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absolute right over the property bequeathed than she would take over such property if conferred upon her by gift during the life time of her husband ; and that, whether in respect of a gift or a will, it would be necessary for the husband to give her in express terms a heritable right or power of alienation."

The ruling recognises the conclusion that if the power of alienation is given, the power can be exercised, and it also is consistent with the rule of law laid down in paragraph 571 of Mayne's Hindu Law, 3rd. ed., where the author says :—

"Immoveable property, when given by a husband to his wife, is never at her disposal, even after his death. It is her *stridhanum*, so far that it passes to her heirs, not to his heirs. But as regards her power of alienation, she appears to be under the same restrictions as those which apply to property which she has inherited from a male. Of course it is different if the gift is coupled with an express power of alienation."

I have said that if the power of alienation is given to the wife by the husband in any portion of his separate property, it follows that she has the power to alienate it.

Under the circumstances, I think that the appeal should be dismissed with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

1888
May 14.

Before Mr. Justice Straight and Mr. Justice Mahmood.

RAMPHAL RAI AND OTHERS (DEFENDANTS) v. RAGHUNANDAN PRASAD (PLAINTIFF).*

Public thoroughfare—Obstruction—Right to sue—Special damage—Lease—Right of lessee to sue—Trespass.

The plaintiff, a holder of a ten years' lease of the share and rights of one of the co-sharers of a village, sued for the demolition of certain buildings and constructions on a plot of land within the area of the village, on the ground that the public have been very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c., and that he by reason of his own inconvenience, and also as lessee in possession of the entire rights of his lessor, has legally and justly a right to bring

* Second appeal No. 1371 of 1886, from a decree of Munshi Matadin, Subordinate Judge of Ghazipur, dated the 28th February, 1886, confirming a decree of Maulvi Inamul Huq, Munsif of Ballia, dated the 24th December, 1885.

the action. The findings of fact were, that by the terms of the lease plaintiff was entitled to maintain the action as representing the zemindari rights of his lessor; that the obstructions complained of existed when the lease was granted; that the roadway mentioned in the plaint was one used by the public in general as a foot-path and also for vehicles, and that the buildings complained of have encroached on the road. The suit was dismissed by the first Court, but decreed in appeal by the lower appellate Court. *Held*, that in the absence of damage over and above that which in common with the rest of the public the plaintiff has sustained, his action must fail. Public nuisance is actionable only at the suit of a party who has sustained special damage, and the case-law of British India in this respect is the same as the rule of English law on the subject. Further, that the lease to plaintiff failed to show either that the land upon which the defendant has built is included in the lease, or that it intended to confer upon the plaintiff any right to question the legality of the erections existing at the time of the lease.

Satku v. *Ibrahim Aga* (1) and *Karim Baksh* v. *Budha* (2) referred to.

The facts of this case are stated in the judgment of the Court.

Mr. *Niblett*, for the appellant.

Mr. *G. T. Spankie*, for the respondent.

MAHMOOD, J.—This case originally came on for hearing before me sitting as a single Judge for the disposal of second appeals, and by my order of the 21st April, 1887, I referred the case, for the reasons stated in that order, to a Division Bench consisting of two Judges. The case was accordingly heard by my brother STRAIGHT and myself, and by his order of the 23rd December, 1887, in which I concurred, my learned brother remanded the case, under s. 566 of the Civil Procedure Code, for the trial of certain issues stated in that order. That order also sets forth the two fold aspects in which the case was presented to us by the argument for the parties on that occasion. The plaintiff is the holder of a ten years' lease from the Maharaja of Dumraon, who is a co-sharer of the village along with defendant No. 3. The lease is a *thika* lease of the zemindari rights of the Mahárája, and it was executed on the 24th January, 1885, conferring upon the plaintiff the right of possession and management of the zemindari share, subject to certain conditions and stipulations which need not be mentioned in detail for the purposes of this case. The cause of action for this suit is stated in the plaint to have arisen on the 6th June, 1883, when the defendant is alleged to have built certain constructions upon a plot of land, No. 788, which is included within the area of the village,

(1) I. L. R., 2, Bom., 459. (2) I. L. R., 1, All., 249.

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and is stated to be a thoroughfare used by the plaintiff as well as by the public.

