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which interest is to be calculated after the Court has decided the rate of interest that should be decreed in the particular case before it. The Court decides the rate of interest recoverable not by virtue of its powers under the Code of Civil Procedure but by virtue of the provisions of those existing Indian laws which have been referred to by me above.

With the wisdom of this Act this Court is in no sense concerned. A Court of law has nothing to do with a Provincial or a Federal Act lawfully passed except to give it effect according to its tenor. With the wisdom or expediency or policy of an Act lawfully passed no Court has a word to say. All, therefore, that I can consider and have considered in the arguments under review is whether it is proved that this provision in the Act is within the authority of the Provincial Legislature and if so whether it conflicts with any existing Indian Law.

Having given this case my most anxious consideration, I come clearly to the conclusion that the provisions of section 11 of the Act though *intra vires* of the Bihar Legislature cannot be applied in favour of the appellant in this appeal. I would, therefore, dismiss this appeal with costs.

S. A. K. *Appeal dismissed.*

REVISIONAL CRIMINAL.

Before Khaja Mohamad Noor and Varma, JJ.

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August, 12.

HARNANDAN LAL

v.

RAMPALAK MAHTO.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 133 *and* 139-*A*—*Penal Code*, 1860 (*Act XLV of* 1860), *section* 12—"*public*", *meaning of*—*right of cultivators to irrigate, whether is a* '*public*' *right.*

* Criminal Revision no. 413 of 1938, from an order of Maulavi S. Ahmad, Magistrate, First Class, Patna, dated the 28th March, 1938.

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The word "public" is not defined in the Code of Criminal Procedure, but for the purpose of the Code the definition given in the Penal Code is to be adopted.

Section 12 of the Penal Code says that "public" includes any class of the public or any community. This definition is inclusive and does not define the word "public". It only says that class of public or community is included within the term "public".

A class or community residing in a particular locality may come within the term "public". The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class.

Where some cultivators claimed the right to use a certain channel to bring water from a reservior for irrigating their fields and contended that this was a public right within section 133 of the Code of Criminal Procedure, *held*, this was a private right and not a public one.

Per Verma, J.—A public right does not depend on the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public.

Queen-Empress v. *Jasodanand*(1), *Emperor* v. *Bharosa Pathak*(2), *Munna Tiwari* v. *Chandrabali*(3) and *Emperor* v. *Raghunandan Prasad*(4), considered.

Budha v. *Mohan Lal*(5), distinguished.

Application in revision.

The case was heard in the first instance by Varma, J. who referred it to the Division Bench by the following order:

"Let this case be placed before the Division Bench for hearing as I understand there is no decision of the Patna High Court on this point."

(1) (1898) I. L. R. 20 All. 501.
(2) (1912) I. L. R. 34 All. 345.
(3) (1928) I. L. R. 50 All. 871.
(4) (1931) I. L. R. 53 All. 706.
(5) (1912) 16 Ind. Cas. 162.

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On this reference

Brahmdeva Narain, for the petitioner.

W. H. Akbari and *R. J. Bahadur*, for the opposite party.

KHAJA MOHAMAD NOOR, J.—This is an application in revision against an order of a first class magistrate staying under section 139-A of the Code of Criminal Procedure a proceeding under section 133 of the Code after taking evidence contemplated by the former section.

It appears that the petitioner filed before the Subdivisional Magistrate of Patna a complaint alleging that the opposite party had obstructed a public water channel. The opposite party appeared before the Magistrate and one of them (opposite party no. 1) at any rate denied the obstruction and further contended that the right claimed by the petitioner was not a public right. The case was made over to the learned Magistrate whose order is in revision before us. He took some evidence. One witness was examined on behalf of the opposite party, and thereupon the learned Magistrate stayed the proceeding or, in other words, dropped it holding that the right claimed by the petitioner was not a public right.

There was an unsuccessful application before the learned Sessions Judge and then the matter has come up before this Court in revision.

It is contended on behalf of the petitioner that the right involved was a public right and therefore the proceeding ought not to have been dropped. It is not disputed that the right claimed by the petitioner in the channel in dispute is a right to bring through it water from a certain reservoir for the irrigation of the fields of the cultivators including himself. According to the only evidence on the record, the village Poonawan where the channel is situated, contains 200 houses of which 60 are cultivators and some

of these 60 use the channel for bringing water from the reservoir for the irrigation of their lands.

