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explained, afford evidence that an intention to separate *had been entertained*. This can hardly be read as laying down any rule of law or even a presumption. It only seems to suggest a possible inference of fact. It is not unlikely, as observed by the learned Subordinate Judge, that in this case the ninth defendant instituted the suit at a time when he thought that he would get some benefit out of it but that when he found that there would be nothing left after payment of the debt due by the family he did not think it worth while to proceed with the suit. These circumstances do not seem to us to warrant the conclusion that he became divided merely by the presentation of the plaint.

We agree with the findings of the lower Court on all the points raised and dismiss the appeal with costs of respondents 1 to 5.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Wadsworth.

1938, December 9.

MUNUSAMI CHETTI AND FOUR OTHERS (DEFENDANTS), APPELLANTS,

v.

PERIYA KUPPUSAMI CHETTI AND TWO OTHERS (PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *sec.* 91—*Suit by member of public for establishing public right of way and removal of obstruction which constitutes a public nuisance—Sanction of Advocate-General—Necessity of—Special damage not proved—Maintainability of suit.*

An individual member of the public can maintain a suit for establishing a public right of way and for removal of an

* Second Appeal No. 1158 of 1934.

obstruction which constitutes a public nuisance without the sanction of the Advocate-General under section 91, Civil Procedure Code, and without proof of special damage.

The decision of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*(1) must be taken to have established that the English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India.

Hussain Sahib v. *Narasimhappa*(2) and *Kandasami Kovundan* v. *Karupanna Kovundan*(3) treated as overruled by *Manzur Hasan* v. *Muhammad Zaman*(1).

Appayya v. *Narasimhalu*(4) dissented from.

APPEAL against the decree of the District Court of North Arcot at Vellore in Appeal Suit No. 86 of 1934 preferred against the decree of the Court of the District Munsif of Arni in Original Suit No. 480 of 1932.

M. Patanjali Sastri for appellants.

N. Srinivasa Ayyangar for *M. S. Rathnasabapathy Mudaliar* for first and second respondents.

Third respondent was not represented.

JUDGMENT.

WADSWORTH J.

WADSWORTH J.—The plaintiffs sued for a declaration that there was a public path running between the house belonging to the third plaintiff and the house belonging to the defendants and for an injunction requiring the defendants to remove the wall obstructing this alleged path. The trial Court found that, though there was no proof of a public path, there was a path common to the third plaintiff and the defendants measuring three and a half feet in width and granted a declaration and injunction accordingly. The learned District Judge on an appeal by the plaintiffs

(1) (1924) I.L.R. 47 All. 151 (P.C.).
(2) (1912) 23 M.L.J. 539.
(3) 1913 M.W.N. 1001.
(4) 1938 M.W.N. 262.

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held that there was a public path, that it was eight feet in width and that there was no objection to the frame of the suit. The defendants therefore appeal.

The main question in appeal is whether the plaintiffs can maintain the suit for establishing a public right of way and removal of an obstruction which constituted a public nuisance, without the sanction of the Advocate-General under section 91 of the Code of Civil Procedure and without proof of special damage. Undoubtedly, according to the view held by this Court in the past, such a suit would not lie. I have been referred to the rulings in *Hussain Sahib* v. *Narasimhappa*(1) and *Kandasami Kovundan* v. *Karupanna Kovundan*(2) and admittedly there are many other decisions to the same effect. These decisions, however, are prior to the decision of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*(3). The Privy Council were actually dealing with the case of a right to go in procession without interference, but, in discussing the right to file a suit for declaration of such a right without proof of special damage, their Lordships consider the case of *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(4) where the English rule, that plaintiffs could not maintain a suit in respect of an obstruction to a highway unless they proved some damage to themselves personally in addition to the general inconvenience occasioned to the public, has been adopted. Their Lordships point out that the judgment in the Bombay case proceeds entirely on English authorities which lay down the difference between proceedings by indictment and by civil action. They point out that such a way of deciding the case was inadmissible and that the distinction between

(1) (1912) 23 M.L.J. 539.
(2) 1913 M.W.N. 1001.
(3) (1924) I.L.R. 47 All. 151 (P.C.).
(4) (1877) I.L.R. 2 Bom. 457.

