

(1922) 01 CAL CK 0035
In the Calcutta High Court

Ram Sagar Mondal

APPELLANT

Vs

Alek Naskar and Bhola Nath Mondal

RESPONDENT

Date of Decision : 16-01-1922

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 133

Citation : AIR 1922 Cal 59 : 67 Ind. Cas. 177

Hon'ble Judges : Lancelot Sanderson, C.J.; William Teunon, J.; Thomas Richardson, J.; Newbould, J.; Ghose, J

Bench : Full Bench

Judgement

Lancelot Sanderson, C.J.—This is a Reference to a Full Bench by my learned brothers Newbould and Suhrawardy, JJ. The questions which are submitted are:

1. When in proceedings u/s 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?

2. Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings u/s 133, Criminal Procedure Code?

Was the case of Belat Ali v. Abdur Rahim 8 C.W.N. 143 : 1 Cr. L.J. 70 giving effect to the dictum in Luckhee Narain Banerjee v. Ram Kumar 15 C. 604 at p. 570. 7 Ind. Dec. 960 rightly decided?

2. The following facts may be taken from the case:

This Rule is directed against an order passed by the Sub-Divisional Magistrate of Alipore in proceedings u/s 133 of the Code of Criminal Procedure. Ali Nashkar and others instituted proceedings Under that section against the petitioners

before us, Ram Sagar Mandal and another person, alleging that they had obstructed a public road. Ram Sagar Mandal showed cause denying the existence of the alleged public road and getting up a claim to the land in dispute." On the 15th April last, the Magistrate passed the following order:

I have heard the Vakils for both the parties. The second party contend that in a criminal case I held that there was no pathway, so the conditional order ought to be discharged. The Vakil for the first party has urged that this was a case of assault and my finding ought not to bind the present parties. I have given a careful consideration to the arguments advanced. I am of opinion that the claim of the second party though not substantiated is not mere pretence and is not raised to oust the jurisdiction of this Court but it is raised bona fide, so I think that following the ruling laid down in *Manipur Dey v. Bidhu Bhusan Sarhet* 26 Ind. Cas. 148 : 42 U. 158 : 18 C.W.N. 1083 : 15 Cri L.J. 698 I will give the second party a chance to go to the Civil Court. The second party should file a case within a reasonable time and I allow them time till 25th May 1921 to do so, and if the second party does not go to the Civil Court within this time, the trial will be continued. Put up on 25th May 1921. The petitioner did not go to the Civil Court and on the 25th May, the Magistrate refused to re-consider his order and directed witnesses to be summoned.

3. On behalf of the petitioner it was contended that on the Magistrate's finding that the petitioner's claim was "bona fide" his jurisdiction u/s 133, Criminal Procedure Code, came to an end and he was not justified in continuing the proceedings, because the petitioner failed to bring a suit in the Civil Court. On behalf of the opposite party it was contended that the finding that the claim, though made bona fide was not Substantiated justified the Magistrate's order which is supported by decisions of this Court.

4. The case of *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 was referred to in the case as follows: "But in the case of *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 a distinction is drawn at page 573 between a claim of right which the Magistrate thinks well founded and a claim of rights which the Magistrate does not think well-founded but considers to have been made bona fide. It was laid down that in the former case the Magistrate will take no further proceedings but in the latter he should allow the defendant an opportunity of asserting his claim by civil proceedings and that if he does not go to a Civil Court within a reasonable time or fails there the Magistrate will proceed."

5. The two learned Judges doubted the correctness of this view of the law and consequently they made this Reference to the Full Court.

6. With regard to the first question, in my judgment, the first step to be taken is to examine the sections of the Criminal Procedure Code, applicable to this matter, which are Sections 133 to 139, and to interpret these sections according to the natural meaning of the language used.

7. I do not propose to discuss these sections in detail. It is sufficient for me to say that if the ordinary and natural meaning is given to the language used in these sections, in my judgment it is clear that the Magistrate had jurisdiction thereunder to decide the case even though a claim of title was raised by the petitioner, and even though, as the Magistrate held, the claim was "raised Bona fide" and "was not a mere pretence and was not raised to oust the jurisdiction of the Court."

8. It was, however, argued on behalf of the petitioner that it had been held in England that, when the title to property is in question, the exercise of a summary jurisdiction by Justices of the Peace it ousted, and it was further argued that the same principle should be applied to the sections now under consideration. It was also urged that the principle is a principle of natural justice and should be applied unless an exception is made in the Act.

9. I cannot accept these arguments. In the first place I do not agree that the rule laid down in the English cases should be taken to bind the Court in construing the Indian Act in question: secondly, it is to be noted that the Code of Criminal Procedure is an Act for consolidating and amending the law relating; to Criminal Procedure, and in my judgment the principle of construction laid down by Lord Hershell in the case of the Bank of England v. Vagliano (1891) A.C. 107 : 60 L.J.Q.B. 145 : 64 L.T. 358 : 39 W.B. 657 : 55 J.P. 676 and affirmed by the Privy Council in Norendra Nath Sarcar v. Kamalbasini Dasi 23 C. 563 : 28 L.A. 18 : 6 Sar. P.C.J. 637 : 6 M.L.J. 71 : 12 Ind. Dec. 371 should be applied to this Act. The passage in the latter case is as follows: "it is hardly necessary for their Lordships to do more then express their concurrence with the judgment of the High Court. But they think it may be useful to refer to some observations in a recent case before the House of Lords as to the proper mode of dealing with an Act intended to codify a particular branch of the law. I think, said Lord Herschell in the Bank of England v. Vagliano (1891) A.C. 107 : 60 L.J.Q.B. 145 : 64 L.T. 358 : 39 W.B. 657 : 55 J.P. 676 the proper course is in the first instance to examine the language of the Statute and to ask what is its natural" meaning uninfluenced by any considerations derived from the previous state of the law and not to start with enquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a Statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a Statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, roaming over a vast number of authorities in order to discover whet the law was, extracting it by a minute critical examination of the prior decisions.... "Applying that principle to the sections of the Consolidating and Amending Act now under consideration, and giving to the language of the sections the natural meaning, in my judgment the Magistrate had jurisdiction to decide the questions before him,

even though the defendants in the proceedings before the Magistrate set up a claim of title to the land in question.

