
(2001) 07 BOM CK 0110

In the Bombay High Court

Case No : Criminal Writ Petition No. 312 of 1999

Surendra Ramchandra Taori

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 27-07-2001

Acts Referred:

Bombay Police Act, 1951 — Section 120, 56

Bombay Prohibition Act, 1949 — Section 85

Constitution of India, 1950 — Article 14, 142, 21, 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 106, 107, 108, 109, 110

Penal Code, 1860 (IPC) — Section 294, 323, 324, 337, 353

Citation : (2001) ALLMR(Cri) 2079 : (2002) BomCR(Cri) 128 : (2002) 104
BOMLR 34 : (2001) 4 MhLj 601

Hon'ble Judges : P.V. Hardas, J;J.N. Patel, J

Bench : Division Bench

Final Decision : Allowed

Judgement

J.N. Patel, J.—The petitioner who is a journalist and working as reporter of Daily Hindusthan published from Amravati, is a resident of Malkapur town in Buldhana District. The petitioner was required to invoke the extraordinary jurisdiction of this Court by filing the petition under Articles 226 and 227 of the Constitution of India as he came to be arrested and detained in custody under the impugned order passed by the respondent No. 2-Special Executive Magistrate and Police Inspector Local Crime Branch, Buldhana, District Buldhana on 23.10.1999 in a proceedings initiated under Chapter VIII of the Code of Criminal Procedure, 1973.

2. It is the case of the petitioner that, as a journalist, he exposed the police machinery of Malkapur Police Station on having taken up some matters criticising the mal practice and high handedness of the Police personnel. One of such matter was relating to sensational murder case in Malkapur town which occurred in the month of September 1999. It is the case of the petitioner that, annoyed by such publications, the respondent Nos. 3 to 6 started harassing the petitioner and also booked him in a false case. On 24.9.1999, the petitioner was

threatened by respondent No. 4 Shri S.M. Jagdale, Police Sub-Inspector and therefore the petitioner approached City Police Station, Malkapur for lodging a complaint, but his complaint was not accepted and therefore he forwarded the complaint to the S.D.P.O. Malkapur and forwarded copies of the same to the authorities. The petitioner expressed that there was eminent danger to his life and personal liberty as he has been threatened by respondent No. 4. Instead of taking cognizance of the complaint, the respondents Police Officials, out of vengeance, accosted the petitioner on 24.10.1999 at 10.30 p.m. when he was going to visit his relative, on his way. The respondent No. 6. Police Constable Baban Sangade, along with the Police Officers who are joined as respondent Nos. 3 to 5 mercilessly beaten the petitioner in Police Station, Rural, where respondent No. 6 Baban Sangade is attached and posted because of which the petitioner suffered injury to his right eye and other parts of the body. According to the petitioner, it is respondent No. 6 Baban Sangade who accosted the petitioner while he was going to visit his relative on his vehicle at Harikiran Society, Malkapur and brought the petitioner to Police Station, Rural Malkapur and informed respondent Nos. 3 to 5 on telephone and it is in the Police Station, Rural that all these persons mercilessly assaulted the petitioner. In support of his contention, the petitioner has placed on record photograph at Annexure "O" and "A-1". It is the case of the petitioner that while assaulting the petitioner, he was threatened by respondent Nos. 3 to 6 that if he does not stop giving news against them, they will not leave him alive. Thereafter the petitioner was taken to City Police Station and there again respondent Nos. 3 to 6 along with the other staff on duty assaulted the petitioner and he was detained in lock up. Thereafter the petitioner was taken for medical check up to Medical Officer of Cottage Hospital, Malkapur who advised to take the petitioner to Buldhana for immediate medical treatment. But, instead of doing so the petitioner was brought back to police station and by threat and under duress, obtained in writing that the petitioner wants to take medical treatment in private hospital and the petitioner was released.

3. It is submitted by the petitioner that a false complaint came to be registered against the petitioner for having committed an offence u/s 353 of the Indian Penal Code and so on and that the petitioner was illegally detained on summoning him to the police station on the pretext of taking him to Buldhana Hospital for further medical treatment (Annexure "D"). The petitioner came to be produced before the Special Executive Magistrate (Respondent No. 2) on 23.10.1999, who is a Police Inspector, by filing istegasha, showing his arrest on 23.10.1999 at 13.15 Hrs. u/s 41(2) of the Criminal Procedure Code vide istegasha No. 44/1999. On his production before the respondent No. 2 without even questioning the petitioner, the respondent No. 2 passed an order:

N.A. produced before me at 17.20 hrs. Brought by P.C. 1026 of Malkapur city. He has no complaint against Police. No surety. M.C.R. granted.

