

Manohar Singh Vs. Emperor

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Court : Allahabad

Decided On : Jan-03-1929

Reported in : AIR1929All220

Appellant : Manohar Singh

Respondent : Emperor

Judgement :

Boys, J.

1. The applicant applies in revision of an order under Section 140, Criminal P.C., directing him to remove a portion of his house on plot 43 across which there is held to be a public right of way. I have had considerable difficulty in ascertaining what are the actual facts. It appears that upon the defendant filing a written statement a Naib Tahsildar was called on to make measurements and report. I had proceeded thus far with the commencement of this judgment on the case as stated by counsel when I referred for another point to the written statement and from that it appears that the Naib Tahsildar had already made his measurements and made a report. This fact is sufficient to indicate the difficulty I have had in arriving at the facts to which I am asked to apply the law. I will, therefore, proceed to state what is the case of the applicant for it is for him to show that there is proper ground for interference. The case, then as stated on behalf of the applicant, is that upon receipt of a notice issued under Section 133 the applicant appeared to

show cause; that he showed that cause by filing a written statement; that in that written statement there was a denial that there was any public right of way over the plot in question; that the Magistrate did not, as he was required by law to do, Section 139-A (2), enquire into the matter and determine whether there was 'any reliable evidence' in support of the applicant's denial; that if he had done so he would have felt compelled to stay the proceedings until the matter had been decided by a competent civil Court; that he had no power to proceed direct to the holding of the formal inquiry under Section 137. It is said that this irregularity vitiates the final order.

2. In the first place counsel is not able to satisfy me that there was in fact no such inquiry as is mentioned in Section 139-A (1), and on that ground alone I should have to dismiss the revision. Secondly, counsel has not been able to state what materials his client had ready to which the Magistrate could direct any preliminary inquiry. But on the other hand I have nothing to satisfy me that the Magistrate considered the possibility of holding or the obligation to hold any such inquiry, and I think it is desirable to state what in my view is the procedure that should be followed. It is matter of common knowledge that prior to the amendment of Ch. 10 by the Act, 1893, the Courts had engrafted on the Code a law which may be generally stated as having the effect of casting on the Magistrate the duty of determining whether a claim to title made by the opposite party was bona fide or mala fide, and directing the Magistrate, if he found the claim to be bona fide, to refer the parties to the civil Court. This graft on the Criminal Procedure Code was no doubt dictated by a feeling that it was undesirable where there was really some reliable evidence of title in the opposite party to allow the criminal Courts to order the destruction of property.

3. As it seems to me the legislature desired to clarify the law on this point by the enactment of Section 139-A. It will be noticed, however, that the legislature has very carefully avoided any reference whatever to any consideration of the bona fides of the denial of the opposite party except so far as there may be definite reliable evidence of that bona fides. The Court has not been directed, on the opposite party showing cause, to consider directly the question of his bona fides at all, but to consider whether there is any reliable evidence in support of his denial.

The merit of this is obvious. A person may make a denial absolutely bona fide, but he may have no reliable evidence to put forward in support of his denial. He may have in fact no evidence to put forward at all. A denial need not necessarily be mala fide because a person cannot produce evidence to support his denial. He may have a perfectly honest belief in his own denial. Bona fides was therefore a bad test to apply, and the legislature has substituted a much better one. On the applicant showing cause the Magistrate must 'inquire' into the matter and determine whether there is 'any reliable evidence.' This 'inquiry' is clearly something to be kept quite distinct from the formal inquiry which may have to be held later under Section 137 if the Magistrate finds that there is no prima facie reliable evidence in support of the denial of the opposite party.

