
(1978) 03 OHC CK 0005
In the Orissa High Court

Hadu Palei and Others

APPELLANT

Vs

Chandramani Mantri and Others

RESPONDENT

Date of Decision : 16-03-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, 111, 112, 113, 114
Penal Code, 1860 (IPC) — Section 34, 380, 427, 454

Citation : (1978) 45 CLT 548 : (1978) CriLJ 1307

Hon'ble Judges : S. Acharya, J

Bench : Single Bench

Judgement

S. Acharya, J.—This revision is directed against an order passed by the Sub-divisional Magistrate, Banki directing each of the petitioners to execute interim bond of Rs. 500/- with one surety of the like amount to maintain peace during the pendency of the enquiry u/s 116(3). Cr. P.C. A proceeding u/s 107 Cr. P.C. (Cr. Misc. Case No. 84/76) was started on 13-8-76 on police report stating that there was party faction between two sections in the village and there was likelihood of serious breach of the peace as ill feeling between the parties was intensely hot. Again another report was submitted before the said Magistrate on 19-7-77 from which it appeared that the 2nd party members in Criminal Misc. Case No. 34/76, i. e. the petitioners in this revision, destroyed the dwelling house of one Kangali Mantri, one of the members of the first party, on 17-7-77 and threw away the house materials-The Officer-in-charge of the police station also stated in that report that on the latter-mentioned occurrence he had already registered a criminal case Under Sections 454, 427 and 380/34 I.P.C. and that he was apprehending further trouble of a serious nature in the village which would badly affect the law and order situation in the locality,

On the above-mentioned two reports the Magistrate, by his order dated 19-7-77, issued notice to both the parties in the proceeding to show cause by 22-7-77 why they should not be required to furnish interim bonds. On 22-7-77 the Advocate for both the parties appeared before the Magistrate and made their submissions in favour of their respective parties. The Magistrate, on hearing the

counsel for both the parties and on perusal of all the police reports before him, held that there were materials on record on which he was satisfied that the second party members in the proceeding were indulging in committing overt acts, and that there was distinct possibility of serious trouble brewing up in the locality in future. On that finding the Magistrate, by the impugned order dated 25-7-77, directed the second party members in the proceeding, i. e. the petitioners in this revision, to execute interim bonds as stated above and directed the police to keep watch over the locality to maintain peace. As per the said order, 37 out of 39 delinquents executed interim bonds u/s 116(3) Cr. P.C. on that date. This Court, however, while directing issuance of notice for admission and hearing of this re-Vision, has ordered interim stay of the operation of the said order.

2. Mr. Das, the learned Counsel appearing for the petitioners, contends that the impugned order directing the petitioners to execute interim bonds u/s 118(3) Cr. P.C. is illegal as that order was passed before the commencement of the enquiry in the proceeding. According to him, the enquiry commences only at the stage when some witnesses are examined in the proceeding and an order u/s 116(3) Cr. P.C. cannot be passed without the testimony of any witness to support the police report filed before the Magistrate. In support of his above contention he has cited the Division Bench decision reported in (1977) 44 C LT 381(sc) 1978 Cri LT 124 (On) (Uchhaba Jena v. Kunjabehari Rautray). That Bench, while deciding the question as to from which date the period of six months provided under Sub-section (6) of Section 116 Cr. P.C. is to be calculated, held that the inquiry referred to in Sub-sections (3) and (6) of that section is with reference to the stage when both the parties appear before the Magistrate and he proceeds to inquire, with reference to the evidence before him as to whether the delinquencies alleged are established or not.

3. In *Madhu Limaye and Another Vs. Ved Murti and Others*, , which has been referred to in *Uchhaba Jena and Others Vs. Kunjabehari Rautary and Another*, , it has been held : at p. 1719 of 1971 Cri LJ.

The Magistrate could only ask for an interim bond if he could not complete the enquiry and "during the completion of the enquiry" postulates a commencement of the enquiry, which means commencing of a trial according to the summons procedure.

The trial of a summons case starts from the stage of Section 251, Cr. P.C. This has also been so accepted in *Uchhaba Jena*'s case. Section 251 Cr. P.C. provides:

251. Substance of accusation to be stated:

When in a summons case the accused appears or is brought before the Magistrate the particulars of the offence of which he is accused shall be stated to him. and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.