The question for consideration is whether this right of cultivators of using the channel for the purpose of irrigation can be said to be a public right within the meaning of section 133 of the Code of Criminal Procedure or, in other words, about 60 cultivators can be said to be public. As the learned Sessions Judge has pointed out, the word " public " is not defined in the Code of Criminal Procedure; but for the purposes of the Code the definition given in the Penal Code is to be adopted. Section 12 of the Indian Penal Code says that " public " includes any class of the public or any community. This definition is inclusive and does not define the word " public ". It only says that class of public or community is included within the term " public ".

It must be conceded that the learned Magistrate has gone a bit too far when he says that—

" it (public) evidently means the class or community throughout the world."

A class or community residing in a particular locality may come within the term " public ". The question is whether the cultivators who use the channel form a class or community. That obviously is not necessary. The learned Sessions Judge has relied upon *Munni Tiwari* v. *Chandrabali*(1) where Dalal, J. held the right to be of a private nature and not a public right. In *Emperor* v. *Bharosa Pathak*(2), where a certain act was likely to cause damage to the inhabitants of two villages, Tudball, J. held that the right of passage was a public right. The question has to be decided on the facts of the case. There may be a case where there cannot be any doubt that the right claimed is a public right. On the other hand, there may be a case in which there cannot be any doubt that the right claimed is a private one. There may, however, be a

(1) (1928) I. L. R. 50 All. 871.
(2) (1912) I. L. R. 34 All. 345.

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case in which it may be arguable whether the right claimed is or is not a public right. The number of persons claiming the right and the nature of right itself will no doubt be the criteria on which conclusions may be arrived. The best criterion will be to see whether the right is vested in such a large number of persons as to make them unascertainable and to make them a community or class. Judging from this point of view, I have no hesitation in holding that though, as I have said, the learned Magistrate has gone far, he was perfectly right in holding that the right claimed was a private right vested only in a selected number of persons who claim to irrigate their fields from this channel; and his order, in my opinion, was perfectly correct.

The learned Advocate for the petitioner has further contended that the learned Magistrate was not justified in entering into the question of the nature of right at that stage. His inquiry ought to have been confined in ascertaining whether reliable evidence exists in support of the denial of the existence of the public right and he ought not to have gone into the question whether the right is or is not a public right. In my opinion, this case goes much beyond what is contemplated in law. The law requires that the mere existence of reliable evidence in support of the denial of the public right is sufficient to stop the hands of the Magistrate from proceeding further with the case. But in this case not only reliable evidence exists in support of the denial but, as the fact shows, the public right does not exist at all.

The application is rejected.

VARMA, J.—I agree.

The application is directed, as has been pointed out, against the order of the Magistrate dropping the proceedings under section 133 of the Code of Criminal Procedure. The argument advanced by the petitioner before us is that on the materials before the Magistrate he was not justified in holding that the right claimed by the applicant in the case was not a public right.

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VARMA, J.

In a proceeding under section 133 what section 139-A requires is that a magistrate should be satisfied that there is reliable evidence in support of the denial of the public right; the moment he finds that, he has to stop his hands and leave the matter for the civil court to decide. As to what is reliable evidence, it will depend upon the circumstances of each case. But a good test seems to be this, that if the evidence adduced stands unrebutted, the public nature of the right will be demolished.

Mr. Brahmadeva Narain for the petitioners has drawn our attention to various cases from which he has tried to show that from the facts of this case the Court ought to have come to a finding that the right claimed by the applicant before the Magistrate was in the nature of a public right. A public right does not depend upon the number of individuals who enjoy it. It is, generally speaking, that which must be enjoyed by members of the general unascertained mass of the public [*vide* Desai's Dictionary of Legal Terms and the decision in *Queen-Empress* v. *Jasoda Nand*(1)]. The decisions which have been referred to by the Sessions Judge are *Emperor* v. *Bharosa Pathak*(2), *Munna Tiwari* v. *Chandrabali*(3) and *Emperor* v. *Raghunandan Prasad*(4). I venture to suggest that the decision in *Munna Tiwari's* case(3) is very much in point. The decision in *Budha* v. *Mohan Lal*(5) referred to by the Advocate for the petitioners does not help him and seems to be based chiefly on whether section 133 of the Code of Criminal Procedure was applicable to prevent a breach of the peace on the facts of that case.

I would, therefore, discharge the rule.

Rule discharged.

J. K.

(1) (1898) I. L. R. 20 All. 501.
(2) (1912) I. L. R. 34 All. 345.
(3) (1928) I. L. R. 50 All. 871.
(4) (1931) I. L. R. 53 All. 706.
(5) (1912) 16 Ind. Cas. 162.