CRIMINAL REVISION.

Before Lort-Williams and S. K. Ghose JJ.

JATINDRANATH BARAT

v.

1930

Dec. 16, 22.

CORPORATION OF CALCUTTA.*

Highway—Public highway, how created—When dedication to public can be presumed—Mere user by public, if sufficient—Period for a proceeding under s. 364 (1) of the Calcutta Municipal Act (Beng. III of 1923), whence to be counted—" Sâdhâraner," *meaning of—Calcutta Municipal Act (Beng. III of 1923), ss. 363 (2), 364 (1).*

A proceeding under section 364 of the Calcutta Municipal Act, instituted within 5 years from the date of non-compliance with a notice under section 299 (*1*), for the removal of an unauthorised structure encroaching over a *kutchâ* passage, but not within the said period from the erection thereof, is legal.

Section 363 (*2*) applies to section 364 (*1*), *mutatis mutandis*, by substituting for "any work which has been done," the words "any non-compliance with a notice which expired."

The word "proceedings" means proceedings before a magistrate and does not contemplate proceedings before a committee of the Corporation which precede the application to a magistrate.

The term "*sâdhâraner*" means "that which is common, as a common property, possession in common," and is not synonymous with "public."

Before private land can become a public street or passage, it must be made so by statute, or be dedicated specifically by the owner to the use of the public, or there must be circumstances from which such dedication can be presumed.

A public highway must, *prima facie*, lead from one public place to another. A *cul de sac* may be a public highway, but its dedication will not be presumed from mere public user without evidence of expenditure for repairs, lighting and other matters by the public authority. Scavenging by the local authority may not be sufficient evidence.

Bourke v. *Davis* (1), *Attorney-General* v. *Antrobus* (2), *Whitehouse* v. *Hugh* (3), *Kingston-upon-Hull Corporation* v. *North Eastern Railway Company* (4), *Vine* v. *Wenham* (5), *R.* v. *Bradfield* (6) and *Mildred* v. *Weaver* (7) referred to.

The evidence adduced in the present case was held insufficient to raise the necessary presumption.

*Criminal Revision, No. 990 of 1930, against the order of Abu Nasr Md. Ali, Municipal Magistrate, Calcutta, dated Aug. 8, 1930.

(1) (1889) 44 Ch. D. 110.
(2) [1905] 2 Ch. 188.
(3) [1906] 1 Ch. 253, affirmed in [1906] 2 Ch. 283.
(4) [1916] 1 Ch. 31.
(5) (1915) 84 L. J. (Ch.) 913.
(6) (1874) L. R. 9 Q. B. 552.
(7) (1862) 3 F. & F. 30; 176 E. R. 15.

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The material facts appear sufficiently from the judgment of the Court.

Pugh (with him *Bipinchandra Mallik* and *Prabodhchandra Chatterji*) for the petitioners. The present proceedings are clearly out of time. The Building Inspector, according to his own statement, inspected it on the 15th January, 1924. The present proceeding was started on the 3rd October, 1929, *i.e.*, more than five years from the former date. Section 364 (*1*) of the Calcutta Municipal Act lays down that, in a proceeding of this description, the provisions of section 363 (*2*) shall apply. Therefore, no proceeding under section 364 (*1*) can be instituted in respect of any work which has been done more than five years before the institution of such proceedings. The present prosecution was, therefore, entirely incompetent. Proceedings referred to in section 363 (*2*) must mean proceedings before a magistrate and not before the municipal authorities. The view taken by the learned magistrate that the period should run from the date of the service of notice is erroneous.

Moreover, there is no evidence in this case to establish that the blind lane, on which the offending structure was alleged to be an encroachment, is a public street within the meaning of section 3 of the Municipal Act. The origin of the passage shows that it was private property, though common to owners of several houses abutting upon it. There is nothing to show that it became a public street either by statute or grant or dedication to the public. There are also no circumstances from which such dedication could be presumed. [Discussed several documents and other evidence.] The Corporation could not object to such encroachment and the passage was not a public street and never vested in the Corporation.

