

(1991) 05 PAT CK 0030
In the Patna High Court
Case No : Criminal Rev. No. 704 of 1989

Shambhu Choudhary

APPELLANT

Vs

Rajendra Prasad and others

RESPONDENT

Date of Decision : 27-05-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 133, 134, 134, 135
Evidence Act, 1872 — Section 101, 102
Penal Code, 1860 (IPC) — Section 139, 161, 188, 268

Citation : (1993) 2 PLJR 151

Hon'ble Judges : S.H.S. Abidi, J

Bench : Single Bench

Advocate : A.K. Roy and R.K. Sharma, for the Appellant; Ram Nath Sharma and Mr. B.P. Gupta for the State, for the Respondent

Final Decision : Dismissed

Judgement

S.H.S. Abidi, J.—Shambhu Choudhary 2nd party petitioner has filed this revision against the order dated 12.9.1989 passed by the learned Executive Magistrate, Danapur who had ordered the 2nd party, Shambhu Choudhary, Ramesh Choudhary, Birbal Mian and Ayub Mian to remove the obstruction caused by them by constructing rooms on plot no. 493 which the 1st party claimed to be a chat (flank) of the District Board Road (Zila Parishad Road) which runs from north to south. It appears that on 3.4.1988, an application had been filed by Rajendra Prasad, 1st party before the Anchal Adhikari for removing the encroachments on the said chat. Later on, on 1.6.1988, he filed petition u/s 133 of the Code of Criminal Procedure (hereinafter referred to as "the Code") saying that his house stands on plot no. 488 and Niksar (exit) of the petitioner's house is towards the south-west. The chat on the Zila Parishad Road running north to south is being used not only by the petitioner but also by the villagers as Rasta for going to the Zila Parishad Road. The 2nd party Shambhu Choudhary has conducted a shop in front of the house of the 1st. party obstructing the Rasta by encroaching upon the road also. When the 2nd party was requested against such high-handedness,

he got angry and chased the 1st party to assault and so, the petitioner has filed that petition u/s 133 of the Code.

2. On this application, the same day the learned Executive Magistrate called for a report from the Anchal Adhikari, Naubatpur fixing 27.6.1988. In the meantime, show cause was also asked for from Shambhu Chaudhary and another, the second party in that proceeding. After several dates, the 2nd party appeared on 12.7.1988. He filed show cause on 11.8.1988 denying any obstruction, and said that Shambhu Choudhary (petitioner) is the son of Mostt. Daulati Devi, sister of Kishan Choudhary who was in possession of the land in question. She in order to avoid any further complication, applied to the District Board authorities to settle the land with her upon which the authorities of the Zila Parishad directed a Junior Engineer of its department to make an enquiry who, on enquiry, reported that there will be no obstruction in coming and going to the public on the road. On the basis of the said report (Annexure-D) Zila Parishad settled the plot of land measuring 25" x 10" with Mossti. Daulati Devi the rate of 33 paise per sq. ft. per month and issued a settlement letter (Annexure-2). It was after the settlement that she made construction over the land containing three rooms and left the portion of the land towards west of the rooms to be used as passage and was living there since its construction. It was also said that the Zila Parishad was not impleaded as a party and so any order or direction against Zila Parishad was not binding.

3. On 20.7.1988, both parties appeared. Report of the Anchal Adhikari was not received, though the report from the Zila Parishad was received. The Magistrate ordered the case to be put before Sub-Divisional Magistrate, Danapur. The Subdivisional Magistrate heard both the parties on 19.8.1988 and passed a detailed order after dealing with the case of the 2nd party and also considering the reports of the Junior Engineer of Zila Parishad and the Anchal Adhikari. He therefore, directed for starting proceedings u/s 133 Cr.P.C. and for sending the record to the Executive Magistrate who alone was competent to decide the case. The second party was also directed to file his show cause.

4. The case went back to the Executive Magistrate on 29.11.1988. The 2nd party filed show cause on 4.8.1988. On several dates witnesses were examined in support of denial of public right besides filing certain documents. Surajdeo Prasad, A. W. 1 has said that the land had been allotted to Shambhu Choudhary by the Zila Parishad. He was seeing his shop since 1948. Towards west is the house of Rajendra Pd. 1st party. Chat is 10" wide and that through this chat, the people of the village go. Bishwanath Prasad, O. P. W. 2 has said that the house was over 50 years old. Shambhu Choudhary, 2nd party himself had appeared as O.P.W. 3 and said that his Mama Kishan Choudhary have been keeping shop. The C.O. Naubatpur had never come for any inquiry and no passage had been declared. He admitted that the house of the 1st party is just west of the chat. There are also other houses. It is only he and none-else to whom settlement had been made towards north or south. He admitted that the settlement is.

temporary and permanent settlement of the house can be made. Nasrul Haque, D. P. W. 4 who is a formal witness, has proved Ext. Ka, the inquiry report of Shri K. P. Verma, the Junior Engineer settling the land on rent in favour of the 2nd party and Ext. Kha, the letter bearing no. 70 dated 3.7.1988 written by the District Engineer asking Smt. Daulati Devi to come for agreement. O. P. W. 5 is Narendra Prasad, an advocate's clerk, who has proved (Ext.Ga), the letter no. 298 dated 19.7.1988 written by the Secretary, Zila Parishad to Subdivisional Magistrate, Danapur in which reference has been made of the settlement.

5. On the basis of the oral and documentary evidence, the learned Magistrate, by the impugned order dated 12.9.89, held that by the settlement of chat land towards west, over which the 2nd party has made construction, the exit of the 1st party from the house has been obstructed and that 2nd party has made shop of bricks and tiles in violation of the terms of settlement causing obstruction to exit of the 1st party and the public in general and so, the settlement is against the public policy and as such, this create a nuisance to the general public. Further the settlement by the Junior Engineer is also illegal. As such, the 2nd party was directed to remove the obstruction by 30th of September, 1989 otherwise, through the police force, it would be got removed at the expense of the 2nd party. Against this order, this revision has been filed.

6. The Learned Counsel for the petitioner has urged that as the settlement has been made by the Junior Engineer after making in quires, so there is no encroachment. As the chat is private property of the District Board then the onus is on the 1st party to prove that it is the public property. Further, as Section 139 of the Code is in the negative form, so the onus is on the 1st party to prove that this is a public place and u/s 101 and 102 of the Evidence Act negatives are not proved and only positives are proved and the court below has conveniently ignored the reliable evidence led by the 2nd party. Next, it was contended that the learned Magistrate has made local inspection but the court has not kept the record of the same. The court should have given opportunity to the party to file objection. As the dispute is of a private land, jurisdiction of the court u/s 133 of the Code, is ousted Further, it was contended that the learned Magistrate had got the report of the Anchal Adhikari u/s 139A of the Code yet the court had not considered the said aspect It was also urged that without the compliance of the provisions of Section 137 (Old 139A). the learned Magistrate could not pass orders u/s 138 (Old 137) of the Code and as such, order is bad and illegal.

7. To appreciate these contentions of the Learned Counsel for the petitioner, the scheme to the provisions of sections 133 to 139 of the new Code of Criminal Procedure, so far it relates to obstruction or nuisance on any public place, will have to be seen. Sections 137 and 138 of the new Code correspond to sections 139A and 137 of the old Code. Section 133 deals with the passing of conditional order for removal of nuisance when the magistrate on getting a police report or on taking such evidence, as he thinks fit, considers that the unlawful obstruction or nuisance should be removed from the public place. Section 134 deals with

service or notification of the order. Section 135 deals about the person to whom order is addressed to obey or show cause. Section 136 says that if such person does not perform such act or does not appear or show cause, then he will be liable to penalty prescribed in this behalf u/s 188 of the Indian Penal Code and the order shall be made absolute. Section 137 provides that when the person appears in pursuance of the notice u/s 133, then the Magistrate will 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 denies the existence of the public right, the magistrate shall proceed u/s 138 inquiring into the matter. If on such inquiry, the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter under existence and such right has been decided by a competent court. But if he finds that there is no such evidence, then he shall proceed as laid down u/s 138. Section 138 provides that if the person against whom the order u/s 133 has been made, appears and shows cause the magistrate shall take evidence in the matter as in summon cases. If the Magistrate is satisfied that the order originally made is subject to such modification as he thinks necessary is reliable and proper, the order shall be made absolute with modifications or without modifications as the case may be. But if the Magistrate is not satisfied after taking evidence, he shall not take evidence. Section 139 gives a power to direct a local investigation by such person as he thinks fit or summon and examine an expert.

