

(1978) 07 BOM CK 0030**Bombay High Court****Case No:** None

Vasant Manga Mahajan and
Others

APPELLANT**Vs**

Baburao Bhikanna Naidu and
Another

RESPONDENT**Date of Decision:** July 31, 1978**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 138, 141

Citation: (1979) CriLJ 526**Hon'ble Judges:** Jahagirdar, J**Bench:** Single Bench**Judgement****@JUDGMENTTAG-ORDER**

Jahagirdar, J.

An order passed by the Sub-Divisional Magistrate of Jalgaon u/s 138 read with Section 141 of Cr. P. C, 1973, is challenged in this petition by ten petitioners. They are the tenants of house No. 66 situated at Polan Peth, Jalgaon and owned by the first respondent in this petition (hereinafter referred to as "the respondent"). According to the petitioners, the respondent served upon them a notice on 9th July 1970 asking them to vacate but they did not comply with this notice. On 19th July 1974 the Chief Officer of Municipal Council of Jalgaon served a notice on the respondent asking him to pull down the building on the ground that it was dilapidated and it was in a dangerous condition. No action was taken immediately by the respondent on this notice issued by the Municipality, but nearly after two years he made an application to the District Magistrate of Jalgaon for taking action u/s 133 of the Cr.P.C. In due course this application was forwarded to the Sub-Divisional Magistrate for action and he by his judgment and order dated 14th Sept. 1976 passed what has been described as a conditional order u/s 133 of the Code. Several steps have been taken during the course of the enquiry conducted by

the Sub-Divisional Magistrate, but I will refer only to those which are strictly relevant for I ho point? arising in this petition.

2. On 30th Nov. 197G the petitioners made an application to the learned Sub-Divisional Magistrate asking for permission to lead evidence in the matter. In that application they had specifically mentioned that they want to examine their engineer, one Menghani whose evidence was to be recorded. The learned Sub-Divisional Magistrate on the same day rejected this application by holding that there was no need to give oral evidence and instead affidavits may be filed. Affidavits indeed were filed thereafter including that of the engineer who was otherwise to be examined by the petitioners. Little later on 24th Dec. 1976 the petitioners made an application for issuing witness summonses to two engineers, one of whom was Menghani. The respondent also applied for witness summons to some witnesses including Joshi who was also an engineer. Though these two applications were granted, those witnesses were not examined for what reasons, it is not clear from the record. I have already mentioned above, one Menghani was an Engineer who was to be examined by the petitioners and he had made an affidavit pursuant to the order of the learned Magistrate. On 11th April 1977 the respondent made an application to the Magistrate requesting him to call for the remarks of the Executive Engineer on Menghani's affidavit. Accordingly a requisition was sent by the Court to the Executive Engineer.

3. From the report which has been sent by the Executive Engineer to the Sub-Divisional Magistrate, one can infer that the Executive Engineer had deputed one Deputy Engineer to inspect the building. But it is not clear whether he had submitted any particular report to the Executive Engineer and if so, what that report contains. The report dated 23rd Jan. 1978 sent by the Executive Engineer himself mentions that "The following remarks are offered on the affidavit and the plan by the local Architect Shri Menghani". From this it is not clear at least to me whether the remarks contained in this report were those of the Deputy Engineer or were of the Executive Engineer signing this document dated 23rd Jan. 1978. The learned Magistrate relied upon this report of the Executive Engineer and came to the conclusion that the building was in dangerous condition and all the walls of the building should be removed without any delay. This he did by his judgment and order dated 25th Sept. 1978. It is this order of the Magistrate that is impugned in this present revision application which has been supported before me by the learned Advocate Mr. C. A. Phadkar.

4. Mr. Phadkar directed his criticism against the order of the Magistrate mainly from two angles. One was that u/s 138 of the Cr.P.C. applicable to this enquiry, it was obligatory on the Magistrate to take evidence in the manner of a summons case and the learned Magistrate by shutting out oral evidence in the instant case has given a go-by to the procedure prescribed by law. Secondly, he contended that the so-called report dated 23rd Jan. 1978 given by the Executive Engineer is no report at all or at

any rate it was not the report which was called for by the Magistrate, For reasons to follow and after hearing Mr. Sonalkar appearing for the respondent, I accept the criticism made by Mr. Phadkar.

