

(1985) 03 AHC CK 0023

In the Allahabad High Court

Case No : Criminal Miscellaneous Petition No. 2440 of 1984

Zelidar and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 22-03-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 133, 137, 137(2), 138, 139A

Citation : (1985) ACR 346

Hon'ble Judges : A.S. Srivastava, J

Bench : Single Bench

Advocate : Pradeep Kumar, for the Appellant; A.G.A. and Virendra Saran, for the Respondent

Judgement

A.S. Srivastava, J.—By means of this petition filed u/s 482 Code of Criminal Procedure the only question which has been raised by the Petitioners is whether it is within the competence of a Magistrate to allow cross-examination of the witnesses produced in an enquiry held by him u/s 137(2) Code of Criminal Procedure in support of the denial of the opposite-parties of the existence of the public right. The facts of this case giving rise to this question may first briefly be stated.

2. A proceeding u/s 133 Code of Criminal Procedure was initiated against the Petitioners at the instance of Mewa Ram and Hussain Khan opposite-parties Nos. 2 and 3 alleging that they have, by encroaching upon a land belonging to the Gaon Sabha, caused obstruction to a public pathway existing on that land. On receipt of notice of these proceedings, the Petitioners appeared before the Magistrate concerned and denied the existence of any public pathway on the disputed land. The Magistrate then fixed a date for holding an enquiry u/s 137 Code of Criminal Procedure for ascertaining the denial of the existence of the public pathway but the enquiry could not proceed on account of a revision filed by the Petitioners before the Sessions Judge. On dismissal of this revision, the enquiry u/s 137 Code of Criminal Procedure was again resumed by the

Magistrate. During that enquiry the Petitioners produced witnesses in support of their denial of existence of the public pathway on the disputed land. The Magistrate permitted the complainants-opposite-parties Nos. 2 and 3 to cross-examine those witnesses despite Petitioners objection made before him by means of their application dated 12-5-1983. A revision (Criminal Revision No. 37 of 1985) against the order of the Magistrate made before the Sessions Judge was also dismissed on 28-1-1984. The Petitioners have now filed this petition.

3. According to Sri Pradeep Kumar, counsel for the Petitioners, the learned Magistrate had no jurisdiction to permit the opposite-parties Nos. 2 and 3 to cross-examine their witnesses produced in support of their denial of existence of the public pathway on the disputed land because an enquiry u/s 137 Code of Criminal Procedure is an enquiry of an ex-parte nature made by the Magistrate only for the purpose of satisfying himself whether there is a prima facie reliable evidence of denial. At this stage the complainant's party cannot participate in the enquiry even for cross-examining the witnesses adduced in support of the denial of the public right claimed by that party. At this stage he is a mere spectator. In support of this contention, he placed reliance on Chandra Deo Singh Vs. Prokash Chandra Bose and Another, , Darsan Ram Vs. The State and Others, and Ram Pratap v. Ram Autar 1982 AWC 343. None of the above mentioned cases is of any help to the Petitioners. Before adverting to them, it would be appropriate to examine Section 137(2) Code of Criminal Procedure which defines the scope of such an enquiry. It reads as under:

If in such enquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by the competent Court; and, if he finds that there is no such evidence, he shall proceed as laid down in Section 138.

The language of the section is plain and suffers from no ambiguity whatsoever. It contemplates a determination in the enquiry whether there is "any reliable evidence" in support of the denial of the existence of the public right. The word "reliable" preceding the words "evidence in support of such denial" make it abundantly clear that in this enquiry the Magistrate has to satisfy himself about the reliability of the evidence. In the process of his satisfaction about the reliability of such evidence, the Magistrate can always test the veracity of the witness or get it tested. It is now well settled that the most important mode of testing the veracity of witnesses is by cross-examination. The cross-examination of witnesses produced in support of denial of a public right is, therefore, permissible for enabling the Magistrate to satisfy himself about the reliability of those witnesses. This cross-examination can be done either by the Magistrate himself or he may permit the same to be done by the complainant's party.