In the case of *Thakur Sao and Others Vs. Abdul Aziz*, mentioning about the procedure, a Division Bench has held at page 171, Col-I as follows :

"The law, therefore, requires first of all that the party shall appear before the Magistrate and deny the existence of the public right in question. Secondly that he shall produce some reliable evidence, and, thirdly, that such evidence shall be legal evidence and shall support the denial. If these three conditions are satisfied, then the Magistrate's jurisdiction ceased to be in existence."-- The Section, however, requires evidence and not proof and the only condition is that upon the materials before him the Magistrate has no reason to think the evidence false. The Magistrate has no jurisdiction to weigh the evidence and to determine on which side the balance leans.

Later on, in the case of *Sukh Lal Gope and Another Vs. Satyadeo Prasad and Others*, , a learned single Judge, after referring to the decision in the case of *Thakur Sao Vs. Abdul Aziz* (Supra) where procedure has been laid down, observed at page 312 as follows :

It is only for him to see whether there is reliable evidence in support of the denial of the existence of any public right in respect of the disputed lands. That evidence may not be completed for the purpose of negating the public right after compliance with the other evidence and materials on record adduced by the other side." - "It is only at that state in the nature of an *ex parte prima facie* evidence, and if that evidence is *per se* reliable, then the Magistrate should hold of his hands and refer the parties to have their dispute settled in the Civil court.

He should only consider the evidence adduced on behalf of the petitioner and so if that evidence is reliable to support his denial, he should also consider the other circumstances and then decide whether having regard to those facts it would be desirable for him to proceed in Section 137 Cr. P. C. but in no case should he look to the evidence of the opposite party for the purpose of coming to such a decision.

Further, in the case of Darsan Ram Vs. The State and Others, , giving out the procedure a Division Bench of this Court has held at page 82 (Para 3) as follows :

In a case falling u/s 139-A, it is imperative for the Magistrate, first to hold an enquiry as laid down therein before he proceeds under S.137 or 138; as the case may be. It will appear that the procedure laid down in S. 139-A requires, first that the party against whom a provisional order has been made, shall appear before the Magistrate and deny the existence of the right in question, secondly that he shall produce some reliable evidence; and thirdly that such evidence shall be legal evidence and shall support the denial.

The enquiry envisaged in Section 139-A is in the nature of an ex parte summary enquiry and what the Magistrate has to see is whether there is prima facie reliable evidence in support of the denial and not that the non-existence of the public right should be affirmatively proved. It is, therefore, not the duty of the Magistrate to take evidence of both the sides and then to judge if the party against whom the order has been made, has succeeded in establishing the non-existence of the public right.

Further, the court is also to see in this process whether this denial is bonafide or is a pretence to oust the jurisdiction of the court. The Division Bench, in the case of Thakur Sao and others V. Abdul Aziz (Supra) at page 171 has observed as follows :

The law, previous to the Code of 1923 as expanded in judicial decisions, was that as soon as the party cited appeared before him the Magistrate's first duty in a case under S. 133 of the Code was to determine whether any public right existed, if the party denied that there was any public right, the Magistrate had to determine whether that denial was bonafide or mere pretence. Only when he was satisfied that it was pretence could he proceed to make the order absolute. If, however, he found that the denial was bonafide his jurisdiction was ousted and he had no authority to enquire further.

In the case of Jagroshan Bharti Vs. Madan Pande, , it has been held at page 266: "The question of possession is relevant for the purpose of finding out whether the claim is bonafide or not. II the claim is held to be bonafide then the rule must be discharged. If it is held to be not bonafide, and if there by encroachment upon public path, the rule must be made absolute."

Later, in the case of Mohd. Ayub and Others Vs. State, , it has been observed at page 217 as follows :

Before the enactment of this section in 1923, it had been decided by various High Courts that the Magistrate had to determine in each case whether the claim set up by the second party -- the party required to remove an alleged obstruction by an order under S. 133 -- was a bonafide one or not. If it was found to be a bonafide one, the Magistrate had to stay proceedings till the claims set up had been enquired into and decided by the civil court. After the introduction of S. 139-A into the Code in the year 1923, it seems to me that any consideration of the bona fides of the claim set up has become irrelevant. What is required now is that the Magistrate had to find, by a summary enquiry, if there is prima facie reliable evidence in support of the denial of the evidence of any public right in respect of the way, river, channel of place -- If there is reliable evidence of this character in support of the denial made, the Magistrate is bound to stay proceedings until the question of the existence of such public right has been decided by a competent Civil Court.

During the course of the summary enquiry at times settlement entries, patta, deed of arrangement or settlement are referred to by the notice opposite party in support of the claim that there has been no encroachment and that they have got title. The court at one stretch is to see only prima facie case of denial. The court is not to scrutinise the evidence. But at that stage, there is no rebutting evidence. In such a situation, the court is to see only whether the evidence in support of the denial was prima facie reliable.

In the case of Sarwan and another Vrs. Purilal, 1962-(2)-Cri.LJ-716, it has been held at page 717 in para 6 as follows :

The stand taken by the non-petitioners was that they were in occupation of that land only which they had got by means of a Patta and so the real question which the magistrate ought to have determined was whether the non-petitioners had encroached upon a land not covered by their Patta. The non- petitioners had further denied the existence of any public right of way in respect of the land which was in their occupation. Under these circumstances, it was incumbent upon the Magistrate to first proceed u/s 139-A Cr. P. C. and find out if there was any reliable evidence in support of the denial made by the non-petitioners. If the non-petitioners could prove that the land in dispute was included in the patta, that would have certainly been reliable evidence in support of their denial and in that case the Magistrate should have stayed the proceedings until the matter of the existence of the right of way was decided by a competent civil court.

In the case of Amar Singh Vrs. State of U.P. and others, 1980-Cri.LJ-1350, where, the opposite party in response to the notice u/s 133 filed copies of Khasra and Shajra of the last settlement showing that there was no entry of the public way to be filled by the opposite party as the settlement entries are presumed to be genuine u/s 57 of the Land Revenue Act unless they are rebutted and not those Sajra entries the Court has observed that "of course, it was not conclusive and could be rebutted by evidence. But at this stage with no rebutting evidence on record, it was enough to show that there was prima facie reliable evidence

about their denial of public way. The court referred to decisions in the case of Satish Chandra Sen V. Krishna Kumar Das, (AIR-1931-Cal.2) : (32 Cri.LJ 189), Sita Ram Ray V. Badri Ray, (AIR-1935 Pat 218); 36 Cri.LJ-1051) and Jai Ram Singh V. Bhuley, (AIR-1963-All-27); 1963(1) (Cri.LJ 33). Since the learned Magistrate, in that case, had discarded the evidence by observing that it was not necessary that public record should always be correct, but as I observed earlier, "it was not the stage for him to scrutinise this evidence in this way rather he had only to see whether there was prima facie case of denial and it being a settlement entry it was certainly good reliable evidence of denial."

8. The criminal procedure has not prescribed any form and nature of inquiry. It has said that it is only summary in nature and the Magistrate is to record a definite finding as to reliability or otherwise of the evidence in support of the denial of the existence of the public right.

In the case of Budha Rai and others Vrs. Emperor, AIR 1948 All 115, the learned Single Judge has observed at page 116 as follows :

Nothing is laid down in the Code as to the form which the inquiry under S. 139-A should take and no restrictions are imposed upon the discretion of the Magistrate as to how he should conduct the inquiry except such as can be inferred from the purpose for which inquiry is intended. His duty is to determine whether there is reliable evidence i.e. the evidence which has no reason to think as false, in support of the denial and for that purpose he may allow the witnesses called in support of the denial to be cross--examined. (A.I.R. 938 All 653 -- Supra).

In the case of Bardeshwari (Barodeshwari) Prosad Battacharjee Vs. Rabi Nandan Saha, , a Division Bench observed at page 25 (Para 6 and 7) as follows :

It is thus seen that upon the second party's denial of the existence of the alleged public right there is to be a proper enquiry ending with a definite finding by the learned Magistrate on the reliability or otherwise of the evidence in support of such denial.

The order concerned does not however indicate what the actual evidence in support of the opposite party's denial was, nor does it show why the evidence in support of the opposite party's case was considered unreliable.

In our view, the provisions of S.139-A must be expressly complied with. The order complained of does not indicate any such compliance.

9. From this procedure it appears that after the appearance of the opposite party in response to the notice u/s 133, the Magistrate has first to follow the procedure as laid down u/s 137 and then proceed u/s 138 or passing a final order, whether confirming or modifying the original conditional order. Section 137 requires a brief inquiry and finding on the limited questions whether the denial of public right is true or false. If correct, the Magistrate is to wash off his hands and ask the party to get it decided by a competent Civil Court but if the parties denied the existence of the public right, but the evidence is not reliable evidence then

the Magistrate is to proceed u/s 138. Thus there are two different stages of enquiry, u/s 137 and then 138. In the case of Abu Sayeed and others Vs. Damodar Prasad Tiwary and others, AIR 1935 Patna 138, it has been held "it is only in cases where he finds that there is no reliable evidence in support of the denial that he is empowered by Sub-section (2) of S.139-A to proceed further in the matter.