10. Numerous cases were cited to us during the course of the argument, and it is said that there is a discrepancy to be found between the decisions of this Court. I think that to some extent there is a discrepancy. But on the whole, in my judgment, the weight of the decisions is in favour of the view which I have expressed.

11. For instance as long ago as 1872 in *Angelo v. Oargill* 9 B.L.R. 417 : 18 W.R. Cr. 41 the Court, when dealing with a section of the Criminal Procedure Code then in force, held that the Magistrate had jurisdiction to decide whether the place was a thoroughfare and whether there was an obstruction, though the defendants claimed the land as their own property. The sections then under discussion do not differ materially from the sections now under discussion and the Advocate-General appealing for the defendants in that case, raised in his argument the identical points which have been raised on behalf of the petitioner in this case, yet the Court held that the Magistrate had jurisdiction.

12. In *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 which was decided in 1898, the decision, in my judgment, implied that the Magistrate had jurisdiction though the learned Judges stated that this Court in revision in several cases had given directions as to the mode in which the Magistrates should exercise their powers. The following passages in the judgment may be referred to. Page 570: The ground upon which these decisions have proceeded is that there is no provision made in Chapter X of the Code for an enquiry into disputed questions of title; and that it cannot be held to have been the intention of the Legislature that question of this nature raised bona fide should be finally decided in a summary manner and to the exclusion of any recourse to the Civil Courts. These decisions go, not actually to the jurisdiction of the Magistrates, as the English rule referred to does, but rather to the mode in which, in revision, this Court has held that the Magistrates should exercise their powers, following the principles of the English rule so far as may be;" page 573, viz., "Our observations in this judgment are, of course directed to that part of Section 133, which relates to the case now before us and deal with obstructions to public ways. We may observe that in cases in which danger to public health or safety is involved, we by no means suggest that the Magistrate is fettered, in the exercise of the powers given to him under these sections, by the considerations to which we have adverted." It seems clear that if the Magistrate has jurisdiction in cases, where public health and safety are endangered, he must also have it in cases where they are not endangered, for the jurisdiction to deal with the two classes of cases is conferred by the same words in the Act.

13. These passages seem clearly to imply that the Magistrates had jurisdiction, but that this Court had from time to time given directions as to the mode of exercising that jurisdiction. It is to be noticed that the learned Judges in the last-mentioned case drew attention to the case of *Chuni Lal v. Ram Kishen Sahu* 15

C. 460 at p. 468 : 12 Ind. Jur. 425 : 7 Ind. Dec. 892 whereby it was decided that the right of an owner of land to bring a suit u/s 42 of the Specific Relief Act against one of the public, who formally claimed to use such lands as a public road and who has thereby endangered the title of the owner, is not barred by an order of a Criminal Court u/s 137 of the Criminal Procedure Code.

14. In *Queen-Empress v. Bissessur Sahu* 17 C. 562 at p. 666 : 8 Ind. Dec. 914 the learned Judges held that the Magistrate "ought not to have made the order if there was a bona fide contention on Bisseswar's part that the path was not a public way" and the learned Judges quoted with approval the passage from the judgment in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960. The head note of that case seems to me to go further than the actual decision.

15. Again, *Fakir Mullick v. Emperor* 47 Ind. Cas. 674 : 28 C.J.J. 211. 19 Cri. L.J. 947 (decided in 1916; is, in my judgment, a decision confirming my view that the Magistrate had jurisdiction even though a bona fide claim of right had been set up.

16. It was, at the end of the argument, practically conceded that to say that the Magistrate had no jurisdiction or that "the Magistrate's jurisdiction was entirely ousted" was putting the case too high, but, the argument was urged that under the circumstances of the case the Magistrate ought to have stayed his hand and should not have proceeded with the enquiry when he found that the defendants were putting forward a claim of title in the land, bona fide and the Magistrate should have allowed the parties to litigate the question in the Civil Court.

17. In my judgment, therefore, the first question should be answered in the negative.

18. The second question may conveniently be divided into two parts. With regard to the first part--the learned Vakil for the petitioner did not complain of the ruling at page 571 in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 which runs as follows:

19. "When such a question is bona fide raised the Magistrate ought not to make an order under this section of the Code; he should allow an opportunity for the determination of the question by the Civil Court." But objection was taken by the learned Vakil to the passage at page 573; If the Magistrate does not think this claim well-founded, so far as he can judge, but considers that it is made bona fide, he should allow the defendant an opportunity of asserting it by civil proceedings." It was urged that the defendants who might be in possession of the land, should not be forced into the position of plaintiffs in a civil suit to maintain the claim of right. It was argued further that the distinction between an ill-founded bona fide claim and a well-founded bona fide claim is unintelligible. In my judgment there is considerable force in those arguments. At the same time I am unable to say that the Magistrate had no jurisdiction to make the order of 15th April 192. It seems to me that it was a matter for the discretion of the

Magistrate. He had apparently on that date, on the materials then before him, come to the conclusion that the claim of title set up by the defendants had no substance in it; although he believed that the claim was not set up as a mere pretence having given the defendants an opportunity of instituting a suit in the Civil Court, of which the defendants failed to avail themselves, the Magistrate proposed to enquire farther into the facts of the case, In view of the judgment which I have already given on the first question I am unable to say that he had no jurisdiction to continue the proceedings u/s 133 of the Criminal Procedure Code.

