

there should be a fine of Rs. 200 or in default that respondent should be committed to prison for a term of one month or until payment of fine.

It is not necessary to deal at any great length with the statement which the respondent has put in. For that statement is wholly inadequate as an apology for the offence of which he has been found guilty. Had he expressed his regret in an unequivocal and straightforward manner, he might not, I think, have been dealt with severely in this case. But the absurd suggestion that this is fair comment shows that he is totally unaware of the seriousness of his action if indeed he means to plead that this is fair comment.

Order accordingly.

R. R.

CRIMINAL REVISION.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Cramp.

In re KARIYAPPA BIN NINGAPPA^o.

Criminal Procedure Code (Act V of 1898), sections 133, 137, 537—Conditional order passed by one Magistrate—Subsequent inquiry transferred with consent of parties to another Magistrate—Passing of the final order.

A Magistrate passed a conditional order under section 133 of the Criminal Procedure Code. When the party appeared to show cause, the Magistrate, with the consent of the parties, sent the case to another Magistrate for inquiry and report, and on receipt of the report so submitted, made the final order :—

Held, that the procedure followed was irregular, and that the irregularity vitiated the proceedings.

THIS was an application against an order passed by G. K. Kumble, Sub-Divisional Magistrate of Dharwar.

The Sub-Divisional Magistrate of Dharwar passed a conditional order, under section 133 of the Criminal

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Procedure Code, directing the petitioner to pull down a wall or to show cause, if any, against the order before himself. When the parties appeared before the Magistrate, he, with the consent of the parties, sent the case to the Second Class Magistrate at Navalgund for inquiry and report. The Second Class Magistrate heard the evidence and submitted his report. The Sub-Divisional Magistrate took the report into consideration and made the order absolute under section 137 of the Criminal Procedure Code.

The applicant applied to the High Court.

H. B. Gumaste, for the applicant.

G. S. Mulgaonkar, for the opponent.

S. S. Patkar, Government Pleader, for the Crown.

SHAH, AG. C. J.:—In this case a conditional order was made under section 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.

It was open to the Magistrate to direct the party by the conditional order to appear before himself or before

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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 under section 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 under section 137 to take evidence as in a summons case, if the final order was to be made by him.

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. I am 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.:—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

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matter, there has been a complete disregard of the imperative provisions of section 137. The conditional order under section 133 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 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 (*I*) 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.

Order set aside.

R. R.

APPELLATE CIVIL.

Before Sir Lallubhai Shah, Kt., Acting Chief Justice, and Mr. Justice Crump.

LAKSHMIBAI WIFE OF JAGANNATH VAMAN JOSHI, AND OTHERS
(HEIRS OF ORIGINAL DEFENDANT), APPLICANTS *v.* YESHVANT VITHAL
BAGKAR (ORIGINAL PLAINTIFF), OPPONENT*.

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Indian Limitation and Code of Civil Procedure (Amendment) Act (XXVI of 1920), section 2—Abatement—Application to bring heirs on record made

* Civil Extraordinary Application No. 184 of 1921.