

(2009) 06 BOM CK 0066

In the Bombay High Court

Case No : Criminal Writ Petition No's. 2682 and 1301 of 2008

Pravin Vijaykumar Taware, Tejsingh Shrihari Taware and
Karan Tejsingh Taware

APPELLANT

Vs

The Special Executive Magistrate and The State Government
of Maharashtra
 Shri Sunil Ramchandra Chavan (At
present Lodged at Yerawada) Central Jail Vs Special
Executive Magistrate, Pune Rural Division, Senior Inspector of
Police and The State of Maharashtra

RESPONDENT

Date of Decision : 18-06-2009

Acts Referred:

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

Citation : (2009) 111 BOMLR 3166

Hon'ble Judges : F.M. Reis, J; Bilal Nazki, J

Bench : Division Bench

Advocate : Vishal Kanade, A.V. Borwankar, in W.P. No. 2682/2008 and Prashant Hagare in W.P. No. 1301/2008, for the Appellant; V.B. KondeDeshmukh, APP, for the Respondent

Judgement

Bilal Nazki, J.—Number of cases are coming before this Court complaining of an abuse of powers by the Executive Magistrate under Chapter VIII of the Criminal Procedure Code. These cases come from the cities or bigger towns. This Court has not seen a case coming from a remote village. Obviously, the people living in such areas do not find it possible to reach the High Court. Therefore, this Court presumes that these powers may be abused with impunity as the persons suffering under these areas may not be able to reach the High Court. The power of the Executive Magistrate are exercised in the State of Andhra Pradesh by the Assistant Commissioner of Police InCharge of the area. There is always a clash of interest between a Police Officer In Charge of an area and the Magistrate exercising the magisterial power within the same area. We had earlier also expressed a desire that the Government should consider delegating these powers either to Judicial Magistrates or at least to officials of the Revenue Department. The provisions of the Criminal Procedure Code are being misused and abused

sometimes purposely, but more often without note because of ignorance of law. We are taking this case as one of the sample cases for the purpose of demonstrating as to how the provisions of law are being abused.

2. Since the issues involved in both the above writ petitions are same, both the writ petitions are being decided by this common judgment. For the purpose of deciding the issue, the facts in Criminal Writ Petition No. 2682 of 2008 are taken note of.

3. The petitioners received a notice 24th March, 2008. The petitioners submit that they are law abiding citizens and have never been involved in commission of any offence. According to them, two false complaints were registered against the petitioners. In Sessions case No. 58 of 1996, one of petitioner was acquitted and another was discharged. In another case being C. R. No. 8 of 2008 the petitioner No. 1 had been admitted to bail in anticipation of his arrest. The respondent issued a notice u/s 111 of the Criminal Procedure Code on 24th march, 2008 and the proceedings were fixed for hearing 6th April, 2008. But the respondent passed orders on the same day i.e. 24th march, 2006 purportedly u/s 116(3) of the Code of Criminal Procedure without giving any opportunity of being heard, directing the petitioners to execute an interim bond for good behaviour on conditions. The petitioners contend that it was not possible for the petitioners to arrange for surety and the surety which the respondents had sought and, therefore, the petitioner No. 1 was arrested and sent to jail on the same day. The petitioner No. 1 filed a revision in the Court of Sessions Judge. The learned Sessions Judge allowed the revision partly.

4. Earlier also the proceedings were initiated against the petitioners which they had challenged by filing a Writ Petition and the writ petition was disposed of as a statement was made by the respondents that the Chapter proceedings against the petitioners were dropped. This order had been passed on 20th October, 2008.

