

## [APPELLATE CIVIL

*Before Mr. Justice Kemp and Mr. Justice Glover.*

RAMTARAK KARATI (DEFENDANT) *v.* DINAMATI MANDAL  
AND OTHERS (PLAINTIFFS).\*

1871  
May 12.

*Right of Way—Public Road—Jurisdiction—Special Appeal—Objection  
taken for first time.*

A suit for declaration of right of way by a public road will not lie, where there is no allegation of special injury or inconvenience to the plaintiff.

THIS was a suit for declaration of a right of way by a particular route, on the allegation that the road in dispute had long been used by the public and the plaintiff in a way sufficient to create title, and that the defendant did in 1273 (1866) close the same.

The defendant set up that the suit for that portion of the land which had been the subject-matter of a suit under section 318 of the criminal Procedure Code was barred; that the suit was barred by lapse of time; and that the plaintiffs had not acquired any right of way over the land in dispute.

The Moonsiff dismissed the plaintiffs' suit.

On appeal, the Subordinate Judge remanded the case, in order that further evidence might be taken.

The defendant appealed to the High Court, on the ground that the suit was not cognizable by the Civil Court.

Baboo *Mahendra Lai* Seal for the appellant.

Baboo *Srinath Banerjee* for the respondents.

The judgment of the Court was delivered by,

GLOVER, J.—A preliminary objection was taken by the special appellant's pleader, that this being a suit for removing

\* Special Appeal, No. 56 of 1871, from a decree of the Subordinate Judge of Hooghly, dated the 10th December 1870, reversing a decree of the Moonsiff of that district, dated the 12th September 1870.

an obstruction of a public road, the Civil Court had no jurisdiction. It is contended by the pleader for the special respondents, in the first place, that this objection was never taken at any stage of the case in the Courts below, and next that there is nothing on the record to show that the road which is sought to be opened is a public road.

It is no doubt true that the objection was not taken in any particular form until the special appeal stage; but as it is a point of law upon which several decisions of this Court have been passed, we do not think we should be justified in ignoring it even although it was not taken, as it ought to have been earlier in the proceedings. As to the fact, whether the road is or is not a public road, we observe that the plaintiffs in their plaint call it a public road. The Moonsiff has decided the case on that understanding; and, although his decision does not go on that point, he clearly considered it to be a public road. Moreover, in the evidence of one of the plaintiffs, Rup Chand Roy, he speaks of it distinctly as a road used by the public. It is therefore, impossible to say that this road is not, to all intents and purposes, a public road. We remark, moreover, that the road was once before the subject of an application to the Magistrate under section 318 of the Code of Criminal Procedure, which would of itself show that it must have been treated by the then petitioner and the present plaintiffs as a public road, otherwise no such application could have been made. If then it be a fact that the road is a public road, the objection raised by the special appellant is a good one, and must be allowed.

In the case of *Baroda Prasad Mostafi v. Gora Chand Mostafi* (1), it has been distinctly laid down that no one has the right to sue for obstructing a public thoroughfare without showing that he has sustained some particular inconvenience from that obstruction, and the proper course to be pursued in cases where injury has been done to the public by the obstruction of a road is pointed out in the latter part of that decision. In this case there has been no attempt to show that the plaintiffs have sustained any particular inconvenience from the obstruction complained

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of, and therefore this decision is exactly in point. There is another decision in the case of *Pyari Lal v. Rōoke* (1),<sup>o</sup> in which it was laid down that a Civil Court had no jurisdiction to enquire abstractedly into a public right, otherwise than as collaterally to a suit arising out of a private injury; and again, in the case of *Hira Chand Banerjee v. Shamā Charan Chatterjee* (2), it was laid down that any question as to the opening or closing of a public road belongs to the Criminal, and not to the Civil Court, and that such question can only be enquired into in a Civil Court as ancillary to the question whether or not any damage has been done to the plaintiff. It appears to us clear on these rulings that, if it be shown that the road in question in this case is a public road, and that there is no allegation of any special injury or inconvenience, the plaintiffs had no right to bring the present action. We think, as above stated, that the road is shown to be a public one, and that, therefore, under the circumstances, the Civil Court had no jurisdiction to try the case. The judgment of the Subordinate Judge must be reversed and the plaintiffs' suit dismissed with costs.

*Appeal allowed.*

[PRIVY COUNCIL.]

P. C.\*  
 1871  
 Feby. 3 & 20.

SYUD TUFFAZAL HOOSEIN KHAN (PLAINTIFF)  
 v. RAGHUNATH PRASAD AND ANOTHER (DEPENDANTS)

ON APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDE.

*Act VIII of 1859, s. 205—Execution—Attachment—Property, Definition of*

Under section 205 of the Civil Procedure Code, sums to be attached must be not inchoate but existing and definite, and although liquidated demands in their nature definite and certain though *sub lite* and unproved may be seized, mere expectancy or a mere right of suit cannot be attached: the attachment must operate at the time of attachment and not be anticipatory so as to fasten on some future state of property in which the suit may result.

\*Present:—THE RIGHT HONS. SIR JAMES WILLIAM COLVILLE, SIR JOSEPH NAPIER  
 LORD JUSTICE JAMES, AND SIR LAWRENCE PEEL.

(1) 5 B. L. R., A. C. 305.

(2) 3 B. L. R., A. C. 351