Mohd. Ayub And Ors. vs State on 24 January, 1950

Equivalent citations: AIR1952ALL215, AIR 1952 ALLAHABAD 215

JUDGMENT

Wali Ullah, J.

1. I agree to the order proposed to be passed by my learned brother. In view of the elaborate arguments addressed to us on certain aspects of the case and in view of the fact that the case was referred by a learned single Judge to a Bench of two Judges, I wish to add a few observations of my own.

2. On the evidence in the case it is clear that the authorities of the Madarsa known as Madarsa Miftahu-1Ulum have made certain new constructions. The town of Mau was till recently a notified area. Shri Girish Chandra, the Sub-Divisional Magistrate of Mohammadabad was the Chairman of the Notified Area Committee. Soon after the constructions had been completed, a tussle appears to have ensued between the Madarsa authorities on the one hand and those who were interested in the Ram Lila and Bharat Milap on the other. I have no doubt in my mind that at first an attempt was made to have a portion of the new constructions demolished under the orders of the Notified Area authorities. In this the Sub-Divisinal Magistrate, Shri Girish Chandra, took a prominent part. This attempt, however, was frustrated because it so happened that the Notified Area Committee, by means of a resolution passed by a majority, declined to order demolition and even passed a resolution to the effect that no encroachment was made on the "Rasta." At this stage, Shri Girish Chandra, acting as a Sub-Divisional Magistrate, under Section 133, Criminal P. C., appears to have issued the preliminary order on 12-7-1949. This order was directed against three persons who represented the Madarsa authorities. Shri Girish Chandra undoubtedly utilized the information that be possessed in his capacity of the Chairman of the Notified Area Committee in issuing the preliminary order under Section 133, Criminal P. C.

3. It was strongly contended by Mr. Vishwa Mitra, the learned counsel for the applicants, that, at the very least it was very improper on the part of Sbri Girish Ohandra to exercise his powers as a Magistrate under Section 133, Criminal P. C. when, as the Chairman of the Notified Area Committee, he, along with others, had failed to secure demolition of the building which was alleged to have made an encroachment on public land.

4. Mr. Kanhaiya Lal Misra, the learned Additional Government Advocate, endeavoured to meet this contention of the learned counsel for the applicants by contending that Shri Girish Ohandra was the only Magistrate who could have passed the preliminary order and there could be no transfer of proceedings before the issue of the preliminary order.

5. To my mind, there is no force in these contentions of the learned Government Advocate. Under Section 133 (1), Criminal P. C., besides a Sub-Divisional Magistrate, a District Magistrate, or a Magistrate of the first class, is fully competent to take action. It is, therefore, not correct to say that Shri Girish Chandra was the only Magistrate who could have passed the preliminary order under Section 133, Cri. P. C. Further, I am quite clear in my own mind that before issuing the preliminary order under Section 133, Shri Girish Chandra, the Chairman of the Notified Area Committee, if he felt that action under Section 133, Cri. P. C. was called for, could have taken appropriate steps and moved the District Magistrate to take action. Under Section 192 (1), Cri. P. C., any case of which a Sub Divisional, Magistrate has taken cognizance can be transferred by him, for enquiry or trial, to any Magistrate subordinate to him. A case of which he has taken cognizance, means nothing more than that the Magistrate has applied his mind to the facts of the ease. The words, "any case" are not restricted to offences or criminal cases. The principle underlying the decision of a Full Bench of this Court in Kapoor Chand v. Suraj Prasad, 1933 ALL. L. J. 188, clearly supports the view that I have taken. That was a case which related to proceedings under Section 145, Cri. P. C , but the same principle would be applicable to a case under Section 133, Cri. P. C. I am, therefore, quite clear that Shri Girish Chandra could and should have taken steps to transfer this case to another Magistrate before passing the preliminary order under Section 133, Cr. P. C.

6. When a Magistrate acts under Section 133 and issues a preliminary order calling upon a party to do a particular act, he does a judicial act. I find it very difficult to justify a judicial act done by a Magistrate who, prior to the stage at which he came to act judicially had already formed an opinion against a party on the basis of information received by him in another capacity. To my mind, it was incumbent on a Magistrate in the position of Shri Girish Chandra to have stayed his hands and not passed the preliminary order when he, on the facts established in this case, must be considered to have formed an adverse opinion against the party against whom he eventually issued the preliminary order on 12-7-1949. I am, therefore, of opinion that there is force in the contention urged on behalf of the applicants that Shri Girish Ohandra acted improperly in passing the preliminary order. As, however, my learned brother takes a different view, I do not desire to base my order on this aspect of the case.