20. With regard to the case of Belat Ali v. Abdur Rahim 8 C.W.N. 143 : 1 Cri. L.J. 70 which is the subject of the second part of the second question, in my judgment, it cannot be said, having regard to the facts of that case, that it was wrongly decided.

21. It is necessary for the Court to decide whether the Rule in this case should be made absolute or discharged. The Magistrate, as I read his judgment, came to the conclusion on the materials then before him, that there was no real substance in the claim of title, and consequently, in my judgment, the Rule should be discharged.

Teunon, J.

22. In this matter the facts have been sufficiently set out in the order made by the Referring Bench and also in the judgment of his Lordship the Chief Justice. It is, therefore, unnecessary for me to recapitulate them.

23. In many cases decided under Chapter X of the Code of Criminal Procedure there has been considerable conflict of judicial opinion, and much that is not to be found in the sections themselves has been imported into them by the Courts.

24. In a case such as the present it appears to me that there are but two questions for the Magistrate (or for the Jury, if under Sections 135 and 138, a Jury be substituted for the Magistrate) to decide, namely, (1) whether the way in question is one which is or may be lawfully used by the public, and (2) whether such way has been unlawfully obstructed. These two questions should be decided on evidence in the same manner as any other questions arising in criminal proceedings. There appears to me to be no reason why in a codifying enactment such as the Code of Criminal Procedure, we should introduce any rule of interpretation borrowed from English Law. It is also not for us, but for the Legislature, to say whether questions of title should or should not be decided in the Courts of Magistrates. When in proceedings u/s 133, a claim of private title is asserted the good faith or bad faith of the defendant raising this plea, in my opinion, is immaterial. There is no reference to good faith in the sections themselves and if on evidence the Magistrate (or the Jury) be satisfied that the path is a public path, the Magistrate should act on that decision and conclude the controversy for the time being. The defendant, if aggrieved, still has his remedy in the Civil Courts.

25. Whether in any individual case before making his conditional order absolute, the Magistrate should give the defendant an opportunity of establishing by suit his claim of private title is at most a question of discretion and I am not prepared to lay down any general rules for the exercise of such judicial discretion. I may, however, point out that Sub-section (2) of Section 183, does not appear to favour any such reference of parties to the Civil Courts.

26. In the result I should answer the questions referred to up, which I take to be three in number, as follows: To the first question my answer is No. To the second question my answer is that in the exercise of his discretion the Magistrate may take the course indicated in the question.

27. To the third question my answer is that I am not prepared to say that on its own facts the case of *Belat Ali v. Abdur Rahim* 8 C.W.N. 143 : 1 Cri. L.J. 70 was wrongly decided.

28. For the reasons given I agree in discharging this Rule.

Thomson Richardson, J.

29. Section 133, and the following sections of the present Code substantially repeat the corresponding sections of the earlier Codes. The word "thoroughfare," however, used in the Codes of 1861-1869 and 1872 is replaced in the Codes of 1882 and 1898 by the expression way which is or may be lawfully used by the public. The purpose in view is the removal of unlawful obstructions from public ways and the abatement of certain other nuisances affecting the public health or safety such as the carrying on of a trade "injurious to the health or physical comfort of the community." Proceedings are initiated by a conditional order in appropriate terms. If the order is not obeyed, inquiry may follow whether it is a reasonable and proper order or not, the result depending on the finding arrived at upon that issue. The inquiry may be made, at the choice of the defendant, by a Magistrate or by a Jury.

30. The first and principal question referred to this Bench may be thus stated. Whether, a conditional order having been made for the removal of an alleged unlawful obstruction from an alleged public way, the Magistrate's jurisdiction to proceed further is ousted if the defendant raises a bona fide claim of right or title.

31. Under the Code of 1861 69 it was held that it was for the Magistrate to determine whether a way was or was not a "thoroughfare" [*Becheram Bhattacharjee*, In re 15 W.R. Cr. 67 and *Angelo v. Oargill* 9 B.L.R. 417 : 18 W.R. Cr. 41]. But under the Code of 1872 there seems to have been either an abrupt transition to a different view or a reversion to some earlier view; witness the observations of Phear, J. in *Ray Omesh chunder Sen v. Ichanath Mozumdar* 21 W.B. Cr. 64 decided in 1874, less than two years after Angelo's case 9 B.L.R. 417 : 18 W.R. Cr. 41 and without any reference thereto, and see also *Petamber Jugi v. Nasaruddy* 25 W.R. Cr. 4 and *Chundernath Sen*, In the matter of the Petition of 5 C. 875, 6 C.L.R. 379 : 2 Ind. Dec. 1165.

32. The view then taken was apparently determined by two considerations. In the first place the power given by the provision in the two earlier Codes corresponding to Section 147 in the later Codes, enabled a Magistrate to intervene in any case of dispute concerning a right of way, public or private. The provision was not restricted, as it now is, to disputes likely to lead to a breach of the peace. In the second place, it was doubted at the time whether an order made by a Magistrate under what I may call the Section 133 procedure would be conclusive in the Civil Courts on the question of highway or no highway. There was some conflict of opinion and it was not till 1888 that the point was decided by a Full Bench in favour of the Civil Court *Chunilal v. Ramkishan Sahu* 15 C. 460 at p. 468 : 12 Ind. Jur. 425 : 7 Ind. Dec. 892 . Upon these considerations, it was laid down that where there was any dispute concerning the existence of a "thoroughfare" the Magistrate should follow, not the Section 133 procedure, but the different procedure appropriate to cases of dispute under which the Magistrate's final order would be subject, by express enactment, to the result of proceedings taken in a competent Court by a party aggrieved.