The present suit was instituted on the 12th August, 1885, and the case of the plaintiff can best be set forth by quoting from the plaint itself. His case is:—"That by reason of building the house, placing a trough, manger, wood, &c., and tying cattle, the width of the passage, which was ten *lathas*, is now left only eight *lathas*: that the public are very much inconvenienced in going to and coming from the road and in taking carts, carriages, cattle, &c.: that the plaintiff by reason of his own inconvenience, also as the lessee in possession of the whole right in the zemindari share of the Mahárája of Dumraon, has legally and justly a right to bring this action." And upon these grounds the plaintiff prayed for the following reliefs:—

"That the house in dispute, the trough, the manger, the wood, &c., built, erected, and placed by the defendants on 1 biswa 18 dhurs of land (bounded as below), part of the passage site No. 788, valued at Rs. 10, be demolished, pulled down, and removed, and the passage site be levelled and restored to its original state and condition; that the defendants be prevented, in future, from making any appropriation for their own use or doing any act injurious to the convenience of the public;" and the plaint ended up by praying "that any other relief which may be just and proper be also granted."

It is clear from this, as was pointed out by my brother Straight in his remand order of the 23rd December, 1887, that the suit has a double aspect; one being that of an action for an injunction to remove a nuisance caused by the obstruction which the defendant's building upon the land has created, and the other aspect being that of an action in trespass founded upon the plaintiff's alleged right as lessee to possession of the land upon which the erections have been made. The suit was resisted in both its aspects.

So far as the first aspect is concerned, the defendant pleaded that the plot of land being a public thoroughfare and no special damage or injury having been alleged by the plaintiff in consequence of the alleged obstruction, the plaintiff could not maintain the suit, the alleged wrong to a right possessed by the plaintiff in common with

the public not being available to him as a sufficient foundation for such an action. Then as to the second aspect of the plaintiff's case, the main defence was that the plaintiff, as a mere lessee, had no *locus standi* to maintain such an action, and that the defendant had been in possession of the land for more than the prescriptive period of twelve years, and the suit was therefore barred by limitation. Further, in respect of both the aspects of the case, the effect of the defence was that the land upon which the defendant had built did not form part of the thoroughfare; that the road had not been narrowed so as to put any one to inconvenience, and that the land on which the defendant had built had from ancient times been in his possession and he had a right to build thereon.

The first Court dismissed the suit, but that decree has been reversed by the lower appellate Court mainly upon the ground "that the constructions have not been in existence for more than twelve years;" "that the houses are new and have been built without the permission and consent of the zemindar;" that the plaintiff could maintain the action "as the representative of the zemindar;" that "it is proved by the evidence that the passage is narrower than before, since formerly three carts used to pass through it, now only one cart can pass, and therefore, if another cart comes from the other direction, inconvenience will surely occur."

In pursuance of my brother Straight's remand order of the 23rd December, 1887, the findings of the lower appellate Court in effect are that the terms of the *thika* lease of the 24th January, 1885, entitled the plaintiff to maintain such an action as representing the zemindari rights of his lessor; that the obstruction or constructions complained of by the plaintiff were erected antecedent to the lease and were in existence at the time when that lease was executed; that "the way referred to by the plaintiff in his plaint is a roadway used by the public in general on foot and with vehicles;" that the house and other buildings have encroached upon the road, and "for this reason the plaintiff complains in his petition of plaint that, besides the injury caused to the public who use this way, the plaintiff's passage along the road and that of his carts, cattle, &c., has been obstructed."

These findings have not been contested by either party under s. 567 of the Code of Civil Procedure, and taking all the findings

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of fact upon which the lower appellate Court has proceeded, I shall deal with the case upon pure questions of law in the two aspects of the suit stated in my brother Straight's order of remand.

