

(1919) 11 MAD CK 0018
In the Madras High Court

Varnasi Subbayya and Others

APPELLANT

Vs

Varnasi Somalingam and Others

RESPONDENT

Date of Decision : 07-11-1919

Acts Referred:

Citation : 55 Ind. Cas. 643

Hon'ble Judges : Seshagiri Aiyar, J; Moore, J

Bench : Division Bench

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 Munsif 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 argued that on these facts the plaintiffs are not entitled to a mandatory injunction. He strongly relies upon the observation of Mookerjee, J., in *Ananda Chandra Sen v, Parbati Nath Sen* 4 C.L.J. 198 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 the other person's 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 and*

Company v. Ramchund Dutt 17 I.A. 110 : 18 C.P 10 : 5 Sar. P.C.J. 535 and a number of English decisions upon the point. In this Court it was

quoted with approval in Kalliani Amma v. Govinda Menon 12 Ind. Cas. 432 : 35 M.K 648 : 22 M.L.J. 23 : 10 M.L.T. 399 : (1911) 2 M.W.N.

487 where the question was whether a building erected on a 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 Ananda Chandra Sen v. Parbati Nath Sen 4 C.L.J.

198 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 12 Ind. Cas. 432 : 22 M.L.J. 23 : 10

M.L.T. 399 : (1911) 2 M.W.N. 487 and that in Great Indian Peninsula Railway Co. v. Nowroji Pestonji 10 B.K 390 apply to this case and not

Ananda Chandra Sen v. Parbati Nath Sen 4 C.L.J. 198. In Great Indian Peninsula Railway Co. v. Nowroji, Pestonji 10 B.K 390 the suit was for

re-opening a gateway over which there was a public right of way, and 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.