(1978) 04 CAL CK 0008

Calcutta High Court

Case No: Criminal Rev. Case No. 92 of 1977

Gurupada Saha		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: April 21, 1978

Acts Referred:

- Constitution of India, 1950 - Article 134
- Criminal Procedure Code, 1973 (CrPC) - Section 107, 111, 397, 397(2)

Citation: 82 CWN 917

Hon'ble Judges: Sudhamay Basu, J

Bench: Single Bench

Advocate: P. Burman and Gauri Sankar Das, for the Appellant; Sudipta Maitra, for the Respondent

Final Decision: Dismissed

Judgement

Sudhamay Basu, J.

This Rule was obtained against an order, dated the 14th of December 1976 passed by the learned Executive Magistrate, Rampurhat, Birbhum in N.G.R. (E) No. 80 of 76. The impugned order was passed u/s 107 of the Code of Criminal Procedure against the petitioner who is an Inspector, Food and Supplies Department. The order directed him to show cause as to why he should not be ordered to execute a bond of Rs. 500/- with one surety of like amount for maintenance of peace for a period of six months. The learned Magistrate stated that he was satisfied that "there was a chance of serious breach of peace by the petitioner as he was very dangerous and desperate in nature". The said order was passed, it appears, on the petition, dated the 22nd September, 1976 of one Indu Bhusan Sarkar, a neighbour of the petitioner at Duckbungalow Para, Rampurhat alleging inter alia that on June 16, 1975 some people under the leadership of the petitioner tried to make a park by cutting several trees standing on the western part of his house and breaking fencing as a result of which he sustained injuries. Thereafter, again under the leadership of the petitioner

one Khalibur Rahaman and others tried to make a park by throwing earth. On protest made by women folk they were abused. On these allegations the police submitted a report on November 13, 1976. In that report the police said that the applicant was being harrassed in various ways. Two cases had already been started. The report, however, stated that the petitioner was not physically present on the spot at the time of the incidents but he was responsible for the two incidents. There was also apprehensions for breach of peace and the petitioner''s activities were prejudicial to maintenance of public peace and tranquility. In the circumstances by the impugned order the petitioner was asked to show cause on the 8th of January, 1977 and a notice was served on him. The petitioner alleged that he felt ill and submitted an application through lawyer with a medical certificate for not being able to attend the court, but the learned Magistrate issued warrant of arrest and fixed January 17, 1977 for further hearing. Thereafter the petitioner moved this court and obtained an order of stay on January 10, 1977.

2. Mr. Burman, the learned Advocate appearing in support of the Rule firstly argued that the order and the notice, are at variance. The notice, inter alia, states "Whereas it has been made to appear to me by credible information that you, the O.P. Member is very dangerous and desparate in nature. Your activity is prejudicial of the maintenancy to the public peace and you allow creating trouble upon the first party and every chance of the breach of the peace by you." Mr. Burman commented that no person could have signed the notice after reading the same, inter alia, in view of the incorrect English. It merely shows that the learned Magistrate did not apply his mind at all. According to Mr. Burman, the order and the notice being at variance the learned Magistrate had no jurisdiction to initiate the proceeding. The language used is not felicitous but what we are primarily concerned with are the contents of the notice. It is difficult to find discrepancy of any significance between the notice and the information received which would vitiate the entire proceeding. Although the nature of the English may be shocking to some of us yet we have positively outlived the days when use of ungrammatical or incorrect English by a Magistrate would be synonimous with non-application of the mind. However in this connection Mr. Burman relied on a decision by A.N. Banerjee, J. in Criminal Revision No. 1121 of 1975 (Nikhilesh Majumdar v. Lina Majumdar) who held that the notice must be in conformity with the order. He also relied on a decision by myself in Iltaf Hossain and others v. Anil Ch. Singh and another (Criminal Rev. No. 1704 of 76, dt. 10.3.78).