5. Before going to the counter affidavit, it will be necessary to have a look on the orders passed by the Executive Magistrate on 24th March, 2008. He passed an order u/s 111 of the Criminal Procedure Code, referred to two cases and then said, "I have confirmed that there will not be any improvement in the behaviour of the respondents (petitioners herein) in future". Then says, "Therefore, it is proper to proceed against you as per Section 110(e)(g) of Criminal Procedure Code, hence why not be taken one surety with solvency certificate of Rs. 1,00,000/for 1 year for good behaviour from you and another chairman who is not involved in the dispute, as such two sureties from the area where the respondents are residing ? Its reasons be given orally or in writing. You have been given the date 6/4/2008 for the work." In fact this was not a show cause notice but was an order to furnish two sureties from the area where the petitioners were residing. It was also stated that one surety must be given by the Chairman. We do not know how can the respondents ask a surety of a particular person and if the particular person was not ready to give surety that would eventually mean that the man would have to go to Jail. This order was passed on

24th March, 2008, per se fixed on 6th April, 2008. But the petitioners were brought perhaps after arresting them before the Magistrate on the same day and on the same day he passed another order u/s 116(3) of the Code of Criminal Procedure in which he brazenly stated that for the interim period till the inquiry is completed the respondents (Petitioners in this writ petition) should give surety on following terms:

(1) One surety with Solvency Certificate in the area where the respondents are residing.

(2) One surety chairman who is not involved in the dispute in the area where the respondents are residing.

Then on same day he puts a question as to whether the Petitioners wanted to say anything about interim bond. Records answer as "No" and then passed an order, which reads thus:

Respondent :Pravin Vijaykumar Taware, R/o. Sanghvi, Tal. Baramati, Dist. Pune, this respondent was produce before me as per Section 110(e)(g) of Criminal Procedure Code and the enquiry of the respondent is adjourned upto date 7/4/2008, which is necessary.

Therefore, take the custody of the respondent and produce before me on the above day in the Court of Special Executive Magistrate, Pune Rural Chavan Nagar, Pune8, on 7/4/2008 in the morning 11.00 hours, as such informing you.

Issued on 24/3/2008 with my signature & seal of the Court.

The Respondent was arrested on 24/3/2008.

And sends the petitioner to jail.

6. At no point of time the petitioners were given a chance to show cause against the furnishing of bond and at no point of time they were also given a chance to arrange for the bond and the conditions imposed were such that it was impossible to get a bond from the Chairman with whom according to the petitioners, the petitioners had a dispute. This is absolutely defensible. The scheme of Chapter VIII of the Criminal Procedure Code is that when a Magistrate acting under Sections 107, 108, 109 or 110 of the Criminal Procedure Code deems it necessary to require any person to show cause under such sections, he shall make an order in writing. Therefore, when the Magistrate takes action u/s 111 of the Criminal Procedure Code, he has no power to arrest and detain a person. His power is to require to show cause and if necessary start an inquiry. Inquiry has to be done in terms of Section 116 of the Criminal Procedure Code and if at that stage the Magistrate is of the view that during the inquiry a person should be asked to give a bond and he refuses to give a bond then the person may be sent to custody till the inquiry is complete and final order can be passed u/s 17 of the Criminal Procedure Code. Now this section also has proviso. One of the proviso is, "No person against whom proceedings are not being taken u/s

108, section 109, or section 110 shall be directed to execute a bond for maintaining good behaviour". Then the second proviso is that, "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 u/s 111".

7. Even directing a person to give bond and on failure send him to jail cannot be done even at the interim stage unless some sort of inquiry is conducted with regard to truth of the information. This question came before the Supreme Court as early as in the year 1991 in the case of *Madhu Limaye Vs. Sub-Divisional Magistrate, Monghyr and Others*, and the Constitutional Bench laid down the parameters of Section 117 of the Criminal Procedure Code. Paragraph 43 of the judgment is reproduced here below:

