Anand Kishore Vs. State

Anand Kishore Vs. State

SooperKanoon Citation : sooperkanoon.com/472996

Court : Allahabad

Decided On : Mar-04-1974

Reported in : 1974CriLJ1321

Judge : K.N. Seth; and H.L. Capoor, JJ.

Appellant : Anand Kishore

Respondent : State

Judgement :

H.L. Capoor, J.

1. Suresh Chand, a resident of village Muradpur Jaunpura, made an application against Ram Narain and others for proceedings being initiated under Section 133, Cr.P.C. The application was sent to the Tahsildar for enquiry and the Sadar Kanungo of Circle Garh submitted a report to the effect that Ram Narain and others had removed their unauthorised encroachment, but the encroachment was made by Anand Kishore . upon an area of five Biswas five Biswansis of plot No. 326 which was a public-way. Notice under Section 133, Cr.P.C. was issued against Anand Kishore on 24th November, 1970, and he was directed to remove the said encroachment within fifteen days of the receipt of notice or to show cause why the order be not enforced. In response to this notice Anand Ki-shore filed a written statement alleging that Akhora, Bitoras and Kolhu had been set up in plot No. 326, area five Biswas five Biswansis. since the time of Zamindari Abolition and

that one Bigha one Biswas land of the said plot was a public way which still existed. In other words, it was denied that any encroachment was made by him on the public way which was said to have been existing as before.

2. Evidence, both oral and documentary, was led on behalf of the parties and the learned Magistrate after considering it confirmed the conditional order, dated 24th November, 1970, and directed' Anand Kishore to remove his Akhora and Bitoras from an area of five Biswas five Biswansis in plot No. 326 within a period of one month failing which they were to be removed according to Rules.

3. Anand Kishore went up in revision before the learned Sessions Judge against the order of the Magistrate and two objections were raised before him. Firstly, it was pointed out that the learned Magistrate had failed to question Anand Kishore whether he denied the existence of public right of way. The second contention was that the Magistrate had no jurisdiction to proceed under Section 137(1), Cr. P. C without holding the enquiry contemplated under Section 139-A, Cr. P. C.

4. The learned Sessions Judge, Meerut, who heard the revision petition was of the view that the learned Magistrate had failed to comply with the mandatory provision of Section 139-A, Cr.P.C. by not questioning Anand Kishore whether he denied the existence of public right of way over the land in dispute and had also failed to hold the enquiry as contemplated by Section 139-A of the Code. Accordingly, he made a reference to this Court with a recommendation that the said order of the learned Magistrate be set aside and the case be sent back to him for being decided according to law.

5. The reference came up for disposal before a learned single Judge of this Court before whom it was pointed out that there was a conflict in the decisions of this Court in regard to the scope of Section 139-A, Cr, P.C. The case has consequently been referred to us for decision.

6. Section 139-A, Cr.P.C. lays down the procedure where existence of public right is denied. Sub-Section (1) provides that where an order is made under Section 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the

appearance before him of the person against whom the order was made question him whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding under Section 137 or Section 138, enquire into the matter. Sub-Section (2) lays down that if as a result of such enquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent civil court. If, however, the Magistrate finds that there is no such evidence, he shall follow the procedure prescribed in Section 137 or Section 138 as the case may require. Sub-Section (3) imposes a bar that a person who on being questioned by the Magistrate under Sub-Section (1) failed to deny the existence of a public right of the nature referred to therein or who having made such denial failed to adduce reliable evidence in support thereof to the effect that in the subsequent proceedings he shall not be permitted to make any such denial and no such question shall be enquired into by any jury appointed under Section 138.

7. It is apparent that Section 139-A contemplates an enquiry only of a summary nature. Its object is not to empower the Magistrate to institute an elaborate enquiry with regard to the rights of the parties. It only requires that the Magistrate should see whether there is reliable evidence in support of the denial, and not that the non-existence of the public right should be proved. Reliable evidence only means evidence on which it is possible to place reliance and does not signify evidence which positively establishes the title in the land. The enquiry being of a summary character, it is not intended that the party complaining of the obstruction should be required to adduce evidence to counteract the evidence in support of the denial of the public right.

8. Sub-Section (1) enjoins the Magistrate to question the person against whom an order under Section 133, Cr.P.C. was made when he puts in appearance before him. It does not require the person concerned to put in his claim in writing but casts an obligation on the Magistrate to question him. If the Magistrate fails to question him with a view to find out the stand taken by him, the purpose behind the statute would be frustrated for it contemplates that if the person concerned denies the existence of a public right the Magistrate is required to hold an enquiry

before proceeding under Section 137 or Section 138. If without questioning the Magistrate proceeds to pass an order under Section 137 or Section 138, his order would be illegal. However, in a case where the person concerned files a written statement challenging the existence of the public right, the oral questioning by the Magistrate may be a mere formality and the failure on the part of the Magistrate to question such a person would be a mere irregularity and would not vitiate the enquiry that the Magistrate may hold in the matter.

