

(1880) 05 CAL CK 0016

Calcutta High Court

Case No: None

Kalishunkur Doss

APPELLANT

Vs

Gopal Chunder Dutt

RESPONDENT

Date of Decision: May 31, 1880

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 13

Citation: (1881) ILR (Cal) 49

Hon'ble Judges: Richard Garth, C.J; Mitter, J

Bench: Division Bench

Judgement

Richard Garth, C.J.

The following sketch will suffice to explain roughly the position of the premises, the nature of the easement, which is the subject of dispute, and the defence to the suit, which we have to consider in this appeal.

Defendant's land.

Drain

Privy. Plaintiff's house
and premises.

Wall erected by the Defendant
Across the drain.

Drain

House and premises of
Subject of former suit

That defence, upon the strength of which the lower Courts and the learned Judge of this Court have dismissed the plaintiff's case is, that, in a former suit, in which another person, whom we will call A, set up a similar right against the present defendant to that now claimed by the plaintiff, it was decided that no such right existed; and it has been held by the lower Courts, and by the learned Judge in this Court, that this judgment between the defendant and A operates as a res judicata in this case to debar the present plaintiff from prosecuting his claim.

2. We think, however, upon a review of the circumstances of that case, and of the grounds upon which the judgment proceeded, that the plaintiff in this suit is in no

way barred by that judgment.

3. The circumstances are these:--A was the owner of a house, (the position of which is shown in the above plan) the back premises of which adjoined the drain in question, in the same way as the plaintiff's premises adjoin it; and A claimed to use the drain in the same way as the plaintiff claims to use it, for the passage of his refuse, and as an access for his servants to his back premises.

4. It then appears that, some time ago, the present defendant, with a view of stopping up this, drain, commenced to build the wall, which is now the subject of dispute, and A then took proceedings before the Magistrate with a view of preventing the defendant from building the wall, and so stopping up the drain.

5. The Magistrate, however, finding that the question between the parties was one of civil right, very properly declined to interfere, except so far as to stay the defendant from building his wall until the question of right had been decided by the Civil Court.

6. A suit was then brought by the present defendant against A, asking for a declaration from the Court, that he (the present defendant) had a right to build the wall, and that A had no easement which ought to interfere with the defendant's right to build it. A, in that suit, set up no doubt a similar right to that which is claimed by the present plaintiff,--i.e., he claimed, that by prescription he had a right to use the drain for the purposes aforesaid, and he went on to say, that other persons (including the present plaintiff), whose premises adjoined the drain, were entitled to a similar right.

7. Upon the trial of that case, the defendant and his witnesses were examined upon the question, whether he had obtained a twenty years' prescriptive right to use the drain; and the plaintiff and others were also called as witnesses, for the purpose of showing that they too had used the drain for many years in a similar way; but the real claim in that case was founded entirely upon A's alleged prescriptive right, and the question upon which the judgment of the Court turned was, whether A and the occupiers of A's premises had acquired such a prescriptive right, and the Judge eventually decided against A, upon the express ground, that he had only proved a user of the drain for fifteen years, and consequently had not acquired a prescriptive right under the Limitation Act.

8. It is perfectly true, that in that case A endeavoured to avail himself of the fact that other persons besides himself had also used the drain; but no general or public right of drainage was in fact claimed by him, nor did the question of any prescriptive title enjoyed by the plaintiff or others enter into the consideration of the case. Nor could it have done so, as a matter of law, because, from the very nature of the right claimed, A could only succeed upon the strength of his own title in respect of his own premises; and no right which the present plaintiff or other persons might have acquired in respect of their premises would have been of any assistance to A.

9. Now, in this case, the point which has been raised by the present defendant, and which all the three Courts have found in his favour is this--that the judgment in the former suit has, in fact, decided the same question of right which is raised by the plaintiff in this suit, and the enactment upon which this judgment has proceeded is contained in expl. 5 of Section 13 of the new Civil Procedure Code.

10. That Section enacts, "that no Court shall try any issue, the subject-matter of which has been heard and finally decided by a Court of competent jurisdiction in a former suit." Then expl. 5 says, that, " where persons litigate bona fide in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of Section 13, be deemed to claim under the persons so litigating."

11. It has been decided by the previous judgments in this case, that the-right claimed by A in the former suit, and the right claimed by the plaintiff in the present suit, is a private right, "which he claims in common for himself and others" within the meaning of expl. 5.

12. We cannot agree in this view; and it appears to us, that the mistake has arisen in consequence of the nature of the right claimed not being correctly understood.

13. The right claimed by the plaintiff is not one which he and other inhabitants of the neighbourhood claim under one common title. It is a prescriptive right which he claims individually in respect of his own house and premises, and depends upon how long he or the occupier of the house have used the right. It would not avail the plaintiff, if all the other owners of the houses in the same locality could prove, that they had used the drain for the prescribed period, if he himself or the occupiers of his premises had not used it for that period. The claim, therefore, of each owner is essentially a separate claim in respect of his own premises. Expl. 5 of Section 13 does not, therefore, apply to such a case. It only applies to cases where several different persons claim an easement or other right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same trace of land or to take water from the same spring or well; see *Arlett v. Ellis* (7 BC. 346) and *Blewett v. Tregonning* (3 Ad. B. 554).

14. In this particular case it is very possible that the plaintiff may be able to prove a twenty years' user of the drain, and so establish his right to it in respect of his own premises, although A, who claimed a similar right, failed to establish it, because he could not prove a user for the full period of twenty years.

15. We think, therefore, that all the previous judgments in this case should be reversed; and that the case should go back to the Munsif's Court to be tried upon its merits.

16. The costs in all Courts will follow the ultimate result of the cause.