
(2005) 08 SHI CK 0040
In the High Court Of Himachal Pradesh
Case No : Civil Writ Petition No. 496 of 2005

Citizen Rights Protection Forum

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 09-08-2005

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 107, 108, 109, 110, 111

Citation : (2005) 2 ShimLC 505

Hon'ble Judges : V.K. Gupta, C.J.; K.C. Sood, J

Bench : Division Bench

Advocate : Sandeep Kaushik, for the Appellant; M.S. Chandel, General and J.K. Verma, Dy. A.G. for Respondent Nos. 1, 3 and 4 and Rajiv Sharma and Surinder Sharma, for the Respondent

Final Decision : Allowed

Judgement

V.K. Gupta, C.J.—Order passed on 13th May, 2005 by Respondent No. 2, Sub-Divisional Magistrate (Urban), Shimla is the subject-matter of this petition for habeas corpus filed by the Citizen Rights Protection Forum. This order is under challenge in this case on the ground of it being violative of the fundamental rights of six persons for whose benefit this petition was filed and who were detained in custody by the force of this order. These six persons are as under:

1. Mr. Vikas Kashyap son of Shri Brahm Dass Kashyap.
2. Mr. Manu Sharma son of Shri Rajender Sharma.
3. Mr. Sushil Sharma son of Shri Baldev Sharma.
4. Mr. Vivek Thakur son of Shri Joginder Singh.
5. Mr. Pradeep Chandel son of Shri Balwant Singh.
6. Mr. Suman Kumar son of Shri Surjit Singh.

2. Since the order prima-facie appeared to be unconstitutional and illegal, on 17th May, 2005 when this case came up before the Court for the first time, the Court making pertinent observations about the prima facie nature of this order's illegality and unconstitutionality, that very day directed the release of the six persons detained in custody vide the aforesaid order. In compliance with the aforesaid direction the six persons, of course, were released by the Respondents and in that view of the matter, in normal course the petition could have been considered as having become infructuous but the issues involved in the case were of such vital Constitutional and statutory importance, touching upon and adversely affecting the fundamental right of liberty, that we decided to proceed further in the matter since we were convinced that an appropriate judgment in this case would be of far reaching importance as well as a guiding factor for everyone. This was especially so, and more importantly, because in the recent past this Court came across a few other instances where the Executive Magistrates purportedly exercising their jurisdiction under Chapter VIII of the Code of Criminal Procedure (Cr.P.C., for short) exceeded their jurisdiction and in utter disregard to the statutory provisions as well as the constitutional mandate dealt a severe blow to the fundamental rights of freedom as well as liberty, thus jeopardizing the very Constitutional scheme forming the basis of our Constitutional edifice.

3. It is in this backdrop that we decided to hear this case on merits and pronounce on the validity, correctness, legality and Constitutionality of the impugned order.

4. To appreciate all the contours of the case, in their correct perspective, let us first and foremost have a look at the impugned order. The text of the impugned order shall highlight the informative nature of the illegalities having been committed in its passing. The impugned order reads thus:

13.5.2005 Today one Kalendra u/s 107/151 Code of Criminal Procedure have been put in the Court by Sub-Inspector Pyare Mohan who along with head constable Sahib Singh No. 178, constable Rakesh Kumar No. 527, constable Nikhil Kumar No. 800, constable Tikkam Dass No. 1540, constable Pappu Mehta No. 442, constable Parbeen Dutt No. 753 and constable Mohinder Singh No. 681 of the Police Station Boileauganj. The Respondent Nos. 1 to 6 were produced in police custody.

The police case is that on 12/5/2k5 that the police authorities were on law and order duty in Himachal Pradesh University Campus, because on 10.5.2005 there was a fight amongst the students and there is every likelihood of quarrel between students belonging to ABVP and SFI. The police came to know that 10 to 15 students assembled near Raj Guest House at Sangti and they are having iron rods and sticks with them, and they are coming to commit some heinous crime, the police went to the spot and found that 25 to 30 students were standing on the road who were having iron rods and sticks in their hands and they were shouting slogans with the intention to commit some heinous crime.