7. On the question whether Section 139-A, Cri. C. is applicable to the facts of the present case, I am of opinion that the denial of the existence of any public right in respect of the way over the piece of land said to have been encroached upon was such as to bring into play the provisions of Section 139-A, Cri. P. C. It has been strenuously contended before us by the learned Additional Government. Advocate that the denial of any encroachment or the denial of any public right in regard to the piece of land in dispute such as was made by the second party (the applicants in the present case), was not such a denial of right as would attract the application of this section. Learned counsel has contended that Section 139-A contemplates an absolute denial of the existence of the public right in respect of the way or place and that it does not comprehend a case like the present where the denial of the existence of the public right is limited to the particular piece of land said to have been encroached upon. Section 139. A. Cri. P. C. runs thus:

> "(1) 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 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 under Section 137 or Section 138, inquire into the matter.
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> (2) If in such inquiry the Magistrate finds that there is any reliable evidence in support of suoh 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."

8. The denial must be in respect of "the existence of any public right in respect of the way, river, channel or place . . . ." To my mind, when the second party, against whom the preliminary order has been passed under Section 133, appears and makes a denial of the right, his denial refers to the existence of any public right in respect of the particular way, river, channel or place which is said to have been obstructed. The denial must, therefore, obviously refer to the existence of the public right in so far as it is said to have been obstructed. The section does not contemplate a mere denial of the public right of way or public place as such, without reference to the particular place where it is said to have been obstructed or interfered with. The expression "any public right" must be construed in each case with reference to the right which is said to have been interfered with, or obstructed. I do not see how it can be reasonably construed to mean a denial which goes to the length of denying the existence of the public right absolutely, without reference to the particular piece of land in regard to which the dispute has arisen. 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 Section 133--was a bona fide one or not. If it was found to be a bona fide 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 Section 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 existence of any public right in respect of the way, river, channel or 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.

9. In support of his contentions, the learned Additional Government Advocate has placed particular reliance on four cases. It seems to me, however, that none of them really helps the contention of the learned counsel. I shall briefly deal with each one of these cases.

10. The first case is that of Churahu Das v. Shakalraj Das, A. I. R. (13) 1926 ALL. 157 (1) decided by a learned single Judge of this Court. The judgment of the learned Judge, Daniels J. is a very brief one and does not give full facts of the case. It, however, appears that the case related to an alleged obstruction on a public road. It further appears that the Magistrate had passed an order directing the removal of certain constructions. The Sessions Judge, however, made a reference to the High

Court recommending that the order of the Magistrate may be set aside. It was found in that case, in the first place, that the alleged obstruction was at least fifteen or sixteen years old and the learned single Judge of this Court expressed the view that Section 133 was not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which has been in existence for such a long time. Next, it was found that, on the evidence, there was in fact no obstruction proved. The learned Judge was of opinion that these two grounds were sufficient to justify the setting aside of the order passed by the Magistrate. He accordingly set it aside. Incidentally, the learned Judge made an observation with regard to the scope of Section 139-A. of the Code. He observed:

> "I am not sure that the learned Sessions Judge has correctly interpreted the law. The defendant did not deny the existence of a public road at that place; he. merely denied that he had encroached upon it."

11. It seems to me that this was a mere obiter dictum. Moreover, so far as it goes, it does not support the contention of the learned counsel

