

Nazimulla Vs. Wazidulla and ors.

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Court : Kolkata

Decided On : Mar-02-1915

Reported in : 29Ind.Cas.385

Judge : Asutosh Mookerjee and ;Richardson, JJ.

Appellant : Nazimulla

Respondent : Wazidulla and ors.

Judgement :

1. This is an appeal by the first defendant in a suit for establishment of a right of way. The plaintiffs came to Court on the allegation that they had used the disputed land as a path from time immemorial peaceably, openly and uninterruptedly; and that this was the only means of access to their land. The Courts below have found that the right of way as alleged by the plaintiffs has been established, and have made a decree accordingly. The only ground urged by the appellant against this decision is that the question of limitation has been erroneously decided, as the Subordinate Judge has held that Section 23 of the Indian Limitation Act is applicable to the case and consequently no question of, limitation arises. The obstruction is said by the plaintiffs to have been caused in 1908 and the suit was commenced on the 15th July 1911. It has been urged that Section 23 has no application to the case and that the Courts below should have investigated whether the obstruction was caused within 12 years prior to the suit, so as to bring the case within Article 144. In our opinion there is no foundation for this contention.

2. It was pointed out by their Lordships of the Judicial Committee in *Rajrup Koer v. Abul Hossein* 6 C. 394 : 7 C.L.R. 529 : 7 I.A. 240 : 4 Shome L.R. 7 : 4 Sar. P.C.J. 199 : 3 South. P.C.J. 816 : 4 Ind. Jur. 530 where the suit was instituted for the removal of obstructions to a water-course used by the plaintiff from time immemorial, that the obstructions which interfered with the flow of water were in the nature of continuing nuisances as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. In support of this conclusion reference was made by their Lordships to Section 24 of the Indian Limitation Act, 1871. The same view was applied subsequently in the cases of *Achul Mahta v. Rajun Mahta* 6 C. 812 and *Punja Kuvarji v. Bai Kuvar* 6 B 20. But it has been argued on behalf of the appellant that the cases mentioned related to water-courses, and that although an obstruction to a water-course may rightly be described as a continuing nuisance, an obstruction to a way does not fall within that category. We are of opinion that the distinction suggested is not well founded and that wrongful interference with a right of way constitutes a nuisance *Lane v. Gapsey* (1891) 3 Ch. 411 : 61 L.J. Ch. 55 : 65 L.T. 375 : 40 W.R. 87; *Thorpe v. Brumfitt* (1893) 8 Ch. 650. The principle laid down by the Judicial Committee in *Rajrup Koer v. Abul Hossein* 6 C. 394 : 7 C.L.R. 529 : 7 I.A. 240 : 4 Shome L.R. 7 : 4 Sar. P.C.J. 199 : 3 South. P.C.J. 816 : 4 Ind. Jur. 530 and applied in the case of *Punja Kuvarji v. Bai Kuvar* 6 B. 20 was applied by Norris, j., to the case of obstruction of a way in *Soojan Bibi v. Shamed Ali* 1 C.W.N. 96 and we agree with the view taken by that learned Judge. A reference to the cases of *Gillon v. Boddington* (1824) 1 Car. and P. 541: *Ryan and M.* 161 and *Whitchouse v. Fellowes* 10 C.B. (N.S.) 765 : 30 L.J.C.P. 305 : 4 L.T. 177 : 9 W.R. 557 : 142 E.R. 654 : 128 R.R. 919 will show that obstructions to easements other than water-courses may be treated as continuing nuisances. We hold accordingly that the Subordinate Judge has correctly applied Section 23 to the circumstances of this case.

3. The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.