

**(1929) 06 CAL CK 0024**

**Calcutta High Court**

**Case No:** None

Inasaddar Ali and Others

APPELLANT

Vs

Isimulla and Others

RESPONDENT

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**Date of Decision:** June 21, 1929

**Citation:** AIR 1929 Cal 813

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### **Judgement**

1. This Rule is directed against an order passed in proceedings u/s 133, Criminal P.C. relating to alleged obstruction of a public path. The conditional order was passed by the Additional District Magistrate on 5th June 1928. On 20th June the opposite party No. 3 appeared and denied the existence of the right, and 6th July was fixed for taking evidence. On 6th July all the opposite parties appeared and gave a denial of the right, whereupon the Magistrate passed an order making the case over to Babu A.M. Dam, E.A.C. for enquiry and to report to the existence of a public path. His report was submitted after enquiry, and the report was in favour of the existence of the right. On 17th August the Additional District Magistrate took the report into consideration and acted upon it by passing an order declaring it to be a public path. Matters then proceeded before a jury, the majority of whom found that the obstruction should be removed. This Rule was issued on the ground that the provisions of Section 139-A had not been complied with, and that the Magistrate had no jurisdiction to direct an enquiry by another Magistrate as to the existence of the right. There was also a question as regards the constitution of the jury to which it is unnecessary to refer further in view of our decision.

2. It is conceded that the terms of the Section 139-A contemplate an enquiry by the Magistrate himself; there is no such provision in proceedings under Chap. 10 for deputing a subordinate Magistrate to make the enquiry as is to be found under Chap. 12 expressly laid down by the terms of Section 148. It is, however, said that in effect the Magistrate did hold the enquiry himself by reading and acting on the report of the subordinate Magistrate and there has been no prejudice; that the accused participated in all the proceedings in the subsequent stage: and that the

omission of the Magistrate to enquire is a mere irregularity which is cured u/s 537. We are of opinion that the matter cannot be disposed of in this manner. Upon the result of the enquiry depends the subsequent procedure-either a stay of proceedings, or a further step u/s 137 or 138. The test is whether there is or is not reliable evidence in support of the denial of the existence of the alleged public right. The value of the evidence is a matter better determined by the Magistrate if he has heard it himself than if, as appears from the order sheet in the present case, he merely "read the report" of his subordinate. Moreover "the Magistrate to whom the enquiry was deputed in the present case was, we are told, a Third Class Magistrate whereas the opening words of Section 133 shows that the intention is that this class of proceeding should be in the hands either of a District Magistrate, a Sub-Divisional Magistrate or a Magistrate of the First Class. We accordingly are of opinion that the Magistrate had no jurisdiction in the present case to make over" the enquiry as he did, and for these reasons the Rule must be made absolute Fresh proceedings may be instituted if necessary.