

**Kranti Parcel Service Vs. the State**

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**Court :** Andhra Pradesh

**Decided On :** Sep-03-1996

**Reported in :** 1996(4)ALD807; 1996(2)ALD(Cri)839; 1996(2)ALT(Cri)748; 1997CriLJ679

**Judge :** Y. Bhaskara Rao and ;Y.V. Narayana, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 133, 134, 136, 137 and 138

**Appeal No. :** Criminal Petn. No. 4417 of 1995

**Appellant :** Kranti Parcel Service

**Respondent :** The State

**Advocate for Def. :** Public Prosecutor

**Advocate for Pet/Ap. :** M. Lakshmana Sarma, Adv.

**Judgement :**

**Y. Bhaskar Rao, J.**

1. This petition is filed to quash the proceedings in M.O. No. 30/95 dated 1-9-1995 on the file of the Sub-Divisional Magistrate, Peddapuram, East Godavari district.

2. The facts of the case are that : the petitioner herein is Kranti Parcel Service, Tuni, represented by its Manager. Its office is located at Tuni. The office of the petitioner will receive and send parcels, by making booking of the parcels and loading and unloading operations will be done during the office hours. While so, the Sub-Divisional Magistrate issued an order under Section 133 of the Code of Criminal Procedure (for short 'the Code') for removal of nuisance. The petitioner was also issued with a notice. The case of the petitioner is that it filed explanation denying the allegations that it is committing any nuisance. Further, it is stated that there are number of lorry services in the same street, which are more popular and which got more business than the petitioner. The petitioner also requested the Sub-Divisional Magistrate to make local inspection of the spot to find out the truth or otherwise of the matter. The Sub-Divisional Magistrate without recording any evidence and without conducting any enquiry passed the final order, which is questioned in this criminal petition.

3. The learned counsel for the petitioner contended that the learned Magistrate erred in not following the procedure contemplated under Section 138 of the Code. After issuing notice to the respondent, after the respondent has submitted its explanation, it is imperative for the Magistrate to record evidence and then pass the final order. But in the present case the said procedure is not followed. Therefore, the proceedings are vitiated and are liable to be quashed.

4. The learned Public Prosecutor contended that the petitioner had only requested the Sub-Divisional Magistrate to make spot inspection and that he has not offered any explanation or adduced any evidence. Therefore, question of recording any evidence does not arise.

5. In view of the above contentions, the important question that arises for consideration is - whether it is imperative to record the evidence before passing final order under Section 138 of the Code.

6. Chapter - X(B) of the Code deals with public nuisances. Section 133 of the Code empowers the Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government to remove any obstruction or nuisance from any public place or from any way, river or channel

which is or may be lawfully used by the public. Thus, as per Section 133 of the Code, the Sub-Divisional Magistrate passed the preliminary order in this case and issued notice to the petitioner as contemplated under Section 134 of the Code. There afterwards, the petitioner appeared and filed his explanation. Section 138 of the Code prescribed the procedure to be followed after appearance of the person in pursuance of the show-cause notice. It mandates that the Magistrate shall take evidence in the matter as in a summons case and there afterwards, if he is satisfied with the order made originally is reasonable, he shall confirm the same or if he thinks to modify he can modify the orders earlier passed by him. If the Magistrate is not so satisfied, no further proceedings shall be taken in the case. Thus, sub-section (1) of Section 138 of the Code casts an obligation on the Magistrate to take evidence as in a summons case. In the present case no evidence was recorded by the Magistrate.

7. The Bombay High Court in *State of Maharashtra v. Hassanali Vali Mohammed*, 1975 Cri LJ 1782 held that it is imperative for the Court to record evidence in the matter under Section 137 of the Old Code, which is equivalent to Section 138 of the New Code. As the Magistrate has not recorded evidence at all either on behalf of the original applicant or on behalf of the respondents-accused, his order making preliminary order absolute is bad in law. Similarly the Kerala High Court in *Krishna Jillai Bhaskaran Nair v. Varghese Samuel*, 1975 Cri LJ 104 was considering the scope of Ss. 136 and 137 of the Old Code.

In para-4 of its Judgment, it observed as follows :

'If the person against whom the show cause summons is served, appears and files objections, the Magistrate should not dispose of the case under Section 136 but should take evidence and satisfy himself that the order passed by him is reasonable and proper. Even in cases the person concerned does not pursue his objections, the complaint should lead evidence on his side and should not leave the Magistrate to base his order on materials placed before him when the preliminary order was passed. Neither the reports of the Tahsildar nor police papers relating to the case nor evidence produced while passing order under Section 133 are substitutes for the taking of evidence under Section 137.'

Thus, it is evident from the principle laid down in the above Judgment and on a reading of sub-section (1) of Section 138 of the New Code, it is imperative for the learned Magistrate to record evidence after the respondents are appeared in pursuance of the show-cause notice issued under Section 133 of the Code. In the present case no evidence is recorded and the Sub-Divisional Magistrate has made the preliminary order absolute without recording any evidence. Therefore, the impugned order in M.C. No. 30/95, dated : 1-9-1995 is quashed. However, the Sub-Divisional Magistrate is permitted to issue a fresh notice and record evidence and proceed further in accordance with law.

8. The criminal petition is accordingly allowed.

9. Petition allowed.

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