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

BENI MADHAB DAS *v.* RAMJAY ROKH.* 1868 *Aug.* 26

Right of Way—Interruption of—Acquiescence.

A. had a right of way over B.'s land. He allowed B. to erect a house on the pathway, and enjoy it for 7 years. He then brought a suit to have the pathway re-opened by pulling down B.'s house, *Held*, A. must be taken to have acquiesced in the interruption of his right of way, and his claim was such that a Court of equity and good conscience would not enforce.

THE plaintiff claimed a right of way over a small piece of land belonging to the defendant, which was closed by the latter, six or seven years prior to the institution of the suit, by erecting buildings thereon. The plaintiff alleged that he had hitherto always enjoyed the use of the passage which formed the shortest cut to a tank, and prayed that the defendant's house be pulled down, in order to restore the pathway.

The Moonsiff found that the disputed plot of land was proved to have been used by the public, from time immemorial, at the passage leading to the tank. He held, on the authority of *Sham Bagdi* v. *Fakir Bagdi* (1), that "if a road, which is used by the public or by any particular individual, be in existence for a long series of years, it cannot, on any account, be closed." He accordingly ordered the pathway to be thrown open.

On appeal, the Judge affirmed this decision, on the ground "that the disputed pathway was used by the public from a date long prior to twelve years, and it was closed by the defendant only five or seven years since, by building a house thereon."

The defendant appealed to the High Court.

Baboo *Nilmadhab Sen*, for appellant, contended that the plaintiff had acquiesced in the interruption of his right of way

* Special Appeal, No. 461 of 1868, from a decree of the Principal Sudder Ameen of Beerbhoom, affirming a decree of the Moonsiff of that district.

(1) 6 W. R, 222.

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by suffering the defendant to build a house on the land in question, and allowing him to enjoy the same for a period of six or seven years.

Baboo *Anukul Chandra Mookerjee* (with him Mr. *Sandel*), for respondent, contended that a right of way is an interest in land, and can be enforced, if the infringement has taken place, within twelve years; consequently, the closing up of the aforesaid pathway, for a period of six or seven years only, did not place the defendant in such a position as to defeat the right of easement of the plaintiff: *Joy Prakas Sing* v. *Amir Ali* (1); *Durga Charan Pal* v. *Peari Mohan* (2).

JACKSON, J.—In my opinion, the judgment of the Court below cannot be sustained. It seems that the plaintiff (in common, it is alleged, with other members of the community) was accustomed to go across the defendant's land to a tank. It appears that there was more than one way to approach the tank, but upon that way, which is the subject of the present suit, the defendant, to whom the land belonged, seven years before the commencement of the suit, erected a building which was part of his family dwelling-house, and has since used and enjoyed the building so erected. After that length of time, plaintiff comes into Court, and asks that the building in question may be pulled down, in order to restore to him the shortest mode of access to the tank above-mentioned. The Courts below have held, that plaintiff's right of way, which they find to have existed for a number of years previous to the act complained of, "is such that it cannot, in any way, be interrupted," and, apparently putting aside other considerations of equity, they have ordered the defendant's house to be pulled down, and the pathway to be restored.

We do not wish to decide, in the present case, whether such right of way, as is asserted by the plaintiff, is an interest in immovable property, within the meaning of clause 12, section 1, Act XIV. of 1859, for we prefer to decide the case on the other grounds. It seems to me, in the first place, that the

(1) 9 W. R., 91. (2) 9 W. R., 283.

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conduct of the plaintiff in allowing the erection of the defendant's house to proceed without interruption, and in remaining silent for seven years before he brought his suit, was such that the Court ought to have inferred that the defendant had the plaintiff's acquiescence in what he did. I am of opinion that this is a defect in the investigation quite sufficient to enable us to set aside the judgment of the Court below, which, in consequence, is erroneous on the merits; but I also think that where a person having a right of way over another's ground, permits that other to divert (for it does not appear that more has been done in this case), the right of way by the erection of buildings, at more or less expense, and further permits the owner to habituate himself and his family to the convenience and comfort of the building so erected, and allows that state of things to continue for seven years, the claim of such person to destroy the building so erected, and put an end to the convenience which the defendant has enjoyed, merely for the purpose of shortening the plaintiff's access to a particular locality, is an unreasonable claim, such as a Court of equity and good conscience ought not to enforce. It is difficult, moreover, to understand how the Courts can be called on to give effect to a right of easement which must rest on a presumed ground, where the evidence, and indeed the plaintiff's allegation, shows an entire intermission of the enjoyment of it for seven years. I am of opinion, therefore, that the decision of the Court below is erroneous, and it must be set aside, and the special appeal allowed with costs.

MITTER, J.—I am also of the same opinion. It appears to me that upon the facts found by the lower Appellate Court, the special respondent has no right to obtain the relief he has asked for. It is true, that there is no legislative enactment directly applicable to rights of easements; but in the absence of such an enactment, our duty is to decide according to equity and good conscience. The plaintiff in this case allowed the defendant to shut up the pathway in question, and to build a house upon it, seven years prior to the institution of this suit, and he is not therefore entitled, in my opinion, to maintain this action

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before a Court of equity and good conscience. It has been held that, if a person builds upon land jointly belonging to himself and his co-sharers, and these co-sharers stand by and allow him to do so without objection, an action subsequently brought by them to put down the building, would not be allowed by a Court of justice. The principle of this decision is applicable *à fortiori* to the circumstances of the present case. A right of easement is much weaker than a right of proprietorship; and, if a co-sharer cannot maintain the action referred to above, I do not see any reason why the plaintiff should be permitted to maintain such a suit. I would, therefore, decree this special appeal with costs.

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Sept. 5.

Before Sir Barnes Peacock, Kt. Chief Justice, and Mr. Justice Mitter.

DESARATULLA *v.* NAWAB NAZIM NAZIR ALI KHAN.*

Execution of Decree under Act X. of 1859—*Jurisdiction of Revenue Courts.*

A obtained a decree against B. for arrears of rent, in respect of a saleable tenure. In execution of the decree, the Deputy Collector of Basirhat requested the Collector of the 24-Pergunnas to attach and sell any movable property belonging to B. He, accordingly, caused "certain houses and buildings and some movable properties" belonging to B. to be attached. On an application by B. to the High Court, to set aside the attachment, *held*, the Collector had no jurisdiction to attach the property. The decree could not be executed by the attachment of any immovable property except the tenure, before it was shewn that satisfaction of the decree could not be obtained by execution against the person or movable property of the debtor.

Baboo *Bhawani Charan Dutt*, on behalf of Desaratulla and others, moved to make absolute a rule *nisi* granted on the following petition:

"That Nawab Nazim Sidhi Nazar Ali Khan instituted a suit, for arrears of rent, against the petitioners, in the Deputy Collector's Court of Chauki Basirhat, in the district of 24-Pergunnas; and obtained a decree on the 25th of November 1867.

"That long before the institution of the present suit, the petitioners had sold the tenure, for the arrears of which the

* Rule *Nisi* on Motion, No. 956 of 1868.