33. Section 147 assumed in the relevant particular its present form in the Code of 1882 and this change in the law made it clear that Section 147 and Section 138 were entirely independent provisions and that neither section could be used to throw any light on the interpretation of the Other, the object, scope and language being totally different. If there was any overlapping, that merely meant that in some cases where a public way was concerned, the Magistrate might have alternative procedures open to him. At the same time there was no reason why the restricted operation of Section 147 as compared with the corresponding previous provision, should of itself enlarge the powers given by Section 133. It became necessary, therefore, to re-examine the position and this was done in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 which has since been treated as the leading case.

34. The judgment then delivered has already been referred to and I will only say that, as it seems to me, the learned Judges attempted to find a basis for previous decisions in the rule or maxim of English Law, their "where the title to property is in question, the exercise of a summary jurisdiction by Justices of the Peace is ousted." (*Paley on Summary Convictions*, 8th Edition, page 157). It is this maxim which they set before themselves as one to be followed in India "so far as may be." The difficulty lies in this qualification, as the Magistrate cannot in the same case both have and not have jurisdiction. No satisfactory conclusion can be reached without considering whether the maxim should be, not partially, but wholly accepted or rejected.

35. The maxim is probably due in its origin to conditions which no longer obtain. There was a time when few Justices of the Peace had any training in law. Formerly also Statutes were less scientifically drawn than they now are and were in consequence more loosely interpreted according to their supposed reason or equity. An illustration lies ready to hand in the deer-killing case cited by Paley on

page 158, where Holt, C.J. said this:

36. And, therefore, if there was a dispute concerning the limits of a walk in a forest; and one claims as part of his walk what is in fact a part of the division of another, and accordingly kills deer there, the case is out of the intent of the Act, but is plainly within the words. The intent of the Act Was to punish rogues and vagabonds and not to persons who by mistake is the execution of their trust exceed what the law Warranted Rex v. Speed (1700) 1 Ld. Raym. 583 : 91 E.R. 1920.

37. But however the rule originated, it has been explained in more recent time as a presumption applicable to the construction of statutory powers conferred on Justices of the Peace--a presumption which may OR may not be displaced by the language employed. ID Reg. v. Cridland (1857) 7 El. & Bl. 853 at p. 871 : 27 L.J.M.C. 28 : 3 Jur. 1213 : 5 W.R. 679 : 119 E.R. 1463 : 29 L.T. 210 : 110 R.R. 860 Crompton, J, said: "Being an old maxim of law, which has been to generally applied for ages, we must assume that it is still intended to be applied by every Act relating to such matters though not specifically mentioned," and in While v. Feast (1872) 7 Q.B. 333 : 41 L.J.M.C. 81 : 28 L.T. 611 : 20 W.R. 382 Blackburn, J. was explicit. "All summary jurisdiction," he observed, "is the creature of Statute and on the principle that title could not be intended to be decided by an inferior tribunal, there has arisen the well-established rule that every Statute giving summary jurisdiction has the implied restriction as to title and the Justices must hold their hands if a bona fide claim of right is set up. On the other hand, in some Statutes, as the Highway Acts, the terms used to show that the Justices were not to hold their hands even if a right were set up."

38. No doubt the Justifies were supposed to know all about the local highways and one reason why in my opinion this presumption should not be intruded into the Criminal Procedure Code, is that I doubt whether it has been consistently applied in England, It was not applied, for instance, in Williams v. Adams (1863. 2 B. & SC 312 and 31 L.J.M.C. 109 : 8 Jur. 816 : 5 L.T. 790 : 127 R.R. 379 : 121 E.R. 1089 and Vaughen, Ex parte (1866) 2 Q.B. 114 : 7 B. & SC 902 : 36 L.J.M.C. 17 : 15 L.T. 277. 15 W.R. 198. while it was applied in Reg. v. Justices of Dorset (1866) 35 L.J.M.C. 211 and Reg. v. Stimpson (1863) 9 Cox C.C. 356 : 32 L.J.M.C. 208 : 4 B. & SC 301 and 10 Jur. 41 : 8 L.T. 536 : 129 R.R. 753 : 122 E.R. 472 At any rate where it is not applied, the Justices retain full jurisdiction of the nature affirmed in Reg. v. Bolton (1841) 1 Q.B. 66 : 4 P. & D. 679 : 5 Jur. 1154 : 13 E.R. 1054 : 10 L.J.M.C. 49 : 55 R.R. 209 and where it is applied the jurisdiction ceases on a bona fide claim of title being raised.

39. In England, again, the Superior Courts derive their jurisdiction to decide questions of right and title from the Common Law and may at one time have regarded encroachments with suspicion. The jurisdiction of the Indian Courts from the highest to the lowest depends on Statute. No doubt Civil Courts of various grades have been created for the special purpose of deciding Questions of right and title. But as time goes on various powers may be conferred either on

existing Courts or on newly created Courts outside the range of the ordinary Civil Courts. If the presumption that none but a Civil Court is to decide a question of right or title is admitted in one case, it may be extended to other cases and to other tribunals created, it may be, for some particular purpose or to administer some particular Act Quite recently a tribunal was created by the Calcutta Improvement Act for purposes of that Act and only the other day the President of the Tribunal was vested with certain powers to deal with rents in Calcutta. Indian Statutes being of the modern character, it seems to me wholly advantageous and desirable that they should be interpreted by the ordinary canons without resort to an adventitious presumption recognised it may be, in England, but not sanctioned by general principle and not authorised by anything in the Indian General Clauses Act; which is itself, so far as it goes, a statutory Code of construction. It is for the Legislature when it create) a new jurisdiction to define and limit the extent of that juris" diction, as it does, for example, in the Small Cause Courts Act, and when the question arises what powers are or are not conferred, the answer ought to be found within the four corners of the Statute.