First, then, as to the question whether the plaintiff could, upon the allegations contained in the plaint, maintain this action for removal of an alleged obstruction erected upon land which has been found to form part of a public thoroughfare. For the purpose of deciding this part of the case it is not necessary to consider the plaintiff's right as lessee under the *thika* lease of the 24th January, 1885, for he to that extent comes into Court as one of the public entitled to use the thoroughfare. It is a settled proposition of the English law of torts that obstructions in a public thoroughfare are not actionable as creating a civil liability, unless some particular or special damage or injury is proved to have resulted to the individual person or the determinate body of persons maintaining the action. Such obstructions, being in a public thoroughfare, are classed as public nuisances, falling under the same category as many other kinds of public nuisances which need not be referred to for the purposes of this case. But the principles upon which the English law of tort proceeds in respect of all the multifarious classes of public nuisances are identical, and those principles do not so much relate to the right as to the form of the remedy. In England and also in America the erection of obstructions in a public thoroughfare are indictable offences under the criminal law; and our own Indian Penal Code, in following the same principles, has virtually defined a public nuisance in s. 268, and has rendered the same punishable as a criminal offence. The Criminal Procedure Code also makes provision for summary proceedings by Magistrates to stop such nuisances. But upon the question whether such public nuisances are in themselves sufficient to sustain a civil action, the statute law, so far as I am aware, is totally silent, and it therefore devolves upon Judges sitting in British India virtually to legislate, by judicial exposition, for the people of the country, under the authority of the somewhat indefinite rule of justice, equity and good conscience, which has to be administered, in the absence of any legislative directions, by the Courts of Justice in British India. Such is virtually the effect of the present state of the law of tort in British India, resulting as

might well be expected, in a vast conflict of decision on various questions of civil liability *ex delicto*. The practice of the Courts in British India, the highest of which have been presided over by English lawyers, has, however, been to fall back upon the analogies of the English law, and to take it in all cases to be a good guide for applying the rule of justice, equity, and good conscience. This method has, in the absence of any definite rules of law governing actions *ex-delicto* or other classes of litigation, been approved by the Lords of the Privy Council, and probably the latest *dictum* of their Lordships is contained in *Waghela Rajsanji* v. *Masludin* (1), where, however, their Lordships qualify their observations by indicating that the English law is not to be imported wholesale into India, regardless of the conditions of the people and the country.

Fortunately, upon the exact question now before me, the case-law of British India is decisive, and is the same as the rule of the English law of torts.

The principle authorities of the English law, in their application to Indian cases, were well considered by Westropp, C. J., in *Satku* v. *Ibrahim Aga* (2), and it was there laid down that the plaintiffs could not maintain a civil suit in respect of an obstruction in a public thoroughfare, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. The rule so laid down followed many Indian cases upon which the learned Chief Justice relied, and although in that case the obstruction complained of was not of such a permanent character as a building, I hold that the same principle, so far as it requires proof of particular or special damage, is applicable to this case: and in this view I am supported by the ruling of this Court in *Karim Baksh* v. *Budha* (3), where the obstruction complained of consisted of the erection of a *chabutra* which encroached upon a public thoroughfare, and the relief prayed for was the removal of a portion of the *chabutra*, the plaintiffs alleging that the encroachment was such that carts and other wheeled conveyances were unable to pass along the road.

Such being the state of the case-law, I do not think the exigencies of this case either require me to enter into the juristic reasons

(1) L. R., 14, Ind., Ap. 96. (2) I. L. R., 2, Bom., 457. (3) I. L. R., 1, All., 249.

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upon which this rule is supposed to proceed, or in the face of the authorities of Indian cases, to open up the question how far those reasons are adapted to the conditions of British India. I accept the authority of the case-law as it stands, and hold that no action of this kind is maintainable upon the ground that the defendant has erected obstructions in a public thoroughfare, thereby causing inconvenience to the plaintiff with the rest of the public, there being no allegation or proof of special or particular injury or damage having been sustained by the plaintiff in consequence of such obstructions.

As to the second aspect of the case, namely, so far as it can be regarded as an action for trespass, the contention of the parties raises two main questions:—

First, whether the plaintiff, as the lessee under the lease of the 24th January, 1885, is entitled to maintain the action for removal of constructions made upon the land antecedent to the lease and existing at the time when the plaintiff took the lease. *Secondly*, whether under the terms of the lease itself the plaintiff is entitled to maintain this action without joining his lessor, the Mahárája of Dumraon, and other co-sharers of the village as plaintiffs to the action.

Upon the first of these points, Mr. *Spankie*, in arguing the case on behalf of the plaintiff-respondent, has contended that the circumstance that the erections now complained of were constructed antecedent to the plaintiff's lease does not deprive him of the remedy prayed for by him, because, as the learned counsel argues, the trespass complained of in this case is of a continuing nature, and as such the continuance of the buildings on the land subsequent to the lease would amount to a sufficient cause of action available to the plaintiff for this suit. In support of this contention the learned counsel relies upon *Holmes* v. *Wilson* (1) and *Bowyer* v. *Cook* (2) the effect of which, as represented in Addison's work on Torts (5th ed., p. 50 and pp. 331-2), seems to be that in the case of continuing trespasses, such as trespass by erecting buildings, as a continuing injury, fresh causes of action arise for recovery of damages, and the author exemplifies this by saying that "if a man throws a heap of stones or builds a wall, or plants posts or

