

(1981) 01 CAL CK 0023
In the Calcutta High Court
Case No : A.F.A.D. No. 87 of 1976

Harendra Nath Chakraborti and Others

APPELLANT

Vs

Asim Sindhu Chakraborty

RESPONDENT

Date of Decision : 13-01-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8
Easements Act, 1882 — Section 18

Citation : AIR 1981 Cal 325 : 85 CWN 509

Hon'ble Judges : B.N. Maitra, J

Bench : Single Bench

Advocate : Man Mohan Mukherjee and Murari Mohan Mukherjee, for the Appellant; Tarun Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

B.N. Maitra, J.—The plaintiffs filed the suit after obtaining the permission of the Court according to the provision of Rule 3 of Order 1 of the Civil P. C. Their allegation is that the C. S. Plot No. 1434/1901 having an area of .1 decimal has been erroneously recorded in the name of defendant No. J in the R. S. Khatian. It is a public way and it is a part of plot Nos. 1846 and 1424. The disputed way is meant for the use by the public. Plots Nos. 1404, 1424 and 1846 form a public road. It has been shown in the sketch map attached to the plaint. The disputed path is a continuation of the public pathway. Its character has been sought to be changed because it has been made a bata plot. The general public have been using the same from time immemorial and they have acquired customary right and easement of necessity on the principles of lost grant. The defendant No. 1 threatened to obstruct that plot on the 1st Pous, 1379 B. S. The suit is for declaration of easement right and for an injunction.

2. The defendant filed a written statement denying the plaintiffs' allegations. It has been alleged, inter alia, that the entry in the R. S. Khatian is correct. The disputed property was never used by the general public and there is no case of

easement right.

3. The learned Munsif stated that the issues were answered in the plaintiffs' favour. The suit was decreed.

4. The defendant preferred an appeal. The Appellate Court stated that the suit was for removal of public nuisance. Proof of special damage was necessary. Since there was no pleading in that respect, the suit was within the mischief of the Bench case of Surendra Kumar Basu Vs. District Board and Another,). The appeal was, therefore, allowed and the suit dismissed. Hence this appeal by the plaintiff.

5. It has been contended on behalf of the appellant that the decision of the Madras High Court in the case of Subbamma v. Narayana Murthi in AIR 1949 Mad 634 is illuminating. Proof of special damage is not necessary in the case where representative action is instituted after obtaining the Court's leave under Order 1, Rule 8 of the Code. The case of Harish Chandra Saha Vs. Pran Nath Chakraverty and Others,) has been referred to show that in a suit for declaration of public right of way regarding a village path permission of the Court was taken under Order 1, Rule 8 of the Code. It was held that the question of proof of special damage was not necessary. Hence the Appellate Court made a mistake in this respect. 6. It has been argued on behalf of the defendant-respondent that the clear case in the plaint is that the disputed way is a public way. There is an averment that the same constituted a public nuisance. The case therefore is within the mischief of the Bench decision of Surendra Kumar Basu Vs. District Board and Another, .

7. In the Full Bench case of Chunilal in (1888) ILR 15 Cal 460, it has been stated that a village pathway comes under the description of the second class of rights intermediate between the public and private roads. This decision was followed by Mukherjee, J., in the case of Jatindra Nath Mallick and Others Vs. Satya Kinkar Sain and Others, . It has been stated that a village pathway is not a public highway and so interference with the user of the same does not involve any invasion of public rights, vide the page 448 (of Cal WN) : (at p. 368 of AIR). It however appears from these cases that a village pathway, which comes under the description of the second class of rights intermediate between the public and private way, has its origin in Custom but a public highway exists for all the citizens and has its origin in dedication. The case of Harish Chandra Saha Vs. Pran Nath Chakraverty and Others, is in the plaintiffs' favour. The decision of the Madras High Court in the case of Subbamma v. Narain Murthi (AIR 1949 Mad 634) (supra) cannot be followed because the learned single Judge of the Madras High Court dissented from the decisions of this Court in the cases of Mandakinee Debee Vs. Basantakumaree Dabee,) and of Surendra Kumar Basu Vs. District Board and Another,). A village pathway is not a public highway. So in the case of obstruction of a village pathway or road, no proof of special damage arises. Such question is relevant only in the case of a public highway, where there is allegation of public nuisance. This principle has been enunciated by the Court in

the cases of (1924) 39 Cal LJ 347 at p. 352 : (Harish Chandra Saha Vs. Harish Chandra Chuckerbutty and Others,).

8. The averment in the plaint is a bit vague because it does not clearly show if the disputed way is a public highway or a village pathway. Nevertheless the sketch map appended to the plaint clearly shows that it is not a public highway, but is a village pathway. Hence no question of proof of special damage or averment of the same is called for in the plaint. Hence the decision of the learned Appellate Court cannot be sustained.

9. It has already been pointed out that the evidence on the record is complete- But the learned Munsif did not arrive at any specific finding whether the case of lost grant, easement of necessity etc. was specifically established. The learned Appellate Court did not care to state anything about the merits of the case. Hence for the ends of justice, the matter must be remitted to the first Appellate Court to arrive at a finding on the merits after considering the case in all its aspects.

10. The appeal is allowed. The judgment and decree appealed against are hereby set aside. The case is remitted to the first Appellate Court for disposal according to law in the light of the observations made in the body of the judgment.

11. There will be no order as to costs.