1870

QUEEN v. RAI LACHMIPAT SING.

must be set aside. Of course, as the Judge says, this will not prevent the Magistrate from passing a fresh order, after hearing evidence and giving the parties opportunity to show cause, but he cannot pass an order, without first issuing a rule to show cause.

Before Mr. Justice Phear and Mr. Justice Mitter.

1870
July 13.

MAHOMED ALI AND OTHERS (PLAITIFFS) *v.* JUGAL RAM CHANDRA (DEFENDANT).*

Right of Way—Questions of Fact.

THIS was a suit to enforce a right of way over the land of the defendant. The defendant denied the existence of any right of way over his land.

The Moonsiff found from the report of the Ameen that there were traces of a road over the plaintiffs' land, and from the evidence of witnesses (one of whom had deposed to the effect that the plaintiffs had used the road for 8 or 10 years; another, that it had been used for 10 or 11 years; and a third that it had been used for 14 years) that the plaintiffs had used the road for a period of 14 years previous to the defendant's obstruction to such user. He accordingly passed a decree in favor of the plaintiffs.

On appeal, the Judge found that the land in dispute had been settled with the defendant by the Government in 1867; that there was no reservation of any right of way in such settlement; that, previous to such settlement, the land had remained unassessed waste land, of which the Government was the sole proprietor; that the public are generally allowed by Government to use these lands while they remained unassessed to cut timber and collect jungle product. He held that such use could not confer a prescriptive right and even if it did, the silence of the plaintiffs at the time of the settlement raised a presumption that they had not used the lands long enough to raise such a right. He accordingly dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboo *Kaliprasanna Roy* for the appellants.

Baboo *Taraknath Sen* for the respondent.

The judgment of the Court was delivered by

PHEAR, J.—We think that there is no error of law in the judgment of the lower Appellate Court.

That Court was called upon by the plaintiffs to declare that they had a right of way over certain lands belonging to the defendant; and the plaintiffs supported their claim of right by certain evidence of user,

* Special Appeal, No. 458 of 1870; from a decree of the Deputy Commissioner of Cachar, dated the 18th December 1869, reversing a decree of the Moonsiff of that district, dated the 7th September 1869.

The Court below has refused to infer from that evidence that the plaintiffs have the right which they claim. It does not appear to us that the Judge made any error of law in refusing to draw that inference.

As far as we can see, the evidence of user was in its character very indefinite. There was very little, if anything, to show that it was user as of right against the defendant and his predecessors in the possession of the land. Indeed, according to the case of both parties, such user as had taken place appears, for a considerable portion of the time at least, to have been a user by passing and re-passing over waste and jungle lands which nobody had any interest in disputing.

There was also evidence which tended to rebut the presumption as to the right which might possibly be justifiable upon the user alone, and the lower Appellate Court drew attention to that evidence, and argued from it that the plaintiffs never had in fact the right which they claim.

We do not, in dismissing this appeal, say that, had the lower Appellate Court, in its discretion and on a full view of the evidence on the record, come to the opposite finding to that at which it has come, that finding would necessarily have been bad in law.

Several cases have been cited to us in which this Court has declined to interfere with findings of fact which have been come to by Courts of regular appeal upon certain evidence of user. But this Court has never yet undertaken to say that user of a specified kind must necessarily in law lead to the inference that the party who has enjoyed that user had a right of way. In all cases where a right of way comes in question, and the party claiming the right supports his claim by evidence of user only, the Court, which is the judge of fact, must satisfy itself as best it can upon that evidence, having regard to all the circumstances under which the user took place, whether or not the user was founded on actual right. The guiding principle to be observed is that open user of another person's land for the purposes of a road or path-way, if continued without interruption for a long time, and not shewn to be attributable to permission or sufferance on the part of the owner, properly induces the presumption that the user was of right. The only other alternative would be that each passing and re-passing was a trespass, and the law will rather presume that acts, such as these constantly repeated for a considerable length of time before all the world, are rightful than that they are wrongful.

The sooner it is understood that these questions are substantially questions of fact to be determined upon the evidence furnished by the litigants, the better it will be for the interests of the parties to these suits.

We dismiss this appeal with costs.