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HUSSAIN  
KHAN  
v.  
RAM NEWAZ  
GAYASAT  
RAM.  
  
FAZI  
ALI, J.

it is not free from certain difficulties owing to the somewhat inartistic language of sections 35 and 60A and what further adds to my diffidence in the matter is that I find that section 35 has been construed differently by Mookerjee, J. in *Krishna Prasad Singh v. Goshtha Bihari Kundu*(1). I cannot also overlook the fact that in some cases the newly acquired property may be valueless or so heavily encumbered that the Court of Wards may not like to deal with it. Should it, however, be a fact that the Legislature really intended that if subsequent to the assumption by the Court of Wards of the charge of the property of a disqualified proprietor any other property is acquired by him by succession or otherwise, no fresh formal order under section 35 would be necessary to complete the charge of the Court of Wards over such property, the Act might be amended in suitable terms so as to express this intention more clearly than it has been done in the present Act. It is sufficient for the purpose of disposing of these appeals that I have expressed myself to be in complete agreement with my learned brother on the first question and so I concur in the order that these appeals should be allowed with costs.

*Appeals allowed.*

## APPELLATE CIVIL.

*Before Wort, J.*

MUHAMMAD DIN MIAN

v.

MUSSAMMAT ATIRAJO KUER.\*

*Public highway, action brought by a member of the public for obstruction of—special damage, proof of, whether*

\* Second Appeal no. 459 of 1920, from a decision of J. Chatterji, Esq., District Judge of Saran, dated the 22nd November, 1928, affirming a decision of Babu Atal Bihari Saran, Munsif of Siwan, dated the 18th February, 1928.

(1) (1907) 5 Cal. L. J. 494.

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necessary—rule of equity, justice and good conscience—Code of Civil Procedure, 1908 (Act V of 1908), Order 1, rule 8, scope of.

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As a rule of equity, justice and good conscience, no action can be maintained in India by a member of the public for the obstruction of a highway without proof of special damage.

*Adamson v. Arumugam*(1), *Rajkumar Singh v. Sahebzada Roy*(2), *Satku Valad Kadir Sausare v. Ibrahim Aga Valad Mirza Aga*(3) and *Gehanaji bin Kes Patil v. Ganpati bin Lakshuman*(4), followed.

*Harihar Das v. Chandra Kumar Guha*(5) and *Harish Chandra Saha v. Prannath Chakrabarty*(6), distinguished.

Order I, rule 8, Code of Civil Procedure, 1908, is intended to enable some of a class having the same interest to sue on behalf of the rest; it is not intended to allow individuals to sue on behalf of the general public.

*Adamson v. Arumugam*(1), followed.

Appeal by the defendants.

The facts of the case material to this report are stated in the judgment of Wort, J.

*Aditya Narain Lal*, for the appellants.

*P. P. Varma*, for the respondents.

WORT, J.—The cause of action alleged by the plaintiffs was that the defendants encroached on a public highway and it appears that before action was brought, permission was obtained under Order I, rule 8, of the Civil Procedure Code to enable the plaintiffs to bring the action. Now in my judgment it is quite clear in the first instance that Order I, rule 8, does not apply to the facts of the case; the rule on its proper construction will show that. The rule is

“where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested.”

(1) (1886) I. L. R. 9 Mad. 463.

(2) (1877) I. L. R. 8 Cal. 20, F. B.

(3) (1877) I. L. R. 2 Bom. 457.

(4) (1875) I. L. R. 2 Bom. 469.

(5) (1918) 23 Cal. W. N. 91.

(6) (1921) 26 Cal. W. N. 587.

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That rule and Order appear to have been taken from the rules made under the Judicature Act of England and the purpose of those rules is well understood. The obvious class of cases to which the rule refers is such as one shareholder suing in behalf of all the other share-holders of a company: that of course is a clear case in which the persons have the same interest in the suit. It is impossible to say in this case that all the members of the public had the same interest in the subject-matter of this suit. It is quite impossible to discover to what extent they are interested in the encroachment which is the cause of action alleged. But apart from the provisions of Order I, rule 8, it seems to me quite clear that this action is not maintainable. The rule of the common law in England is that no action can be maintained by one member of the public for the obstruction of a highway without proof of special damage and that rule has been applied in numerous cases in India, as the rule of equity, justice and good conscience.