12. The next case referred to is that of Rajani Kanta v. Ibrahim Sarkar, A. I. R. (16) 1929 cal. 507. The facts of that case are clearly distinguishable from those of the present case. In that case the petitioner was charged with obstructing a public river to throwing earth into it and raising the level of the land over which water of the river used to pass. Thereupon notice under Section 133 was served upon him. In obedience to it, he appeared before the Magistrate. It was admitted by him that the river said to have been obstructed was a public river. He, however, asserted that the piece of land in dispute on which apparently he had built belonged to his zamindar and not to the public. On these facts, the Magistrate held proceedings under Section 137, found that the obstruction was on the bed of the river and ordered the removal of that obstruction. Two points were taken before the High Court (i) that Section 139A had not been complied with, and (ii) that the order of the Magistrate was vague and incapable of being carried out. In the course of the judgment, the High Court pointed out that, on the facts of that case, strictly speaking Section 139A was not applicable. But even if in view of the language of the section it be considered to be applicable, there was, at the most, a mere irregularity on the part of the Magistrate in omitting to put a formal question to the petitioner whether he denied the existence of the publics right in respect of the river concerned. Such an; irregularity, if any, was cured by Section 537, Criminal P. C. In the course of the judgment, an observation to this effect was made :

> "The object with which Section 139-A was enacted seems to be that where the existence of the public right is denied the Magistrate haa to make an enquiry. If it, is not denied, then the section hardly seems to apply."

13. I find no reason to think that the above quoted observation, in any way, supports the contention of the learned counsel. Moreover, the proposition of law on which that decision rests appears to have been conceded by the learned counsel for the petitioner as would appear from an earlier part of that judgment.

14. The next case referred to is that of Mahabir Prasad v. Dhanushdhari Prasad Singh, A.i.r. (23) 1936 Pat. 409. This is a single Judge case of the Patna High Court. In that ease certain per. sons applied for removal of a latrine constructed near a public well on the ground that its continuance at that place would render the water of the well insanitary and unfit for use. There was no denial on the part of the owner of the latrine in regard to the existence of the public right in the well and the atmosphere surrounding it. On the contrary, the owner of the well applied for appointment of a jury to try whether the order was reasonable and proper or not. The jury held that the conditional order should be made absolute. It was contended before the High Court in revision that the order absolute passed by the Magistrate was vitiated because the Magistrate had made no enquiry under Section 139A, Criminal P. C. It was held that no enquiry under Section 139A was feasible since there was no denial of the existence of the public right in the well. Obviously, therefore, there is nothing in this case which can help the contention of the learned counsel.

15. The last case referred to is that of Sodasheo Chintaman v. Chintaman Khushalrao, A.i.r. (32) 1945 Nag. 226 This is a decision by a learned single Judge of that Court. On the facts of that case, it is quite clear that there was no denial of the existence of the public right of way along the public road a part of which had become impassable because of the embankment pat up by the applicant on the edge of his own field at the point where the water flowing across the road entered it. The whole question was whether the petitioner could be held responsible for the obstruction to the public right caused by the collection of water. On these facts, it was held that he was responsible and he was ordered to remove the obstruction by removing the dam. It seems to me, therefore, that the paint which has been raised before us did not and could not arise in that case. I do not find anything in the judgment of the Court in that case which would support the contention of the learned counsel.

16. To sum up, in my judgment, the denial of the existence of public right contempleted by Sub-section (1), Section 139A 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 encroched 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 Section 139A, Criminal P. C.

17. The evidence led in this case in support of the denial is, to mind prima facie reliable. That being the position, the Magistrate was bound to stay proceedings till the existence of the public right alleged to have been violated, has been decided by a competent civil Court. All proceedings taken in the Magistrate's Court from that stage onwards must therefore, be held to be proceedings without jurisdiction and as such null and void.

Wanchoo, J.

18. The revision is by Moulvi Mohammad Ayub, Habibur Rahman and Maulvi Abdul Latif against the order of the Sessions Judge of Azamgarh in a case under Section 133, Criminal P. C. The miscellaneous application ia also by the same persons praying for the stay of the proceedings in the

Magistrate's Court pending the decision of a civil suit and of the criminal revision in this Court.

19. The case relates to certain constructions within the Notified Area of Mau, District Azamgarh, in connection with which a notice under Section 133, Criminal P. C., was issued to the applicants requiring them to demolish a part of them. The applicants represent an institution known as 'Madarsa Mufatahul Ullam.' Habibur Rahman is the muntazim or manager of the said Madarsa and Mohammad Ayub is the nazim while Abdul Latif is a teacher in that Madarsa. It was alleged that in the course of certain constructions which had been made on behalf of the Madarsa, there was an encroachment on Nazul Plot No. 580 in Mau. This plot is said to be a public place through which the Bharatmilap procession passes every year and where Bharatmilap takes place.

