

Bombay High Court

Jitendra R. Deshpabhu And Ors. vs Executive Magistrate And Anr. on 4 October, 1990

Equivalent citations: 1992 (1) BomCR 233

Author: G Kamat

Bench: G Kamat

JUDGMENT G.D. Kamat, J.

1. In this petition under section 482 of the Criminal Procedure Code, 1973, the petitioners are questioning the legality and propriety of the order of the Executive Magistrate, Pernem, dated 1st August, 1990, in Case No. JM/MAG/39/90 and for quashing the proceedings initiated thereunder.

2. By the Order dated 1st August, 1990 issued under section 111 of the Criminal Procedure Code by the Executive Magistrate, the petitioners are directed to attend the Court of the Executive Magistrate on the 9th day of August, 1990, to show cause as to why they should not be required to enter into a bond of Rs.10,000/- each and also give sureties each by a bond of like amount under section 107 of the Criminal Procedure Code to maintain peace for a term of one year. The same order further directs the petitioner in the meantime to enter into a personal bond and to furnish sureties for the same amount as interim measure that they shall maintain peace. It is needless to say that this order is made in case No. JM/MAG/39/90 in proceedings drawn up under chapter VIII of the Criminal Procedure Code.

3. Though the order has been made against four persons, only three of them have come in the present petition challenging the same and it is the case of the petitioners that the first petitioner comes from a respectable and well-known family of Goa; that the petitioners No. 2 and 3 are employees of the first petitioner; that the first petitioner has been and continues to be an active worker of the Congress-I party, but ever since the Ministry of the Congress-I Government was toppled, from March, 1990, the petitioner No. 1 is harassed in many ways by the members/workers of the Maharashtrawadi Gomantak Party which party has come in power by aligning itself with and forming the Progressive Democratic Front Ministry; that many of the workers/sympathisers of the Maharashtrawadi Gomantak Party reside in the first petitioner's property at Devsum in Pernem Taluka and they are seeking to prevent the first petitioner's access to his own properties, for its improvement. It has been next averred that the first petitioner was recently perforced to file a Writ Petition (No. 119/90) against the Mamlatdar of Pernem, Taluka as also P.S.I. of Pernem Police Station for a mandamus restraining them from aiding the Sarpanch of the village Mandrem in the illegal construction of a road in the petitioner's property known as Kharbawada, that on 15th July, 1990, when petitioners visited his property at Devsum for plucking coconut from his garden property though a person by name Nakul Mhamal was caught by them stealing coconuts from the property and though not a resident of the said village was being supported by one Raju Talaunekar who bears a long-standing grudge against the first petitioner. But even before the first petitioner could file the first Information Report it was discovered by the petitioners that the troubleshooters of the first petitioner had with the connivance of P.S.I. Lobo already registered a complaint against them as No. 49/90. It is against this background it is averred that the petitioners were served with the order of the Executive Magistrate of Pernem Taluka dated 1st August, 1990.

4. The impugned Order under section 111 Criminal Procedure Code dated 1st August, 1990 and the proceedings taken thereunder are challenged that the same are without jurisdiction firstly that under no circumstances the petitioners can be required to execute bonds pending the inquiry in Case No. JM/MAG/39/90 as an interim measure to maintain peace inasmuch as the petitioners are yet to appear before the Executive Magistrate and at any rate, the proceedings have not commenced before the Executive Magistrate and therefore, there is no question of the Executive Magistrate requiring the petitioners to enter into any bond by way of any interim measure. The order and the proceedings are equally challenged on the other jurisdictional grounds that at any rate the information received by the Executive Magistrate from any quarter cannot lead him to the opinion that the petitioners are likely to commit a breach of peace or disturb the public tranquility or do any wrongful act that may occasion breach of peace; that at any rate, the Magistrate did not record his opinion that the information received by him is likely to lead to breach of peace or even for that matter, commission of unlawful offences are likely to cause, breach of peace and public tranquility and it has been equally attacked on the ground that the allegations found against the first petitioner cannot be held to be likely to disturb public tranquillity and in the same breath it has been pointed out that reference to three cases which are under trial are again qua specific individuals that by no stretch of imagination there could be any allegation that they are likely to lead to breach of peace or public tranquility. These being the challenges, Mr. S.K. Kakodkar, learned Counsel appearing for the petitioners, read before me the Order dated 1st August, 1990, to point out and urge as to how this order made under section 111 Criminal Procedure Code cannot be sustained on the grounds made by him. He has relied upon a number of authorities to show as to how these proceedings under Chapter VIII of the Criminal Procedure Code are viewed and further to ascertain what is the scheme of the provisions starting from section 107 onwards as to how the Executive Magistrates are to exercise their jurisdiction and further to show that such jurisdiction is limited to several predicates mentioned in the sections themselves, one of which being the requirement of giving the substance of the information received.

