

(1926) 07 PAT CK 0032

In the Patna High Court

Syed Nazir Husain and Another

APPELLANT

Vs

Syed Aulad Haider and Others

RESPONDENT

Date of Decision : 08-07-1926

Acts Referred:

Citation : AIR 1926 Patna 460 : 96 Ind. Cas. 1010

Hon'ble Judges : Das, J;Adami, J

Bench : Division Bench

Judgement

Das, J.—In my opinion the decision of the learned Judge in the Court below ought: to be upheld. The learned Advocate for the appellants has assailed the judgment of the lower Appellate Court on two grounds; first, on the ground that it is not correct to say that an open user without interruption for, a long time and not shown to be attributable to permission or sufferance on the owner's part is prima facie evidence of enjoyment as, of right; and, secondly, on the ground that the learned. Judge in the Court below should have dismissed the suit as barred by limitation. In regard to the first point it is to be observed that the defendants did not sets up a case of permissive user. On the other hand, they denied the user upon which the plaintiffs relied On this question the learned Judge, in the Court below has found in favour of the plaintiff a that they have, as a matter of fact, used the lane for the statutory period. The only question is whether that user should be regarded as of right. In Shaikh Khoda Bulcsli v. Shaikh Tajuddin (1) Banerji, J,. said as follows: "Then in the second place, having regard to the habits of the people of this country, I do not think that it would be right to draw the same inference from mere user that would be proper and legitimate in a case arising, in England. The question is always a question of fact, and the propriety of the rule that the presumption from user should be that it is as of right, must depend upon the circumstances not only of each particular case but also of each particular country, regard being had to the habits of the people of that country." I entirely agree with this view; but that learned and distinguished Judge proceeded to say that although no case of permissive user may be set up by the defendant, still it is for the plaintiff to establish that the user has been of right. The question

is really one of fact and, in my opinion, it is not possible to go to the extent to which Banerji, J., did go in that case. The rule is well established in England that a party enjoying an easement acted under a claim of right until the contrary is shown. See Gale on Easements, 10th Edition, page 227. Now the rule under what circumstances an easement can be acquired is the same in England as here. In order to establish a right of way in England it must be proved that the claimant has enjoyed it for the full period of twenty years and that he has done so as of right; but if it should be the case of the defendant that the enjoyment was by violence or by stealth or by leave asked from time to time, it is for the defendant to allege that case and establish that case.

2. On what ground are we then to say that the English rule does not apply to this country? I am quite aware that circumstances are different in this country and that in the villages there is often express or tacit permission to use the private lanes, but such a case must be alleged by the defendant and when so alleged the Court may consider the whole matter with a strong leaning in favour of the defendant. But where no such case is made by the defendant, the Court, in my opinion, ought not to allow him to argue such a case. In my opinion, the point has been correctly decided by the learned Judge in the Court below.

3. The question of limitation must also be decided against, the defendants. The plaintiffs gave evidence which was accepted by the learned Judge in the Court below that their house fell down in 1923. The, suit was filed in 1924.

4. I must dismiss this appeal with costs.

Adami, J.

5. I agree.