4.11.1999.

Reqd. one year Rs. 10,000/- one solvency. One surety. Simple Cross.

and was ordered to be sent to prison. On this, the petitioner informed the respondent No. 2 that he has been mercilessly beaten by the police and he is having various injuries and further requested to release him on personal bond and time to give the surety. But, neither his request was granted nor he was allowed to take legal aid, and, therefore, the respondent No. 2, without following the due process of law, straightway, passed the impugned order and sent the petitioner to M.C.R. fill 4.11.1999. It is contended on behalf of the petitioner that this was an illegal order because of which petitioner was in jail from 23.10.1999 to 30.10.1999 and it was only due to intervention of this Court that on 29.10.1999 an order was passed by this Court to release the petitioner. But the petitioner was released on 30.10.1999 though the orders passed by this Court were communicated to the authorities by wireless and telephone.

4. It is the contention of the petitioner that the proceedings initiated by respondent No. 2 u/s 110 of the Criminal Procedure Code are totally unwarranted, and without following the procedure of law he came to be detained during the period 23.10.1999 to 30.10.1999 unlawfully and illegally and, therefore, the petitioner seeks action against respondent Nos. 2, 2-A, 3 to 6 in accordance with law. The petitioner also claims compensation for his custodial torture and illegal detention.

5. It is the case of the petitioner that the powers vested with the Police Officers to initiate proceedings under Chapter VIII of the Code of Criminal Procedure and the abuse of these powers by the police in connivance with their senior officers who have been appointed as Special Executive Magistrates is violative of petitioner's right enshrined in Articles 14 and 21 of the Constitution of India and, therefore, the petitioner seeks appropriate writ order or direction against the respondent-State to regulate arbitrary exercise of such powers which affects the liberty of person "as in all such cases, without following the due process of law and the procedure provided under Chapter VIII, innocent persons are illegally detained in prison and, therefore, such powers of Executive Magistrate/Special Executive Magistrate vested in police officers should be directed to be withdrawn. The petitioner has also challenged the conferring of power of Executive Magistrate or Special Executive Magistrate in Police Officers below the rank of Commissioner of Police, as contemplated under Sub-section (5) of Section 20 of the Criminal Procedure Code. The petitioner has specifically sought a direction of withdrawal of powers conferred on respondent No. 2-A u/s 21 of the Criminal Procedure Code appointing him as Special Executive Magistrate for gross misuse of the powers by him and, therefore, declare the notification dated 10.2.1993 (Annexure F-1) which confers, power u/s 107 to 110 of the Criminal Procedure Code on the officers like respondent No. 2 (Police Officers), as bad in law and also a direction that the State shall not confer such powers on any other officer below the rank of Commissioner of Police. The petitioner has, in addition to his claim for compensation, also prayed for allowing the petition with costs.

6. In spite of service on all the respondents it is only respondent No. 2 who has chosen to file his submissions on affidavit. It is the case of respondent No. 2 that the petitioner, by taking advantage of his position as a journalist and reporter of one Daily Hindusthan at Malkapur, indulged in extortion of money from shopkeepers, businessmen and other Government Officers by publishing false and defamatory news items against them in newspapers and due to his nuisance value none of the affected persons dares to lodge any complaint against him. It is submitted that following cases are pending against the petitioner.

1. Crime No. 86/1997 u/s 406 of Indian Penal Code.
2. Crime No. 3020/98 under Sections 294, 504 and 506 of Indian Penal Code.
3. Crime No. 6049/1998 u/s 85(1) of Bombay Prohibition Act.
4. Crime No. 88/1998 under Sections 324, 504 and 337 of Indian Penal Code.
5. Crime No. 152/1998 under Sections 452 and 294 of Indian Penal Code.
6. Crime No. 149/1999 u/s 353 of Indian Penal Code read with Section 120 of Bombay Police Act.
7. N.C. No. 521/1998 u/s 504.
8. N.C. No. 28/1998 under Sections 323, 504 and 506 of Indian Penal Code.