20. The Madarsa is said to have started making the constructions early in January 1949. The Secretary of the Notified Area submitted a report on 8th January to the effect that the constructions were being made without permission and were an enoroaahment over public land. Thereupon, an inspection was made by a member of the Notified Area Committee and on 21-1-1949, this gentleman agreed with the Secretary and apprehended that there might be a breach of the peace on account of encroachment on the Bharatmilap ground and suggested to the President of the Notified Area Committee to have a detailed enquiry made through the overseer. The Sub-overseer of the Committee was apparently deputed to make an enquiry and reported, on 9-2-1949, that the nazim of the Madarsa had refused to show him the permission and that the constructions were apparently being made without any permission. The Sub-overseer also reported that he could not make any measurements as he had no maps with him. Nothing further seems to have been done till 30-5-1949, when the President of the Notified Area Committee, who is also the Sub Divisional Magistrate of Mohammadabad within which sub-division Mau is situate, ordered that measurements should be made after obtaining the map from the applicants. The applicants, however, did not produce any map and the matter was reported to the President on 25-5-1949. In the meantime, a notice had been issued in February 1949, under Sections 211 and 186 of the Municipalities Act to the applicants for demolishing the unauthorised constructions. This matter came up before the Notified Area Committee and the President was asked to have measurements made. On 9-7-1919, the measurements were made in the presence of the Saoretary and the applicants as well as the representatives of the Ram Lila Committee on the basis of a map produced by Habibur Rahman, applicant, which was part of the permission which was said to have been granted to the Madarsa by the Notified Area Committee. According to these measurements, it was found that there had been an encroachment over plot No. 580 to the extent of six feet nine inches and a report to this effect was submitted to the President. On 11 7-1949, the President made a report to the Notified Area Committee recommending the prosecution of the applicants under Section 307 of the Municipalites Act. As the President was also the Sub Divisional Magistrate of Mobammadabad, he simultaneously decided as a Magistrate, to take action under Section 133, Criminal P C. So on 12-7-1949 a preliminary order was passed under Section 133, Criminal P. C. and the applicants were asked to show cause why that preliminary order should not be made absolute. 29-7 1949 was fixed for filing objections, if any, by the applicants to this preliminary order. The Notified Area Committee met on 23-7-1949 and decided by a majority that there was no encroachment and in any case, there should be no demolition and the deviation, if any, should be condoned. It appears that the President did not agree with this resolution and reported to the

District Magistrate for quashing it. It is not clear what orders were passed on this report by the District Magistrate. On 29-7-1949, however, the applicants appeared before the Sub-Divisional Magistrate and filed objections to the preliminary order. Thereupon, the case was fixed for 6 8-1949. On 3-8 1949, however, the Sub-Divisional Magistrate asked the District Magistrate that the case might be transferred to another Magistrate in view of his connection with the matter as President of the Notified Area Committee. No proceedings took place on 6-8-1949 and the case was transferred to another Magistrate namely Shri Mahipal Gupta on 10-8-1949. The applicants' case is that they had taken an objection under Section 139. A, Criminal P. C. and denied the right of public way over the land said to have been encroached upon. This matter came up on 12-9-1949 for recording of evidence. It seems that the applicants wanted postponement on that date, but the Magistrate was bent upon finishing the proceedings as early as possible, perhaps, because Dashera was coming early in October. Consequently dates were fixed in quick succession on 13, 15 and 20 9 1949. On this last date, however, a civil suit was filed on behalf of the Madarsa and an application was made for postponing the proceedings under Section 133. The Magistrate, however, refused to stay the proceedings. There was a revision against the order rejecting stay before the Sessions Judge which was heard on the 23rd and dismissed on the 24th of September. Thereafter the preliminary order was made absolute on the 27th. In the meantime, the present revision was filed in this Court on the 26th September along with the miscellaneous application mentioned above praying for a stay. 29-9-1949 was fixed for demolishing the constructions. On that date, the revision, which had been filed in the Court of the Sessions Judge against the final order of 27th Sept. was also dismissed and a further revision by these applicants was filed in this Court on 6-10-1949. No demolition has yet taken place, however, as an undertaking was given by the Additional Government Advocate that the order of 27th September would not be carried out till this Court had disposed of the present criminal revision No. 1497 of 1949.

