

## CRIMINAL REVISION.

---

*Before C. C. Ghose and Patterson JJ.*

KISHORIMOHAN PRAMANIK

v.

KRISHNABIHARI BASAK.\*

1930

May 30.

*Cross-examination—Obstruction to a pathway—Nature of the enquiry—Code of Criminal Procedure (Act V of 1898), ss. 139A, 540.*

In an enquiry under section 139A, Code of Criminal Procedure, the magistrate decided to allow cross-examination of the witnesses tendered in support of the denial of the existence of the public right to a pathway.

*Held* that the magistrate, in order that he might satisfy himself whether there was reliable evidence on behalf of the second party in support of the denial of the existence of the public right, might allow cross-examination of the witnesses adduced by the second party.

*Held*, also, that the enquiry being of a summary character, it was not intended that the first party should be required to adduce evidence to contradict the case sought to be made out by the second party.

*Held*, further, that there was nothing in section 139A, Code of Criminal Procedure, which could exclude the exercise of the court's powers under section 540 of the same Code.

RULE obtained by the second party.

There arose a dispute between the petitioners Pramaniks (second party) and Basak (first party) as to whether a lane was a public or private pathway. The second party alleged that the lane in dispute was a private pathway leading to their premises. But the first party alleged that it was a public pathway.

After some criminal proceedings between the parties, the Subdivisional Magistrate of Natore, on the application of the first party, issued a conditional order on the second party under section 133, Code of Criminal Procedure, calling upon them to remove the obstructions complained of or to show cause against this order.

\*Criminal Revision, No. 271 of 1930, against the order of S. N. Mukherji, Subdivisional Magistrate of Natore, dated Jan. 18, 1930.

1930

*Kishorimohan  
Pramanik  
v.  
Krishnabihari  
Basak.*

Thereafter, the second party prayed for a dismissal of the proceedings under section 133, Code of Criminal Procedure, on the ground that the lane in dispute was a part of their premises and was a private pathway belonging absolutely to them and used for entry into their houses and that the first party or anyone else had no right of easement thereto, and that they were entitled to an enquiry under section 139A, Code of Criminal Procedure. Thereupon the magistrate decided to hold an enquiry under the said section.

The second party then prayed that the enquiry under section 139A, Code of Criminal Procedure, might be held in strict compliance with the procedure laid down in Chapter X of the said Code, so that they (the second party) alone would have to adduce evidence in support of their denial of the existence of the public right. They also prayed that it was for them to satisfy the court whether the evidence adduced by them in support of such denial was reliable or not, and that the first party would neither be permitted to cross-examine the witnesses of the second party nor to adduce rebutting evidence of their own at that stage. The magistrate, however, rejected the second party's prayer holding that in an enquiry under section 139A, Code of Criminal Procedure, it was permissible to allow the first party to cross-examine the witnesses for the second party and adduce evidence on their behalf.

Thereupon the petitioners (second party) obtained the present Rule against the order of the magistrate.

*Narendrakumar Basu* (with him *Jatindramohan Chaudhuri*) for the petitioners (second party). Section 139A, Code of Criminal Procedure, only requires that the magistrate should satisfy himself if the evidence adduced by the second party in support of the denial of the existence of the public right is *primâ facie* reliable or not. He need not sift or test or weigh the evidence at this stage. Therefore,

the first party (opposite party) can neither intervene and cross-examine at this stage, nor can they adduce rebutting evidence of their own; otherwise the enquiry subsequently to be made under section 137, Criminal Procedure Code, would become supererogatory. *Thakur Sao v. Abdul Aziz* (1), *Ude Singh v. Mohamada* (2), *Manohar Singh v. King-Emperor* (3), *Matabbar Molla v. Golam Panjaton* (4).

1930  
 Kishorimohan  
 Pramanik  
 v.  
 Krishnabihari  
 Basak.

*Debendranarayan Bhattacharya* for the first party. Not only should cross-examination be permissible for the satisfaction of the magistrate as to the reliability or otherwise of the evidence adduced, but also rebutting evidence should be allowed to be given on behalf of the first party; otherwise when the witnesses for the second party will deny any suggestion made in cross-examination, how can the first party prove such suggestion.

C. C. GHOSE AND PATTERSON JJ. The point involved in this Rule is about the construction of section 139A of the Code of Criminal Procedure. The construction, to our minds, is reasonably clear. The second party, against whom the provisional order has been made, is to appear before the magistrate and to state what his case is; if he is inclined to deny the existence of the public right in question, he must say so. If he has denied the existence of the public right, he is to be required to produce reliable evidence in support of his denial and it is needless to add that such evidence should be legal evidence. The magistrate is to find whether there is reliable evidence in support of the second party's denial of the existence of the public right. Obviously in order that the magistrate may satisfy himself whether there is reliable evidence in support of the denial, he may allow cross-examination of the witnesses adduced by the second party in support of such denial. The enquiry being of a summary character, it is not intended that the first party should be required to adduce

(1) (1925) I. L. R. 4 Pat. 783.

(3) (1929) 27 A. L. J. 385.

(2) (1928) I. L. R. 10 Lah. 151.

(4) (1929) I. L. R. 57 Cal. 368.

1930

*Kishorimohan  
Pramanik  
v.  
Krishnabihari  
Basak.*

evidence to contradict the case sought to be made out by the second party. But it must be understood that there is nothing in section 139A which can exclude the exercise of the court's powers under section 540 of the Criminal Procedure Code. It is not necessary to discuss the cases which have been cited. With this intimation of our opinion, let the record be returned to the trying magistrate.

M. M.