It is further submitted that the enquiry before the S.D.P.O. Malkapur is pending for initiating externment proceedings against the petitioner as per Section 56 of the Bombay Police Act, 1951. Another allegation made against the petitioner is that he is in the habit of consuming liquor and committing breach of peace in the city by creating nuisance and therefore, in Ganpati festival, the petitioner was served with notice u/s 144 of the Criminal Procedure Code in September 1999 in order to maintain law and order and it is because of this notice that the petitioner was enraged and published a defamatory news item in Daily Hindustan dated 22.9.1999 against the Police of Police Station Malkapur City of which enquiry is pending.

7. According to respondent No. 2, on 21.10.1999 at 21 hours, the petitioner went to Police Station, Malkapur, Rural where Police Constable Baban Sangade was on duty. He enquired from him as to where is Gadari Saheb on which he was informed that he will come to know about it in the morning. At that time the petitioner was in drunken condition and his clothes were smeared with blood. Thereafter at 23.00 hrs. petitioner came to the Police Station. At that time, it was noticed that there was injury on his hand and blood was oozing out of it. At that time also the petitioner was in drunken condition. It is the case of respondent No. 2 that the petitioner told the Police Constable Baban Sangade that he is beaten by the people and therefore he should accompany him on which Police Constable Baban Sangade told the petitioner to report at Police Station, City. The petitioner again got enraged and started abusing Police Constable Baban Sangade in filthy language and further told him that "Police

Wale Majle, Maza Hafta Kothe Ahe, Tumhi Paise Khata." On this Police Constable Baban Sangade requested him to go from there. So, petitioner picked up a stone and threw it on Police Constable Baban Sangade and assaulted him. Other police personnel present there separated the petitioner from Police Constable Baban Sangade. It is out of this incident that an offence u/s 353 of the Indian Penal Code read with Section 120 of Bombay Police Act came to be registered on 22.10.1999 at 01.00 hrs. against the petitioner at Police Station, Malkapur City as the incident occurred in Police Station, Malkapur, Rural which is within the jurisdiction of Police Station, Malkapur City. In case of the complaint of the petitioner that he has been beaten by public, he was told that he should report the matter with that police station i.e. Police Station, Malkapur City. It is the contention of respondent No. 2 that after registering the said crime, the petitioner was arrested on 23.10.1999 and he was sent to Rural Hospital, Malkapur for medical examination. As per the Medical Officer at Rural Hospital, Malkapur, petitioner suffered minor injury and further he was referred to E.N.T. specialist at Buldhana for further treatment but the petitioner refused to go at Buldhana and informed in writing that he will get treated from private doctor. Thereafter, at about 12.30 hrs. he was released on bail.

8. The reason given for the arrest of the petitioner u/s 110 of the Criminal Procedure Code is that at the relevant time there were processions of immersion of Durga Idols and therefore the petitioner was arrested u/s 110 of the Criminal Procedure Code and was sent on 23.10.1999 at 17.20 hrs. to Special Executive Magistrate. Local Crime Branch and that it was necessary to take prohibitory action against the petitioner and therefore, under the istegasha No. 44/1999, u/s 110 of the Criminal Procedure Code, he was told to keep ready two sureties of Rs. 10,000/- each for his release. But, as the petitioner could not furnish sureties he was sent to magisterial custody till 1.11.1999. It is submitted that the petitioner was sent to magisterial custody as he could not produce the sureties and that the respondent No. 2 has not misused any powers or provision and the prohibitory action was taken against the petitioner as per law. It is also clarified that when he was produced before respondent No. 2, respondent No. 2 enquired with him as to whether there is any complaint against the police. But the petitioner informed that he has no complaint against the Police and it is only on 29.10.1999 when this Court passed an order, petitioner came to be immediately released on bail on 29.10.1999 and therefore there is no substance in the petition. The same deserves to be dismissed.

9. We have heard Mr. P.B. Patil, learned Counsel appearing for the petitioner and Mr. Bhushan Gavai, learned Government Pleader and Public Prosecutor along with Mr. K.S. Dhote, learned Additional Public Prosecutor for the respondents and have given anxious consideration to the facts and circumstances placed before us.

