**(1912) 09 CAL CK 0017**

**Calcutta High Court**

**Case No:** None

C.H. Crowdy — APPELLANT

Vs

L. O''Reilly — RESPONDENT

**Date of Decision:** Sept. 5, 1912

**Citation:** 17 Ind. Cas. 966

**Hon'ble Judges:** Holmwood, J; Ashutosh Mookerjee, J

**Bench:** Division Bench

**Judgement**

1. The plaintiff-respondent, as the owner of the Masnadpur Indigo Factory, commenced this action for enforcement of a right of way against the defendant appellant, the owner of an adjoining property known as the Hajipur Bungalow. The Court of first instance dismissed the suit; upon appeal, that'' decree has been reversed by the District Judge. The antecedent history of the dominant and servient tenements may be briefly stated. The Masnadpur Indigo Factory was built between the years 1870 and 1879. In 1891, one Meares purchased land towards the north of the factory, and in 1895 he built thereon the Hajipur Bungalow. In the latter year, one Holloway purchased the factory, and on the 30th April 1897, he also purchased the Hajipur Bungalow from the widow of Meares. The position at that time was that Holloway became the owner of both the properties. On the 31st January 1901, Holloway sold both the factory and the bungalow to C.H. Crowdy and his brother H.E. Crowdy. The District Judge has found upon the evidence that the disputed thoroughfare came into existence during the period that Holloway was the owner of the two properties, possibly immediately after the acquisition of the bungalow by Holloway in 1897. The thoroughfare, it has been found, was a formed road, and was used as a passage by Holloway, his servants, his tenants, carts, bullocks and cattle to pass from the factory across the land of the bungalow and in front thereof, to the public road towards the north. This condition of things continued during the time that the Crowdys were owners of the two properties. On the 3rd September 1906 the Crowdy brothers sold the factory as also the bungalow to the plaintiff-respondent O''Reilly; it appears that the agreement for transfer had been

made as early as the 26th May 1906, and O''Reilly had been put in possession; this, however is not material for the purposes of this suit. On the same date, the 3rd September 1906, O''Reilly transferred back the bungalow to the defendant-appellant O.H. Crowdy, who was one of the vendors. After this, O''Reilly for about two years used the disputed (Thoroughfare as a passage for himself, his men, his wheeled vehicles, and he never asked permission of Crowdy nor did he, meet with any resistance or obstruction from, him, In October 1908, however, the defendant stopped a servant of the plaintiff; this (sic) to criminal proceedings, and, ultimately on the 26th November 1903, the Sub-Divisional Officer directed O''Reilly not to use the thoroughfare till he had established his right of way in a Civil Court. O''Reilly thereupon commenced the present action on the 15th January 1903. As already stated, the suit was dismissed by the Court of first instance, but has been decreed on appeal. The District Judge has found that the thoroughfare was a formed road and was a way of necessity, and that the plaintiff has a title thereto by implied reservation. This view has been assailed before us as unsound in law. The questions, therefore, which arise for examination are, first, is the thoroughfare an easement of necessity, and, secondly, can the plaintiff claim title thereto by implied reservation?

2. In so far as the first question is concerned it has been contended that there can be an easement of necessity, only when an absolute necessity is established. This may be conceded, because the expression of opinion in Watts v. Kelson (1870) 6 Ch. Ap. 168 at p. 175 : 40 L.J. Ch. 123 : 24 L.T. 209 : 19 W.R. 833 which tends the other way, as also a similar opinion of Mansfield, C.J., in Morris v. Edgington (1810) 3 Taunt 24 at p. 31 : 12 R.R. 579 cannot be treated as good law, in view of the later decisions in Holmes v. Goring (1824) 2 Bing. 76 : 9 Moore 166; Proctor v. Hodgson (1855) 10 Ex. 824 : 3 C.L.R. 755 : 24 L.J. Ex. 195; Union Lighterage Co. v. London Graving Dock Co. (1902) 2 Ch. 557 at p. 572 : 87 L.T. 381 : 71 L.J. Ch. 791 : 18 T.L.R. 751; Ray v. Hazeldine (1904) 2 Ch. 17; 73 C.J. Ch. 537 : 90 L.T. 703. We take it, therefore, as stated in the Laws of England, edited by Halsbury, Vol. If, Section 487, that an easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement but one without which that tenement cannot be used at all. A similar view was taken in Sukhdei v. Kedar Nath 33 A. 467 : 8 A.L.J. 280 : 9 Ind. Cas. 628 : see also Wutzler v. Sharpe 15 A. 270; Esubai v. Damodar 16 B. 552; Chunilal v. Manishankar 18 B. 616; Krishnamarazu v. Marrazu 28 M. 495 : 15 M.L.J. 255. Tested in the light of these principles, the plaintiff has completely established that the disputed thoroughfare is a way of necessity. The defendant sought to make out that there was a pathway towards the west of the factory, through which it might be possible to get out of the land; but the District Judge has found that the path in question was so narrow, a foot in width, that it could not be used for the ingress and egress of carts, bullocks and cattle, and that if the plaintiff was confined to the use of that way and had no way for wheeled traffic, the factory must be immediately abandoned. Under these circumstances, we must hold that the thoroughfare in question is a way of necessity properly so called: Dodd v. Burchall

(1862) 1 H.& C.113 : 31 L.J. Ex. 364 : 8 Jur. (N. s.) 1180; Brown v. Alabaster (1887) 37 3Ch. D. 490 : 57 L.J. Ch. 255 : 58 L.T. 265 : 36 W.R. 155.

