

Sandeep Shivaji Mhatre Vs State of Maharashtra

Court: Bombay High Court

Date of Decision: April 23, 2014

Acts Referred: Constitution of India, 1950 " Article 22, 226
Criminal Procedure Code, 1973 (CrPC) " Section 107, 107, 108, 109, 110
Penal Code, 1860 (IPC) " Section 323, 324, 34, 403

Citation: (2014) ALLMR(Cri) 3913 : (2014) 3 BomCR(Cri) 306

Hon'ble Judges: N.H. Patil, J; Anuja Prabhudesai, J

Bench: Division Bench

Advocate: S.R. Gaud, Advocate for the Appellant; K.V. Saste, A.P.P, Advocate for the Respondent

Final Decision: Allowed

Judgement

Anuja Prabhudesai, J.

Rule. Rule made returnable forthwith. By consent, the petitions are taken up for final hearing. Since the issue

involved in these writ petitions is common, the same is being disposed of by common order. The petitioners herein challenge the Notices u/s 111 of

the Criminal Procedure Code, dated 5.3.2014 and the order dated 25.3.2014 issued by the Special Executive Magistrate, Agripada Division,

Mumbai for initiation of Chapter proceedings u/s 107 of the Cr.P.C.

2. The brief facts relevant to decide the controversy are that the Special Executive Magistrate had issued Notices, dated 5.3.2014 for initiating

chapter proceedings against the petitioners. The Notices refer to C.R. No. 250 of 2013 under sections 324, 323, 403 r/w section 34 of the IPC

registered against the petitioners with Byculla Police Station. The Notices proceed on the footing that the petitioners are likely to repeat such

offence and cause disturbance to the public peace and tranquility. The petitioners were, therefore, called upon to show cause as to why they

should not be ordered to execute bonds of Rs. 1,000/- with three sureties in the like amount, for keeping the peace for a period of one year. The

petitioners filed their reply wherein they refuted the allegations levelled against them and prayed for dropping of the proceedings. Vide order dated

25.3.2014, the Special Executive Magistrate rejected the prayer made by the petitioners to drop the proceedings. Aggrieved by the said order, the

petitioners have filed the present petitions under Article 226 of the Constitution of India r/w section 482 of the Cr.P.C. challenging validity and

legality of the impugned notice and order therein.

3. The learned Counsel for the petitioners submitted that the Special Executive Magistrate had not passed order u/s 111 of the Cr.P.C. and non-

compliance of the said mandatory provisions vitiates the entire chapter proceedings. He has further pointed out that the proceedings are initiated

against the petitioners on the basis of a single criminal case which is pending for trial before the Judicial Magistrate. He has contended that in the

absence of any other material to show that the petitioners are habitual offenders or that they were involved in any activity calculated to cause,

alarm, danger or disturb the peace and tranquility, the Executive Magistrate was not competent to invoke powers u/s 107 of the Cr.P.C. He,

therefore, submits that the order is illegal and unconstitutional.

4. The learned APP has pointed out to the Roznama dated 5.3.2014 and submitted that the Special Executive Magistrate has passed the order u/s

111 of the Cr.P.C. and has thereby complied with the mandatory provisions of section 111 of the Cr.P.C. The learned APP submitted that the

order is not illegal and hence no interference is warranted.

5. We have considered the submissions advanced by the learned Counsel for the petitioners and learned APP for the State. Before advertng to

the factual matrix of the case, it would be appropriate to have a look on the law relating to the scope and object of section 107 of the Cr.P.C. The

constitutional validity of section 145 and Chapter VIII of the Cr.P.C. was challenged before the Apex Court in the case of Madhu Limaye Vs.

Sub-Divisional Magistrate, Monghyr and Others, The Apex Court while considering the scope of section 107 of the Cr.P.C. has held as under:

33. The gist of section 107 may now be given. It enables certain specified classes of Magistrates to make an order calling upon a person to show

cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as

the Magistrate thinks fit to fix. The condition of taking action is that the Magistrate is informed and he is of opinion that there is sufficient ground for

proceeding that a person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably

occasion a breach of the peace or disturb the public tranquillity. The Magistrate can proceed if the person is within his jurisdiction or the place of

the apprehended breach of the peace or disturbance is within the local limits of his jurisdiction. The section goes on to empower even a Magistrate

not empowered to take action, to record his reason for acting, and then to order the arrest of the person (if not already in custody or before the

Court) with a view to sending him before a Magistrate empowered to deal with the case, together with a copy of his reasons. The Magistrate

before whom such a person is sent may in his discretion detain such person in custody pending further action by him.

