Privy Council Appeal No. 5 of 1918.

Nawab Bahadur Muhammad Rustam Ali Khan, since deceased (now represented by Nawab Muhammad Sajjad Ali Khan and others), and another - - - - - - - *Appellants*

v.

The Municipal Committee of Karnal City - - - *Respondents*

FROM

THE CHIEF COURT OF THE PUNJAB.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1919.

Present at the Hearing:

LORD SHAW.
SIR JOHN EDGE.
MR. AMEER ALI.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SHAW.]

This is an appeal from a decree of the Chief Court of the Punjab, dated the 12th April, 1916, reversing a decree of the Court of the District Judge, Karnal, dated the 23rd December, 1912.

The respondents in the appeal are the Municipal Committee of Karnal City. The proceedings had reference to an alleged public street in Karnal. The District Judge affirmed, and the decree of the Chief Court disaffirmed, the existence of such a public street.

The municipality has made no appearance by Counsel at the Bar of the Board. Their Lordships are in the position of having to decide what *ex facie* is an important question of public right, in the absence of those who in the ordinary course would defend it. This has added to the difficulties of the case.

By section 3, sub-section 13, of the Punjab Municipal Act, 1911, " street " is defined to mean—

> " Any road, footway, square, court, alley or passage, accessible whether permanently or temporarily, to the public, whether a throughfare or not."

And by the same sub-section " public street " is defined to mean any street—

> " (I) over which the public have a right of way; or
>
> " (II) heretofore levelled, paved, metalled, channelled, sewered, or repaired out of the municipal or other public funds; or
>
> " (III) which, under the provisions of section 171, is declared by the municipality to be, or under any other provisions of this Act becomes a public street."

On one outstanding fact of the case there would appear to be no difficulty in the judgments of the Courts below, namely, that, apart from the question now raised as to the street, the appellants are the absolute owners of Nawab Ganj, a market in the city. Notwithstanding the protest of the appellants, the Municipal Committee recently constructed a metalled road through the Ganj on the plea that the area over which the road was laid was a " public street " under the Municipal Act as above quoted.

The Ganj is built in a form of a katra or rectangular close, to which entrance is obtained by four gates. One of these gates was missing at the institution of the suit. The others existed and were shut at night. Round the close was a series of shops which were leased mostly to grain merchants. The enclosure thus formed is a narrow courtyard, on the floor of which the tenants pile up their grain in separate heaps, and under the courtyard there are masonary bins for storage. There seems little doubt that the solum of the courtyard was necessary, or at least most valuable, to the tenants of the shops, and these tenants not only paid rent for the shops, but paid dues for the use of the courtyard.

The municipality have under their Act the ordinary powers of draining, cleaning and lighting. Prior to the operations complained of they never exercised any of such powers over the ground in issue. They never drained the courtyard. In the correspondence preceding the action, and in the pleading of the suit, they claimed, however, that the courtyard was municipally lighted; but it turned out, and has been so found by both Courts, that the only lighting was by two lanterns put up by or for a member of the Municipal Committee for his own convenience. As the learned Judges of the Chief Court say, " there is no evidence that the mandi was properly lit by the Municipal Committee, and the putting up of these two lanterns does not prove that the place was a public one." The cleaning of the courtyard was never done by the municipality: on the contrary, the responsibility for that was laid by them upon the appellants' predecessor. This important matter will be presently referred to.

A plot of ground of this character owned by one citizen, and by its nature accessory to shop property, and let by him as such to his shop-tenants, and neither drained, lighted, nor cleaned by the municipality, would not appear in ordinary circumstances to form a public street. The only foundation for such a plea would be that which has been affirmed by the Court below, namely,

that there existed through this Ganj a public right of way, and that this had been acquired by reason of dedication as such by the owner. The question in the case is whether this view is correct.

On this question it is admitted that there has been no dedication expressly or in writing. It appears also to be quite clear that there is no user of long duration from which an inference of such a dedication to the public would naturally arise.

Their Lordships have, however, examined the evidence of dedication relied upon by the Chief Court, and it may be at once stated that they found nothing therein which is adequate to support such a transaction.