3. As to the maintainability of the application Mr. Barman submitted that the impugned order was not an interlocutory one. He cited a decision reported in Amalendu Ghosh and Others Vs. Prem Pathak, in which Bhattacharyya, J. held that the High Court has inherent jurisdiction to quash the proceedings initiated u/s 107 if it is found that the order initiating the proceedings is passed without jurisdiction and not authorised by law. In that case Bhattacharyya, J. found (paragraph 9) that "the learned Magistrate did not express his opinion about the proceeding to say that he was of the view that there was sufficient ground for such proceeding nor

was any ground for proceeding u/s 107 of the Code of Criminal Procedure indicated". He further held that the nature of the information received was not indicated nor did the learned Magistrate apply his mind. It was found that "the learned Magistrate acted out of jurisdiction and the order was not passed according to law". It that view of the matter the impugned order was quashed. Incidentally Bhattacharyya, J. while construing what is an interlocutory order observed "the word ''interlocutory'' means according to the import of the dictionary ''intermediary and the interlocutory order is one passed during progress of the proceedings, that is to say, interlocutory order must be an order passed after the initiation of the proceedings and before the final order disposing of the matter". As the order initiated or started the proceeding, according to him, it is not an interlocutory one. Interlocutory orders according to him, were those passed "after the initial order and before the final order."

4. Mr. Burman, also cited the case of Bishnu Pada Jana and others v. Suprova Dutt, reported in 1977 C.H.N. 78. In that case a Division Bench consisting of A.K. Sen and A.P. Bhattacharyya, JJ. held that if the conditions required to be fulfilled u/s 111 of the Code of Criminal Procedure, viz., (i) written order; (ii) substance of information against the person; (iii) amount of bond; (iv) period of the bond and (v) principle, character and class of sureties were fulfilled the order u/s 107 could not be impugned as wrong or illegal. In that case there was no order in writing by the Magistrate setting forth the substance of the information received. In was held that since the learned Magistrate maintained a copy of the show cause notice signed by him and the said show cause notice drawn up and signed by the Magistrate fulfilled all the requirements of Section 111 no separate order in writing was required The said decision disposed of a number of cases and in one of the cases the learned Magistrate was held not to have applied his mind in drawing up of the proceedings and the entire proceeding was held liable to be quashed. Mr. Barman also relied on the decision of Madhu Limaya Vs. State of Maharastra reported in AIR 1973 S.C. 47. But in that case it was held, inter alia, that the inherent power of the High Court was not to be resorted to if there was a specific provision in the Code for redress of the grievance of the party and it should be exercised very sparingly. The bar provided in subsection (2) of Section 397 operated only for exercise of the revisional powers of the High Court. If the order was purely interlocutory in character which could be corrected in exercise of the revisional power of the High Court under 1898 Code the High Court will refuse to exercise its inherent power, but in case the impugned order was an abuse of the process of the court then nothing contained in section 397(2) could limit or affect the exercise of the inherent power of the High Court. "But such cases would be few and far between." The bar u/s 397(2) will not operate to prevent the abuse of the process of the court and/or to secure the ends of justice. Following Amar Nath and Others Vs. State of Haryana and Another, and Mohan Lal Magan Lal Thacker Vs. State of Gujarat, it was held that "an order rejecting the plea of the accused on a point which, when accepted will conclude the particular

proceedings, will surely not be an interlocutory order within the meaning of section 397(2)".

5. It is indeed a difficult task at times to find out what is an interlocutory order in a given context. In spite of the elaboration of the principles in some of the recent decisions of the Supreme court the point is not as crystal clear as one would like it to be. In this regard attention should first be drawn to the judgment of Bhattacharyya, J. already referred to earlier. On the facts of the case His Lordship was clearly of the view that there was non application of the mind of the Magistrate and therefore the initiation or the proceedings was bad and the learned Magistrate lacked jurisdiction. On that ground the matter was quashed. It may be made clear that decisions of this court have held from time to time that if the issue of notice is without jurisdiction, this court will quash the proceeding. The decisions of Banerjee, J., my earlier decision, the case reported in 1977 C.H.N. 78 and Bhattacharyya, J."s decision in Amalendu Ghosh and Others Vs. Prem Pathak, are all in accord in this regard. But in the light of what the Supreme Court has said whether the simple formula to determine the nature of an interlocutory order following from the dictionary meaning as enunciated by Bhattacharyya, J. in Amalendu Ghosh and Others Vs. Prem Pathak, will still hold good, seems to be an open question. Particular reference may be made to the observation of the Supreme Court in the case of Madhu Limaya at page 53 where it was held "it appears to us that the real intention of the legislature was not to equate the expression ''interlocutory order'' as invariably being the converse of the words "final order". There may be an order passed during the course of proceeding which may not be final in the sense noticed in AIR 1949 1 (Federal Court) . 1 but, yet it may be an interlocutory order--purely or simple--some kinds of order may fall in between the two. By a rule of harmonious construction we think that the bar in sub-section (2) of section 397 is not meant to be attracted to such kinds of intermediate orders. They may not be final orders for the purpose of article 134 of the Constitution; yet it would not be correct to read them as merely interlocutory orders within the meaning of section 397(2)".

