CRIMINAL REVISION.

Before Mukerji J.

PRANNATH KUNDU

v

EMPEROR.*

1929

May 8.

Public way—Public rights, how acquired—Customary right of way, how acquired and proved—Indian Penal Code (Act XLV of 1860), ss. 283, 341—Code of Criminal Procedure (Act V of 1898), s. 133.

Where the privilege of a way is enjoyed only by a particular section of the community or by the inhabitants of two or three villages and not by others, the way is not a public way within the meaning of section 283 of the Indian Penal Code.

In India, as much as in England, there are three distinct classes of right of way, namely, (1) private rights, (2) rights belonging to a certain portion of the public and (3) public rights in the full sense of the term. The third class of rights is unconnected with any dominant tenement. They can be acquired by user or dedication to the public in general. In order to constitute a valid dedication to the public of a high way by the owner of the soil, there must be an *animus dedicandi*, of which the user by the public is evidence and no more. The evidence of user adduced in this case was held not to support an inference of dedication for the user of the public in general and hence section 283 of the Indian Penal Code had no application.

Chuni Lall v. *Ram Kishen Sahu* (1), *Muhammad Rustom Ali Khan* v. *The Municipal Committee of Karnal* (2), *Sham Soonder Bhuttacharjee* v. *Monee Ram Doss* (3), *Fatehyab Khan* v. *Muhammad Yusuf* (4), *Brocklebank* v. *Thompson* (5), *Farquhar* v. *Newbury Rural District Council* (6) and *Bermondsey Vestry* v. *Brown* (7), referred to.

The English Common Law rule of immemorial user is not required to establish a custom in India. It is sufficient if the court is satisfied of its reasonableness, certainty and existence for a sufficiently long time to have become the customary law of the particular locality, the user being neither permissive nor fraudulent.

Kuar Sen v. *Mamman* (8), *Shadi Lal* v. *Muhammad Ishaq Khan* (9), *Palaniandi Tevan* v. *Puthirangoda Nadan* (10) and *Mohidin* v. *Shivlingappa* (11), referred to.

For the case of an obstruction on any way, which is not a public way, the more appropriate remedy is by taking proceedings under section 133 of the Code of Criminal Procedure.

*Criminal Revision, No. 182 of 1929, against the order of D. H. Wares, District Magistrate of Faridpur, dated Dec. 14, 1928.

(1) (1888) I. L. R. 15 Calc. 460.
(2) (1919) I. L. R. 1 Lah. 117; L. R. 47 I. A. 25.
(3) (1876) 25 W. R. 233.
(4) (1887) I. L. R. 9 All. 434.
(5) [1903] 2 Ch. 344.
(6) [1909] 1 Ch. 12.
(7) (1865) L. R. 1 Eq. 204.
(8) (1895) I. L. R. 17 All. 87.
(9) (1910) I. L. R. 33 All. 257.
(10) (1897) I. L. R. 20 Mad. 389.
(11) (1899) I. L. R. 23 Bom. 666.

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RULE obtained by Prannath Kundu accused, against a conviction under section 341 of the Indian Penal Code.

The material facts appear from the judgment of Mukerji J.

Mr. Surajitchandra Lahiri, for the petitioner. The conviction under section 341 of the Indan Penal Code is not maintainable inasmuch as the right has not been perfected and has not been confirmed by any decree of a civil court. In any case, it comes within the exception to section 339 of the Code. So far as the original charge under section 283 of the Indian Penal Code is concerned, the right of way sought to be established in this case does not come within the meaning of " public way " as used in that section. According to the classification made in the Full Bench case of *Chuni Lall* v. *Ram Kishen Sahu* (1), the present pathway does not come within the class of public highways. Cited passages from Volume X of Halsbury's Laws of England, pages 243 and 244.