4. Mr. Sahu, the learned Counsel for the opposite parties, contends that Sub-section (2) of Section 116 Cr. P.C. provides that the inquiry u/s 116 Cr. P.C. has to be made as nearly as may be practicable in the manner prescribed for conducting trial and recording evidence in summons cases. That being so, the inquiry u/s 116 Cr. P.C. would actually commence as soon as the delinquents appear before the Magistrate and the accusations or allegations against them are stated to them. If the delinquents appear before the Magistrate after receiving the summons u/s. 113 Cr. P.C. requiring them to show cause as provided u/s 111 Cr. P.C., then the Magistrate will not be required to state the allegations against them when they appear before him, as by then they knew those allegations from the notices served on them. But if the delinquents appear before the Magistrate before receiving such notices or if the Magistrate is possessed of any new allegations against the delinquents which could not be mentioned in the summons previously issued to them, then the magistrate has to state the particulars of all the allegations against the delinquents to them when they appear before him. So the inquiry commences from that stage, and therefore the Magistrate shall be competent to pass an order u/s 116(3) Cr. P.C. at that stage without waiting for witnesses to appear and testify before him, if of course he is satisfied on the materials already before him that such an action is necessary to prevent breach of the peace or the disturbance of public tranquillity in the locality in question. Mr. Sahu's above submission is supported by the Division Bench decision of the Bombay High Court reported in 1977 Cri LJ 120 (Dwarkanath v. State of Maharashtra) wherein in para 26 it is stated as follows:

26. Having regard to the provisions of Section 112 and Sub-section (1) of Section 116. and the fact that a summons procedure is prescribed for an enquiry by Sub-section (2) of Section 116 it would appear that in the case of a person who is present in Court when the order u/s 111 is passed, the said order must be read over to him and the substance thereof explained to him, if so desired by him, on that very day, and, therefore, the inquiry in his case shall be deemed to have commenced on that very day irrespective of the fact whether the Magistrate records his plea or not. In the case of an opponent who is not present in Court when the order made u/s 111 is passed, but whose presence is secured by a summons or a warrant, as provided u/s 113, it would appear that since there is nothing to prevent the Magistrate from reading the accusations to him and recording his plea on the very day when he so appears or is brought before the Magistrate and on the other hand there is a legislative mandate to proceed to inquire into the truth of the accusation on the happening of such an event it would appear that irrespective of the fact whether the Magistrate records the plea of the opponent or not, and irrespective of the fact whether the Magistrate proceeds with the inquiry or not, the inquiry in the proceedings must be deemed to have commenced against such a person on the very day when his presence is thus secured on the day fixed by the Court.

In AIR 1952 Trav Co 262 1952 Cri LJ 1111 (Jallaludin Kunju v. State) a Division Bench of the Travancore and Cochin High Court, following the decision of another

Division Bench of that Court, held that an enquiry u/s 117(1) Cr. P.C. (i. e. Section 116(1) of the new Code) can be said to commence when the persons sought to be proceeded against appear before the Court or are brought before it to answer the charge against them. Their Lordships have further held that an order for interim security cannot be said to be premature if it is passed after hearing the persons proceeded against who appear before the court in pursuance of a preliminary order and file documents in support of the objection against furnishing interim security.

In the single Bench decision of the Himachal Pradesh High Court reported in 1970 Cri LJ 568 (Paras Ram v. State) it has been held : at p. 569 of 1976 Cri LJ.

It is only after an order u/s 112 is either read over and explained to the accused, that the next step can be taken, demanding security from them.

In the decision reported in Amir Singh (2nd Party) Vs. The State, it is held : at p. 182 of 1962 Cri LJ.

In my judgment, therefore, there is absolutely no substance in the argument that an order under Sub-section (3) of Section 117 (Cr. P. C.) cannot be passed until the Magistrate has started recording evidence.

In another para it has been held:

Indeed, there is nothing in Section 117 to indicate that the Magistrate must take some preliminary evidence before taking action under Sub-section (3). A police report or any other material may be sufficient to satisfy the Magistrate that it is necessary for him to take action under that sub-section, and there will be absolutely no illegality if he takes action after being so satisfied on the material which is before him.

In the decision reported in Laxmilal and Others Vs. Bherulal, it has been held : (at p. 1548 of Cri LJ).

(4). The question which arises for determination is as to when an enquiry as contemplated by Section 117(3), Cr. P.C. should be deemed to commence. To my mind, the answer is provided in Sub-section (1) of Section 117 itself. It provides that if the person against whom an order is made u/s 112 is present in Court, it should be read over to him or explained to him as provided in Section 113. The enquiry in this case would be deemed to commence as soon as the Magistrate proceeds in the matter after reading or explaining the order to the person concerned.

In case such a person is not present in the Court at the time when the order u/s 112 is made, then the Magistrate should proceed under Sections 114 and 115 and a summons or warrant should be issued against him mod it should be accompanied with the order passed u/s 112. In this case, the enquiry will be deemed to commence when the person, against whom the order u/s 112 has been made, appears before the Magistrate in compliance with or in execution of

the summons or warrant issued against him u/s 114.

