

(2015) 06 BOM CK 0093

In the Bombay High Court

Case No : Criminal Writ Petition No. 31 of 2014

Fayyaz

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 09-06-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1), 226

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

Penal Code, 1860 (IPC) — Section 307

Citation : (2015) ALLMR(Cri) 3998 : (2015) 3 BomCR(Cri) 455

Hon'ble Judges : T.V. Nalawade, J; I.K. Jain, J

Bench : Division Bench

Advocate : S.S. Kazi, for the Appellant; S.B. Pulkundwar, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

1. Rule. Rule made returnable forthwith. By consent, heard both the sides for final disposal.

2. The petition is filed for issuing directions to the District Superintendent of Police to take action against respondent No. 5 -Shri. D.S. Harne (Assistant Police Inspector of Shivaji Nagar Police Station, Beed) for illegal detention of the petitioner from morning of 23.7.2013 to the evening of 24.7.2013. The relief of compensation of Rs. ten lakh is claimed in respect of this so called illegal detention. Another relief for issuing directions to take action against respondent No. 2 for illegal detention of petitioner is also claimed. It is claimed that the District Superintendent of Police also did not comply the order made by this Court in Criminal Writ Petition No. 900/2012 and so action needs to be taken against him.

3. It is the case of petitioner that he had some dispute of matrimonial nature with his wife -Monika alias Muskan. After about 10 years of marriage, when two issues were born to her from the petitioner, she left the matrimonial house on

1.6.2012. It is the case of petitioner that the matrimonial house is situated within local jurisdiction of Juna Bazar, City Police Station, Beed and Shivaji Nagar Police Station, Beed has no jurisdiction over this place.

4. It is the case of petitioner that on 23.7.2012 respondent No. 5 sent a constable to the house of petitioner and asked the petitioner to come to Shivaji Nagar Police Station. It is the case of petitioner that on 23.7.2012 itself he went to Shivaji Nagar Police Station and as soon as he reached to police station, he was taken to lock up and he was kept there without giving any reason to him for the same. It is his case that from police station, he was taken to jail at about 6.00 p.m. and for that also, no reason was given to him.

5. It is the case of petitioner that when he questioned police from Shivaji Nagar Police Station for such action, he was told that he needs to forget his wife. It is the case of petitioner that on 24.7.2012 one local councillor stood surety for him and then he was released from jail and that was at about 6.00 p.m.

6. It is the case of petitioner that he had filed Criminal Writ Petition No. 900/2012 for habeas corpus as his two children were illegally detained by one Atul Kosankar, the manager of the concern, where Monika was working and there was a danger to their life. It is the case of petitioner that in the same petition, he had requested for taking action in respect of his aforesaid illegal detention. It is the case of petitioner that this Court had advised him to first approach District Superintendent of Police, Beed with the grievance and so, the matter was not considered by this Court. It is the case of petitioner that he made detail representation to District Superintendent of Police, Beed, but threats were given to him including by the Superintendent of Police and then he realized that the higher officers were protecting respondent No. 5. It is the case of petitioner that no action is likely to be taken against respondent No. 5 and so, he is constrained to file the present proceeding.

7. Superintendent of Police, Beed Shri. D.Y. Mandlik has filed reply affidavit. He has contended that after receiving the representation of petitioner, he directed one of his subordinates to make inquiry and accordingly, one Police Inspector of Local Crime Branch, Beed has made inquiry. In the affidavit, it is contended that the wife of petitioner had given complaint against the petitioner on 22.7.2012 and she has made allegations that the petitioner had tried to finish her by pressing her neck. It is contended in the reply affidavit that petitioner was called to Shivaji Nagar Police Station and he came to police station on 23.7.2012. It is contended that the police station then referred the petitioner to Executive Magistrate with a report to start chapter proceeding under section 107 of Criminal Procedure Code ("Cr.P.C." for short) against the petitioner. It is contended that the Executive Magistrate directed the petitioner to give interim bond with surety in the said proceeding and as the petitioner failed to give surety, he was remanded to magistrate's custody and he was kept in jail. It is contended that when the petitioner gave surety on 24.7.2014, he was released from jail and so, there was no illegal detention of petitioner at any time.