In the case of Narsing Narain and another Vs. Rameshwar Singh and others, AIR 1936 Pat 380, also, it has been said that since the Magistrate has not made the inquiry as enjoined u/s 139-A, his order could not stand."

In the case of Gangadhar Marwari Vs. Emperor, , it was observed at page 151 (Col-II) as follows :

It is generally desirable that the Magistrate should record a definite finding in terms of Section 139A though if record otherwise indicates that he did find that the denial of the public right was well founded, the requirements of section 139-A(2) would be made out.--It is obvious that the court and the parties distinctly understand when the case enters on the second stage of the proceedings provided by S.137, Cr.P.C. so that the evidence, not of the preliminary character contemplated by S.139-A (2) but such as is contemplated by Section 137 be produced.

Further in the case of Govinds Gounden and others Vs. I.A.Y.I. Gounden and others, AIR 1939 Mad 465, it has been observed that to pass an order u/s 138 without recording the finding as required u/s 137, is not legal and proper. In the case of AIR 1948 19 (Oudh) , it was said at page 20 : "the language of the section is perfectly clear and unambiguous and requires evidence at two stages, once in the inquiry u/s 139-A Cr.P.C. and again in the proceedings u/s 137". In this case, the learned Judge referred to the case of Pratap Narain Vs. Ram Kumar, AIR 1941 Oudh 271, where it was held that in such cases the Magistrate can only proceed u/s 137 Cr.P.C. and if that has not been done, the order of the Magistrate must be set aside. The learned Judge also referred to Mahavir Vrs. Asliarfi, AIR 1947-Oudh-65 where it has been held, "Both the stages must be complied with as the provision is mandatory and it is not a question of mere irregularity which can be cured by section 537 Cr. P.C.". The learned Judge has also referred to several decisions including the Division Bench cases in Thakur Sao and Others Vs. Abdul Aziz, ; and AIR 1934-Cal. 545 (Krishna Mandal Vs. Emperor) 61-Cal-390.

In the case of Thomas Varkey Vrs. V. Indicula John, AIR 1951 P C. Coc 228: 52 Cri LJ 250, it has been said that the section contemplated two stages of inquiry. In the case of Ravi Shankar Vs. Siaram and others, 1983 Cr LJ 1478, a learned Single Judge of the Allahabad High Court has said that "non-observance of procedure u/s 137 and resort to section 138 straightway warranted interference in revision u/s 397".

In the case of Ganga Ram Vs. State of Rajasthan and others, 1969-Cri.L.J. 1461,

it has been said at page 1463 in paragraph 8 as follows :

Here what learned Magistrate actually did was that without recording any evidence under S. 139-A Cr. P.C. he examined the evidence of the parties and disposed of the case. It is not clear whether the Magistrate thought that he was holding inquiry u/s 139-A Cr.P.C. Even if he did so, it seems to me that the inquiry made by him was not in consonance with the provisions of S.139-A Cr. P.C. He did not reach any conclusion to the effect that there was reliable evidence in support of the denial of the existence of the public path by Ganga Ram. No proper finding was given by the learned Magistrate u/s 139-A Cr. P.C. and that being so, the order made by him ostensibly u/s 137 must be deemed to have been made without jurisdiction.

In the case of Brahamdeo Singh Vs. Indradeo Singh and others, 1984-Cri.LJ -300, a learned Single Judge of this Court has said at page 300 (para 4) : "The Code specifically provides in section 137 that the moment there is denial of existence of any public right, the Magistrate has to inquire into that question first before proceeding to deal with the matter under S.138 of the Code. This procedure in between the initiation of the proceedings under S.133 and final order under S.138 of the Code is a mandatory one, the failure whereof will make the final order u/s 138 an illegal one".

In the case of Ram Krishnan Vs. Musalikutti and others (1985-Cri.LJ-630), a learned single Judge of the Kerala High Court has observed at page 632 (para 9) as follows :

9. A reading of sections (1), (2) and (3) of section 137 clearly shows that the provisions in section 137 (1) is obligatory and that magistrate gets jurisdiction to proceed u/s 138 only in a case where he finds that there is no reliable evidence in support of the denial of the public right. I am therefore, in respectful agreement with the view that non-compliance of the provision of sub-section (1) of section 137 vitiates the whole proceedings and the subsequent proceedings cannot be sustained.

In the case of Thaneswar Bora Vs. Kumud Sarmah, , a learned Judge of Gauhati High Court observed at page 1294 in para 5 as follows :

In short if the opposite party admits the existence of public right the magistrate may on admission of the party, proceed u/s 138 of the Code to decide the respective rights of the parties. However, if the public right is denied the magistrate must hold an enquiry. If he finds that there is any reliable evidence in support of such denial he must stay the proceedings until the existence of public right is decided by a competent court in favour of the applicants. If he finds on inquiry that the denial of the opposite party has no backing of any evidence he shall proceed u/s 138 of the Code. As such, Parliament has laid down a set procedure directing to magistrate to proceed in that particular manner as to prescribed u/s 137(1) of the Code. He must comply with the terms of the order. If the opposite party denies the existence of the public right he cannot decide the

issue on merit without holding an enquiry. It is a condition precedent to exercise jurisdiction u/s 138 of the Code.

10. Still there is another aspect, as to whether non-observance of the provisions and passing an order u/s 138 (old 137) without following the provisions contained in S. 137 (old 139-A), is curable or not. There are decisions on this point of curability. In the case of Chhangu Vs. Suraj Pal (Supra) it has been said that "if the parties are deprived of their right of producing evidence at either of the stages they are materially prejudiced and. it cannot be said that only an irregularity has been committed which may be cured by invoking the aid of section 537 Cr.P.C.

In the case of Ram Krishnan Vrs. Musulikutti and others 1985-Cri-LJ-630, (Supra), it has been observed at page 632 in para 7 as follows :

There is fundamental difference between two inquiries u/s 137(1) and that under S. 138. Where in reply to a notice issued u/s 133, the party denies the existence of public right alleged to have been obstructed by him and urges an inquiry under S. 137(1), it is not proper and legal for the Magistrate to mix-up the inquiries under sections 137(1) and 138 which are fundamentally different and pass a composite final order upon them. It is the right of a party against whom a preliminary notice is issued to show cause that further proceedings should not be taken, if he can adduce the reliable evidence in support of denial of existence of the public right in question, and before the proceedings u/s 138 the Magistrate must give a finding on the point. The failure to make an inquiry under the mandatory provisions of S. 137(1) cannot be ignored as mere irregularity. It is a question of jurisdiction to pass the final order. Merely because the Magistrate allowed both parties to adduce evidence, it cannot be inferred that the petitioner was aware that the Magistrate dispensed with the inquiry u/s 137(1) and continued the proceedings under S. 138. It cannot be presumed that the Magistrate proceeded to act under S. 138 for failure of the petitioner to adduce evidence.

11. But there are also the decisions otherwise that non-compliance with the mandatory provisions of section 137 and going over directly for the proceedings u/s 138, is an irregularity curable u/s 465 (old 537), if no material prejudice has been caused and the opposite party has got opportunity to meet the notice under S. 133 Cr. P. C., by filing his written statement and objection and also producing evidence or documents.

In the case of Kishorilal Vs. State, it has been observed at page 451 (para-5) as follows :

It is obligatory on the Magistrate to, first of all, conduct an inquiry u/s 139-A Cr.P.C. in cases where the existence of any public right in respect of any way or place is denied, before holding the inquiry under S.137 or 138 Cr. P.C.-Similar view was taken in Mahabir Vrs. Asharfi (Supra) and Chhangu Vrs. Suraj Pal (Supra) which are as follows : "but with due respect I do not agree with the

opinion expressed for an irregularity committed by not following the procedure laid down u/s 139-A Cr.P.C., could not be cured by invoking the aid of section 537 Cr. P.C. While in expressing this opinion, Hon'ble Judge did not comment upon the various provisions of the Cr.P.C. Thomas, J. observing in 47-Cri.L.J. 398 (Supra) that as the provision was mandatory, it was not a question of mere irregularity which could be cured by section 537, Criminal Procedure Code. In the other case, 48-Cri.L.J. 666 (Supra) Kidwai, J. expressed the opinion that if the parties were deprived of their right of producing evidence at either of the stages, they were materially prejudiced and could not be said that only irregularity has been committed which could be cured by invoking the aid of S.537 Cr.P.C.

