

(1918) 04 CAL CK 0023
In the Calcutta High Court

Lakhi Kanta Roy and Others

APPELLANT

Vs

Raj Chandra Saha and Others

RESPONDENT

Date of Decision : 15-04-1918

Acts Referred:

Citation : AIR 1919 Cal 976 : 46 Ind. Cas. 374

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

Bench : Division Bench

Judgement

1. This is an appeal by the plaintiff under Clause 15 of the Letters Patent against the judgment of Mr. Justice Newbould in a second appeal. The suit was started in the Court of the Munsif for a declaration of the plaintiff's right of way. The learned Judge in the lower Appellate Court decreed the right of way, having found that it had been used by the owners of the dominant tenement for about fifty years. Mr. Justice Newbould reversed that finding on the ground that, as the way ran through the compound of the defendants from north to south, it was difficult, as the learned Judge in the lower Appellate Court remarked, to locate the exact position in which the way lay, nor was there any satisfactory evidence to show that a definite track was always used. In that view, Mr. Justice Newbould held that the plaintiffs had failed to establish their right of way over this path of the way claimed and dismissed that part of the suit. I do not agree with the view of Mr. Justice Newbould. The question is, "where did the way run from and to?" It is not necessary to locate the exact position in which the way was enjoyed over the compound of the defendants Nos. 1 to 3, nor is it necessary to show that any definite marked pathway over the compound was always used. By compound I suppose what we in England call the yard, namely, an open piece of land attached to the dwelling-house. If the plaintiffs establish the termini from which and to which the way runs, there is good authority for saying that they would be entitled to have the right of way and that that right would be enjoyed in the way that the owners of the tenement point out, being the track over which the way should be enjoyed; and, if not, then the plaintiffs would be entitled to enjoy the way by the nearest route. These propositions are supported by the judgment of

Lord Justice Mellish in the case of Wimbledon and Putney Commons Conservators v. Dixon (1876) 1 Ch. D. 362 : 45 L.J. Ch. 353 : 33 L.T. 679 : 24 W.R. 466. It must be noticed that the other Lord Justice sitting with Lord Justice Mellish was Lord Justice James and the remarks made by these two learned Judges must be taken to be of the highest authority. There is nothing in Jibananda Chakrabarti v. Kalidas Mallik 26 Ind. Cas. 213 : 42 C. 164 : 20 C.L.J. 97 : 18 C.W.N. 1296, relied on by, the learned Vakil for the respondents, which is, in any way, opposed to the observations of Lord Justice Mellish. In fact, the observations of the learned Judges there, that the way must be enjoyed substantially in the same track, shows that it is not essential that it should be enjoyed over the very same track on each and every occasion. We set aside the judgment of Mr. Justice Newbould and remit the case to the lower Appellate Court, for the learned Judge there to come to a finding as to the termini of this way between the point on the plaintiffs' home-Stead from which they allege that they enjoyed the right of way up to the point P. In the event of the learned Judge coming to the conclusion that there were those fixed termini between which this right of way was enjoyed, then it would be open to the defendants Nos. 1 to 3 to point out the way over their compound which the plaintiffs ought to enjoy; and, in the event of their not pointing out and the track not being ascertained as has already been found by the learned Judge, then the plaintiff must enjoy the right by the nearest convenient track. On the other hand, if the termini of this way cannot be ascertained, then the part of the plaintiffs' claim as regards their right of way over the homestead of the defendants must be dismissed. The respondents will get their costs in this appeal, before Mr. Justice Newbould and also before the lower Appellate Court.

Syed Shamsul Huda, J.

2. I agree.