

CRIMINAL REVISION.

Before Pearson and Mallik JJ.

MATABBAR MOLLA

v

GOLAM PANJATON.*

1929

April 12.

Procedure—Provision of s. 139A of the Code of Criminal Procedure, if mandatory—Proceedings when to be stayed—Public right, question as to the existence of—Code of Criminal Procedure (Act V of 1898), s. 139A.

The provisions of section 139A of the Code of Criminal Procedure are mandatory.

When a person on receipt of the notice of proceedings under section 133 of the Code of Criminal Procedure appears in court, the first duty of the magistrate is to question him whether he denies the existence of public right in respect of the pathway alleged to have been obstructed.

Where in a case the order of the magistrate showed that there was some evidence before him, which he nowhere said was unreliable, to indicate that the path was a private path,

held that it was incumbent on him to stay his hand immediately, until the matter of the existence of public right was decided by a competent civil court.

RULE obtained by Matabbar Molla, accused.

On the 28th August, 1928, one Sheikh Golam Panjaton and others preferred a complaint in the Court of the Subdivisional Officer of Katwa, alleging *inter alia* that Matabbar Molla and one Alijan had obstructed a village lane by raising some mud platforms in the same, adjoining Matabbar's *morais*, and by placing some blocks of wood there. The Subdivisional Officer then gave orders to Matabbar and Alijan to show cause why they should not be criminally prosecuted. On the 17th September, they showed cause and stated that the lane was their private pathway and the public had no right to pass that side. Subsequently a proceeding under section 133 of the Code of Criminal Procedure was drawn up with Matabbar and Alijan as the second party. Both sides adduced evidence on the question as to whether the lane was a

* Criminal Revision. No. 372 of 1929, against the order of Maulvi Ali Asghar, Magistrate of Katwa, dated Jan. 8, 1929.

private pathway or a public lane. The learned Magistrate held that the lane was not a private pathway, although in the judgment he nowhere said that the evidence of the second party was unreliable. By his order, dated the 8th January, 1929, he directed Matabbar Molla to remove the mud platforms adjoining his *morais*. The petitioner, thereupon, obtained the present Rule.

Mr. Panchanan Chaudhuri, for the petitioner.

Mr. Manindrakumar Basu, for the opposite party.

PEARSON AND MALLIK J.J. This Rule is directed against an order whereby a conditional order under section 133 of the Code of Criminal Procedure was made absolute. The Rule was issued on ground No. 2 alone of the petition and that ground was that the procedure as laid down under sections 139 A and 137 of the Code of Criminal Procedure had not been followed. It appears that a notice was at first served on the petitioner to show cause why he should not be prosecuted under section 283 of the Indian Penal Code and the petitioner, on the notice being served on him, appeared and showed cause. Thereupon, proceedings were drawn up against him under section 133 of the Code and, when the petitioner appeared and showed cause by saying that his objection was the same as contained in his first petition, the learned Magistrate proceeded to enquire into the matter whether there had been any obstruction and, having come to the finding that there had been an obstruction, made the conditional order absolute. The procedure followed by the learned Magistrate was, in our opinion clearly wrong in law. When the petitioner, on receipt of the notice of the proceedings under section 133, appeared in court, the first duty of the Magistrate was to question him whether the petitioner denied the existence of public right in respect of the pathway alleged to have been obstructed. This the Magistrate did not do and he proceeded, as stated before, to enquire into the matter whether there had been any obstruction. The order of the learned

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Magistrate shows that there was some evidence before him—evidence which he nowhere said was unreliable—to indicate that the path was a private path. If the Magistrate had before him any evidence of this nature, it was, under the provisions of section 139A of the Code of Criminal Procedure, incumbent on him to stay his hand immediately, until the matter of the existence of public right was decided by a competent civil court. This again the learned Magistrate did not do in the present case.

We are, therefore, of opinion that the order of the learned Magistrate cannot be sustained. The Rule is, accordingly, made absolute. The order passed by the Magistrate, making the conditional order under section 133 of the Code of Criminal Procedure absolute, is set aside and it is directed that he do proceed with the proceedings which he started under section 133 in accordance with law, after complying with the mandatory provisions of section 139 A of the Code.

A.C.R.C.

Rule absolute.