REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Raza.

BISHNATH SINGH, BABU (DEFENDANT-APPLICANT) *v.* KHURSHED AHMAD AND OTHERS (COMPLAINANTS-OPPOSITE PARTY).* 1931 December, 22.

Criminal Procedure Code (Act V of 1898), as amended by the Act of 1923, section 139—Complaint under Chapter 10—Defendant denying the existence of a public right of way—Reliable evidence produced by defendant—Magistrate's duty to refer the parties to a civil court and to stay proceedings.

Where in a case under Chapter 10 of the Code of Criminal Procedure the defendant denies the existence of a public right of way and it is impossible to say that there is no reliable evidence in support of his denial and that the claim put forward by the defendant is not a *bona fide* one, the Magistrate should not proceed to decide intricate questions of title and easement but should stay proceedings and ought to leave the matter to be decided by a civil court as required by section 139A(2) of the Code of Criminal Procedure. *Manipur Dey* v. *Bidhu Bhushan Sarkar* (1), *Munna Lal* v. *Emperor* (2), *Thakur Sao* v. *Abdul Aziz* (3), *Nur Ali Shah* v. *Naththa* (4), *Hari Kishna* v. *Malik Kanshi Ram* (5), and *Satish Chandra Sen* v. *Krishna Kumar Das* (6), referred to.

Messrs. *Bishambhar Nath* and *Al-i-Raza*, for the applicant.

Mr. *Hyder Husain*, for the opposite party.

RAZA, J. :—This is an application in revision from an order of the Sessions Judge of Fyzabad upholding an order passed by Mr. Dwarka Prasad Singh, 1st class Magistrate, District Sultanpur, in a case under Chapter X (sections 133—143) of the Code of Criminal Procedure.

The dispute in this case relates to a public right in respect of a way, the existence of which is denied by the

*Criminal Revision No. 116 of 1931, against the order of Pandit Shyam Manohar Nath Shargha, Sessions Judge of Fyzabad, dated the 17th of September, 1931.

(1) (1914) I.L.R., 42 Calc., 158. (2) (1926) 24 A.L.J., 361.
(3) (1925) I.L.R., 4 Pat., 783. (4) (1927) 28 Cr.L.J., 247.
(5) (1928) A.I.R., Lah., 664. (6) (1931) A.I.R., Calc., 2.

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opposite party. I have read the orders of the lower courts.

While I appreciate the care and intelligence with which the learned Magistrate has tried this case, I am not prepared to uphold his order, in view of the provisions of section 139A of the Code of Criminal Procedure. In my opinion the learned Magistrate should have stayed proceedings until the matter of the existence of the right in question had been decided by a competent civil court. Section 139A was added by section 26 of the Criminal Procedure Code Amendment Act of 1923, in view of the following observations made by their Lordships of the Calcutta High Court in the case of *Manipur Dey* v. *Bidhu Bhushan Sarkar* (1) :—

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> "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 path-way is not a public property in the sense of the provisions of this section, the Magistrate trying the case should be careful not only to decide as to whether the path-way 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 *bona 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 *bona fide*,

(1) (1914) I.L.R., 42 Calc., 158 (162).

he should stay his hands 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."

The following observations were made by SULAIMAN, J., in the case of *Munna Lal* v. *Emperor* (1) :— *Raza, J.*

"That section (section 139A) provides that when an order is made under section 133 of the Code of Criminal Procedure, the Magistrate shall, on the appearance before him of the person against whom the order is made, question him as to whether he denies the existence of any public right, etc. Then sub-clause (2) provides that if in such inquiry the Magistrate finds that there is any reliable evidence in support of the denial, he shall stay proceedings until the matter of existence of such right has been decided by a competent civil court, but if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138. This section is imperative. It does not authorize a Magistrate to look into the question of title and decide for himself whether the accused's case is or is not true.

All that the Magistrate is to see is whether there is any reliable evidence in support of such denial. If there is some reliable evidence in support of the denial, then the proceedings under the Code have to be stayed."

The question was considered by their Lordships of the Patna High Court in *Thakur Sao* v. *Abdul Aziz* (2). It was held "that the procedure laid down in section 139A of the Criminal Procedure Code, 1898, requires first that the party against whom a provisional order has been made shall appear before the Magistrate and deny the existence of the public right in question; and,

(1) (1926) 24 A.L.J., 361 (363). (2) (1925) I.L.R., 4 Pat., 783.

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secondly that he shall produce some reliable evidence; and, thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction to continue the proceedings ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans. Section 139A(2) requires only evidence and not proof, and the only condition requisite to enable the Magistrate to stay the proceedings is that upon the materials before him he shall have no reason to think the evidence false."

In *Nur Ali Shah* v. *Naththa* (1) it was held that "where in proceedings for removal of obstruction of a public way under section 133, Criminal Procedure Code, the party obstructing the way denies the existence of any public right in respect of the way and is supported by the revenue records in his denial, the Magistrate is bound to stay the proceedings under section 139A of the Code of Criminal Procedure till the matter is decided by a competent civil court."

