

Kishorilal Vs. State Through P.W.D. District Engineer, Jalaun at Orai

Kishorilal Vs. State Through P.W.D. District Engineer, Jalaun at Orai

SooperKanoon Citation : sooperkanoon.com/453072

Court : Allahabad

Decided On : May-13-1959

Reported in : AIR1960All244

Judge : D.S. Mathur, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 133, 133(1), 135, 136, 137, 138, 139A and 537

Appeal No. : Criminal Ref. Nos. 90 and 91 of 1959

Appellant : Kishorilal

Respondent : State Through P.W.D. District Engineer, Jalaun at Orai

Judgement :

ORDER

D.S. Mathur, J.

1. These are two references under Section 438 Cr. P. C. which have been registered as Nos. 90 and 91 of 1959, by the Additional District Magistrate of Jalaun with the recommendation that final orders passed, by the Tahsildar Magistrate, Kal-pi, in two separate proceedings under Section 133 Cr. P. C. against Kishori Lal and Ram Singh, respectively, be set aside and the Magistrate directed to proceed afresh according to law.

2. The District Engineer (P.W.D.), Orai, submitted reports for taking proceedings under Section 133 Cr. P. C. against Kishori Lal and Ram Singh for having made encroachments on a public way. These reports were taken cognizance of by the Sub-Divisional Magistrate, Kalpi, and in both he ordered that a notice be issued to the opposite party requiring him to remove the encroachment within 15 days or to appear before the Tahsildar-Magistrate Second Class, Kalpi, on the date specified in the order. Kishori Lal put in his appearance on 1-10-1958. and filed a written statement denying the existence of a public right of way over land on which the alleged constructions stood.

His case, in brief, is that the alleged constructions were old and did not stand on any part of P.W.D. road and that his claim had been upheld by the civil court in a regular suit instituted by him. The Tahsildar-Magistrate fixed 8-10-1958 for there-cording of evidence of P.W.D. and 13-10-1958 for the evidence of the opposite party, namely, Kishori Lal. Evidence was recorded on those dates and arguments heard on 17-10-58. The notice was made absolute under order dated 29-10-58 of the Tahsildar-Magistrate,

3. In the other reference, Ram Singh put in his appearance before the Tahsildar-Magistrate on 16-10-1958 and filed his objection wherein he denied the existence of a public right of way alleging that the land on which the constructions stood did not belong to P.W.D. He also made a request for the appointment of a Jury to decide matters in controversy. 23-10-1958 was fixed for argument to decide if Ram Singh was entitled to 'Jury trial'. He failed to appear in the Court of the Tahsildar-Magistrate on the date fixed with the result that not only was the request for appointment of Jury rejected, but final ex parte orders were passed in the proceeding.

4. In other words, both Kishori Lal and Ram Singh were directed to remove the encroachments by a particular date. They went up in revision, before the Additional District Magistrate, who has made the present references on two legal grounds, firstly, the Tahsildar-Magistrate did not follow the procedure laid down in Section 139A, Cr. P. C. and secondly, he had no jurisdiction to pass final orders in the proceedings. In criminal reference No. 91 of 1959 another point was also

raised and which was accepted by the Additional District Magistrate, namely, that the Tahsildar-Magistrate was in the wrong in passing final orders when the date was fixed merely for disposal of the application whether Ram Singh was entitled to 'Jury trial', in other words, whether the application for appointment of Jury under Section 135 Cr. P. C. was maintainable.

5. In both the cases the existence of public right of way was denied by opposite-parties who were alleged to have caused obstruction on public way. Section 139-A, Cr. P. C., provides that, where an order, is made under Section 133 Cr. P. C. for the purpose of preventing obstruction to the public in the use of any way or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way or place, and if he does so, the Magistrate shall, before proceeding under Section 137; or 138, inquire into the matter.

It is further laid down in Sub-section (2) that, if in such inquiry, the Magistrate finds that there is no reliable evidence in support of such denial, he shall proceed as laid down in Section 137 or Section 138, as the case may require. Of course, if the Magistrate takes a contrary view, he has to stay the proceedings till the matter of the existence of such right has been decided by a competent civil court. The law is thus clear and is not capable of two interpretations. It is obligatory on the Magistrate to, first of all, conduct an inquiry under Section 139-A, Cr. P. C., in cases where the existence of any public right in respect of any way or place is denied, before holding the inquiry under Section 137 or Section 138 Cr. P.C.

