

(1963) 10 P&H CK 0022
In the Punjab And Haryana At Chandigarh
Case No : Criminal Revision No. 313 of 1963

Chuni Lal Mansa Ram and Others

APPELLANT

Vs

Ratti Ram Shiv Narain and Others

RESPONDENT

Date of Decision : 09-10-1963

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 133, 133(1), 137, 138, 139

Citation : AIR 1965 P&H 340 : (1965) CriLJ 240

Hon'ble Judges : Gurdev Singh, J

Bench : Single Bench

Judgement

Rati Ram and three others made an application u/s 133 of the Code of Criminal Procedure against Ram Chander Chuni Lal Rameshwar Dass and Baby Ram respondents (now petitioners) in the Court of Magistrate 1st Class Rohtak and alleged that the respondents had constructed a factory near their houses and that 80 "Kolhus" and 40 expellers were working there with a 250 Horse Power electric connection. It was alleged that the smoke and flames were emitted by the "Chemni" of the factory and that its working was injurious to the health of the resident of the locality and that it was a cause of great nuisance to them. It was further alleged that the respondents had constructed a wall and had thereby obstructed the natural flow of rain water and that the stagnant water was causing nuisance to the people of the locality. A prayer was accordingly made that the respondents should be restrained from working the mill and that the obstruction of the street and the mori causing the nuisance be also removed.

The learned Magistrate 1st Class recorded the preliminary evidence and passed the conditionals order as contemplated by section 133(1) of the Code of Criminal Procedure on 8th August, 1961, directing the respondents to stop the working of the said factory and remove the obstruction from the gali and clear the "mori" by 25th August, 1961, and if they had any objection they should appear before the Tahsildar (Magistrate 2nd Class) Rohtak on 25 the August, 1961, and show cause against the same, failing which the order would be made absolute. After

recording the said order the file was sent to Magistrate 2nd Class Rohtak.

Notices were issued to the respondents by Magistrate 2nd Class. Originally Chuni Lal and Ram Babu respondents were served. They filed their written reply on 16th October, 1961, which is at page 32 of the file of the trial Court. The other respondents were served later. They too raised objections against the conditional order.

The learned Magistrate then proceeded with the case and after recording the evidence of both the parties passed the impugned order on 16th June 1962. He directed the respondents to provide some outlet for the flow of the rain water of the locality including that of the respondents. He further ordered the respondents to change the diameter and the size of the present "chemni". This conversion of the "chimni" was to be determined by an Electrical and Mechanical Engineer to be appointed by the respondents within a period of two months who would survey the site in question and come to a final conclusion after consultation and agreement of both the parties. In case of default the present "chemni" was to be removed from its side. The prayer of the petitioners for the removal of the entire factory from its present position was however disallowed. Aggrieved from the said order Chuni Lal and others filed this revision petition.

(1) In this reference u/s 438 of the Criminal Procedure Code the learned Additional Sessions Judge Gurgaon has recommended that the order Shri Bhupinder Singh Magistrate Second Class Rohtak dated 16th April, 1962 passed in proceedings u/s 133 of the Criminal Procedure Code between the parties be set aside for non-compliance with the provisions of section 139-A of the Criminal Procedure Code. The facts of the case are given in the reference order and need not be recapitulate in detail.

(2) The proceedings were initiated by Ratti Ram on the allegations that the working of the factory of the present petitioners Chuni Lal Ram Chander Rameshwar Das and Ram Babu was a nuisance to him and other residents of the locality as smoke and flames emitted from its chimney were injurious to health. He further complained that Chuni Lal had obstructed the path by construction a wall resulting in blocking the flow of the water and danger to the health of the persons residing in that locality due to stagnant water. When the present petitioners appeared before him in response to the preliminary notice they refuted these allegations and denied the existence of public right of passage but the Magistrate ignoring the provisions of sections 139-A of the Criminal Procedure Code proceeded to record the evidence of the parties and passed final orders u/s 140 of the Criminal Procedure Code directing Chuni Lal and others to provide outlet for the flow of rain water of the locality and to change the diameter and size of the chimney in accordance with the advice of the Electrical and Mechanical Engineer.

(3) As has been observed earlier the present petitioner while contesting the preliminary notice under section 133 of the Criminal Procedure Code had

denied the existence of the public right of way and passage of water through there property. In such circumstances it was incumbent upon the Magistrate to proceed in accordance with the provisions of section 139-A of the Criminal Procedure Code and to enquire if there was reliable evidence in support of the denial. Sub-section (2) of section 139-A of the Criminal Procedure Code provides that if the Magistrate after enquiry finds that there is reliable evidence in support of such denial of the existence of any public right "he shall stay the proceedings until the matter of the existence of such a right has been of this provision of law is mandatory as has been held in various authorities including *Akulananda Rout v. State* AIR 1954 Orissa 210; *S.P. Trivedi Vs. State*, *Ata Mohammad v. Abdul Rahman* AIR 1937 Lah 676 *Hamid Ali v. Emperor* AIR 1930 Lah 1046; *Nur Ali Shah v. Nath* AIR 1927 Lah 745 and *July Mia v. Golam Hussain* AIR 1960 Tri 3.

