

1903  
JULY 7, 17. *Hollins v. Verney* (1), cited by the learned counsel in support of his argument, seems to be of doubtful authority. In any case it was decided under the English Prescription Acts, and has no direct application to the present case.

APPELLATE  
CIVIL.  
30 C. 1077.

We see no reason why the period of Sukchand's lease should not be taken into consideration in computing the period necessary for the acquisition of the easement. His right in the land is not shown to have been of a leasehold nature or in any way different from that of his successors, the defendants.

The onus of proving the damages has not been misplaced though the Judge does not consider it to have been altogether satisfactorily discharged. He has, however, affirmed the findings of the Court of first instance on the question of damages. We accordingly dismiss the appeal and the analogous appeals with costs.

*Appeal dismissed.*

30 C. 1084.

[1084] CRIMINAL REVISION.

SUNDAR MAJHI v. EMPEROR.\*

[23rd June, 1903.]

*Arbitrator—Public servant—Mischief—Land-mark—Penal Code (Act XLV of 1860) ss. 21, 434.*

The parties to a proceeding under s. 145 of the Criminal Procedure Code by mutual consent referred the dispute as to the possession to the arbitration of A, and the Magistrate thereupon cancelled the proceedings under s. 145. The arbitrator in order to define the boundary erected certain pillars, which were destroyed by the accused, and they were in consequence convicted under s. 434 of the Penal Code :

*Held* that the conviction was illegal, as A was not an arbitrator within the definition of s. 21, cl. (6) of the Penal Code, nor was he a public servant authorized to fix the pillars within the meaning of s. 434 of that Code.

RULE granted to the petitioner, Sundar Majhi.

This was a Rule calling upon the District Magistrate of Birbhum to shew cause why the conviction of the petitioner should not be set aside on the ground that Mr. Ahmad, under whose authority the boundary pillars had been set up, was not an arbitrator within the definition of s. 21, cl. (6) of the Indian Penal Code.

Proceedings under s. 145 of the Criminal Procedure Code were instituted by the Subdivisional Magistrate of Rampur Hat between the Manager of the Benagaria Mission and his tenants as the first party and the Rajah of Hetampur and his tenants as the second party, with respect to certain disputed lands on the border line of the villages Tadbandha and Mijhanpur which were claimed by the parties respectively. On a petition being put in by the parties the Magistrate, on the 24th November 1902, passed the following order :—

"A petition is filed to-day signed by both parties stating that they are willing to refer the whole dispute to the arbitration of A. Ahmad, Esq., District Magistrate of Birbhum, and to abide unconditionally by his decision in every respect. This compromise naturally does away with the [1084] likelihood of an imminent breach

\* Criminal Revision No. 488 of 1908, against the order passed by A. J. Laine, Sessions Judge of Birbhum, dated March 18, 1903.

(1) (1884) L. R. 13 Q. B. D. 304.

of the peace which has in the Court's opinion existed hitherto, and consequently removes all reason for further action. The proceedings will accordingly be stopped, the constables remaining on the spot only till the arbitrator has decided all points in dispute. Such crops as may have been already cut by the Court's order will be apportioned to the parties by the arbitrator as he thinks fit."

1903  
JUNE 23.  
—  
CRIMINAL  
REVISION.  
—  
30 C. 1084.

In the petition it was also stated that the parties agreed that whatever boundary should be fixed by the arbitrator should be marked by definite boundary pillars.

Mr. Ahmad made his award and caused certain boundary pillars to be erected on the boundary line which he had fixed in his award. Shortly afterwards two complaints were made by the Manager of the Banagaria Mission stating that the tenants of Mijhanpur had been and were breaking down these boundary pillars. Thereupon, warrants were issued, and the petitioner was tried by the Subdivisional Magistrate of Rampur Hat and was, on the 18th March 1903, convicted under ss. 143 and 434 of the Penal Code and sentenced to two months' rigorous imprisonment. He appealed to the Sessions Judge of Birbhum who on the 5th May 1903 dismissed the appeal.