A similar view was taken in *Mahabir v. Asharfi* 47 Cri LJ 398 : (AIR 1947 Oudh 65) and *Chhangu v. Surajpal*, 48 Cri LJ 666 : (AIR 1948 Oudh 19) but with due respect, I do not agree with the opinion expressed that an irregularity committed by not following the procedure laid down under Section 139-A, Cr. P. C., could not be cured by invoking the aid of Section 537 Cr. P. C. While expressing this opinion, Hon'ble Judges did not comment upon the various provisions of the O.P. C. Thomas C. J observed: in 47 Cri LJ 398 : (AIR 1947 Oudh 65) that as the provision was mandatory, it was not a question of mere irregularity which could be cured by Section 537, Criminal Procedure Code.

In the other case, 48 Cri LJ 666 : (AIR 19481 Oudh 19) Kidwai J. expressed the opinion that, if parties were deprived of their right of producing; evidence at either of the stages, they were materially prejudiced, and it could not be said that only an irregularity has been committed which could be cured by invoking the aid of Section 537 Cr. P. C. It is not necessary that the parties would be materially prejudiced in each and every case, e.g., if the Magistrate makes it clear, and the parties are aware, that a joint inquiry was being conducted under Ss. 139A and 137 Cr. P. C. and the parties in fact lead evidence on points which arise in both the inquiries, none of them would be prejudiced by the procedure laid down, in Section 139A, not being strictly adhered to.

6. The relevant portion of Section 537 Cr. P. C. runs as follows:

'Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Ch. XXVII or on appeal or, revision on account:--

(a) of any error, omission or irregularity in order or other proceedings in any inquiry or other proceedings under this Code unless such error, omission or irregularity has in fact occasioned a failure of justice.

Explanation:-- In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.'

7. The wording of Section 537 Cr. P. C. is a general one and it would cover all proceedings including those under Ch. X of the Code, provided that the Court was competent to take cognizance of the proceeding and the error, omission or irregularity committed had not occasioned a failure of justice. Where it is laid down in the conditional order passed under Section 133 Cr. P. C. that the person is to show cause before some other Magistrate of the First or Second Class, at a time and place to be fixed by the order, such a Magistrate, even though not competent to issue the order under Section 133, shall have jurisdiction to pass final orders subject to certain restrictions contained in Ch. X.

In the present case, it was provided in the conditional order under Section 133 that the parties were to appear before the Tahsildar-Magistrate Second Class on a particular date; the Tahsildar-Magistrate was, therefore competent to pass final orders and his was a Court of competent jurisdiction to entertain proceedings after the issue of the conditional Order. In other words, therefore, the correct interpretation of the above section is that, where the Magistrate was competent to take jurisdiction of the proceeding and no failure of justice was occasioned, that is, the parties were not materially prejudiced, any irregularity in the proceedings can be condoned under Section 537 Cr. P. C. Consequently, if the Magistrate held a joint inquiry under Ss. 139-A and 137 Cr. P. C. and the parties were not in any way prejudiced, the final orders passed cannot be interfered with on appeal or revision. But if the Magistrate was not competent to take cognizance of the proceeding or the parties had been materially prejudiced by the Court not holding the inquiry in accordance with the law, such order can be set aside by the appellate or revisional court.

8. In reference No. 90 of 1959 dates had been fixed for recording evidence of the parties without indicating whether the inquiry being conducted was under Section 139-A, Cr. P. C. or under Section 137 Cr. P. C. with the result that the parties did not adduce proper evidence as to the existence or non-existence of the public right of way. In criminal reference No. 91 of 1959 no opportunity was given to the parties to adduce their evidence. 23-10-1958 was fixed for argument, if Ram Singh was entitled to trial by Jury, and when he did not put in his appearance on that date, ex parte final orders were passed in the proceeding.

In case 23-10-58 was also fixed for recording evidence of the parties under Section 139-A. Cr. P. C., the Tahsildar-Magistrate would have been justified in holding that the denial of the existence of public right in respect of the public way or place was groundless. When the parties were not given any opportunity to adduce their evidence, there was a gross illegality committed by the Magistrate. On this ground alone, the ex parte final order passed by the Tahsildar-Magistrate can be set aside. In other words, in both the cases there was failure of justice by non-compliance of the provisions of Section 139-A. Cr. P. C.

