

1914
 ABDUL
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 v.
 KHIRODE
 CHANDIA
 PAL.

There will, therefore, be a mortgage decree for Rs. 248-6-5 with costs to the plaintiff in proportion to his success. The defendants Nos. 1 and 2 will get no costs on the amount disallowed. The defendant No. 3 will get costs on the sum disallowed, in proportion to the amount of his security.

S. K. B.

CRIMINAL REVISION.

Before Jenkins C.J., and Teunon J.

SAROJBASHINI DEBI

v.

SRIPATI CHARAN CHOWDHRY.*

1914
 Sept. 9

Public Nuisance—Encroachment on public pathway—Application to District Magistrate by letter—Reference of applicant by letter to Civil Court—Subsequent petition to the Subdivisional Magistrate regarding the same pathway—Issue of conditional order—Appearance of opposite party and claim of title to the path—Dropping proceedings without taking evidence—Criminal Procedure Code (Act V of 1898), ss. 133, 137.

When a Magistrate makes a conditional order under s. 133 of the Criminal Procedure Code against a party who appears and shows cause, he is bound, under s. 137, to take evidence as in a summons case. It is open to him thereafter to consider whether there is a complete answer to the case, or whether it is not a proper one for reference to the Civil Court,

ON the 29th November 1911, one Ram Lal Chowdhry and others wrote to the District Magistrate of the 24-Parganas alleging that Sripati Charan Chowdhry and others, opposite party, had encroached upon a public pathway, and praying for the removal of the encroachment. A reminder was sent to the Magistrate on the

*Criminal Revision No. 1154 of 1914, against the order of H. P. Duval, Sessions Judge of 24-Parganas, dated June 4, 1914.

13th May 1912, whereupon he had the matter enquired into by various persons *ex parte* and informed the applicants by letter, dated the 23rd May, "that, as the matter involves civil disputes, they should seek their remedy in the proper Court." On the 23rd December 1913, the petitioners made an application under s. 133 of the Criminal Procedure Code to the Subdivisional Magistrate of Basirhat who directed the police to enquire and report. Upon the receipt of the report the Magistrate drew up a proceeding under s. 133 on 13th January 1914 directing the opposite party to remove the obstruction within 15 days, or to appear and show cause. The latter appeared on the 11th February, and showed cause, alleging, *inter alia*, that the path was not a public one and that the present proceedings were without jurisdiction with reference to the previous decision of the District Magistrate. The Subdivisional Officer then directed the parties to produce evidence on the 3rd March, but dropped the proceeding on the 28th April, without taking any evidence, on the ground that the order of the District Magistrate amounted to a judgment, and that, as long as it remained in force, he himself had no jurisdiction to entertain the present proceeding. The petitioners, after an infructuous application to the Sessions Judge of the 24-Parganas moved the High Court and obtained the present Rule.

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Babu Dasarathi Sanyal and Babu Debendra Narain Bhattacharjee, for the petitioners.

Babu Atulya Charan Bose and Babu Dwijendra Nath Mukerjee, for the opposite party.

JENKINS C. J. The proceedings which are called in question by the Rule now under consideration arise out of action taken by the Magistrate under Chapter X of the Code of Criminal Procedure. Section 133

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provides that whenever a Magistrate, of the qualifications there described, considers, on receiving a police report or other information and on taking such evidence, if any, as he thinks fit, that any unlawful obstruction should be removed from any way used by the public, he may make a conditional order of the nature described in the section, and may call upon the person affected to appear before himself and move to have the order set aside or modified. Here it appeared to the Magistrate that there was a public nuisance coming within the terms of that section and the nature of the nuisance was an unlawful obstruction of a way used by the public. He accordingly made a conditional order. The person affected undoubtedly appeared and showed cause, but notwithstanding that the Magistrate has allowed the proceedings to drop, without following the procedure prescribed by section 137, clause (1). It is this omission on the part of the Magistrate that has led to the Rule being granted calling upon the opposite party to show cause why the order complained of should not be set aside and such other and further order made as to this Court might seem fit.

We have been assured that a large number of cases appear to sanction what the Magistrate has done, though they do not go the length that he has. But whatever may have been decided, we cannot escape from the words of the Legislature until we are told by some higher authority that we must. The Legislature in the event that has happened has directed that the Magistrate shall take evidence in the matter as in a summons case, and in so far as he has failed to do that he has not performed the duty cast upon him by law. It appears to me that the rule is rightly conceived. It is said that it is open to the Magistrate to consider whether the claim by the opposite party

in derogation of this asserted public right affords an answer or not. But in deciding that section 137 must be followed. We in no way deprive the opposite party of his right to show that the terms of section 133 do not apply, or say that the Court should not apply them, in the particular circumstances of the case, either by reason of real doubt as to the applicability of the section or otherwise. All we say is that the Magistrate having taken such measures as make the provisions of section 137 applicable, those provisions must be observed.

Therefore, we must make the Rule absolute and direct the case to go back to the Magistrate in order that he shall take evidence in the matter as in a summons case in the manner provided by section 137. It will be open to him, as I have indicated, to consider, when that evidence is taken, whether there is a complete answer to the case against the opposite party or whether this is not a case where the parties should be referred to the Civil Court for the purpose of determining a matter which for some reason or other the Magistrate considers that he cannot decide. But in saying that I do not wish to encourage the idea that the Magistrate should endeavour to escape from dealing with matters which legitimately fall within his jurisdiction.

There is one further matter that has been pressed upon us. It is that these proceedings are in some measure barred by the doctrine of *res judicata*. We are not satisfied that there is any room on the facts of this case for the application of this doctrine.

TEUNON J. I agree.

E. H. M.

Rule absolute.

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