

(1969) 10 KL CK 0019
In the High Court Of Kerala
Case No : C.R.L. R.P. No. 177 of 1969

Chirukandath Chandrasekharan and others

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 24-10-1969

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107, 112, 117(3)
Criminal Procedure Code, 1898 (CrPC) — Section 107, 110(a), 110(a)(b), 112, 112
Penal Code, 1860 (IPC) — Section 147, 148, 149, 323, 324

Citation : (1970) KLJ 61

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Advocate : T. Karunakaran Nambiar, for the Appellant;

Final Decision : Allowed

Judgement

K. Sadasivan, J.—The counter-petitioners in M.C. 13/69 on the file of the Executive First Class Magistrate, Tellicherry are the revision petitioners. Proceedings under S. 107 of the Code of Criminal Procedure were taken against them by the learned Magistrate on the report of the Circle Inspector of Police, Tellicherry that they are likely to create a breach of peace and disturb public tranquility within the jurisdiction of the Tellicherry police. The learned Magistrate acting u/s 107 has passed a composite order purporting to be falling both under sections 112 and 117 (3) of the Code. Two points were raised before me against the validity of the order and they are:- (i) The grounds stated for the initiation of the proceedings are irrelevant and in any event insufficient for passing an order either under S. 112 or 117(3) of the Code; and

(ii) The order is illegal, in that it is in violation of the mandatory provisions of the Code. I think there is considerable force in the contention of the learned counsel.

Point No. 1: The "sine qua non" for the institution of a proceeding under S. 107 is that the Magistrate shall be of opinion that there is sufficient ground for proceeding. It must appear to the Magistrate that a likelihood of a breach of the

peace is imminent. Security in anticipation of a breach of peace cannot be justified. So also mere enmity between two factions is insufficient to sustain an order under S. 112. It is not sufficient that bad feelings exist between two sets of people, for starting proceedings under S. 107. In the present case grounds are stated in support of the order and they are: (i) On 1-4-69 at about 23-30 hrs, counter petitioners 1 to 6 along with other persons numbering about 25, formed themselves into an unlawful assembly carrying deadly weapons near the Jaganath Temple gate at Tellicherry, beat with sticks and stabbed with knife etc.;

(ii) On 24-4-69 at about 17-00 hrs, at Mallor road, near Mukunda Talkies in Tellicherry amsom counter petitioners 1 to 3 along with others formed themselves into an unlawful assembly armed with deadly weapons and assaulted Kottammal Balakrishnan, Kannachankandy Kadur Jaya Rajan and other Marxist group of the Communist Party and caused injuries; and

(iii) Counter-petitioners 7 and 8 who are active members of R.S.S. have been organising training for volunteers with long sticks in the premises of Daivatharamadom, Tiruvangad. There is also information that the counter petitioners and others are likely to indulge in acts of violence with a view to retaliate against the Marxists for the offences committed by them on

2. In respect of the first two instances, cases under the Indian Penal Code have been registered; incident under the first head is covered by crime No. 60/69 and that under the second head by crime No. 75/69, both under sections 147, 148, 149, 323, 324 and 341 I.P.C. It has clearly been laid down in decisions of the various High Courts that allegations of offences under the Indian Penal Code in respect of which cases have already been registered cannot be made the subject matter of security proceedings under S. 107, since such grounds are irrelevant. In a recent case in *Sushanta Goswami v. State of West Bengal* (1969 M.L.J. Crl 665) The Supreme Court has observed that:-

Where grounds of detention are mere allegations of offences under the Indian Penal Code and where the grounds of detention relate to matters for which penal or other action could be taken under the relevant statutes, detention for the maintenance of public order is not justified. Grounds which are so irrelevant that it is incomprehensible cannot be justified.

3. That was a case under the Preventive Detention Act; but the position is analogous.

There also the detention was resorted to for maintenance of public peace and order.

The learned Judge further observed in that case:-

if some of the grounds which are given are irrelevant, the order of detention under S. 3 (2) of the Preventive Detention Act, 1950 cannot be upheld because the court cannot predicate what the subjective satisfaction of the authority would have been on the exclusion of those reasons.