5. Section 107 of the Criminal Procedure Code under the heading "Security For Keeping The Peace In other Cases", says that when an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility and is of the opinion that there is sufficient ground for proceeding, he may, manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond with or without sureties, for keeping the peace for such period, no exceeding one year. From this section it is therefore clear that mere receipt of the information by the Magistrate that any person is likely to commit a breach of the peace or disturb public tranquility or do any wrongful act that may probably occasion breach of peace, is not sufficient, but the Executive Magistrate must then reach his opinion that there is sufficient ground for his proceeding in the matter.

A Magistrate is required to make an Order under section 111 when he deems it necessary to require any person to show cause, in the first place in writing, setting forth the substance of the information received, the amount of the bond to be executed and the term for which it is to be in force. When a person is not present in Court, it is incumbent upon the Magistrate to issue summons requiring that person to appear and when such a person is in custody, a warrant directing the officer in whose

custody he is to bring that person before the Court, Section 114 mandates that every summons or warrant issued under section 113 shall be accompanied by a copy of the order made under section 111 and such a summons or warrant as the case may be, served on the person sought to be proceeded against. Coming to section 116 the order made under section 111 is required to be read and explained to the person concerned present in Court or when such person appears or is brought before the Magistrate either in compliance with the summons or the warrant as the case may be, the Magistrate should proceed to inquire into the truth of the information derived by him. Sub-section (3) of section 116 lays down that 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 peace or disturbance of public tranquility or the commission of any offence or for the public safety, may, for reasons to be recorded in writing direct the person against whom an order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or detain him in custody until such time the bond is executed and in default of execution of the bond, until the inquiry is concluded. On a plain reading of sub-section (3) of section 116, it is therefore clear that whenever the Executive Magistrate requires a person proceeded against to execute a bond for keeping peace or maintaining good behaviour until the conclusion of the inquiry it can only be after the commencement and before the completion of the inquiry under sub-section (1) thereof. Mr. Kakodkar, therefore, is absolutely right in attacking that part of the Order dated 1st August, 1990, which required the petitioners to enter into personal bond and to furnish securities in the amount of Rs. 10, 000/- as and by way of interim measure that they shall maintain peace until the conclusion of the inquiry. Though Mr. Bhobe, the learned public Prosecutor fairly conceded this law position, I am making a prominent reference to this aspect of the matter so that the Executive Magistrate may know the position of the law and not that this Court has acted on the concession of the learned Public Prosecutor.

The facts in this case are simple and clear that apart from the Order dated 1st August, 1990, under section 111 Criminal Procedure Code impugned in this petition no summons has been issued to the petitioners in Form No. 14 as required under section 113 Criminal Procedure Code. The Executive Magistrate shall do well to note that summons required to be served under section 113 Criminal Procedure Code is found in Form No. 14 which in its turn is included in Schedule II of the Code of Criminal Procedure. Apart from summons not being served, the petitioners are yet to appear before the Executive Magistrate. Therefore, at any rate there is no scope for the State to contend that any inquiry as contemplated under sub-section (3) of section 116 Criminal Procedure Code has commenced. It is therefore, obvious that there is no question of any interim bond being taken from the petitioners unless the proceedings had commenced.

5-A. Mr. Kakodkar, learned Counsel appearing for the petitioners as mentioned earlier attacking the impugned order and the proceedings drawn up thereunder has sought assistance of a large number of decisions for the various propositions he canvassed to show that the impugned order made under section 111 Criminal Procedure Code is without jurisdiction.

In the first place, he says that proceedings under Chapter VIII of the Criminal Procedure Code are viewed with all seriousness because they equally affect the liberty of the citizen. He is indeed justified in this submission and, as rightly pointed out by him, in the decision of Ram Narain Singh

& ors. v. State of Bihar, in similar proceedings the Supreme Court has observed thus :

"Wide powers have been conferred on the Magistrates specified in this section and as the matter affects the liberty of the subject who has not been found guilty of an offence, it is essential that the power should be exercised strictly in accordance with law."