40. In conferring powers relating to land or any other subject matter on Magistrates, it is easy to say, if that is the intention, that the Magistrate's jurisdiction is ousted if a bona fide claim of right or title is raised. Or the restriction may be qualified so that the Magistrate's jurisdiction will not be affected unless the claim made is not merely bona fide but also fair and reasonable (of *White v. Feast* (1700) 1 Ld. Ray 583 : 91 E.R. 1920, *Rex. v. French* (1902) 1 K.B. 637 : 71 L.J.K.B. 382 : 86 L.T. 587 : 60 W.R. 555 : 63 J.P. 487. 20 Cox. C.C. 200 : 18 T.L.R. 410],

41. When we come to the actual language and scheme of these sections, it is clear that the question of public way or no public way, if it arises, is directly involved in the enquiry which the Magistrate or the Jury have to make. To use words which occur in the cases, the question is an essential element in, or goes to the foundation and merits of, the enquiry. Even, therefore, if this were an English Statute it might well be debated whether the Magistrate had not a complete jurisdiction, But if, as I think, the language should be interpreted without any presumption one way or the other, it is plain that the Magistrate or the Jury have full jurisdiction to deal with a question of right or title for the purpose of determining whether a conditional order is reasonable and proper. The Jury, where there is a Jury, would presumably be persons acquainted with the locality, the Legislature relying not on their knowledge of law but on their local knowledge.

42. That construction is supported by the authority of Sir Richard Couch, C.J. in *Angelo's case* 9 B.L.R. 417 : 18 W.R. Cr. 41 though the learned Chief Justice did not consider the question of ouster of jurisdiction now raised. It is strange that *Angelo's case* 9 B.L.R. 417 : 18 W.R. Cr. 41 does not appear to have been cited in argument or referred to in any subsequent case before the present. The case was decided, as I have mentioned, under the Code of 1861 1869. I do not know

whether the subsequent enlargement of the revisional jurisdiction of this Court was a factor in altering the course of opinion; Under the Code of 1861-69, the High Court could only intervene in respect of error in law. Under later Codes the High Court in revision may question "the correctness, legality or propriety" of any finding sentence or order of an inferior Court and make an appropriate order.

43. If then the Magistrate has this jurisdiction, it is difficult to justify the general instructions laid down in Luckhee Narain's case 15 C. 604 at p. 570. 7 Ind. Dec. 960 dictating how he should act in the exercise of his discretion. Such rules with all respect, trespass beyond the legitimate sphere of interpretation and revision into the sphere of legislation It is "wrong in principle for any Court or Judge to impose fetters on the exercise by themselves or others of powers which are left by law to their discretion in each case as it arises. Saunders v. Saunders (1897) P. 89 : 66 L. 2. P. 57 : 76 L.T. 330 : 45 W.R. 583.

44. The instructions involve the distinction referred to in the second question submitted between bona fide claims of title which are well founded and bona fide claims which are ill-founded. This distinction was a new. departure, which has not met with undiluted favour. [See Mukunda Lal Dey v. Heribole Sahi 2 C.W.N. 564 and Peary Lal Mullick v. Surendra Keshore Mitter 54 Ind. Cas. 187 : 24 C.W.N. 247 : 21 Cri. L.J. 87],

45. I do not say that an order giving a defendant whose claim the Magistrate considers ill-founded a limited opportunity to go to the Civil Court is not within the Magistrate's jurisdiction, but he also has jurisdiction, and in some cases it may be his duty, to act himself on his own finding that the claim is ill-founded. It is matter for his discretion. As I apprehend, it would, in the same sense, be within the Magistrate's discretion in such case to terminate his proceedings leaving it to either party desiring to do so to seek a remedy in the Civil Court in the usual way. All that can be said beforehand is that the existence of a bona find dispute of title may be an element for the Magistrate's consideration.

46. Then, again, there is the difference which the learned Judges authorised between the treatment of obstructions to public ways and the treatment of the other nuisances, specified in Section 138, which affect the public health or safety, In the case of these other nuisances, the learned Judges say, the Magistrate is not to be fettered in the exercise of the powers given him by the considerations applicable to obstructions to public ways. This difference of treatment is not easy to support. Questions of right, if not of title, may arise, for instance, in connection with the issue whether some trade should or should not be carried on in some locality that no real distinction exists is shown by the fact that in one or two subsequent cases (no doubt of an exceptional character) this doctrine of urgency has been extended to obstructions to public ways, though nothing in the way of danger to the public health or safety seems to have been involved [Belat Ali v. Abdur Rahim 8 C.W.N. 143 : 1 Cr. L.J. 70 and Fakir Mullick v. Emperor 47 Ind. Cas. 674 : 28 C.J.J. 211. 19 Cr. L.J. 947]. It cannot be said that the possibility of a conflict between the Civil and the Criminal Courts was eliminated

by the judgment in Luckhee Narain's case 15 C. 604 at p. 570. 7 Ind. Dec. 960. Even under the procedure there laid down a defendant might neglect the opportunity given him of going to the Civil Court pending the Magistrate's proceedings. But he might still succeed, after the Magistrate had made a final order against him, in establishing in the Civil Court that the way was not a public way. Would the Magistrate be bound by the Civil Court decree? Sir Richard Couch thought that the Civil Court had no power, in effect, to reverse the Magistrate's order because otherwise there might be a conflict of jurisdiction. "The consequence of that," he said, "would be that there might be another order by the Magistrate, another Jury appointed, another similar finding, and then another suit and so on. The law does not allow that." Meschoo Chunder Sircar v. Ravenshaw 19 W.R. 315 : 11. B.L.B. 9. The Full Bench in Chunilal's case 15 C. 460 at p. 468 : 12 Ind. Jur. 425 : 7 Ind. Dec. 892 overruled the view that the Magistrate's order could not be brought in question in the Civil Court, but were silent as to the effect of conflicting decisions. It may be that few Magistrates would go against a decree of the Civil Court. The danger may be remote. Nevertheless it exists and in some combination of circumstances the point may arise and cause difficulty.

