

**Joseph Abraham Vs. State and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/724613](http://sooperkanoon.com/724613)

**Court :** Kerala

**Decided On :** Dec-09-1971

**Reported in :** 1972CriLJ1459

**Judge :** K. Sadasivan, J.

**Appellant :** Joseph Abraham

**Respondent :** State and ors.

**Judgement :**

ORDER

**K. Sadasivan, J.**

1. This revision arises from an order passed by the Executive First Class Magistrate. Alleppey in a proceeding under Section 133. Criminal P.C. relating to the closing of a Thodu alleged to have been used by the petitioner and others of the locality. The Thodu according to the report of the Tahsildar Kuttanad runs through the registered land of the revision petitioner (respondent before the court below). Under a preliminary order passed by the learned Magistrate on 26-2-1966 the counter-petitioner was directed to remove the obstruction caused to the Thodu or to appear before the Magistrate to show cause why the order should not be executed. On 13-7-1966 the counter-petitioner revision petitioner filed his objections; a witness schedule was also filed by him. Learned Magistrate without proceeding under Section 139-A of the Code has straightway passed the present

order relying mainly on the local inspection notes left by his predecessor-in-office.

What the learned Magistrate is expected to do when parties appear in pursuance of the notice issued under the preliminary order is to question the respondent as to the existence of the public right claimed by the petitioner and if he denies the existence of the right the Magistrate is to proceed to enquire into the matter under Section 139-A (2) of the Code and on such inquiry if he finds that there is reliable evidence in support of the denial he shall stay the proceedings until the matter of the 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 Section 137 or 138. as the case may require. Evidence was produced by the respondent present revision petitioner before the Magistrate, He examined himself and also examined on his side two witnesses and produced Exts. D1 and D2 in support of the denial of the public right.

It was up to the learned Magistrate in the circumstances to record a finding whether the evidence produced was reliable or not, if reliable he must stay proceedings and direct the parties to the civil Court, if not. he is to proceed under Section 137 or 138. as the case may be. I see no such finding entered by the learned Magistrate. On the other hand he has passed the present order. making the preliminary order absolute and directing the respondent to remove the obstruction. The order cannot be sustained, as it is highly irregular and in violation of the mandatory provisions of the Code. I would therefore set aside the order and send back the case for being proceeded with according to law.

After recording the denial of the public right by the respondent the Section provides as already indicated that an inquiry should be conducted by the Magistrate so as to see whether there is reliable evidence in support of such denial. It is only after such inquiry and recording a finding one way or other that the Magistrate will get jurisdiction to proceed to the next stage in the inquiry. What the learned Magistrate is expected to do therefore at the first stage is to see whether there is reliable evidence in support of the denial and in so doing it should clearly be understood what would amount to 'reliable evidence' under the section. This has come up for judicial consideration many a time and by way of guidance I

would point out to the learned Magistrate how reliable evidence has been viewed in such decisions.

Reliable evidence is the evidence of reliable persons and all that a Magistrate has to satisfy is that the evidence produced is not false. What is meant by the section is not that the Magistrate should weigh the evidence produced by both the parties and then come to the conclusion which is more reliable or should be preferred. The object of Section 139A is that if the denial of the public pathway involves a bona fide claim on the part of the persons denying the public right the matter should be decided by a competent civil court and not by a Magistrate in a summary inquiry provided under Section 139A. *Jai Ram Singh v. Bhuley* : AIR1963 All27 .

2. The Punjab High Court has also proceeded on the same lines. The Court observed:

Reliable evidence does not mean 'evidence' which is sufficient to establish a title to the land for in that case reference to civil Court as contemplated by Section 139A (2) would become unnecessary and meaningless.' *Sukh Ram v. Manohar Lal* .

3. On the same point the Calcutta High Court has held in *Atul Krishna v. State* : AIR1966 Cal215 :

The expression 'reliable evidence' as used in Section 139-A means evidence on which a competent Court may place reliance. The expression does not mean 'evidence' which definitely establishes the right of claim. This is opposed to 'proved evidence.' Such reliable evidence must not be legal evidence. The Magistrate has to satisfy himself that the evidence does not appear to be unreliable or forged.

4. The learned Magistrate will do well to approach the question of reliable evidence in the light of the above pronouncements and examine the evidence produced by the respondent (revision-petitioner) and come to a finding whether the evidence is reliable or not.