5. Section 133 of the Code provides that whenever a Magistrate mentioned therein on information received and on taking such evidence, if any, as he thinks fit. considers that any building is in such a condition that it is likely to fall and thereby cause injury to persons living in it or in the neighbourhood, then he may make an conditional order requiring the per- sons owning or occupying such building to remove, repair or support such building. This requisition to be made by the Magistrate should also contain an option, namely, that if the owner of the building objects to it, he should appear before the Magistrate and show cause why the order should not be made absolute. Section 138 then provides that if a person against whom an order u/s 133 is made appears and shows cause against the order, then the Magistrate shall take evidence in the matter as in the summons case. The Magistrate may for the purpose of the enquiry u/s 133) direct a local investigation to be made bv a person or he may summon and examine an expert. When the Magistrate directs a local investigation by any any person as aforesaid, then it is open to the Magistrate to give him such instructions as may be necessary for his guidance. Any report submitted by such person may be read as evidence in the case. These are broadly the provisions relating to an enquiry of this type.

6. The order passed by the learned Magistrate on 30th Nov. 1970 shutting off the oral evidence which was sought to be produced by the petitioners is thus patently illegal. A summons case cannot be decided merely on the basis of affidavits. u/s 254 of the Code, the Magistrate is required to proceed to-hear the prosecution and take the evidence as may be produced in support of the prosecution and also to hoar the accused and take all .such evidence as her produces in his defence. If this procedure is to be followed for an enquiry] u/s 138. it is implicit therein (hat the Magistrate must give an opportunity to the persons appearing before him to lead evidence if they so desire. I have, therefore, no hesitation in upholding the contention of Mr. Phadkar that on the threshold itself the Magistrate committed an error of law leading to an error of jurisdiction.

7. In Banta Singh Vs. Sohawa Singh and Others, a Division Bench of the Punjab and Haryana High Court has taken the same view and has pointed out that it is not permissible to adduce evidence by way of affidavits in proceedings u/s 133 and the Magistrate is bound to record evidence in the same manner as is recorded in the summons case.

8. Mr. Sonalkar, however, sought to support the order by pointing out that the evidence that may be led in this case will be essentially expert's evidence and if Menghani has been tender-de by them as their expert, it was open to the respondents to request the Court to subject the report or the affidavit of Menghani to an examination by an independent person, as such the Executive Engineer. In the

instant case, this is the procedure followed and no prejudice has been caused to the parties. I am unable to subscribe to this interpretation of the procedure adopted by the Sub-Divisional Magistrate. If the parties were entitled to lead oral evidence, that right could not be denied to them by the Magistrate. Affidavit-evidence can never be a substitute for oral evidence given in the Court and tested by cross-examination. If law itself does not permit affidavit-evidence, then the benefit of oral evidence must be given to the parties concerned. The learned Magistrate, having failed to do this, has committed a patent error of jurisdiction which is liable to be corrected by this Court in exercise of its revisional jurisdiction.

9. I have already mentioned above that the Sub-Divisional Magistrate had asked the Executive Engineer to offer his comments on Menghani's affidavit. When this was done, I must presume that it was the Executive Engineer who was to examine the material contained in Menghani's affidavit and to offer comments. Unfortunately the report dated 23rd Jan. 1978 sent by the Executive Engineer does not disclose whose remarks are offered on Menghani's affidavit. The said document, therefore, could not properly be the basis of the order passed by the Sub-Divisional Magistrate. Mr. Sonalkar, however, points out that there is internal evidence to show that the Deputy Engineer was asked to collect the facts after inspecting the building and on the basis of the facts so collected by the subordinate, the Executive Engineer has made the remarks contained in the report of 23rd Jan. 1978. If the document itself had so mentioned, there would have been no difficulty in holding so. Unfortunately it is not clear whether that document incorporates the remarks made by the Deputy Engineer or contains the remarks of the Executive Engineer himself. In any case, it would have been appropriate in a case of this type that even before the remarks are offered by a particular Engineer, he should have seen the building which had been seen and reported upon by another Engineer. In my opinion, the material contained in the report dated 23rd Jan. 1978 was not such as to enable a judicial or quasi-judicial authority to arrive at a clear-cut finding.

10. In the result, this petition has to be allowed and the impugned order to be set aside with appropriate directions which I now proceed to give.

11. The order dated 25th April 1978 passed by the Sub-Divisional Magistrate, Jalgaon Division, Jalgaon, in Criminal Case No. 2 of 1976 is set aside. The Magistrate is hereby directed to take the proceedings *de novo* and to follow the procedure prescribed for a summons case in the Criminal Procedure Code by allowing the parties to lead evidence if they so desire. He is of course free to exercise the powers vested in him under Sections 139 and 140 of the Code. But if he has to rely upon a report of any person, it should be the report of that particular person. Since the matter relates to a building alleged to be in dilapidated condition, the record of the case shall be sent immediately and the Magistrate should hear and dispose of the case as expeditiously as possible.