

[FULL BENCH.]

*Present*: Lascelles C.J. and Wood Renton and Pereira JJ.SOURJAH *v.* FALLEELA *et al.*

M. C. Colombo, 427.

*Prosecution for failure to remove projection on road after notice—Bona fide claim of right based on long possession—Municipal Councils Ordinance of 1910, s. 157—Ordinance No. 23 of 1910, s. 6.*

The accused were charged under section 157 of the Municipal Councils Ordinance of 1910 with having failed to remove within fourteen days of notice an alleged projection into the street. They set up a *bona fide* claim based on long possession by way of defence.

*Held*, that as title to the road cannot be based on prescription (section 6 of Ordinance No. 23 of 1910) accused could not set up a *bona fide* claim by way of defence.

LASCELLES C.J.—It is true that where a claim is made *bona fide* it is not the duty of a Magistrate to ascertain whether it is well founded; but it is well settled that the jurisdiction of the Magistrate is not ousted where it is clear on admitted facts that the law will not admit of the claim set up—where, in other words, the claim is impossible in law.

WOOD RENTON J.—*Bona fides* in cases of this kind are not by itself sufficient to exclude the jurisdiction of the Police Magistrate. There must be a *bona fide* claim of right; that is to say, the person charged must be in a position to allege what, if established, would be a good legal ground of defence.

PEREIRA J.—The last proviso to section 157 does not apply to a case where a person establishes title or a right to a portion of ground claimed as a part of the road, but is used by him as his own property; . . . . . It refers to such encroachments, obstructions, and projections, temporary or otherwise, on or over what is proved to be or admittedly is road and made or erected lawfully; that is, for instance, with the sanction, where such sanction is duly provided for by law, of the proper local authority.

THE facts are set out in the judgment.

*E. W. Jayewardene*, for the appellants.—This is a matter for a Civil Court. The appellants have a *bona fide* claim to the portion of road. They have possessed it for over thirty years. [Pereira J.—You cannot base your claim on prescription; see Ordinance No. 23 of 1910.] The appellants have also a paper title. [Lascelles C.J.—You did not base your claim on any deed in the Police Court.] Counsel cited *Akbar v. Slema Lebhe*.<sup>1</sup>

*Hayley*, for the respondent (not called upon).

*Cur. adv. vult.*

<sup>1</sup> (1893) 2 C. L. R. 175.

1913.

February 4, 1913. LASCELLES C.J.—

*Sourjah v.  
Faleela*

This is a case which was reserved for the opinion of the Full Court on a question of the construction of section 157 of the Municipal Councils Ordinance, 1910. The appellants, who are the owners of a building bearing assessment Nos. 53-55, Old Moor street, were charged and convicted under the above-mentioned section with having failed to remove within fourteen days of notice an alleged projection or encroachment into the street, consisting of a masonry flight of steps in front of their house.

The argument for the appellants is that they at the trial set up a *bona fide* claim of right which ousted the jurisdiction of the convicting Magistrate. The question which then arose, and which was reserved for the opinion of the Full Court, was whether such a defence was admissible in a prosecution under section 157, inasmuch as the latter portion of the section apparently enables the Council to take action with regard to projections and encroachments which have been made lawfully as well as with regard to those which have been made unlawfully.

At the argument our attention was directed to section 90 B, added to the Road Ordinance, 1861, by section 6 of the Road (Amendment) Ordinance, 1910, the effect of which is that the laws under which rights are acquired by right of possession or user do not apply to roads.

The effect of this alteration in the law is fatal to the contention that the defendants set up a *bona fide* claim of right, for the only claim of right which was seriously put forward was based on long possession, which, under the amended law, could not found any claim to rights on a road.

It is true that where a claim is made *bona fide* it is not the duty of a Magistrate to ascertain whether it is well founded; but it is well settled that the jurisdiction of the Magistrate is not ousted where it is clear on admitted facts that the law will not admit of the claim set up—where, in other words, the claim is impossible in law. (*Vide Arnold v. Morgan*<sup>1</sup> and *Coles v. Miles*.<sup>2</sup>)

In the present case the only ground set up was one which in law could not support the claim.

I am of opinion that the jurisdiction of the Magistrate was not ousted, and that the appeal should be dismissed. In the circumstances of this particular case, and without laying down any rule as to payment of costs in appeals of this nature, I do not think that any order should be made as to costs.

WOOD RENTON J.—

There can be no doubt as to what our decision in this case must be. The Police Magistrate has found as facts, and the evidence warrants the finding, that the flight of steps in front of the appellants'

<sup>1</sup> (1911) 2 K. B. 322.

<sup>2</sup> (1888) 57 L. J. M. C. 132.

1913.

Wood  
RANTON J.  
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Faleela

house projects over the pavement and stands on a portion of the street. The only defence set up at the trial in the Municipal Court was a plea of prescriptive title. That is perfectly clear from the record; but by section 6 of Ordinance No. 23 of 1910 the Legislature had declared that no person shall be entitled to any exclusive rights of ownership, possession, or user in respect of any portion of a road by reason of his having, whether before or after the Ordinance came into operation, had any possession or use thereof. The effect of this enactment is to exclude the sole defence relied upon at the trial. The appellant, in his evidence in reply to a question by the Court, said that he had not brought his deed with him. He did not say, however, that he had any deeds, and we may be quite sure that if he had been in a position to set up a paper title he would have done so at the proper time. In view of the provisions of section 6 of Ordinance No. 23 of 1910, it is unnecessary to consider the question of the appellants *bona fides*. *Bona fides* in cases of this kind are not by itself sufficient to exclude the jurisdiction of the Police Magistrate. There must be a *bona fide* claim of right; that is to say, the person charged must be in a position to allege what, if established, would be a good legal ground of defence (see *Coles v. Miles*,<sup>1</sup> *Arnold v. Morgan* <sup>2</sup>). The appellants cannot do so here. I would dismiss the appeal.

PEREIRA J.—

It is clear that the new section (section 90 B) added to the Road Ordinance, 1861, is fatal to the right set up by the appellants, and I agree that the appeal be dismissed without costs.

I may add that in my opinion the last proviso to section 157 of the Municipal Councils Ordinance, 1910, does not apply to a case where a person establishes title or a right to a portion of ground claimed as part of a road, but is used by him as his own property. In that case there would be no encroachment on a road, or destruction of it, or projection over it. The proviso refers to such encroachments, obstructions, and projections, temporary or otherwise, on or over what is proved to be or admittedly is road and made or erected lawfully; that is, for instance, with the sanction, where such sanction is duly provided for by law, of the proper local authority.

*Appeal dismissed.*

<sup>1</sup> (1888) 57 L. J. M. C. 162.

<sup>2</sup> (1911) 2 K. B. 322.