

(2017) 03 BOM CK 0017

In the Bombay High Court

Case No : Criminal Writ Petition No. 20 of 2017

Mr. Ruben Franco

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 31-03-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 107, Section 111, Section 116

Citation : (2017) 2 MhLJCrI 435

Hon'ble Judges : F.M. Reis and Nutan D. Sardesai, JJ.

Bench : Division Bench

Advocate : Shri Rohit Bras De Sa, Advocate, for the Petitioner; Shri P. Faldesai, Additional Public Prosecutor, for the Respondents

Final Decision : Dismissed

Judgement

Nutan D. Sardesai, J.— Heard Shri Rohit Bras De Sa, learned Advocate for the petitioner and Shri P. Faldesai, learned Additional Public Prosecutor for the Respondents.

2. Rule. Learned Additional Public Prosecutor appearing for the respondents waives service. Heard forthwith with the consent of the learned Counsel.

3. Briefly it was the case of the petitioner that the notice dated 6/01/2017 under Section 111 of the Code of Criminal Procedure, 1973 ("the Code" for short) was issued against him by the respondent no.3 which was politically motivated in order to lower his self esteem, respect and dignity in the society. He had been issued the said notice and as he had expressed his willingness to oppose the ruling MLA who was contesting the present Assembly Elections at one meeting called by him. The petitioner had also questioned the sincerity and honesty of the ruling MLA and the development done in the Constituency resulting in the notice under Section 111 of the Code issued to him at the behest of the ruling MLA which was malafide and politically motivated. The said notice had been printed on a proforma without recording the reasons, which clearly showed a non-

application of the judicial mind. The use of the printed/cyclostyled proforma with some insertions here and there rendered the impugned notice a clear farce. Besides, it contained vague apprehensions and allegations apart from preconceived notions. Moreover, he had been aggrieved by the non-service of the order and the impugned notice under Section 111 of the Code without following the mandate of law as contemplated therein rendering the notice under Section 111 of the Code vitiated provoking him to file the petition.

4. Shri Rohit Bras De Sa, learned Advocate for the petitioner contended at the outset that the impugned notice under Section 111 of the Code was in excess of jurisdiction, without jurisdiction and patently illegal and liable to be quashed and set aside. It nowhere indicated that the impugned notice had been issued under Section 111 of the Code on a definite information received by the respondent no.3 and therefore the said notice was an illegality. Such a notice had to be accompanied by a separate order made by the respondent no.3 under Section 111 of the Code and therefore in the absence of any such separate order, the notice was illegal. Moreover based on an FIR registered against the petitioner in 2014, a report was made by the respondent no.3 to the Deputy Collector and Sub-Divisional Magistrate and the impugned notice under Section 111 of the Code came to be issued to him. The impugned notice therefore stood vitiated and hence he was entitled to a writ in the nature of declaration or an appropriate writ, order or direction, directing the impugned notice as being violative of his fundamental rights and therefore ultra vires the Code. He placed reliance in the case of *Vasantkumar Jivrambhai Majithia v. State of Maharashtra & anr.* [2005 SCC Online Bom 1296] and in *Shilpa w/o Ashwin Aade & Ors. v. State of Maharashtra & Ors.* [2011 SCC Online Bom 1524] and submitted that a mere registration of an FIR was not a prerequisite to call for a bond and surety. On a parting note he relied in the case of *Rakesh Singh v. State of U.P.* [2010 SCC Online All 2491].

5. Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the respondents read the scheme of the provision namely Section 111 contained in Chapter VIII of the Code and submitted that the captioned notice which has been assailed in the present petition was a composite notice containing the order pursuant to which the petitioner was called upon to show cause why he should not be called upon to execute a bond and furnish surety. He adverted to the list of persons arrested since 2012 to 2016 by the Calangute Police Station to buttress his plea that the notices had been issued to several persons including the petitioner. The impugned notice duly satisfied the criteria of the requirement of Section 111 of the Code in which the learned Deputy Collector and the Sub-Divisional Magistrate had recorded his satisfaction before issuing the notice to the petitioner. The contention therefore on behalf of the petitioner that a separate order was required under Section 111 of the Code was misconceived to say the least. He also referred to the provision of Section 145 of the Code which was similar to that under Section 111 of the Code and relied in *Reggie Fernandes v. The Police Inspector & Ors.* [Criminal Writ Petition No.129 of 2016] to

substantiate his contention and besides adverted to the scheme of Section 107, 111, 112, 113, 114 and 116 of the Code to substantiate his contention that the Deputy Collector and the Sub-Divisional Magistrate had duly recorded his satisfaction and passed the order under Section 111 while issuing the notice to the petitioner which did not call for any interference.

