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(1872) 07 CAL CK 0009

Calcutta High Court

Case No: None

Chandrakumar Nooker  
Jee and Others

APPELLANT

Vs

Madanmahan Sen

RESPONDENT

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**Date of Decision:** July 26, 1872

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### Judgement

Sir Richard Couch, Kt, C.J.

The question between the parties really depends up-on the construction of the deed of the 17th of March 1863, whether by that deed the plaintiffs acquired the soil in the passage in question, or whether they only acquired a right of way over it? If they have a right to the soil, they can prevent the defendant from -making any nee whatever of the passage. It might be that the defendant could Open doors in his wall running along the side of the passage provided he did not encroach upon the passage; still the doors would be of no use to him because he would not be allowed to pass through them into the passage, On the other hand, if the deed granted only a right of way, the plaintiffs could only complain of the defendant"s doing acts which obstructed them in the enjoyment of it, and the injunction which the plaintiffs have claimed to restrain him from having egress or ingress through the doors, and to close thorn up, cannot be granted. The terms of the deed are these (his Lordship need the portion of the deed above set out, and continued We think that the ordinary meaning of such words as these in a conveyance of this description is that the parties intended to only a right of way, and not to pass the property in the soil. Even if there were not persona besides the plaintiffs who appear to be intended to have the use of the passage as purchasers of other portions of the property we think that the words, would only hare given a right of way, it makes it stronger against the plaintiffs" plaint to a right in the soil that otter persons were evidently intended to have the use of the passage Nor do the words which follow, "together also with the right of the two passages for ingress and egress hereinbefore mentioned," make any difference; they, would only give a right of way, and this is sufficient for the plaintiff"s enjoyment of their property.

2. Then it was argued that the subsequent deed, the bill of sale, right against the plaintiffs" case and show that it was intended that the plaintiffs should have a right to the soil. We think it does not do that Provision is made for some alteration, in the passage in order to allow the purchasers to erect other buildings, and the words relied on are, "no one shall be able to throw sweepings or filth on the said road or make it unclean; if any one does at any time act thus, you will deal with him according to the laws in force." That could be prevented as well by having a right of way as by having a right to the soil. The plaintiffs would be able, according to the laws in force, to prevent persons from depositing sweepings and filth in the passage. we think, therefore, that the right which the plaintiffs acquired was only a right of way; that they were entitled to captain of any acts of the defendant which obstructed them in the enjoyment of that right of way; and were entitled to an injunction against future obstructions, A considerable portion of the plaintiffs" case as to the obstruction has failed, but it did seem that the use of the doors to clean privies was a serious obstruction to the nee of the right of way. The plaintiffs have a right to nee the passage at all times, and it certainly did appear that there wore times when the presence of the men who were engaged in cleaning the privies practically prevented the use of the passage. We think, therefore, that, in order to prevent at far as possible future disputes between the parties as to the cleaning of the privies, that portion of the decree of the learned Judge should stand. The decree grants an injunction "to restrain the defendant, his servants, and agents from using all or any of the three door-ways or openings made by the defendant through the western wall of the defendant"s dwelling-house, No. 114, Balaram Day"s Street, as & means of cleaning and emptying the privies situated in the said house, No. 114, in Balaram Bay"s Street aforesaid, or either of them." We think that the injunction should go to that extent, and there should be added the words "or in any other manner so as to cause any obstruction to the free use by the plaintiffs of the said passage." The other part of the decree is "or as a means of egress and ingress from and to the said house. No. 114, in Balaram Day"s Street aforesaid, to and from the passage running north from Balaram Day"s Street along and past the western wall of the said house No. 114, in Balaram Day"s Street." That part cannot remain The plaintiff, have not shown a title which could support that, and it must be omitted. The decree will be modified in that respect, The plaintiffs failed before the learned Judge as to a very material portion of their suit, and they have also failed in this appeal. The appellant has shown good grounds for appealing, and has succeeded in having the decree modified He will, therefore, have his coats of the appeal on Scale No. 2