4. But I do not think that this Court should dictate any further than the legislature has gone as to the nature of that inquiry. There are other cases in the Code: of. Section 476 and Sections 523, 524, where a Magistrate has to hold an inquiry, but where nothing is laid down as to the form that inquiry shall take. It appears to me the legislature of deliberate purpose has refrained from binding the hands of the Magistrates in a class of cases in which the circumstances may be of infinite variety. As it appears to me the Magistrate is left an absolute discretion as to how far he will go or upon what materials he will act in considering whether the defendant seems likely to have such a case in support of his denial as may make it seem unfitting for the criminal Court to proceed. The opposite party may be able to produce along with his written statement or after any such interval as the Court may see fit to allow him title-deeds, or maps or affidavits or any other material that the Court may also see fit to accept in support of his denial and indicating that he has reliable evidence. It is not merely because he produces material of some sort that the Court is bound to stay the proceedings. The Court has to consider whether there is any 'reliable evidence, and some force must be given to the word 'reliable.' If no material is produced before the Court suggesting that there is likely to be any reliable evidence in support of the opposite party's denial it will proceed with the inquiry under Section 137. If in its opinion the plaintiff has some reliable evidence in support of his denial it will in the exercise of its discretion stay the proceedings till the matter is determined in the civil Court. There is no discretion in Section 139A as to which of the parties is to be directed to go to the civil Court, but

that appears to me to give rise to no real difficulty. The Court is not directed to quash the proceedings altogether but to stay the proceedings. Nor do I find any obligation on the Magistrate to force the opposite party or any particular party into Court. It is clearly within its inherent jurisdiction to stay those proceedings until the matter has been decided by a competent civil Court on such conditions as may to it seem fit in the varying circumstances of each case.

5. I have only tried to indicate the lines on which it appears to me clear the Magistrate should proceed and no particular phrase that I may have used is to be regarded as in any way in the nature of a direction to the Magistrate.

6. I agree with the view expressed by, Dalal, J., in Criminal Revision No. 759 of 1928 decided on 6th December 1928, that it is unfortunate that Section 139-A was put into the statute book in a later position than Section 137. The position given to it is apt to lead to its being overlooked when a Magistrate who is not thoroughly familiar with the procedure in studying Chapter 10 with a view to seeing how he should proceed. I have been referred to *Munna v. Emperor* A.I.R. 1926 All. 330; *Ghurahu v. Shakal Raj* : AIR1926 All157 , and *Raghunath v. Emperor* : AIR1925 All311 , in *Munna v. Emperor* A.I.R. 1926 All. 330 in one place the learned Judge says:

In the present case it is impossible to say that there was no bona fide claim put forward by the accused or that there was no reliable evidence in support of his denial,

7. I have already given my reasons for deprecating any reference to the bona fides of the opposite party. In my view it has no longer to be considered whether the denial was bona fide or not but whether there was reliable evidence in support of it-two matters which as I have explained are to my mind very different.

8. In reference to all these cases, if I may say so, it appears to me that a distinction was not borne in mind between the evidence which eventually came on to the record as a result of the proceeding under Section 137 and the material which may have been before the Magistrate before he commenced the proceeding under Section 137. It is not at all certain that if the Magistrate had made an inquiry

under Section 139A (2) he would have had before him all the material which he subsequently had as a result of the formal inquiry under Section 137.

9. In this particular case I have, as I have already stated, no reason for being fully satisfied that the Magistrate did not hold any inquiry under S-139-A. But even if he did not do so I do not think that I should now interfere on that ground alone, in view of the fact that without objection taken by the opposite party the inquiry proceeded under Section 137 and the Magistrate has found as the result of an inquiry much more searching than it was incumbent on him to have held under Section 139-A that there is in fact no reliable evidence in support of the denial.

10. The question remains what order I should pass. It is clear that this Court would have power to confirm the order of the Magistrate but I see no ground for holding that it has not also power to modify that order to such extent as may seem fit. I maintain the order of the Magistrate with this modification that its execution will be suspended for the period of six months. If the opposite party fails to obtain the decision of a competent civil Court in his favour within six months the order of the Magistrate will be executed forthwith. If through no negligence of his own he is unable to obtain a decision in his favour within that period, it will be open to him to apply to this Court for an extension. With this modification the order of the Magistrate is maintained.