
(1913) 01 CAL CK 0029
In the Calcutta High Court

Munshi Misser

APPELLANT

Vs

Bhimraj Ram

RESPONDENT

Date of Decision : 14-01-1913

Acts Referred:

Limitation Act, 1963 — Section 26

Citation : (1913) ILR (Cal) 458

Hon'ble Judges : Jenkins, C.J.;Stephen, J;Mookerjee, J;Holmwood, J;Harington, J

Bench : Full Bench

Judgement

Jenkins, C.J.—But there is no finding as to your enjoyment of right two years before suit.

2. Yes, there is none. The point was discussed before the referring Judges.

Jenkins C.J.

3. But there must be a finding as to enjoyment within two years before suit, and you must also show a lost grant or the origin of your right.

4. But we may suppose that the case was under the common law, and not u/s 26 of the Limitation Act.

5. All decided cases are in my favour, the only exception being Bidhoo Bhusan Palit v. Beny Madhab Muzumdar (3) 8 C. W.N. 244.

6. Babu Umakali Mukherji, for the respondents, admitted that he could not resist the point of law, and referred to Peacock on Easements, pp. 118 and 119, and Bidhoo Bhusan's case (1). He submitted that, even if the point were decided against him, the case should be remanded for findings of fact as to the period of enjoyment of the alleged right.

7. The judgment of the Court (Jenkins C.J., Harington, Stephen, Mookerjee and Holmwood JJ.) was delivered by

Jenkins C.J.

8. The fact that the water flows over the surface of the servient tenement without a definite channel for its carriage cannot prevent the acquisition of an easement. We, therefore, think that the case of *Bidhoo Bhusan Palit v. Beny Madhab Mazumdar* 8 C. W. N. 244. was not correctly decided. We must accordingly remand the case to the lower Appellate Court, in order that it may be determined, first whether a right has been acquired to discharge water into the servient tenement through a drain, which ends in a wall standing on the boundary of the defendants' land, and, secondly, whether, having regard to the provisions of Section 26 of the Limitation Act, the present suit lies in respect thereof, and to dispose of the case accordingly.

The costs in the High Court, including the costs of the reference, will abide the result.