6. In my mind the aforesaid passage from the judgment of Untwallia J. is enough to indicate that uniform grouping of certain orders on the basis of the dictionary meaning alone may not meet the requirements of the section or be in consonance with the meaning attributed to the words "interlocutory" by the Supreme Court. The enunciation of the principle by Bhattacharyya J. is based upon the two concepts of ''final'' and ''initial''. The Supreme Court''s judgment in this regard is again relevant. "We may, however, indicate that the type of order with which we are concerned in this case, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of sub-section (2) of section 397". In the present case as I am unable to hold that there is discrepancy between the order and the notice or that the issuance of the notice is without jurisdiction the same is distinguishable from the case decided by Bhattacharyya, J. Nonetheless the main question whether the impugned order is an interlocutory one would still remain. As Mr. Moitra pointed

out the Supreme Court in the case of Amar Nath and Others Vs. State of Haryana and Another, held that orders summoning witnesses, adjoining cases, passing orders for bails, calling for reports and such other steps in aid of the pending proceedings may no doubt amount to interlocutory orders against which no revision would lie u/s 397(2). It, however, said that orders which are "matters of moment" and "which affect or adjudicate the rights of the accused or a particular aspect of the trial" cannot be paid to be an interlocutory order so to be outside the purview of the revisional jurisdiction of the High Court. The issuance of notice may as well be held to be a step "in aid of pending proceedings". It is not an order which can be described "as a matter of moment" or which "affects or adjudicates" the right of the accused. This is merely a notice to which a person concerned is asked to show cause. Nor can it be regarded as an "adjudication of the right of a particular aspect of the trial". Except in a very extended sense the notice at this stage cannot be said to affect the right of the party at all. Again, the Supreme court, as has been noted earlier, specifically held "order summoning witnesses" as interlocutory. If that is so, it is not clear how issue of a notice u/s 107 should not be one. It may be noted that the purpose of the proceedings u/s 107 is preventive in nature. It is not punitive. In that respect the issuance of a notice is unlike the issue of a process, the result of which is to make the accused stay in custody unless he is enlarged on bail. The issuance of process in that sense make a qualitative change in the situation. But in the case of a notice issued u/s 107 all that the person concerned is asked to put his version of the case before the learned Magistrate who may very well stop the proceedings after hearing him. As already stated the facts of this case are distinguishable from the facts of the case decided by Bhattacharyya, J. who quashed the order for lack of jurisdiction. After a decision on that ground was made and jurisdiction was found wanting, the order for quashing was an exercise of the inherent power of the court. The observation on the interlocutory nature of the issue of notice may, in that context, be regarded as an obiter. With great respect to my learned brother I am constrained to take a different view in the light of the Supreme Court decisions as to the nature of the order in issuing notice u/s 107 of Code of Criminal Procedure. In view of the Supreme Court decision and in as much the decision of Bhattacharyya, J. rested on the ground of lack of actual jurisdiction, I do not propose to send the question to a larger Bench. In my view the impugned order is of an interlocutory nature. As in my view this is not a case where the learned Magistrate lacked jurisdiction the exercise of inherent power is not called for. The bar u/s 397 (2) applied.

In the circumstances the petition fails and the Rule is discharged.