12. On account of being there two different stages of inquiry, some courts have held that these enquires under Ss. 137 and 138 cannot be held in one stretch, but they should be separate with separate findings, so the chances of lack of opportunity and prejudice may be ruled out. In the case of Gangadhar Marwari Vs. Emperor, it has been observed at page 151 as follows :

In this case, the entire proceedings were taken at one stretch and the parties could not possibly understand where the inquiry u/s 139-A(2) terminated and that u/s 137 Cr.P.C. began. It is obvious that the court and the parties should distinctly understand when the case enters on the second stage of the proceedings provided by S.137 Cr.P.C, so that the evidence not of the preliminary character contemplated by S.139 -- A (2) but such as is contemplated by section 137 be produced I do not think that in the present case it can be said that on a particular date the court found that there was no reliable evidence in support of Gangadhar's denial and that the proceedings under S.137 Cr.P.C. could commence thereafter. In these circumstances, the proper order to pass is to set aside the order of the Magistrate and to direct him to proceed according to law. It is ordered accordingly.

In the Division Bench decision in Darsan Ram Vs. The State and Others, , it has been said at page 83 in para 3 :

As laid down in Sub-section (2) of Section 139-A he could not proceed simultaneously under these two sections. He could proceed u/s 137 only when the enquiry u/s 139-A did not disclose any reliable evidence in support of the denial.

In the case of Kartik Ram Vs. Jagarnath Misir and others, 1964 (1) Cri.LJ 248, a learned Single Judge of Orissa High Court has said: "the Magistrate making a joint inquiry both under sections 137 and 139-A and passing a composite order, then the proceedings are irregular and final order not legal". In the case of Ram Krishnan Vs. K. Musulikutti (Supra) as seen earlier it has been said at page 632 (para) that there is fundamental difference between the two enquiries and there was no legal and proper for the Magistrate to conduct the inquiry u/s 137(1) and 138 together and pass a composite order upon them.

13. But there is a decision otherwise also that the holding of the joint inquiry

under these sections 137 and 138 only an irregularity and does not vitiate the trial. In the case of Kishorilal Vs. State, a learned Single Judge of Allahabad High Court has observed at pages 245 and 246 (paras 5 and 7) as follows :

5. The law is thus clear and is not capable of two interpretations. It is obligatory on the magistrate to, first of all, conduct an enquiry u/s 139-A Cr.P.C. in cases where the existence of any public right in respect of any way or place is denied before holding the enquiry u/s 137 or section 138 Cr.P.C.

A similar view was taken in AIR 1947 65 (Oudh) and AIR 1948 19 (Oudh) , but with due respect I do not agree with the opinion expressed that an irregularity committed by not following the procedure laid down u/s 139--A Cr. P. C. could not be cured by invoking the aid of section 537 Cr. P. C. While expressing this opinion Hon"ble Judges did not comment upon the various provisions of Cr. P. C. Thomas, CJ. observed in 47-Cr. L. J.-398 : AIR 1947 65 (Oudh) that as the provision was mandatory it was not a question of mere irregularity which could be cured by section 537 Cr. P.C.

In the other case, 48 Cr. LJ. 666 : AIR 1948 Oudh 19 Kidwai, J. expressed the opinion that if the parties are deprived of their rights of producing evidence at either of the stages, they are materially prejudiced and it could not be said that only an irregularity has been committed which could be cured by invoking the aid of section 537 Cr. P. C.

It is not necessary that the parties would be materially prejudiced in each and every case e.g. if the magistrate makes it clear and the parties are aware, that a joint inquiry was being conducted u/s 139-A and 137 Cr. P.C. and the parties in fact led evidence on points which are in both the inquiries, none of them would be prejudiced by the procedure laid down in section 139-A, not being strictly adhered to".

7. "In other words, therefore, the correct interpretation of the above section is that, where the magistrate was competent to take jurisdiction of the proceeding and no failure of justice was occasioned, that is, the parties were not materially prejudiced, any irregularity in the proceedings can be condoned u/s 537 Cr. P. C. Consequently, if the magistrate held a joint inquiry u/s 139-A and 137 Cr.P.C. and the parties were not in any way prejudiced, the final orders passed cannot be interfered with on appeal or revision. But if the magistrate was not competent to take cognizance of the proceeding or the parties had been materially prejudiced by the court not holding the inquiry in accordance with the law, such order can be set aside by the appellate or revisional court.

14. Under Sub-section (1) of section 137 of the Code, it has also been provided that if the opposite party in response to the notice u/s 133 of the Code appears before the Magistrate, then the Magistrate has to question the opposite party as to whether he denies the existence of the public right over the place of obstruction and if he does so, the magistrate shall before proceeding u/s 138, inquire into the matter. Section 138 says that if the person against whom the

order u/s 133 is made, appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a ssuimon's case. There are divergent pronouncements. Some decisions are that if the Magistrate does not put the question then further proceeding is bad; whereas, some say that if the person appears and files written statement denying the existence of public right then non-questioning by the Magistrate to the noticee does not vitiate the further proceedings. In the case of Emperor Vs. Raghunandan Saran Das, , it has been said that "person to whom the order is addressed must first be questioned regarding existence of denial of public right and inquiry u/s 138 and 139-A should follow afterwards".

In the case of Mt. Chunni and Another Vs. Emperor, , it has been said "Under section 139-A Criminal P.C., it was incumbent upon the Magistrate to question the applicants as to whether they denied the existence of the public way, but there is absolutely nothing on the record to show that any such enquiry was made".

In the case of Kalipadda Das Vs. The King, AIR 1949 Cal 583, a Division Bench observed at page 583 (Para 6) as follows :

It appears from a perusal of record that the learned Magistrate neither questioned the petitioner as to whether he denied the existence of a public right in respect of the land in question nor came to a definite finding in support of the petitioner's denial of a public right made in his petition before the learned S. D. M. Proceedings under Chapter 10 of the Code are to be taken in distinct stages. The enquiry u/s 139-A must end with a finding in terms of that section and it is only when the denial of the public right is found not to be well founded that the inquiry u/s 137 should be undertaken.

In the cases of Mahabir Vs. Asharfi (Supra) Chhangu Vs. Suraj Pal and others and Thaneshwar Bora Vs. Kumud Sarmah (Supra), the same view has been taken that it was obligatory on the Magistrate to follow the procedure laid down u/s 139-A.

In the case of Jangal Prasad Vs. Rameshwar Prasad, A. I. R. 1960 Pat 39, it has been held "the Magistrate did not question and appointed jury, the order was said to be bad". Following the decision in the case of Barti Singh and others Vrs. Narain Das Pala and others, 1973 - BBCJ - 678, 1974-BBCJ-358 and 1975-Cri.LJ-959, it has been said: "it is the first duty of the Magistrate to put questions to the person without waiting for the objections where he denied the existence of the public right over the place of obstruction".

In the case of Madan Mohan Chowlia Vs. Ashutosh Sasmal and Others, , it has also been held that "question to the party is a mandatory requirement".

15-A; But there are some decisions to the contrary holding that if on the appearance of the opposite party, no question is put to him required u/s 137, but he files his written statement denying the existence, then omission to question is

an irregularity curable and not vitiating the trial.

In the case of Rajani Kanta Roy Vs. Ibrahim Sarkar, a Division Bench has held at page 507 as follows :

No doubt, S.139-A requires the Magistrate to ask the party against whom a rule has been issued under S.133, as soon as he appears whether he denies the existence of any public right in respect of the way, river, etc. and if he does so, the Magistrate shall proceed under S.137 if he finds that there is no ground for such denial.

But the language of the section is so general that I am not prepared to hold that even in such a case as this, the Magistrate should not exercise a good discretion in following the direction of the law, but the omission to do it does not necessarily vitiate the entire proceeding. It would be an act of superfluity when a party comes before a Magistrate and admits the public character of the river which he is said to have obstructed to ask him whether he denies or admits its public character. This section applies only in case where a party wants a determination of the public character of the river or way obstructed.

Even if it be so, when the petitioner appeared before the Magistrate and denied that it was part of the public river, there was no necessity for putting a formal question to him and the subsequent procedure followed by the Magistrate was as indicated in the Cl-2 of that section, and the final order passed was u/s 137 since the obstruction was admitted. The omission at the most is an irregularity which is covered by section 537, Criminal PC.

In the case of Bansidhar Marwari Vs. P.W.D., , it has been held "that the failure to question u/s 139--A is an irregularity not effecting the merits and the High Court will not interfere in revision".

In the case of Ram Kripal Singh and others Vs. The Superintendent, Way and Works, E.Rly (AIR 1945 Pat. 301) a Division Bench has held "it is unnecessary for the Magistrate to put any question when a party directly upon appearance has put a statement denying the existence of any public right."

