

Before Mr. Justice Ghose and Mr. Justice Gordon.

SRINATH ROY AND OTHERS (PETITIONERS) v. AINADDI HALDER
(OPPOSITE PARTY).^c

1897
February 1.

Criminal Procedure Code (Act X of 1882), sections 133, 137, 437—Further enquiry—Ultra vires—Obstruction to public thoroughfare.

In a complaint for alleged obstruction of a public thoroughfare, the Magistrate, after making preliminary enquiries, was of opinion that the alleged way was not a public thoroughfare, and refused to take action under section 133 of the Code of Criminal Procedure.

The Sessions Judge, being of opinion that the Magistrate should have gone with the case, directed a further enquiry under section 133. Such enquiry held, and the Magistrate, without taking evidence in support of the plaint, made his conditional order under section 133 absolute under ion 137.

Held, that the order of the Sessions Judge, directing a further enquiry, *ultra vires*, there being no section of the Code under which an order further enquiry could be made in the case; section 437 having no lication.

Held, also, that the Magistrate, before whom the petitioner shewed cause, should not have made his conditional order under section 133 absolute without taking evidence upon the matter of the complaint: the words "evidence in the matter" meaning "in the matter of the complaint," and not simply evidence which the opposite party might offer.

THE facts of this case were as follows: In 1891 the police of Munshigunge reported that a certain road was a public one and had been obstructed. On 3rd December 1891 the Deputy Magistrate sent the matter to the Sub-Deputy Collector for a report, and on 1st April 1892 that officer, in his report, stated that the road was a public road which had been obstructed, and that orders should issue for the speedy removal of such obstruction. otices were thereupon issued to the petitioner who denied that e road was a public one, and alleged that the application had en made out of spite. On 16th June 1892 the Deputy Magis- ate recorded the following remark, namely: "The Raja says that abu Syama Kanta Banerjee wants to open a new road from his house"; but did not proceed in the manner laid down in Chapter X of the Code of Criminal Procedure. Nothing further having been

^c Criminal Revision No. 5 of 1897, made against the order passed by S. J. Douglas, Esq., Sessions Judge of Dacca, dated 20th November 1896, confirming the order passed by Babu Gogan Chundra Dass, Deputy Magistrate of Munshigunge, dated the 8th of October 1896.

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done, on 9th November 1895 the opposite party, Ainaddi Halder, moved the then Deputy Magistrate of Munshigunge to institute a case under section 133 of the Code of Criminal Procedure. He, however, refused to do so on the ground that he was satisfied, from certain preliminary enquiries that he had made, that the alleged way was not a public one. The complainant thereupon, on 19th December 1895, moved the Sessions Judge of Dacca against the order of the Deputy Magistrate of Munshigunge refusing to take up the complaint. He thereupon allowed the petition of the complainant, and directed that a further enquiry should be made under section 133 of the Code of Criminal Procedure. On 8th October 1896 the Deputy Magistrate, who had held a further enquiry and passed a conditional order under section 133 of the Code of Criminal Procedure, made the order absolute in the following terms :—

The second party has not established in the Civil Court that the claim of right asserted by him is well founded. I should therefore proceed with the case according to the provisions of law laid down in the Code of Criminal Procedure, and decide whether the conditional order passed by me is reasonable and proper. The *onus* of proving that it is not so lies on the second party showing cause, and it is incumbent on that party to apply for the appointment of a jury, or to produce evidence to-day in support of the contention. As this has not been done, I find no ground for holding that the order is not reasonable and proper. I therefore make the conditional order passed by me under section 133 of the Code of Criminal Procedure absolute, and direct the removal of the obstruction within fifteen days.

