

(2013) 09 BOM CK 0013

In the Bombay High Court

Case No : Criminal Writ Petition No. 3052 of 2013 along with Criminal Writ Petition No. 3053 of 2013

Farhan Nasir Khan

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 03-09-2013

Acts Referred:

Citation : (2013) ALLMR(Cri) 3919 : (2014) CriLJ 1314 : (2014) 3 RCR(Criminal) 625

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Patel, J

Bench : Division Bench

Advocate : Priyanka Ghosh, instructed by Mr. Moin Khan, for the Appellant; K.V. Saste, APP, for the Respondent

Final Decision : Allowed

Judgement

G.S. Patel, J.—Rule, returnable forthwith. Respondents waive service. By consent, taken up for hearing and final disposal. These Writ Petitions invoke Article 226 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973 ("the Code") to assail show cause notices and summonses dated 20th July 2013 issued to the Petitioners by the 2nd Respondent u/s 111 of the Code.

2. The impugned show cause notices and summonses appear to be based on allegations made in FIR No. 42 of 2013 dated 22nd March 2013 for offences under Sections 324, 506(2) and 34 of the Indian Penal Code, 1860. The show cause notice and summons impugned in Writ Petition 3052 of 2013 also rely on the allegations made in FIR No. 111 of 2011 dated 4th August 2011 for offences alleged to have been committed under Sections 324, 504, 506, 392, 384 and 34 of the Indian Penal Code and under Sections 3 and 25 of the Arms Act, 1959.

3. FIR No. 42 of 2013 relates to an incident of 22nd March 2013. The Petitioners claim to have been returning home on foot after a religious function at a dargah

in Dongri. Construction was under way at a site along that road. Some stones and rubble are said to have fallen from the construction work on the higher floors. The original complainant--not a party to these Petitions--was hit on the head by some of this debris, as was a lady on a scooter. The Petitioners claim that their "associate", one Mohsin, was at the site, as were others. The complainant demanded that a safe space be created around the construction site. There followed an altercation between Mohsin and the complainant and this soon degenerated into a brawl, with the Petitioners being accused of assaulting the complainant, one of them using an iron rod. The complainant filed a First Information Report, Cr No. 42 of 2013 with the Dongri Police Station against the Petitioners under Sections 324, 506(2) and 34 of the Indian Penal Code, 1860. The Petitioners were arrested and later released on bail, the Petitioner in Writ Petition 3052 of 2013 on 31st May 2013 and the Petitioner in Writ Petition No. 3053 of 2013 on 9th June 2013.

4. On 20th July 2013, the impugned show cause notices and summonses were served on the Petitioners. They were asked to present themselves before the 2nd Respondent on 7th August 2013. They did so. Both filed applications for inspection and certified copies of the material on which the show cause notices and summons had been issued, in particular the order u/s 111 of the Code and the roznama. Copies were refused, but inspection was granted. This revealed that there seemed to be no order u/s 111, nor were there any statements or other evidentiary materials though both show cause notices seem to have referred to these.

5. The show cause notices and summons emanate from proceedings under Chapter VIII of the Code; specifically, under Sn. 110(a) and (c) of the Code. The Petitioners have been required to show cause why they should not be each required to furnish a bond in the sum of Rs. 10,000/- and a like solvent surety for good behaviour for a period of one year.

6. Ms. Ghosh, Learned Advocate for the Petitioners, formulates her submissions thus: (i) the Petitioners have not been supplied with the supporting material said in the show cause notices to have been relied on by the 2nd Respondent, thus violating fundamental principles of natural justice; (ii) there is no written order by the Special Executive Magistrate u/s 111 of the Code though this is the mandate of the Code; (iii) there is only one recent FIR common to both cases, and the Petitioners cannot therefore be said to be "habitual" offenders within the meaning of Sn. 110 of the Code; and (iv) the second FIR referred to in the show cause notice in Writ Petition 3052 of 2013 is of some vintage, being registered in 2011 and, in any case, is under the Arms Act, which is not one of the statutes that may be invoked u/s 110 of the Code.

7. These are proceedings under Chapter VIII of the Code. Section 110 of the Code is permissive and enabling. That section permits an Executive Magistrate of the first class to require a person against whom he receives information of the kinds covered in clauses (a) to (g) to show cause in the prescribed manner why

he should not be required to execute a bond with sureties for good behaviour for a period not exceeding three years. The section requires that the show cause is to be issued "in the manner hereinafter provided". This is a reference to the procedure delineated in the subsequent sections. The Magistrate enjoys no discretion at all in this regard; the procedure, must be followed. Section 111 says that when a Magistrate who acts under Sections 107 through 110 deems it necessary to require a person to show cause under any of those sections, he must make an order in writing. That order must contain the substance of the information received, the amount of the bond executed, the proposed term for which it is to be in effect, and the number, character and class of sureties, if any, required. That order is a condition precedent to the issuance of a show-cause notice. *Dattaram Krishna Pedamkar Vs. State of Maharashtra and Another* .

8. Further conditions must also be met. u/s 112, if the person is present in court, the order u/s 111 is to be read over to him, or its substance explained if the person so desires. If the person is not present, a summons or warrant may be issued u/s 113; and if a summons or warrant is in fact issued, a copy of the order u/s 111 must accompany that summons or warrant. The written order u/s 111 is, therefore, the foundation on which the entire edifice of Chapter VIII rests. *Dattaram Krishna Pedamkar Vs. State of Maharashtra and Another* ; *Vasantkumar Jivrambhai Majithia Vs. State of Maharashtra* (At the instance of Special Executive Magistrate, Mulund Division) and *Laxman Narsaiyya, Ravi Cable Network, .*

9. In the present cases, there is no evidence of orders u/s 111. There are only the show cause notices and the accompanying summonses. The Petitioners were not given copies of the material and witness statements on which the show cause notice is supposed to have been based. The proceedings seem also to have been based on the 2013 FIR and, in one case, the earlier FIR of 2011 under the Arms Act. The latter cannot be the basis of an order u/s 111 or a show cause notice u/s 110. The latter section enumerates various statutes, sections and situations under which a show cause notice may be issued. The Arms Act is not among these. It could never be the basis of proceedings u/s 110 of Chapter VIII of the Code. The second FIR of 2011 could, thus, never be the basis of the impugned show cause notices and summonses.

10. There is also the repeated use of the words "habit" and "habitually" with grammatical variations in Section 110. This eliminates the use of isolated, one-off incidents. These words imply repetition and persistence in committing offences. There must be some degree of continuity, repetition and persistence in the person's commission of offences. *Dinesh Vitthal Patil and Bharat Vitthal Patil Vs. State of Maharashtra, Special Executive Magistrate, Local Crime Branch and The Inspector, .* That is a necessary element that must be shown to exist. Absent such a finding, and absent material to support such a finding, a show cause notice u/s 110 cannot be sustained. The 2013 FIR seems to have been a solitary incident. Certainly there is nothing to show that either Petitioner is "habitually"

an offender within the meaning of Section 110(a) or (c). The 2011 FIR is far too remote in time to lend any support and apart from being an impermissible invocation u/s 110, is far too remote in time. In the result, the Petitions succeed. Rule is made absolute in terms of prayer clause (b) of each Petition. No order as to costs.