Mr. Hill for the Crown. The Magistrate trying the case under s. 145 of the Criminal Procedure Code was a Court of Justice, and he referred the dispute for decision to Mr. Ahmad as will be seen by perusal of the final portion of his order, which runs as follows :—"such crops as may have been already cut by the Court's order will be apportioned to the parties by the arbitrator." Mr. Ahmad was appointed an arbitrator for the purpose of apportioning the crops, and would be a public servant within s. 21, cl. (6) of the Penal Code. He could only apportion the crops by ascertaining what lands were possessed by each side : in order to do that he had to define the boundary, which he did by erecting certain pillars. These pillars the accused has destroyed, and has, I submit, been rightly convicted under s. 434 of the Penal Code.

Mr. P. L. Roy (Babu Joy Gopal Ghose with him) for the petitioner. The duty of putting up the pillars was not enjoined upon the arbitrator by the Magistrate. It does not necessarily follow, because Mr. Ahmad was appointed to apportion the crops, [1086] that he had to erect boundary marks. In order to convict the accused under s. 434 of the Penal Code, Mr. Ahmad must be authorized by the Court to erect the pillars. The pillars were erected at the request of the parties. The Magistrate does not mention anything about erecting pillars in his order. No matter was referred by any Court to Mr. Ahmad for his decision. He was appointed arbitrator by the parties, and the Court simply agreed to it. The portion of the order referred to by Mr. Hill does not constitute Mr. Ahmad an arbitrator under s. 21, cl. (6) of the Code. It was, I submit, only a suggestion by the Court of what Mr. Ahmad might do in disposing of the matter. The conviction is illegal and should be set aside.

RAMPINI AND HANDLEY, JJ. This is a Rule calling upon the Magistrate of the district of Birbhum to shew cause why the conviction and sentence in the case of the applicant Sundar Majhi should not be set aside on the ground that Mr. Ahmad, under whose authority the boundary pillars had been set up, was not an arbitrator within the definition of section 21, clause (6) of the Indian Penal Code. The petitioner has been convicted and sentenced under section 434 of the Code for having destroyed a landmark fixed by the authority of a public servant. Mr. Roy, who obtained this Rule on his behalf, contends that the

1903  
JUNE 23.  
CRIMINAL  
REVISION.  
30 C. 1087.

conviction is bad, because, although Mr. Ahmad who put up the boundary pillar was a public servant and collector, yet he did not put up the pillar as such, but in his capacity of arbitrator, or person to whom a certain matter, namely, the dispute under section 145 of the Code of Criminal Procedure, had been referred by the parties themselves and not by the Court.

Mr. Hill on behalf of the Crown shews cause against the Rule; but after looking into the orders passed in the case, we think that the ground upon which the Rule was obtained was a good ground and that the Rule must be made absolute. We see from the order of the Sub-divisional Magistrate of Rampur Hat on whose file the section 145 case was pending, that Mr. Ahmad was not appointed by him to be arbitrator, nor was any matter referred to him for decision. There was an application before the Subdivisional Magistrate to the effect that the [1087] parties were willing to refer the question of the lands in dispute to Mr. Ahmad; and that being so, and as there was no further likelihood of breach of the peace, the proceedings under section 145, Criminal Procedure Code, were stayed. In these circumstances it appears to us that Mr. Ahmad was not a public officer authorized to fix the boundary pillars, but was a private person to whom the parties chose to refer the dispute between them for decision.

Mr. Hill relies on the last sentence in the order of the Sub-divisional Magistrate, which is as follows:—"Such crops as may have been already cut by the Court's order, will be apportioned to the parties by the arbitrator." We do not think, however, that the Subdivisional Officer meant by this to appoint Mr. Ahmad to apportion the crops. It was in our opinion a mere declaration of what he thought Mr. Ahmad should do in disposing of the case.

Furthermore, we do not think that Mr. Ahmad was authorized to put up the boundary pillars. If he did put them up, he did not do so in his capacity of public servant within the meaning of section 434, Indian Penal Code.

The Rule is therefore made absolute and the conviction and sentence in the case of the applicant set aside. The fine if paid must be refunded.

*Rule absolute.*