10. The facts relating to the arrest and detention of the petitioner by the impugned order passed in a proceeding initiated u/s 110 of the Criminal Procedure Code are not much disputed. It is also not disputed that the petitioner

had suffered injuries as claimed by him. The only point of disagreement is who is responsible for these injuries suffered by the petitioner on 22.10.1999. It is the case of the petitioner that he was accosted by Police Constable Baban Sangade and taken to Police Station, Rural Malkapur where he called respondent Nos. 3 to 6 and they all assaulted him in the police station, which resulted in injury. On the other hand, it is the case of the respondent No. 2 that the petitioner had come to Police Station, Rural, Malkapur with a complaint that he has been assaulted by the members of the public and was in drunken condition. If these allegations and counter allegations are taken into consideration in the background that the petitioner has lodged a complaint dated 24.9.1999, (Annexure A) to the S.D.P.O., Malkapur, followed by another complaint on 22.10.1999 which was sent through Post and Telegram Department, and a detailed complaint of the same was also lodged to the S.D.O. Malkapur before the petitioner came to be arrested by Police Station, Rural or City, Malkapur after he was summoned as per Annexure "O". We fail to understand as to why the Police did not take cognizance of the complaint made by the petitioner and there is no reply filed on affidavit before the Court by the State of Maharashtra to explain this. In the affidavit-in-reply filed by respondent No. 2, there is no whisper about this complaint lodged by the petitioner. Secondly, if the story given by respondent No. 2 in his affidavit-in-reply has to be accepted that the petitioner came to Police Station Rural, Malkapur in the night of 22.10.1999 with a complaint that he has been assaulted by members of the public, why the Police did not register such a complaint and sent the petitioner for medical examination. If the Police was satisfied that the petitioner had suffered serious injuries and was in drunken state, it was necessary on their part to get him medically examined for the injuries suffered by him and to ascertain the fact that he has consumed alcohol. None of the respondents have filed their affidavit-in-reply denying the allegations made by the petitioner. Therefore, this Court has no hesitation to arrive at a conclusion that the story given by the petitioner will have to be accepted that he was accosted by Police Constable Baban Sangade and brought to Police Station, Rural, Malkapur and given beating, causing serious injuries on his person. The respondents have not denied the injuries as reflected in the photograph annexed to the petition. On the other hand, it is their case that these injuries are caused because he is beaten by members of the public. In his affidavit-in-reply, the respondent No. 2 has, in terms accepted that the petitioner is a nuisance for the Society as he extorts money from businessmen, people in the locality as well as Government officers and therefore, the contention of the petitioner that as he was exposing the functioning of the Police i.e. mal practice and high handedness of the Police personnel. It was out of vengeance that the respondent Nos. 3 to 6 not only assaulted him in the Police Station while he was in their custody but also threatened him of dire consequences and the superior officers, in spite of repeated complaints by the petitioner, failed to take notice of it.

11. Now let us turn our attention to the proceedings initiated against the petitioner by the respondents under Chapter VIII of the Code of Criminal

Procedure. The reason given in the affidavit-in-reply filed by respondent No. 2 for initiating such proceedings against the petitioner was that at the relevant time processions for immersion of Durga Idols was under process and therefore the petitioner was arrested u/s 110 of the Code of Criminal Procedure and was sent on 23.10.1999 at 17.20 hours, to Special Executive Magistrate Local Crime Branch and such action was necessary keeping in mind the processions of Durga Idols immersion and therefore the respondent No. 2, under istegasha No. 44/1999, u/s 110 of the Criminal Procedure Code as it was necessary to take prohibitory action against the petitioner told him to keep ready two sureties of Rs. 10,000/- each for his release. But as the petitioner could not furnish the sureties, he was sent to Magisterial custody on 1.11.1999 whereas the istegasha, on which the impugned order came to be passed do not mention anything about the prohibitory action taken by the Police due to procession of immersion of Durga Idols. But there is a specific mention of the fact that considering the previous offences for which the petitioner is being prosecuted and that the petitioner lodges false complaint with senior officers against any person and publishes report in newspapers because of which nobody is prepared to make complaint against the petitioner in Police Station and because of this, common people are terrorised and there is a danger to their property and lives due to these activities of the petitioner and that there is all likelihood that he may commit offence of serious nature, and to prevent all this, it is necessary that he should be called upon to furnish substantial surety.