When the police approached near them they started shouting slogans against the police and started running hither and thither. The police was able to apprehend the six Respondents and they were taken in custody, so that they may not indulge in any crime. The police authorities took them under custody to prevent the commission of any crime and kalendra u/s 107/151 Code of Criminal Procedure have been prepared. The police authorities further requested the Court that keeping in view the situation in the University, which is very sensitive and full of tension the aforesaid students may not be released on bail and be sent to judicial custody for 14 days and be bound down u/s 116 Code of Criminal Procedure.

The Respondents when they were produced before me learned Counsel for the Respondents appeared i.e. Sh. Vinod Thakur Advocate, V.B. Verma Advocate and Sh. Parveen Sharma Advocate. The learned Counsel for the Respondents argued that the Respondents are ready and willing to furnish the bail bond and surety in the case and on the bail of the respondents be released on bail. But ADA for the State stoutly refuted the contention and argued that the students are resorting to fighting amongst each other and there are various student factions in the University campus, who are indulging in show of strength on one pretext or the other and resort to violence amongst themselves. The students are not interested in their academics and the atmosphere in the University campus is so much changed that the Respondents are bent upon to commit breach of peace and disturb the public tranquility. ADA for the State pleaded that keeping in view the facts which are known to everyone as the situation have been reported daily in the newspapers also the Respondents may be sent to judicial remand for 15 days, so that the situation in the University may normalize.

I have gone through the Kalendra and I have heard contention of the learned ADA for the State and learned Counsel of the Respondents. The Respondents are ready and willing to furnish the bail bond and sureties in the case which were demanded and put on file, the surety is resident of Mandi District, there is no verification from the competent authorities about the financial status of the surety, hence the bail bond and surety are not accepted and are sent for verification to the revenue agencies of Mandi District. After going through the whole record in the case to my mind the contention of law enforcing agency is not devoid of any merit, the situation in the University is not congenial for studies. There is every likelihood of breach of peace in the campus and on the basis of all the facts mentioned supra I am of the opinion that there are reasonable grounds for temporary detention of the Respondents on the basis of facts on record and ground realities of the situation prevalent in the Himachal Pradesh University campus the Respondents are sent to judicial custody and the Respondents be produced before me on 19.05.2015 at 10 a.m.

5. The portions of the impugned order which have a direct bearing to the issues involved have been highlighted by us to provide necessary emphasis.

6. Article 21 of the Constitution of India stipulates that no person shall be

deprived of his life or personal liberty except according to procedure established by law. Keeping in mind that Article 21, is at the fountain head of all laws and procedures relating to the freedom and the right of personal liberty, let us have a look at the provisions contained in Chapter VIII of Code of Criminal Procedure with respect to the subject of "Security for keeping the peace and for good behaviour". Section 107 Code of Criminal Procedure relates to the subject of security for keeping the peace. It reads thus:

Security for keeping the peace in other cases.

(1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such 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.

(2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act as aforesaid beyond such jurisdiction.

7. Whereas Section 107 Code of Criminal Procedure relates to the aspect of requiring a person to show-cause why he should not be ordered to execute a bond for keeping peace when such a person is likely to commit a breach of peace or disturb public tranquility or to do any wrongful act that may probably occasion a breach of peace or disturb public tranquility, Sections 108, 109 and 110 Code of Criminal Procedure relate to the requirement of obtaining bond, from persons relatable to some other aspects touching upon law and order, such as good behaviour from persons disseminating seditious matters, good behaviour from persons suspected of concealing their presence, good behaviour from habitual offenders etc. etc. Then comes Section 111 Code of Criminal Procedure which provides that whenever a Magistrate acts u/s 107 or other Sections such as Sections 108, 109 or 110 and he deems it necessary to require any person to show-cause under any of the aforesaid Sections as to why he should execute a bond, such a Magistrate shall make an order in writing setting forth the substance of information received, the amount of the bond to be executed etc. etc. If such a person with respect to whom such an order is made is present in the Court, the order would be read over to him and if such a person is not present in the Court the Magistrate shall issue a summons requiring him to appear in the Court. u/s 116 Code of Criminal Procedure it is provided that as a follow up to the action initiated u/s 111 Code of Criminal Procedure the Magistrate shall proceed to inquire into the truth of information upon which action has been taken and to take evidence as may appear necessary. Section

