

(1888) 05 CAL CK 0003
In the Calcutta High Court

Meser Mullick

APPELLANT

Vs

Hafizuddi Mullick and Others

RESPONDENT

Date of Decision : 30-05-1888

Acts Referred:

Citation : 9 Ind. Cas. 965

Hon'ble Judges : Rampini, J;Piggot, J

Bench : Division Bench

Judgement

1. In this case we think the appeal must be allowed. The learned Judge holds, as the Munsif had done, practically, though in less distinct terms than the Munsif, that there was no proof of a grant. He holds, however, that by reason of the absence of proof of permission, the use, under the circumstances, of whatever the way was that he had been considering, must be taken to have been as of right. There we disagree with him. We think the character of the ground, the space for which the right is claimed, the relations between the parties, the circumstances under which the user took place, by which it is sought to establish the claim, these are matters that should be given their due weight, Now, here it is not disputed, and the Judge himself finds, that the way claimed lies through the defendants' oothan that is, the space immediately surrounding the house. The Judge does not connect the user of this way in any manner with the partition between the plaintiffs and the defendants, which we understand from his judgment took place, but with reference to which nothing has been stated to us in argument. If at the time of partition any arrangement was made with the plaintiffs that they should enjoy this way, now claimed by them, together with the other way to the east, which is referred to in the judgment, and if that were established, that would support a case of right of way by grant and grant is negatived, so that we have the mere fact of a frequent or perhaps even constant user of the defendants' oothan by the plaintiffs, they being relatives and neighbours. We do not think that those circumstances alone amount to proof of user as of right, having regard to the nature of the ground, through which the path is alleged to have lain, and the other circumstances we have referred to.

We, therefore, allow the appeal and restore the judgment of the Munsif with costs.