(1909) 04 CAL CK 0002

Calcutta High Court

Case No: None

Nerode Kanta Chakravarti and Others		APPELLANT
	Vs	
Bharat Chandra Chakravarti and Others		RESPONDENT

Date of Decision: April 19, 1909

Judgement

1. This is a suit for establishment of a right of way for the removal of obstructions and for an injunction against the defendants not to further obstruct it. Both the lower Courts have held in favour of the plaintiffs. The defendants have preferred this second appeal. Though no less than 16 grounds of appeal have been filed, the only question that was argued before us, and that we need determine, is whether the suit is barred by limitation. It would seem that this path has been a bone of contention between the parties, who are agnates, descended from a common stock, for 160 years, for we find that there was a chitta of 1156 B.S. relating to it. We need not, however, go so far back as that. In the year 1861 the predecessors of the plaintiffs brought a suit to establish their right to this very way, and in 1862 a decree was passed in their favour. From 1862 the plaintiffs had uninterrupted user of the way until the obstructions by the defendants now complained of. It is not quite certain when that obstruction actually commenced. The way which is 3 cubits in breadth has been blocked as to two cubits of its breadth by a hut, or extension of a hut, built by the defendants. As to the remaining 1 cubit defendants have planted plantain trees and shrubs, there by completely blocking the path. The plaintiffs put the date of the obstruction in Jaistha 1310 May-June 1903. The defendants put in earlier but admit that it was not more than 9 years before suit filed. The suit was filed on the 9th May 1906. For the appellants it was argued that Section 26 of the Limitation Act applies, and that the plaintiffs were bound to bring their suit within two years of the interruption of their user. Section 26 has, however, no application to the present case, In the first place the plaintiff''s claim to this right of way cannot be supported as an easement though that, expression is no doubt used in

paragraph 2 of the plaint. As we understand the case, this path was set apart on a partition of joint lands for use by both branches of the family as it then existed. It was and continued to be a part of the joint property not divided. It is clear, therefore, that there is no dominant or servient tenement in this case, and there is consequently no easement. Apart from that it is clear that plaintiff''s claim to the right of way is not dependent on their uninterrupted user for the past 20 years. They had acquired very many years ago an absolute, and indefeasible right of way, which in 1862 was declared by a competent Court to be theirs as of right. This right they admittedly exercised up to within 8 or 9 years of the date of suit. They could only lose that right by its obstruction during so many years that a suit to enforce it would be barred by limitation. Now what is the article in the second schedule of the Limitation Act which applies? It cannot be article 37 which prescribes three years as the period, within which a suit for compensation for obstructing a way must be brought, because this is not a suit for compensation. The article which in our opinion applies is article 144. If that be so the suit is clearly within time. If authority be required for the proposition that Section 26 of the Limitation Act does not apply, it is to be found in the case of Raj Rup Kher v. Abul Hossein 6 C. 394 (P.C.) : 7 C.L.R. 529 : 7 I.A. 240. This case was followed in Punja Kuvarji v. Bai Kuvar 6 B. 20 and Sreemati Soojan Bibi v. Shamed Ali 1 C.W.N. 96. Their Lordships of the Privy Council point out that a right may be acquired independently of the provisions of Section 26 where (as here) the plaintiff has an absolute and indefeasible right acquired many more than 20 years ago and enjoyed without interruption up to quite recent times it is not necessary for him to seek the aid of this section. If it be said that article 37 does apply even then the suit would not be barred, for as pointed Out by their Lordships of the Privy Council in the case cited, the obstruction is in the nature of a continual containing nuisance, and the pro-visions of Section 23 became applicable and give a fresh starting point for limitation he die in diem.

2. It was agreed by the learned pleader for the appellant that the plaintiffs'' remedy was not by suit but by execution of their decree of 1862. Ho did not, however, explain how that decree could be now executed for the purpose of removing these obstructions which were created some 35 years later. There can be no doubt that the plaintiffs were entitled to bring a fresh suit for their removal. For these reasons we are of opinion that the appeal fails and it is dismissed with costs.