

that the respondents took possession under the mortgage decree in 1913 without opposition from any one as sufficient evidence to enable him to decide in the appellants' favour. The question for this court to determine is not whether the weight of evidence was in favour of the appellants or the respondents but whether there was any evidence to justify the finding. The appellants' title to Gobind's holding is not in dispute and their recognition as tenants of that holding is admitted. The only question for decision was whether the particular plot in dispute was in Gobind's holding or in that of Tilak. This was a question of fact upon which evidence of assertion of title and of acts of possession over the property was material. I think the decree appealed from should be set aside and the judgment of the District Judge, dated the 28th June, 1919, restored. The appellants will have their costs of this appeal and of the appeal to Jwala Prasad, J.

1921
 ———
 Munshl Lal
 v.
 Mahanath
 Ramasis
 Puri.
 ———
 Dawson
 Miller, C. J.

COURTS, J.—I agree.

Appeal allowed.

CRIMINAL REFERENCE

Before Jwala Prasad and Adami, JJ.

MAHESH SHAH

v.

DARBARI HUSSAIN.*

1921
 ———
 Nov. 11 and
 1922
 ———
 January 3.

Bengal Local Self-Government Act, 1885 (Ben. Act III of 1885) sections 78, 139 and 140—By-law prohibiting encroachment on any road and imposing penalty, validity of.

A bye-law framed by a District Board under section 139 of the Bengal Local Self-Government Act, 1885, prohibiting encroachment on any road and imposing a penalty for such encroachment is not *ultra vires*.

Ramanath Ghosh v. Emperor (1), dissented from.

*Criminal Reference No. 45 of 1921 made by H. W. Williams, Esq., Sessions Judge of Shahabad, dated the 12th August, 1921, under section 438 of the Code of Criminal Procedure, 1898.

(1) (1906-07) 11 Cal. W. N. Clxxv (a).

1921-1922

Mahesh Shah

v.
Darbari
Hussain.

The facts of the case material to this report were as follows :—

The Chairman of the Local Board of Sasaram served a notice on Mahesh Shah directing him to remove a house which it was alleged encroached on a Local Board road. The latter failed to comply with the notice and the Chairman directed his prosecution. The Sub-Divisional Magistrate ordered the accused to be summoned under section 1 of the District Board Bye-laws. He was summarily tried by another Magistrate under that bye-law and convicted and sentenced to pay a fine of Rs. 50, or in default one week's imprisonment.

The accused moved the Sessions Judge who accordingly made the present reference to the High Court.

JWALA PRASAD, J.—This is a reference by the Sessions Judge of Shahabad under section 428 of the Code of Criminal Procedure, recommending that the conviction of and the sentence passed by the Magistrate upon the accused under the bye-law framed by the District Board of Shahabad under section 139 of the Local Self-Government Act Act III of 1885, B. C.) be set aside, on the ground that the bye-law in question is *ult, a vires*.

The bye-law in question runs as follows:—

“Whoever encroaches on any road by cultivating crops, or by ploughing it up for cultivation or by the construction of any building or structure thereon, except by the permission of the Chairman of the District Board, shall be liable to a fine not exceeding Rs. 50 and to a further fine not exceeding Rs. 2 for every day on which the offence is continued.”

Section 139 of the Act says:

“Every district board or local board, empowered in this behalf by the Lieutenant-Governor, may, subject to the control of the Lieutenant-Governor, make bye-laws for carrying out all or any of the purposes of this Act.

Section 140 empowers the Board to provide for the punishment of a breach of the bye-laws with a fine which may extend to Rs. 50, and in the case of continuing breach, with a further fine which may extend to

Rs. 5 for every day during which the breach is continued. 1921-1922

Thus a District Board is empowered to make a bye-law, for carrying out the purposes of the Act.

Section 78 of the Act enjoins upon the District Board the duty—

.....to provide for the repair and maintenance of roads, etc. which have been taken charge of by the Board under the Act, or towards which it may have agreed to contribute.

The learned Sessions Judge holds that the words "repair and maintenance" in the section cannot possibly include encroachment on the roads and therefore the District Board has no right to make a bye-law for the purpose of punishing persons making encroachments upon the roads. He has relied upon the case of *Ram-math Ghosh v. Emperor* (1) which fully supports his views and is on all fours with the present case.

Now, the words "provide for" in the section mean to procure means in advance or to take measures in view of an expected or possible need, and the word "maintenance" of a road means the keeping it up. Maintenance of way has a technical meaning of maintaining in repairs all fixed property of a road, such as, tracks, bridges, etc., which are the necessary appurtenances. The above meanings of the words have been taken from Webster's and the Imperial Dictionaries.

Thus under the section, a duty is cast upon a District Board to keep the road in repair and to maintain it by keeping in repairs the bridges, tracks, etc., on the road by providing funds and taking necessary measures with respect thereto.

On the one hand, it is possible to contend that no duty is cast upon the District Board to provide by its bye-law for the punishment of persons encroaching upon their roads. On the other hand, it is difficult to see how a road can be maintained in its proper condition without preventing encroachments thereon and impliedly the District Board would be deemed to be authorised to make bye-laws making such encroachments penal

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in addition to the provisions made for dealing with encroachments on roads by the penal laws of the country, such as, the Indian Penal Code and the Code of Criminal Procedure (Section 133). The point is not free from difficulty and in view of the decision of Stephen, J., in the case cited above, I was, at one time, inclined to refer this case for the consideration of a larger Bench so as to decide the point once for all, inasmuch as it is of great public importance. On further consideration I have come to the conclusion that the case should not be referred to a large Bench but should be decided by us.

No decision of any court, excepting that of Stephen, J., referred to above, has been shown to us. I have fully considered that decision in the light of the provisions of the Local Self-Government Act, and hold that the District Board has impliedly, if not expressly, power to provide for, by its bye-laws, the punishment of encroachments over its roads, in order to carry out the provisions of section 78 of the Act, namely, to provide for the repair and maintenance of its roads, etc., Section 139 empowers the District Board to make bye-laws and section 140 empowers it to impose punishment for the breach of bye-laws.

I, therefore, differ from the view taken by the learned Sessions Judge of Shahabad as well as by the Calcutta High Court and hold that the bye-law is not *ultra vires*, and the conviction of and the sentence passed upon the petitioner was not without jurisdiction.

I decline to accept the reference.

ADAMI, J.—I agree.