

Ram Asray vs State Through Shamsher Singh And Ors. on 29 October, 1953

Equivalent citations: 1954CRILJ498, AIR 1954 ALLAHABAD 247

JUDGMENT

Harish Chandra, J.

1. This is an application in revision arising out of an order passed by a Sub-Divisional Magistrate in the district of Sultanpur directing the applicant, Bam Asrey, to remove a certain encroachment on a public way by demolishing a portion of his house on the south-east corner. He went up in revision before the learned Sessions Judge who dismissed his application. He has now come up to this Court in revision.

2. The facts are simple. After a local inspection the Sub-Divisional Magistrate, Sadar, passed an order on the 15th October, 1950 under Section 133 of the Code of Criminal Procedure directing the applicant and one other person to remove the alleged encroachments by the 25th October, 1950 or "to show cause on that day why they should not be made to do so". Ram Asrey appeared on the 25th October, 1950 and filed an objection in which he said that his residential house had not encroached upon the public way by even an inch and that it had been re-constructed on its old foundations. He accordingly prayed that a jury be appointed in accordance with law to decide the matter. On the 2nd November, 1950, the Magistrate directed Ram Asrey to furnish three names for appointment as jurors on the next date and said that he would nominate four other persons to act on the jury, He apparently meant that he would nominate three persons to be members of the jury and one to act as foreman. On the 9th January, 1951 Bam Asrey nominated three persons and the learned Sub-Divisional Magistrate directed that they be included in the jury. On the same date the complainant also nominated three persons and the learned Magistrate directed that they be also included in the jury and at the same time he nominated one Sri Jagannath Prasad, a Vakil, as the foreman. The jurors submitted a report finding by a majority that the original order of the Magistrate was reasonable and proper and the Magistrate accordingly made the order absolute on the 11th May, 1951.

3. This order is challenged on two grounds. The first objection is that the procedure indicated in section 139-A was not followed by the learned Magistrate. According to that section where an order is made under Section 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 is 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 under section- 137 (procedure where the opposite party appears to show cause) or section 138 (procedure where jury is claimed), inquire into the matter.

4. It would appear, however, that the applicant, when he appeared on the 25th October, 1950, did not deny the existence of public right in respect of the way upon which he was alleged to have made an encroachment. No doubt, when he appeared, he was not put a question by the Magistrate as indicated in section 139A. But no such question was necessary when the applicant appeared and himself filed a written statement in which he admitted that the way which he was alleged to have encroached upon was a public way.

5. In the case of - 'Bajani Kanta v. Ibrahim Sarkar' AIR 1929 Cal 507 (A), the facts were very similar and it was held that in such circumstances section 139A did not apply. The object, as pointed out in that judgment, with which section 139A was enacted, seems to be that where the existence of the public right is denied the Magistrate has to make 'an inquiry. If it is not denied, then the section will not apply. The mere fact that the person against whom an order under Section 133 is made denies that the land over which the alleged obstruction is said to have been made is not part of a public way will not attract the application of section 139A. In the circumstances the learned Magistrate was quite right in not following the procedure indicated in section 139A. No doubt the provisions of section 139A are mandatory. But when the applicant appeared and admitted the existence of a public right in the way upon which he was said to have made an encroachment, there was no occasion to follow the further procedure provided in that section.

6. The other objection raised on behalf of the applicant is that the appointment of members of the jury was irregular and that the irregularity is such as vitiates the proceeding. According to section 138 the jury is to consist of an uneven number of persons, not less than five, of whom the foreman and one half of the remaining members are to be nominated by the Magistrate and the other members by the applicant. It is said that the Magistrate in accepting names of the three persons nominated by the complainant acted irregularly.

7. It was held in a Calcutta case, - 'Upendra Nath v. Khitish Chandra' 23 Cal 499 (B), that it is the duty of the Magistrate to exercise his own independent discretion in appointing members of the jury whose appointment devolves upon him under the provisions of section 138 and that he cannot merely accept persons who may be put forward by the party opposed to the applicant and that a jury constituted in violation of the provisions of section 138 was not legally constituted and was not capable of making a legally binding award,

8. In the Allahabad case of - 'Farzand Ali v. Hakim Ali' AIR 1914 All 491 (C), it was, however, pointed out by this Court that it is not illegal on the part of a Magistrate to address an inquiry to the applicant with a view to ascertaining the names of respectable persons living in the neighbourhood who would be willing to serve on jury. The Magistrate has, however, to see that he does not appoint friends or partisans of the applicant. As pointed out in that judgment the criterion to be applied to a case of this kind is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he was a party to the litigation and whether as a matter of fact the Jurors nominated by the Magistrate could rightly be described as friends or supporters of that person. This case was followed in another case of this Court, - 'Abdul Shakur Khan v. Emperor' AIR 1931 All 257 (D).

9. In the present case, as We have seen, the learned Magistrate had clearly expressed his intention in the order passed on the 2nd November, 1950, that the applicant would furnish three names while he himself would nominate the remaining members as well as the foreman. In the circumstances, his acceptance of the three persons nominated by the complainant as members of the jury may, I think, be treated as a nomination by himself. There is nothing whatsoever to indicate that the three persons whose nomination was accepted by the Magistrate on the suggestion made by the complainant were his friends or supporters. No objection whatsoever was made by the applicant to their nomination. Even before the learned Sessions Judge it was not suggested that these three members of the jury were friends or partisans of the complainant and were in any way inimical to the applicant. Nor has such an allegation been made in the grounds of revision before me and the irregularity, if any, cannot be said to have occasioned a failure of justice and I agree with the view expressed in the case of - 'Digambar Ramsingh v. Emperor' AIR 1933 Pat 676 (E), that a mere irregularity in the appointment of a jury would not be a ground for setting aside such proceedings.

10. I am, therefore, satisfied that the proceedings before the learned Sub-Divisional Magistrate were in order and reject the application.