MUKERJI J. The proceedings in this case originated in an application addressed to the Circle Officer of Pangsa Circle, by which a number of persons complained that the petitioner Prannath Kundu had placed some refuse, *etc.*, on a public road running through plots Nos. 511, 512 and 513, which was in use for a very long time, in order to convert it into land in his possession and had thus caused inconvenience to the appellant. It prayed that the public road might be cleared up and opened to the public as before. It was forwarded by the Circle Officer to the Subdivisional Magistrate who summoned the petitioner under sections 283 and 290 of the Indian Penal Code. The case was tried by another magistrate, who eventually convicted the petitioner under sections 283 and 426 of the Code and sentenced him to pay a fine of Rs. 20 in default to undergo simple imprisonment for one week. On appeal, the District Magistrate has altered

(1) (1888) I. L. R. 15 Calc. 460.

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the conviction to one under section 341 keeping the sentence intact.

The learned District Magistrate has found that the path lies on the land of the accused and to that extent it is not a public path, but that the public have been using it for over twenty years and that right of way has been established. The petitioner's contention is that these findings, and for the matter of that the evidence, is not sufficient for the conviction of the petitioners.

In the Full Bench decision of this Court in the case of *Chuni Lall* v. *Ram Kishen Sahu* (1), Wilson J, in one of his classical judgments, agreed in by the other members of the Bench, explained that in India, just as much as in England, there are three distinct classes of right of way: "First, there are private "rights in the strict sense of the term vested in partic- "ular individuals or the owners of particular "tenements, and such rights commonly have their "origin in grant or prescription. Secondly, there "are rights belonging to certain classes of persons, "certain portions of the public, such as the freemen "of a city, the tenants of a manor, or the inhabitants "of a parish or village. Such rights commonly have "their origin in custom. Thirdly, there are public "rights in the full sense of the term which exist for "benefit of all the Queen's subjects; and the source "of these is ordinarily dedication."

The first question that falls for determination is, to which class of rights does the right alleged to have been infringed in the present case appertain? In the application, to which I have referred, the way is described as a public way. The evidence bearing on the matter stands thus:—

P. W. 1: "The public of the village Magura-dangi and others walk by this path..... The path is 4 or 5 cubits wide and 5 or 6 *rasis* long. It does not go beyond his (meaning witness's) house. From

(1) (1888) I. L. R. 15 Calc. 460, 464.

witness's house it goes to accused's house and then by Shamlal Kundu's house and thence to the railway line."

P. W. 2. "The path is 6 cubits wide. The path from the accused's house up to the railway line to the north and then east is raised but not so on the south up to the house of P. W. 1."

P. W. 3. " The path was used by public for a very long time for over 20 years."

P. W. 4. "The path does not meet the *halot* on the south. It passes along south-east of the house of P. W. 1 and then along the south of the house. The path is not a raised one. The witness comes southward from his house and going along the south of the house of P. W. 1 and then east, he uses the path. P. W. 3's house is south of witness's and he goes eastward by the south of the house of P. W. 1 and then east and then uses the path in question. Another *halot* to the south of the house of P. W. 1 is 200 cubits away from the path alluded to by the witness along the south of the house of P. W. 1."

P. W. 5. "The prosecution witnesses and the public walk over it. There is no other path for going to that direction."

It has been found that the plots over which the path is alleged to pass belong to the petitioner. The evidence quoted above shows that the way begins at or near the house of P. W. 1 and ends at or near the railway line and does not join any high way or public thoroughfare at either end. It also shows, taken at its highest, that the inhabitants of the village and possibly of other villages use the way but such user must be for the purpose of going to or from one of the houses abutting on the way, for the *termini* of the way are not highways or public thoroughfares. A public right of way in the full sense of the term and as to all the King's subjects is unconnected with any dominant tenement. Such right of way may be acquired by user of or dedication to the public in general. But as the Judicial Committee has pointed