9. The Additional District Magistrate relied upon the case of Ram Charan v. Residents of Shahabad Ward Baran, AIR 1958 Raj 248 in expressing his opinion that a Magistrate Second Class before whom the party was to appear to show cause why the obstruction be not removed, has no power to make the order under Section 133 Cr. P. C. absolute, and it was necessary for him to send back the papers to the Magistrate who issued the conditional order for making it absolute. It is true that certain observations made therein do give an impression that they are of a general nature, but it will be found that the facts of the case are different. Therein Ram Charan was not directed to appear before another Magistrate in case he objected to the conditional order passed under Section 133 Cr. P. C.

The Sub-Divisional Magistrate, had directed that, in case Ram Charan objected, he should appear before him on 16-8-1955 to show cause against the order; and when Ram Charan appeared before him on that date and wanted time for filing the objection, the proceedings were transferred to the Court of Magistrate First Class, Baran. In other words, the proceedings were not, as may be said, transferred to Magistrate First Class, Baran. under Section 133. Cr. P. C.. but independently of the provisions of that section. In the present case, the opposite-parties were directed to appear before the Tahsildar-Maffistrate second class under the conditional order under Section 133 Cr. P. C. Consequently principle enunciated in the Rajasthan case could not be made applicable to the present proceedings.

10. A perusal of Ch. X, Cr. P. C., will make it clear that a conditional order under Section 133 (1) can be made only by a District Magistrate, a Sub-Divisional Magistrate, or a Magistrate of First Class. Such a Magistrate can be called the Magistrate who issued the conditional order. The Magistrate can, if he so desires, transfer the case to some other Magistrate of First or Second Class by incorporating in the order that if the person being served with the notice desired to raise any objection, he should appear at a time and place to be fixed by the order before another Magistrate of First or Second Class; in other words, proceedings for having the order set aside or modified are to be continued by such Magistrate. It is by virtue of such an order contained in the conditional order that other Magistrates of Second Class can take cognizance of the proceeding even though they were otherwise incompetent to entertain an application under Section 133.

Cr. P. C.

11. Under Section 135, Cr. P. C., the person against whom such order is made has to perform the act directed in the order, unless he wishes to contest the proceeding, in which case he has to appear in accordance with such order either to show cause against the order, or apply to the Magistrate by whom it was made to appoint a Jury to try whether the same was reasonable and proper. Thus, after the proceeding was in one way transferred to the Magistrate of First or Second Class, the party concerned has to show cause against the order before such Magistrate. But if he desires the appointment of a Jury to try whether the order is reasonable and proper, he has to approach the Magistrate who had made the conditional order.

12. Under Section 136, Cr. P. C. the conditional order under Section 133 shall be made absolute if the person does not perform the act directed in the order or does not appear and show cause or apply for the appointment of Jury as required by Section 135. It has not been laid down in the section as to who would pass final orders making the conditional order absolute: but if this section is read along with Section 137, it would be apparent that such an order is to be passed by the Magistrate to whom the proceedings, as one may say, had been transferred, that is, the Magistrate before whom the person had to appear and show cause. Section 137. Cr. P. C. governs the proceeding which are contested by such person.

It lays down that if he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons case. The Magistrate contemplated by Section 137 shall be one before whom that person was to appear and show cause. It is that Magistrate who can either drop the proceedings or can make the order absolute. It is also of significance that Sections 136 and 137 have not been drafted on the lines of Section 135, wherein for a restricted purpose a reference was made to the Magistrate by whom the conditional order was made. There can thus be no impropriety on the part of the Magistrate to whom proceedings were transferred to pass final orders even though the proceedings were initiated before another Magistrate.

13. To sum up the Magistrate before whom the person being proceeded with was directed in the conditional order under Section 133 (1), Cr. P. C. to appear and show cause, can pass final orders except for the appointment of Jury for which an application shall have to be made before the Magistrate who passed the conditional order But if the Magistrate who made the conditional order, did not incorporate in the order that the person was to appear and show cause before some other Magistrate of the first or second class and proceedings were later on transfer-red to another Magistrate, such Magistrate would not be competent to pass final orders in the proceeding. In other words, the Tahsildar-Magistrate Second Class could in the present case pass final Orders in accordance with the law, unless in criminal reference No. 91 of 1959 a formal application had been moved before the Magistrate who made the conditional order for appointment of Jury. But as the Tahsildar-Magistrate had not followed the procedure laid down in Section 139-A. Cr. P. C. and the irregularity committed had occasioned a failure of justice, the final orders passed in the two cases must be set aside.

14. Both the References are hereby accepted and the final orders passed on 29-10-1958 and 23-10-1958. respectively, are set aside. It is further ordered that both the proceedings should now be held afresh in accordance with the law.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com