21. Two points have been urged on behalf of the applicants. In the first place, it has been urged that the entire proceedings beginning with the preliminary order of 12-7-1949 are illegal and should be quashed. In the second place, it has been argued that the order of the Magistrate, dated 12-9-1949 under Section 139-A, Criminal P. C. is incorrect and that the Magistrate should have found that there was reliable evidence in support of the denial of the public right of way and should have stayed the proceedings on that date and that all proceedings taken after 12-9-1949, were illegal and should be quashed.

22. I shall first consider the argument that the preliminary order of 12-7-1949, is illegal and that the entire proceedings should be quashed. The argument is that Shri Girish Chandra, who passed that order, had information as President of the Notified Area Committee and as such, it was illegal on his part to pass a preliminary order as a Magistrate and at any rate, it was most improper and that the proceedings should, therefore, be quashed. Section 183 (1), Criminal P. C. provides that :

> "Whenever a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class considers, on receiving a polios report or other information and on taking such evidence (if any) as he thinks fit that any unlawful obstruction or nuisance should be removes from any way ..... or from any public place ..... such Magistrate may make a conditional order ....."

A mere reading of this part of Section 133 shows that a Magistrate can act either on a police report or other information. The words "for other information" are very wide and permit a Magistrate to take action under Section 133 on information derived from any source. It appears that the police bad sent a report, in this case, on 14-5.1919. It is also clear that the Magistrate had information which he certainly got as President of the Notified Area Committee. There was, in my opinion, nothing illegal if the Magistrate acted on the police report and the information which he had received as President of the Notified Area Committee and decided to pass a preliminary order on 12-7-1949. He had the jurisdiction to do so and the order that was passed by him cannot be considered illegal on the ground that part of the information was derived by him in his capacity as Chairman of the Notified Area Committee. Reliance was placed on Section 556, Criminal P. C. which prohibits a Judge or Magistrate to try or commit for trial any case to or in which he is a party, or personally interested. This section, however, prohibits a Judge or Magistrate from trying a case or committing it for trial. I am, however, of opinion that this section has no application to the passing of a preliminary order under Section 133, Criminal P. C. for that section recognises that a Magistrate can pass a preliminary order on any information that might come to him. If, of course Shri Girish Chandra, after passing this preliminary order, had continued to hear the case, his action would have been improper. It seems that although two dates were fixed before him, namely, 29-7-1949 and 6-8-1949, he did nothing on these two dates and had himself reported on 3-8-1949 for transfer of the proceedings to another Magistrate.

23. Learned counsel for the applicants referred to the case of Rajani Kanta v. Emperor, 4 Ind. Cas, 437 (Cal.) in this connection. That was a case where also a Sub-Divisional Magistrate, who happened to be the Chairman of a local board, had taken action under Section 133. But in that case, the Sub Divisional Officer as Chairman had issued a notice and dismissed the objection to that notice. Thereafter he initiated proceedings under Section 133 on 22-3-1900 which were terminated on 24th of May. In these circumstances, the order under Section 133, was quashed. It is, however, clear that in that case the Magistrate had not only passed a preliminary order, but had heard the case under Section 133 and also passed the final order, which, is not the case here. I am, therefore, of opinion that Shri Girish Ghandra did not act illegally when he passed the prelimirary order under Section 133 and that the proceedings based on that order cannot be quashed on that ground.

24. It was urged, in the alternative, that in any case, it was most improper on the part of Shri Girish Chandra, when he was the President of the Notified Area Committee and know certain things in that capacity, to have passed the preliminary order on 12-7-1949 and that he should have arranged to transfer the proceedings immediately to another Magistrate and should not have passed the preliminary order himself. There was a long argument on the question whether a Magistrate could transfer the proceedings before passing a preliminary order under Section 133. This question is, however, set at rest by the decision of a Full Bench of this Court in Kapoor Chand v. Suraj Prasad, 55 ALL. 301. In that case, the City Magistrate of Kanpur bad received an application under Section 145, Criminal P. C. He sent it for enquiry to the police. On receipt of the police report, he passed the following :

> "There appears to be some basis for this complaint, to judge from the police report. As I am unable owing to pressure of work, to dispose of it myself, it is transferred for

> such action as may be thought fit, along with a connected application, to the Court of Babu Anand Barup Baheb for disposal."

