

(2003) 10 AHC CK 0194
In the Allahabad High Court
Case No : Criminal Revision No. 940 of 2001

Karam Hussain and Others	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 31-10-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 137, 138, 139A

Citation : (2004) 2 ACR 1378

Hon'ble Judges : K.N. Ojha, J

Bench : Single Bench

Advocate : S.K. Rai, for the Appellant; A.K. Srivastava and D.N. Pandey, Anoop Ghosh and Shekhar Yadav, A.G.As., for the Respondent

Final Decision : Dismissed

Judgement

K.N. Ojha, J.—Instant revision has been preferred against judgment and order dated 12.3.2001 passed by learned Vth Additional District and Sessions Judge, Basti in Mohd. Khalil and Ors. v. State of U.P. Criminal Revision No. 271 of 2000, whereby revision instituted by Opposite Parties Nos. 3 to 8 against order dated 2.8.2000 passed by Sub-Divisional Magistrate, Mehdawal, District Sant Kabir Nagar in, Mohd. Khalil v. Karam Hussain and Ors. Criminal Case No. 21 of 1998 has been allowed and the Sub-Divisional Magistrate was directed to decide the case u/s 133, Cr. P.C. rather than to drop it proceedings on the ground that civil suit is pending in civil court.

2. Heard Sri S. K. Rai, learned Counsel for the revisionists and Sri Anoop Ghosh and Sri Shekhar Yadav, learned A.G.A.

3. Revisionists 1 to 4 and opposite parties No. 3 to 8 both are resident of village Batsara, Police Station Bakhira, Tehsil Mehdawal, District Sant Kabir Nagar. The opposite parties No. 3 to 8 moved application against revisionists u/s 133, Cr. P.C. containing the fact that there is a public path in village Batsara. The opposite parties who are revisionists, namely, Karam Hussain, Ubaidur Rehman, Shoharat

Ali and Waliullah raised wall on public path and thereby obstructed the passage which has been in public use up till now. Therefore, prayer was made for removal of the wall which was constructed on the public path. When notices were issued, the revisionists appeared and filed objections before the Sub-Divisional Magistrate that they are owner and in possession of Gata Nos. 53 and 105 and whatever construction was made, it is on their plot and the public path has not been encroached. It was also alleged that a suit was filed in civil court in respect of abadi land and it was directed that the parties will maintain status quo on the spot. The Sub-Divisional Magistrate held that since regular suit is pending in civil court, therefore, it was not proper to pass any order u/s 133, Cr. P.C. Aggrieved therefrom, instant revision has been preferred.

4. The learned revisional court held that the proceedings u/s 133, Cr. P.C. started prior to institution of regular suit in civil court. Application u/s 133, Cr. P.C. was moved on 10.6.1999 while regular suit was filed on 13.7.1999. Placing reliance on *Ram Narain Singh v. State of U.P.* 1983 ACR 990 : (20) 1983 ACC 196, it was held that since suit was filed later to the proceedings u/s 133, Cr. P.C., started, the proceedings u/s 133, Cr. P.C. will not come to an end and the case is to be decided. Therefore, the Sub-Divisional Magistrate was directed to take further action in the matter.

5. It is submitted by the learned Counsel for the revisionists that the proceedings were rightly dropped by the Magistrate and reliance has been placed on *M/s. Ghulam Rasool Riaz Ahmad v. State* 1978 ACR 349 : 1978 All LJ 1288 . Reliance has also been placed on *Purnamasi Kar and Another Vs. Purandar Kar*, , in which it was held that Magistrate is required to see 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. If the evidence adduced by the party against whom the order is made is legal and reliable, there is an end of the matter and the Magistrate has to stay his hands and refer the parties to the civil court. "Reliable Evidence" as envisaged u/s 139A means evidence on which it is possible for the Court to place reliance. It does not mean that the evidence is such that it definitely establishes title to the land. 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 u/s 139A. Where the Magistrate records evidence and also allows the other party to cross-examine the witnesses and then arrives at his decision, his order will not be sustainable.

6. The revisionist has also relied on *Amar Singh Vs. State of U.P.*, , in which it was held that the scope of the inquiry u/s 137 is only to find whether there was prima facie reliable evidence in support of the case taken by the opposite parties about denial of the existence of public right in respect of the way. It does not

require any definite proof at that stage.