12. Chapter VIII of the Code of Criminal Procedure provides for various provisions under which security for keeping the peace and for good behaviour can be sought from any person. The provisions in this Chapter which empower the Court of Magistrates to obtain security from a person to prevent him from committing offence, in future, are of two kinds. (i) A security for keeping peace which is covered by the provisions under Sections 106 and 107 of the Criminal Procedure Code and (ii) A security for good behaviour which is covered by provisions under Sections 108 to 110. Sections 111 to 124 contains procedural provisions under which such proceedings are to be conducted. We are not concerned with provisions under Sections 106 and 107 of the Criminal Procedure Code. In case of security for good behaviour, it is Sections 108 to 110 which can be initiated. Sections 110, 111 and 116(3) of the Criminal Procedure Code relevant for the purpose, reads as under:

110. Security for good behaviour from habitual offenders.-When an Executive Magistrate receives information that there is within his local jurisdiction a person who

(a) is by habit a robber, house-breaker, thief or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment or disposal

of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860) or u/s 489A, Section 489B, Section 489C or Section 489D of that Code, or

(e) habitually commits, or attempts to commit or abets the Commission of offences, involving a breach of the peace or

(f) habitually commits, or attempts to commit or abets the commission of-

(i) any offence under one or more of the following Acts, namely

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973);

(c) the Employee's Provident Funds (and Family Pension Fund) Act, 1952 (19 of 1952);

(d) the Prevention of Food Adulteration Act, 1954 (37 of 1954);

(e) the Essential Commodities Act, 1955 (10 of 1955);

(f) the Untouchability (Offenders) Act, 1955 (22 of 1955);

(g) the Customs Act, 1962 (52 of 1962); or

(ii) any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or

(g) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years as the Magistrate thinks fit.

111. Order to be made.-When a Magistrate acting u/s 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.

116. Enquiry as to truth of information.-

(1) ???????

(2) ???????

(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 reason to be recorded in writing, direct the person in respect of whom the order u/s 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 over u/s 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 u/s 111.

Therefore, it is clear that proceedings u/s 110 are taken to prevent committing such acts by a person as mentioned therein. The object of this section is to bind down the person to good behaviour with an object to afford protection to the public against a repetition of crimes against their person or property and is not a punishment of the offender for his past offences, but for securing his good behaviour for the future. Since this section confers drastic powers to bind down persons suspected; but not proved to have committed any of the offences specified in various clauses, the powers should be used with extreme caution and judicial discretion and strictly according to the procedure laid down, so that it may not be used as an engine of oppressions, blackmail or private vengeance.

13. The first step in the proceedings is passing of a preliminary order u/s 111 of the Criminal Procedure Code which is a condition precedent for taking further steps in any proceedings under Sections 107 to 110 of the Code of Criminal Procedure. Such order, with its required contents, must be recorded and indicated even where the Police have brought before the Magistrate a person under arrest as a suspected offender. The first thing is that the Magistrate must do after receipt of the information, referred to in Section 110 is to apply his mind to such information, if he is satisfied that there is ground for proceeding under such Chapter to pass an order in writing under the present section and, therefore, it is mandatory on the part of the Magistrate for passing of a preliminary order stating the substance of the information etc. which will be served as a notice. It does not contemplate a notice different from such order. If the person charged is present in the Court, the order should be read over to him and that may amount to notice. If they are not present, a copy of summons must be enclosed with the summons or warrant as the case may be and therefore, it is quite clear that no final step in the proceedings can be made and therefore, without giving an opportunity to such person to show cause by reading over the

order to him if he happens to be in the Court when order u/s 111 is made. It is only thereafter that the preliminary order under Sub-section (3) of Section 116 of the Code of Criminal Procedure can be passed and, therefore, one thing is clear that unless and until steps as contemplated u/s 111 of the Criminal Procedure Code are taken i.e. an order requiring a person to show cause under such section, which should be 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 no further steps can be taken, in the present case, plain reading of the impugned order which is reproduced below:

N.A. produced before me at 17.20 hrs. Brought by P.C. 1026 of Malkapur city. He has no complaint against Police. No surety M.C.R. granted.

4.11.1999.

Reqd. one year Rs. 10,000/-, One solvency, One surety, Simple Cross.

does demonstrate that the learned Executive Magistrate did not follow the procedure as contemplated u/s 111 of the Code of Criminal Procedure. Even the impugned order does not indicate under what clause of Section 110 of the Criminal Procedure Code he has to execute bond and furnish surety. The order also do not conform to the requirement of Section 116(3), which is indicative of the fact that the respondent No. 2A, in misuse of his powers conferred u/s 21 of the Criminal Procedure Code, remanded the petitioner to custody as the impugned order is passed without application of mind and by ignoring the due process of law, therefore, the detention of the petitioner can only be said to be illegal and in violation of Article 21 of the Constitution of India.