Again in the case of Sadasheo Chintaman Tamne Vs. Chintaman Khushalrao Lodhi and other (AIR 1945 Nag 226). It has been held that omission to question at first hearing is curable."

In the case of Sukh Ram Kalu Ram Vs. Manohar Lal Ramsaran Dass, , there was an allegation of construction of a Chbutra on a public thoroughfare, whereupon a conditional order was passed u/s 133 Cr.P.C. and then written statement was filed denying the unlawful obstruction and existence of any public right. The Magistrate asked the opposite party to lead evidence as required under S.139-A Cr. P.C. and so, the opposite party produced a resolution of the Panchayat sanctioning the construction of the Chabutra. The Magistrate, after considering the entire evidence did not accept the case of opposite party. The High Court held at page 995 in para 7 as follows :

After considering the respective contentions of the Learned Counsel and after going through the record in my opinion, there was no material non-compliance of the provisions of Section 139-A of the Code of Criminal Procedure. The written statement having been filed and an inquiry having actually been held by the Magistrate, the failure, if any, to strictly and meticulously complete with the technicalities of section 139-A would also, in my opinion, be curable under sections 135 and 537 of the Code of Criminal Procedure.

Further, in the case of Gulab Singh Vs. State, , a learned single Judge has observed at page 437 in paragraphs 3 as follows :

3. In the first place, the Magistrate had a right to assume that whatever Gulab Singh's defence was he had embodied it in his written application and in this application there was no denial of the encroached land being part of the highway. Hence, no useful purpose would have been served by putting oral questions on the same subject. By the omission to put question u/s 139-A(1) no prejudice was caused to Gulab Singh. In the analogous case of the application of section 342 Cr. P.C., the Supreme Court in the case of Mosab Kaka Choudhury and another Vrs. State of West Bengal, AIR-1956-SC-536 has held "It is well settled and recognised that a judgment is not to be set aside merely by reason of inadequate compliance of section 342 Cr. P.C. It is settled that clear prejudice must be shown. It is upto the accused or his counsel in such cases to satisfy the court that such inadequate examination has resulted in miscarriage of justice.--If the counsel was unable to say that his client had in fact been prejudiced and if all that he could urge was that there was a possibility of prejudice, that was not enough.

The principle must apply in the case of section 139-A(1) also; that is to say, unless prejudice can be clearly demonstrated, the non-questioning of the person concerned cannot be admitted to vitiate the Magistrate's order.

Secondly, the provision regarding questioning in section 139-A(1) is not mandatory but mere directory. In the case of Pratap Singh Vs. Shri Krishnand Gupta and others, AIR 1956-SC-140, the Supreme Court approving the principle enunciated by the Privy Council in the case of Punjab Cooperative Bank Limited Vs. The Commission, Income Tax, Lahore, AIR 1940-PC-230 that as a general rule an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially", observed "We deprecate this tendency towards technicality, it is the substance that counts and must take precedence over mere form so no rules are vital and to to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as a whole and provided no prejudice ensues and when the legislature does not itself state which is which judges must determine the matter and exercising a nice discrimination, sort out one class from the other along broad based common sense lines". The provision in S.139 (1) being only directory and the Magistrate having substantially complied with the law and no prejudice having been caused

to Gulab Singh, the Magistrate's final order cannot be impugned".

6.It has been laid down in many rulings i.e. Balgovind Vs. Emperor, AIR 1926-Patna-393, AIR 1933 421 (Oudh) , Kewal Singh Vs. Emperor 33 Cr.LJ.-1022 (Allahabad), Giani Vs. Emperor, 38-Cr.LJ.-123 , : (AIR-1936 - Lahore-1015) , Alimahomed Joosab Vs. Kasturchand Balabhai Jhaveri, and Jagdish Singh and Others Vs. Emperor, , that where no prejudice has been caused to the aggrieved person a technical failure to comply strictly with the legal provision should not be deemed to be an infirmity.

In the case of Hakam Singh Natha Singh Vs. Niranjana Singh Chheda Singh and another, 1964(1) Cri.LJ-125, it has been observed at page 126 (Para 5) as follows :

It is always open to the person proceeded against to admit the existence of the public right of way and yet to assert that he has caused no obstruction to it. In such a case, there is no question of holding the enquiry u/s 139-A and the only question which would need determination would be u/s 137 of the Code whether the person has made the obstruction. The finding of the Magistrate in the present case is also to the effect that there exists public thoroughfare and it has not been encroached upon by the respondent.

In the case of Rasamavee Das and others Vs. Nakul Choudhary Deb and others (1972-Cri.LJ 936), it was observed at page 637 (para 3) as follows :

Be that as it may there is an obligation upon the Magistrate to question the opposite party in conformity with S.139-A when he appears. The Magistrate in this case has not strictly complied with this procedure. All the same the opposite party has denied the existence of public right of way which is clear from his long written statement filed in the case. In that view of the matter, this non-compliance of S.139-A in omitting to question the opposite party is a mere technical irregularity which does not vitiate the proceeding in this case, as no prejudice has been caused for not questioning the opposite party at that stage.

Thus, from all these it is clear that on the appearance of the opposite party on the basis of notice u/s 133 Cr.P.C. the Magistrate should put question to him and if he denies the existence of the public right then u/s 137(1) he is to make inquiry and then come to section 138 Cr.P.C. But if on appearance opposite party files written statement denying the existence of public right then questioning may not be of importance and omission to question is not material. The purpose of this questioning is to give opposite party an opportunity to give out his case so that he may not be prejudiced, if further proceedings continue. But when he has filed his written statement he gets full opportunity to give out what he would have given in the question and so, on getting this opportunity of giving out his plea, does not cause any failure of justice. In this way, it cannot be said that there is failure of justice and so this omission is only a technical irregularity, and not an illegality going to the root of the matter and does not vitiate the proceedings of a competent court. It becomes then for the court to make inquiry

as provided u/s 137(1) Cr.P.C. to find out as to whether the denial of existence of public right is well founded or made only to oust the jurisdiction of the court.

15. In the Cr. P.C. Chapter 35 deals with the irregularity in proceedings. Section 460 deals with those irregularity which do not vitiate proceedings in respect of sections 94, 155, 176, 187, 190, 192, 306, 400, 410, 458 and 459. The next section 461 deals with those irregularities which vitiate the proceedings. In this, the proceedings under sections 133 to 139 have not been dealt with. Sections 462, 463 and 464 also deal with some irregularities which, do not concern with the provisions contained in respect of public nuisance. Section 465 deals with the provisions in respect of finding or sentence when reverse by reason of error, omission of irregularity. This section 465 is equivalent to old 537 Cr. P.C. It is a residuary section in the chapter intended to cure any error, omission or irregularity committed by a court of competent jurisdiction knowingly or unknowingly. The underlined principle under this section is to do justice by preventing the trial to be invalid if during the trial some infringement of the provisions of the Code without causing any prejudice or injustice has been caused. The court has to see in such situation as to the gravity of the violation of the mandatory provisions and whether it is so vital as to frustrate the ends of justice. If the contravention of the mandatory provisions does not frustrate the ends of justice or does not defeat the cause of justice or does not prejudice the party or parties, then infraction of mandatory provisions, done by a court of competent jurisdiction inadvertantly, will not vitiate the trial. In the case of Willie (William) Slaney Vs. State of M.P. (AIR -1956 - SC - 116), the Supreme Court observed at page 122-23 (paras 11, 12, 13, 14, 15 and 16) as follows :

11. For a time it was thought that all provisions of the Code about the mode of trial are so vital as to make any departure therefrom an illegality that could not be cured. This was due to the language of the judicial committee in 28, Indian Appeals-257 (PC).

12. Later, this was construed to mean that, that only applies when there is an express prohibition and there is prejudice. In 28 Indian Appeals 257 (PC), the Privy Council said :

The remedy of mere irregularity is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here "shall not be permitted" that this contravention of the Code comes within the discreption of error, omission or irregularity. This was examined and explained in Abdul Rahman Vs. Emperor AIR 1927-PC-44 at page 49 as follows :

The procedure adopted was one which the code positively prohibited and it was possible that it might have worked actual injustice to the accused.

13. In our opinion, the key to the problem lies in the words underlined (herein). Except where there is something so vital as to cut at the root of jurisdiction or so

abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth.

These go to the foundations of natural justice and be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial and not of the kind envisaged by the law of land because either way they would be struck down at once. Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.

14. This, in our opinion, has been trend of the more recent decisions of the Privy council and indeed of latter day criminal jurisprudence in England as well as in India. The swing of the pendulum has been away from technicality, and a greater endeavour has been made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered; fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered.

