

our judgment the view expressed in the earlier Allahabad case, viz., *Parsotam Rao v. Janki Bai* (1) previously cited, is to be preferred to the later case. The view that an order passed under order XXII, rule 5 does not operate as *res judicata* is supported by abundant authority in other High Courts and that being so we hold that the order passed by the learned Subordinate Judge of Ghazipur in appeal No. 2 of 1918 does not operate as a bar to the present contention of the defendants.

For the reasons which we have given above we are satisfied that Gendu Rai was not a brother of Nihal Rai and therefore that the plaintiffs were not related to Gopal Rai in the manner suggested by them. Further we are satisfied that Gendu Rai, the ancestor of Gopal Rai deceased, belonged to an entirely different branch of the family which included the present appellants. In our judgment the learned Subordinate Judge was not justified in coming to the conclusion to which he did and that being so his decision cannot stand. In our judgment the defendants have established their right to this property and that being so the plaintiffs have no claim whatsoever to it and their claim should have been dismissed.

In the result, therefore, we allow this appeal and set aside the decree of the learned Subordinate Judge and dismiss the plaintiffs' claim.

REVISIONAL CRIMINAL

Before Mr. Justice Allsop

EMPEROR *v.* MUHAMMAD KHALIL*

*Criminal Procedure Code, section 139A—Scope of inquiry—
Summary inquiry whether denial of the public right is
frivolous or otherwise—Final decision of question of title
not aimed at.*

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(1) (1905) I.L.R., 28 All., 109.

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The duty of a Magistrate under section 139A of the Criminal Procedure Code is merely to see whether the denial of the public right is frivolous or not. If the person who denies that right is able to produce some evidence which *prima facie* there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision as to whether the land is or is not public land. Questions of title of this kind are obviously not intended to be decided in summary inquiries before a Magistrate; these are matters which should be left to the decision of the civil court.

Mr. *Saila Nath Mukerji*, for the applicant.

Mr. *Mukhtar Ahmad*, for the opposite party.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

ALLSOP, J.:—This is a reference by the learned Sessions Judge of Azamgarh recommending that an order passed by a Magistrate under the provisions of section 133 of the Code of Criminal Procedure should be set aside in revision. An application was made to the Magistrate that one Muhammad Khalil had gathered materials for building a house on a public place used by the public for recreation in the town of Mau. The Magistrate issued a provisional order under section 133 of the Code of Criminal Procedure. Muhammad Khalil then appeared and denied that the place was a public place at all. He said that the land was his own and that he had bought it from the zamindar. The Magistrate purported then to hold an inquiry under section 139A of the Code of Criminal Procedure. Muhammad Khalil produced the karinda of the zamindar and proved that he had bought the land.

It may be that the Magistrate is right in thinking that Muhammad Khalil had no right whatsoever to this land and that the land was really the property of the public or that the public was entitled to use it, but it seems to me that the learned Magistrate has misdirected himself by thinking that it was his business in an inquiry under section 139A of the Code of Criminal Procedure

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to decide whether Muhammad Khalil had established that the land was not public land. It is obvious that questions of title of this kind are not intended to be decided in summary inquiries before a Magistrate. These are matters which should be left to the decision of the civil court where the case can be properly fought out. The duty of a Magistrate under section 139A of the Code of Criminal Procedure as I understand it is merely to see whether the denial of the public right is frivolous or not. If the person who denies that right is able to produce some evidence which *prima facie* there is no reason to disbelieve, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision. There does not appear any *prima facie* reason for thinking that the witnesses produced by Muhammad Khalil were absolutely unworthy of belief.

I set aside the order by which the learned Magistrate confirmed his provisional order under section 133 of the Code of Criminal Procedure and direct that proceedings shall be stayed until the matter of the existence of the public right shall be decided by a competent civil court.