47. In my opinion, the attempt made in Luckhee Narain's case 15 C. 604 at p. 570. 7 Ind. Dec. 960 to find a half way house between holding that the Magistrate has no jurisdiction where a bona fide claim of title is raised and holding that he has full jurisdiction, placed the law on an unsound and uncertain basis. There can only be two alternatives, either the Magistrate has this jurisdiction or he has not. If he has the jurisdiction, it is beyond the province of this Court to oust it. And the real difficulty in choosing between the two alternatives for the purpose of answering the first question submitted is this, that in actual practice the distinction which Luckhee Narain's case 15 C. 604 at p. 570. 7 Ind. Dec. 960 draws between well and ill-founded claims has been generally disregarded, and the raising of a bona fide claim of title has been treated, apart from exceptional cases decided on the ground of urgency, as being in itself an effective bar to the Magistrate proceeding farther, [of Queen-Empress v. Bissessur Sahu 17 C. 562 at p. 666 : 8 Ind. Dec. 914 Praonath Dey v. Goborahone Malo 25 C. 278 : 13 Ind. Dec. 187 and Kamini Kumar Biswas v. Emperor 36 C. 283 : 7 C.L.J. 188 : 13 C.W.N. 267 : 7 Cri. L.J. 105 The case is often cited and profession is made of following it, but in general the result has been as I have said. In that state of things my doubt has been whether this Bench should radically alter a practice which goes back to the Code of 1872 or whether it should be left to the Legislature which is understood to be engaged in the revision of the present Code to put its intentions beyond all doubt. On the whole, however, for the reasons which I have endeavoured to express I agree with my Lord and Teunon, J., that the first question referred to us should be answered in the negative. If it were answered in the affirmative further questions would arise which need not now be considered as to the time at which the objection to the Magistrate's jurisdiction should be taken and as to the position of a Jury where the claim is

made after the case goes to them; Subject to what I have already said I agree that an affirmative answer should be returned to the first branch of the second question. Farther than that I express no opinion in regard to Belat Ali's case 8 C.W.N. 143 : 1 Cri. L.J. 70.

48. I agree that in the result the Rule should be discharged.

Newbould, J.

49. There is very little difference in practice between the rule of English Law that a bona fide claim of title ousts the jurisdiction of Justices proceeding in a summary way and the effect of decisions of this Court in Revision that a Magistrate should stay his hand when in proceedings u/s 133, Criminal Procedure Code, he finds that a claim of title is raised bona fide, No reference was made to this distinction when the case was argued before my learned brother Suhrawardy and myself had there been we should have framed the questions which we referred for decision by a Full Bench differently. The form in which we have put the questions requires a decision on the point of ouster of jurisdiction. Now that I have considered these questions from the point of view of a member of a Full Bench and am no longer bound to follow previous decisions of Divisional Benches, I am convinced that there is no ouster of jurisdiction. I have read the judgment which my learned brother Richardson, J., has just delivered and find myself so entirely in agreement with his views that I do not think it necessary to say more than that I fully agree with that judgment

Ghose, J.

50. The questions referred to the Full Bench for determination are as follows:

When in proceedings u/s 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public the defendant sets up a claim of right which is found by the Magistrate to be made in good faith, is the Magistrate's jurisdiction entirely ousted?

Or can the Magistrate, if he does not think this claim well-founded though he considers it made in good faith, allow the defendant a reasonable time to assert this claim by a civil suit and if he does not go to the Civil Court within such time or fails there, can the Magistrate continue the proceedings u/s 133, Criminal Procedure Code?

Was the case of Belat Ali v. Abdur Rahim 8 C.W.N. 143 : 1 Cri. L.J. 70 giving effect to the dictum in Luckhee Narain Banerjee v. Ram Kumar 15 C. 604 at p. 570. 7 Ind. Dec. 960 rightly decided?

51. The present reference has arisen out of an application to this Court under the provisions of Section 439 of the Code of Criminal Procedure by one Ram Sagar Mandal, described as one of the second party, against whom proceedings u/s 138, Criminal Procedure Code, had been instituted on the complaint of one Alek Naskar and several others. It was alleged that Ram Sagar Mandal and another,

person had included within their homestead a portion of a public road and had erected a cowshed thereon. Ram Sagar Mandal showed cause denying the existence of the alleged public road and setting up a claim to the land in dispute. The Magistrate was of opinion that the claim of Ram Sagar Mandal, though not substantiated, was not a mere pretence and had not been raised to oust the jurisdiction of the Court but that it had been raised bona fide. He thereupon directed that the second party should go to the Civil Court within a date fixed by him namely, within the 25th May 1921, and that in the event of the second party not going to the Civil Court within the said period, the trial should be continued. The petitioner did not go to the Civil Court and thereupon the Magistrate directed witnesses to be summoned.

