(1963) 03 P&H CK 0004

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Revision No. 1364 of 1962

Hukam Singh		APPELLANT
	Vs	
Niranjan Singh and Another		RESPONDENT

Date of Decision: March 6, 1963

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 133, 134, 135, 136, 137
- Penal Code, 1860 (IPC) - Section 188

Citation: (1963) 2 ILR (P&H) 221

Hon'ble Judges: H.R. Khanna, J

Bench: Single Bench

Advocate: B.S. Chawla, for the Appellant; H.S. Wasu, K.L. Jagga, Assistant A.G., for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

H.R. Khanna, J.
The short question arising for determination in this ease is whether a Petitioner making an application u/s 133, Code of Criminal Procedure (hereinafter) referred to as the Code, can ask for the setting aside of the order of the trial Magistrate under Sub-section (2) of Section 137 of the Code on the ground that the trial Magistrate held no enquiry under Sub-section (1) of Section 139-A of the Code? This question has arisen in the following circumstances.

2. Hukam Singh, Petitioner filed an application u/s 133 of the Code against Niranjan Singh and Hazara Singh, Respondents on the ground that they had illegally encroached upon a public thoroughfare leading from Fatehgarh to Kurali and Chatauli railway stations by bringing that area under cultivation and enclosing it with a fence. This act of the

Respondents was stated to have caused considerable difficulty to the people using that thoroughfare. The Sub-Divisional Magistrate, Kharar, to whom the application was made, made a conditional order on 21st January, 1960, directing the Respondents to remove the encroachment from the thoroughfare within fifteen days and to show cause against the order before Tehsildar-cum-Magistrate 2nd Class, Kharar, by 8th February, 1960, in case they had any objection. The Magistrate, 2nd Class, Kharar, thereafter proceeded to hear the parties. He recorded their evidence and visited the spot and came to the conclusion that there had been no encroachment on the public thoroughfare. It was accordingly ordered that no further action was necessary in the matter and the application be filed.

3. The Petitioner then filed a revision and the learned Sessions Judge, Ambala, held that it was essential for the trial Magistrate to have held an enquiry u/s 139-A of the Code before proceeding u/s 137 of the Code. The learned Sessions Judge has accordingly recommended for quashing the order of the trial Magistrate and for directing him to proceed in accordance with the provisions of Section 139-A.

4. I have heard Mr. B.S. Chawla, on behalf of the Petitioner and Mr. H.S. Wasu, on behalf of the Respondents and am of the view that the recommendation of the learned Sessions Judge, should not be accepted. Chapter X of the Code, which contains Sections 133 to 143, is entitled "Public Nuisances" and provides for speedy remedy for removal of public nuisances and various kinds of obstructions in public paths and other places and dangers to the public. Section 133 authorises a Magistrate of 1st Class or a higher Magistrate to pass a conditional order requiring the person causing such obstruction, nuisance or danger, to remove it; or, if he objects so to do, to appear before himself or a Magistrate of 2nd Class and move to have the order set aside. Section 134 provides for the service of the conditional order. Section 135 requires the person, against whom order is made, to obey the same or to show cause against the order and in case he so deems proper to apply for appointment of jury to try whether the order is reasonable and proper. Section 136 provides that the failure of a person to do so would make him liable u/s 188 of the Indian Penal Code. Section 137 prescribes the procedure to be adopted where a person proceeded against shows cause, and reads as under:

137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

Section 138 and 139 deal with the procedure in case of appointment of jury. Section 139-A which has a material bearing on the present case, is to the following effect:

139-A. (1) Where an order is made u/s 133 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding u/s 137 or Section 138, inquire into the matter.

(2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and; if he finds that there is no such evidence, he shall proceed as laid down in Section 137, or Section 138, as the case may require.

(3) A person who has, on being questioned by the Magistrate under Sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any such public right be inquired into by any jury appointed u/s 138.

5. Reading Sections 133, 137 and 139-A together, it follows that if the case does not relate to obstruction, nuisance or danger to the public in the use of any way, river, channel or place, after conditional order is made and the appointment of jury is not claimed, the Magistrate has to proceed u/s 137, as soon as the person proceeded against appears. Where, however, the case relates to preventing of obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the law provides that before proceeding u/s 137 the Magistrate should question the person proceeded against whether he denies the existence of any public right in respect of way, river, channel or place, and in case he does so, to enquire into the same. There is an additional provision that in case some reliable evidence is produced in support of such a denial to stay the proceedings until the existence of such a right is decided by Civil Court. In case no such evidence is produced, the Magistrate is to proceed u/s 137. It has further been provided that if a person fails to deny such a right or fails to adduce reliable evidence, he shall not be permitted to make any such denial in subsequent proceedings. The learned Magistrate in the instant case it would appear, did not question the Respondents u/s 139-A whether they denied the existence of the right of the public in respect of the path in question and the question arises whether the Petitioner can take advantage in revision of that omission and pray for setting aside the order of the Magistrate on that account. In this respect I am of the view that Section 139-A has been introduced in the Code for the benefit of the person proceeded against. The law gives him a double layer of protection in case the proceedings relate to the removal of obstruction, nuisance, or danger to the public in the use of way, river, channel, or place. The person proceeded against in such a case can ask for two inquiries, one u/s 139-A and, in case he fails in that, to another inquiry u/s 137. The scope of the two inquiries is different. The one u/s 139-A relates to the

existence of public right in respect of way, river, channel or place, while that u/s 137 relates to the question as to whether the person proceeded against has caused obstruction, nuisance or danger to the public in the use of such way, river, channel or place. The inquiry u/s 139-A having been designed for the benefit of the persons proceeded against, who are the Respondents in the present case, only they could have made a grievance of the failure of the Magistrate to proceed u/s 139-A and it is not open to the Petitioner to take advantage of that because he is not prejudiced thereby. The question regarding whose benefit the provisions of Section 139-A are intended, was considered in Sibte Husain and Another Vs. Emperor, , and it was observed as under:

It is true that the Magistrate does not appear to have made any inquiry under the provisions of Section 139-A, Code of Criminal Procedure, into the question whether Chainsukh"s claim was frivolous or not, but it seems to me that the provisions that an inquiry should be held are intended to protect the rights of a person against whom it is proposed to pass an order u/s 133, Code of Criminal Procedure. They are not intended to enable any person complaining of a construction to compel the Magistrate to hold an inquiry into the rights of the parties concerned.

The matter can also be looked at from another angle. 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 inquiry 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 exist public thoroughfare and it has not been encroached upon by the Respondents. In the circumstances, the Petitioner cannot take advantage of the omission of the learned Magistrate to proceed u/s 139-A of the Code and ask for the setting aside of the impugned order on that ground.

6. I, therefore, decline to accept the recommendation of the learned Sessions Judge, and dismiss the revision petition.