

Harihar Das and ors. Vs. Chandra Kumar Guha and ors.

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Court : Kolkata

Decided On : May-16-1918

Reported in : AIR1919Cal123,49Ind.Cas.79

Judge : Fletcher and ;Syed Shamsul Huda, JJ.

Appellant : Harihar Das and ors.

Respondent : Chandra Kumar Guha and ors.

Judgement :

Fletcher, J.

1. This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Noakhali, dated the 31st March 1916, affirming the decision of the Munsif of Sandwip. The plaintiff brought the suit for a declaration of a public right of way alleging special damage. The facts have been found in his favour by the lower Appellate Court; but the suit has been dismissed on a purely technical objection, namely, that the suit is barred by the rule of res judicata. Now, the alleged res judicata arose in this manner. The plaintiff brought a former suit for a similar relief. The learned Judge on that former occasion dismissed the suit on the ground that the plaint did not disclose any cause of action and there being no allegation that the plaintiff had suffered any special damage. In dismissing the suit, however, the learned Judge remarked, and it was expressly stated, that the plaintiff was not debarred of any right to bring a fresh suit properly constructed. I do not quite know

what he says about the construction, but the reason of the learned Judge is quite clear. He thought that it would be a more convenient way, the plaint not having disclosed any cause of action, to dismiss the suit, reserving the right of the plaintiff to bring a fresh suit. The more convenient way would have been if the plaintiff had been given leave to amend his plaint by alleging any special damage instead of dismissing the suit. However, acting upon the reservation of his right given by the former judgment, the plaintiff brought the present suit. Before the lower Appellate Court, as I have already stated, he managed to satisfy the learned Judge, that he had, in fact, suffered special damage and the proof of the special damage was contained in the deposition of the plaintiff himself, in which he stated that he and his servants were compelled to go by a longer route and, therefore, he had been put to further and additional expenses. It is quite clear that the evidence of the plaintiff was amply sufficient to entitle the Judge. to come to the conclusion that the plaintiff had established the case of special damage, If the case of special damage is established and the way be a public way, then the case is a clear one. The case, however, found by the learned Judge was this. In his view, the pathway in dispute was a village pathway in which the plaintiff had got a right with the other villagers by reason of a grant implied from long user. An infringement of a right of that nature does not require proof of special damage. The suggestion put forward by the defendants is that the plaintiff having called it a public pathway the suit must fail, and the view of the learned Judge is that because the plaintiff's Pleader has called it a public pathway the whole litigation should terminate in favour of the defendants. I do not think so. The allegations in the plaint are amply sufficient to support a cause of action founded on a village right of way. The mere fact that the plaintiff in his plaint has called it a public way--in fact, the right of way is limited to a section of the public, namely, the inhabitants of the particular village--is not sufficient to defeat the plaintiff's suit. I think the learned Judge was wrong when he held that the plaintiff's suit was barred by the doctrine of res judicata. In that view, all the findings of fact being in favour of the plaintiff, we ought to set aside the order of the two lower Courts dismissing the suit and in lieu thereof pass a decree declaring that the plaintiff is entitled to a right, together with the other members of the village, of using the pathway mentioned in the plaint and for a mandatory injunction ordering the defendants to remove the obstruction and also for an

injunction restraining them from raising any further or additional obstruction interfering with the rights of the plaintiff or the other members of the village. The suit will, therefore, be decreed in that form with costs both here and in the Courts below.

Syed Shamsul Huda, J.

2. I agree.

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