52. On behalf of the petitioner it was contended before the Division Bench and also before us that on the Magistrate's finding that the petitioner's claim was bona fide, his jurisdiction u/s 133, Criminal Procedure Code, came to an end and that he was not justified in continuing the proceedings u/s 133, Criminal Procedure Code, simply because the petitioner had failed to bring a suit in the Civil Court, On behalf of the opposite party, the contention was put forward that, having regard to the findings arrived at by the Magistrate, the jurisdiction of the Magistrate had not been ousted and that he was justified in making the order in the manner in which he did.

53. In order to appreciate the contentions set out above, it is necessary to refer to the terms of Section 133 and of the sections which follow in Chapter X of the Criminal Procedure Code and to some of the more important cases decided u/s 133 of the Criminal Procedure Code, The sections, it need hardly be stated, have to be interpreted according to the natural meaning of the words used Section 133. so far as it relates to the case before us lays down that whenever the Magistrates mentioned in the section consider on receiving a Police report or other information and on taking such evidence, if any, as they think fit that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place, they may make a conditional order directing the, removal of such obstruction or nuisance or directing the person responsible for the; obstruction or nuisance to appear before a Magistrate and move to have the order set; aside or modified in manner indicated in the Statute Section 134 deals with the, service, of notification of the conditional order made u/s 133. Section 135 lays down, the courses open to the person against whom, the conditional order has been made. He can either perform the act directed in the conditional order within the time limited therein, or appear and show cause against the conditional order or he can apply to the Magistrate to appoint a Jury to consider whether the conditional, order is reasonable and proper. The procedure which is to be followed in, the event of the person affected failing to take advantage of the provisions of Section 135, and also in the event of the person affected following the provisions of Section 135 is indicated in Sections 133 to 141 of the Criminal Procedure Code. Farther, in cases where there is likelihood of imminent danger or injury of a

serious kind to the public, the Magistrate is empowered by Section 142, to issue, whether a Jury is to be or has been appointed or not, such an injunction to the person against whom the conditional order has been made, as is required to obviate or prevent such danger or injury pending the determination of the matter.

54. It may be noted in passing that Section 133 of the present Code of Criminal Procedure corresponds to Section 521 of the Code of 1872, which again corresponds to Section 308 of the Code of 1861. Under the Code of 1872, it was held by this Court that in proceedings u/s 521 of that Code, if a claim of private right were set up in respect of what was alleged to be a thoroughfare or public place, the Magistrate could not make any order u/s 521, and the following sections, but was to proceed u/s 532 (which corresponds to Section 147 of the Code of 1882, and of the present Code), so that the person claiming such private right should have an opportunity of having the question raised by him duly enquired into and determined. It is unnecessary to refer to the cases in support of this view they will be found collected to the case of Chundernath Sen, In the matter of the Petition of 5 C. 875, 6 C.L.R. 379 : 2 Ind. Dec. 1165 The ratio of the decisions was that it was no part of the duty either of the Magistrate or of a Jury acting u/s 526 of the Code of 1872, to determine the rights of parties in properly. Then came the Code of 1882, and in the case of Baseruddin Bhuiah v. Baharali 11 C. 8 : 5 Ind. Dec. 762 Mr. Justice Wilson observed as follows: "It has been more than once held by this Court that the powers now embodied in Sections 133 to 137, with regard to the obstruction of public ways, are not to be exercised where there is a bona fide dispute as to the existence of the public right. In the present case it is plain that the right of way is really in dispute, and that its existence is at least open to doubt. No order, therefore, can be made under the sections referred to until the public right has been established by proper legal proceedings, civil or criminal." It is to be remembered that the Code of 1882 and the present Code of 1898 did not and does not in Section 147 as in Section 532, the corresponding section of the Code of 1872, give a Criminal Court power to deal with such a matter. The case in Basaruddin Bhuiah v. Baherali 11 C. 8 : 5 Ind. Dec. 762 was followed without any discussion in the cases reported as Askar Mea, v. Sabdar Mea (27.) and Lal Mich v. Nazir Khalashi 12 C. 696 : 6 Ind. Dec. 471.

55. In Luckhee Narain Banerjee v. Ram Kumar 15 C. 604 at p. 570. 7 Ind. Dec. 960 the question was discussed at some length and the cases under the Code of 1872 were referred to. It was pointed out by Prinsep and Pigot, JJ., that in accordance with the last mentioned decisions it had been held by this Court that a Magistrate proceeding under the like sections of the Code of 1882, was not, when a bona fide claim of title was set up, to proceed to make an order but was to allow the party setting up such a claim to substantiate it if he could do so by civil proceedings. It was further pointed out that there were no proper provisions in Chapter X of the Code of Criminal Procedure for an enquiry into disputed question of title and that it could not have been held to have been the intention of the Legislature that questions of this nature raised bona fide should be finally

decided in a summary manner" and to the exclusion of any recourse to the Civil Courts. In the case in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 the learned Judges after pointing out that these decisions in question did not go to the jurisdiction of the Magistrate but only to the mode in which Magistrates should exercise their powers, observed further as follows on page 571:

When such a question is bona fide raised the Magistrate ought not to make an order under these sections of the Cods, but should allow an opportunity for the determination of the question by the Civil Court.

The claim of title must, however, in order that it should be allowed to have this effect be bona fide and not a mere pretense to oust jurisdiction, and it is for the Magistrate to say whether the claim be bona fide or a mere pretence. The Magistrate cannot, of course, in determining this, decide this contrary to the facts that the claim is not made bona fide but must have reasonable and probable cause for his decision, which will be subject to revision by this Court. The rule, however, that a bona fide claim of title ought not to be determined in summary proceedings before the Magistrate is subject to this that the objection must be raised by the defendant at or before the bearing; he cannot be heard, afterwards to object to the result of proceedings to which he has deliberately submitted himself.