9. As pointed out earlier, Sub-Section (2) contemplates that if in the enquiry conducted by the Magistrate the person concerned adduces reliable evidence in support of his denial, the Magistrate shall stay the proceedings until the existence of such right has been decided by the competent civil court. The law does not contemplate that in conducting the enquiry the Magistrate should allow the rival parties to lead evidence in support of their respective claims. He is required only to find out that there is some reliable evidence in support of the claim of the person against whom the order under Section 133, Criminal Procedure Code was made. If the Magistrate embarks on a detailed investigation of the rights of the contending parties, he travels beyond the jurisdiction vested in him and his order in such a case would be incompetent and invalid,

10. In Gulab Singh v. State 1960 All LJ 64 : 1960 Cri LJ 879 a learned single Judge of this Court held that Sub-Section (1) of Section 139-A, Cr.P.C. is only directory and not mandatory and unless prejudice can be clearly demonstrated the non-questioning of the person concerned cannot be deemed to vitiate the Magistrate's order. It appears that in that case the P.W.D. District Magistrate made a report to the Magistrate that Gulab Singh had made an encroachment on the Lucknow-Jbansi road in the town of Orai by constructing a shop on it. The learned Magistrate made a conditional order under Section 133, Cr.P.C. requiring Gulab Singh to remove the encroachment within fifteen days or to show cause why the order should not be enforced. On the date of hearing Gulab Singh made an application in which he neither admitted nor denied that his shop stood on the highway but he only prayed for a local inspection. The learned Magistrate recorded the statements of the local Lekhpal and the P.W.D. Overseer. The Lekhpal filed a map and stated that the shop stood on the land forming part of the

highway. The Overseer corroborated him. Gulab Singh adduced to evidence in rebuttal. The learned Magistrate thereupon made his earlier order absolute. It is apparent that on appearance before the Magistrate Gulab Singh only prayed for a local inspection. He did not put in any written statement either accepting or denying the existence of the public right. In such a situation it was incumbent on the Magistrate to question him before proceeding any further. He committed another illegality in permitting the other party to adduce evidence in support of its assertion that an encroachment had been made on the public way. The procedure adopted by the Magistrate was contrary to the provisions of Section 139-A, Cr.P.C. If Gulab Singh had put in a written statement indicating his stand, the learned Magistrate may not have questioned him when he appeared before him as that would have been a mere formality but when Gulab Singh without signifying the stand taken by him only prayed for a local inspection, the Magistrate was bound to question him in order to proceed further and enquire into the matter. In such a case prejudice is bound to be caused. It appears that in the aforesaid case the only question raised before this Court was with regard to the omission of the Magistrate to question Gulab Singh. The other illegality committed by the Magistrate was neither raised nor decided. In our opinion the view taken in Gulab Singh's case cannot be endorsed.

11. The view taken in Gulab Singh's case, 1960 All LJ 64 : 1960 Cri LJ 879 (supra) was specifically dissented from in Haji Sultan Ahmad v. State 1964 All LJ 71 (Summary) wherein it was held that:

The provisions of Section 139-A of the Code of Criminal Procedure are mandatory and not merely directory. The enquiry contemplated in Chapter 10 of the Code of Criminal Procedure is essentially one concerning a civil right involving title, Such a question must obviously be decided by a civil court. Section 139-A of the Code of Criminal Procedure, therefore, requires merely the production of evidence which is prima facie credible so that the Magistrate should be able to make up his mind whether the denial of the existence of a public right is frivolous or has some substance. Once the evidence produced in support of the denial of the existence of a public right is found to be reliable, the proceedings must be stayed and the parties left to approach the appropriate civil court. It is one thing to produce one

sided prima facie reliable evidence and it is quite another to have to produce evidence which, on rebuttal and assessment, may be found to be false. What Section 139-A of the Code of Criminal Procedure requires is that some evidence, which is prima facie reliable, should be produced. It does not cast a burden upon a person who denies the existence of a public right, to establish it affirmatively that no public right, in fact, exists.

If the Magistrate proceeds to act under Section 137 of the Code of Criminal Procedure without first following the procedure laid down under Section 139-A of the Code, prejudice is bound to be caused to the person denying the existence of a public right in every case, for, obviously, it is far more onerous to establish a fact affirmatively after evidence has been led on both sides than merely to produce evidence which is prima facie believeable.