4. In the present case as already pointed out, two out of the three accusations have already been made the subject matter of cases under the Indian Penal Code and they are pending in the respective courts. They cannot, therefore, furnish grounds for initiation of proceedings under S. 107. The third ground, viz., that two of the counter-petitioners are active members of the R.S.S. and they are organising training for volunteers with sticks, is flimsy and cannot be made the basis for security proceedings under S. 107. So long as the R.S.S. is not banned by an order of the government they are entitled to carry on their legitimate activities. The physical training in which they are stated to be indulging is carried on not in any thoroughfare or public place; but within their own premises. The apprehension that they are likely to indulge in acts of violence against the Marxist party is equally frivolous. The police officer has been careful enough to point out that these R.S.S. people are likely to let loose violence only against those Marxists who have committed offences against them. The report would show that on 24-4-69 certain offences were committed by the Marxists and by way of retaliation the R.S.S. are likely to hit back; but it is interesting to note that no action has been taken against the Marxists for the offences alleged to have been committed by them. In the circumstances it must be said that ground No. 3 is lacking in good faith. The report of the police continues to state that in view of the gravity of the situation the police have taken all possible precautions to avert clashes between the parties and the situation is now well under control. Still the police anticipate a possible breach of the peace if the notification issued u/s 21(1) and (11) of Kerala Police Act prohibiting carrying swords, spears etc., is withdrawn. The report runs:-

It is feared that the counter petitioners are likely to indulge in unlawful activities as soon as the notifications are withdrawn and the police patrolling reduced.

5. In other words, the police wants security proceedings to be taken against the counter-petitioners in anticipation of a possible breach of the peace when the notification is withdrawn. Such an apprehension is not what is contemplated in S. 107. S. 107, on the other hand, contemplates imminent breach of the peace.

It must appear to the Magistrate that a likelihood of a breach of the peace is imminent, the object of the bond being to prevent an imminent breach of the peace between parties who have quarrelled and to secure peace until the lapse of a reasonable time, allowing them to cool down, and not to protect a town from any possible misconduct at some future time on the part of notoriously turbulent and dangerous bad characters, who may have kept the town in ferment in past years. There must be something more than a bare possibility, there must be a reasonable likelihood of a breach of the peace. (Queen v. Kidar Nath--7 N.W.P.H.C.R. 233 and Queen v. Abdool Haq--20 W.R. 57.)

6. In another case a person applied to the police for assistance to protect him whilst distraining the crops of certain ryots for arrears of rent. On this fact being reported to the Magistrate, he required the applicant to furnish security to keep the peace as he thought that any riot which may result from the resistance of the

cultivators would be attributable to the applicant; it was, held that the order was illegal, and as the Magistrate had not found that the applicant himself was likely to commit a breach of the peace, he ought not to have held the applicant responsible in anticipation. (vide Sheo Sarn Lal-3 C.L.R. 280)

7. Similar is the position in the present case. Here, the police are anticipating a breach of the peace when the notification under the Kerala Police Act is withdrawn. What would happen when such a contingency, viz., the withdrawal of the notification arises, cannot now be predicted. The breach of peace that is sought to be prevented by the proceedings under S. 107 must be an imminent breach of the peace and not something which may or may not happen on the happening of a certain event. A Division Bench of this court in *B. Moosa Mohammad and Others Vs. Amin*, observed in a similar situation arising under the Laccadive Islands and Minicoy Regulation (1 of 1912):-

S. 10--C of the Laccadive Islands and Minicoy Regulation like S. 107 Cr. P.C. are provisions which may easily be made an engine of injustice and oppression and the High Court has to exercise the closest scrutiny to prevent the same. The section is not intended to afford the authorities a means of getting hold of a person who is not in the good books of the authorities and against whom they cannot prove any specific offence.

8. I think the above observation is on all-fours with the instant case. Mere party bickering or enmity between factions cannot be made the basis for security proceedings under S. 107.

9. Point No. 2: On this point also the position is clear. An order under S. 117(3) cannot be passed before an order under S. 112 has been made and read over or explained to the counter petitioner, under S. 113. An order under S. 117(3) passed before such reading, is one passed prematurely and as such illegal. The position has been well brought out by the Allahabad High Court in *Kumar Gupta v. Superintendent, District Jail, Mathura* (A.I.R. 1957, All. 189). The learned Judge observed:-

Where there are proceedings under S. 107 or when proceedings under that provision are contemplated, the procedure to be adopted is laid down in Ss. 112 to 118. Whenever proceedings under S. 107 are contemplated against any person the proceedings are to be initiated by preparing a notice under S. 112 of the Code and serving it on that person under S. 113 or 114. When the detenues were produced before the sub-Divisional Magistrate and the report of the police indicated that they had been taken into custody for the purpose of taking proceedings under S. 107, the Magistrate should have then and there prepared a written order under S. 112 and should have read over that order to these detenues and, if they so desired, should have explained the contents of that order to them. Until he had done so, his powers of remanding these detenues to custody under sub-s. (3) of S. 117 did not vest in him and could not be exercised by him. Even thereafter it was incumbent on the Magistrate under sub-s. (3) of

S. 117 to come to a finding that immediate measures were necessary for prevention of the breach of the peace or disturbance of the public tranquility and thereupon to direct these detenues to execute bonds with or without sureties for keeping the peace until the conclusion of the enquiry. After the Magistrate had taken all these steps, he could then direct detention of these persons in custody until such bonds were executed or until the conclusion of the enquiry in case no such bonds were executed. Thus though the detention of these detenues may have been valid until the time when they were produced before sub divisional Magistrate, the subsequent detention of these persons under the orders of the Sub Divisional Magistrate was not in accordance with law and was without any power vested in the Magistrate to direct their detention in jail.

