

1870
 RAJBALLAB
 SAHA
 v.
 RAMSADAY
 GHOSE.

“If the party shall attend in person or by a pleader, and shall offer any objection to the enforcement of the decree, the Court shall pass such order as in the circumstances of the case may appear to be just and proper.”

It seems that, in this case, the party had attended by pleader, and had offered objection, in the shape of a written petition, to the enforcement of the decree. The proper course would have been for the Judge to have fixed a day on which the petitioner was to be heard, but whether such day was fixed or not, and even if the petitioner was not present, still I think the Judge would be bound to consider the objection which he had filed and to pass, as required by the Act, such order as in the circumstance of the case appeared to be just and proper. It might be that the ground of objection raised in the petition would be of such a nature as that the Judge might *prima facie*, and without going further into the case, see reason for not proceeding with the execution.

I think the Judge's order must be set aside, and he must be desired to take into consideration the objection of the judgment-debtor; and pass such order as he thinks proper.

GLOVER, J.—I concur generally with Mr. Justice Jackson. I think the case should be remanded to the Judge to try the nature of the objection taken by the judgment-debtor. I also think that if a day had been fixed, and the party had not then appeared, the judge would have been justified in not going further into the case, but might have disposed of it at once.

1870
 June 22.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

HARIDAS NANDI (DEFENDANT) v. JADUNATH DUTT (PLAINTIFF)*

Right of Way—Easement—Limitation—Act XIV of 1859.

A right of way over the land of another must be kept up by constant use. After a discontinuance of such use for a period of six years, no suit can be brought to re-establish it.

Baboo Koma Kant Sein for the appellant.

Baboo Boikanto Nath Paul for the respondent.

THE facts of the case sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—It appears to me that the decision of the lower Appellate Court in this case was erroneous, and that it is much to be lamented that the careful and well-considered decision of the Moonsiff was reversed.

The plaintiff, it seems, had purchased a dwelling house which formerly belonged to one Jaykisto Nandi, a relative of the defendant. Jaykisto Nandi having died, his widow sold the house, which appears to have remained

*Special Appeal, No. 294 of 1870, from a decree of the Judge of East Burdwan, dated the 11th December 1869, reversing a decree of the Moonsiff of that district, dated the 29th July 1869.

unoccupied for the space of six years. The plaintiff has now discovered that the defendant is building a privy which crosses a pathway leading to a tank, which had formerly been used by the female members of Jaykisto's family ; and he brings his suit, asking for possession of the pathway, and for the pulling down of this construction erected by the defendant.

The Moonsiff took evidence and went to the spot, and he ascertained that the pathway in question lay over ground belonging to the defendant ; that in the life-time of Jaykisto, and, after his death, in the time of his widow, the members of both families had been accustomed to use this pathway and a *khirkee*, or private door, communicating therewith ; but that for some years since Jaykisto's widow had left the place, this pathway had not been used by any person residing in that house. He found that the land belonged to the defendant, and considering that by six years' non-user, the plaintiff had lost the right to claim that easement, he dismissed the suit so far as it related to the pathway, but he ordered the defendant to pull down the privy, on the ground that it was a nuisance, an inconvenience to the plaintiff, and likely to interfere with his occupation of his own purchased premises.

The plaintiff did not appeal from that part of the decision by which the land was found to be the property of the defendant, but he appealed on the ground that his non-user for six years did not deprive him of the right to the pathway. On that the Subordinate Judge states : " I think a portion of the lower Court's decision is incorrect and erroneous, for the existence of a pathway in the place of the disputed pathway, the use whereof is contested, has been admitted by all parties as well as by the lower Court on personal observation by the lower Court. That only defendant and not plaintiff used this pathway, defendant has failed to satisfy the Court by any particular evidence. Besides, I see no law providing that the non-user of a pathway for six years shall destroy the right to use it. And as regards the judgment of the lower Court holding the privy to have been unjustly made by defendant on that pathway, no appeal has been taken on this point."

Now that which the Moonsiff found was not that the previous occupants of the house purchased by the plaintiff had a right of way over the land in question, but that when that house was occupied by a family early related to that of the defendant, the members of both families were accustomed to go over that path. This it seems to me is far from implying the right of way claimed by the plaintiff : and in this point of view, the observation made by the defendant's *vakeel* is not altogether out of place, namely, that the widow of Jaykisto did not affect to convey to the plaintiff any such easement as this right of way in question. Presumably, I think, it was a license given to the family of Jaykisto by reason of their relationship to the defendant. But whether this be so or not, it seems to me that a right of the description claimed by the plaintiff,—namely, of passing freely over the land of the defendant is one which requires to be kept up by constant use, and if the plaintiff discontinues the use of such right, if there were any, for the space

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of six years, I think he is not in a position to maintain a suit to re-establish it.

I think, therefore, that the decision of the Moonsiff in this case was reasonable and right, and that the Subordinate Judge has reversed it on insufficient and invalid reasons. I think the decision of the lower Appellate Court must be set aside with costs.

Before Mr. Justice L. S. Jackson and Mr. Justice Glover.

1870
 July 23.

MAHES CHANDRA MOOKERJEE (PLAINTIFF) v RAMUTAM PALIT
 AND OTHERS (DEFENDANTS).*

Highway—Criminal Procedure Code, (Act XXV of 1861) s. 320—Civil Court
 Jurisdiction.

The Magistrate had, on the complaint of the defendant, passed an order, under section 320 of the Criminal Procedure Code, forbidding the plaintiff to retain possession of a piece of land to the exclusion of the public, until he had obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff, accordingly, brought his suit in the Moonsiff's Court to recover possession, of the land. The Moonsiff gave him a decree for exclusive possession of the land. On appeal, the Judge held that the Moonsiff had no jurisdiction to try the question whether the public had a right of way over the land. The Judge's decision was reversed in special appeal, and the case remanded to the Judge to try the issue, whether the plaintiff was entitled to the exclusive use of the land. *Rooke v. Pyari Lall* (1) distinguished.

Baboo *Bhvirab Chandra Banerjee* and Mr. J. S. Rochfort for the appellant.

Baboo *Rash Bekari Ghose* and *Debender Chandra Ghose* for the respondents.

THE judgment of the Court was delivered by

JACKSON, J.—This suit is brought by the plaintiff against Ramutam Palit and others to recover possession of a small piece of land belonging to the lakhiraj homestead of the plaintiff.

It appears that the defendant had complained in the Magistrate's Court against this plaintiff in respect of the right of use of this piece of land; and the Magistrate having enquired into the matter, under the provisions of section 320 of the Code of Criminal Procedure, made an order forbidding the plaintiff to retain possession thereof to the exclusion of the public, until he should have obtained the decision of a competent Court adjudging him to be entitled to such exclusive possession.

The plaintiff being dissatisfied with that order, brought his suit in the Moonsiff's Court. The Moonsiff took evidence and found that the land formed part of the plaintiff's homestead. He also found that a private path (over that

* Special Appeal, No. 539 of 1870, from a decree of the Additional Judge of Jessore, dated the 30th December 1869, reversing a decree of the Sudder Moonsiff of that district, dated the 14th August 1869.

(1) 3 B. L. R., App 43; S. C on review, v. *Shama Charan Chatterjee* ib A.C. 351. ib. A. C., 305; see also *Hira Chandi Banerjee*.