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 OF STATE  
 FOR INDIA.  
 JENKINS C.J.

Act. I have also shown that the Collector has determined that the plaintiff is a person chargeable and that in so doing he acted within the limit of his jurisdiction. That being so, it appears to be a case where, according to section 39, it is right to say that the suit does not lie. It has, therefore, been rightly dismissed by the lower Court, and we dismiss the appeal with costs.

N. R. CHATTERJEA J. I agree.

S. M.

*Appeal dismissed.*

### CRIMINAL REVISION.

*Before Sharfuddin and Taunon JJ.*

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 May 21.

MANIPUR DEY

v.

BIDHU BHUSHAN SARKAR.\*

*Public Nuisance—Unlawful obstruction to public way—Bona fide question of title—Duty of Magistrate to determine the question—Criminal Procedure Code (Act V of 1898), ss. 133, 137.*

*Per SHARFUDDIN J.* When a party, against whom an order under s. 133 of the Criminal Procedure Code is contemplated, appears and raises the question that a pathway, alleged to have been unlawfully obstructed, is not a public but a private one, the Magistrate should not only decide whether it is public or private, but he should determine whether the claim is *bona fide* or a mere pretence set up only to oust the jurisdiction of the Court. If he finds that the claim is a mere pretence, he may proceed to pass a final order; but if he finds that the claim, though not substantiated, has been raised *bona fide*, he should stay his hand and refer the party to the Civil Court, and if the party does not have recourse to such Court

\* Criminal Revision No. 595 of 1914, against the order of M. Smither, Sessions Judge of Dacca, dated March 13, 1914.

within a reasonable time, the Magistrate may then proceed to make the order absolute.

*Belat Ali v. Abdur Rahim* (1), *Mataulhari Tewari v. Hari Madhab Das* (2), *Luckhee Narain Banerjee v. Ram Kumar Mukherjee* (3), and *Preonath Dey v. Goborihone Malo* (4) referred to.

The provisions of s. 133 of the Code should be sparingly used.

TEYXON J., in the circumstances of the case, assented to the order proposed.

ON the 20th June 1913, one Bidhu Bhushan Sarkar filed a petition before the Sub-divisional Magistrate of Manikgunge, in the district of Dacca, alleging that the petitioner had thrown up earth and thereby obstructed a public pathway leading from Dhankoria to Khalli which was used for the passage of horses, cattle and boats. The Magistrate referred the petition to the President of the Dhankoria Union for enquiry and report. The President reported that the disputed way was a public path used for marriage and religious processions, the carriage of corpses and the passage of boats during the rains. The Magistrate thereupon drew up a proceeding under s. 133 of the Criminal Procedure Code calling upon the petitioner to remove the alleged obstruction or show cause why the order should not be set aside. In answer, the petitioner filed a petition stating that the land on which he had raised earth appertained to his homestead and denying the existence of any, and still less a public, pathway. He further submitted that the alleged pathway was not shown as a public *rasta* on the Settlement maps, and that a previous proceeding under s. 133 of the Code had been instituted, through enmity, by a servant of the President against his (the petitioner's) landlord, Dinesh Chunder Roy, in respect of a portion of the same pathway, and had been quashed

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(3) (1888) I. L. R. 15 Calc. 574.

(2) (1904) 9 C. W. N. 72.

(4) (1897) I. L. R. 25 Calc. 278.

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on the ground that the land belonged to Dinesh and was not public property. On the 13th January 1914, the witness was present and the case was made over to a Subordinate Magistrate for disposal. The latter proceeded to take evidence on both sides, and thereafter made the order absolute under s. 137 of the Code on the 28th February 1914. He held it proved that the disputed strip was waste-land lying between houses and extending beyond the petitioner's house, that the pathway was public, though not used for processions or as a cattle track, that being less than 15 links in width, it was incapable of representation on the Settlement maps and was ordinarily ignored in the *khatians*, and that the previous proceeding related to different land.

A motion against the order was made to the Sessions Judge of Dacca who refused to refer the case by his order, dated the 13th March 1914. The petitioner then moved the High Court and obtained the present Rule.

