

**(1922) 06 BOM CK 0005****Bombay High Court****Case No:** Criminal Application for Revision No. 65 of 1922

In Re: Kariyappa Ningappa

APPELLANT

Vs

RESPONDENT

**Date of Decision:** June 15, 1922**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 133

**Citation:** (1922) 24 BOMLR 807**Hon'ble Judges:** Lallubhai Shah, J; Crump, J**Bench:** Division Bench**Judgement**

Lallubhai Shah, Acting C.J.

1. In this case a conditional order was made u/s 133, Criminal Procedure Code, by the Sub-Divisional Magistrate, Third Division, Dharwar, on the 5th December 1921, whereby the present petitioner, Kariappa bin Ningappa Savadi, was required either to remove the wall by the 21st December 1921 or to appear before the said Magistrate to show cause against the order. After that the parties appeared before him and it appears from the proceedings that the papers were forwarded to the Second Class Magistrate, Navalgund, for inquiry and report, because the parties expressed their inability to attend the Court of the said Magistrate. Afterwards the Second Class Magistrate recorded evidence and made a report. On that the Sub-Divisional Magistrate made his final order. We think that the procedure followed in this case is irregular and the order should be set aside on that ground.

2. It was open to the Magistrate to direct the party by the conditional order to appear before himself or before some other Magistrate of the First or Second Class at a certain time and place to be fixed by the Court. But he ordered that the party should appear before himself, and having done that, it seems to me that, u/s 137, Criminal Procedure Code, it was his duty to take the evidence in the matter as in a summons case. The Code does not provide that evidence can be recorded in the

manner in which it has been recorded in this case even with the consent of the parties. The result in the present case has been that the evidence has been recorded by one Magistrate and the decision thereon has been given by another Magistrate. That seems to me to be opposed to the scheme and provisions of the Criminal Procedure Code bearing on the point. After the conditional order was made in the terms already stated, it was incumbent upon the Magistrate u/s 137 to take evidence as in a summons case, if the final order was to be made by him.

3. It has been urged by the Government Pleader that this may be treated as an irregularity and as the parties consented to the procedure it may be condoned. I am, however, unable to accept that contention. I think that it is a matter of substance that the evidence should be recorded by the Magistrate who has to decide the case; and generally speaking it is difficult to say that the omission to do so does not occasion a failure of justice an of opinion that on this ground the order made by the Sub Divisional Magistrate on the 17th February 1922 should be set aside. This will be of course without prejudice to any fresh proceedings that may be taken with reference to the alleged obstruction in a proper way under this Chapter against the present petitioner.

Crump, J.

4. I agree. I do not think that it is possible to uphold this order by invoking Section 537 of the Criminal Procedure Code. For, as I apprehend the matter, there has been a complete disregard of the imperative provisions of Section 137. The conditional order u/s 138 was made by the Sub-Divisional Magistrate on the 5th December 1921, and, on the 17th February 1922, he made that order absolute. Now, if we refer to Section 137, it is manifest that the materials on which the conditional order can be made absolute by the Magistrate who makes that order are described in the language ~~of~~ of the section as evidence taken as in a summons case. That imports the necessity of the Magistrate taking the evidence before himself and he cannot, even with the consent of the parties, refer the matter for inquiry and report to another Magistrate. I am not speaking now of those cases where parties are directed to appear before another Magistrate of the First or Second Class as provided for in the last paragraph of Section 133(1), for that is not the case in the present matter. The order having thus been made absolute on materials which are not provided for by the section and in a manner contrary to the express provision of the section, no consent of the parties can possibly cure the illegality. I, therefore, agree that the proceedings must be set aside.