

(1881) 03 CAL CK 0023

Calcutta High Court

Case No: None

Rajun Mahta and
Others

APPELLANT

Vs

Achul Mahta and
Others

RESPONDENT

Date of Decision: March 9, 1881

Acts Referred:

- Limitation Act, 1877 - Section 26

Citation: (1881) ILR (Cal) 812

Hon'ble Judges: Prinsep, J; Cunningham, J

Bench: Division Bench

Judgement

Cunningham, J.

In this case the plaintiff's cause of action is the forcible obstruction in September 1877 of a right of way through the defendants' premises, which the plaintiff alleges that he has peaceably and publicly used for upwards of fifty years. The original Court, finding that no easement was proved, and that any use made of the way by the plaintiff was permissive only, dismissed the suit.

2. The lower Appellate Court, considering that the right of way two feet wide was proved, reversed the decision of the Munsif, and gave the plaintiff a decree. The objection, however, was taken, and is now urged before us in special appeal, that there was no proof of enjoyment within two years before the suit was brought, and that, accordingly, the right was barred under the 4th para, of Section 26 of the Limitation Act of 1877.

3. As to this point the Judge observes: "I do not find any proof that there was any interruption (which was submitted to for one year) before December 1875." This remark appears to refer to the explanation given in the section of an "interruption," and leaves indistinct the point whether, there had been an actual enjoyment of the

plaintiff, or those under whom or in whose right he claims, within two years of the institution of the suit. We must, therefore, refer the following issues to the lower Appellate Court.

1. Was The Right Of Way In Question Peaceably, Openly, And As Of Right, Used By the plaintiff or those through whom he claims within two years of the institution of the suit? Supposing that it was so enjoyed, and with reference to the alleged antiquity of the right and the observations of their Lordships of the Privy Council in *Maharai Rajroop Koer v. Syed Abdul Hossein* (L. R. 7 I. A. 240), we further direct the following issue:

2. Is there evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of Section 26 of the Limitation Act of 1877.