*Mr. P. L. Roy* (with him *Babu Ramani Mohan Chatterjee*), for the opposite party. It is true that it has been held that when a *bond fide* claim of title is raised, the Magistrate must determine the point first: *Belat Ali v. Abdur Rahim* (1), *Matukdhari Tewari v. Hari Madhab Das* (2), *Luckhee Narain Banerjee v. Ram Kumar Mukherjee* (3), *Preonath Dey v. Gobordhone Malo* (4). But the facts found by the Magistrate negative *bond fides* by implication. At all events the case should be remanded.

*Mr. K. N. Chaudhuri* (with him *Babu Upendra Lal Roy*), for the petitioner. The cases cited establish that the Magistrate was wrong in not deciding

(1) (1903) 8 C. W. N. 143.

(3) (1888) I. L. R. 15 Calc. 564.

(2) (1904) 9 C. W. N. 72.

(4) (1897) I. L. R. 25 Calc. 278.

expressly whether the claim was a *bond fide* one or a mere pretence.

*Cur. adv. vult.*

SHARFUDDIN J. This is a Rule calling upon the District Magistrate of Dacca to show cause why the orders passed under sections 133 and 137 of the Criminal Procedure Code, dated the 28th February 1914, should not be set aside on the ground that having regard to the *bond fide* question of title raised, and in the absence of any finding that the objection raised was not *bond fide*, the order is without jurisdiction. It appears from the order of the Deputy Magistrate concerned that Manipur Dey, the petitioner before us, on receipt of a notice under section 133 of the Criminal Procedure Code, appeared and alleged that the pathway in question was not a public pathway. The following are the findings of the trying Magistrate with regard to the objection thus raised. "It is contended on behalf of Manipur Dey that the way cannot be called public, if a few neighbours and acquaintances have acquired mere permissive right thereto . . . . It is idle in the present case to urge that the way is Manipuri's private property, it is waste-land lying between houses and extending beyond Manipuri's house . . . . It is pointed out that the Settlement Department has not recognised the way as a public *rasta*. It is to be remembered that a *rasta*, which is less than 15 links in width, is incapable of representation on the Settlement map, scale 16" to a mile, and is ordinarily ignored in the *khatians*." Section 133 occurs in a Chapter headed "Public Nuisances," and the section itself deals with unlawful obstruction, etc., of any way, etc., used by the public, etc. Sub-section (2) of section 133 of the Criminal Procedure Code provides that no

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order duly made by a Magistrate under this section shall be called in question in any Civil Court. From this latter provision it is clear that the provisions of section 133 of the Criminal Procedure Code should be sparingly used. Any order passed under this section cannot be questioned in any Civil Court. It is, therefore, necessary that if the party against whom the order is contemplated to be passed, raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim of the objector is not substantiated, find whether the claim is *bond fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the Rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bond fide* he should stay his hand and refer the party to the Civil Court. And if the party, within a reasonable time, does not have recourse to the Civil Court, the Magistrate may then proceed to make the Rule absolute. In the present case the objector, who is the petitioner before us, had contended that the pathway in question was a private property, and that only the neighbours and acquaintances had been using it in a permissive way. The question is whether this contention on the part of the objector is a *bond fide* contention or not. From the findings of the lower Court it is clear that the pathway in question is close to the objector's house. It is apparent from the judgment of the lower Court

that the path in question has not been shown as a pathway in the map prepared by the Settlement Department. Regard being had to the above two facts I think it was necessary for the lower Court to have come to a finding as to whether the claim set up by the objector was a mere pretence or whether it was *bonâ fide*. In this view I am supported by a number of authorities of this Court, viz., the cases of *Belat Ali v. Abdur Rahim* (1), *Mabukdhari Tewari v. Hari Madhab Das* (2), *Luckhee Narain Banerjee v. Ram Kumar Mukherjee* (3), and *Preo Nath Dey v. Gobordhone Malo* (4).

For the above reasons, I would set aside the order complained against and make the Rule absolute. I would further direct that the lower Court should try the case from the point reached on the 13th January 1914, and dispose it of according to law.

TEUNON J. Having regard to the long series of decisions in which this Court has held that when a person called upon to show cause under section 133 of the Criminal Procedure Code raises a question of title, the trying Magistrate must decide whether that question has been raised in good faith, I am prepared in the present case, without agreeing in all the reasons advanced\*by my learned colleague, to assent to the order proposed by him.

E. H. M.

*Case remanded.*

(1) (1903) 8 C. W. N. 143.

(3) (1888) I. L. R. 15 Calc. 564.

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