7. The revisionist has also relied on *Lala Bissomai v. State* 1957 ALJ 597, in which it has been held by this Court that the duty of a Magistrate u/s 139A of the Code of Criminal Procedure, is merely to see whether the denial of public right is frivolous or not. If the person who denies that the right is able to produce some evidence, and prima facie there is no reason to disbelieve it, it is not for the Magistrate to examine evidence on the other side by way of rebuttal and so forth and attempt to arrive at some final decision. "Reliable evidence" in the sense in which the term is used in Section 139A means evidence on which it is possible for a competent court to place reliance. It does not mean evidence which definitely establishes the title to the land ; because if that was the meaning of the term it would be unnecessary in any case to refer the matter to the civil court at all. It is, therefore, manifest that the intention of the Legislature obviously was that a question of title should not be decided in a magisterial proceeding by a Magistrate in a Criminal Court.

8. Learned Counsel for the Respondent has placed reliance on *Ram Narain Singh v. State of U.P.* 1983 ACR 990 :(20) 1983 ACC 196, in which it was laid down by this Court that Section 133, Cr. P.C. confers certain powers on the Magistrate which are based on public policy and the power is independent one and the mere circumstance that finally the civil court is entitled to decide the title, will not stand as a bar to the exercise of such powers as they have under Cr. P.C. The proceedings u/s 133, Cr. P.C. having been initiated first, the mere institution of civil suit would not divest the Magistrate of his power to first decide whether there is any reliable evidence in support of denial, and if it holds that it is not so, he will be at liberty to continue the proceedings u/s 138, Cr. P.C. and the institution of any suit pending the proceedings u/s 133, Cr. P.C. would not bar his jurisdiction to proceed.

9. Section 137 of the Code of Criminal Procedure contemplates that

(1) where an order is made u/s 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 as to 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 u/s 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceeding until the matter of the existence of such right has been decided by a competent court ; and, if he finds that there is no such evidence, he shall proceed as laid down in Section 138.

(3) A person who has, on being questioned by the Magistrate under Sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subse-quent proceedings be permitted to make

any such denial.

10. In instant case, the application u/s 133 of the Code of Criminal Procedure was moved before the civil suit was filed, the Magistrate is required to make inquiry as is mentioned in Section 137 of the Code of Criminal Procedure. If any reliable evidence is adduced by the revisionist, only then the Sub-Divisional Magistrate has to drop the proceeding u/s 133, Cr. P.C. and the dispute is to be decided by the civil court, but if there is no evidence at all and still the public path has been obstructed, the Magistrate has to proceed with his duty to remove obstruction of wall raised on the public path. Mere institution of civil suit subsequent to an application moved u/s 133 of the Code of Criminal Procedure in itself cannot be taken to be a sufficient ground to drop the proceedings u/s 133, Cr. P.C. The fact as to whether there is reliable evidence is to be ascertained as contemplated u/s 137 of the Code of Criminal Procedure and thereafter it is to be ascertained whether further steps for removal of the obstruction is to be taken or there is real dispute between the parties about the right of the property and land, and, therefore, the matter be decided by the civil court. Therefore, if the learned Revisional Court has set aside the order passed by the Magistrate, the order does not suffer from any jurisdictional error, illegality or material irregularity, but at the same time, it would be significant to mention that while making direction to the Sub-Divisional Magistrate to proceed with the case, the learned Additional Sessions Judge has made certain observation in the judgment that wall was raised on a portion of public path. This finding can be made only after appreciation of evidence. Therefore, the learned Magistrate will not be influenced by this finding made by the revisional court. What is required for the learned Sub-Divisional Magistrate is that he has to call for evidence from the opposite party revisionist and if he arrives at the conclusion that there is real dispute of the path land, such dispute is to be decided by civil court and the proceedings u/s 133, Cr. P.C. is to be dropped, but if the learned Magistrate arrives at the conclusion after appreciating evidence of both the parties that the revisionists have encroached the public path and they have no prima facie case and there is no reliable evidence, the Magistrate has to proceed as is required in Chapter X of the Code of Criminal Procedure for dealing with matter of public nuisance.

11. Since the impugned order passed by learned Additional Sessions Judge is in accordance with law with Section 137, Cr. P.C. and does not suffer from any jurisdictional error, illegality or material irregularity, therefore, instant revision fails.

12. The revision is dismissed.