

Stationary Sub-Magistrate of Badvel in Cuddappah District. The two complainants were re-building their houses which abut a public street in the

aforesaid village. A portion of the superstructure was alleged to be an encroachment on a portion of the public street and the accused in these two

cases are said to have gathered there for the purpose of abating what they considered to be a public nuisance and demolished a portion of the

terrace and the walls which stood on the encroached portion. The Magistrate who tried the case framed charges against the accused under

Sections 147 and 427, Indian Penal Code, and in one case there was an additional charge u/s 114. According to the facts found by the

Magistrate, the portions of the building demolished by the accused would be an encroachment on part of the public path and the respondents were

participating in the acts complained of. We have therefore to take it that the alleged demolition of the walls and a portion of the terrace by the

accused is true.

2. The main question arising for consideration now is, whether in view of the aforesaid findings of fact the accused can be deemed to be guilty of

the offences with which they were charged. It is clear that the act of the complainants in building upon a portion of the public pathway would

amount to the offence of public nuisance u/s 268, Indian Penal Code. The Magistrate in the Court below mainly relied on the decision of Sadasiva

Aiyar, J. in *In re Dharmalinga Mudalyi* and held that the accused could not be found guilty of the offence of mischief and consequently they would

not constitute an unlawful assembly within the meaning of Section 141, Indian Penal Code. It is argued before us by Mr. Jayarama Aiyar for the

petitioner that there is no statutory provision in India justifying a private person or a member of the public, in demolishing a building and causing

loss to another person by way of abating a nuisance. This contention, we are of opinion, is well founded. The very scheme of the legislature as

would appear from Sections 133 to 140, Criminal Procedure Code, indicates that in the case of such a public nuisance, anybody aggrieved by it

should not take the law into his own hands but must resort to the particular procedure laid down therein. There are provisions in the Madras Local

Boards Act and also in the Land Encroachment Act to the effect, that in cases of encroachment on public streets or Government property the

remedy laid down in those Acts has to be adopted, implying clearly that there would be no right to take the law into one's own hands for the

purpose of abating a nuisance as the one mentioned above. The object with which these provisions are introduced in the statutes is a salutary one.

We need hardly say that the legislature has taken a precaution by means of these provisions against breaches of public peace and acts of high-

handedness. It is suggested that the view taken in *In re Dharmalinga Mudaly* ILR (1914) Mad. 57 might have been based on the impression that

the principle of English Common Law is applicable to India. But we find from the decisions relied on by the learned "" advocate for the petitioners,

that even in England an unconditional right to abate a public nuisance is not given. The principle of one of the decisions cited is that a private

individual cannot of his own accord abate a public nuisance, unless by such nuisance he has suffered some special injury, vide *Dimes v. Petley*

(1850) 15 Q.B. 276 : (1850) 117 E.R. 462 and also *Bateman v. Bick* (1852) 18 Q.B. 870 : (1852) 118 E.R. 329. In the latter case, the learned

Judges have held that unless it was absolutely necessary for a person to demolish a wall in order to exercise a right of passage, there would be no justification for such removal. As was held by a Full Bench of this High Court in *Gopal Naidu v. King-Emperor* ILR (1922) Mad. 605 : (1922) 44 M.L.J. 655 (F.B.) a question of this kind has to be determined according to the statute law of India and the English Common Law principle cannot be applied. Even in the decision of the Bombay High Court reported in *Emperor v. Zipru* ILR (1927) Bom. 487 it was held that when there was an obstruction to the exercise of a private right of easement, it was not open to the dominant owner to remove the obstruction of his own accord, when there is a statutory remedy u/s 36 of the Indian Easements Act. That being so, we have only to see whether the acts complained of in the present case would amount to the offence of mischief. We may note that there is no charge of criminal trespass in the present case, as there was in *In re Dharmalinga Mudaly* ILR (1914) Mad. 57 and it is not necessary for us to express any opinion on the portion of the judgment dealing with that aspect. But with great respect, we have to differ from the view taken in the said case that by the act complained of there would be no wrongful loss and consequently there would be no offence of mischief. If the damage to the complainants' properties caused by the demolition of the walls and the terrace can be deemed to be wrongful loss, then the essential element necessary to make out the offence of mischief exists. u/s 23, Indian Penal Code, wrongful loss is loss by unlawful means of property to which the person losing it is legally entitled. If the demolition of the walls and the terrace undertaken by the accused has no justification in law, then the loss caused to the complainants by reason of that demolition must be deemed to be by unlawful means. Unless these accused have got a right of abating a public nuisance, the acts done by them can in no sense be deemed to be lawful. There are only two ways in which the accused can contend that no offence has been committed by them. They may either show that the ingredients for the offences of mischief and rioting do not exist, and even if those do exist, they can make out facts which would bring their case under any of the general exceptions in Chapter IV, Indian Penal Code. Even Section 81 in that chapter cannot be easily invoked for the aid of the accused in this case, as the explanation to that section shows it is a question of fact in each case whether the harm to be prevented or

avoided was of such a nature and so imminent as to justify the doing of the act with the knowledge that it was likely to cause harm. The portions of

the terrace in question were built in the course of a month or so, and the encroachment thereby was only on a small portion of the public street. In

no sense can we say that the harm caused by these encroachments was of such a nature and so imminent as to justify the accused to take the law

into their own hands and demolish the buildings. We are therefore of opinion that the accused were really guilty of the offence of mischief and as

their common object in gathering on the scene was for the purpose of causing wrongful loss to the complainants, they may properly be deemed to

have been guilty of rioting also.

3. The learned Magistrate has acquitted them on what we think to be an erroneous view of the law and therefore we set aside the order of

acquittal in these two cases and order their re-trial and disposal according to law.