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out in the case of *Muhammad Rustam Ali Khan* v. *The Municipal Committee of Karnal* (1). "In order to "constitute a valid dedication to the public of a "highway by the owner of the soil there must be an "intention to dedicate—there must be an *animus* "*dedicandi*, of which the user by the public is evidence, "and no more." It has also been pointed out in that case that, while there may be dedication to the public for a limited purpose, as for instance, an access to a particular building, or a footway, horseway or drift-way, there can be no such thing, in law, as a public right of way constituted by dedication to only a section of the public. The fact that there are no thoroughfares at the *termini* is consequently of not much importance on the point of dedication, but the question whether the public in general use the way as a pathway or only the inhabitants of this village and also of some other villages do so is a question of considerable materiality. Where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others, the road is not a public road [*Sham Soonder Bhuttacharjee* v. *Monee Ram Doss* (2) and *Fatehyab Khan* v. *Muhammad Yusuf* (3)]. Where there is the intention to allow not the public generally, but merely, visitors to or traders with the people of the village, or ways allowed to be used by villagers to go to church or a market or the common fields of a village, such ways are not regarded as public ways but private ways and they generally have their origin in custom: *Brocklebank* v. *Thompson* (4). Such a customary way can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication [*Farquhar* v. *Newbury Rural District Council* (5)], but the evidence in support of the public claim must be cogent [*Bermondsey Vestry* v. *Brown* (6)]. See Peacock's Law of Easements, Third Edition, p. 237, footnote. The evidence

(1) (1919) I. L. R. 1 Lah. 117 (122); L. R. 47 I. A. 25.
(2) (1876) 25 W. R. 233.
(3) (1887) I. L. R. 9 All. 434.
(4) [1903] 2. Ch. 344.
(5) [1909] 1 Ch. 12.
(6) (1865) L. R. 1 Eq. 204.

of user such as there is in this case, does not support an inference of dedication for the use of the public in general and the pathway alleged is not one which section 283 contemplates.

Section 283 of the Indian Penal Code being out of the way, it will have to be considered whether one of the other two kinds of rights has been established so that the case may come under section 341 of that Code, In the present case, there is no question of the complainant, whose case is that the obstruction put upon the way has prevented him from going in a particular direction, has acquired a right of way either by grant or prescription. The question really is whether the prosecution has established a customary right of way on the part of the villagers, amongst whom the complainant is one, to use this land as a pathway. The English Common Law rule of immemorial user is not required to establish a custom in India, and it has been held that it is sufficient if the court is satisfied of its reasonableness and certainty and that the user on which it is founded was not permissive nor exercised by stealth or force and that the right had been enjoyed for such a length of time as to suggest that, by agreement or otherwise, the usage has become the customary law of the particular locality. See *Kuar Sen* v. *Mamman* (1), *Shadi Lal* v. *Muhammad Ishaq Khan* (2), *Palaniandi Tevan* v. *Puthiangonda Nadan* (3), *Mohidin* v. *Shivlingappa* (4). For the conviction of the petitioner under section 341, Indian Penal Code, this customary right of way has necessarily to be proved by the prosecution in order to make out that the complainant had the right to proceed on the pathway in some particular direction. The difficulty of proving a customary right of way, with all its requisite elements, upon the oral testimony of two or three witnesses, who are only able to say that for over twenty years the way has been used by the villagers, is considerably enhanced by the exception to the definition contained

(1) (1895) I. L. R. 17 All. 87.
(2) (1910) I. L. R. 33. All. 257.
(3) (1897) I. L. R. 20 Mad. 389.
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in section 339 of the Indian Penal Code. It is extremely difficult, in a case of this nature, to say that the accused, who has caused the obstruction, did not, in good faith, believe that he had a right to obstruct the further user of his land as a pathway.

For this reason, I am of opinion that this conviction cannot be supported. The Rule is made absolute. The petitioner's conviction and sentence are set aside. The fine, if paid, will be refunded.

Before parting with the case, I may point out that, in cases of this nature, the law has provided for a remedy in the shape of proceedings under section 133, Criminal Procedure Code, which speaks of "obstruction" on "any way" and not merely "public way." The original application of the complainant and his co-applicants clearly suggested that course, but unfortunately it was not adopted, for reasons which are not apparent. These proceedings were clearly more appropriate than a prosecution for a criminal offence.

A. C. R. C. *Rule made absolute.*
Accused acquitted.