10. The same view was taken by the Delhi High Court in *Balaraj Madhok v. The Union of India* (A.I.R. 1967 Del 31), where Hegde, C.J., observed:-

I am in entire agreement with Shri C.B. Aggarwala in his contention that without an order under S. 112 of the Code, the Magistrate is not competent to deal with the petitioners. From a reading of these provisions it is clear that when a person is proceeded against under S. 107 of the Code, and he appears or is produced before a Magistrate the first thing that a Magistrate has to do is, when he deems it necessary to require the person to show cause under that section, to make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force and the number, character and class of sureties (if any) required. This is a condition precedent for taking further steps under chapter VIII of the Code. An order under S. 112 is the very basis of a proceeding under that chapter. Without such an order the Magistrate is incompetent to take further action.

11. An order under S. 117(3) is contemplated when in the course of an enquiry under sub-s. (1) if the Magistrate considers that immediate measures are necessary for the prevention of the breach of peace or disturbance of public tranquility or for public safety and it is mandatory that reasons are stated in writing by the learned Magistrate justifying his action. The court is bound to issue summons to the counter-petitioners when an order is made under S. 112 together with the copy of the order passed thereunder. The enquiry as to the truth of the information will start when an order under S. 112 has been read or explained to the concerned person and before completion of the enquiry if the Magistrate considers that immediate measures are necessary to meet the situation he can pass an order under S.117 (3) of the Code stating in writing the reasons therefor. The learned Magistrate has acted in flagrant-violation of the above provisions. He has passed a preliminary order purporting to be under S. 112 and towards the close, the order takes a sudden turn so as to make it appear that it is one passed under S. 117(3) of the Code as well; but no reasons have been given by the learned Magistrate. All that he states is:

It is therefore found that immediate measures are necessary for the prevention of breach of public tranquility and commission of Offences by the counter

petitioners.

12. As to what the reasons are we are left in the lurch. It is clear from the section itself that the reasons should be recorded by the Magistrate in writing. This question has come up for judicial consideration many a time and the consensus of judicial opinion is that the Magistrate must give reasons for taking such an emergent measure. In *Bachal Samaho v. Emperor* (A.I.R. 1942 Sind 77) the learned Judges observed:-

Before a Magistrate passes an order under S.117 (3) he must direct his consideration particularly to the question of emergency and the necessity of immediate measures. Charges falling under S. 110 (a), (b) and (c) do not with one exception being the case under S. 117 (3). The words "commission of any offence" in S. 117(3) cover case falling under S. 110 (a) (b) and (c), only when the Magistrate considers that emergency orders involving immediate measures are necessary to prevent the commission of any offence. The Magistrate must give a careful consideration to the separate case of an emergency under S. 117(3) and the necessary immediate measures. The Magistrate cannot be said to have done this when merely on a police report, without even calling the police officer in the witness box, without making any further inquiry in the general and vague allegations such as that the person; complained against were "dangerous badmasters" and the public was in fear of them, he passes an order under S. 117 (3). The mere report by a police officer that the persons complained against were desperate and dangerous character is not sufficient for action under S. 117 (3). The Magistrate should make some further inquiry either from the police officer himself or from some other source before he is satisfied that an emergency justifying immediate measures under S. 117(3) exists.

13. The Patna High Court in *Hurmat Vs. The State*, under similar circumstances held as follows :-

Magistrate has to consider the prayer for demanding the bond with care and circumspection, give careful consideration to the separate case of emergency as contemplated by S. 117 (3) and must be satisfied that immediate measures are necessary.

Suspicion of the police alone was not a good reason for demanding an interim bond.

14. The same view has been expressed by the Travancore-Cochin High Court in *Jallaludin Kunju v. State* (A.I.R. 1952 T.C. 262). The learned Judge held:-

An order for interim security under S. 117 (3), Cr. P.C. merely stating that "for reasons stated in the police report the counter petitioners shall execute bonds etc" is unsatisfactory and is hardly likely to inspire confidence in the parties or the public. The order must clearly show that the emergent action under S. 117(3) was called for and that the requirements of the section are fulfilled.

15. In the light of the above pronouncements I should hold that the order is

unsustainable, firstly for the reason that it is in violation of the mandatory provision of the Code; and, secondly that no reasons have been stated by the learned Magistrate for the issuance of such an order which is intended to meet an existing emergency. It (sic) from the order that no emergency as such was in existence at the time; a situation was only expected on the happening of a contingency in an uncertain future. The result is that the order is unsustainable and has to be set aside. It is accordingly set aside and this revision petition is allowed.