8. Shri. Reddy, another Superintendent of Police has filed reply affidavit. The contents of this affidavit are similar to the aforesaid affidavit of Shri. Mandlik. He has further contended that the petitioner and Monika belong to different religions like Muslim and Hindu and as there was possibility of communal disturbance, the Executive Magistrate directed the petitioner to give surety. It is contended that the petitioner was produced before the Executive Magistrate at 4.00 p.m. on 23.7.2012 and when he failed to give surety, he was sent to jail. This Superintendent of Police has contended that respondent No. 5 could have taken action like registering crime for offence punishable under section 307 of Indian Penal Code ("I.P.C." of short) against the petitioner in view of the nature of allegations made by Monika.

9. Respondent No. 5 has filed affidavit and his contentions are similar to the contentions made by Shri. Mandlik and Shri. Reddy.

10. The report of Superintendent of Police and the record of inquiry made by the police officer appointed by Superintendent of Police show that there was dispute of matrimonial nature. At the end of inquiry, the parties were directed to approach Civil Court. It is the defence of the respondents that due to application of the wife of petitioner dated 22.7.2012, the action was proposed of chapter proceeding under section 107 of Cr.P.C. The record produced by the respondents contains copy of application given by Monika to Shivaji Nagar Police Station. But, copy of her statement recorded during inquiry is not produced. In the copy of report, it is mentioned that during inquiry Monika had made similar contentions.

11. The petitioner is Muslim. Prior to marriage, Monika was Hindu. Their marriage had taken place about 10 years prior to starting of dispute. At the relevant time, they had two issues. Monika is working in Fino Foundation, a private concern. The petitioner has made allegations that he has suspicion about the relationship of Monika with the Manager of that concern. It is the case of Monika that she was not ready to leave the service as she was thinking that the income of the husband was not sufficient for livelihood of the family and further, the petitioner has bad habits like gambling and drinking liquor. It is her case that due to dispute, she had started living separate in rented room at Beed at different place. It is her case that even after starting of separate residence by her, the petitioner was giving threats and was picking up quarrels and so, she had given complaint to police on 22.7.2012. The record of inquiry shows that in September 2012 Monika returned to matrimonial house and cohabited with the petitioner for some time and she again left the matrimonial house.

12. In the application dated 22.7.2012 given by Monika, she had contended that till 20.7.2012 she was cohabiting with petitioner. She had contended that she had left the matrimonial house on 20.7.2012 as petitioner had tried to hang her and finish her. She contended that she then went to her father's house but the petitioner kept giving threats of life by visiting her residential place. In the application, she had given address as Shivaji Nagar, Beed when the address of matrimonial house is Juna Bazar, Beed. In the application dated 22.7.2012

Monika had requested to take action against the petitioner as she was feeling that there was threat to her life.

13. The statement of father of Monika dated 11.1.2015 shows that Monika had come to him first time after the marriage in September 2012. She was not in touch with him probably due to the reason that she had married with a person from other religion. In September 2012, she had made complaint to him against the petitioner of aforesaid nature.

14. The record like the complaint application of Monika, statement of her father, the other statements and the report of respondent No. 5 given to Executive Magistrate for starting chapter proceeding do not show that at any time, anybody had felt that there was possibility of creating communal tension. Thus, there was no communal colour to the dispute. In spite of these circumstances, the Superintendent of Police has filed affidavit to the effect that the Executive Magistrate felt that there was possibility of creation of communal tension. Executive Magistrate's order is not to that effect and there was such report given by respondent No. 5 against the petitioner. It is unfortunate that an attempt is made in the matter like present one by police to give different colour to the dispute. Police and other parts of the Government machinery are expected to act fairly and they are expected to see that, no dispute takes communal colour. The marriage was very old. Parties are very poor and there was no room for creating tension in two communities.