In *Hari Kishna* v. *Malik Kanshi Ram* (2) it was held that "where a right of public way is denied and the person denying as well as the person complaining produces evidence the Magistrate should take the evidence as it stands and see whether, on the face of it, if there was no evidence to the contrary, he could come to the conclusion that the evidence was false and was therefore unreliable. It is not a correct procedure that he should weigh the evidence produced by both sides and then come to the conclusion which he believes or which he prefers."

It was held recently in the case of *Satish Chandra Sen* v. *Krishna Kumar Das* (3) that "the record of rights is a very valuable piece of evidence which raises the presumption of correctness of the entries therein; and if it happens to be in favour of a second party

(1) (1927) 28 Cr.L.J., 247. (2) (1928) A.I.R., Lah., 664.
(3) (1931) A.I.R., Calc., 2.

the Magistrate is perfectly justified in considering it as 'reliable evidence' in support of the denial. The object with which this section 139A is enacted is to prevent the Magistrate in inquiring into the matters under Chapter X arrogating to himself the functions of a civil court and instituting an elaborate inquiry with regard to the rights of the parties; and all that the Magistrate has to do is to inquire into the matter of the existence of a public right and if it appears that there is reliable evidence in support of the denial by the second party, he shall stay proceedings. He has no option in the matter and he is not bound to wait till he has examined all the witnesses produced by the parties unless for the purpose of the inquiry."

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The defendant in this case has produced copies of the old and the recent settlement maps and also the current village papers. The way in dispute has not been shown in these papers. His denial of the existence of any public right in respect of the way is supported by revenue records. He has also produced some 15 witnesses in support of his defence. The learned trying Magistrate was not satisfied with all this evidence produced by the defendant. He preferred the oral evidence produced by the applicants to the oral and documentary evidence produced by the defendant. In my opinion he should not have weighed the evidence produced by both parties in the way in which he has done in this case. The evidence which the defendant has produced in support of his denial appears to me to be "reliable evidence."

The learned Magistrate should have referred the party to the civil court as required by section 139A(2) of the Code of Criminal Procedure. In my opinion it is impossible to say in the present case that there was no *bona fide* claim put forward by the defendant or that there was no reliable evidence in support of his denial. The learned Magistrate should not have proceeded to

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decide intricate questions of title and easement and ought to have left the matter to be decided by the civil court.

I am therefore of opinion that the proceedings in this case should be stayed until the matter of existence of the right in question has been decided by a competent civil court. The order of the learned Magistrate is set aside and he is directed to proceed according to law. The proceedings in this case should be stayed until the matter of the existence of the right in question has been decided by a competent civil court.

Raza, J.

Case remanded.

APPELLATE CIVIL.

Before Sir Syed Wazir Hasan, Knight, Chief Judge and Mr. Justice Bisheshwar Nath Srivastava.

1932 *January*, 15.

MOHAMMAD SADIQ ALI KHAN, NAWAB MIRZA, (DEFENDANT-APPELLANT) *v.* SAIYID ALI ABBAS (PLAINTIFF) AND OTHERS (DEFENDANTS-RESPONDENTS).*

Court Fees Act (VII of 1870), *sections* 13, 14 *and* 15— *Appeal unnecessary—No proceedings held except admission of appeal—Court, whether can order refund of court-fee— Refund of court-fee, whether can be allowed in a case not falling within section* 13, 14 *or* 15 *of the Court Fees Act.*

Held, that the court has jurisdiction to order a refund of court-fee even in cases which do not fall within section 13, 14 or 15 of the Court Fees Act.

In a case where the court is satisfied that the appeal was wholly unnecessary and no proceedings except the admission of the appeal have taken place in respect thereof the court can order that a certificate for the refund of the court-fee be issued in favour of the appellant. *In the matter of Mr. G. H. Grant* (1), *Bhuneshwari Prasad Singh* v. *Kishen Dayal* (2), *C. T. A. M. Chettyar Firm* v. *Ko Hin Gyi* (3), *Prabha Kar Bhat* v. *Vishwam Bhar* (4), *Vishweshwar Sarma* v. *T. M. Nair* (5), and *Raja Seth Swami Dayal* v. *Raja Muhammad Sher Khan* (6), referred. to.

*First Civil Appeal No. 107 of 1931, against the decree of Babu Gulab Chand Srimal, Subordinate Judge of Lucknow, dated the 31st of July, 1931.

(1) (1870) 14 W.R., 47.
(2) (1912) I.L.R., 40 Calc., 365.
(3) (1929) I.L.R., 7 Rang., 88.
(4) (1884) I.L.R., 8 Bom., 313.
(5) (1911) I.L.R., 35 Mad., 567.
(6) (1923) 11 O.L.J., 148.