REVISIONAL CRIMINAL.

Before Mullick and Ross, J.J.

THAKUR SAO

v.

ABDUL AZIZ.*

1925.

May, 7.

Code of Criminal Procedure, 1898 (*Act V of* 1898), *section* 139A—*Reliable evidence in support of denial of public right—Magistrate's jurisdiction, whether ousted—section* 139A, *scope of.*

The procedure laid down in section 139A of the Code of Criminal Procedure, 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; 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 proceeding ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans.

Section 139A(2), however, requires only evidence and not proof, and the only condition requisite to enable the Magistrate to stay the proceeding is that upon the materials before him he shall have no reason to think the evidence false.

Per ROSS, J.—"The intent of section 139A(2) is that the Magistrate should neither encroach upon the jurisdiction of the Civil Court which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence supporting the denial, which he can pronounce reliable. That is necessary and it is sufficient to oust his jurisdiction."

The facts of the case material to this report were as follows:—

A dispute having arisen between the Hindus and Muhammadans residing within the cantonment of

* Criminal Revision Cases nos. 58 and 59 of 1925, from an order of G. E. Owen, Esq., I.C.S., District Magistrate of Patna, affirming an order of T. A. Freston, Esq., Subdivisional Magistrate of Dinapore, dated the 14th January, 1925.

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Dinapore regarding the use of a *ghat* on the river Sone, the Subdivisional Magistrate of Dinapore, on the 14th January, 1925, issued two orders which formed the subject of the present applications.

One of those orders declared the *ghat* to be public and purported to have been made under section 139A, Code of Criminal Procedure. The Magistrate had issued a notice under section 133 of the Code calling upon Deonarain Pande, the priest of the temples at the *ghat*, to show cause why he should not remove certain enclosures and a sign board indicating that the *ghat* was private property. The other order was made under section 144 of the Code and prohibited six of the leading Hindus from restraining the Muhammadans from using the *ghat*.

It appeared that the bank down to the water was the property of Government and that 40 to 60 years ago a Hindu resident of the locality obtained permission to erect two or three temples on the bank and to construct a flight of steps for the use of bathers. The case of the Hindus was that they have acquired an exclusive right to use the steps and that the Muhammadans were not entitled to use the same as of right.

When the learned Magistrate proceeded to hold an inquiry under section 139A of the Criminal Procedure Code as to Deonarain's claim that the *ghat* was private property and as to his denial that there existed any public right in respect thereof, he took the evidence of five Hindus and of a number of Muhammadans, and the conclusion to which he came was that the Hindu witnesses though reliable were mistaken in imagining that there was no public right. He accordingly passed an order in favour of the Muhammadans.

K. B. Dutt (with him *S. P. Varma*, *Manohar Lall* and *S. N. Sahay*), for the petitioners: The Magistrate has no jurisdiction to weigh the evidence

under section 139A, Criminal Procedure Code. He has only to see whether the claim is *bonâ fide* or otherwise. It may be that the Civil Court may not finally consider the evidence adduced by the claimant as sufficient to establish the existence of a private right. The finding rests with the Civil Court and not with the Magistrate. *Manipur Dey* v. *Bidhu Bhusan Sarkar*(1) lays down that the Magistrate is competent only to enquire into a claim relating to title and if on such enquiry he finds the claim to be *bonâ fide* he is bound to stay the proceedings until the existence of such right has been decided by a competent court. The legislature, in enacting the present section, has given legislative recognition to the decision in *Manipur Dey* v. *Bidhu Bhusan Sarkar*(1). As soon as the Magistrate found that the witnesses supporting the denial were reliable, he should have stayed his hands as his jurisdiction to proceed further in the matter was ousted forthwith. "Reliable evidence" means evidence given by reliable persons. In the present case there was such evidence and the Magistrate had no option left but to refer the parties to the civil court.

Sultan Ahmed (with him *Hasan Jan*, *A. H. Fakhruddin* and *Ahmad Raza*) for the opposite party: Under section 139A(2) the point turns upon the question whether there is any reliable evidence in support of the denial. The witnesses may be quite reliable but, nevertheless, the evidence may not be reliable. It is the Magistrate who is to decide whether the evidence is such as is contemplated by section 139A(2). The insertion of the word "finds" in that section is significant. The Magistrate is entitled to say that the evidence is not satisfactory. If the intention of the legislature had been otherwise the language of the section would have been "if there *be* any reliable evidence". It is on account of the

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decision in *Manipur Dey* v. *Bidhu Bhusan Sarkar*(1) that the old law has been amended. The present law goes further than the old law as explained in that case.

S. A. K.

MULLICK, J. (after stating the facts set out above, proceeded as follows): It is contended that the law does not give the Magistrate the power to find whether in fact the denial referred to in section 139A of the Code of Criminal Procedure is true or false and that as soon as a *bonâ fide* dispute has been made out, the Magistrate must hold his hand and refer the parties to the civil court. The law, previous to the amendment in 1923, as expounded in judicial decisions, was that as soon as the party cited appeared before him the Magistrate's first duty in a case under section 133 of the Code was to determine whether any public right existed. If the party denied that there was any public right, the Magistrate had to determine whether that denial was *bonâ fide* or a mere pretence. Only when he was satisfied that it was a pretence could he proceed to make the order absolute. If, however, he found that the denial was *bonâ fide*, his jurisdiction was ousted and he had no authority to inquire further.

Now section 139A of the present Code appears merely to have confirmed this view of the law and given statutory expression to it. The section provides:

> "If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138 as the case may require."

The law, therefore, requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question. Secondly

(1) (1915) I. L. R. 42 Cal. 158.

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 ceases to exist.

MULLICK, J.

Now it is contended that the Magistrate is entitled to demand that the evidence shall be sufficient to satisfy him that no public right exists. The section, however, requires evidence and not proof and the only condition is that upon the materials before him the Magistrate shall have no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans.

Here there was evidence which, if believed, supported the claim made by the petitioner. It is not disputed that the witnesses are thoroughly honest in what they say; but the Magistrate says that they are mistaken in thinking that the *ghat* is not public. That is a matter for the Civil Court and, in my opinion, the Magistrate had no jurisdiction to inquire any further into the actual existence of the public right claimed by the Muhammadans.

In this view of the case the order of the learned Magistrate of the 14th January, 1925, will be set aside and he will be directed to stay all further proceedings in the case. The order under section 144 has spent its force and no orders are required in respect of it.

ROSS, J.—I agree. It seems to me that the intent of section 139A (*2*) is that the Magistrate should neither encroach on the jurisdiction of the Civil Court which alone can determine the existence of such a public right as is referred to, nor fail to exercise his own jurisdiction. The criterion is that he should find evidence supporting the denial which he can pronounce reliable. That is necessary and it is sufficient to oust his jurisdiction.