

Harish Chandra Saha Vs. Pran Nath Chakraverty and ors.

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Court : Kolkata

Decided On : Jul-15-1921

Reported in : AIR1921Cal405,69Ind.Cas.910

Judge : Panton, J.

Appellant : Harish Chandra Saha

Respondent : Pran Nath Chakraverty and ors.

Judgement :

Panton, J.

1. This is an appeal by a defendant against the judgment and decree of the Subordinate Judge of Tippera affirming in appeal those of the Munsif of Comilla. The suit was one for the declaration of a right of way and for a mandatory injunction on the present appellant to remove certain obstructions on the pathway in question. The suit was decided in the plaintiff's favour.

2. It is argued, in the first place, that the learned Subordinate Judge is wrong in his finding that the plaintiffs have suffered special damages. The plaint sets out that the way is a public way and plaintiff seeks relief for himself and his fellow villagers of Balerabad. The trial in the Court of first instance was on the footing that the right of way claimed was a public one and not one peculiar to the plaintiffs. The learned Munsif observes: 'The point; for trial would, therefore, be whether the portion of the

suit land covered by stations 66-69 to 18-25 is the public Gopat or not' and he decides that 'it is no doubt a Gopat used by the men of the locality and they have the right to pass with plough...etc. ' This finding was affirmed in appeal, the judgment of the learned Subordinate Judge being, 'that the plaintiffs have succeeded in proving the existence of the public way over the disputed land,' On these findings, the question of whether the plaintiffs have or have not suffered the special damage does not arise. I may mention that it has been held by this Court in Harihar Das v. Chandra Kumar Guha 49 Ind. Cas. 79 : 23 C.W.N. 91, that a suit for a declaration that a pathway is a village pathway and for an injunction of the kind now sought can proceed without proof of special damage,

3. The second point urged before me is that there was in fact no permission under Order 1, Rule 8. Now the finding of the Munsif, whose permission it was which was necessary under the rule, is 'the plaintiffs have taken permission of the Court to sue for the public.' That finding was not attacked in the Court of Appeal below. The learned Subordinate Judge sets out clearly what the points were which were urged before him and this is not one of them. It is plain, moreover, from his judgment that the correctness of this particular finding was never challenged and I must now take it as a fact that the Munsif did give the permission referred to under Order 1, Rule 8, It has been suggested in this connection that the suit should fail in the absence of the consent of the Advocate-General given under Section 92 of the Code of Civil Procedure. But the suit is, in my judgment, one to which Order I, Rule 8 is appropriate and the Court's permission having been obtained under that rule, recourse to the Advocate-General was unnecessary.

4. In the third place, it is argued that the suit was barred by limitation since it was not instituted until some seven years after the creation of the obstruction complained of. It is said that the suit is governed by Article 120. Both Courts have held that the period applicable is 12 years, presumably under Article 144, This is, in my view, the Article which applies to the suit. But in either case the plaintiffs could, in the particular circumstances, have recourse to Section 23 of the Limitation Act, with the result that the suit would be within time.

5. Fourthly, it was argued that the report of the Jury appointed under Section 133 of the Code of Criminal Procedure was wrongly received in evidence. There is no substance in this contention, it being appellant himself who adduced this particular document in evidence.

6. Finally, it is contended that the learned Munsif was wrong in saying that the defendant admitted the existence of the public pathway at the place in question. It is no doubt, correct to say that there was no admission of the existence of pathway of the kind claimed by the plaintiffs. That the admission was a qualified and that the learned Munsif took it so to be is plain from his observation that the admission was 'subject only to the dispute of the right of passage of men with ploughs, etc., over the bari of the defendant No. 1 and the other defendants.' The contesting defendant did not resile from this admission in the Court of the Subordinate Judge who defines She position clearly in his judgment where he says: 'That there was a village path there is not disputed. In fact it was admitted by the present appellant in the case under Section 133, Criminal Procedure' Code. What he then contended and now contends is that it was a path some 3 cubits and for only passage of men of the village.' There is no ground for the interference of this Court in second appeal in this point of the case. The learned Vakil for the appellant has connected with this point of his appeal a contention founded on a sentence in the judgment of the Court of Appeal below which runs: 'it is vary probable that only when that Gopat (that is to say, a pathway other than the pathway in suit) 'became impassable for the greater part of the year, the public began to use the Gopal now in suit,' The argument is that if this be so the right of way over the path in suit existed only for such time as the other path was impassable. But the observations of the learned Subordinate Judge refer, as the context shows, to events long since past and in no sense amount to a finding as to the existing state of affairs.

7. The appeal fails and is dismissed with costs.