15. The report and the statements of concerned show that on 23.7.2012 the petitioner went to police station on his own as he was called to Shivaji Nagar Police Station by police. It is admitted and the record also shows that from the police station he was directly taken to the office of Executive Magistrate. The Executive Magistrate remanded the petitioner to M.C.R. as he could not give interim bond with surety as directed by Executive Magistrate. As per the record, the Executive Magistrate directed to give bonds of Rs. 15,000/-each of two sureties and one of the surety was to be councilor. The petitioner was remanded to M.C.R. up to 29.7.2012. As per the record and the submissions, one police officer of the rank of Police Inspector was given the power of Executive Magistrate by the State and he made such order.

16. The record produced does not show that there was any help or legal aid of any kind given to the petitioner when he was produced before the Executive Magistrate on 23.7.2012. As per the record, one order under section 111 of Cr.P.C. was made, but no record is produced to show that such order was separately made. One order made at 16.30 hours, zerox copy of which is available, shows that it was the first order in which M.C.R. was granted. There is the computer copy of notice which is titled as "Notice U/s. 111 of Cr.P.C." But, the contents of this document show that it is actually a direction to give interim bond under section 116(3) of Cr.P.C.

17. The respondents have not said anything about the arrest of petitioner. It is

admitted that the petitioner was called to police station and from police station, he was taken to the office of Executive Magistrate by police. It is not the case of respondents that petitioner was arrested by using provision of section 151 of Cr.P.C.

18. In view of the aforesaid record and circumstances, it needs to be seen as to whether the aforesaid actions were legal and there was detention of the petitioner and whether the detention was illegal.

19. The relevant provisions of Cr.P.C. in aforesaid regard are sections 107, 111, 112, 113, 114, 115 and 116(1)(2) and (3). These provisions runs as under :-

"107. 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 tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity 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 tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction.

111. Order to be made.-When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section, he shall 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.

112. Procedure in respect of person present in Court.-If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

113. Summons or warrant in case of person not so present.-If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is to bring him before the Court :

Provided that whenever it appears to such Magistrate, upon the report of a police officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

114. Copy of order to accompany summons or warrant.-Every summons or warrant issued under section 113 shall be accompanied by a copy of the order made under section 111, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under, the same.

115. Power to dispense with personal attendance.-The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace or for good behaviour and may permit him to appear by a pleader.

116. Inquiry as to truth of information.-(1) When an order under section 111 has been read or explained under section 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 under section 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) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons-cases.

(3) After the commencement, and before the completion, of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded:

Provided that-

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111. "

20. The record and circumstances already mentioned show that it was purely matrimonial dispute. From the wording of section 107 of Cr.P.C., this Court has no hesitation to observe that it was not possible to take the matter under section 107 of Cr.P.C. No crime was registered either of cognizable nature or non cognizable nature by police on the basis of application dated 22.7.2012. No crime was registered against the present petitioner in the past also. No attempt was

made to see that settlement can be arrived between the parties as it was dispute of matrimonial nature and wife had approached police for first time.

21. The petitioner was not arrested and in view of the aforesaid provisions of Cr.P.C., it was not only improper, but it was illegal for police to take the applicant in custody and then produce him before the Executive Magistrate with the report.

22. The aforesaid provisions show that in such a case firstly the Executive Magistrate is expected to apply mind and form opinion as to whether the proceeding under section 107 of Cr.P.C. needs to be started. The Executive Magistrate is expected to issue show cause notice under section 111 of Cr.P.C. The provisions of section 111 and 113 of Cr.P.C. show that ordinarily the Executive Magistrate is expected to issue summons when report is given by police for starting chapter proceeding. The provision of section 116(3) of Cr.P.C. shows that the opponent of chapter case cannot be asked to give interim bond if the chapter proceeding is started under section 107 of Cr.P.C. In spite of these circumstances, in the report submitted before the Executive Magistrate, request was made by police, to take interim bond of Rs. 30,000/- and the Executive Magistrate did exactly the same thing.