4. At this stage, I may again refer to the contention of the counsel for the Petitioners that once the complainant's party is permitted to cross-examine the witnesses, the proceedings cease to be ex-parte in character by virtue of that party's participation, though only for the limited purpose of the cross-

examination of such witnesses. According to him, such a participation of that party at this stage of the enquiry is not permissible and it is in support of this contention that he has placed reliance on the three cases already cited above. Therefore, before examining this contention, I will examine these cases. Out of the three cases referred to above, Chandra Deo Singh v. Prokash Chandra Bose (supra) is not a decision u/s 137 Code of Criminal Procedure. In this case the scope of a preliminary enquiry u/s 202 Code of Criminal Procedure into a complaint has been considered. It lays down that even though an accused named in a complaint does not come into the picture at all till process is issued against him, the law does not prevent him from being present when an enquiry u/s 202 Code of Criminal Procedure is held by a Magistrate. It has, however, been held that even if he is present at such an enquiry, he has no right to take part in the proceedings and suggest questions to the Magistrate to be put to the complainant and his witnesses. This decision has obviously taken note of the entire scheme and purpose of enquiry held u/s 202 Code of Criminal Procedure. In this connection the observations of the Supreme Court in Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker and Another, at page 1116 quoted in the case of Chandra Deo Singh (supra) at page 1433 contain the reasons why an accused person is not permitted to intervene in such an enquiry. These observations are:

The enquiry is for the purpose of ascertaining the truth or falsehood of the complainant; that is, for ascertaining whether there is evidence in support of the complainant so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage, for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial.

The above observations leave no room for doubt that they have no bearing on the question under consideration.

5. The other two cases, viz. Darsan Ram v. The State and Ram Pratap v. Ram Autar (supra) also do not lend any assistance to the Petitioners.

The case of Darsan Ram v. The State relates to Section 139A of the old Code whereas the case of Ram Pratap v. Ram Autar relates to Section 137(2) of the new Code. Both these sections are in pari materia. The ratio of these two cases is that the enquiry envisaged at this stage is in the nature of an ex-parte summary enquiry and the Magistrate has to see whether there is a prima facie reliable evidence in support of the denial of the public right. While laying down this dictum, these cases have merely emphasized that in such an enquiry it is not the duty of the Magistrate to take evidence of both the sides and then to judge "whether non-existence of the public right" has been affirmatively proved. If in such an enquiry, the denial is found baseless the Magistrate will proceed further. But, if on the other hand, there is reliable evidence of such denial then there is end of the matter and the Magistrate cannot but stay his hands and refer the

parties to the Civil Courts. The word "ex-parte" has been used in these decisions only in this specific context. The question raised in this petition is, therefore, entirely distinct and this question did not even arise for decision in them.

6. I will now refer to Budha Rai and Others Vs. Emperor, cited by Sri Virendra Saran, the counsel for the opposite-parties Nos. 2 and 3, which again is a decision u/s 139A of the old Code and which is directly applicable to the controversy in hand because, as already pointed out, Section 139A of the old Code and Section 137(2) of the new Code are in pari material. It has been held in this case that-

Nothing is laid down in the Code as to the form in which the inquiry u/s 139A should take, and no restrictions are imposed on 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. The duty of the Magistrate is to be determine whether there is some reliable evidence i.e. evidence which he has no reason to think is 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.

7. Therefore, there is absolutely no doubt that in an enquiry u/s 137 Code of Criminal Procedure the Magistrate, while satisfying himself whether there is reliable evidence in support of a denial of existence of the public right, may allow cross-examination of the witnesses adduced in support of such denial.

8. In the above view of the matter, I find that the impugned order of the Magistrate allowing cross-examination of the witnesses adduced by the Petitioners in support of their denial of the existence of the public pathway on the disputed land does not suffer from any error of law.

9. The petition, therefore, fails and is dismissed. The interim order dated 21-3-1984 staying further proceedings in Case No. 33 of 1981 pending in the Court of S.D.M. Etawah, is, hereby vacated.

Petition dismissed.