15. The more recent attitude of the Judicial Committee is summed up by Sir John Beaumont in AIR 1947-PC-67 at page 69-70 (E) where he says that :

The distinction drawn in many of the cases in India between an illegality and an irregularity is one of "degree" rather than of "kind" and by Viscount sumner in AIR 1930 57 (Privy Council) at page 59 (C)-

In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise His Majesty to interfere.

16. We prefer this way of stating the law, for the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us as unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to "substantial" denial of a trial as contemplated by the Code and understood by the comprehensive expression "natural justice".

17. It is for the Court in all these cases to determine whether there has been prejudice to the accused ; and in doing so to bear in mind that some violation are so obviously opposed to natural justice and the true intendment of the Code that on the face of them and without anything else they must be struck down, while in other cases a closer examination of all the circumstances will be called

for in order to discover whether the accused has been prejudiced.

In the case of Chittaranjan Das Vs. State of West Bengal (AIR-1963 SC-1696) it has been observed at page 1699 (Para 7) "where the provisions made by the law of procedure are not of vital importance, but are, nevertheless, intended to be observed, their breach may not necessary vitiate the trial unless it is shown that the contravention in question has caused prejudice to the accused. This position is made clear by sections 535 and 537 Cr. P.C".

Further in the case of Chaturdas Vs. State of Gujrat (AIR-1976-SC-1497), being a case u/s 161 of the IPC and Prevention of Corruption Act, it was observed at page 1503 in paragraph 20 : "All the material circumstances appearing in evidence constituting of evidence u/s 161 IPC, simplicitor were put to him during his examination. This objection was not raised in any of the court below at any stage. No prejudice has, therefore, been caused to the appellant by this technical defect in the charge. In any case this irregularity stood cured u/s 537 Cr.P.C.

In the case of State of Karnataka Vs. Kuppu Swamy Guilder (AIR-1987-SC-1354), it has been observed at page 1358 in paragraphs 15 and 16 as follows:

15. This goes a long way to show that even if a trial takes place in a wrong place where the court has no territorial jurisdiction to try the case still unless failure of justice is pleaded and proved, the trial cannot be quashed. In this view of the matter, therefore, reading S. 462 along with S. 465 clearly goes to show that the scheme of the Criminal P.C. is that where there is no inherent lack of jurisdiction merely either on the ground of lack of territorial jurisdiction or on the ground of any irregularity of procedure an order or sentence awarded by a competent court could not be set aside. Unless a prejudice is pleaded and proved which will mean failure of justice. But in absence of such a plea merely on such technical ground the order or sentence passed y a competent court could not be quashed.

16. It is not disputed that the plea of prejudice or failure of justice is neither pleaded nor proved. Not only that even the judgment of the High Court does not indicate any possibility of prejudice or failure of justice.

16. In these proceedings at both the stages, it is only the person against whom notice has been issued, is required to produce evidence in denial of public right. The complainant or the person who has made the ball rolled is not required to produce evidence at these stages. But before these stages the complainant is also required to file legal evidence which would justify a finding that what is complained of amounts to a public nuisance. In the case of Rameshwar Narain Agarwal Vs. Emperor (AIR-1939-Bom-89), a Division Bench has observed at page 95 (Calrin, J.) as follows :

It was argued that u/s 135 the persons against whom the conditional order is made is required to show cause against the same and it was suggested that the burden of proof is on him. This, however, is not a correct statement of the position. In the first place, he has only to show cause in respect of the matters

complained of, and as I have pointed out, the original complaints mention nothing but that the violation has affected the houses of Uttam Chand and Balkishan. But, apart from that, section 137 provides that the magistrate has to take evidence as in summons case. That means that the complainant has to make out a prima facie case, that is to say, he has to produce before the court legal evidence which would justify a finding that what is complained of amounts to a public nuisance.

However, a Division Bench of this Court in the case of Darsan Ram Vs. The State and Others, has observed : "The enquiry envisaged in section 139-A is in the nature of an ex parte summary enquiry and what the magistrate is 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. It is, therefore, not the duty of the Magistrate to take evidence of both the sides and then to judge if the party against whom the order has been made has succeeded in establishing the non-existence of the public right.

When the object of the enquiry is to ascertain if there was reliable evidence in support of the denial, it is obvious that the only party who should be called upon to adduce evidence in support of the denial is the party denying existence of the public right. The person complaining of the obstruction or nuisance is out of the picture at this stage. 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 cannot but stay his hands and refer the parties to the Civil court.

17. As regards proof of evidence in this proceeding, in the case of Thakur Sao and Others Vs. Abdul Aziz, , it has been said at page 171 that "the section, however, requires evidence and not proof and the only condition is that upon the materials before him, the Magistrate has no reason to think the evidence false. The Magistrate has no jurisdiction to weight the evidence and to determine on which side the balance leans".

In the case of AIR 1933 267 (Nagpur) it has been observed at page 268 as follows :

The Magistrate has simply to satisfy himself that there is no reason to think that the evidence is false. If he finds any reason to enable him to treat the evidence false, then alone he has power to deny the proceeding. The Magistrate is, therefore, to consider the evidence solely from the point of view of the person who produces it and find whether the evidence considered ex parte is genuine and lends prima facie to support the existence of the private right or the non-existence of any public right as urged by the party. If the Magistrate finds that the evidence is reliable ousts his jurisdiction, as has been held in a series of cases. See -- Ragunath Upadhia Vrs. Emperor, AIR-1925-All--311, Thakur Sao V. Abdul Aziz, AIR-1926-Pat-170 and Munnal Lal V. Emperor, AIR 1926-All-390.

18. Reliable evidence means evidence which a competent court can place reliance and it does not mean evidence which definitely establish the right claim.

In the case of L. Janardan Sarup Vs. Emperor, , it has been held at page 13(Col.I) as follows :

I think reliable evidence in the sense in which the term is used in S.139-A, 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 cases to refer the matter to the Civil court at all. It was obviously the intention of the legislature that question of title should not be decided in a summary proceeding by a Magistrate in a criminal court.

In the case of Jai Ram Singh Vs. Bhuley and Others, , a learned Single Judge has observed at page 28 in para 5 as follows :

Reliable evidence is the evidence of reliable person 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 weight the evidence produced by both the parties and then come to the conclusion which is more reliable or should be preferred. It is significant to note that section 139-A says reliable evidence and not proof.

In the case of Pooranmashi Kar and others Vs. Purendra Kar, 1978-Cri.LJ-1952, it has been observed at page 1053 in para 3 as follows :

The enquiry u/s 139-A is in the nature of an ex parte summary inquiry and what the Magistrate is to see is 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. It is not the duty of the Magistrate to take evidence of both the sides and then to judge if the party against whom the order has been made has succeeded in establishing the non-existence of the public right. 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. It is not the duty of the Magistrate to decide the question of title. His duty is merely to see that any claim to a piece of land alleged to be a public place or a public way is not frivolous and is bona fide". -- "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 proper. The object of section 139-A 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 139-A "(See Jai Ram Singh Vs. Bhuley AIR.-1963 All. 27 ; 1963 (1) Cr. LJ 33

19. It also appears that if the party appears in response to a notice u/s 133, Cr. P.C., then the Magistrate issuing the notice is not to transfer the case to some other Magistrate for proceeding under S.137 (139-A old) rather it is the Magistrate himself, who has issued the notice, to try the case in a summary way

under sections 137 and also 138. In the case of Jai Ram Singh Vs. Bhuley (Supra), the learned single Judge of Allahabad Court has observed at page 28 in para 4 as follows :

It is true that under S.133 a Magistrate before whom the proceedings have been initialed under S.133 Cr. P.C., and who has made a conditional order can direct the parties to appear before some other Magistrate of the first or second class but he cannot direct the parties to appear before the Magistrate for the limited purpose of inquiry u/s 139-A. If he, after making conditional order, chooses to send the case to another Magistrate, the other Magistrate gets seized of the case until he dispose it of finally either by setting aside the conditional order or by modifying it in the manner provided in the sections following section 133 Cr. P.C. The transfer of inquiry to any Magistrate u/s 133 Cr. P. C. does not contemplate transfer for a limited purpose of section 139-A only. This is obvious from the wordings of section 133 itself.

20. It has also been said that this section 137 applies when the party served on appearance, does not deny the existence of public right but denied the fact of obstructions or cause of obstruction. But if he denies that the public has got no right and no obstruction has been caused then section 133 is not operative. In the case of Ghurahu Das Vs. Shakalraj Das, , the court said as follows :

As regards section 139-A, I am not sure that the learned Sessions Judge has correctly interpreted the law. The defendant did not deny the existence of a public right at that place; he merely denied that he had encroached upon it.

In the case of Rajani Kanta Rai Vs. Ebrahim Sarkar (Supra), the Division Bench has observed at pages 507 and 508 in para 8 as follows :

This section applies only in a case where a party wants determination of the public character of the river or way obstructed.

