
(1920) 05 CAL CK 0063
In the Calcutta High Court

Kala Chand Mukhapadhya and Others	APPELLANT
Vs	
Jotindra Nath Chakerbutty and Others	RESPONDENT

Date of Decision : 25-05-1920

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2

Citation : 57 Ind. Cas. 852

Hon'ble Judges : Teunon, J; Syed Shamsul Huda, J

Bench : Division Bench

Judgement

Teunon, J.—These two appeals arise out of two suits brought by two sets of plaintiffs for a declaration of a right of way.

2. The path in question runs east to west, running from the culturable lands of the village on the west to the ghat on a certain khal on the east: connecting the path again with the house of one set of plaintiffs, spoken of as the Chakerbuttis, to the north is another path over what is spoken as the Chattan. The path is also in dispute.

3. The Chakerbuttis have a homestead in the estate or mahal known as No. 201 granted rent free to their predecessors in-title by the then owners of estate No. 201. The 2nd set of plaintiffs, the Dasses, are residents in estate No. 183, and were raiyats thereon up to 1316, and are now part owners of that estate.

4. The path or paths in question run partly over the lands of 201 and partly over the lands of 183.

5. The findings of fact arrived at by the Subordinate Judge in the Court of first appeal are as follows: The existence of the paths in question and the user thereof as of right by the plaintiffs for a period exceeding 40 years have been established up to 1243; when 3 of the Chakerbuttis purchased a garden lying between their homestead and another path or halat on the north, those plaintiffs had no other means of access to or egress from their house. Even now the remaining two Chakerbutty plaintiffs have no other way of ingress or egress.

6. From these facts the learned Subordinate Judge has found that in so far as the paths run over estate No. 201, the Chakerbuttis have a way of necessity by grant and that in so far as they run over estate No. 183, they have acquired a right of way by prescription. So over the portions of the path lying in 201 the Dass plaintiffs have a right of way by prescription and as regards the portions within No. 183, a right of way by grant.

7. The inferences drawn by the Subordinate Judge from the facts found are reasonable and indeed irresistible.

8. The contentions then advanced before us by the appellants are based mainly on the previous litigation between the parties.

9. In the year 1909 certain proceedings u/s 145 re a portion of the path over the Chattan were decided in favour of the present defendants, who obtained the usual order declaring their possession and forbidding all disturbances of their possession otherwise than in the course of law. It is suggested that the present suits should have been instituted within 2 years of that order. This contention is obviously unsustainable. The Section 145 proceedings had reference to the possession of the soil and involved no question of a right of way.

10. The Section 145 proceedings were followed by two title suits in 1910. In those suits the plaintiffs claimed title to the portions of the Chattan which formed the subject-matter of those suits. They failed. It is now contended that inasmuch as they did not claim a right of way in the alternative, the present suits are barred by res judicata or by the provisions of the Code of Civil Procedure, Order II, Rule 2. This contention is equally erroneous. No doubt the claim to a right of way may be made in the alternative but may also be left to a second suit. Further in the Appellate Court the question of a right of way was expressly left open.

11. It was next contended that the suits were not within 2 years from the date of obstruction. But here the findings of fact are against the appellants.

12. Lastly it has been suggested that the conclusion that a right of way has been acquired as regards a portion by grant and as regards another portion by prescription involves inconsistency and unreasonableness. We see no force in this contention.

13. There are two (2) cross-appeals. These refer to the prohibition against funeral processions and the carrying of dead bodies over the western portion of the pathway and are concluded by findings of fact.

14. In the result the appeals and cross appeals are dismissed with costs.

Huda, J.

15. I agree.