117 Code of Criminal Procedure provides that upon culmination of the inquiry conducted u/s 116, if it is proved that it is necessary for keeping the peace etc. that the person against whom an inquiry is made should execute a bond, the Magistrate shall make an order accordingly. On the other hand, u/s 118 Code of Criminal Procedure if on completion of inquiry u/s 116 it is not proved that it is necessary for keeping the peace that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry in the record to that effect and discharge the person concerned.

8. Then comes the most important provision in Chapter VIII Code of Criminal Procedure which has a direct bearing to the issues involved in this case. This is Section 122 Code of Criminal Procedure It stipulates that whenever any person who has been ordered to give security u/s 117 Code of Criminal Procedure does not give such security on or before the date on which or the period for which the security is to be given commences, he shall be committed to prison until such period expires or until he gives the security in terms of the order passed u/s 117 Code of Criminal Procedure.

9. The sequence in which various Sections are placed in Chapter VIII Code of Criminal Procedure and the scheme of the Chapter clearly reveals that a Magistrate exercising jurisdiction u/s 107, read with Sections 111, 116 and 117 Code of Criminal Procedure has to follow, in letter and spirit the strict procedure prescribed in these Sections. Only upon a prima-facie process having started u/s 107, has the Magistrate jurisdiction to proceed further u/s 111 and under this Section he has to draw up a formal order in writing setting forth in this order the substance of information received, the amount of the bond to be executed, the term for which such a bond is to remain in force and the number, character and class of sureties if required. The drawing up of a formal order u/s 111 is a statutory sine qua non to the holding of an inquiry u/s 116 Code of Criminal Procedure with respect to the truth of the information upon which action has been initiated u/s 107 Code of Criminal Procedure What, therefore, follows is that first and foremost the Magistrate has to initiate action u/s 107, then to draw up a formal order in terms of Section 111 and only thereafter to proceed to hold the inquiry with respect to the truthfulness of the information upon which the action has been initiated u/s 107. On completion of such an inquiry if the Magistrate finds that the allegation against the person is proved and that it is necessary for keeping the peace that such a person has to execute a bond, he shall make an order accordingly. This is provided in Section 117. This is the last link in the entire chain of the process because once the order is passed directing such a person to execute the bond with or without surety, the process gets completed. Section 122 Code of Criminal Procedure comes into play only if the person concerned does not give or furnish the bond or the sureties despite the order passed by the Magistrate u/s 117.

10. The entire scheme of Chapter VIII Code of Criminal Procedure and the sequence of Sections in this Chapter, referred to hereinabove, therefore, clearly

reveals that a Magistrate acting u/s 107 Code of Criminal Procedure has no jurisdiction or power to order the detention, temporary detention or otherwise, of a person against whom he is proceeding u/s 107 unless such a person fails or refuses to execute the bond or to furnish sureties, if ordered to do so u/s 117. The power to commit such a person to prison or to detain such a person in prison is derived only from u/s 122 and that power is subject to the condition that after the completion of the proceedings under Chapter VIII, such a person neglects, fails or refuses to execute the bond or furnish sureties. What, therefore, emerges is that the Magistrate has no power or jurisdiction to order the detention of a person at any stage prior to the stage of Section 122 or for any reason other than the reason of the person failing or refusing to execute the bond or furnish the sureties. There is only one exception to this and that is contained in Sub-section (3) of Section 116 which provides that the Magistrate, after commencement and before the completion of the inquiry, if he considers that immediate measures are necessary for the prevention of a breach of peace or disturbance of public tranquility etc., he may for reasons to be recorded in writing direct the person concerned to execute a bond for keeping the peace until the conclusion of the inquiry and it is only if such a person despite such a direction fails to execute the bond, the Magistrate may order his detention in custody until the bond is executed by him. Except for Sub-section (3) of Section 116 Code of Criminal Procedure the Magistrate has no power to order the detention of a person concerned until and unless a situation as contemplated u/s 122 Code of Criminal Procedure arises.

