

(1903) 08 CAL CK 0013

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 1863 of 1901

Bidhoo Bhusan Palit

APPELLANT

Vs

Beny Madhab Mazumdar and Others

RESPONDENT

Date of Decision : 18-08-1903

Acts Referred:

Citation : (1903) 08 CAL CK 0013

Final Decision : Dismissed

Judgement

Mitra, J.—This is an appeal by one of the Defendants, who is described as the principal Defendant in the case in an action brought by the Plaintiffs for a declaration of their right to pass surplus rain water from their house through the land of the Defendants. The Munsif decreed the suit and directed that the obstruction caused to the passing of the rain water from the Plaintiffs house should be removed, but that the Defendant was at liberty to construct a drain at his own cost for the passage of such water in the northern direction over his land to the northern limit of the house. The Defendant No. 1 appealed and one of the grounds of appeal was the tenth in which he urged that there could be no decree in favour of the Plaintiffs inasmuch as the surplus water from the Plaintiffs' house did not, upon the finding of the Munsif, pass through the Defendant's land in a defined channel.

2. It is evident from the Munsifs judgment that he thought that there was no defined channel and he had accordingly directed that the Defendant might construct a drain for the passage of such water. The same thing also appears from another part of the Munsifs judgment in which he says "the Defendant No. 1 is entitled to restrict the Plaintiffs' use of his (Defendant's) land to a definite part of the same."

3. The Subordinate Judge, however, has not said anything in his judgment as regards this ground of appeal which I consider to be an important one. The right of an owner of a dominant tenement to pass water through the servient tenement is restricted by numerous authorities to a defined channel and in order

to enable the owner of a dominant tenement to prove a right according to law he must prove that the water passed, for the period indicated in sec 26 the Limitation Act, through a defined channel. It is not sufficient to prove that the water passed in various directions through the servient tenement.

4. It is not necessary for me to go into the authorities on this point as the learned vakil for the Respondents has frankly conceded that if this point was argued before the Subordinate Judge the case must go back for a finding on it. That it was argued cannot be reasonably doubted because the point appears to have been taken in the Munsif's Court, There is also the 10th ground of appeal, to which I have referred and the judgment of the Subordinate Judge does not show that it was not argued.

5. I, therefore, think that this case must go back to the Subordinate Judge for a finding on the tenth ground of appeal taken before him. If the Subordinate Judge finds that water did not pass through a defined channel, it will be his duty to dismiss the suit, but on the other hand if he finds that the water passed through a defined channel he should give a decree accordingly and modify the directions in the Munsif's judgment to the effect that the Defendant should construct a drain in his own land according to his own convenience. The form of the decree passed by the Munsif is rather defective and if ultimately the Plaintiffs be found entitled to the relief the Subordinate Judge should see that a proper decree is drawn. Costs of this appeal will abide the result.