
Dakshina Ranjan Dutt Vs Fakir Chandra Sen and Another

None

Court: Calcutta High Court

Date of Decision: Jan. 23, 1919

Citation: 50 Ind. Cas. 34

Hon'ble Judges: N.R. Chatterjea, J

Bench: Single Bench

Judgement

N.R. Chatterjea, J.

This appeal arises out of a suit for declaration of a prescriptive right of way claimed by the plaintiff over the defendant's land and for other reliefs.

2. The right of way claimed is in connect in with a passage for Mehters to cleanse a privy attached to the plaintiff's house. That privy is situated to

the south of the privy belonging to the defendant and both the privies appear to have been served by common Mehters.

3. The court of first instance held that the prescriptive right had not been proved. On appeal, the lower Appellate Court held that it was proved,

and accordingly made a declaration that the plaintiff had a right way and granted a perpetual injunction against the defendant in respect of the same.

4. The defendant has appealed to this Court.

5. It is contended on behalf of the appellant that as the Mehters used to pass over the land for the purpose of cleansing the defendant's privy also

and not merely for cleansing the privy of the plaintiff, the right of easement claimed, cannot be said to have been enjoyed as of right notwithstanding

the user for more than 20 years. It is suggested that as a neighbour, the defendant might have allowed the Mehter to cleanse the plaintiff's privy, so

that the user, so far as the plaintiff was concerned, was merely by license or permission of the defendant.

6. The question, however, whether the user was permissive or whether it was as of right, was gone into by the Court of appeal below. The learned

Subordinate Judge, after referring to the evidence in the case, says: ""Thus the plaintiff has very satisfactorily proved the use of the disputed passage

by Mehters for cleansing his privy to the knowledge of the defendants without any obstruction for the statutory period and such open and

continued user without any interruption cannot be construed as permissive but as of right."" Then again, he says: ""The very position of the trap door

facing north and the evidence on both sides dispel the theory of permission as stealthy user and so I am of opinion, that all the essential elements for

the creation of a prescriptive right are present in this case.

7. There is no doubt that the learned Subordinate Judge placed before himself correctly what the plaintiff had to prove in a case like this, because

he says: ""in order to acquire a right of way, there must be a peaceful and open enjoyment by a person claiming title thereto as an easement and as

of right for the statutory period of 20 years ending within two years immediately proceeding the institution of the suit. The user must not be

attributable to permission or sufferance of the owner of the servient tenement."" So that the question sought to be raised here was considered by the

Court below and the finding arrived at is that it was not permissive but that it was as of right.

8. It was pointed out by the learned Pleader for the appellant that there was a fencing erected by the defendant on some portion of the land, but

the learned Subordinate Judge has found that ""there was no actual discontinuance of enjoyment by reason of the obstruction and the plaintiff did

not submit to, or acquiesce in the defendant No. 1's act."" He further says that the plaintiff enjoyed the right to the knowledge of the defendant for

nearly a quarter of a century.

9. It is also contended that the plaintiff cannot claim an easement based on the user by the Mehters who are Municipal Mehters.

10. But I do not see how that would make any difference, when it is proved that the right was exercised in connection with the plaintiff's privy. In

the case of *Jadulal Mullick v. Gopalchandra Mukerji* 13 C. 136 (P.C.) : 13 I.A. 77 : 4 Sar. P.C.J. 713 : 10 Ind. Jur. 350 : 6 Ind. Dec. (N.S.) 590

Municipal scavengers used a passage (in connection with which the right was claimed) for a portion of the period during which the user was

proved, and their Lordships of the Judicial Committee had to consider the question whether the previous user by the plaintiffs' own servants had

been interrupted or altered in character by the subsequent user by Municipal scavengers and whether the servitude gained by user was materially

aggravated thereby. Their Lordships said (I am only quoting the observations bearing on the present point): ""it cannot make any difference that the

plaintiffs no longer use the passage to admit their own scavengers but use it to admit those of the Municipality to whom they are bound to afford

free access.

11. I am accordingly of opinion that the decision of the Court below is right, and this appeal is dismissed with costs.