

(1901) 07 CAL CK 0028

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 95 of 1899

Juggernath Barj

APPELLANT

Vs

Kanai Das Byragi and Another

RESPONDENT

Date of Decision : 01-07-1901

Acts Referred:

Citation : (1901) 07 CAL CK 0028

Judgement

1. This appeal arises out of a suit for a declaration of the Plaintiff's right of way over the Defendants' bari from his own chora bari to the public road. The right is based on the provisions of sec. 26 of Act XV of 1877. In order to satisfy the conditions of that section it is necessary that the Plaintiff should establish that he had enjoyed the way peaceably, openly and as of right and without interruption for a period of 20 years. The period of 20 years as it is by the 4th clause of the section provided must be a period terminating within two years next before the institution of the suit wherever the right is claimed. The Defendants raised two defences. They pleaded in the first place that no such right of way as the Plaintiffs asserted had ever existed and they pleaded secondly that the obstruction complained of had existed for more than two years before the institution of the suit and that during that time there had been no enjoyment of the right by the Plaintiff. Both the Courts below have found that the way claimed by the Plaintiffs really existed, but the first Court dismissed the suit on the ground that it had not been brought within two years from the date of the obstruction by the Defendant. In the Court of first instance it may be mentioned the Plaintiff tendered in evidence a certain order passed in a criminal case on a petition preferred by them complaining of the obstruction in question. In the petition it was stated that the obstruction had taken place on the 1st December 1805. The petition, however, was not tendered before the Munsif, and he rejected the order as irrelevant. The Plaintiffs appealed to the District Judge who reversed the decree of the Munsif mainly apparently on the strength of the petition to which I have just alluded. This petition was with the order passed thereon tendered in his Court and was though not formally admitted in evidence

perused by the learned Judge and he has, as I have said, formed his judgment in great measure if not altogether, so far as the question of limitation is concerned upon that document.

2. Now the procedure of the District Judge in this respect was wrong in more than one particular. In the first place the petition was not evidence at all in favour of the Plaintiffs and ought not therefore to have been considered in any sense by the lower Appellate Court in support of their case. Then the document has not been marked as an exhibit or otherwise properly brought on the record as evidence, nor has the learned Judge complied with the provisions of sec. 568 of the CPC which requires a Court if it admits additional evidence in the appellate stage of the case to record its reasons for such admission. This has not been done so that in addition to the fact that this document was not in any sense admissible in evidence for the purpose it has been used, the learned Judge has committed these and other irregularities in relation to it. The consequence of the admission of this document, if it can properly be said to have been admitted at all, is this that the trial which has already taken place in the lower Appellate Court must be re-opened.

3. We have no alternative whatever but to set aside the decree of the learned Judge and direct him to decide the appeal upon the evidence which was on the record when the appeal came before him and to the exclusion of the petition to which reference has been made above.

4. It is to be observed that the judgment of the lower Appellate Court is further defective, in that there are no findings specifically as to the existence of the conditions prescribed by sec. 26 of Act XV of 1877 on which the right of the Plaintiffs to succeed in this case must depend. The learned Judge must find whether those conditions have or have not been satisfied in the present instance in the event of his coming to the conclusion upon the evidence on the record before him that the suit is within time.

5. The decree of the lower Appellate Court is set aside and the case will be remanded to that Court to be dealt with in accordance with the foregoing remarks. The costs of this appeal will abide the result.