

**(1925) 11 BOM CK 0055**

**Bombay High Court**

**Case No:** Second Appeal No. 272 of 1925

Ramchandra Vasudev Vijapure

APPELLANT

Vs

Anant Laxman Thakar

RESPONDENT

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**Date of Decision:** Nov. 18, 1925

**Citation:** (1926) 28 BOMLR 601 : 95 Ind. Cas. 170

**Hon'ble Judges:** Norman Macleod, J; Coyajee, J

**Bench:** Division Bench

**Final Decision:** Dismissed

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### **Judgement**

Norman Macleod, Kt., C.J.

The plaintiffs sued for a declaration that they had a right of way over the plaintiff Bol (passage), and for an injunction directing the defendants not to obstruct the sweeper (Bhangi) of the plaintiffs coming through the Bol to cleanse the plaintiffs' privy, the plaintiffs alleging that the sweeper had been using this Bol for cleansing plaintiffs' privy for a period of more than twenty years so as to give the plaintiffs a right of easement for such user, and that the defendants had wrongfully obstructed the enjoyment of such right by putting up a door frame at the north end of the Bol blocking the passage some time about March 1921.

2. The lower Court dismissed the suit, finding that, even from plaintiffs' evidence Exhibit 63, it was clear that, though not a regular passage, there was no other open space over which the sweeper could pass to the plaintiffs' privy for cleansing it; that there had clearly been obstruction in the alleged enjoyment by the plaintiffs, but that as the date of obstruction given by a witness showed that plaintiffs had post-dated the cause of action when they described it as taking place in March 1921, and as the obstruction really took place in 1918, the suit was barred.

3. The appellate Judge on the question of limitation said :-

As regards the second point, it was not set up by respondents and no issue thereon was framed prior to the hearing. The issue appears to have been framed by the

learned Subordinate Judge at the time of writing the judgment as the result of a remark by appellants" witness Exhibit 67. That witness says that the sweeper was obstructed five or six years ago. This obstruction was apparently by word of mouth and is not the obstruction complained of in the plaint. Exhibit 67 was examined in June 1924 and the suit was filed in April 1921, so if the obstruction took place five, and not six years before his examination, there would have been no interruption more than two years before the date of suit. Further it does not appear that the obstruction ended in cessation of the user at all. The witness implies the contrary.

4. The appeal was, therefore, allowed and injunction was granted to the plaintiffs-appellants.

5. It has been urged in this Court, in the first place, that the plaintiffs, as owners of their house, cannot acquire an easement of the nature of a right of way over the passage for the use of the sweeper who is a municipal servant, "An "easement" is a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own." Existence of a privy necessitates some agency for its being cleaned. That agency in this country generally is employed from outside. We do not think the fact that the sweeper is a servant of the Municipality would prevent the plaintiffs" acquiring a right of way over the defendants" land provided it was used by the sweeper for the purpose connected with the proper enjoyment of the plaintiffs" premises. It seems to us from the illustration (b) to Section 21 that plaintiffs certainly would be entitled to establish an easement in their favour, provided they could prove that the passage belonging to the defendants had been used as of right by the municipal sweeper for the necessary period. We agree with the District Judge that the defendants had not proved that there had been an obstruction in the legal sense of the term to the user of the passage by the sweeper. We must, therefore, dismiss the appeal with costs.