(1868) 08 CAL CK 0003

Calcutta High Court

Case No: Special Appeal No. 461 of 1868

Beni Madhab Das		APPELLANT
	Vs	
Ramjay Rokh		RESPONDENT

Date of Decision: Aug. 26, 1868

Judgement

L.S. Jackson, J.

In my opinion, the judgment of the Court below cannot be sustained. It seems that the plaintiff (in common, it is alleged, with other members of the community) was accustomed to go across the defendant''s land to a tank. It appears that there was more than one way to approach the tank, but upon that way, which is the subject of the present suit, the defendant, to whom the land belonged, seven years before the commencement of suit, erected a building which was part of his family dwelling-house, and has since used and enjoyed the building so erected. After that length of time, plaintiff comes into Court, and asks that the building in question may be pulled down, in order to restore to him the shortest mode of access to the tank above-mentioned. The Courts below have held, that plaintiff''s right of way, which they find to have existed for a number of years previous to the act complained of, "is such that it cannot, in any way, be interrupted," and, apparently putting aside other considerations of equity, they have ordered the defendant''s house to be pulled down, and the pathway to be restored. We do not wish to decide, in the present case, whether such right of way, as is asserted by the plaintiff, is an interest in immoveable property, within the meaning of Clause 12, Section 1, Act XIV. of 1859, for we prefer to decide the case on the other grounds. It seems to me, in the first place, that the conduct of the plaintiff in allowing the erection of the defendant''s house to proceed without interruption, and in remaining silent for seven years before he brought his suit, was such that the Court ought to have inferred that the defendant had the plaintiff''s acquiescence in what he did. I am of opinion that this is a defect in the investigation quite sufficient to enable us to set aside the judgment of the Court below, which, in consequence, is erroneous on the merits; but I also think that where a person having a right of way over another''s ground, permits that

other to divert (for it does not appear that more has been done in this case), the right of way by the erection of buildings, at more or less expense, and further permits the owner to habituate himself and his family to the convenience and comfort of the building so erected, and allows that state of things to continue for seven years, the claim of such person to destroy the building so erected, and put an end to the convenience which the defendant has enjoyed, merely for the purpose of shortening the plaintiff''s access to a particular locality, is an unreasonable claim, such as a Court of equity and good conscience ought not to enforce. It is difficult, moreover, to understand how the Courts can be called on to give effect to a right of easement which must rest on a presumed ground, where the evidence, and indeed the plaintiff''s allegation, shows an entire intermission of the enjoyment of it for seven years. I am of opinion, therefore, that the decision of the Court below is erroneous, and it must be set aside, and the special appeal allowed with costs.

Mitter, J.

2. I am also of the same opinion. It appears to me that upon the facts found by the Lower Appellate Court, the special respondent has no right to obtain the relief be has asked for. It is true, that there is no legislative enactment directly applicable to rights of easement; but in the absence of such an enactment, our duty is to decide according to equity and good conscience. The plaintiff in this case allowed the defendant to shut up the pathway in question, and to build a house upon it, seven years prior to the institution of this suit, and he is not therefore entitled, in my opinion, to maintain this action before a Court of equity and good conscience. It has been held that, if a person builds upon land jointly belonging to himself and his co-sharers, and these co-sharers stand by and allow him to do so without objection, an action subsequently brought by them to pull down the building, would not be allowed by a Court of justice. The principle of this decision is applicable a fortiori to the circumstances of the present case. A right of easement is much weaker than a right of proprietorship; and, if a co-sharer cannot maintain the action referred to above, I do not see any reason why the plaintiff should be permitted to maintain such a suit. I would, therefore, decree this special appeal with costs.