

(1919) 11 MAD CK 0009
In the Madras High Court

Varanasi Subbayya and Others

APPELLANT

Vs

Varanasi Somalingam and Others

RESPONDENT

Date of Decision : 07-11-1919

Acts Referred:

Citation : (1920) 43 MLJ 491

Judgement

1. The facts are not in dispute. The plaintiffs and the defendants are joint owners of a lane. The lane is 10 feet in breadth. The defendants, on that

portion of it, which adjoins their house have put up two pials and steps thereby encroaching upon the common lane to the extent of one foot in

breadth. The plaintiffs brought the suit for a mandatory injunction for the removal of these obstructions. The District Munsiff dismissed the suit on

the ground that the lane was a public one and that the plaintiffs have no right of action. The Subordinate Judge has held that the lane is the common

private property of the plaintiffs and defendants and has given a decree for demolishing the steps and pials. The learned Vakil for the appellants

argues that on these facts the plaintiffs are not entitled to a mandatory injunction. He strongly relies upon the observations of Mookerjee, J., in

Ananda Chandra Sen v. Parbatinath Sen (1906) Cri.L.J. 205 where the learned Judge points out that in cases where property is owned by two

persons in common the mere fact that a building is erected by one of the co-owners in violation of other persons' right would not enable the other

owner to bring a suit for demolishing the building so erected. This follows a judgment of the Judicial Committee in Robert Watson & Co. v.

Ramachand Dutt (1890) 17 I.A. 120 and a number of English decisions upon the point. In this Court it was quoted with approval in Kalliani

Amma v. Govinda Menon ILR (1911) Mad. 648 : 22 M.L.J. 23 where the question was whether a building erected on tarwad property by one of

the members should be demolished-at the instance of the other members. The learned Judges of this Court point out that there was a distinction

between Anandachandra Sen v. Parbathinath Sen (1906) Cri.L.J. 205 and the case before them inasmuch as the property in the Madras case

would be required for the purpose of extending the tarwad buildings for the use of the members of the tarwad. We think that the decision in

Kalliani Amma v. Govinda Menon ILR (1911)Mad. 648 : 1911 22 M.L.J. 23 and that in G.I.P. "Railway Company v. Nowroji Pestonji ILR

(1885) Bom 390 apply to this case and not Anandachandra Sen v. Parbathinath Sen (1906) Cri.L.J. 205. In G.I.P. Railway Company v. Nowroji

Pestonji ILR (1885) Bom. 390 the suit was for re-opening a gateway over which there was a public right of way it was held that the plaintiff was

entitled to sue for the removal of the obstruction. The principle, so far as we are able to see, is that if it is common property and if there are other

remedies open to the party who has been affected, by the wrongful act of the co-owner then the courts should not ordinarily grant a mandatory

injunction. But in this case no other remedy is possible. Therefore the property should be left in its original condition if there is to be convenient

enjoyment as the lane cannot be partitioned. Under these circumstances when one of the joint owners puts an obstruction on the lane which has the

effect of making it less convenient for the other co-owner the only remedy open to him is to sue for a mandatory injunction. In our opinion

therefore the injunction granted by the lower appellate court is right.

2. One other point has been raised by the learned Vakil for the appellants and that is that there has been acquiescence on the part of the plaintiffs

which debars them from bringing a suit for a mandatory injunction, The District Munsif found that the steps and the pials were recently constructed.

In his opinion apparently it was not more than a year old. The Subordinate Judge has expressed no opinion upon the matter because there has

been no issue upon the question of acquiescence. Having regard to the finding of the District Munsif we are not prepared to hold that the conduct

of the plaintiffs has been such as to deprive them of their right of action by way of injunction. For these reasons we think the decree of the

Subordinate Judge is right and dismiss the second appeal with costs.