"The object with which section 139-A was enacted seems to be that whether the existence of the public right is denied the magistrate has to make an inquiry. If does not deny, then the section hardly seems to apply".

In the case of Mahabir Prasad Chaudhuri and Another Vs. Dhanushdhari Prasad Singh and Others, , it was observed at page 409 as follows :

But the circumstances were such that no inquiry was feasible since there was no denial of the existence of the public right in the well and the atmosphere surrounding it. The only other point is whether that S.132 is applicable. Clearly the magistrate thought that the nuisance mentioned should be removed from the public place, that is the well. That is sufficient, altogether apart from the general nuisance on the Bandh Road and Bowstead Road adjoining.

In the case of Sadasheo Chintaman Tamne Vs. Chintaman Khushalrao and others (Supra), it has been observed at page 227 as follows :

The words "Whether he denies the existence of any public right, etc.", relate to

the public right which is said to have been obstructed and not the obstruction or the cause of it. There is, in my opinion, no denial of the public right in respect of which the complaint is made, namely, the public right of way over this road, and there never has been any such denial at any stage of this case.

21. Some encroachment upon public road, river, channel is the crux of the matter. The question will be first, whether the road is a public right or not. A road under any State or any agency of the State is a public property as the State or its agency represents the property and so, the public has a right of user of the State road subject to such reasonable and legal restrictions which may be in the interest of the public and in the interest of the State itself. No doubt, the State has got right to regulate its user without any prejudice to the rights of the public at large. If a land of the State or a public way is tried to be used by any person instead of passage but for construction under temporary or permanent katcha or pucca to the detriment of the public then the State has got a right to regulate the same. Railways and its line, no doubt, is a public property but its user can be regulated. A road, river or channel is public properly and so, is railways and its line. In the case of Ramkripal Singh and Another Vs. Superintendent, Way and Works, E.I.R., in which, on the report of the Superintendent, Way and Works, I.E.R. Gaya (the State railway), a proceeding was started against the manager and Gomashta of Tekari Raaj for removal of a bandh that had been extended right up to the railway embankment, thereby projecting into the railway land for 100", and the effect was to lead to an accumulation of water below the embankment and prevent it flowing away naturally through a railway culvert, lower, down and so to endanger the track. Then the Tekari Raaj officials in the show cause denied the existence of any public right in the land in question. But the enquiry as required u/s 139-A Cr. P.C., was done and then finally order was passed after enquiry under S.137 holding that there has been an encroachment on the public land causing danger to the track and so, order made absolute against Raj officials and direction was issued for removal of the encroachments. Relying upon the explanation to Section 173 Cr. P. C. which says : "a public place belonging to the State, Camping grounds and grounds left unoccupied for sanitary or recreative purposes".

In revision by the Raj, a Division Bench of this Court has observed at page 310 as follows :

In my opinion, the expression "way" ..."which is or may be lawfully used by the public" and "from any public place", are disjunctive, that is to say, the section will be applicable either in the case of land which need not be State land, lawfully used by the public or in the case of any public place where the public has unrestricted right to use it or not". Were it not so, it is difficult to understand why the Legislature used words distinguishing these place and why it went on further to add an explanation to show that the expression "public place" includes property belonging to the State.

Having regard to frame and wording of the section, I am of the opinion, that it is

applicable to all cases of unlawful obstruction or nuisance upon any public property, even though the public may not be entitled to use it. In the eye of law, moreover, the State represents the people, and in this view also, a State right is the same thing as a public right, though not necessarily the same thing as public user". I would, therefore, hold, that the consideration put forward by the learned District Magistrate afford no ground for interference with the Magistrate's order.

22. It has also been said that encroachment upon a public road is an obstruction to the public path which attracts the provision of the Penal Code. The public has got a right of user of each portion of the public way and nobody can say that he has got right to encroach. The moment there is an encroachment, the provisions of this Chapter are attracted. Whatever duration of the encroachment may be, it will not give any right to a person encroaching the public land. In the case of *Jagroshan Bharti Vs. Madan Pande*, , a learned single Judge has said at page 266 in para 3 :

In the present case, Bubu Sheo Nandan Prasad came to the finding that there was encroachment upon the public road, but he refused to make the conditional rule absolute upon the ground that it does not cause any inconvenience. Encroachment upon a public road such as the one in the present case, as is obvious from the map made by the Amin, is an obstruction to the public path and is a nuisance in itself u/s 268 of the Indian Penal Code. No length of user can justify an encroachment upon a public way. The question of sufficient width of the road being left, in support of the encroachment, for public use is no ground for allowing the encroachment or obstruction to continue. The public has a right to the use of every inch of public path or way, and nobody has a right to encroachment upon any portion of it.: (*Municipal Commissioner of Calcutta Vrs. Mahomed Ali*, (1905) 7 Bom. I.R. 499) has pointed in the case of *Preonath Dey and others Vrs. Gobardhone Malo*, (1897)-25-Cal.278). Therefore, the order of Babu Sheonandan Prasad is illegal and must be set aside. The case must be sent back to the Subdivisional Officer for holding a fresh enquiry into the matter and dispose of it in accordance with law.

In the case of *Mohd. Ayub and Others Vs. State*, a Division Bench of the said Court has observed at page 218 in para 16 as follows :

To sum up, in my judgment, the denial of the existence of public right contemplated by Sub-section (1), S.139-A includes a denial of such public right in respect of the place or piece of land on which an encroachment is said to have been made. For the application of the section, it is not necessary that the denial should be a denial of the existence of the entire public right in respect of the way, river, channel or place at all. The denial of the public right in the piece of land said to have been encroached upon is denial of the existence of the public right qua the piece of land said to have been encroached upon or obstructed in any way. And that is enough to attract the application of S.139-A, Criminal P.C.

--It seems odd that the legislature should have extended for example, in the

case of an alleged encroachment, so, on the Grand Trunk road that the person who claimed that the place where he had built was not part of the Grand Trunk road, but was part of his private property, should be put to the necessity or denying that the public had right of way over the Grand Trunk road. It would be absurd on the part of such person to make that denial and the absurdity would be exposed by a mere look at the place. It appears therefore, that a denial by a person of the existence of the public right in that part of the way on which the obstruction has been made is a sufficient denial, within the meaning of S.139-A of the existence of public right in respect of the way or place. I do not think that any violation is done to the words of the section by placing this interpretation on it. Whenever, a preliminary order under S.133 is issued with respect to a public right of way, there is an implicit assertion that the public has a right with respect to every part of the way or place including the part which has been obstructed. If, therefore, the person, who is alleged to have caused the obstruction, comes forward to deny the public right with respect to that part of the way which is obstructed, he is, in effect, denying the right of the public with respect to the way. It may be that he is not denying the right of the public with respect to the entire way, but only with respect to a part of it. But, to my mind, the denial of the public right with respect to a part of the way is a denial of the public right with respect to the way itself.

23. Section 139 has been introduced in the new Code giving power to a Magistrate to direct local investigation and examination of an expert. This power is for the asertainment of the facts. But this local investigation does not replace the ascertainment of facts by recording the statement of the witnesses. The court has to consider the same. In the case of Amur Singh Vs. State of U.P., 1980 Cri.LJ-1350, a learned Single Judge of the Allahabad High Court has observed at page 1352 in para II as follows :

Local investigation does not merely mean one's own observation of the case but even ascertainment of facts of recording statements of certain witnesses.

In the new Cr.P.C., there is another provision for local inspection u/s 310 (old 539/B) which says that any judge or magistrate may, at any stage of any enquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place on which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given on such enquiry or trial, and without unnecessary delay record a memo of relevant facts observed at such inspection. Further, such memo shall form part of the record of the case and if any party to the case, desires then a copy of memo shall be furnished to him. The Supreme Court in the case of State of U.P. Vs. Het Ram, AIR 1976 SC 2124 has observed at page 2127 in para 7 as follows :

For what that section contemplates is the local inspection of the photography of the place in which the offence was alleged to have been committed or its local peculiarities for the purpose of properly appreciating the evidence which was

already on the record.

Further, in the case of Keisam Kumar Singh and another Vs. State of Manipur, AIR-1985 SC 1664 it has been observed at page 1666 as follows :

Normally a court is not entitled to make a local inspection and even if such an inspection is made, it can never take the place of evidence or proof but is really meant for appreciating the position at the spot. The Sessions Judge seems to have converted himself into a witness in order to draw full support to the defence case by what he may have seen. this Court in Pritam Singh and Another Vs. The State of Punjab, observed thus: "A magistrate is certainly not entitled to allow his view or observation to take the place of evidence because such view or observation of his cannot be decided by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same."