The Board do not enter upon details, but feel inclined to cite the principal example of the evidence relied on by the Court below. It is that of Mr. Ram Chander. In the judgment appealed from it is stated "that he frequently passed through that part of the kacha road which previously existed where the pacca road now is. He is a perfectly independent witness, and we have no reason for disbelieving him."

Their Lordships entirely accept the description of the witness here given. On examination of his evidence, however, it turns out that for a few years back he has gone from his bungalow to his office "generally via Nawab Ganj Mandi." And he says :—

> "There used to be a kacha road previously at the place where the Municipal Committee has now built a pacca road. I do not know whether it is a public road or not. I often pass by that road."

After explaining that his office has been in the neighbourhood only for the last seven or eight years, he adds : —

> "There was no fixed way before the construction of the pacca road. I used to pass by the way I could find. There was no drain on any side. Previously corn was generally stored on the road also. Some passage was left . . . . As there was no particular pacca road and drain, corn was generally stored a little way off the centre. . . . Most of the Banias objected to my passing. When I passed over the corn the shopkeepers objected, saying 'why do you go over the corn ?'"

Their Lordships cite this as a sample not of evidence of dedication, but of evidence which is wholly insufficient to suggest dedication, to the public. It is in such cases of crucial importance to distinguish between the grant to the public as such of a right of way, and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it. In the present case it appears to their Lordships extremely doubtful whether the term "dedication" can with propriety be applied to what took place. If the term be employed, it can only be in this sense that the dedication of the solum of the courtyard was dedication not to the public, but to the uses of the shopkeepers and their customers, the principal use being the storing and display of grain. At night, when business was over, the place was shut up and the gates were closed.

It is true that members of the public would get access to a place which was used by customers, and might or might not

pass through it. This on the point of dedication infers nothing. A person in dedicating land to public use may, of course, place such limits as he wishes upon the dedication, if he make those limits clear and definite. That is to say, he may announce to the public that a certain road is dedicated to it as access, say, to a particular building or for a particular purpose. But there can be no such thing in law as a public right of way, constituted by dedication to only a section of the public. As Baron Parke said in *Poole* v. *Huskinson*, 11 M. & W., 827 :—

> "There may be a dedication to the public for a limited purpose, as for a footway, horse-way, or drift-way ; but there cannot be a dedication to a limited part of the public."

A further dictum of that very learned Judge may be also cited :—

> "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that 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 ; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."

Upon this point the evidence appears to their Lordships to be substantially all in one direction. According to it, intention to dedicate (apart from the user, of which a sample has been given) there was none. On the contrary, so recently as the year 1902, the municipality itself treated the Ganj not as public but as private property. On an application of the shopkeepers therein, the municipal authority wrote to the proprietor of the Ganj asking that a well should be protected by a wooden structure, while as to the right of way, etc., the municipality put the matter thus :—

> "The way in the market is in a very bad condition, and the sweeper deputed by the State does not do any work. A bad smell is spreading in the market. It is requested that the way in the market should be paved with concrete, because the income of the octroi duty of the market is deposited in the treasury of the Nawab. If you be so generous as to get this amount deposited in the Municipal Fund, the Municipal Fund shall be responsible for cleanliness and for getting the road in the market made pucca, otherwise you should make your own arrangements in connection therewith."

No date is assigned by the Court below for the alleged dedication ; but it cannot be said that it occurred after the date of this letter ; and the letter itself is a negation of the idea of dedication to the public having been made.

Notwithstanding this, the municipality entered upon the ground and built a road across it—in spite of the objection of the Nawab and without taking any steps under this statute to acquire the ground. In the opinion of their Lordships, this was a trespass. The ground still remains the private property of the appellants.

Their Lordships will humbly advise His Majesty that the appeal be allowed, and that the decree of the Chief Court of the Punjab, dated the 12th April, 1916, be recalled with costs, and the decree of the District Court be restored. The respondents will pay the costs of this Appeal.

In the Privy Council.

NAWAB BAHADUR MUHAMMAD RUSTAM ALI KHAN, SINCE DECEASED (NOW REPRESENTED BY NAWAB MUHAMMAD SAJJAD ALI KHAN AND OTHERS), AND ANOTHER

v.

THE MUNICIPAL COMMITTEE OF KARNAL CITY.

DELIVERED BY LORD SHAW.

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