12. In Tirkha v. State 1965 All LJ 241 it was held that in proceedings under Section 133, Cr.P.C. as soon as an objection is raised denying the existence of a public way, it is the duty of the Magistrate, first to hold an enquiry within the provisions of Section 139-A and if there is any reliable evidence in support of such denial, it is incumbent on him to stay the proceedings until the matter of the existence of such right has been decided by a competent civil court. In order to find out whether there was any reliable evidence in support of such denial or not, the Magistrate has only to examine the evidence produced by the party denying such right and then has to reach his own conclusion on the basis of such evidence as to whether a prima facie case in favour of such denial has been made out or not. At this stage he should not allow the other party to lead evidence and he had neither to analyse the evidence in support of such fact threadbare nor to weigh it in a manner as to reach a definite conclusion in support of the factum of such denial. Similar view was taken in Ashwani Prasad v. Kamla 1968 All LJ 464.

13. In Darshan Ram v. State : AIR1959 Pat81 a Division Bench of the Patna High Court held:

In a case falling under Section 139-A it is imperative for the Magistrate, first, to hold an enquiry as laid down therein before he proceeds under Section 137 or Section 138, as the case may be. It will appear that the procedure laid down in

Section 139-A requires, first, that the party against whom a provisional order has been made, shall appear before the Magistrate and deny the existence of the public right in question; secondly that he shall produce some reliable evidence; and, thirdly, that such evidence shall be legal evidence and shall support the denial.

It has been repeatedly laid down by authorities that if these three conditions-are satisfied then the Magistrate's jurisdiction to continue the proceeding ceases. He has no jurisdiction to weigh the evidence and decide on which side the balance leans. The criterion is that the Magistrate should find evidence supporting the denial, which he can pronounce reliable. If there is such an evidence, it is sufficient to oust his jurisdiction to continue the proceedings further.

The enquiry envisaged in Section 139-A is in the nature of an ex parte summary enquiry, and what the Magistrate is to see is whether there is a prima facie reliable evidence in support of the denial and not that the non-existence of the public right should be affirmatively proved. It is, therefore, not the duty of the Magistrate to take evidence of both the sides and then to judge if the party against whom the order has been made has succeeded in establishing the non-existence of the public right.

14. Reference in this connection may be made to the case of Kishorilal v. State : AIR1960 All244 where a learned single Judge of this Court, while holding that it was obligatory on the Magistrate to, first of all, conduct an enquiry 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 enquiry under Section 137 or Section 138. laid down that an irregularity committed by not following the procedure laid down under Section 139-A could be cured by invoking the aid of Section 537. The learned single Judge dissented from the view taken in Mahabir v. Asharfi AIR 1947 Oudh 65 : (1946) 47 Cri LJ 398 and Chhangu v. Suraipal AIR 1948 Oudh 19 : (1947) 48 Cri LJ 666. The learned Judge proceeded to observe 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 enquiry under Sections 139-A and 137, Cr.P.C. and the parties were not in any way prejudiced, the final orders passed cannot be interfered with in appeal or revision. In our opinion the proposition has been rather widely worded. As pointed out earlier, if the Magis-trate omits to question the person eoncerned when he appears before him after a conditional order was made under Section 133 and puts in a statement in writing denying the existence of public right, the omission may be an irregularity curable under Section 537, Cr.P.C. but it the Magistrate holds a joint enquiry under Sections 139-A and 137, Cr.P.C., or allows the complainant to adduce evidence in rebuttal of the evidence of the objector and scrutinises or weighs the evidence of the parties with a view to determine the truth of the denial or to arrive at the finding whether the non-existence of the public right is conclusively established it would not be a case of mere irregularity which could be cured by Section 537, Cr.P.C. but would be beyond the jurisdiction of the Magistrate.

15. In the instant case Anand Kishore filed a written statement disputing the existence of public right in resbect of five Biswas five Biswansis of plot No. 326 and denying that any encroachment was made by him on the public way. There was no vagueness or ambiguity in the stand taken by him. In the absence of any material to indicate that prejudice was caused to Anand Kishore on account of the failure of the Magistrate to question him when he appeared before him, the order of the Magistrate could not be held to be vitiated. The learned Magistrate, however, committed an illegality when he permitted both the parties to lead oral and documentary evidence in support of their respective claims and based his decision on an evaluation of the evidence of the rival parties. In that view of the matter the order of the learned Magistrate must be quashed.

16. In the result the reference is accepted, the order of the learned Magistrate, dated 13th September, 1971, is set aside and the case is sent back to him for proceeding in accordance with law.