

Akulananda Rout Vs. State

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Court : Orissa

Decided On : Jan-13-1954

Reported in : AIR1954Ori210; 20(1954)CLT112

Judge : Narasimham, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 137 and 139A

Appeal No. : Criminal Revn. No. 395 of 1953

Appellant : Akulananda Rout

Respondent : State

Advocate for Def. : L.K. Dasgupta and ;G.N. Sengupta, Advts.

Advocate for Pet/Ap. : G.K. Misra, Adv.

Judgement :

ORDER

Narasimham, J.

1. This revision is against an order under Section 137 Cr. P. C. passed by the Subdivisional Magistrate of Dhenkanal directing the petitioner to remove a fencing which was said to have been erected by him on plot No. 410 of village Kandabindha. It was alleged that the petitioner blocked a rasta by putting a fence

over plot No. 410. The learned Magistrate started a proceeding under Section 133 Cr. P. C. and first passed a conditional order on 22-8-53. The petitioner appeared and showed cause and then instead of proceeding under Section 139A Cr. P. C. to ascertain whether the petitioner was denying the existence of any public right of way over the disputed plot the learned Magistrate heard the evidence of both parties and passed a final order under Section 137 Cr. P. C. The order of the learned Magistrate cannot obviously be supported inasmuch as he had failed to comply with the mandatory provisions of Section 139A Cr. P. C. In a dispute of this type where the public claim a right of way over a piece of land and one of the parties claims it as his property the Magistrate is bound under Section 139A Cr. P. C. to ask the party whether he denies the existence of any public right of way and if there is such a denial the Magistrate should hold an enquiry and take evidence.

In such an enquiry it is not necessary for him to weigh the evidence and come to a clear finding as to whether there is, in fact, public right of way over the plot or not. If there is reliable evidence in support of the petitioner's claim his jurisdiction is ousted & he should direct both parties to go to the Civil Court.

2. Apart from non-compliance with the provisions of Section 139A, Cr. P. C., I find that there are several other unsatisfactory features in the procedure adopted by the learned Magistrate and also in the final order passed by him. From the settlement khatian it appears that plot No. 410 is the paddy field of the petitioner. Doubtless, while describing the boundary of the field it is noted that on its northern side lies a rasta. The map, however, shows that adjacent north of that plot is plot No. 404 which is a narrow strip connecting the public path-way on the west with village Beda on the east. But this plot No. 404 has also been recorded in the last settlement as the paddy field of the petitioner's father. Doubtless, the southern boundary of this plot is noted as 'Mahara' (water channel). It was alleged that the settlement entry was a mistake and the whole of plot No. 404 was a rasta. But in view of the clear settlement entry to the effect that it was a paddy field this allegation on behalf of the opposite party cannot be so easily accepted. It may be that between plot No. 404 and plot No. 410 there was a narrow water channel which was presumably used as a rasta by the villagers during the off season and as the channel was too narrow to be clearly demarcated in the settlement map no

separate plot number was assigned to it.

But its existence seems to be indicated by the southern boundary of plot No. 404 and the northern boundary of plot No. 410 as mentioned in the settlement Khatian. In such circumstances, if the Magistrate considers that proceedings under Section 133 Cr. P. C. should be initiated he may get an enlarged map of plot No. 404 prepared demarcating therein the narrow strip, if any, that is used as a water channel or rasta by the villagers. He may then start a fresh proceeding under Section 133, Cr. P. C. and after complying with the provisions of Section 139A Cr. P. C. complete proceeding according to law.

3. The order under challenge of the learned Magistrate also suffers from another, serious mistake. In the original proceeding under Section 133 Cr. P. C. the plot number of the path which was said to have been obstructed was not stated. In the final order the learned Magistrate directed the petitioner to remove the fencing from plot No. 410. Admittedly, plot No. 410 is the private property of the petitioner and he was clearly entitled to erect a fence on that plot and there can be no question of a proceeding under Section 133 Cr. P. C. in respect of such obstruction over a private plot. Presumably, the parties meant that the fencing had been erected over the path-way which was said to lie adjacent north of plot No. 410. But this fact is not clear either from the original proceeding under Section 133 Cr. P. C. or from the order of the Magistrate though the evidence of the witnesses seems to lend some support to that view. This question may, however, be further examined if a fresh proceeding under Section 133, Cr. P. C. becomes necessary.

4. For the reasons given above, I would set aside the order dated 27-10-53 of the learned Subdivisional Magistrate subject to the aforesaid observations.