

not made *bond fide* and was prepared in fraud of himself. If the lower Court found that there was a genuine contract of sale, the Court would then have to determine whether or not the auction-purchaser at the time of his purchase was aware of the original contract.

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With this view of the case we annul the finding of the lower appellate Court, and remand the case, under s. 351 of Act VIII of 1859, with directions that it may be restored to its original number on the file, and be tried on its merits by the lower appellate Court. Costs will abide the result.

*Cause remanded.*

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## APPELLATE CIVIL.

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January 18.

*Before Sir Robert Stuart, Kt, Chief Justice, and Mr. Justice Oldfield.*

FAZAL HAQ (PLAINTIFF) v. MAHA CHAND AND ANOTHER (DEFENDANTS). \*

*Public Thoroughfare—Easement—Act XV of 1873 (North-Western Provinces and Oudh Municipalities' Act), ss. 27, 32, 38—Special Damage—Right of Action—Municipal Committee, powers of.*

While certain land formed part of a certain public thoroughfare *F* had immediate access to such thoroughfare and the use of a certain drain. The Municipal Committee sold such land to *M* and constructed a new thoroughfare. *M* used and occupied such land so as to obstruct *F*'s access to the new thoroughfare and his use of the drain. *F* therefore sued him to establish a right of access to the new thoroughfare over such land and a right to the use of such drain. *Held* that, having suffered special damage from *M*'s acts, *F* had a right of action against him, and that such right of action was not affected by the circumstance that *M* had acquired his title to the land from the Municipal Committee, inasmuch as the Municipal Committee could not have dealt with the old thoroughfare to the special injury of *F*, and had it closed the same would have been bound to provide adequately for his access to the new thoroughfare and for his drainage.

THIS was a suit to establish a right of access to a certain public thoroughfare and to the use of a certain drain, the plaintiff alleging that he had peaceably enjoyed such access and the use of such drain, as easements and as of right, without interruption and for twenty years. The facts of the case and the manner in which the lower Courts dealt with the suit are sufficiently stated in the order of remand made by the High Court, to which the plaintiff appealed against the decree of the lower appellate Court. That decree

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\* Special Appeal No. 1009 of 1877, from a decree of Rai Shankar Das, Subordinate Judge of Saharanpur, dated the 5th July, 1876, affirming a decree of Muhammad Inad Ali, Munsif of Saharanpur, dated the 18th May, 1876.

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affirmed the decree of the Court of first instance dismissing the plaintiff's claim to such right of access.

Munshi *Hanuman Prasad* and *Shah Asad Ali*, for the appellant.

The *Senior Government Pleader* (*Lala Juala Prasad*), the *Junior Government Pleader* (*Babu Dwarka Nath Banarji*), and *Babu Oprokash Chandar*, for the respondents.

The Court made the following

ORDER OF REMAND. — As we understand the facts, it would appear that land which belonged to and formed part of the old public road and adjoined the plaintiff's premises has been sold by the Municipality to the defendant, but that a sufficient portion of land remains in use as the public road, and the defendant has appropriated to his own exclusive use that portion which he has purchased and which lies between the plaintiff's premises and the present public road, and by so doing the plaintiff avers that defendant has interfered with his right of way and prevented approach as of old on his part from his premises to what now constitutes the public road. The plaintiff asks that a passage three yards wide be opened across the purchased land to the public road for his use; he also seeks to have a drain opened which defendant has closed. The Court of first instance decreed the opening of the drain, and dismissed the rest of the claim, and the lower appellate Court has affirmed this decision. The Subordinate Judge has found that the land purchased by the defendant was a public thoroughfare, but has held that plaintiff has no right to relief in respect of maintenance of his right of way, apparently on the ground that he could obtain access to the public road by making a detour, and that any inconvenience to him would be trifling compared with the loss to the defendant who has purchased the land at a high price. This judgment proceeds on erroneous grounds. If the land purchased from the Municipality was part of a public thoroughfare, and the defendant by his purchase obstructs its use, the plaintiff can sue for relief, if he can show that he has been individually injured by the defendant's act. In the present case there is no doubt that such injury has been shown, if the plaintiff's allegations are true that he has no longer the direct access to the present public road which he had before, and that the act of the defendant has

caused the closing of an established drain, and it would be no ground for denying him relief that he may by making a detour get access to the road, or that to give him relief will interfere with the benefit which defendant anticipated from his purchase.