In the decision of Reddy Channabasavanna Goud & ors. v. The State of Mysore & ors., reported in 1973 Cri. L.J. 1049, the learned Single Judge of the Mysore High Court has held that in proceedings under section 107 Criminal Procedure Code the information for taking action thereunder must be clear, definite and directly affecting the person against whom action is being taken with a further rider that the apprehension must be of a breach of the peace and not of some other acts. On an analysis of the facts involved in that decision the learned Single Judge observed :---

"From the facts stated above it is clear that in regard to some acts of some of the petitioners either investigation is pending or a case has been filed in the Court. The Sub-Divisional Magistrate in his order does not say that these alleged acts of some of the petitioners are likely to cause breach of peace or disturb public tranquility."

A little later it is observed :

"A mere omnibus statement to that effect that the petitioners had committed various acts is not sufficient to take action against them under section 107 of the Criminal Procedure Code."

This authority equally makes it clear that in the matter of disclosing material for initiating action under section 107 the same must disclose tangible details so that a person proceeded against may come prepared to meet the allegations made against him. In the Full Bench decision of the Kerala High Court in the case of Moidu v. State of Kerala, reported in 1982 Cri. L.J. 2293, it has been observed that though past-conduct can be the basis of proceedings under section 107 the events which are subject of investigation by the police or which are the subject of trial in courts can never be the basic material though a clear-cut answer one way or the other may not be possible, but then however it is clearly held that section 107 proceedings should not be used as a parallel proceedings. A little later it has been observed that regard being had to the object of the proceedings under section 107 they are never intended as punitive action but merely preventive, but as a rule of prudence information about events which are subject matter of pending prosecutions may not be themselves be relied on by the Magistrate as information sufficient to warrant an order under section 107 Criminal Procedure code. In the decision of 'Chinaswamy' ors. v. State, reported in 1983 Cri. L.J. 1761, Natrajan, J., on an analysis of section 111 Criminal Procedure Code held that the Executive Magistrate has to consider the information or the report of the police that he receives and then satisfy himself not only about the likelihood of the breach of the peace but also of the need to take action to prevent the same. Relying upon this authority Mr. Kakodkar, has urged that every order made under section 111 must therefore, reflect these two predicates. In addition he has relied upon the decisions in Rameshwar Harijan v. State of Bihar & anr., reported in 1984 Cri.L.J. 56, Ravikindi Ramaswamy & anr. v. Sri Bhavansi Subrahmanyam & anr., reported in 1983 Cri. L.J. 761, and two decisions Rama Chandra Jena & ors. v. Muralidhar Ojha & ors., and Bairagi Charan Jena &

ors. v. State of Orissa & anr., reported in 1988 Cri. L.J. at pages 218 and 286. All these authorities refer to the giving of the substance of information received by the Magistrate on the basis of which he takes the action as also the application of the mind that too judiciously, failing which how the noncompliance thereof vitiates order issued. There is no point in multiplying authorities and on a bare analysis of the impugned Order dated 1st August, 1990, it must be held that there is great merit in the submissions made. It is advantageous to transcribe this order :

"Order under section 111 of Cr. P.C.

Whereas, it has been made appear to me by the credible information received from the P.S.I. Pernem that the Accused No. 1 is threatening of dire consequence the witnesses namely :

1) Raju B. Talaunekar, 2) Piru A. Talaunekar, 3) Sipriyan S. Fernandes, 4) Diege S. Fernandes, 5) Kamil J. Dias, 6) Vassudeo K. Talaunekar, 7) Bautin D. D'Souza, 8) Pedre D'Souza, 9) Sandeep V. Talaunekar, 10) Ulhas P. Bandekar, 11) Suresh B. Talaunekar, 12) Nakul P. Mhammal, 13) Rekha S. Talaunekar, 14) Prabhakar M. Talaunekar, all are r/o Devsum Korgaon Pernem on account of enjoyment of the land of Mundkarial/Tenancy rights enjoyed by the said witnesses and other mundkars/tenants of the Village Devsum in Pernem Taluka.

And whereas, it is also made known to me upon information from the said P.S.I. that the Accused No. 1 alongwith the accused Nos. 2 to 4 go from house to house in the Village of Devsum, fully armed with deadly weapons such as guns, pistols, iron bars, spades and dandas and are threatening and harassing the mundkars/tenants in case they keep their fire-woods and other material within radius of 5 mts. of their houses.

And whereas, the accused Jitendra Deshpabhu has forcibly taken away the fire-woods and other material belonging to the mundkars, which were kept by them near their houses and most of the mundkars with the exception of the witnesses mentioned above are reluctant to file complaints against the said accused Jitendra Deshpabhu and are also reluctant to give their statements out of fear.

