1888

SITAL PRASAD v. PARBHU LAL.

been prepared by the defendant, and that during the whole time of its being written out the plaintiff was sitting at the elbow of the defendant. I am not prepared to say that the decision of the Subordinate Judge was an erroneous decision, and I therefore dismiss the appeal with costs.

BRODHURST, J.—I concur.

Appeal dismissed.

1888
June 1.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

TOTA (DEFENDANT) *v.* SARDUL SINGH (PLAINTIFF).*

Public way—Obstruction by building—Suit by zemíndár for removal of building —Special damage—Right to sue.

The plaintiff who is the zemíndár of the village brought an action claiming to have a chabutra or building erected by the defendant in one of the village roads removed. The road in question was a *katcha* road used by the village over which the public have a right of way and it had been dedicated as a road for the use and convenience of the general public. The plaintiff got a decree for the removal of the chabutra and the defendant appealed.

Held, that the rule of English law that a member of the public cannot maintain an action for obstruction to a public road without showing special injury to himself beyond that suffered by any member of the public, does not apply to a zemíndár who or whose predecessor in title had dedicated to the public the road over his zemíndári land. A zemíndár in giving the public right of road or way over his land does not give the public or any one else a right to interfere with the soil of the road as by erecting a building upon it. In such a case the zemíndár has in common with the public the right to use the road as a road and, over and above it, he has a right to the soil in the road, which he had never given to the public. In an action of this kind, the zemíndár does not sue as a guardian of the public but in respect of an interference with his own rights of property.

Baroda Prasad Mustafee v. *Gorachand Mustafee* (1) discussed.

Dovaston v. *Payne* (2). *R.* v. *Pratt* (3). *Rolls* v. *Vestry of St. George the Martyr, Southwark* (4), and *Goodson* v. *Richardson* (5) referred to.

In this case the plaintiff, Mahárája Sardul Singh of Kishengarh, sued as zemindar and muáfidár of the village Rilsown for the removal of a *chabutra* or building erected by the defendant in one of the village roads.

---

* Second Appeal No. 2303 of 1886, from a decree of Babu Kashi Nath Biswas, Subordinate Judge of Agra, dated the 15th December, 1886, reversing a decree of Pandit Alopi Prasad, Munsif of Muttra, dated the 6th August, 1886.

(1) 12, W. R. *Civ. R.*, 160.
(2) 2 Sm. L. C., 9th Ed., 154.
(3) 4 E. and B. 860.
(4) 14 Ch. D. 785.
(5) L. R. 9, Ch. 221.

1888

TOTA v. SARDUL SINGH.

The Munsif of Muthra, holding that the building complained of was not a recent construction, dismissed the suit. In appeal, the learned Subordinate Judge of Agra differing from the Munsif in his view of the facts decreed the claim.

In second appeal the defendant for the first time contended, that the road being a public thoroughfare, the plaintiff who had not proved any special damage to him from the obstruction complained of, had no right of action. Upon this contention the following issues were remitted for trial to the lower appellate Court, *viz.*:—

1. Does the land whereon the building in dispute is erected belong to the plaintiff or is it a public thoroughfare?

2. If the latter, has the building erected by the defendant caused any special damage to the plaintiff such as would entitle him to sue for demolition thereof?

Upon these issues the lower appellate Court found that the road passed through and on the land which belonged to the plaintiff, who is the zemíndár and muáfidár of the village, and it was used by the village, and over it the public have a right-of-way; that it had been dedicated as a road for the use and convenience of the public, and the plaintiff has not suffered any greater damage than any one of the public.

Munshi *Madho Parshad*, for the appellant.

The Hon'ble Pandit *Ajudhia Nath* and Munshi *Kashi Parshad*, for the respondent.

EDGE, C. J.—In this case the plaintiff brought an action claiming to have a *chabutra* or building which had been erected by the defendant on one of the village roads removed. The plaintiff is the zemíndár. The road in question is a *katcha* road used by the village and over which the public have a right-of-way. The lower appellate Court found that the road passed through and on the land which belonged to the plaintiff, zemíndár, and that it had been dedicated as a road for the use and convenience of the general public. The lower appellate Court gave a decree for the removal of the *chabutra*, and the defendant has appealed.

