

ALLAHABAD HIGH COURT

Munna Lal

vs

Emperor

(Sulaiman, J.)

07.01.1926

JUDGMENT

Sulaiman, J.

1. This is a criminal revision from an order passed under Section 140 of the Criminal Procedure Code, requiring the applicant to have a portion of his building removed within a month. The accused went up in revision before the learned Sessions Judge who summarily dismissed his application.

2. The matter in dispute was somewhat complicated as is borne out by the circumstances that the original notice issued under Section 133 of the Criminal Procedure Code had to be amended several times. The notice proceeded on the assumption that the accused in building a shop had encroached upon a part of the public way. When the accused appeared he contested the notice and denied that there had been any encroachment. His pleas were that he made no encroachment and that there was already a distance of 9 feet between the road and his shop. He produced a map showing that there was a space of 9 feet between the road and the shop and that the width of the public road varied at different places. On the other hand, the Magistrate had before him a map prepared by order of the Town Area Committee in 1920. showing that there had been an encroachment upon the road, as also the Survey of India map kept by the P.W.D. Several witnesses for the prosecution and for the defence were examined. The learned Magistrate, after considering the evidence elaborately came to the conclusion that there was undoubtedly an encroachment. He accordingly passed the order aforementioned.

3. The learned Sessions Judge has dismissed the revision on the ground that the Court found that the building involved an encroachment of the public way. An affidavit has been filed in this Court suggesting that the dispute between the accused and the local authorities as regards the right to build on this land or at any rate on the land in this locality is of a very long duration. I, however, do not take into account the various allegations referred to in the affidavit.

4. There can, however, be no doubt that the accused did put forward a claim of title and contested the allegation that the land covered by his shop was a part of the public way. Even under the old Code of Criminal Procedure when a bona fide claim of title was raised by an accused contesting a notice under Section 133 it was considered the duty of the trying Magistrate not to go further

with criminal prosecution but to let the matter be decided by a civil Court. I may only refer to the case of *Queen-Empress v. Khushali*¹ and *King-Emperor v. Dost Mohammad*(*Supra*)

5. The Code of Criminal Procedure has now been amended and Section 139A has been added. The provisions of that section were apparently overlooked by the learned Magistrate. That section provides that when an order is made under Section 133 of the Code of Criminal Procedure, 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, etc. Then Sub-clause 2 provides that if in such enquiry the Magistrate finds that there is any reliable evidence in support of denial, he shall stay proceedings until the matter of existence of such right has been decided by a competent civil Court, but if he finds that there is no such evidence he shall proceed as laid down in Section 137 or Section 138. This section is imperative. It does not authorise a Magistrate to look into the question of title and decide for himself whether the accused's case is or is not true. All that the Magistrate is to see is whether there is any reliable evidence in support of such denial. If there is some reliable evidence in support of the denial then the proceedings under the Code have to be stayed. In the present case it is impossible to say that there was no bona fide claim put forward by the accused or that there was no reliable evidence in support of his denial. The Survey maps are apparently very old documents and the town area map has been recently prepared under the order of the Town Area Committee. The applicantt also apparently had some map on which he was relying in support of his denial.

6. I am, therefore, of opinion that no order under Section 140 should have been passed without first proceeding under Section 139A. In a recent case reference decided by Piggott, J. it was held that where in a dispute relating to a closing of an old drain and the opening of a new one it was denied that the drain was a public one, the procedure adopted by the Court below in taking up evidence at once under Section 137 and passing an order under Section 140 without proceeding under Section 139A was illegal. I am, therefore, of opinion that the proceedings in this case should be stayed until the matter of existence of such right has been decided by a competent civil Court.

Cases Referred.

1(1900) AWN 204