indictments and actions in regard to what is done on a highway is a distinction peculiar to English law and ought not to be applied in India. Now, this decision has been considered in at least two cases of other High Courts expressly dealing with the right to sue for removal of an obstruction in a public way. One is that of the Calcutta High Court, *Mandakinee Debee* v. *Basantakumaree Debee*(1), where JACK J. held that an individual member of the public could sue for the removal of an obstruction of a public way if it affected him personally without proof of special damage. He also found on the facts of that case that there was special damage and MALLIK J. agreed with the finding of special damage and did not consider the effect of the Privy Council decision as to the general right of suit. Another case on the same lines is *Municipal Committee, Delhi* v. *Mohammad Ibrahim*(2) where the learned CHIEF JUSTICE and DIN MOHAMMAD J. observe that the principle of English law requiring proof of special damage in the case of a suit by an individual member of the public to remove an obstruction from a public way does not apply to India. The learned Judges follow the decisions in *Manzur Hasan* v. *Muhammad Zaman*(3) and *Mandakinee Debee* v. *Basantakumaree Debee*(1) above referred to. They also observe that the owners of houses abutting on the public highway in question which was obstructed have an actionable claim on the ground of the diminution of the amenities of those houses. To this extent it may be said that they put their decision both ways—both on the ground that a member of the public can bring such a suit without proof of special damage and on the view that in the special circumstances of the case there was a cause of action on the

(1) (1933) I.L.R. 60 Cal. 1003. (2) (1934) I.L.R. 16 Lah. 517.
(3) (1924) I.L.R. 47 All. 151 (P.C.).

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basis of damage to the property in the neighbourhood. There is no Madras case, so far as I am aware, in which the effect of the Privy Council decision in *Manzur Hasan* v. *Muhammad Zaman*(1) has been considered. There is one decision of a single Judge, HORWILL J., reported as *Appayya* v. *Narasimhalu*(2) which follows the older Madras cases and holds that special damage is necessary but the learned Judge does not refer to the Privy Council decision or cases based upon it. Two other cases have been quoted before me, *Pahlad Maharaj* v. *Gauri Dutt*(3) and *Ardesar Jivanji* v. *Aimai Kuvarji*(4), in which a right of action has been recognised on the basis of the special interests of an adjoining proprietor, without reference to the question whether in view of the Privy Council decision in *Manzur Hasan* v. *Muhammad Zaman*(1) it is necessary to prove special damage. Mr. Patanjali Sastri for the appellants has endeavoured to maintain that the rule laid down by the Judicial Committee refers only to procession cases, i.e., to cases in which a man is endeavouring to establish a right to use a public way without interference and not to cases in which he is endeavouring to remove an obstruction from a public way on behalf of the general public ; and he points out that according to the Madras decisions even before the Privy Council decision, the former class of actions could be maintained without proof of special damage, whereas the latter class could not. As I read the judgment of the Privy Council, however, no such distinction is contemplated by their Lordships. They deal generally with the whole class of cases governing the rights of the public to use a public way. The case from the consideration of which the

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(1) (1924) I.L.R. 47 All. 151 (P.C.). (2) 1938 M.W.N. 262.
(3) A.I.R. 1937 Pat. 620. (4) (1928) I.L.R. 53 Bom. 187.

comment arose was one of actual obstruction, though the case which the Privy Council were themselves deciding was a case of a right to use a road without interference. I find it very difficult to see any difference in principle between the two classes of cases both governed by the same rule in England and if the English rule does not apply in one class of cases, as the Privy Council has certainly held that it does not, I find it very difficult to see how it should be applied in the other class of cases. Section 91 of the Code of Civil Procedure, though it provides a remedy by getting the sanction of the Advocate-General—a remedy which in many of these cases will be financially out of reach of the parties —, expressly safeguards any other remedies which may exist. It seems to me that the decision of the Privy Council in *Manzur Hasan* v. *Muhammad Zaman*(1) must be taken to have established that the English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India. It seems to me to follow, therefore, that the decision of the District Judge is correct on this point.

I do not accept the alternative contention of the respondents that special damage was proved in the present case. The District Munsif found it to have been proved on slender materials; the District Judge gives no finding at all. If this right of way is a public right of way, I do not see how the third plaintiff has been damnified any more than other members of the public merely because the way runs by the side of his house.

It is urged by the appellants that the learned District Judge was wrong in deciding that the width

(1) (1924) I.L.R. 47 All. 151 (P.C.).

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of this path was eight feet merely on the evidence of the Union Survey of which neither party appears to have had notice. So far as I am able to gather, there is no other evidence in support of this measurement and the title deeds of the parties indicate that the proper width of the path is three and a half feet only as found by the trial Court. While, in my opinion, the record of the Union Survey (though not conducted under the Survey and Boundaries Act) was admissible in evidence, I doubt very much whether the learned District Judge was justified in treating it as practically conclusive in the face of the measurements in the sale deeds and in the face of the fact that the plaintiffs' witnesses themselves were unable to say what was the proper width of the path. We do not know on what materials this survey was made and clearly the most reliable criteria in a case of this kind are the measurements in the sale deeds.

In the result, therefore, the appeal will be allowed and the declaration and injunction given by the learned District Judge will be modified by the adoption of a width of three and a half feet in lieu of eight feet for the public path which has been established. In the circumstances, both parties will bear their own costs in the second appeal.

V.V.C.