14. Our attention was drawn by the learned Counsel for the petitioner to the case of Chandrabhan Dhengle Vs. Indarbai Dhengle and others, , in which this Court held that the Magistrate was found to have exercised jurisdiction u/s 107 of the Criminal Procedure Code arbitrarily and in clear violation of Article 21 of the Constitution resulting in illegal detention of the petitioner in the said proceedings for a period of 63 days. The State was liable to pay compensation of Rs. 50,000/- to the petitioner for the said illegal confinement. Another case is of Smt. Vimladevi Tiwari Vs. State of Maharashtra and others, , wherein also this Court held that the Court having failed to follow the procedure u/s 111 as well as 116 of the Criminal Procedure Code and causing detention of the son of the petitioner, can be only termed as wholly unauthorised and without jurisdiction. In the two cases cited before us, this High Court had an occasion to examine the manner in which the Special Executive Magistrate conferred with powers under Chapter VIII of the Code of Criminal Procedure had exercised them in an arbitrary manner and without following the due procedure, causing illegal detention, which was held to be wholly unauthorised and without jurisdiction.

15. In the given facts and circumstances of this case we are satisfied that the respondent No. 2, which office was held by respondent No. 2A overlooked the

necessary and essential requirement of law, while passing the impugned order and arbitrarily ordered the magisterial custody remand of the petitioner without being vested with such powers at the instance of respondent Nos. 3 to 6 and the whole object of initiation of these proceedings which are challenged before this Court was to see that the petitioner is taught a lesson by torturing him in custody resulting in serious injuries and is also detained in prison so that he should learn a lesson not to expose Police Officers of the region within whose jurisdiction he was residing.

16. In addition to seeking quashing of the proceedings, the petitioner has also claimed compensation on two counts, firstly for the injuries suffered by him while he was detained in Police custody and assaulted by respondent Nos. 3 to 6 to which there is no challenge by the respondent Nos. 3 to 6 and secondly for his wrongful detention in the prison under orders of respondent No. 2. The petitioner has also sought for directions against the State Government for withdrawing the powers vested in respondent No. 2 as Special Executive Magistrate and by ordering the respondent/State to refrain from vesting of such powers under Chapter VIII in Police Officers except in cases provided under Sub-section (5) of Section 20 of the Code of Criminal Procedure.

17. Mr. Patil the learned Counsel appearing for the petitioner after a well researched study made several submissions, highlighting the importance of independence of judiciary as an essential attribute of rule of law which is a basic feature of our Constitution in the background of frequent and deliberate misuse of powers vested under Chapter VIII in favour of Special Executive Magistrate, specially with reference to Police Officers in addition to various constitutional provisions. Mr. Patil has also drawn our attention to the various reports of Law Commission of India regarding reform of judicial administration and submitted that in fact this Court should issue appropriate writ, order or direction so as to declare Section 21 of the Code of Criminal Procedure as ultra vires as it vests unguarded discretion in the State to confer judicial powers on Police Officers which is misused with impunity with total arbitrariness as such misuse of powers has direct nexus with the liberty of the citizen and it is in derogation of the fundamental right guaranteed u/s 21 which shall provide that no person shall be deprived of his life or personal liberty except according to procedure established by law. Mr. Patil submitted that though the provisions under Chapter VIII, do provide for a procedure which can be called reasonable fair and just but it is prone to misuse by the Executive to subserve their cause and therefore, such appointment of Police Officers as Special Executive Magistrates deserves to be quashed and set aside.

18. Mr. Gavai, learned Government Pleader and Public Prosecutor submitted that when statute permits the State Government to appoint an Executive Magistrate to exercise powers vested in the provisions under Chapter VIII, it cannot be said to be arbitrary as the manner in which such powers are to be exercised is also regulated by the said provisions and, therefore, it will not be proper to quash and

set aside or issue any writ, order or direction against the State from conferring powers of Special Executive Magistrates to Police Officers. It is submitted that the State, in its wisdom and considering the exigencies, has conferred powers of Special Executive Magistrate on Police Officers of the rank of Police Inspectors for conducting proceedings under Chapter VIII of the Code of Criminal Procedure and that in a given case, this Court can very well quash and set aside orders which are passed by such Executive Magistrates which are found to be illegal. Mr. Gavai has tried to canvass before us that the Court will have to consider the submissions made by Mr. Patil by looking to the object which the Statute seeks to achieve and it should have a purposive approach for interpreting the provisions of Sections 20 and 21 of the Code of Criminal Procedure.