The questions for decision are whether the land bought by defendant was part of a public thoroughfare ; whether the title obtained by the defendant under the Municipality's right to sell was one which gave him the land free from any liability or responsibility to the plaintiff on account of previous user of it ; and whether plaintiff has suffered the injuries alleged by the defendant's act so as to give him a right of action and a claim to the relief now sought.

It will be necessary that the Municipality be properly represented in the suit as defendant, and we remand the case under s. 354 of Act VIII of 1859 that this may be done and the above issues tried and decided ; when the lower appellate Court will return the case with its finding to this Court, and seven days will be allowed for objections to be preferred to the finding

On the return of the Subordinate Judge's finding, the Court delivered the following

JUDGMENT.—The lower Court's finding on the issues remitted is to the effect that the land in dispute formed part of a public thoroughfare, and that the defendant by his occupation of it since his purchase from the Municipal Committee has interfered with the plaintiff's right of drainage and way. On the latter point the Court's finding shows that plaintiff's premises adjoin this land, and while it formed part of the highway he and his tenants had immediate access to the highway, but by the exclusive occupation of this portion of the highway by defendant their access to that portion which now forms the highway has been shut off, and no other adequate means of access has been provided.

Accepting this finding it shows that plaintiff has suffered injuries and inconveniences by the closing of the highway by defendant, which affect him beyond what affects the public at large, and he has in consequence a right of action against the defendant Maha Chand, and there is nothing in the circumstance that defendant's title is derived by purchase of the land from the Municipality, as has been urged, which can affect the plaintiff's right to relief. No doubt

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by s. 38 of the Municipalities' Act the property in all public highways is vested in the Committee, and by s. 27 the Committee can, with the sanction of the Local Government, sell any portion of land referred to in that section which is not required for the purposes of the Act, and shall keep roads in repair and may do all acts and things necessary for purposes of general utility—s. 32. But there is nothing in the Act which debars the Civil Courts from entertaining suits and giving relief in respect of any civil right which may be shown to have been infringed through the exercise by the Municipality of its powers under the Act; on the contrary provision is made for such suits. Here the plaintiff has made out a case. He has shown that the drainage from his premises has been stopped, and that he has been isolated and shut off from access to the present highway. The Municipality could not have thus dealt with the highway to the special injury of the plaintiff. In closing a portion of it they would have been bound to provide adequately for his drainage and his access to the highway which they had substituted; indeed, it is not clear that they had any intention of doing otherwise, and the defendant can do no less.

The relief which plaintiff now seeks is very reasonable. He does not ask to set aside the sale of the land, but that a cart-road nine feet wide should be reserved communicating with the highway, and that the existing course of drainage be not interfered with.

We decree the appeal, and modifying the decrees of the lower Courts decree the claim with all costs.

*Appeal allowed.*

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January 21.

## APPELLATE CIVIL

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

RADHIA (DEFENDANT) v. BENI AND OTHERS (PLAINTIFFS).

*Act VIII of 1859 (Civil Procedure Code), s. 2—Res judicata*

The plaintiffs in the present suit claimed, as the heirs of *J*, certain property from *M*, the daughter of *R*, alleging that such property was the joint and undivided property of *R* and *J*, to which on *R*'s death *J* had succeeded. The plaintiffs

\* Special Appeal, No. 866 of 1877, from a decree of Babu Ram Kali Chaudhri, Subordinate Judge of Cawnpore, dated the 30th April, 1877, affirming a decree of Munshi Man Mohan Lal, Munsif of Akbarpur, dated the 1st December, 1875.