

Jogesh Chandra Roy Vs. Niranjan De and ors.

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SooperKanoon Citation : sooperkanoon.com/877607

Court : Kolkata

Decided On : Dec-06-1934

Reported in : AIR1935Cal357,159Ind.Cas.383

Appellant : Jogesh Chandra Roy

Respondent : Niranjan De and ors.

Judgement :

1. The plaintiff in the suit in which this appeal has arisen wanted to have khas possession of certain lands described in the plaint in total denial of the defendants' right of way and of a right asserted by them to use a portion of the said lands as a cremation ground. The contesting defendants it would appear, asserted user of the lands in question as a pathway and cremation ground for the period of 50 years before suit. The right of way asserted by the defendants in the suit is not in question in this appeal preferred by the plaintiff; the subject-matter of the appeal to this Court is confined to the defendants' right to use a portion of the lands in suit as a cremation ground.

2. The Courts below agreed in holding that the plaintiff in the suit was not entitled to get khas possession of the portion of the lands in suit in regard to which the defendants asserted, that it was a cremation ground. The question raised in the Court below on this part of the case, was, whether the, defendants had any right of easement by custom or immemorial user in any portion of the lands used as cremation ground. It was held that an easement, could not be acquired in regard to

the cremation ground, under the Limitation Act. This position is not challenged by the defendants respondents in this Court. The Court below then proceeded to hold that the acquisition of such a right must be ascribed either to custom or to immemorial user giving rise to a presumption of lost grant. Custom was not pleaded by the defendants in the suit, and no customary right was asserted by them in regard to the cremation ground. The Court below upon the evidence on the record, came to the conclusion that it was

quite sufficient for conceding to the defendants a presumption in their favour about a lost grant.

3. As indicated already, the plaintiff has appealed to this Court for the purpose of questioning the propriety of the decision of the Court below, the effect of which was that the defendants in the suit could acquire right of the description claimed in the suit of using the plaintiff's land as cremation ground, by prescription.

4. It may be taken to be well established that a prescriptive right to use land as burial ground by user of the same as such for even 100 years, openly, continuously, without interruption as of right, as an easement by prescription, cannot be acquired or created, and by no stretch of language could the right to bury the dead on a plot of land be called an easement, implying that such user was for the beneficial enjoyment of land: See in this connexion *Gopal Krishna Sfi v. Abdul Samad Chaudhuri* 1921 Cal 569. The right to cremate dead bodies may very well be treated as a right of similar nature as the right to bury the dead, and such a right could not be acquired as an easement by prescription. Land for use as a cremation ground could however be acquired by dedication or by prescription, as a mode of acquisition or extinction of substantive or primary rights by a certain lapse of time, which mode has sometimes been described by English lawyers as acquisitive prescription, inasmuch as it not only negatives the right of the late owner, but positively affirms that the adverse party has, acquired that right. In the case before us, what was claimed by the defendants was that by immemorial user they had acquired a prescriptive right to cremate dead bodies on the plaintiff's land. They gave evidence, which has been accepted by the Courts below that the user by the defendants was sufficient, extending for over 40 or 45 years, for giving

rise to a presumption of lost grant in favour of the defendant. This conclusion on evidence come to, by the Court of appeal below, in our judgment, fully justified the decision that the defendants had acquired a right by prescription on a portion of the lands an suit, which debarred the plaintiff from getting khas possession of the same as claimed in the suit. Where there is evidence showing long and continuous user, it is sufficient for the Court to find whether it has not lasted long enough to confer a right, without particular reference to any specific number of years. The defendants had on the evidence before the Court, succeeded in establishing that long user by them has given rise to a presumption that right of a limited description had accrued in their favour of burning dead bodies on land owned by the plaintiff. The presumption was that of lost grant: that there was such a grant in favour of the defendants or their predecessors in interest in derogation of the full rights of ownership in the land concerned.

5. In the above view of the case before us, the decrees passed by the Courts below, the effect of which is that the plaintiff-appellant in this Court was not entitled to get khas possession of portion of the lands in suit, for the reason that the defendants-respondents had acquired a limited right of cremating dead bodies on the same, by acquisitive prescription, must be affirmed, and this appeal dismissed; and we direct accordingly. The respondents are entitled to their costs in this appeal.