Ordinarily, when such person appears before the Magistrate he should at once show cause against the order passed u/s 112. There may be some rare cases in which such a person may request for an adjournment. But simply because the Court grants adjournment, at his request, it cannot be said that the enquiry has not commenced.

The enquiry would be deemed to commence as soon as the person (referred to above) appears in the Court personally or through his counsel and a stage is set for the Magistrate to enquire into the truth of the information upon which action has been taken. It is not contemplated by Section 117 that such a person should. On the one hand, go on asking for adjournments and contend, on the other hand, that the enquiry has not commenced and therefore the Magistrate is not authorised to pass an order against him for keeping peace or maintaining good behaviour until the conclusion of the enquiry.

The above view has been taken on agreement with the view expressed on the point in the decision reported in AIR 1952 Trav-Co 262 : 1952 Cri LJ 1111 (Supra).

In the decision reported in 1966 C LT 742 1966 Cri LJ 432 (Ori), Amir Singh (2nd Party) Vs. The State, was expressly approved and it was held as follows : (at p. 433 of 1966 Cri LJ).

The Magistrate is mainly responsible for prevention of breach of the peace. He is the sole Judge whether immediate measures are necessary for prevention of breach of the peace pending completion of the inquiry. The sub-section does not prescribe that the Magistrate would start a further enquiry and take evidence while asking for execution of interim bond merely on the basis of the police report, if, on application of his mind, he considers that immediate measures are necessary for prevention of breach of the peace. The only safeguard prescribed in the sub-section is that he must record his reasons in writing. This provision has been made to see that he does not mechanically follow the police report, but applies his mind to determine that an emergency exists calling for immediate measures during the pendency of the inquiry. This is the only restriction imposed on him. The learned Sessions Judge is not correct in his view that the Magistrate cannot sit upon the overt acts mentioned in the Station Diary entries unless those are corroborated by some affidavits filed either by the police or by the particular party in whose favour the police report stands.

Again in the decision reported in (1972) 38 C LT 1133 (Bhagabat Biswal v. State) it has been held:

There is nothing u/s 117(3) which states that the Court cannot pass an order u/s 117(3), Cr. P.C. so long it does not examine some witnesses summoned for the purpose of the enquiry u/s 117 Cr. P.C.

In arriving at the aforesaid conclusion, the salient observations made in Madhu

Limaye and Another Vs. Ved Murti and Others, were taken into consideration.

(The sections referred to in all the above decisions, except the decision reported in 1977 Cri. L. J. 120 (Bom), are of the old Code. Similar provisions appear in the new Code).

On citing the above decisions which all support the contention of Mr. Sauu, he submits that for the purpose of taking action u/s 116(3) it will not be correct to say that the Magistrate can do so only after the enquiry in the proceeding commences by the examination of witnesses in that proceeding. He submits that it the Magistrate has to wait till that stage, then in many urgent cases of impending danger to peace and tranquillity in the society, he, who has the responsibility of preventing the same, cannot take any effective step or action in that direction, and will thus be rendered powerless and ineffective in matters within his sole responsibility and jurisdiction.

There is enough weight and substance in the above contention and submission of Mr-Sahu. His contention gets ample support from the above and many other decisions on the field. In view of the Division Bench decision in Uchhaba Jena and Others Vs. Kunjabehari Rautary and Another, Mr. Sahu suggested that this case should be referred to a Pull Bench for the interpretation of the clause "commencement of the inquiry" in its application to Sub-section (3) of Section 116 of the Code, keeping in view the emergent situations in which immediate measures are required to be taken under this sub-section. Mr. Sahu's above suggestion is also reasonable. But in view of the facts that the apprehension of breach of the peace and disturbance of public tranquillity took place in this case as far back as August, 1978 and overt acts were committed in July, 1977, and the operation of the impugned order has been stayed since August, 1977 and nothing is known about the now existing situation in the locality. I do not deem it proper to refer this case to a bigger Bench at this stage.

5. In view of the decision in Uchhaba Jena and Others Vs. Kunjabehari Rautary and Another, the impugned order be not given effect to. If the Magistrate by now has examined any witness in this proceeding he may pass trash orders in accordance with law, if necessary If he has not examined any witness and he still apprehends breach of the peace or any other emergent situation or case as mentioned in Section 116(3) he may immediately proceed to examine any witness or witnesses in this proceeding and pass any lawful order as he deems fit. There is also no bar for the initiation of a new proceeding against any of the parties if considered necessary.

The revision is disposed of accordingly.