11. Viewed in the aforesaid backdrop of legal provisions contained in Chapter VIII Code of Criminal Procedure, what we find in the present case is that without at all following any procedure and without at all proceeding u/s 111 or 116 or 117 Code of Criminal Procedure and without there being any situation contemplated u/s 122, Respondent No. 2 in this case ordered the temporary detention of six persons for as much as six days. This order passed by Respondent No. 2 was wholly unconstitutional and patently illegal. Whether it was passed in ignorance of above referred statutory provisions or in gross abuse of the power being exercised by Respondent No. 2, the result was that these six persons were detained in illegal custody, and they were deprived of their personal liberty without any procedure established by law. The impugned order directing temporary detention of these six persons was passed not only in gross violation of all the provisions of Chapter VIII Code of Criminal Procedure, it was passed in total derogation of Article 21 of the Constitution of India. As a result of the passing of the impugned order, six persons concerned actually remained in illegal custody upto 17th May, It was only on 17th May, 2005 that they were ordered to be released because of the intervention of this Court. They remained in illegal custody from 13th May, 2005 to 17th May, 2005 only because of a patently illegal and unconstitutional order passed by Respondent No. 2, he having no jurisdiction at all to pass such an order.

12. The impugned order is accordingly quashed and set aside.

13. Respondents No. 1 and 3 filed their replies originally on 25th June, 2005 and 31st May, 2005 respectively. In these replies these Respondents on most untenable grounds defended the action of Respondent No. 2 in passing the impugned order and equally on untenable grounds misinterpreted grossly the provisions contained in Chapter VIII Code of Criminal Procedure. However, Respondent No. 1 grew wiser as the case progressed and filed a supplementary reply through the affidavit of Secretary (Home), Government of Himachal Pradesh in which, very wisely and fairly Respondent No. 1 admitted that in passing the impugned order Respondent No. 2 did not follow/ observe the procedure prescribed under law for holding security proceedings nor did he observe the procedure to reject the surety as contemplated under law. Respondent No. 1 has regretted the non-observance of proper procedure by Respondent No. 2. In this affidavit Respondent No. 1 has assured this Court that it is going to take remedial measures to avoid re-occurrence of such instances in future. What remedial measures Respondent No. 1 would be taking have been spelt out in paras 4 to 7 of the aforesaid reply.

14. We appreciate the candour and the fairness which ultimately came to be adopted by Respondent No. 1 in this case. Since Respondent No. 1 has, through the aforesaid reply affidavit assured this Court of remedial measures being taken and completed, we wish to proceed no further in this case except to direct that all the remedial measures proposed shall be initiated and taken to their logical conclusion in the shortest possible time and in any event before 31st December, 2005.

15. As has become evidently clear, because six persons for whose benefit this petition has been filed were kept in illegal detention for five days between 13th May, 2005 to 17th May, 2005, a duty is cast upon this Court to award at least a token compensation in their favour. Actually in this case we should have awarded exemplary compensation in favour of these detained persons but because of change of attitude as far as Respondent No. 1 is concerned and because Respondent No. 1 has now assured this Court that it proposes to adopt remedial measures, we feel that awarding only token compensation would meet the ends of justice. We, therefore, direct that each of these six persons shall be paid an amount of Rs. 5,000/- by way of token compensation. This amount shall be paid by Respondent No. 1 to these persons within a period of six weeks from today. We leave it open to Respondent No. 1 to recover this amount from Respondent No. 2.

We direct the Chief Secretary, Government of Himachal Pradesh "to circulate a copy of this judgment to every Executive Magistrate in Himachal Pradesh for information, future guidance and absolute compliance.

The petition is allowed.