34. The section is aimed at persons who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the

public tranquility. This is an instance of preventive justice which the courts are intended to administer. This provision like the preceding one is in aid

of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquility. For this purpose Magistrates are invested

with large judicial discretionary powers for the preservation of public peace and order. Therefore the justification for such provisions is claimed by

the State to be in the junction of the State which embraces not only the punishment of offenders but, as far as possible, the prevention of offences.

36. We have seen the provision of section 107 that section says that action is to be taken "in the manner hereinafter provided" and this clearly

indicates that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent This is very salutary because the

liberty of the person is involved and the law is rightly solicitous that this liberty should only be curtailed according to its own procedure and not

according to the whim of the Magistrate concerned. It behoves us, therefore, to emphasise the safeguards built into the procedure because from

there will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of the general public.

37. The Procedure begins with section 112. It requires that the Magistrate acting u/s 107 shall make an order in writing setting forth the substance

of the information received, the amount of the bond, the term for which it is to be in force and the number, character and class of sureties (if any)

required. Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach

of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the "substance of the information" it does not mean

that the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take

the action. This order is the foundation of the jurisdiction and the word "substance" means the essence of the most important parts of the

information.

38. Next follow three sections-sections 113-115. They deal with the person's presence. Section 113 deals with the situation when the person is

present in Court, then the order shall be read over to him and if he so desires, the substance of it shall be explained to him. This is not a mere

formality. The intention is to explain to the person what the allegations against him are. The next section (section 114) deals with a situation when

the person is not present in Court. There the option is twofold. Ordinarily, a summons must issue to him but in cases where the immediate arrest of

the person is necessary a warrant for his arrest may issue. This is however subject to the qualification that there must be a report of a Police Officer

or other information in that behalf and the breach of the peace cannot otherwise be prevented. The Magistrate must not act on an oral information

but must record the substance of it before issuing a warrant. The section also envisages a situation in which the person is already in custody. In that

case the Magistrate shall issue a warrant directing the Officer having the custody to produce that person. The provisions of this section are quite

clearly reasonable in the three circumstances it deals with. If the presence of the person is to be secured, a summons to him is the normal course

except in the other two cases.

39. Section 115 then provides that such summons or warrant u/s 114 as the case may be, must be accompanied by the order u/s 112 and the

person serving or executing the summons or warrant must serve the order on the person. There is enabling power in section 116 under which the

Magistrate may dispense with the presence of the person in Court and allow him to appear by a pleader.

40. Then follows section 117 That section (omitting the proviso to the third sub-section and omitting sub-sections (4) and (5) which do not

concern us) may be read here:

117. Inquiry as to truth of information

(1) When an order u/s 112 has been read or explained u/s 113 to a person present in Court, or when any person appears or is brought before a

Magistrate in compliance with, or in execution of, a summons or warrant issued u/s 114 the Magistrate shall proceed to inquire into the truth of the

information upon which action has been taken, and to take such evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trials and recording evidence

in summons cases.

(3) Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the

prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for

reasons to be recorded in writing, direct the person in respect of whom the order u/s 112 has been made to execute a bond, with or Without

sureties, for keeping the peace or maintaining good behavior until the conclusion of the inquiry, and may detain him in custody until such bond is

executed or, in default of execution, until the enquiry is concluded.

41. The first sub-section read with the second requires the Magistrate to proceed to inquire into the truth of the information. The third sub-section

enables the Magistrate to ask for an interim bond pending the completion of the inquiry by him. This is conditioned by the fact that immediate

measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for

protection of public safety. This is applicable where the person is not in custody and his being at large without a bond may endanger public safety

etc. The Magistrate has to justify his action by reasons to be recorded in writing. If the person fails to execute a bond, with or without sureties, the

Magistrate is empowered to detain him in custody.