It was urged, in that case, that the City Magistrate had no jurisdiction to transfer the case to Mr. Anand Sarup without having previously taken cognizance of the case. At p. 307, the Fall Bench disposing of the matter observed thus :

> "The first point that has been argued is that Mr. Barron, the City Magistrate, had no jurisdiction to transfer the case to Mr. Anand Sarup without having previously taken cognizance of the case. The argument is based on Section 192, Criminal P. C. It is argued that a. Magistrate can transfer a case only if he has taken cognizance of it, and that Mr. Barron had not taken cognizance of it. We are of opinion that Mr. Barron did take cognizance of the case inasmuch as he, on the presentation of the petition, examined the petitioner on oath, then ordered a police inquiry to be made and on receipt of the police report he applied his mind to the report and came to the conclusion that there was some basis for the complaint. He did not himself proceed further with the case because he was busy otherwise, but he had undoubtedly taken cognizance of the case before he transferred it."

This means that a Magistrate can transfer proceedings under Section 145 even without passing a preliminary order. The same considerations apply to a case under Section 133. So it was possible for Shri Girish Chandra to transfer this case before passing the preliminary order. But even if he did not do so, I am not prepared to hold that his action was improper. So far, therefore, as the first point is concerned, I am of opinion that the order of 12-7-1949 is perfectly legal and the proceedings were validly initiated by that order.

25. I now come to the second point urged on behalf of the applicants. Reliance is placed on Section. 139A, Criminal P. C. and it is argued that there was reliable evidence in support of the denial of the existence of any public right in respect of the way and the Magistrate should therefore, have stayed the proceedings till that question was decided by a competent civil Court. On the other hand, the argument, on behalf of the Crown, is two fold. In the first place, it is argued that Section 139 A contemplates a complete, denial of the existence of any public right in respect of the way or place and that a ease like the present where there is no denial of the existence of the public right in the way or place is not covered by that section. In the second place, it is urged that even if the case is covered by that section, there was no reliable evidence in support of the denial. The first contention, on behalf of the Crown raises a question of great general importance and that is why the case was referred to a Division Bench by my brother, Agarwala J. Section 139-A reads as follows :

> '(1) 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, chancel 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 under Section 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."

The argument is that the Magistrate should question the person against whom the conditional order has been passed whether be denies the existence of any public right in respect of the way etc. and that person has to deny the existence of the public right in respect of the way etc. and that his saying that though there is a public right in the way or place, yet the part upon which he has encroached is not part of the public way or place is not a denial of the existence of the public right in the way or place. In the present case, the applicants have not denied that there is a public way through plot No. 580 or that plot No. 580 is not a public place. All that they deny is that that strip of land six feet nine inches broad which they are supposed to have encroached upon is not part of plot No. 580 and that, therefore, there is no public right of way over that strip of land and that strip of land is not a public place. If a person has to deny the existence of the public right in respect of the entire way or place in order to bring himself within Section 139-A, then, of course, the applicants' denial, in this case, was not a denial of the existence of the public right in respect of the way or place. I may add that the Magistrate treated it as a denial of the existence of the public right in respect of the way or place, though he came to the conclusion that there was no reliable evidence in support of it. The learned Government Advocate relies on four cases, particularly, in this connection. The first case is Ghurahu Das v. Shakalraj Das, A. I. R. (13) 1926 ALL. 157 (1). That was a case of an alleged obstruction of a public road. The alleged obstruction was found to be at least fifteen or sixteen years' old and the learned Single Judge, who decided that case, hold that Section 133 was not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which had been in existence for fifteen years. It was also found, in that case, that there was, in fact, no obstruction. The case could, therefore, be decided on these two grounds and was so decided. But the learned Judge went on to make the following observations :

> "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 road at that place; he merely denied that he had encroached upon it. The other two reasons given by the learned Sessions Judge are, however, amply sufficient to justify the Magistrate's order being set aside and I set it aside accordingly."

This observation is obviously an obiter dictum and the language in which it is couched shows that the learned Single Judge himself was not sure of his interpretation. No reasons have been given for the view that there should be a complete denial of the existence of a public road and that a mere denial of encroachment on the public road at that place was not enough.