43. In our opinion, the words of the section are quite clear. As said by Straight J. in *Empress v. Babua* ILR (1883) All 132, the order u/s 112 is on hearsay but the inquiry u/s 117 is to ascertain the truth of the necessary information. Sub-section (1) contemplates an immediate inquiry into the truth of the information. It is pending the completion of the inquiry that an interim bond can be asked for if immediate measures are necessary, and in default it is necessary to put the person in custody. Therefore, as the liberty of a person is involved, and that person is being proceeded against on information and suspicion, it is necessary to put a strict construction upon the powers of Magistrate. The facts must be of definite character. In *Nafar Chandra Pal Chowdhury Vs. Emperor*, there was only a petition and a report and these were not found sufficient material. In some of the cases before us no effort was made by the Magistrate to inquire into the truth of the allegation. The Magistrate adjourned the case from day to day and yet asked for an interim bond. This makes the proceedings entirely one sided. It cannot be described as an inquiry within an inquiry as has been said in some cases. Some inquiry has to be made before the bond can be ordered. We, therefore, approve of those cases in which it has been laid down that some inquiry should be made before action is taken to ask for interim bond on placing the person in custody in default. In an old case reported in *A.D. Dunne v. Hem Chunder* (1869) 12 SWC 60, a Full Bench of the Calcutta High Court went into the matter. The case arose before the present Code of Criminal Procedure and, therefore, there was no provision for an interim bond but what Sir Barns Peacock, C. J. said applies to the changed law also not only with regard to the ultimate order but also to the interim order for a bond. The section even as it is drafted today is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if the view were allowed to prevail that without any inquiry into the truth of the information sufficient to make out a *prima facie* case a person is to be put in jeopardy of detention. A definite finding is required that immediate steps are necessary. The order must be one which can be made into a final order unless something to the contrary is established. Therefore, it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond. If this were the law a bond

could always be insisted upon before even the inquiry began and that is neither the sense of the law nor the wording or arrangement of the sections already noticed.

8. Therefore, at every stage the law has been violated. Surprisingly, the order challenged before the Sessions Judge was more or less upheld and the learned Sessions Judge noted that the impugned orders were not illegal or without jurisdiction. Only the condition of furnishing surety of the Chairman was set aside. The petitioners remained in illegal custody and we have no doubt about that. The petitioner seeks compensation of Rs. 10,000/per day. He remained in custody for 4 days. Earlier also we have imposed costs. But in this case an additional affidavit was filed by the Executive Magistrate tendering an apology to the Court. He sought condonation of the error committed by him and stated on affidavit that he had not exercised the power with any malice.

9. After hearing the learned Public Prosecutor and also the Executive Magistrate, who was also present in the Court, we give benefit of doubt to the Magistrate on the ground that perhaps these Magistrates are not aware of the law. They are not trained to act as Magistrate. We understand they have not undergone any training before they were given the powers of a Magistrate. When a person is appointed or posted as an Assistant Commissioner of Police, he is almost mechanically appointed as an Executive Magistrate and is given authority to execute powers under Chapter VIII of the Criminal Procedure Code. Since the Government is not interested in taking away these powers from the Police Officers and handover the powers to judiciary or to revenue officials, we are inclined to give the following directions :

(1) That the State Government shall immediately take steps to train its all Executive Magistrates so that they understand as to how the provisions of Chapter VIII of the Criminal Procedure Code have to be applied.

(2) We understand that there is a police academy in the State. All the Executive Magistrate should undergo a crash course. Preferably the Sessions Judges should be invited to teach these Magistrate about the nuances of law, so that the powers are not abused or misused by the Executive Magistrate.

(3) Whenever, an order is passed by a Magistrate at interim stage or at final stage requiring a person to give a bond, he shall be given sufficient time to furnish the bond and the surety.

(4) At the stage of inquiry, the Magistrate shall not ask for an interim bond pending inquiry unless the Magistrate has satisfied himself about the truth of the information sufficient to make out a case for seeking a bond.

(5) Whenever, an Executive Magistrate passes an order under Sub-section (3) of Section 116 of Chapter VIII of the Criminal Procedure Code directing a person to be sent to jail, a copy of the order shall be sent to the learned Principal Sessions Judge immediately.

(6) On receiving copy of the order, the learned Principal Sessions Judge shall go through the order and if he finds a case of revision, he may intervene u/s 397 of the Criminal Procedure Code.

(7) A copy of the order directing a person to be sent to jail under Chapter VIII of the Criminal Procedure Code shall also be sent to the immediate superior of the Magistrate in his Department.

9. With the above observations and the guidelines, both the writ petitions are disposed of.

10. Copy of this order shall be sent to all the Principal Sessions Judges in the State of Maharashtra as also to the Principal Secretaries of the State, Law and Judiciary and Home Department.