Against this order the petitioners, Srinath Roy and others, moved the Sessions Judge of Dacca, who, on 20th of November 1896, made the following order and declined to interfere :—

I decline to interfere; the lower Court has acted in accordance with the procedure laid down in the case of *Luckhee Narain Banerjee v. Ram Kumar Mukherjee* (1). The present petitioners were, as therein provided, allowed an opportunity to establish their alleged rights to this road, but they have failed to do so. The lower Court's order, under these circumstances, is quite just and proper. This application is rejected, and the lower Court's procedure and orders are confirmed.

Thereupon, on 1st February 1897, the petitioners, Srinath Roy and others, moved the High Court under section 439 of the Code of Criminal Procedure for the reversal of such order on the following grounds amongst others :—

(1) I. L. R., 15 Calo., 564.

(1). That the Sessions Judge had acted *ultra vires* in remanding the case in the first instance for a further enquiry.

(2). That the conditional order of the Deputy Magistrate should have been discharged, as there was no evidence on the record against the petitioners.

(3). That the Deputy Magistrate should have given the petitioners an opportunity of producing their witnesses, which he failed to do.

Babu *Basanto Kumar Bose* and Babu *Jogendra Chunder Ghose* for the petitioners.

Mr. *P. L. Roy* for the opposite party.

The following judgment was delivered by the High Court (GHOSH and GORDON, JJ.) :—

After hearing both sides in this matter, we think that the rule should be made absolute upon both the grounds on which it was granted.

The complaint was one for illegal obstruction of what the complainant described to be a public thoroughfare. The Magistrate, before whom the said complaint was instituted, after certain preliminary enquiries which he had made, was of opinion that the alleged way was not a public thoroughfare; and he accordingly refused to take action under section 133 of the Code of Criminal Procedure. The complainant then went up to the Sessions Judge; and that Officer was of opinion that the Magistrate was bound to have proceeded with the case; and he directed that a further enquiry be made under section 133, and the following sections of the Code of Criminal Procedure. The Magistrate acted upon this order, as he was bound to do, made a conditional order under section 133, and called upon the petitioners before us to show cause why the obstruction complained of should not be removed.

They appeared and showed cause; but, as it would appear upon the record, they offered no evidence; and thereupon the Magistrate, without taking any evidence in support of the complaint, made the conditional order absolute under section 137 of the Code of Criminal Procedure.

Now, it appears to us that the Sessions Judge's order directing a further enquiry in this case was *ultra vires*. We suppose he meant to make this order under section 437 of the Code of

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Criminal Procedure, there being no other section in the Code under which an order for further enquiry can be made. On referring to that section, however, and reading it by the light of the sections occurring in Chapter XVI which ends with section 203 of the Code, it will be found that it is only in the case of an offence that a superior Court is entitled to direct a further enquiry. The act of the petitioners complained of was not an offence; and in regard to such a complaint we do not think the provisions of section 437 of the Code can have any application. In this view of the matter, it seems to us that the subsequent order of the Magistrate making his conditional order absolute must fall through, the proceedings having been taken upon the authority of the order of the Sessions Judge, which we hold to be illegal. But apart from this consideration we are of opinion that, when the petitioners appeared before the Magistrate and shewed cause, he was not competent to make his conditional order absolute without taking evidence upon the matter of the complaint before him under section 137 of the Code. That section says: "If he appears and shews cause against the order, the Magistrate shall take evidence in the matter. If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case. If the Magistrate is not so satisfied the order shall be made absolute." When the section says "the Magistrate shall take evidence in the matter," we read it to mean that he shall take evidence upon the matter of the complaint, and not simply the evidence which the opposite party might offer. It seems to us that, before the Magistrate in this case could make his conditional order absolute, he was bound to have taken evidence in the presence of the opposite party, and satisfied himself that the alleged way was a public thoroughfare; that there had been an unlawful obstruction thereof; and that his conditional order was reasonable and proper. The report, or other information which the Magistrate had received, or such evidence as he might have taken before making the conditional order, is no evidence against the opposite party, the proceeding under section 133 being entirely *ex parte*.

Upon these grounds we make the rule absolute.

C. B. G.

Rule made absolute.