6. In Vasant Kumar (supra), a learned Single Judge of this Court while dealing with a challenge to the show cause notice issued by the Special Executive Magistrate under Section 111 of the said Code under Article 227 of the constitution of India read with Section 482 of the Code held at para 9 as below:

"9. The power under Section 107 can be exercised when the Special Executive Magistrate receives an 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 peace or disturb the public tranquility. The said section further provides that if the Executive Magistrate is of the opinion that there is sufficient ground for proceeding, he may in the manner provided in the Code require such person to show cause why he should not be ordered to execute a bond (with or without sureties) for keeping peace for such period, not exceeding one year, as the Magistrate deems fit. Section 111 of the said Code mandates that when a Magistrate acting under Section 107 deems it necessary to require any person to show cause, 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. Section 113 provides that if such person to whom notice is intended to be issued is not present in Court, the Magistrate shall issue a summons requiring him to appear. In exceptional circumstances, the said section gives powers to the learned Magistrate to issue warrant of arrest. Section 114 mandates that every summons 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. Section 116 lays down the procedure for holding the inquiry. Under Section 116, the Executive Magistrate is under an obligation to make enquiry into the truth of the Page 1156 information upon which action has been taken and for that purpose he has to take such further evidence as may be necessary. Sub-section (2) of Section 116 mandates that such an enquiry shall be made as nearly as may be practicable in the manner prescribed for conducting the trial and recording evidence in summons cases. Subsection (3) provides that if the Magistrate considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, he may after commencement but before completion of the enquiry, 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 surety for keeping peace or maintaining good behaviour until 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."

It was further observed at para 10 that a perusal of the case file which was produced before the Court showed that a copy of the order passed under Section 111 was not forwarded with the summons issued to the petitioner under Section 113 of the Code. In fact the roznama of the proceedings did not record that a separate order as contemplated by Section 111 was passed setting forth the substance of the information received. The roznama of the proceedings showed that the petitioner had remained present and had submitted a reply to the show cause notice. A reference was also made to the observations of the learned Judge in the same order wherein he had found that the order passed on 14/06/2005 appeared to be in printed/cyclostyled form. The printed portion of the order further recorded that on the basis of the evidence of the Senior Inspector, the Special Executive Magistrate had come to the conclusion that the petitioner was having criminal tendencies and from the petitioner there was a likelihood of a breach of peace and tranquility and therefore the order was passed directing him to furnish the bond. These observations in Vasant Kumar (supra), were by a learned Single Judge of this Court and in any event clearly distinguishable inasmuch as the petitioner unlike the present case was forced to execute a bond and moreover the State Government had refused to abide by the directions given by this Court in the decision in the case of Surendra s/o. Ramchandra Taori v. State of Maharashtra 2001 All M.R. (Cr.) 2079.

7. In Shilpa Aade and Ors. (supra), another learned Single Judge of this Court considered the scope and ambit of Section 107 of the Code contained in chapter VIII of the Code and observed that these proceedings were preventive in nature and not punitive as they were intended to secure peace and tranquility in the society. The Executive Magistrate was under an obligation to conduct an inquiry in the matter to satisfy himself to justify the action and that he could not merely act on the basis of the police report or the private complaint while dealing with the petition praying for a quashing of the criminal proceedings initiated under Section 107, 116(3) and 151 of the Code. The Magistrate is required to hold an inquiry and examine witnesses before any person is required to execute a bond with or without sureties to ensure that there shall be no breach of peace or disturbance of public tranquility as the case may be. Even a preliminary order under Section 111 of the Code should be passed after the application of judicial mind as making a preliminary order under Section 111 of the Code would not be an empty formality but judicial mind must be applied to the substance of the information received from the police or other sources. Such an order passed under Section 111 of the Code is required to be read over and explained to the person to whom notice is issued to attend the Court and when such noticee appears or is brought by the Magistrate as the case may be, an inquiry is required to be held in the same manner, as may be practicable in accordance with the rules and the procedure prescribed regarding evidence in summons cases. It is open for the Magistrate under Section 116(3) of the Code, if immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence to pass

