

In these circumstances and having regard to the fact that the defendants are co-owners of the suit-house, we think there is much force in the contention for the respondents that they cannot be regarded as tenants holding over or that there was any relationship of landlord and tenant subsisting between them and the appellants subsequent to 1899 so as to bring the case within either article 110 or 115. The respondents' possession after 1899 may reasonably be referred to their rights as co-owners and in that view the decision in *Robert Watson & Co., Ltd., v. Ram Chand Dutt*(1) was in our opinion rightly applied to the case notwithstanding the difference in the facts which has been referred to above.

The decree of the lower Court is confirmed and this Second Appeal is dismissed with costs.

S.V.

MADAR  
v.  
KADER  
MOJDEEN.  
AYLING  
AND  
HANNAY, JJ.

## APPELLATE CRIMINAL.

*Before Mr. Justice Sadasiva Ayyar.*

*Re* DHARMALINGA MUDALY AND FIFTEEN OTHERS  
(ACCUSED), PETITIONERS.\*

1914.  
October  
9 and 15.

*Indian Penal Code (Act XLV of 1860), ss. 147, 426 and 447—Obstruction to public way by building a wall—Pulling down the wall in bona fide exercise of the right of public way, no offence.*

The complainant built a wall obstructing a public way. Immediately after this, the accused, who were members of the public, in the bona fide exercise of their right of way, pulled down the wall:

*Held*, that the accused were not guilty either of rioting or of mischief or of criminal trespass (sections, 147, 426 and 447 of the Indian Penal Code).

PETITION under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the order of P. C. DUTT, the District Magistrate of North Arcot, in Criminal Revision Case No. 19 of 1914, preferred against the order of T. S. VENKATRAMAYYA, the Second-class Magistrate of Arkonam, in Calendar Cases Nos. 78 and 79 of 1914.

(1) (1896) I.L.R., 23 Cal., 799.

\* Criminal Revision Case No. 457 of 1914 (Criminal Revision Proceedings No. 885 of 1914).

Re DHARMA-  
LINGA  
MUDALI.

The facts of the case appear from the ORDER below.

A. Sundram for the petitioners.

The *Acting Public Prosecutor* for the Crown.

SADASIYA  
AYYAR, J.

ORDER—The Sub-Magistrate discharged the accused because he held that in pulling down the wall built by the complainant the accused acted in the assertion of a bona fide public right to the site on which the wall was built, that site being a public way.

The accused was charged under sections 147, 426 and 447, Indian Penal Code. Section 426 relates to mischief and mischief includes an intent to cause wrongful loss. If the site was a public path and if the complainant obstructed it wrongfully by a wall, the loss caused to him by the members of the public who pull it down in order to exercise their right of way through the site cannot be considered wrongful loss. As regards section 447, that again depends on the question whether the site was a public path and even if it was not, whether it was in complainant's effective possession. As soon as the complainant began to build and obstruct the path, the accused remonstrated and took steps to have the obstruction removed and it cannot be held that, in these circumstances, the complainant had taken such effective possession as would make the act of the public who pulled down the obstruction (caused by the accused) to constitute *criminal trespass*. In *Browne v. Dawson*(1), Lord DENMAN, C.J., said: "A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence, give himself what the law understands by possession against the person whom he ejects." As Mr. MAYNE says: "A mere trespasser cannot obtain what is known in law as possession, by the act of entry, or even by the continuance of that act, so long as the act is disputed and resisted." It is on this ground that in section 145, Criminal Procedure Code, clause 4, proviso (1), it is stated that possession within two months before the date of the Magistrate's order might be treated as continuing peaceable and juridical possession even though there was a subsequent and very recent forcible dispossession by the opposite party. This shows that the legislature held that a mere trespasser need not

(1) (1840) 12 A. & E., 621; s.c., 113 E.R., 650.

be considered as having acquired peaceable and juridical possession till his possession is acquiesced in for two months. A person who takes possession of the site of a public road and builds upon it to the obstruction of the public cannot by his very act of creating a public nuisance be held to have acquired peaceable and effective possession of that site so as to prevent a member of the public from pulling down that obstruction and exercising his right of way. If, of course, peaceable and effective possession had been acquired by the wrongful act and has been in a manner acquiesced in for a reasonable period, private persons cannot afterwards be allowed to assemble in force and cannot trespass upon the site so effectively and peaceably taken possession of by the person, without their being guilty of the offence of being members of an unlawful assembly though the person who had obstructed the road might be liable to punishment on criminal indictment and may be dispossessed by the public authorities under section 133 of the Criminal Procedure Code and under section 6 of the Madras Land Encroachment Act III of 1905. But it is only where a trespasser's possession has been acquiesced in and hence he has acquired juridical possession that the person entitled to possession cannot dispossess him by force without making himself liable under the criminal law. See *Kailash Ghose v. Jugal Lohar*(1).

RE DHARMA-  
LINGA  
MUDALI.  
—  
SADASIVA  
AYYAR, J.

In the present case, the accused had been exercising their right of way through the site in question till the complainant began to build upon it. Before he could acquire effective peaceable and juridical possession and without acquiescing in his possession they dispossessed him and removed the obstruction caused by him. Hence I think that the Sub-Magistrate was justified in discharging them and the learned District Magistrate ought not to have ordered further enquiry. The District Magistrate's order is set aside and the proceedings against the accused (petitioners) will be dropped.

N.R.

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(1) (1905) 1 C.L.J., 104.