19. Our enquiry from the learned Public Prosecutor as to why the State Government thought it fit to confer power of Special Executive Magistrate by invoking Section 21 of the Criminal Procedure Code in an officer of the rank of Police Inspector when even in case of appointment of Executive Magistrates such powers are restricted by Sub-section (5) of Section 20 only to the officers of the rank of Commissioner of Police we were informed relying upon a communication by Fax from the State Government, that such powers were vested in Police Inspectors as the State was satisfied that they are experienced, Gazetted Officers of the Police Department and have reasonable knowledge of law. Well, we do not propose to go into all these niceties but we should record that vesting of powers of Special Executive Magistrate in Police Officers of whatever rank they may, has resulted in blatant misuse of such powers to the detriment of fundamental right of a citizen as enshrined in Article 21 of the Constitution of India. Very few cases reach the High Court relating to the proceedings before Special Executive Magistrate concerned with Chapter VIII of the Criminal Procedure Code. This Court has no hesitation to take a judicial notice of the fact that if there is a survey conducted in the jails in the State of Maharashtra of the under trial prisoners languishing in jail, most of them are those who are arrested in petty offences and surprisingly a reasonable number of such persons are those against whom proceedings under Chapter VIII have been initiated. At least we have not come across any case in which when such proceedings are challenged either by way of revision before the Sessions Court or by invoking the writ jurisdiction of this Court, a detention of a person against whom proceedings under Chapter VIII is pending, was found to be justifiable. Therefore, in our humble opinion, it is high time that the State, which is duty bound to protect the fundamental right of its citizen and particularly relating to their liberty, should resort to Section 478 of the Code of Criminal Procedure which vests in the State powers to order functions allocated to Executive Magistrates and such powers vested in favour of police officers as Special Executive Magistrate particularly in reference to Chapter VIII proceedings as they are commonly known and relate to Sections 108 to 110 as well as Sections 145 and 147 of the Criminal Procedure Code to be made over to Judicial Magistrate of the First Class or Metropolitan Magistrate, as the case may be.

20. We have already come to the conclusion that the petitioner was tortured in Police Custody which was illegal, causing him serious injuries and further came to be detained under the impugned order illegally and unauthorisedly, without following the procedure provided under Sections 111 and 116 of the Criminal Procedure Code. In *Smt. Nilabati Behera alias Lalita Behera Vs. State of Orissa and others*, , the Supreme Court held as under:

A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from and, in addition to the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available, in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution.

The Supreme Court is not helpless and the wide powers given to it by Article 32 which itself is a fundamental right, imposes a constitutional obligation on it to forge new tools, which may be necessary for doing complete justice and enforcing the fundamental rights guaranteed in the constitution, which enable the award of monetary compensation in appropriate cases, where that is the only mode of redress available. The power available to the Court under Article 142 is also an enabling provision in this behalf. The contrary view would not merely render the Court powerless and the constitutional guarantee a mirage, but may, in certain situations, be an incentive to extinguish life, if for the extreme contravention the Court is powerless to grant any relief against the State, except by punishment of the wrongdoer for the resulting offence and recovery of damages, under private law, by the ordinary process. If the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have-nots, who are not possessed of the wherewithal for enforcement of their rights in private law, even though the exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, were more appropriate.

and therefore, we direct the respondent/State to pay a sum of Rs. 15,000/- to the petitioner for custodial torture and illegal detention of the petitioner. The compensation to be paid to the petitioner within a period of four weeks from the

date of passing of this Order. We also direct the respondent/State to pay Rs. 5,000/- as costs to the petitioner. We further direct the State to take suitable action against its guilty officers i.e. respondent Nos. 3 to 6 for custodial torture meted out to the petitioner. It will be open for the State to recover the amount of compensation directed to be paid to the petitioner from its officers who are found responsible in the cause. Rule made absolute in the aforesaid terms. Certified copy expedited.