26. The next case is that of Bajani Kanta v. Ibrahim Sarkar, A. I. R. (16) 1929 Cal. 507. In that case, a notice had been issued by a Magistrate under Section 133 asking the petitioner to show cause why he should not remove an obstruction on a public river. The petitioner admitted the public character of the river, but claimed that the obstruction was on his Zemindar's Khas land and not on the river; but

the Magistrate came to the conclusion that the obstruction was on the bed of the river and made the order absolute. In revision it was urged that the Magistrate should have stayed the proceedings under Section 139-A, Criminal P. C. I do not see how it was possible for the petitioner, in that case, to admit on the one hand that the river was a public river and then to say that he had not obstructed the bed of the river, for the bed of river is generally a very defined thing lying between the two banks and on the admission of the public character of the river, there was no other matter really which required determination under Section 139-A. The case of a way or a public place is very different because a way or public place is not so defined as the bed of a river lying between the two banks and the question whether there has been an encroachment on a way or place can always be raised, even though the public character of such way or place is admitted. Further, in that case, the point was conceded on behalf of the petitioner as will appear from the following passage in the judgment at page 508:

> "It has been conceded on behalf of the petitioner that if on a notice under Section 133 a party appears before the Magistrate and admits that the way or river which he is said to have obstructed is a public way or river and does not deny the existence of a public right over it but says that he has not put as obstruction in the public way or river but has built upon his own land, Section 139-A does not apply."

In view of this concession which was made in this case, there is not much discussion in support of the view that was expressed therein.

27. The next case is Mahabir Prasad v. Dhanushdhari Prasad, A. I. R. (23) 1936 Pat. 409. This was a case relating to publio nuisance in connection with a latrine which was in existence near a well on a public place. It was urged, in that case, that the order was vitiated because there was no enquiry under Section 139A. It was pointed out, however, that there could be no such enquiry because there was no denial of the existence of the public right in the well and the atmosphere surrounding it. This case has, in my opinion, no application to the question at issue before me.

28. The last caae is that of Sadasheo Chintaman v. Chintaman Khushalrao, A. I. R. (32) 1945 Nag. 226. In that case, a field belonging to the applicant's master adjoined a public road towards the south. On the other side of the road towards the north, there were two fields belonging to the opposite parties. The ground was sloping from north to the south and water uaed to run out from the fields towards the north, crossed the public road and passed through the field to the south. The applicant erected an embankment on the edge of his field at the point where water entered it. This had the effect of banking the water up in the road until it formed a little lake thirty six feet long and five feet deep rendering the road quite impassable. An application was made for the removal of the embankment on the ground of unlawful obstruction to the road. It was argued before the High Court that the Magistrate had over-looked the provisions of Section 139-A. This contention was repelled. It should be noted that this was a case of encroachment at all. The embankment was not on any part of the public road, bnt on the field of the petitioner. Therefore, the precise question with which I am concerned in this case did not really arise in that case. The decision of that case was confined to the question whether Section 139 A applied at all in the circumstances of that case. It was, in that connection, that the following observations ware made at p. 227 :

> "These sections in Chap. 10 relate to the abatement of public nuisances. They are only attracted when there exists In respect of the subject-matter a public right. Therefore, the fundamental position is that there must be a public right. If that is denied, then the Magistrate is forbidden to proceed under this chapter until the existence of the right claimed has been determined by a civil Court. But the right denied must clearly be the right which is said to have been obstructed and not any and every right which has no bearing on the matter at issue."

Reliance is placed by the learned Additional Government Advocate on these observations. But the last sentence is very significant and shows in what connection these observations were made. Later, however, on the same page, the learned Judge observed as follows :

> "There is, in my opinion, no denial of the publla 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."

To my mind, therefore, the observations in this case cannot be used in a case of encroachment where there is a denial that the public has any right, at any rate, on the portion encroached upon.

29. A large number of other authorities were cited. But learned counsel on both sides agree that this point has not been discussed in those cases. A large majority of them have assumed that where a person alleges that the portion which is said to be an encroachment is not an encroachment, he is denying the existence of the public right in respect of the way or place. I may, as an example, refer here to the cases of Munna Lal v. Emperor, A. I. E. (13) 1926 ALL. 390, Oangadhar v. Emperor, A. I. R. (23) 1936 ALL. 150, Janardan Sarup v. Emperor, A. I. R. (24) 1937 ALL. 12 and Chhedi Lal v. Emperor, A. I. R. (26) 1939 ALL. 116.

