

CRIMINAL REVISION.

Before Mukerji and Bartley JJ.

KUSHA MANDAL

v.

PRESIDENT, GOPALNAGAR UNION BOARD.*

1934

Jan. 9

Public Right—Which party should go to the civil court in cases of denial of public right—Code of Criminal Procedure (Act V of 1898), s. 139A.

The introduction of section 139A of the Code of Criminal Procedure in 1923 has altered the law with regard to proceedings under section 133. What has now to be considered is whether the denial of public right is supported by any reliable evidence. If it is, the magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent civil court. Under the law, as it is at present, it is the party moving for proceedings under section 133 or somebody interested in asserting such right, who has got to go to the civil court. The magistrate's order, directing the party denying such public right to go to the civil court, is not one which can any longer be made under the law.

Manipur Dey v. Bidhu Bhushan Sarkar (1) distinguished.

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The material facts of the case and the arguments on behalf of the petitioner appear from the judgment.

Beerbhushan Datta for the petitioner.

No one for the opposite party.

MUKERJI J. We are of opinion that this Rule should be made absolute. It appears that the order, which the learned Deputy Magistrate made on the 5th July, 1933, was an order intended to be made under section 139A, sub-section (2) of the Code. This provision of the law has been expressly referred to by the learned magistrate in his said order. Now,

*Criminal Revision, No. 1052 of 1933, against the order of K. C. Chunder, Sessions Judge of Bogra, dated Sept. 13, 1933, affirming the order of G. C. Mandal, Deputy Magistrate of Bogra, dated July 5, 1933.

what happened was that, on notice being served upon the petitioners, they denied that the alleged pathway was a public one and produced some evidence in support of such denial and the learned magistrate, referring to that evidence and also to the evidence of the party who had moved the court for proceedings under section 133 of the Code, came to the conclusion that it was not sufficiently established that there was a public pathway, with regard to which, proceedings under section 133 of the Code were necessary. He then made an order in the following terms:—

The witnesses of the second party stated that there was no such public path there and that the villagers of *Char Khukshiyâ* use another union board road to the west. The alleged path was not recorded in the settlement map. In such case I consider it desirable to stay proceedings under section 139A (2) of the Code of Criminal Procedure and refer the parties to the civil court for the decision of the matter. Accordingly, I stay proceedings until the matter of existence of any such public right is decided by the civil court. The second party should move the civil court for the assertion of his claim that there is no such public pathway over their lands.

The petitioners, who were the second party in the proceedings, did not move the civil court within a reasonable time, and, upon that, the magistrate, at the instance of the first party, took up the proceedings and began to proceed with them.

The learned magistrate, in his explanation in answer to this Rule, has sought to justify his action, stating thus:—

I found that the claim of the second party might not be a mere pretence and that the second party might be given a chance as enjoined under section 139A (2) of the Code of Criminal Procedure to establish their claim in the civil court.

The Sessions Judge has declined to interfere, holding that the course adopted by the magistrate is quite in accord with the decision of this Court in *Manipur Dey v. Bidhu Bhushan Sarkar* (1) and that although that decision was under the law as it stood prior to the amendments of 1923, the law in this respect has undergone no alteration by the said amendments.

We are of opinion the view taken by the courts below is not right. The law was in fact altered by

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the introduction of section 139A of the Code and the question whether the claim of the second party is *bona fide* or not or, in other words, is a mere pretence or not,—a question which, under the case-law prior to the amendments, was of vital importance, is no longer so. What has now to be considered is very different from what was necessary to be determined then. Under section 139A what has to be seen is whether the denial of public right by the second party is supported by any reliable evidence. If it is, the magistrate has to stay his hands until the matter of the existence of such right has been decided by a competent civil court. Under the law, as it is at present, it is the party moving for proceedings under section 133 or somebody interested in asserting such right, who has got to go to the civil court to establish its existence. The magistrate's order, directing the second party to go to the civil court, is not one which can any longer be made under the law.

What we have to see, therefore, is whether there was reliable evidence in support of the denial. We are satisfied, upon what the magistrate himself has said, that there was such evidence. In our judgment, therefore, the magistrate should have stayed his hands altogether until the right of the public which was set up on behalf of the first party was established in a competent civil court.

The Rule is, accordingly, made absolute. All proceedings taken subsequent to the order of the 5th July, 1933, are set aside, and it is further ordered that the said order be regarded as one passed under section 139A (2) of the Code.

BARTLEY J. I agree.

Rule absolute.

A. C. R. C.