

CRIMINAL REFERENCE.

Before Jwala Prasad, J.

JAGROSHAN BHARTHI

v.

MADAN PANDE.*

1926.

Dec. 1.

Code of Criminal Procedure, 1898 (Act V of 1898), section 133—Nuisance—conditional order—matter referred to another Magistrate for disposal—Encroachment on public road—discharge of conditional order illegal.

The Magistrate who passes a conditional order under section 133 of the Code of Criminal Procedure, 1898, may refer the matter to another Magistrate for disposal.

Manipur Dey v. Bidhu Bhusan Sarkar (1), *Queen-Empress v. Bissessur Sahu* (2), *Preonath Dey v. Gobordhone Malo* (3) and *Narasinha, In re* (4), followed.

Chandrika Koeri v. Budhu Dusadh (5), referred to.

Where it is found that an encroachment has in fact been made upon a public road, a conditional order under section 133 must be made absolute. To discharge the conditional order in such a case on the ground that the encroachment causes no inconvenience is illegal.

Municipal Commissioner of Calcutta v. Mahomed Ali (6) and *Preonath Dey v. Gobordhone Malo* (3) referred to.

The facts of the case material to this report are stated in the order of Jwala Prasad, J.

JWALA PRASAD, J.—This is a reference under section 438 of the Code of Criminal Procedure by the Sessions Judge of Saran, recommending that the order passed by Babu Sheonandan Prasad, Deputy Magistrate, dropping the proceedings and discharging the

* Criminal Reference no. 73 of 1926, by A. N. Mitter, Esqr., Rai Bahadur, Sessions Judge of Saran, dated the 1st October, 1926, recommending that the order passed by Babu Sheonandan Prasad, Deputy Magistrate of Chapra, dated the 25th August, 1926, be set aside.

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

(4) (1886) I. L. R. 9 Mad. 201.

(2) (1890) I. L. R. 17 Cal. 562.

(5) (1923) 73 Ind. Cas. 802.

(3) (1898) I. L. R. 25 Cal. 278.

(6) (1873) 7 B. L. R. 490.

rule issued under section 133 of the Code of Criminal Procedure against the 2nd party be set aside and the case be heard according to law. The ground urged in support of the reference is that Babu Sheonandan Prasad to whom the case was made over by the Sub-Divisional Officer for disposal was not competent to pass the final order in the case and that he should have sent back the record to the Subdivisional Officer, after recording the evidence, for passing final order. The second ground urged is that the said Magistrate having found that there was some encroachment on the public road in question he was wrong in holding that there was no nuisance committed such as is contemplated by section 133 of the Code.

The first ground is not tenable. The learned Sessions Judge says that the Magistrate who issues a conditional rule under section 133 of the Code of Criminal Procedure is alone competent to make the rule absolute upon the evidence recorded and report submitted to him by another Magistrate to whom he had referred the matter under the last paragraph of clause (1) of section 133 of the Code and for this he relies upon *Chandrika Keori v. Budhu Dusadh* (1). That case does not lay down that the Magistrate before whom the person against whom the conditional order is passed is directed to appear and show cause is not competent to dispose of the matter upon the inquiry held by him; vide *In re Narasinha* (2), *Preonath Dey v. Gobordhone Malo* (3) and *Venkanna* (4). Babu Sheonandan Prasad, in his decision, dated the 25th August 1926, makes a distinction between an order made by the Magistrate issuing a conditional rule and directing the petitioner to appear before himself or some other Magistrate and to move to have the order set aside or modified. He says that whereas the Subdivisional Magistrate who issued the conditional rule was competent to direct in that rule that the person against whom the order was made should

1926.

JAGROSHAN
BHARTHI
2.
MADAN
PANDE.

JWALA
PRASAD, J.

(1) (1923) 73 Ind. Cas. 802.

(3) (1898) I. L. R. 25 Cal. 278.

(2) (1886) I. L. R. 9 Mad. 201.

(4) (1899) 2 Weir, 61.

1926.

JAGROSHAN
BHARTHI
v.
MADAN
PANDE.

JWALA
PRASAD, J.

appear before him (Babu Sheonandan Prasad), the Subdivisional Officer not having done so and having directed the person complained against to appear before himself, he was not competent afterwards to make over the case to him (Babu Sheonandan Prasad) for disposal. In the present case the person against whom the conditional order was passed before the 7th June by the Subdivisional Officer showed cause and did not claim a jury under section 135, clause (p), of the Code of Criminal Procedure. The Subdivisional Officer directed the parties to adduce evidence and fixed the 26th of June. On the 7th July the Subdivisional Officer made over the case "to Babu S. N. Prasad for favour of disposal". Babu Sheonandan Prasad took evidence and disposed of the case by discharging the rule under section 137, clause (2), of the Code. He also held that the reference to him for disposal was irregular and that the Subdivisional Officer who issued the conditional order under section 133 and directed the petitioner to appear before himself should have himself disposed of the matter. In this view the Magistrate is wrong. There is nothing in the Code to prevent the Subdivisional Officer who made the conditional rule under section 133 from referring the matter to another Magistrate subordinate to him for disposal. This view is supported by the following cases: *Manipur Dey v. Bidhu Bhushan Sarkar* (1), *Queen-Empress v. Bissessur Sahu* (2) and *Preonath Dey v. Gobordhone Malo* (3). It is only when the person against whom the notice is issued appears and demands a jury under section 135 that the matter must be disposed of by the Magistrate issuing the conditional rule, and not by any other Magistrate to whom the case might have been referred for inquiry. In my opinion, Babu Sheonandan Prasad was competent to dispose of the rule and pass final order upon the inquiry made and the evidence taken by him.

(1) (1915) I. L. R. 42 Cal. 158. (2) (1890) I. L. R. 17 Cal. 562.

(3) (1898) I. L. R. 25 Cal. 278.

The first ground urged by the learned Sessions Judge, therefore, must fail.

The second ground however, is substantial. In the present case Babu Sheonandan Prasad came to the finding that there was encroachment upon the public road but he refused to make the conditional rule absolute upon the ground that it did not cause any inconvenience. Encroachment upon a public road such as the one in the present case as is obvious from the map made by the Amin is an obstruction to the public path and is a nuisance in itself under section 268 of the Indian Penal Code. No length of user can justify an encroachment upon a public way. The question of a sufficient width of the road being left in support of the encroachment for public use is no ground for allowing the encroachment or obstruction to continue. The public has a right to the use of every inch of the public path or way and nobody has a right to encroach upon any portion of it: *Municipal Commissioners of Calcutta v. Mahomed Ali* (1) as pointed out in the case of *Preonath Dey v. Gobordhone Malo* (2). Therefore, the order of Babu Sheonandan Prasad is illegal and must be set aside. The case must be sent back to the Subdivisional Officer for holding a fresh inquiry into the matter and dispose of it in accordance with law.

Another error committed in the course of the inquiry by Babu Sheonandan Prasad was the omission to come to a finding whether the claim made by the opposite party was bona fide or not. The question of possession is relevant for the purpose of finding out whether the claim is bona fide or not. If the claim is held to be bona fide then the rule must be discharged. If it is held to be not bona fide and if there be encroachment upon the public path the rule must be made absolute. This is the procedure laid down in the aforesaid decision.

The reference is, therefore, accepted.

1926.

JAGROSHAN
BHARTI
v.
MADAN
PANDE.

JWALA
PRASAD, J.

(1) (1871) 7 Ben. L. R. 499.

(2) (1898) I. L. R. 25 Cal. 278.