44. The power which is conferred under this Chapter is distinguished from the power of detention by executive action under Article 22 of the

Constitution. Although the order to execute a bond, issued before an offence is committed, has the appearance of an administrative order, in reality

it is judicial in character. Primarily the provision enables the Magistrate to require the execution of a bond and not to detain the person. Detention

results only on default of execution of such bond. It is, therefore, not apposite to characterise the provision as a law for detention contemplated by

Article 22. The safeguards are therefore different. The person sought to be bound over has rights which the trial of summons case confers on an

accused. The order is also capable of being questioned in superior courts. For this reason, at every step the law requires the Magistrate to state his

reasons in writing.....

45. Section 118 then lays down that if upon inquiry it is proved that the person be called upon to execute a bond for keeping the peace or

maintaining good behavior the Magistrate may call upon him to execute a bond. The security must not be more than that stated in the order u/s

112, nor excessive u/s 119 the Magistrate may discharge the person or release him from custody if the necessity for keeping him bound over is not

proved.

46. The last Division numbered C relates to proceedings subsequent to section 118. Section 120 fixes the terminus a quo for the period for which

security is required. Section 121 gives the contents of the bond and the conditions under which there is a breach of the bond. Section 122

empowers the Magistrate to reject sureties but only after inquiry and recording the evidence and his reasons for rejection Section 123 gives power

to commit a person to prison or to be detained in prison if already therefor the duration mentioned in the bond. If the period is more than a year

then the proceedings have to be submitted to a Superior Court. It also provides for ancillary matters. Section 124 empowers the District

Magistrate or a Chief Presidency Magistrate to release a person so detained when there is no longer any hazard to the community or to any other

person. There are other provisions for reducing security etc. with which we are not concerned. Section 125 enables the same Magistrates to

cancel any bond for sufficient reason and u/s 126 the sureties also stand discharged. Section 126-A deals with security for the unexpired period of

bond to which no special reference is needed.

47. The gist of the Chapter is the prevention of crimes and disturbances of public tranquility and breaches of the peace. There is no need to prove

overt acts although if overt acts have taken place they will have to be considered. The action being preventive is not based on overt act but on the

potential danger to be averted. These provisions are thus essentially conceived in the interest of public order in the sense defined by us. They are

also in the interest of the general public. If prevention of crimes, and breaches of peace and disturbance of public tranquility are directed to the

maintenance of the even tempo of community life there can be no doubt that they are in the interest of public order. As we have shown above

"public order" is an elastic expression which takes within it various meanings according to the context of the law and the existence of special

circumstances.....

6. It is thus, well settled that the preventive measures u/s 107 of the Cr.P.C. have to be necessarily preceded with (i) information that there is

likelihood of breach of the peace or disturbance of the public tranquility, (ii) formation of opinion of the Magistrate that there is sufficient ground for

proceeding u/s 107 of the Cr.P.C. (iii) order in writing setting forth the substance of the information received, the amount of the bond to be

executed, the terms on which it is to be enforced and the number, character and class of sureties, if any, required. (iv) Communication of the order

u/s 111 of the Cr.P.C. and (vi) inquiry into the truth of information and to take evidence, as may be necessary. These judicial powers vested in the

Special Executive Magistrate for preservation of the peace and public tranquility have to be exercised with great care and caution, in strict

adherence to the procedure prescribed in the Code and not according to the whims and fancies of the concerned Magistrate.

7. Reverting to the facts of the present case, the records placed before us indicate that vide Notice dated 5.3.2014, the Special Executive

Magistrate, had called upon the petitioners to show cause as to why they should not be ordered to execute bonds of Rs. 1,000/- each with three

solvent sureties in the like amount, for keeping the peace for a period of one year. The said notice was issued on the basis of the information

received from the Senior Police Inspector of Byculla Police Station relating to C.R. No. 250 of 2013, registered against the petitioners for

committing offence under sections 324, 323, 403 r/w section 34 of the IPC.