23. The provisions of sections 111 to 115 of Cr.P.C. if read together show that when a report of the present nature is received by the Executive Magistrate, for reaching the stage involved in this matter, the following procedure needs to be followed by the Executive Magistrate.

- (i) To form opinion that the chapter proceeding needs to be started.
- (ii) Make order of show cause mentioning the substance of information and also the amount and term of bond which needs to be taken from the opponent of the chapter proceeding.
- (iii) Serve show cause notice upon the opponent of chapter proceeding directly on the opponent if he is present before the Executive Magistrate. That is possible if police have arrested him already and he is produced before the Executive Magistrate by police.
- (iv) If opponent is not produced before Executive Magistrate along with the report, then to follow the procedure given in section 113 of Cr.P.C. i.e. to issue summons and ask the opponent to appear and show cause in respect of the allegations made against him.
- (v) Send a copy of order made by Executive Magistrate under section 111 of Cr.P.C. with the summons issued under section 113 of Cr.P.C. to the opponent.
- (vi) On the date given for appearance to show cause, may dispense with the personal attendance of the opponent and may allow the opponent to appear through pleader as provided under section 115 of Cr.P.C.
- (vii) Make inquiry under section 116 of Cr.P.C. to ascertain the truth. After starting of the inquiry, the Executive Magistrate can direct the opponent to give

interim bond. But, in view of the wording of section 116(3) of Cr.P.C. such interim bond is not to be taken in a chapter proceeding started under section 107 of Cr.P.C.

24. The facts of the present case show that before taking the necessary steps like giving of the report to Executive Magistrate and taking of cognizance of the matter by the Executive Magistrate and issuing summons or warrant by the Executive Magistrate, police virtually took the petitioner in custody. As the petitioner was produced before the Executive Magistrate and aforesaid procedure was not followed, it needs to be presumed that the petitioner was first detained in police station unlawfully and then he was taken to the office of Executive Magistrate where he was produced. The record is sufficient to infer that there was no help or assistance of legal practitioner, pleader given to the petitioner. It is already observed that asking the petitioner to execute the interim bond itself was illegal. In view of this position of law, the action of sending him to jail for not giving the interim bond was again illegal. Thus, the detention of petitioner from 23.7.2012 to 24.7.2014 was illegal. He was illegally detained first in the police station and then in the jail.

25. The learned counsel for petitioner placed reliance on some reported cases like 2014 (4) Bom.C.R. (Cri) 113 [Balasaheb Vs. The State of Maharashtra], The State of Maharashtra Vs. Shri. Sagar Balu Ubhe, (2014) ALLMR(Cri) 1010 : (2014) 1 BomCR(Cri) 299 and Yashomandir Sahakari Patpedhi Maryadit, Mumbai Vs. Ashok Raj Enterprises and Others, (2013) 3 MhLj 39 . In the first case, this Court held that there was no ground for invoking provision of section 110(e) and 110(g) of Cr.P.C. and on that ground, it was held that making of order of interim bond was unjustified. This Court further held that the petitioner of that case was entitled for compensation of Rs. one lakh. The facts of the second case were altogether different from the facts of the present case. In the third case, the compensation of Rs. 2.5 lakh was granted by holding that there was illegal detention.

26. For the respondents, the learned APP placed reliance on some reported cases like Rajender Singh Pathania and Others Vs. State of N.C.T. of Delhi and Others, (2012) CriLJ 609 : (2011) 10 JT 294 : (2011) 3 RCR(Criminal) 827 : (2011) 9 SCALE 124 : (2011) 13 SCC 329 : (2011) 10 SCR 260 and 2014 (2) Mh.L.J. (Cri.) 463 [Vijay Lahu Patil Vs. State of Maharashtra and Ors.]. In the first case, the Apex Court set aside the order of High Court, granting compensation, when Apex Court found that the necessary inquiry was not made to ascertain as to whether there was illegal detention. The facts of the case were totally different from the facts of the present case. In the second case, no compensation was granted though High Court came to the conclusion that the arrest was not proper. The facts of that reported case were also different.