56. The broad principle thus laid down is *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 has been followed or referred to with approval or has been acted upon in numerous cases in this Court and does not seem to have been questioned at all in subsequent cases but the controversy, such as it had been, has raged round a distinction drawn in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 between a claim of right which the Magistrate thinks well-founded and a claim of right which the Magistrate does not think well-founded but considers to have been made bona fide, The remark?, last referred to, have been considered in several cases as has been pointed out in the referring order; they have been followed and effect given to them in the case of *Belat Ali v. Abdur Rahim* 8 C.W.N. 143 : 1 Cri. L.J. 70.

57. The rule laid down in the case in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 that a bona fide claim of title ought not to be determined in summary proceedings before the Magistrate is of ten described as amounting to this, namely, that the Magistrate, having jurisdiction to enter upon the enquiry and having rightly entered upon it, becomes incapacitated to proceed because some fact appears which ousts his jurisdiction. No doubt it is a principle of the English Common Law that the jurisdiction of Justices is ousted by a bona fide claim of title on the part of a defendant, but it is to be noted that in England it has been held that although a claim of title is put forward bona fide by the defendant if such a claim is necessarily involved in the very question which the Magistrates have to decide, their jurisdiction is not ousted [*Rai v. Bradley* (1891) 70 L.T. 379 : 63 L.J.M.C. 183 : 10 Rul 183 : 17 Cox C.C. 789 : 58 J.P. 199], In

this country we have to proceed upon the words of the Statute as we had them, Now, excess of jurisdiction may either exist at the time when the Magistrate embarks upon the enquiry u/s 133 and when the conditional order is made and in that case there is no jurisdiction to hear the case at all--a contingency which is excluded by the terms of the Statute itself, or it may crop up in the course of the hearing, When the Magistrate embarks upon an enquiry u/s 133, Criminal Procedure Code, there is clearly no want of jurisdiction as has been shown above-; and having regard to the very careful and guarded language used by the learned Judge! in *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960 I find it difficult to say that the assertion of a bona fide claim of title costs the jurisdiction of the Magistrate in the sense in which the expression is used and understood in England. One test for ascertaining whether a matter is within the jurisdiction of the Magistrate or not is to consider the nature of the arguments used against the Magistrate. If there was DO jurisdiction the Magistrate ought not to have entered into the enquiry at all: but if the argument is that the Magistrate's authority is not fettered in any way in cases where danger to public health or safety is involved but is fettered in other cases, it is Quite clear that the Magistrate has jurisdiction. Where a Magistrate decides one way when he ought to have decided another way, that is not, in my opinion, absence or want of jurisdiction, The manner in which the Magistrate's discretion ought to be exercised in a particular set of circumstances is a different matter altogether and has nothing to do with questions of jurisdiction.

58. In my opinion there cannot be any manner of doubt having regard to the provisions of Section 133 that the Magistrate has complete jurisdiction when he makes the conditional order u/s 133. If the person, against whom the conditional order has been made, has a bona fide claim of right, he should draw the attention of the Magistrate to it at the earliest possible moment. On such a claim being put forward it is for the Magistrate to say whether the claim has been advanced before him with some show of reason and whether it is something more than a bare assertion; in other words it is for the Magistrate to say whether there is a real or substantial question between the parties to be tried out. If the Magistrate is of opinion that there is such a question, he ought to stay his hands at once and take no further action in the matter but refer the parties to the Civil Court. Whether or not the claim can be ultimately maintained in the Civil Court is altogether another matter; it is not for the Magistrate to enquire into all the circumstances to see if it is impossible, But if the claim of right put forward is of a character unknown to the law, the Magistrate is under no obligation to stay his hands although it is bona fide; in other words a mere belief in a right, although bona fide, ought not to be sufficient to induce the Magistrate to stay his hands. This does not mean, however, that the Magistrate is to embark upon a prolonged enquiry into what has been described as the degrees of bona fide in the claim of right advanced before him. For instance, where the encroachment or obstruction complained of is upon a way admittedly public, there cannot be any question that the Magistrate must proceed beyond the stage of the conditional order, even if a

claim of right were put forward by a person believing in the claim.

59. The view taken above is not inconsistent with what has been held to be the proper procedure to be followed in cases of emergency where there is likelihood of imminent danger or injury of a serious kind to the public. Indeed the Magistrate's discretion in cases of danger to public health or safety cannot be fettered as is amply recognised at page 573 of I, L.R. 15 Cal. *Luckhee Narain Banerjee v. Ram Kumar* 15 C. 604 at p. 570. 7 Ind. Dec. 960.

60. I, therefore, answer the first question by saying that if the Magistrate finds that there is a real or substantial question to be tried out between the parties he ought in the exercise of his discretion to stay his hands and not proceed any further after making the conditional order u/s 133. In my opinion it is not a case of ouster of jurisdiction and there is no ouster of jurisdiction,

61. I answer the second question by saying that the Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward. The Magistrate is not entitled to direct the objector to go to the Civil Court because in his opinion the claim of right cannot be ultimately maintained. So far as the case of *Belat Ali v. Abdur Rahim* 8 C.W.N. 143 : 1 Cri L.J. 70 is not inconsistent with the above view, it was rightly decided.

62. As regards the matter out of which the present reference has arisen, I read the Magistrate's order as meaning that he was of opinion that no real or substantial question of title between the parties had been raised before him. If I am right in this interpretation of the Magistrate's order, it follows that the Magistrate was not bound to stay his hands. In this view of the matter I would discharge the Rule which was issued by the Divisional Bench.