a reasoned order whereby the notice or person against whom a preliminary order is passed to execute bond with or without a surety to keep peace or maintain good behaviour until the conclusion of the inquiry with options to detain such person in custody till the bond is executed or in default of execution of the bond till the inquiry is concluded.

8. Rakesh Singh (*supra*), challenged in a petition under Section 482 of the Code the entire proceedings relating to the case under Section 110/111 of the Code including the notice dated 25/11/2009 issued to him under Section 111 of the Code pending in the Court of Pargana Magistrate, Kaisarganj, Bahraich. It was contended on his behalf that the Magistrate proceeded to issue the impugned notice under Section 111 of the Code on the basis of the police report without the application of judicial mind and besides the impugned notice had been issued on the typed format in a cyclostyled manner. In the typed format only the name, date and police station had been filled in the gaps. However, the Magistrate had not set forth the substance of the information received by him in the impugned notice in violation of Section 111 of the Code which was mandatory in nature and non-compliance thereof vitiated the entire proceedings. It was observed in the said case by the learned Single Judge that the impugned order on the printed proforma without recording reasons showed a non-application of the judicial mind. The use of printed/cyclostyled proforma with some insertions here and there in passing such order was not proper rather on the face of it, it was nothing short of a farce. The notice under Section 111 of the Code containing vague apprehensions and allegations on printed/cyclostyled proforma indicate preconceived notions.

Each of these judgments are in the given facts and are clearly distinguishable in the facts of the case at large.

9. Shri Rohit Bras De Sa, learned Advocate for the petitioner had submitted sample notices under Section 111 of the Code issued to different persons to substantiate his contention that they were stereotype and issued in the prescribed proforma once again to highlight his contention that such notices were issued without the application of judicial mind and without passing a separate order in terms thereof recording the satisfaction of the concerned Deputy Collector and Sub-Divisional Magistrate before issuing the notice under Section 111 of the Code. In any event, these were not cyclostyled notices as was his contention but notices issued in a particular manner emanating from the office of the Sub-Divisional Magistrate which made a reference to the credible information received by the concerned officer and based thereon and on recording his satisfaction, was a notice issued to the concerned parties under Section 111 of the Code and that too to show cause why the said person should not be required to enter into a bond and to give security to keep peace. Therefore it is not as if these were notices which were issued in cyclostyled form or wherein the details were filled in the blanks though it must be said that the notices in sum and substance were almost similar. Besides in Reggie Fernandes (*supra*), this Court

had held in a similar matter though in respect of proceedings under Section 145 of the Code at paragraphs 7 and 8 as follows:

"The satisfaction under sub-section (1) is of the Magistrate. The question whether on the material before him he should initiate the proceedings or not, is therefore in his discretion which, no doubt, has to be exercised in accordance with the well recognised rules of law. In that behalf, no hard and fast rules, therefore, can be laid down as to the sufficiency of the material for his satisfaction. Such satisfaction can be arrived at both, from the police report or from other information, which can even include an application by a party dispossessed. In the present case, the Magistrate respondent No.2 has noted that based on the police report, he has arrived at such satisfaction. The question remains is as to whether the preliminary order passed by the learned Magistrate was in breach of Section 145(1) Cr.P.C. i.e. in the absence of either of the two condition precedent. No doubt, the section requires him to record reasons. But, however, the learned Magistrate has expressed his satisfaction on the basis of the police report which he found to be credible. This mean that the learned Magistrate found that the facts stated in the police report, prima facie, was sufficient to lead to his satisfaction.

8. Once the preliminary order was passed based on the police report which the learned Magistrate found to be a credible information, the interference of this Court, in exercise of its extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India, in such orders, would not at all be justified."