8. On receipt of the said information, it was incumbent upon the Special Executive Magistrate to record his opinion as contemplated u/s 107 of the

Cr.P.C. and thereafter, pass an order in writing u/s 111 of the Cr.P.C. setting forth the substance of the information received. The records indicate

that the Special Executive Magistrate had not passed any separate order u/s 111 of the Cr.P.C. Nevertheless, there is an entry in the Roznama,

dated 5.3.2014, under the signature of the Special Executive Magistrate, which indicates that the Shri Kumtale, A.P.I. (Prohibitory Officer),

Byculla Police Station had proposed to initiate proceedings u/s 107 of the Cr.P.C. against the petitioners. It is recorded that in view of the crime

registered against the petitioners and considering the possibility of petitioners repeating such crimes, the Assistant Police Inspector, (Prohibitory

Officer) of Byculla Police Station has recommended initiating proceedings u/s 107 of the Cr.P.C.

9. Upon considering the report submitted by the Senior Inspector of Police of Byculla Police Station and considering the material on record, the

Special Executive Magistrate has recorded satisfaction that there is possibility of the petitioner disturbing the peace and public tranquility, that the

same necessitates action u/s 107 of the Cr.P.C. The Roznama entry further states that in terms of section 111 of the Cr.P.C., the petitioners have

been called upon to show cause why they should not execute bond of Rs. 1,000/- with three sureties in the like amount for a term of one year and

that the Prohibitory Officer Shri. Kumtale, API, Byculla Police Station has been directed to execute the said notice.

10. The order u/s 111 of the Cr.P.C is foundation of the jurisdiction for initiating proceedings under Chapter VII of the Cr.P.C. The entry in the

Roznama dated 5.3.2011, which is stated to be the order u/s 111 of the Cr.P.C. indicates that the notice u/s 107 of the Cr.P.C was issued and

handed over to the Prohibitory Officer Shri. Kumtale, API, Byculla Police Station for execution, even before passing of the order u/s 111 Cr.P.C.

In other words, notice u/s 107 of the Cr.P.C. had preceded the order when in fact the order u/s 111 of the Cr.P.C. was the pre-requisite or sine

qua non for initiating proceedings u/s 107 of the Cr.P.C. The procedure adopted by the Special Executive Magistrate is in total contravention of

the mandatory provisions of the Act and hence, vitiates the action.

11. Be that as it may, the Roznama entry dated 5.3.2014, states to be the order u/s 111 of the Cr.P.C. neither refers to C.R. No. 250 of 2013 nor

gives the gist of the offences allegedly committed by the petitioners, but merely states that a crime is registered against the petitioners by Byculla

Police Station and that there is possibility that the petitioner may indulge in criminal activities and thereby disturb the peace and public tranquility.

The said Roznama entry, neither sets forth the substance of the information nor states the reasons for arriving at such satisfaction. Such mechanical

transcription of the police report in the Roznama cannot be equated to the order u/s 111 of the Cr.P.C. It follows, therefore that the Special

Executive Magistrate has initiated proceedings u/s 107 of the Cr.P.C. without issuing order u/s 111 of the Cr.P.C., which is a condition precedent

for initiating action u/s 107 of the Cr.P.C Non-compliance of the mandatory provisions of the Act vitiates the impugned notice and all further

proceedings.

12. It is also pertinent to note that in the present case, the proceedings are initiated u/s 107 of the Cr.P.C. on 5.3.2014 solely on the basis of C.R.

No. 250 of 2013, which was registered by Byculla Police Station on 19.11.2013 and which is pending trial before the Metropolitan Magistrate,

Mazgaon. The said dispute was essentially between two individuals and does not involve any community or public at large. There is nothing in the

Roznama entry or the notice to indicate that the petitioner was a habitual offender or that he was involved in criminal activity or that his conduct

during the interregnum period was subversive of the peace and public tranquility. The Magistrate has not conducted minimal required preliminary

inquiry to arrive at a satisfaction that the alleged incident or the conduct of the petitioner was likely to cause breach of the peace or disturbance of

the public tranquility but has formed his opinion mechanically, solely on the basis of the solitary FIR and the report forwarded by the Police. It is a

settled principle that powers u/s 107 of the Cr.P.C. have to be exercised only in cases of serious nature likely to occasion breach of the peace or

disturbance of the public tranquility and not as a vehicle for private vendetta. Since foundation of an order is an apprehension or likelihood of a

breach of the peace or public tranquility, such order could not be justified merely on the basis of solitary incident of violence between two

individuals.