Brajalal Chakrabarti (with him *Rajendralal Mukherji* and *Gopendrakishore Banerji*) for the opposite party. On a proper construction of section 364 (*1*), the proceeding before the magistrate is clearly

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within time. In section 364 (*2*), the words *mutatis mutandis* occur. A comparison of this section with section 363 shows that these words were used for a specific purpose. Section 363 applies to cases of erection of new buildings, whereas section 364 refers to buildings erected long ago. The breach of the building regulations in the last mentioned cases might be detected long afterwards. Section 364 (*1*) also covers a case contemplated by section 299 (*3*), which refers to structures erected before June, 1863. This clearly indicates that the limitation of five years mentioned in section 363 (*2*) does not apply as such to these cases. That is the reason why the words *mutatis mutandis* have been put in section 364 (*2*). The period should, therefore, be calculated from the date of expiry of the notice issued under section 299 (*1*), before which the Corporation cannot prosecute the defaulter. Referred to sections 303, 309, 382 and 364, clauses (*1*) to (*5*).

With regard to the second point, the passage is shown as a public street in two successive survey maps. No one took any objection to these entries at the time. The passage is described as "*sâdhâraner "râstâ*" in various ancient documents. "*Sâdhâraner*" means "public." [Discussed several documents and oral evidence with regard to the laying of drains, water pipes and conservancy of the passage by the Corporation.] The passage was, therefore, a public highway and used as such by the public for a very long time.

Cur. adv. vult.

LORT-WILLIAMS J. This was a Rule to set aside an order under section 364 (*1*) of the Calcutta Municipal Act, directing the Corporation of Calcutta to demolish a certain masonry platform at the expense of the petitioners.

The proceedings were started on the 3rd October, 1929, for failing to comply with a notice under section 299 (*1*), which was served on the 26th February, 1927, to remove a platform forming part of a building situate at No. 76, Hari Ghosh Street,

and alleged to be causing an obstruction in a public passage.

It was admitted that the platform was in existence in January, 1924, and the first contention of the petitioners is that the order is invalid, because the work had been done more than five years before the institution of proceedings. This contention is based upon the argument that section 364 (*2*) provides that the provisions of section 363, sub-section (*2*), shall apply, *mutatis mutandis*, and that this sub-section provides that no proceedings shall be instituted in respect of any work which has been done more than five years before the institution of proceedings.

In our opinion, this contention is unsound—clearly it cannot be applied to cases falling under section 364, sub-section (*1*), sub-sub-sections (*3*), (*5*) and other sub-sub-sections.

Chapter XXIII of the Act deals with the demolition, alteration and stopping of unlawful work. Under the provisions of section 363, the work is unlawful from the beginning, and proceedings must be taken within five years of erection. But under section 364, the illegality begins only upon the expiry of the notices mentioned therein, and proceedings must be taken within five years of such expiry. Section 363 (*2*), therefore, is applied to section 364, *mutatis mutandis*, namely, by substituting for "any work which has been done," the words "any "non-compliance with a notice which expired."

The word "proceedings" means proceedings before a magistrate, and does not contemplate proceedings before a committee of the Corporation, which precede the application to a magistrate.

Secondly, the petitioners contend that there was no evidence before the magistrate that the passage in question was a public street within the meaning of section 299 (*1*).

Section 3 (*57*) provides that "public street" means any street, road, lane, gulley, alley, passage, pathway, square or court, whether a thoroughfare or not, over which the public have a right of way.

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The petitioners tendered certain documents. Exhibit 1, dated 1861, is a deed of amicable partition in the Bengali language. The parties agreed that for a beneficial use of the plots divided, they would leave a passage 6 feet by 115 feet, which they referred to as "*sâdhâraner râstâ.*"

Exhibit N (1863) is a deed of conveyance. The passage is called "*sâdhâraner râstâ*" in the recital. but "*ejmâli râstâ*" or common passage in the operative part of the deed. The plot conveyed was sold along with rights in the said common passage.

Exhibit 26 (1867) is a deed of conveyance, in which the rights to the entire passage are mentioned as being sold with the plot conveyed.

Exhibit H (1894) and Exhibit Q (1909) are conveyances of houses built on the plots and mention the common passage.

Exhibit K (1915) is a compromise decree, in which the passage is referred to as "*sâdhâraner râstâ* of "Barat Babus."

Exhibit G (1915) and Exhibit R (1928) are conveyances, in which the passage is mentioned as a common passage.

Exhibit E (1917) and Exhibit O (1921) are conveyances, in which it is mentioned as a private lane.

There seems to have been a subsequent partition of land in 1887, whereby a further strip of land, 2 feet wide, was added to the existing passage.

Under the passage are drains and water-pipes belonging to the adjoining houses and a covered sewer drain runs down the middle, which none of the adjoining owners are anxious to claim or to maintain.

The Corporation rely upon the meaning of the term "*sâdhâraner*" as being equivalent to "public," on certain Government survey maps, on the presence of kerb-stones at the mouth of the passage, and on the alleged fact that they conserve it, to establish their claim that it is a public passage.