Thus, a Magistrate u/s 139 can get the local investigation made for seeing as to whether the evidence produced by the opposite party was reliable enough to support the denial of the existence of the public right. The court may also make a local inspection to see the local peculiarities to properly appreciate the evidence brought on record. In that process, the observation of the court should not take place of the evidence or proof as views cannot be decided by cross-examination. His impression is meant only for appreciating the position on the spot in the light of the evidence led by the parties.

24. Thus, from all these it is clear that when the opposite party appears before a Magistrate in pursuance of notice under S. 133 Cr. P.C., then u/s 137 he may not deny about the existence of public right and comply with the conditional order passed u/s 133 Cr. P. C. and in that event the matter is closed. But if on appearance, he is questioned and he denies the existence of public right in question, orally or by way of written statement, then he will have to produce some reliable evidence. If on scrutiny, the court finds that the evidence produced by him is reliable in support of his denial, then the court ceases to have jurisdiction and the matter is to be decided by competent court of Civil jurisdiction. But if the evidence in respect of the denial of the public right is not reliable then the case will proceed u/s 138 of the Code and in a summary way. Thus, there are two stages, one u/s 137 and the other u/s 138 of the Code. The purpose of this procedure as provided u/s 137 is that the court may not assume the jurisdiction of deciding the civil rights which it does not have. If the court finds that the denial is not based on reliable evidence then he can proceed further to the next stage as provided under S.138. Further, the opposite party also gets opportunity to meet the notice and put his claim. But if no question has been put but written statement has been filed denying the existence of public right, and if the court proceeds and decides the matter under this section without intentionally continuing with the provisions of section 137(2) and without causing any prejudice to the opposite party, but giving the opposite party full opportunity for meeting the notice, then proceedings u/s 138 is only irregular curable u/s

465. Law does not insist upon rigidity and technicality if prejudice is not caused to the opposite party and if there is substantial compliance of law. No doubt, the proceedings in one stretch should not be taken but when the court is of competent jurisdiction and the opposite party has filed his written statement and has full opportunity to place his case, showing that the evidence produced in support of denial is not reliable, and further the opposite party knows well that the enquiry is both u/s 137 and 138 and also this procedure has not caused any prejudice to the opposite party, then a substantial compliance of 137 is otherwise made out, and so a joint inquiry in one stretch resulting into a composite order may not make the order illegal and bad in law. Prejudice to the party and violation of the provisions of law frustrating the ends of justice can be held to be irregular and non-curable. The violation should be inadvertent by a court of competent jurisdiction not at the cost of defeating the ends of justice and prejudice to the noticee. During such enquiry the court can get the investigation done to see as to whether the evidence in support of denial is not reliable. In the process of taking evidence and considering the material, it will be for the opposite party to produce evidence in support of denial. In dealing with such evidence, the court will not decide the question of title and falsity or otherwise of the case of the opposite party. He is only to judge as to whether the evidence is reliable and should be satisfied that the evidence produced is not false and the court can place reliance on the same. If the court is satisfied that the evidence in support of denial is not reliable, then he can pass final order u/s 138 Cr.P.C. either confirming or modifying the conditional order u/s 133 Cr. P.C.

25. In the instant case as seen earlier, on 1.6.1988 Rajendra Prasad had filed an application to the Subdivisional Magistrate, Danapur for drawing up proceedings u/s 133 Cr. P.C. on the ground that adjacent south from the petitioner's house, in plot no. 488 on the Chat land of the District Board bearing plot no. 486 and adjacent to the said Chat being District Board, south to north, Shambhu Choudhary, Ramesh Choudhary, Birbal Mian and Ayub Mian of the second party, began constructing room on the said Chat land on 28.3.1988 at about 3 P.M. and on being requested not to do so, they became ready to assault but on account of interference of the villagers, ugly situation was averted and further on account of the said constructions public rasta through the said Chat land has been blocked causing difficulty for the public and to the petitioner. On this application learned Magistrate passed the order calling for the report from the Anchal Adhikari, Naubatpur fixing 23.6.1988 and also in the meantime, calling for a show cause from Shambhu Chaudhary and others of the 2nd party. From the order sheet of the various dates, i.e. 23.6.88, 5.7.1988, 13.7.1988, 20.7.1988 and 11.8.1988, it appears that the opposite party appeared and filed show cause, report of the Anchal Adhikari and District Board were received and then after hearing both the parties and perusing the reports the court passed the order dated 19.8.1988 from which it appears that 25" x 10" of the Chat land was settled to the 1st party on 31.7.1985 by Settlement No. 554 dated 7.11.1985 on which the mother of the opposite party was keeping kichriparos shop. Further, it appears that 144

proceedings between the first party and second party had been decided on 26.5.1988 then the second party began construction on 20.3.1988 over the rooms on the basis of a letter dated 19.3.1988 about the settlement of the land of 25" x 10" on the basis of the report of the Junior Engineer of the District Board that the land was in the ditch and no obstruction for passage is likely to be occurred. The report of the Anchal Adhikari received through letter no. 562 dated 16.7.1988, showed that he had made the shop by brick and tiles and was keeping churi and kirana shop. The Magistrate found that by the constructions encroachment of the road had been there and also is obstruction to the passage. He was also not satisfied that the shop was of 50 years old, as the mother of the 2nd party was herself 50 years old and on this basis, proceeding u/s 133 Cr.P.C. was ordered to be started and the opposite party was directed to file show cause. Further, the Magistrate sent back the record to the court of the Subdivisional Magistrate. The 2nd party filed show cause on 4.8.1989. The order sheets dated 17.8.1989, 26.3.1989, 3.4.1989 and 29.6.1989 show that the 2nd party produced three witnesses whose evidence has been referred to above. On 7.9.1989, the learned Sub-divisional Magistrate made the inspection in the presence of both the parties and it was on 12.9.1989, the learned Magistrate passed the impugned order.

26. From this it appears that on 1.6.1988, the learned Magistrate issued the notice u/s 133 without making any conditional order and asked him to show cause and then on 13.7.1988, the show cause was filed by the opposites party. Besides that, the reports of the District Board and Anchal Adhikari had also been received. Then the learned Magistrate entered the first stage as provided u/s 137(2) and passed the order dated 19.8.1988. In the second stage of enquiry, the second party again filed a show cause on 4.8.1989 and also examined witnesses on their behalf and so, the court passed the impugned order. Thus, the court has not committed any procedural irregularity. Had the second party not filed show cause, then it was incumbent upon the Magistrate to put question. On account of the filing of the show cause, the Magistrate feeling satisfied that he was denying the existence of the right and so, if he omitted to put question, it was a curable irregularity and not vitiating the trial. Actually, when there was a denial, then there was no necessity for putting a formal question and it was only a formality and superfluity. However, the second party has also not complained of any prejudice on account of the non-putting of the question. Entering into the stage of 137(2) Cr. P.C. the court has passed the order after considering the material placed before him and so, in this procedure, provision of Section 137 of the first stage, has been fully complied with by the learned Magistrate. It could not be said that the procedure of first stage as provided u/s 137, has not been followed, The learned Magistrate, after following the first stage's procedure entered second stage where only the evidence of the second party was considered. The second party was given full opportunity to lead evidence. After recording the evidence also, the court made a local investigation himself on 7.8.1988 in presence of the parties and then the court passed the order dated

12.9.1989. This order has discussed the evidence in support of the denial, The court had not decided the question of title and did not give out about the falsity of the claim of the second party. Rather on appreciation of the evidence, led by the second party, the court tried to find out as to whether the evidence by the second party was reliable or legal. He has not given a finding to show that the evidence definitely establishes the title to the land. He has considered the evidence that it is of a reliable person and that he himself felt satisfied that the evidence produced was not false. He has not weighed the evidence of both the parties. The court had come to the conclusion on the basis of the evidence of the five witnesses produced by the second party, and the various documents Exts. Ka, Kha and Ga, that by the settlement of the said land, the exit of the first party has been disturbed and also the passage of the public in general has been obstructed and it causes nuisance to the public. Thus, the court did not feel satisfied that it was a reliable evidence and in this way, the court observed that the report of the Junior Engineer was objectionable. He also found that the claim of possession from 50 years was also not reliable when the land itself is a Chat land of the District Board. He also held that it was in the interest of the general public and also the 1st party, that such nuisance should be removed and so, he directed removal of the nuisance. In my opinion, the impugned order passed by the learned Magistrate, does not suffer from any illegality and infirmity and the same is, therefore, upheld. This order, in my opinion, does not bar the aggrieved party to approach a court of competent jurisdiction to establish his civil right, if any. In the result, this revision application is dismissed. The interim order passed by this Court on 8.11.1989 is hereby vacated.