Pecuniarily the plaintiff has not suffered any greater damage than anyone of the public, as has been found. It is contended

1883

TOTA v. SARDUL SINGH.

here, on the authority of two cases decided in Calcutta and one case decided in this Court, that the action is not maintainable without proof of special damage. In the first case, *Baroda Pershad Mustafi* v. *Gora Chand Mustafi* (1), Sir Barnes Peacock held that the person who had dedicated the road could not, any more than any other member of the public, maintain an action for the obstruction of the highway without showing special damage. It is quite plain that according to the law of England and the law here, as laid down in those cases, a member of the public cannot maintain an action of the kind without proving a special injury to himself beyond that suffered by the public. I do not think that this rule of law applies to the case of a zemíndár, who, or whose predecessor in title, had dedicated to the public the road over the zemíndár's land. When a land-holder in England or zemíndár here gives the public a right of road or way over his land, he only dedicates or gives the public a right to use the road for the purposes of a road. He does not give the public or any one else a right to interfere with the soil of the road, as for instance, by building a house upon it or turning the road into a garden. In the case decided by Sir Barnes Peacock that learned Judge seemed to think that if the plaintiff in that case were allowed to maintain his action, all the public would have a general right to maintain an action against the defendant. I think that learned Judge overlooked the distinction between the rights of the public and the rights of the zemíndár. The right of the public to go along the road and use the road as a road was a right which the zemíndár also had. The zemíndár beyond the public had a right to the soil in the road which he had never given to the public, so that, in an action of this kind, the zemíndár is suing not as a guardian of the public as was suggested by Sir Barnes Peacock, but in respect of an interference of his own rights of property.

The other Calcutta case, *Bhugeeruth Dass Koyburto* v. *Chundee Churn Koyburto* (2) is merely an authority because it follows the rule laid down by Sir Barnes Peacock. In the case of *Karim Baksh* v. *Budha* (3) this Court merely applied the rule of English law, that is, that an ordinary member of the public could not maintain

(1) 12, W. R., *Civ. R.* 160. (2) 22 W. R. *Civ. R.*, 462.
(3) I. L. R., 1 All., 249.

1888.

TOTA v. SARDUL SINGH.

an action for the obstruction of a highway unless he has sustained some damage peculiar to himself. The rule of English law is one founded on common sense. It is that when a road is dedicated to the public, the public have only got a right to use the road for the purposes for which it has been dedicated, let it be a cart road, or a road for riding on, or a road for walking on.

I asked Mr. *Madho Prasad* who appears for the appellant whether, if in this case the defendant had built a row of houses on the site of the road, the zemíndár could not maintain his action. He was compelled to say that he could not. I asked him whether if the defendant had ploughed up the road and converted it into a grove, or a market-garden, the zemíndár could not maintain the action, and he said that he could not. The authorities which would apply in England in a case of this kind are to be found in the notes to *Dovaston* v. *Payne* (1). One of those cases is the case of *R.* v. *Pratt* (2). There are also quite recent cases which show the principle of the English law on this point. I may refer to *Rolls* v. *Vestry of St. George the Martyr, Southwark* (3), and *Goodson* v. *Richardson* (4). That the zemíndár who dedicates a road to the public does not part with his property in the soil of the road and his right to use the site of the road for any purposes he pleases on the abandonment of the road, is shown very clearly by the judgment of Mr. Justice Oldfield and my brother Mahmood in *Nehal Chand* v. *Azmat Ali Khan* (5). It appears to me that a zemíndár, like the plaintiff here, does, as a matter of fact, suffer an injury peculiar to himself when one of the public builds upon the site of the road dedicated by the zemíndár to the public. I do not put it on this ground. I put it on the wider ground that he is entitled to maintain his action, not as one of the public, but as a zemíndár for interference with his own rights of property.

I think that the appeal should be dismissed with costs.

MAHMOOD, J.—I am of the same opinion, but as it is a case which, by reason of my order of the 20th June, 1887, was remanded to the lower appellate Court, and again, by my order of the 22nd November, 1887, was referred to a Division Bench consisting

(1) 2 Smith's Leading Cases, p. 154.
(2) 4 E. and B., 860.
(3) L. R. 14, Ch. D., 785.
(4) L. R., 9 Ch. D., 221.
(5) I. L. R., 7 All., 362.

of two Judges, I wish to give expression to my own views as to the reasons why I have arrived at the same conclusion as the learned Chief Justice.

In doing so, I do not wish to travel upon the ground on which the learned Chief Justice has done, so far as English law has a bearing upon the case.

The land to which the litigation relates admittedly, as it has been found, forms a road site within the precincts of the village which is the property of the plaintiff, and such road is used by the public for purposes of transit. There can be no doubt, as was held by me with the approval of my brother Straight in a recent case, *Ramphal Rai* v. *Raghunandan Prashad* (1), that where the only right claimed is one in common with the public, in respect of the right-of-way through a public thoroughfare, the plaintiff could not maintain an action unless he proved special damage, or (to use a more modern phrase) injury particular to himself, that is to say, over and above such injury as is sustained by him in common with the public at large. In that case the plaintiff was not the zemindár of the village but a lessee from him, and the obstruction which he sought to remove was, as a matter of fact, found to have been antecedent to the time when he obtained the lease, and my brother Straight and I held that, whilst there was nothing to show that the plaintiff's lessor had any right to the land to which the litigation related, the lease itself was also silent in respect of giving any right to the plaintiff lessee, to maintain any action in respect of encroachments on the land. I refer to that case in order to guard myself against being understood as laying down any rule of law in this case which would be in conflict with what I laid down in the case to which I have just referred.