30. Section 139-A was introduced in the Criminal Procedure Code by the Amending Act of 1923. It was introduced with the object that questions of title in relation to rights of way and the like should not be finally decided by the Magistrate but that the Magistrate must stay proceedings, if he is satisfied that the question has been raised bona fide. This object must be borne in mind in interpreting this section and unless the words used clearly show that a person must deny completely the existence of public right in respect of the way or place before the Magistrate would stay the proceedings, there is no reason to whittle down the object with which the section was introduced, namely, that questions of title should not be decided by Magistrates, but should be decided by a competent civil Court. It seems odd that the Legislature should have intended, for example, in the case of an alleged encroachment, say, 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 of denying that the public had a 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 Section 139 A, of the existence of public right in respect of the way or place. I do not think that any violence is done to the words of the section by placing this

interpretation on it. Whenever a preliminary order under Section 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. Bat, 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. I am, therefore, of opinion that in cases like the present where the implicit claim is that the public has a right with respect to the entire way or place, the denial of the public right with respect to a part of the way or place is a sufficient denial within the meaning of Section 139A. As such, there was a denial of the public right with respect to the way or place in this case and the Magistrate rightly observed the procedure provided in Section 139A (2). Any other interpretation would, in my mind, lead to great hardship and frustrate the object with which Section 139A was introduced into the Code. Suppose that a party, whose house is on a public road, is ordered to demolish the entire house by a preliminary order under Section 133 on the ground that it is an obstruction on the public road. The person comes forward and without denying that the road is a public road, denies that that part of it on which his house stands is a public road. If this denial is not held to be a denial of the existence of the public right with respect to the road, it will be open to the Magistrate to proceed further and decide the question whether the person objecting has proved his title to the land or not. Suppose further that the Magistrate decides that it is an obstruction and orders the demolition of the house. Suppose also that the house is demolished though the person concerned files a civil suit to establish his right. Eventually he wins the suit. But it is no satisfaction to him to get back the land minus the house, for the damage would have been done. Section 140, Sub-section (3), Criminal P. C. provides that no suit shall lie in respect of anything done in good faith under this section. The person concerned cannot, therefore, file a suit for damages supposing that the Magistrate's action was in good faith. It seems to me that 9. 139A was introduced in the Code for the purpose of avoiding this very contingency and if it is interpreted in the manner suggested by the learned Additional Government Advocate, it will become useless for this purpose. For this reason also, I consider that where a person denies the public right with respect to a part of the way or place, he complies with the provisions of Section 139 concerning denial of the public right in the way or place.

31. The next question is whether the Magistrate's view that there was no reliable evidence in support of the denial is correct. (After discussing the evidence, His Lordship proceeded.) On the whole, therefore, this evidence was sufficiently reliable for the Magistrate to stay his hands and to let the matter be decided by a competent civil Court. It has been urged, however, that the question of the reliability of the evidence must be left entirely to the discretion of the Magistrate, unless there is some illegality or perversity in the Magistrate's order and that this Court should not interfere when the Magistrate has come to some conclusion on the evidence produced before him. I am, however, of opinion that it is open to this Court to interfere also in oases where the order of the Magistrate is improper for Section 435, Criminal P. C. itself provides that the High Court should satisfy itself as to the correctness, legality or propriety of any finding, sentence or order. These words are very wide and give full power to this Court to interfere in any case where it thinks that interference is called for. In the present case. I am of opinion that the Magistrate haa not correctly appreciated the

evidence that was produced and his finding is consequently incorrect and calls for an interference by this Court.

32. I would, therefore, allow the revision, set aside the order of the Magistrate, dated 12-9-1949 and direct that the proceedings in the Magistrate's Court should stay pending the disposal of the question relating to the denial of the public right with respect to the way or place by a competent civil Court. This means that all the proceedings that have taken place after 12-9-1949 are without jurisdiction and must be taken to have been set aside by this order.

33. I now come to the Criminal Miscellaneous case No. 1689 of 1949. In view of my decision, in Criminal Revision No. 1497 of 1949, that application has become infructuous.