

**(1994) 07 OHC CK 0025**

**In the Orissa High Court**

**Case No :** Criminal Miscellaneous Case No. 2488 of 1993

Bhagaban Pradhan and Others

APPELLANT

Vs

Jayaram Mohanty and Others

RESPONDENT

**Date of Decision :** 15-07-1994

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 107, 116(6)

**Citation :** (1994) 2 OLR 405

**Hon'ble Judges :** A. Pasayat, J

**Bench :** Single Bench

**Advocate :** P.K. Mishra, B.K. Nayak, A.K. Sahoo, A.K. Mishra and S. Ratho, for the Appellant; R. Ch. Mohanty, R.K. Mohanty, D.K. Mohanty, N. Behuria and P. Rana (for opp. party No 1), for the Respondent

## Judgement

A. Pasayat, J.—The only question that falls for determination in the case at hand is whether the Executive Magistrate, Bhubaneswar had jurisdiction to continue the proceeding initiated in terms of Section 107 of the Code of Criminal Procedure, 1973 (in short "Cr PC") after a period of six months from the date of commencement of inquiry u/s 116, Cr PC ?

2. Background facts necessary for adjudication of this question are as follows :

On the basis of an application filed by Jayaram Mohanty (opp party No. 1 herein) before Executive Magistrate. Bhubaneswar, on 28-4-1992, present petitioners and opp. party Has. 2 to 5 were directed by the said Magistrate by order dated 28-4-1992 to appear personally to show cause why they shall not be asked to execute interim bond under Sec 116(3), Cr PC and bond u/s 116 Cr PC, as he was satisfied that it was necessary to proceed against them. It is to be indicated here that two other persons (not parties in this present proceeding) were deleted from the proceeding before the Executive Magistrate. They were second party members in the said proceeding. On 7-5-1992 most of the second party members personally appeared and moved for time. The matter was adjourned from time to time. On 25-5-1993 opp. party No. 1 Jayaram submitted that there

was still apprehension of breach of peace and prayed for continuance of the proceeding. The said prayer was accepted by the Executive Magistrate on the ground that in view of continuance of breach of peace, life of the proceeding was to be extended u/s 116(6), Cr PC. The said order is subject-matter of challenge in the present proceeding on the ground that the same has no legal sanction having been passed within six months from the date of commencement of the inquiry.

3. The learned counsel for opp. party No. 1, however, submitted that even if six months' period had elapsed, the Executive Magistrate was justified in extending the period when there was continuance of apprehension of breach of peace. Reference is made to Section 116(6), Cr PC.

4. Section 116 so far as relevant reads as follows :

"116. Inquiry as to truth of information.-

(1) When an order under Sec 111 has been heard or explained u/s 112 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 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) XXX XXX XXX (3) XXX XXX XXX (4) XXX XXX xxx (5) XXX XXX XXX

(6) The inquiry under this section shall be completed within a period of six months from the date of its commencement and if such inquiry is not so completed, the proceedings under this Chapter shall, on the expiry of the said period, stand terminated unless, for special reasons to be recorded in writing the Magistrate otherwise directs ; Provided that where any person has been kept in detention pending such inquiry, the proceeding against that person, unless terminated earlier, shall stand terminated on the expiry of the period of six months of such detention.

(7) xxx xxx xxx,"

A question arises when inquiry commences. An order u/s 116(3) can be passed only on the commencement of the inquiry. It would be deemed to commence as soon as the person concerned appears in the Court personally or through his counsel and a stage is set for the Magistrate to inquire into the truth of the information upon which action has been taken. It has to be noticed that inquiry is for ascertainment of truth of information upon which action has been taken u/s 111. Truth of information cannot be inquired into unless something is also heard from the opposite party. Therefore, the stage of commencement of inquiry is set when either the opposite party appears and shows cause or his plea is taken because without that and before doing so, the stage is one sided and it is not possible to inquire into its truth. Power is not given to Magistrate to postpone the case, hear nobody and yet ask a person to furnish a bond for good conduct.