Now I confess that I have long entertained serious doubts whether the rule of the English law of torts which in cases of obstructions of a public way requires proof of special damage, as a condition precedent to the maintaining of an action such as this, is a rule of law in itself justifiable upon juristic grounds, or adopted to the conditions of life in British India, but in the course of my own judgment in the case to which I have referred, I have adopted

(1) *Ante* 498.

1888

TOTA v. SARDUL SINGH.

the rule of English law out of deference to the rulings which I I cited in that case.

That case however, is distinguishable from the present upon the point to which the learned Chief Justice has referred, namely, that here the *status* of the plaintiff is not merely that of an ordinary member of the public entitled to pass through the road, but the plaintiff is admittedly the zemíndár of the village and, as such, the owner of the land whereon lies the road. I think that in a case of this kind the *status* of the plaintiff would be higher than that of an ordinary member of the public, provided he has a subsisting right of ownership pure and simple, or what I may analogically call, a right of reversion to the land used as a public road. That the land is within the four corners of the mahál is admitted on all hands, and that of the mahál the plaintiff is the owner is also admitted, and all that has been found against him is that the land is used for purposes of a public way. I think, as the learned Chief Justice has pointed out, the position of a person holding such a right is to be distinguished from that of an ordinary passer-by or traveller; that even adopting the strict rule of English law as to proof of special damage being necessary in the case of an ordinary passer-by, such a rule would not apply to the case of a person such as the present plaintiff. The reasons for this distinction are, of course, clear, namely, that so long as the strip of land called the public road in this litigation forms part of the mahál, it may at some time or other cease to be a public way, or, by reason of such other changes as time or the administration of the revenue authorities might bring about, may be cultivated again, and, as such, it would no doubt come back to the zemíndár, namely, the plaintiff. It is, therefore, scarcely possible to say that, with rights, such as the plaintiff has in the land, he did not suffer any particular injury by reason of the trespass of which he complained in the suit.

In this view the road, though available to the public for purposes of transit, forms part and parcel of the mahál, but this view is hampered by the *ratio decidendi* adopted in more than one case by this Court. These cases were referred to in my judgment in the Full Bench case of *Niamat Ali* v. *Asmat Bibi* (1). One of those

(1) I. L. R., 7 All., 626.

1888

TOTA v. SARDUL SINGH.

cases was the case of *Sahib Ram* v. *Kishen Singh* (1), where the majority of the Court held that the portion of the *abadi* or populated area of the village did not form part of the rights of a co-sharer, and the other case was that of *Hazari Lal* v. *Ugrah Rai* (2) in which it was held that *sir* land did not form an essential part of the zemíndári share of a co-sharer. Both these rulings, however, proceed upon a *ratio decidendi* which, as Pandit *Ajudhia Nath* has, I think, rightly pointed out, was practically overruled by the whole Court in *Niamat Ali* v. *Asmat Bibi* (3) to which I have referred, because there the Court held that grove-land does form part of the zemíndári rights. Here the road formed part of the zemíndári rights of the plaintiff, and his interest in such land was the right and possibility of making the land available to him for agricultural or other purposes, and his *status* is higher than that of an ordinary person maintaining an action with regard to what would otherwise be a public nuisance. So far as the plaintiff is concerned it is not merely a public nuisance, for he has suffered special injury.

For these reasons I concur in the order made by the learned Chief Justice.

Appeal dismissed.

MATRIMONIAL JURISDICTION.

1888
June 16.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

CULLEY (PLAINTIFF) *v.* CULLEY AND OTHERS (DEFENDANTS).*

Suit for dissolution of marriage—Decree made by District Judge—Confirmation by High Court—Application by petitioner and respondent that decree should not be made absolute—Act IV of 1869 *(The Indian Divorce Act), ss.* 16, 17.

In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under s. 17 of the Indian Divorce Act. The petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition in which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute. On the 2nd June, the case came before the Court, when an order

* Case for confirmation under s. 17 of the Indian Divorce Act (IV of 1869) of a decree *nisi* passed by the Judicial Commissioner of Oudh, dated 1st December, 1887.

(1) Weekly Notes, 1882, p. 192. (2) Weekly Notes, 1884, p. 103.
(3) I. L. R., 7 All., 626.