3. In so far as the second question is concerned, it has been argued that a way of necessity may be acquired by implied grant, only by a grantee and not by a grantor, and reliance has been placed upon the observation of Lord Westbury in Suffield v. Brown (1864) 4 De G.J. & S. 185 : 3 N.R. 340 : 33 L.J. Ch. 249 : 10 Jur. (N. s.) 111 9 L.T. 627 : 12 W.R. 356. It has not bean disputed, however, that under the law of England it is well settled that where an owner of land grants part of the land and retains other parts himself, all easements necessary for reasonable enjoyment are usually implied in favour of the part so granted, bat such easements are not raised by implication in favour of tie part retained, unless they are easements of a much more restricted class, namely, easements of necessity. In support of this proposition, reference may be made to the exposition of the law by Thesigar, L.J., in Wheeldon v. Burrows (1879) 12 Ch. D. 31: 48 L.J. Ch. 853 : 41 L.T. 327 : 28 W R 196 where it was pointed out that the distinction had existed almost as far back as the law could be traced on the subject. Union Lighterage Co. v. London Graving Dock Co. (1902) 2 Ch. 557 at p. 572 : 87 L.T. 381 : 71 L.J. Ch. 791 : 18 T.L.R. 751; Roy v. Hazeldine (1904) 2 Ch. 17 : 73 C.J. Ch. 537 : 90 L.T. 703; Gordon v. Ogilvie (1899) 15 T.L.R. 239. The tendency of the law to favour easements against the common owner rather than easements for his benefit, arises from the two-fold principle, that a man shall not derogate from his grant, Cable v. Bryant (1908) 1 Ch. 259 : 77 L.J. Ch. 78 : 98 L.T. 98 and that a grant is always construed most strictly against the grantor: Neill v. Deronshire (1882) 8 A.C. 135 at p. 149 : 31 W.R. 622. The reason for this rule of construction is, that were it otherwise, grantors would always affect ambiguous expressions, if they were afterwards at liberty to put their own construction on them (Shep. Touchstone 87). It may be conceded that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant; to say that a grantor reserves to himself in entirety that which may be beneficial to him, but which may be most injurious to the grantee, is quite contrary to the principle upon which an implied grant depends, which is that a grantor shall not derogate from or render less effectual his grant, or render that which he has granted less beneficial to his grantee. Consequently, there is ordinarily no reservation by implication in favour of the grantor; to this, however, there is an exception, namely, where the easement is one of necessity properly so called, a reservation will be implied in favour of the grantor. It is true that the operation of a plain grant, not pretended to be otherwise than in conformity with the contract between the parties, should not be limited and cut down by the fiction of an implied reservation in favour of the grantor; the reason, however, does not apply if the easement claimed by the grantor is strictly one of necessity; the grantee could never have imagined that the grantor intended to make valueless what he retained. At any rate, the exception is so firmly imbedded in the law that it cannot be swept away by the assertion that it is not defensible on logical principles, for as Lord Halsbury said

in Quinn v. Leathern (1901) A.C. 495 at p. 506 : 70 L.J.P.C. 76 : 85 L.T. 289 : 50 W.R. 139 : 65 J.P. 708 : 17 T.L.R. 749 the law is not necessarily a logical Code and is not always logical at all. We must hold, therefore, that as the thoroughfare in question has been proved to be a way of necessity, the plaintiff is entitled to claim it on the principle of implied reservation. We arrive at this conclusion without hesitation because upon facts established beyond controversy, there cannot be the remotest doubt as to the true intention of the parties. The conveyance and re-conveyance of the 3rd September 1906 were part of the same transaction, and the parties as reasonable men could only have intended that the owner of the factory should use it in the same manner and with the same amenities as previously. The view we take is supported by the decision in Purnendu Narain v. Dwijendra Narain 8 C.L.J. 289.

4. A subordinate point was urged by the appellant to the effect that if the plaintiff has a right of way of necessity, its measure must depend upon the circumstances as they existed at the time of the grant and implied reservation: London Corporation v. Riggs (1880) 13 Ch. D. 798 : 49 L.J. Ch. 297 : 42 L.T. 580 : 28 W.R. 610 : 44 J.P. 345. This doctrine need not be disputed, and, as we understand the decree of the District Judge, he has kept this principle in view, because he states explicitly that the road is to be used for the benefit of the factory. We are of opinion, therefore, that the appellant has no substantial grievance in this matter.

5. The result is that all the points urged by the appellant, fail. But we are of opinion that as the easement claimed by the plaintiff is one of necessity and in derogation of the rights of the grantee, it should be enjoyed subject to the amenities of the property of the defendant, that is to say, with as little disturbance as possible to the peaceful occupation of his premises; to secure this, we direct that the alignment of the thoroughfare through the compound of the appellant be modified by carrying it (at the expense of the appellant) along the western boundary of the compound and thence from the north-west corner in an easterly direction to the northern gate of the same compound Subject to this modification, the decree of the District Judge must be affirmed and this appeal dismissed with costs.