

1937

CHANDI
PRASAD
vs.
SHYAM
BEHARISrivastava,
C.J.

and the *sahan* were given to the defendants for the construction of *makan waghaira*. The word "*waghaira*" may well include the construction of a *chabutra* for the better use of the *sahan*. For the above reason I am of opinion that the plaintiff has failed to establish his right to recover possession of plot No. 213 or to get a decree for demolition of the *chabutra*. I accordingly allow the appeal, set aside the decree of the lower court and dismiss the plaintiff's suit with costs in all the courts.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

SITA RAM (PLAINTIFF-APPELLANT) v. PUTTU LAL, AND
ANOTHER (DEFENDANTS-RESPONDENTS)*

1937
July, 15.

Highway—Obstruction to public road—Civil suit for removal of obstruction to public thoroughfare, when can be maintained.

No suit for obstructing a public thoroughfare can be maintained in a civil court without proof of special injury. *Karim Bakhsh v. Buddha* (1), *Satku v. Ibrahim Agha* (2), *Adamson v. Arumugam* (3), and *Bati Ram Kolita v. Sib Ram Das* (4), referred to and relied on.

Mr. R. B. Lal, for the appellant.

Mr. K. P. Misra, for the respondents.

SRIVASTAVA, C.J.—This is a second appeal by the plaintiff who has been unsuccessful in both the lower courts. He brought the suit which has given rise to this appeal for demolition of a wall constructed by the defendants on the ground that it was an encroachment on a public road running by the side of it and that the encroachment had caused obstruction to his bullock-carts. Both the lower courts have held that though the

*Second Civil Appeal no. 252 of 1935, against the decree of M. Ziauddin Ahmad, 1st Civil Judge of Kheri, dated the 15th of May, 1935, upholding the decree of S. Akhtar Ahsau, Munsif of Kheri, dated the 14th of December, 1934.

(1) (1876) I. L. R. 1 All., 249.

(2) (1877) I.L.R. 2 Bom. 457.

(3) (1886) I.L.R. 9 Mad., 463.

(4) (1921) A. I. R., Cal., 271.

1937

SITA RAM
vs.
PUTTU LALSrivastava,
C.J.

wall might be a slight encroachment on the road yet it did not cause any such obstruction as might cause any general inconvenience. It has been argued on behalf of the appellant that the defendants have no right to make any encroachment and that the plaintiff as a resident of the village who was using the public road in question was entitled to see that the road was maintained at its full width without any encroachment being made on it. It seems to me to be well settled that in a case like this the plaintiff is not entitled to maintain the suit without proof of special injury. In *Karim Bakhsh v. Buddha* (1) it was held that no suit for obstructing a public thoroughfare can be maintained in a civil court without proof of special injury. Similarly in *Satku Valad Kadir Sausare v. Ibrahim Agha valad Mirza Agha* (2) it was held that plaintiffs could not maintain a civil suit in respect of an obstruction on a public road, unless they could prove some particular damage to themselves personally in addition to the general inconvenience occasioned to the public. In *Adamson v. Arumugam* (3) it was held that the rule of English law that no action can be maintained by one person against another for obstruction to a highway without proof of special damage should be enforced in British India as a rule of "equity and good conscience". The same rule was laid down in *Bati Ram Kalita v. Sib Ram Das* (4). It was also observed in this case that the object of the rule requiring proof of special damage is that but for such a rule the defendants might be harassed by separate suits from every individual member of the public whose right of way has been obstructed, and that special damage means damage of a special nature, that is damage affecting the plaintiff individually or damage peculiar to himself, his trade or calling. The learned counsel for the appellant is unable to show that the plaintiff has suffered any special damage in this case. He has however argued that the right in question is not such a public right that it might be governed by the rule mentioned above. His contention is that it is

(1) (1876) I.L.R., 1 All., 249.

(2) (1877) I.L.R., 2 Bom., 457.

(3) (1886) I.L.R., 9 Mad., 463.

(4) (1921) A.I.R., Cal., 271.

1937
SITA RAM
vs.
POTTU LAL

Srivastava,
C.J.

merely a village road the incidents with regard to which should be decided on the basis of custom. In the first place there is nothing on the record to show that the road is not a public road. The plan prepared by the commissioner shows it to be a public road and it has been referred to as such all along in both the lower courts. There is also nothing to show that there is any custom in the village applicable to the case which may give the residents of the village a right to have encroachments removed irrespective of any special injury or inconvenience. For the above reasons I am of opinion that no case has been made out for interference with the decision of the courts below. I accordingly dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL

*Before Mr. Justice Ziaul Hasan and Mr. Justice
W. Y. Madeley*

1937
July, 16,

THAKURAIN MAHBOOB BANDI (OBJECTOR-APPLICANT) v.
K. B. MAHBOOB HUSAIN KHAN (OPPOSITE-PARTY)*

Musalman Waqf Act (XLII of 1923), scope of—Waqf partly to provide for waqif or his family—Musalman Waqf Act, when will apply.

If part of the purpose of a waqf is to provide for the waqif himself or for any member of his family or his descendants, the provisions of the Mussalman Waqf Act will not come into force till after the death of such persons. *Shabbir Husain v. Ashiq Husain* (1), referred to.

Mr. *M. Wasim*, for the applicant.

Mr. *Ali Zaheer*, for the opposite party.

ZIAUL HASAN and MADELEY, JJ.:—The question involved in this application for revision of an order of the learned District Judge of Fyzabad, dated the 24th of August, 1936, is whether or not a waqf made on the 30th of October, 1913, by Babu Abul Qasim, deceased

*Section 115 Application no. 167 of 1936, against the order of M. Humayan Mirza, District Judge of Fyzabad, dated the 24th of August, 1936.

(1) (1929) I.L.R. 4 Luck., 429.