(1) 10, Ad. & E., 503. (2) 4, C. B., 236.

rails on his neighbour's land and there leaves them, an action will lie against him for the trespass and the right to sue will continue from day to day till the incumbrance is removed" (p. 331). This no doubt is a correct enunciation of the English law upon the subject; though speaking for myself as an Indian Judge, I can scarcely regard the rule either as reasonable in itself or fit to be applied to cases in India, because the rule renders multiplicity of actions unavoidable, as pointed out by Mr. Mayne in his work on Damages (3rd ed., p. 89), and I agree with him in the view that "the fair rule in such a case would be to give the plaintiff such damages as would compensate him for the loss sustained up to the time of verdict and would pay him for putting the land into its original state."

I need not, however, consider this rule in this case, for here there is no claim for damages in consequence of the alleged continuing trespass. The form of the action, so far as it can be gathered from the plaint, no doubt alleges a trespass, and the substantial relief prayed for asks for an injunction to compel the plaintiff to demolish the erections which he has constructed, and to prohibit him from any future encroachment upon the land. The continuance of such erections may entitle the plaintiff to maintain a suit such as this for their removal, although such constructions were made antecedent to the lease. The right of the plaintiff, however, must be defined and circumscribed by the terms of the lease itself, which fail to show either that the land upon which the defendant has built is included in the lease, or that that document intended to confer upon the plaintiff any power to question the legality of erections which existed at the time of the lease, and for aught that appears to the contrary, the lease itself was given subject to the occupation of the land by existing buildings. Further, the case is bare of proof of the plaintiff's lessor, the Mahárája of Dumraon, ever being in occupation of the land or any specific portion thereof on which the erections have been constructed, and it follows *á fortiori* that the plaintiff himself, whose rights originated with the *thika* lease of the 24th January, 1885, could not have been in occupation of the land when the wrongful entry thereon, by the constructions of the 6th June, 1883, is alleged to have taken place. There is thus no proof of the plaintiff's possession being disturbed,

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and so far as the nature of the action may be regarded as one of trespass *quare clausum fregit* as understood in the English law of torts, the suit cannot be sustained. Under the circumstances, the fact that the plaintiff's lessor, the Mahárája of Dumraon, and the other co-sharers of the zemindari rights of the village have not joined the action, ceases to be a matter of significance for the decision of this case, especially as there is nothing in the form of the action or the allegations contained in the plaint to justify the suit being regarded as one of ejectment.

For these reasons, I am of opinion that the suit even in its second aspect fails, and that it was rightly dismissed by the first Court, though some of the reasons given for such dismissal may be unsound.

I would decree this appeal, and setting aside the decree of the lower appellate Court, restore that of the Court of first instance with costs in all the Courts.

STRAIGHT, J.—I concur in the judgment and conclusions of my brother Mahmood.

Appeal decreed.

1888
May 29,

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

RAM CHAND (JUDGMENT-DEBTOR) *v.* PITAM MAL AND ANOTHER (DECREE HOLDERS).*

Attachment before Judgment—Termination of attachment—Execution of decree—sale in execution—Material irregularity in publishing or conducting sale without attachment—Civil Procedure Code, ss. 311, 483.

The plaintiff instituted a suit against defendant for recovery of money, and previous to judgment, that is, on the 8th of January, 1885, applied for, and on the 11th obtained, order for attachment of several houses and premises belonging to defendant and such attachment was made. The suit was dismissed, but eventually on appeal it was decreed: but the attachment was never withdrawn. Plaintiff then applied for execution of his decree and his application was granted by an order directing that the property of the judgment-debtor should be notified for sale on the 1st February, 1887, and accordingly on the 21st December, 1886, a sale notification was issued. Judgment-debtor twice applied for postponement of sale, but his applications were refused, and the sale took place on the date fixed. Judgment-debtor then objected to the confirmation of the sale urging that the property sold was never attached in execution of the decree and the attachment previous to judgment was infructuous because afterwards the claim was dismissed by the Court of first instance; that there had been several other irregularities

* First Appeal No. 131 of 1887, from an order of Maulvi Saiyid Farid-ud-din Ahmad, Subordinate Judge of Agra, dated the 16th September, 1887.