Decision of the apex Court in *Madhu Limaye and Anr. v. Ved Murti and Ors.* AIR 1971 SC 2481, though rendered in relation to Section 117(3) of the Code of Criminal Procedure, 1898 (in short, the "old CrPC") is equally applicable to a case u/s 116(3), Cr PC. In that case it was held that inquiry cannot be said to have commenced until some action has been started. Section 117 (3) of old Cr PC used the expression "pending" whereas in Section 116(3), Cr PC, the expression used is "after the commencement, and before". An (sic) in a proceeding u/s 107, Cr PC does not commence with mere appearance of the opposite Party in answer to the notice to show cause. It depends upon the nature of the cause shown, it commences as soon as the opposite party challenges the allegations made against him or refuses to admit the same or submits a petition showing cause against the allegations for the Magistrate otherwise has reason to proceed or proceeds or decides to ascertain the truth of the allegations made against the opposite party by taking evidence or otherwise, inquiry commence when the Magistrate attempts in a legal way to put thie allegations to test for finding out whether these are the facts See *Sona Khan and Others Vs. State of Orissa*, . The bare allegations cannot form the foundation of the order for a bend and failing furnishing of it detention of the delinquent. The allegations have got to be tested. The mandate of law is that inquiry must commence and the Magistrate trust proceed to ascertain the truth of allegations by application of his judicial mind and look for materials which would substitute allegations into facts. The requirement of Sub-sec (1) of Section 116 is that the Magistrate must "proceed to enquire into the truth of the information" this clearly shows that after exercise of questioning the person is over; some further step must be taken before enquiry can be said to have commenced. The time granted to show cause on denial of the allegation is a step in the direction of enquiring into the truth of the information, but real enquiry cannot commence before show cause is filed, as only then the full mind of the person proceeded against would become known. The provision in Sub-section (1) of Section 116 that the Magistrate must take such further evidence as may appear necessary" would indicate that further evidence may not be necessary in all cases which would be the position where the person concerned admits the allegation. Thus, the real stage for commencement of the enquiry comes alter the show cause has been filed and thereafter the Magistrate decides to proceed to enquire into the truth of the information. The enquiry u/s 116(1) is to be held in the presence of the party unless his Presence is otherwise dispensed with u/s 115.

5. A perusal of the records of the case shows that on 31-7-1992 the second party members filed show-cause reply, and the Executive Magistrate passed order to the effect that the case was posted to 17-S-1992 inter alia, for evidence of first party and hearing on the question of execution of interim bond u/s 116(3), Cr PC. That date, if not earlier is to be held to be the date of commencement of inquiry because the Executive Magistrate decided to test correctness of the aIllegation by fixing the date for evidence. The order of extension was passed on 25-5-1993, much after six months from the date of

commencement of enquiry.

6. Sub sec. (6) of Section 116 contains two-fold legislative mandate, i. e. (i) it determines the span of life of the proceedings u/s 116 to be six months; and (ii) it lays down the consequence of non-compliance with its provisions. The use of expression "shall on the expiry of the said period, stand terminated" leaves no room for doubt that in the event of the enquiry not being completed within the prescribed period, the proceedings come to an end automatically and no order of the Magistrate is, at all, called for. Indeed, the Magistrate becomes function official and he is divested of the session of the case. He cannot revive the same unless, of course, he exercises the power vesting in him to continue the proceedings by recording special reasons therefor. On automatic termination of the enquiry by operation of law, the proceeding becomes non est for all intents and purposes and life cannot be instilled into it by the Magistrate. Sub- sec (6) of Section 116 is a new provision as it has no corresponding provision in the old Cr PC. It is aimed at safeguarding the interests of a person proceeded against under any one of the Sections 107 to 110. However, the Magistrate may, for special reasons to be recorded in writing, direct that the proceedings shall not so terminate. If no special reasons for the continuance of the proceedings are recorded in writing by the Magistrate, the proceedings shall stand terminated on the expiry of the period of six months. The reasons must be special. The order extending the enquiry should , state why the enquiry could not be completed within the normal period of six months. Apprehension of continuance of breach of .piece during enquiry cannot be the sole ground for extension. Any order passed after the expiry of six months during which the enquiry had not been extended according to law, is illegal and without jurisdiction. After the expiry of six months from the commencement of enquiry, it comes to an end automatically. No formal order of termination is contemplated. Special reasons as contemplated u/s 116(6) are something distinguishable from the normal or usual reasons which generally exist in such proceeding. Special reasons can be equated with something of extraordinary circumstance, quite distinguishable from the fact that there has been no co-operation by the parties or there has been lack of Promptness on the part of the Magistrate in disposal of the case. The order of extension has to be passed before expiry of the period of six months. The Magistrate is empowered to extend the period of enquiry beyond a period of six months only prior to the termination of a period of six months and not subsequently. In other words, direction for continuance of proceedings must be issued before the expiry of the period of six months.

7. In the case at hand it is crystal clear that the order of extension was not passed prior to the expiry of six months" period. The impugned order dated 25-5-1993 is illicit and is set aside.

The application is accordingly disposed of.