13. In the case of Vasantkumar Jivrambhai Majithia Vs. State of Maharashtra (At the instance of Special Executive Magistrate, Mulund Division)

and Laxman Narsaiyya, Ravi Cable Network, 9th Division Bench of this Court has approved the view taken by the Single Judge of the Court in

the case of Smt. Christalin Costa and others Vs. State of Goa and others, which is as under:

7.....a bare perusal of section 107 of Criminal Procedure Code read with section 111 shows that such proceedings are to be instituted only in

respect of information received by the Magistrate if he is satisfied that there is any danger or likelihood of somebody committing breach of the

peace and disturbing public tranquility. Obviously when there are quarrels between two private individuals it appears that this situation is not

contemplated by these legal provisions. Quarrels between individuals are not normally creating any problem of public order and at the most it may

lead to a problem of law and order to be dealt with by the appropriate penal law. Proceedings u/s 107 are always dealing with preventive

measures to be taken by the Magistrates in order to preempt any possibility of breach of peace and disturbance of public tranquility. In the case of

(Jayant D. Shah and 4 others Vs. State of Maharashtra), 1986(1) CRIMES 305, this Court has held that the provisions of sections 107 to 110

cannot be used or exercised for satisfying private vendetta of a querulous person and the exercise of powers by the Magistrate under the aforesaid

sections on the basis of incidents involving trivial quarrels without application of mind would amount to gross abuse of process of law.

14. In the present case, the proceedings were initiated without adhering to the procedure provided under the Code. The petitioners had filed

replies to the show-cause notice, wherein they had pointed out the lacunae in the procedure adopted by the Special Executive Magistrate and had

prayed to drop the proceedings. By order dated 25.3.2014 the Special Executive Magistrate had rejected the prayer stating that there were no

substantial grounds and sufficient evidence to drop the proceedings. The question whether the proceedings initiated u/s 107 of the Code could be

dropped without inquiring into the truth of the information as envisaged u/s 116 of the Code and before passing discharge order u/s 118 of the

Code is not required to be delved in the present petitions. Suffice to say that the reasons stated in the order dated 25.3.2014 reflect total non -

application of mind as it is seen that the petitioners in their replies had raised detail and specific grounds. The grounds raised by the petitioners were

relating to the procedure followed by the Special Executive Magistrate in initiating the proceedings and these grounds were not required to be

Proved"".

15. The records indicate that the Special Executive Magistrate has totally deviated from the procedure provided under the Code. In the case of

Vasantkumar (supra), this Court had called upon the State Government to issue necessary directions to ensure that the provisions of the Code are

scrupulously followed and complied with by the Special Executive Magistrate. The Principal Secretary to the Home Department was directed to

circulate a copy of the said judgment to all the Special Executive Magistrate to ensure that the proceedings under Chapter VIII of the Code are

conducted strictly in accordance with law. It is a matter of great concern that despite such directions, the Judicial discretionary powers vested in

the Special Executive Magistrate u/s 107 of the Cr.P.C. for the preservation of public peace and order, are exercised by the Special Executive

Magistrate lackadaisically, in total violation of the mandatory provisions of the Act and in utter disregard to the directions given by this Court. We

are, therefore, constrained to reiterate the procedural safeguards and call upon the State functionaries to direct the Special Executive Magistrate to

follow the steps envisaged in section 107 of the Cr.P.C., strictly in accordance with the procedure outlined in the Code. For the reasons stated

above, we are of the view that the impugned notice dated 5.3.2014 and the consequent order dated 25.3.2014 issued by the Special Executive

Magistrate, Agripada Division Court, Mumbai cannot be sustained. In the result, we pass following order:

ORDER

(i) The writ petitions are allowed.

(ii) The impugned Notice dated 5.3.2014 issued u/s 107 of the Cr.P.C. and the impugned order dated 25.3.2014 passed by the Special Executive

Magistrate, Agripada Division Court, Mumbai in Chapter Case Nos. 15 of 2014 in Court Case No. 25 of 2014, Chapter Case No. 16 of 2014 in

Court Case No. 26 of 2014 and Chapter Case No. 18 of 2014 and Court Case No. 28 of 2014 issued u/s 111 of the Cr.P.C. for initiation of

Chapter Proceedings u/s 107 of the Code are quashed and set aside.

(iii) Rule made absolute in the above terms.

(iv) Copy be forwarded to the Principal Secretary, Home Department for appropriate action.