27. Articles 21 and 22(1) of Constitution of India provide as under :-

"21. Protection of life and personal liberty.- No person shall be deprived of his life

or personal liberty except according to procedure established by law.

22. Protection against arrest and detention in certain cases.-(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice."

In the cases reported as Kartar Singh Vs. State of Punjab, (1994) 2 JT 423 : (1994) 3 SCC 569 : (1994) 2 SCR 375 and A.K. Gopalan Vs. The State of Madras, AIR 1950 SC 27 : (1950) CriLJ 1383 : (1950) 1 SCR 88 , the Apex Court has made following observations :-

"The term "personal liberty used in Article 21 means freedom from physical restraint of a person by incarceration or otherwise. The deprivation of personal liberty is prohibited except in accordance with the procedure established by law. It is to be construed strictly against the State and in favour of the person whose rights are affected".

28. The discussion of facts and circumstances of the present case which is already made shows that there was not only physical restrain against the petitioner on 23.7.2012, but there was incarceration. There was no reason for depriving of the personal liberty of the petitioner. No procedure was followed and no care was taken to see that petitioner gets legal aid of pleader or legal practitioner. Thus, there was violation of both the aforesaid provisions of Articles of Constitution of India. In the landmark case reported as D.K. Basu Vs. State of West Bengal, AIR 1997 SC 610 : (1997) CriLJ 743 : (1996) 4 Crimes 233 : (1997) 1 JT 1 : (1996) 9 SCALE 298 : (1997) 1 SCC 416 : (1996) 10 SCR 284 Supp : (1997) AIRSCW 233 : (1996) 8 Supreme 581 , the Apex Court has laid down that, "The award of compensation is remedy available in public law, when there is infringement of rights guaranteed under Article 21 and such infringement is established." In the case reported as Smt. Nilabati Behera alieas Lalita Behera Vs. State of Orissa and others, (1993) ACJ 787 : AIR 1993 SC 1960 : (1993) 76 CLT 98 : (1993) CriLJ 2899 : (1993) 2 JT 503 : (1993) 2 SCALE 309 : (1993) 2 SCC 746 : (1993) 2 SCR 581 , the Apex Court has laid down that when there is contravention of the present nature, there is strict liability to pay compensation. No statutory formula is available for fixing compensation and so, there cannot be any uniform criteria for the same. Further, it is well settled that the amount of compensation cannot be nominal and it has to be something more. The instances of misusing sections 107 to 110 of Cr.P.C. are increasing day by day. In view of the facts and circumstances of the present case, this Court holds that compensation needs to be awarded to the petitioner by using the power under Article 226 of Constitution of India and just compensation under this Article can be Rs. 50,000/-. It will be up to the State, the employer of respondent No. 5 to hold inquiry and decide as to whether the compensation which the State is required to pay in the present proceeding needs to be recovered from respondent No. 5.

29. In the result, the petition is allowed in following terms :-

(i) The petition is allowed with cost of Rs. 10,000/- (Rupees ten thousand). The respondent, State do pay the cost to the petitioner within eight weeks from today.

(ii) It is declared that the detention of the petitioner from 23.7.2012 to 24.7.2012, both in the custody of police and in jail, was illegal and it was in violation of Articles 21 and 22(1) of Constitution of India.

(iii) The respondent, State do pay compensation of Rs. 50,000/- (Rupees fifty thousand) to the petitioner within eight weeks from the date of this decision. If the amount is not deposited within time fixed by this Court, the amount shall carry interest at the rate of Rs. 12% p.a.

(iv) The State is to hold the inquiry against respondent No. 5 in respect of the present incident for taking disciplinary action and for taking decision as to whether the amount needs to be recovered from him. No action warranted against Superintendent of Police.

(v) This decision will not come in the way of petitioner to claim compensation in tort in Civil Court and also to claim compensation in criminal Court under section 357 of Cr.P.C.

Rule is made absolute in aforesaid terms.