10. Shri P. Faldessai, learned Additional Public Prosecutor had referred to a list of the persons arrested since 2012 to 2016 of the concerned police station to show that notices were issued not only to the applicant but also to the other similarly placed persons in connection with the apprehension expressed in the notice under consideration and that there was no basis in the contention of Shri Rohit Bras De Sa, learned Advocate for the applicant that he was singled out for political reasons. A cursory perusal of the list indicates the crime number, the offence under which the named persons had been placed under arrest and the name of the applicant/petitioner featuring in such list for the year 2014 amongst others. It is also borne out from the further records produced by Shri P. Faldessai, learned Additional Public Prosecutor on behalf of the State that a number of cases were received in so far as the offence under Section 107 of the Code was concerned all of which were processed and similarly in respect of the offence under Section 110 of the Code which were received and processed and interim report obtained thus far. This list was again to highlight that the applicant-petitioner was alone not singled out for the issuance of the notice but such notices were issued to innumerable persons in accordance with law who were found to be on the wrong side of the law and against whom offences were registered under the various provisions of the Indian Penal Code.

11. In the facts of this case, the learned Sub-Divisional Magistrate had issued the notice to the applicant under Section 111 of the Code upon recording his

satisfaction which was based on the credible information received from the PI Calangute Police Station under Section 107 of the Code and after recording his satisfaction that it was a fit case to proceed under Section 107 of the Code. The learned Sub-Divisional Magistrate had thereafter issued a show cause notice to the applicant requiring him to show cause why he should not enter into a bond and also to give security by the bond of one surety and to keep peace in the locality for the term defined therein. A bare reading of these provisions namely Section 107, 111, 112, 113, 114, 116 and 117 of the Code contained in Chapter VIII qua the security for keeping the security and for good behaviour have to be read and understood in the scheme of things and in a proper perspective. Section 107 of the Code at the cost of repetition required an Executive Magistrate receiving information that any person is likely to commit a breach of the peace or disturb the public tranquility or do any wrongful act and after formulating an opinion that there was sufficient ground for proceeding may require such person to show cause why he should not be ordered to execute a bond with or without surety for keeping the peace for such period not exceeding one year as the Magistrate thinks fit. Section 111 of the Code empowers the Magistrate while acting under Section 107 of the Code to require any person to show cause under such section to make an order in writing setting forth the substance of the information received and the amount of the bond to be executed as also the sureties and their number if so required.

12. Coming to the notice under question, it is apparent that the Deputy Collector and the Sub-Divisional Magistrate had based on the credible information received by him from the Calangute Police Station pursuant to the report under Section 107 of the Code that he is of a bad character and not ruling out the possibility of committing cognisable offence as to disturb the peace and public tranquility, recorded his satisfaction from that report that it was a fit case to proceed under Section 107 of the Code and called upon the applicant to show cause appropriately. Therefore it is apparent from the impugned order though not happily worded that it reflects compositely the order recording the satisfaction and the notice to the applicant to show cause appropriately. The question whether the copy of the order shall accompany such summons in terms of Section 114 of the Code therefore remains academic on a proper reading and construction of the scheme of these provisions. Besides in terms of Section 116 of the Code, an Executive Magistrate is duty bound to inquire into the truth of the information upon which an action is contemplated in terms of Section 111 of the Code and only then would the Sub-Divisional Magistrate on considering that immediate measures are necessary for the prevention of breach of the peace or disturbance of the public tranquility or commission of any offence or for the public safety direct such person in respect of whom an order is made under Section 111 of the Code and for reasons to be recorded in writing to execute bond with or without sureties for keeping the peace and maintaining good behaviour.

13. Therefore the contention of Shri Rohit Bras De Sa, learned Advocate for the

petitioner that the impugned order is vitiated as it does not contain an order indicating the application of judicial mind cannot stand the test of scrutiny. Having come to a finding that the learned Deputy Collector and the Sub-Divisional Magistrate had recorded his satisfaction on the basis of the material produced before him, we find that no case is made out for interference in the impugned order in the petition at this stage. The petitioner is at liberty to raise all the objections/defences available in law in the proceedings before the learned Sub-Divisional Magistrate.

14. The Writ Petition is accordingly dismissed. Rule stands discharged accordingly.