

Panchanana Mohapatra Vs. Rex

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Court : Orissa

Decided On : Mar-15-1950

Reported in : AIR1950Ori203; 16(1950)CLT130

Judge : Panigrahi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 133, 139A and 439

Appeal No. : Criminal Revn. No. 343 of 1949

Appellant : Panchanana Mohapatra

Respondent : Rex

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : P. Misra, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

Panigrahi, J.

1. This revision is directed against an order under Section 133, Criminal P.C., passed by the Magistrate, first class, Aska, directing the petitioner to remove an encroachment made by him on a village path in village Marudi Jagannathpur. The

case against the petitioner was that he put up a stone foundation for a house across a public path in survey No. 6 of the said village of Marudi Jagannathpur, and encroached upon an area of 2 (sic) of an acre and thereby caused obstruction and annoyance to the public.

2. The short facts of the case are that the petitioner purchased a plot of homestead land on 26th June 1937 by a registered sale deed (Ex. 1) from one Ganesh Mohapatra (p. w 2) of the village. The site is described in the sale deed as 100 cubits long and 11 cubits wide, and is bounded on the east by the house of the petitioner and on the west by a 'Rajamarga Khama.' The Rajamarga Khama, as the very name implies, is a public path which is used both as a pathway and as a channel for drawing off the rain water from the village.

3. The petitioner does not deny that there existed a public path to the west of the plot purchased by him but his case is that he has not encroached upon any portion of the public path nor has he caused any obstruction or annoyance to the public. There is, at present, a stone foundation running from north to south which, according to the prosecution, was put up by the petitioner in April 1948, and in June 1948 a Manajan petition was presented by villagers before the Tahsildar (p. w. 4) complaining against the petitioner. The petitioner was served with notices under the Land Encroachment Act and the Karanam also reported the alleged encroachment in his B-Memorandum. The Tahsildar made a local enquiry and was satisfied that the petitioner had made the alleged encroachment. He accordingly started proceedings against the petitioner simultaneously, both under the Land Encroachment Act and under the Criminal Procedure Code.

4. On 19th October 1948, the Magistrate passed a conditional order under Section 133(1), Criminal P. C. against the petitioner and his nephew Lokanath Mohapatra (who was discharged by the Magistrate later on) calling upon the petitioner to remove the obstruction within seven days of the receipt of his order. On receipt of this notice, the petitioner appeared on 18th January 1949 and claimed trial in accordance with the procedure laid down in Section 139A, Criminal P. C. The petitioner denied the existence of a public right of way on the disputed land. An enquiry was thereupon started by the Magistrate under Section 139A and the 8. I,

of police was examined on 21st February 1949. Thereafter a number of witnesses were examined for the prosecution, as well as for the petitioner, and the preliminary order passed by the Magistrate on 19th October 1948 was made absolute on 30th July 1949. It is against this order that the petitioner has obtained a rule.

5. After listening to the arguments of Mr. Misra learned counsel for the petitioner, as great length, I am satisfied that the petitioner's case that there has been no encroachment on the public pathway has no merits at all (After discussion of the evidence the judgment proceeds;) I am accordingly satisfied that there has been in fact, an encroachment by the petitioner on the public path as alleged by the prosecution.

6. But the point raised by Mr. Misra by which I was impressed is that the Magistrate failed to comply with the provisions of 8. 1S9A, Criminal P. C. and that the trial was thereby rendered irregular. Section 139A says that the Magistrate shall question the person against whom the preliminary order under Section 132 has been made as to whether he denies the existence of any public right in respect of the way, and if he does so, the Magistrate shall, before proceeding under Section 137 or Section 138, inquire into the matter. Sub-section (2) of that section further says that if, in such inquiry, the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of existence of such right has been decided by a competent civil Court, and if he finds that there is no such evidence he shall proceed as laid down in B, 137 or s. 138 as the case may require, Mr. Misra's point is that all that the Magistrate has done is to enquire whether there is any evidence in support of the denial and that he has not enquired into the merits of the petitioner's case under Section 137 It is doubtless true that if there has been a non-compliance with the language of this section, the order passed against the petitioner would be open to challenge as illegal. But what the Magistrate did was exactly what the section contemplates. On 18th January 1949, the petitioner was examined and he denied the existence of a public right of way over the disputed piece of land. But as the prosecution was not ready with witnesses the Magistrate adjourned the case to 21st February 1949. On that day he started an enquiry under Section 139A as he himself has noted at p.

27 of the records--and examined the Sub-Inspector of police. This witness however admitted that he did not visit the spot and that therefore he was not in a position to say whether the petitioner had made any encroachment on any public land. The Magistrate thereafter asked the Sub-Inspector of police to furnish a list of witnesses. The case underwent several adjournments owing to absence of witnesses for the prosecution and was finally re-posted to 6th April 1949 when two witnesses were examined for the prosecution. The prosecution wanted to produce some records and asked for further adjournment. On 6th May 1949, three more witnesses were examined for the prosecution of whom the tahsildar (p. w 4) was one. The Magistrate made a note in his order sheet on that day that on the evidence of the Tahsildar there was no case against Lokanath Mohapatra the nephew of the petitioner and he accordingly discharged him. He was however satisfied, from the evidence of P.W. 4 that the encroachment charged against the petitioner was clearly proved and proceeded to take evidence under Section 187, Criminal P. C. both for the prosecution and for the petitioner. On behalf of the prosecution, the Revenue Inspector was examined as p. w. 8 and the Karji (p. w. 3) was recalled. One Natwar Sahu was also examined for the prosecution as p. w. 7 and he proved certain documents. Thereafter, witnesses for the petitioner were examined and the case was closed on 29th July 1949. It is no doubt true that all the witnesses examined for the prosecution have been serially numbered, but it is clear from the record as well as from the order sheet, that the Magistrate was satisfied that there had been an encroachment on a public path on the evidence of the Tahsildar and that he decided to proceed further with the recording of evidence in order to satisfy himself whether the preliminary order made by him should be made absolute. I am unable to accept the contention of Mr. Misra that the entire evidence was in connection with the preliminary enquiry under Section 139A. Section 139A does not prescribe the mode of enquiry that a Magistrate has to adopt, nor does it require that he should record an order that he is satisfied that there was a case against the petitioner. What the Magistrate did on 6th May 1949 is clear indication that he dropped the proceedings against Lokanath Mohapatra and decided to proceed only against the petitioner, I am therefore satisfied that the order of the Magistrate does not suffer from any irregularity as has been alleged. It is significant that the petitioner did not complain of any prejudice having been

caused to him by reason of non-compliance with the provisions of Section 139A, in his petition to the Sessions Judge. All that he contended there was that the rights of the parties should have been decided in a civil Court and not under Sections 188 and 139A, Criminal P. C.

7. The order under revision is affirmed and the rule is discharged. This petition fails and is dismissed,

8. I also agree with the observations of the Magistrate regarding the conduct of Satyanarayan Patnaik, the Revenue Inspector of Dhougan Firka who did his best to protect the petitioner and whose attempt failed owing to the supervision of the Tahsildar. The Revenue Inspector is also guilty of having tampered with the report of the Karji in having changed the date from 24th July 1948 to 24th December 1948. The attention of the District Magistrate is invited to the serious misconduct of this officer who has been guilty not only of dereliction of duty but also of a criminal offence. Appropriate proceedings should be drawn up against him.