Section 139-A requiring a Magistrate to refer the question of the existence of public right where it is denied was introduced in the Code of Criminal Procedure by Criminal Procedure Code (Amendment) Act No. 18 of 1923. The object of the legislature was the complicated questions about the existence a public right should be decided after full trial in a civil Court and not in summary proceedings under only where the Magistrate is of the opinion that there is not reliable evidence in support of the denial of the public right that he is at liberty to proceed with the case u/s 137 and 138 of the Criminal Procedure Code and decide the matter without reference to a Civil Court. He cannot be simply ignoring the provisions of section 139-A usurp jurisdiction to decide the question of public right when there is prima facie evidence in support of such denial. In such circumstances the illegality committed by the Magistrate the flouting the amendatory provisions of section 139-A of the Criminal Procedure Code cannot be defended by recourse of section 537 of the Criminal Procedure Code.

(4) Where the law prescribed that a particular thing has to be done in a particular manner and the provisions also affects the jurisdiction of the Court the procedure laid down must be observed otherwise it will encourage violation of the mandatory provisions and leave it to the good sense or the will or whim of the authority concerned to observe or not to observe the procedure prescribed by law. u/s 139-A of the Criminal Procedure Code once reliable evidence in support of the denial of public right is produced the party denying the existence of a public right has a right to have the matter decided by a competent civil Court and not to leave it to the decision of the Magistrate in a summary proceeding. It is thus obvious that non-compliance with section 139-A must ordinarily result in prejudice to the party disputing the existence of public right and in that view of the matter the provisions of section 537 of the Criminal Procedure Code will be of no avail.

(5) As has been observed earlier there cannot be any doubt that the provisions of section 139-A of the Criminal Procedure Code are mandatory. Learned counsel for the respondents in these proceedings has however relied upon *Rajani Kanta Roy Vs. Ibrahim Sarkar*, and *Ramkripal Singh and Another Vs. Superintendent*,

Way and Works, E.I.R., in support of his contention that the non-compliance with section 139-A of no consequence. So far as the Patna decision is concerned it appears to be an agreed order and it cannot serve as a precedent. The decision in Rajani Kanta Roy Vs. Ibrahim Sarkar, proceeds on the finding that no prejudice had been caused. So far as the Lahore High Court is concerned the consistent view has been that the provisions of section 139-A are mandatory and must be strictly complied with. Reference in this connection may be made to Air 1927 Lah 745 : AIR 1930 Lah 1046 and AIR 1937 Lah 676.

(6) The two decisions of this Court which have been brought to my notice are Sukh Ram Kalu Ram Vs. Manohar Lal Ramsaran Dass, and an unreported judgment of Khanna J. in Criminal Revn No. 1351 of 1962 D/- 25-4-1963(Punj). Though in the earlier case Sukh Ram Kalu Ram Vs. Manohar Lal Ramsaran Dass, Das J had held that where enquiry had actually been made by the Magistrate into the existence of the public right the failure if any to comply strictly and meticulously with the provisions of section 139-A would be curable u/s 537 of the Code of Criminal Procedure Khanna J took a country view in the case referred to above. In none of the two cases is there any reference to the earlier decisions of the Lahore High Court and the decisions of Dua J. does not appear to have been cited before Khanna J.

(7) In fact Sukh Ram Kalu Ram Vs. Manohar Lal Ramsaran Dass, is distinguishable on facts. Therein the learned Judge had found that there was not reliable evidence in support of the denial of the public right. Consequently there was no occasion for the Magistrate to have recourse to the procedure prescribed by section 139 A and there could be no question of the Magistrate staying the proceedings before him to await the decision of the competent civil Court. Apart from this since the Magistrate final order by could not be sustained on merits and it was set aside by this court the question whether non-compliance with the provisions of section 139-A of the Criminal Procedure Code had had vitiated the Magistrate's order was not of much consequence.

(8) In view of the above discussion I find that the order of the Magistrate cannot be sustained. I accordingly accept the recommendation of the learned Additional Sessions Judge and setting aside the order remained the case to the Magistrate to deal with the matter from the stage of section 139-A of the Criminal Procedure Code and to decide the dispute between the parties in accordance with law.

(9) Reference accepted.