The Government survey maps are wholly inconclusive on the point. They prove nothing

definite. The fact of conservancy is denied, and evidence was called by the petitioner to show that small payments were made by residents to the Corporation coolies for cleaning the passage. In any case, the fact is inconclusive, because, the Corporation admit that, as a matter of law and practice, all streets, both private and public, including *bustee* streets, are conserved and swept by them. The passage is not lighted, or paved or drained by the Corporation.

It is a blind alley leading to nowhere except the houses abutting upon it and there is no evidence that any one uses it except persons having business thereat. Omitting for a moment the word *sâdhâraner*, all the documents support the claim that this is a private passage common to the premises abutting thereon.

The word *sâdhâraner* is used in the documents as having the same meaning as, and being interchangeable with the words "*ejmâli*" and "common." It is admitted that "*ejmâli*" is equivalent to "common." It is admitted that rights in the passage were conveyed with the adjoining plots, but it is contended that these were only "rights of way." Such a conveyance is inconsistent with the passage being public, because rights in a public passage cannot be the subject of a private conveyance. In one document the term "*sâdhâraner râstâ* of Barat "Babus" is used, which is a contradiction in terms, if "*sâdhâraner*" is to be translated as meaning "public."

In fact I am at a loss to understand from what source the Corporation derives its interpretation of the word. In Wilson's Glossary of Judicial and Revenue Terms, "*sâdhâraner*" is stated to mean "that "which is common, as a common property, possessions "in common." This was published in 1855, six years before the deed of 1861 and there is no suggestion in that definition that the word means "public" or anything approximating to it. This interpretation is in agreement with the contention of the petitioners.

But apart from words and terms, the origin of the passage is not and cannot be disputed. The deed of

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1861 describes how it was created by three co-sharers in a partition, for the beneficial use of the plots to be allotted.

Before private land can become a public street or passage, it must be made so by statute or be dedicated specifically by the owner to the use of the public, or there must be circumstances from which such dedication can be presumed. There is no suggestion of dedication in any of the documents; on the contrary, these documents are in terms inconsistent with such dedication.

Dedication may be inferred from user by the public, but it is difficult, if not impossible, to establish a public right of way over a *cul de sac* by evidence of user alone, without proof that public money has been spent upon it. *Bourke* v. *Davis* (1).

A public highway must *prima facie* lead from one public place to another. A *cul de sac* may be a public highway, but its dedication will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting or other matters by the public authority. *Attorney-General* v. *Antrobus* (2), *Whitehouse* v. *Hugh* (3).

In *Kingston-upon-Hull Corporation* v. *North-Eastern Railway Company* (4), there had been nearly 50 years' unrestricted liberty of user by the public of a 20-foot road which was a *cul de sac*. The owners had put a drain down the middle into which the drains of the adjoining houses ran, and which drained into the public sewer at the end of the road. Gullies and pipes were constructed which conveyed the surface water into the public sewer. Yet it was held that dedication could not be inferred from such user in the absence of evidence of repair at the public expense.

In *Vine* v. *Wenham* (5), a *cul de sac* gave access to the rear of some houses. Though scavenged by the

(1) (1869) 44 Ch. D. 110, 112.
(2) [1905] 2 Ch. D. 188.
(3) [1906] 1 Ch. 253, affirmed in [1906] 2 Ch. 283.
(4) [1916] 1 Ch. 31.
(5) (1915) 84 L. J. (Ch.) 913.

local authority, it was held that there was not sufficient evidence of public user.

In the case of a private or occupation road or passage, which individuals are already entitled to use, very strong evidence of public user is necessary, in fact evidence alone of user by other persons is usually of little value. *R.* v. *Bradfield* (1), *Mildred* v. *Weaver* (2).

In the present case there is no evidence of public user of this blind alley, and it is difficult to imagine how there could be. The evidence of public expenditure in conserving it is of the flimsiest kind, and even so is inconclusive, as I have pointed out already. The evidence about the kerb-stones across the opening seems more to confirm the private character of the passage than the reverse.

In such circumstances, and, in the light of the decided cases, it must be obvious that dedication cannot be inferred, and specific dedication has not been suggested seriously.

For these reasons the Rule must be made absolute and the order must be set aside.

S. K. GHOSE J. I agree.

Rule absolute.

A. C. R. C.

(1) (1874) L. R. 9 Q. B. 552.

(2) (1862) 3 F. & F. 30; 176 E. R. 15.