The first case to which I make reference is *Adamson v. Arumugam*<sup>(1)</sup>. The next case is the case of the Calcutta High Court, *Rajkumar Singh v. Sahebzada Roy*<sup>(2)</sup>; there the decision of the Full Bench was that as the obstruction had caused a special injury to the plaintiff, the plaintiff was entitled to bring an action. In neither of these cases is any reference made, and indeed it is unnecessary to make any reference, to the provisions of Order I, rule 8, because the action lay in spite of the non-compliance with that order and rule. The most exhaustive judgment, however, was delivered in the Bombay High Court in the case of *Satku Valad Kadir Sansare v. Ibrahim Aga Valad Mirza Aga*<sup>(3)</sup> and was followed again by a case, *Gehanaji bin Kes Patil v. Ganpati bin Lakshuman*<sup>(4)</sup>. The only case relied upon by the

(1) (1886) I. L. R. 9 Mad. 468.

(2) (1877) I. L. R. 3 Cal. 20, F. B.

(3) (1877) I. L. R. 2 Bom. 457.

(4) (1875) I. L. R. 2 Bom. 469.

learned Advocate on behalf of the respondents is the case of *Harihar Das v. Chandra Kumar Guha*(<sup>1</sup>). That was a case in which villagers brought an action for a declaration with regard to the right of way in a pathway; but that case does not assist the respondents in this action as the learned Judges in deciding that case clearly distinguished it from the class of the case which I have before me and in the course of their judgment they stated: "If the case of special damage is established and the way be a public way, then the case is a clear one. The case, however, found by the learned Judge was this: In his view, the pathway in dispute was a village pathway in which the plaintiff had got a right with the other villagers by reason of a grant implied from long user", and they go on to state that "an infringement of a right of that nature does not require proof of special damage". The case of a single Judge, *Harish Chandra Saha v. Prannath Chakrabarty*(<sup>2</sup>), followed the previous decision.

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Now that being so, it is clear that the learned trial Judge misconceived the scope of Order I, rule 8, and indeed when he came to try the action he did not address his mind to the fact which was essential before the plaintiff could have established his cause of action; the same must be said regarding the appellate Court. Now the encroachment on the public highway in this case was on the other side of the road from the land of the plaintiffs. In those circumstances, although it might be said that the plaintiffs ought to have an opportunity to bring their case, they must be assumed to have known the law although they made some allegation in their plaint as regards damage. They made no attempt to prove it nor indeed did they claim it in their prayer in the plaint. In those circumstances it does not seem to me to be a case in which they ought to have an opportunity to support what on

(1) (1918) 23 Cal. W. N. 91.

(2) (1921) 26 Cal. W. N. 587.

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the facts before me is a case which could not possibly succeed.

I might add in connection with Order I, rule 8, that the matter is not cured by the learned Judge having given leave under Order I, rule 8, of the Civil Procedure Code to the plaintiffs to bring this action. I have already said that the case has nothing to do with that Order or rule, that special damage was necessary in order to enable the plaintiffs to succeed and as they have not proved this their action must necessarily fail. On the question of Order I, rule 8, I make special reference to the case of *Adamson v. Arumugam*<sup>(1)</sup> which I have already referred to.

In the circumstances the appeal is allowed and the plaintiffs' action is dismissed with costs throughout to the appellants.

*Appeal allowed.*

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## APPELLATE CIVIL.

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*Before Macpherson and Khaja Muhammad Noor, JJ.*

BISWANATH MISSIR

v.

RAM PRASAD TEWARI.\*

*Co-sharer—in possession of lands in excess of his share—possession, whether can be disturbed—partition suit necessary—suit for possession against co-sharer, whether maintainable—Hindu widow in possession of husband's estate, whether entitled to make raiyati settlement—test.*

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\* Appeals from Appellate Decree nos. 928 and 970 of 1929, from a decision of F. F. Madan, I.C.S., District Judge of Muzaffarpur, dated the 5th March, 1929, affirming a decision of Mr. Nut Bihari Chatterji, Subordinate Judge of Motihari, dated the 27th July, 1928.

(1) (1886) I. L. R. 9 Mad. 468.

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Jan. 21, 22.  
Feb. 10.