And whereas, it has also been made appear to me by report of the said P.S.I. that there are three cognizable offences ; 1) Pernem P.S. Cr. No. 27/90 U/S 341 I.P.C. 2) Pernem P.S. Cr. No. 32/90 U/S 1861 I.P.C. 3) Pernem P.S. Cr. No. 49/90 U/S 143, 147, 148, 149, 323, 324, 506, I.P.C. registered against the accused No. 1 and the same are under trial in the competent Court relating to the criminal and terror activities of the said accused and it is on account of this attitude and behaviour of the accused that the breach of peace has been caused in the Village of Devsum and if no preventive steps are taken to contain same there is every possibility of danger to the lives of the witnesses and other inhabitants of the Village Devsum.

And whereas, I am satisfied from the above information of the P.S.I. Pernem to direct the accused to attend in this Court of the 9th Day of August, 1990 at 3.00 P.M. to show cause the accused above as to why they should not be required to enter a bond of Rupees 10,000/- each and also to give sureties each by bond of the like amount U/S 107 of Cr. P.C. that the accused keep peace for the terms of one

year. In the meantime the accused are hereby directed to enter into personal bond and to furnish sureties of the above amount as interim measures that they shall maintain peace."

The first part relates to the first petitioner threatening with dire consequences the witnesses mentioned therein but then it is mentioned that it is on account of enjoyment of land of mundkarial/tenancy rights enjoyed by the said witnesses or other mundkars and tenants of the Village Devsum. Needless to say in the first place no particular incident has been quoted no particulars given. In fact, the whole allegation appears to be so vague and much less to excite the jurisdiction of the Executive Magistrate to initiate proceedings under section 107 Criminal Procedure Code. Mr. Kakodkar, is right when he says that the Magistrate has not recorded any finding that the incident mentioned therein is likely to create breach of peace of public tranquility. To put it in favour of the Executive Magistrate I may point out that he did not record such a suggestion perhaps because he did not find any material to do so. It is indeed true that Mr. Kakodkar, had urged that even assuming that there was some discord in the relationship between mundkars and the tenants on one hand and the first petitioner on the other hand, inasmuch as it was restricted to either only the mundkars or the tenants and not affecting public at large, the Executive Magistrate had no jurisdiction. In my view, it is not necessary to go into this question. Mr. Kakodkar, had no doubt relied upon an observation in the decision of Ram Chander v. Kider Nath & ors, and further to show that the echo of this observation was found in the Full Bench authority of the Kerala High Court in Moidu v. State of Kerala, reported in 1982 Cri. L.J. 2293. As observed earlier it is not necessary to consider these authorities.

6. In the second and third paragraphs it has been mentioned that it is also made known to the Executive Magistrate from the information of the P.S.I. that petitioner No. 1 with petitioners Nos. 2 and 3 and fourth accused (not in this petition) go from house to house in the Village Devsum fully armed with deadly weapons such as guns, pistols, iron bars, spades and dandas and are threatening and harassing the mundkars/tenants, when they store their firewood and other material within a radius of five metres of their houses.

In paragraph 3 it is alleged that the first petitioner forcibly took away their firewood and other material and several mundkars are reluctant to file complaints against the first petitioner and are also reluctant to give their statements out of fear. This is again a very vague and wild allegation devoid of any material particulars and much less can be made the basis of future prognosis for the likelihood of the breach of peace. The next para refers to three cognizable offences but then the order itself makes it clear that all the three cases are under trial thereby clearly meaning that criminal cases are pending before the concerned Judicial Magistrate First Class. On referring to these three pending cases it is then mentioned that on account of this attitude and behaviour of the accused that a breach of peace has been cause in the Village Devsum and if any preventive steps are taken to contain the same there is every possibility of danger to the lives of the witnesses and other inhabitants of the Village Devsum. In the first place, it must be seen that the three criminal cases which are referred to are already pending before the courts. The events from the facts leading to the offences for which either the first petitioner or all the petitioners together are being tried by themselves cannot become the basis for initiation of the proceedings under section 107 Criminal Procedure Code. What is still more is that the impugned notice itself says that the breach of peace

had already been caused. It is needless to interate that the whole object of Chapter IV is the prevention of the future breach of peace or likelihood of breach of peace or such unlawful activities which are likely to cause a breach of peace. On facts, it is not possible to say that because breach of the peace had already occasioned a preventive action is necessary because there is every possibility of danger to the lives of the witnesses. There is another way of looking at this para. The first case referred to is Criminal No. 27/90, which is under section 341 of the Indian Penal Code. It is not disputed that this case is restricted between the first petitioner and his uncle. Therefore, it is needless to say that no member of the public is involved or could be even remotely said to be involved. The second case refers to Criminal No. 32/90 for an offence under section 186 of the Indian Penal Code. I have already made reference to the petitioners' Writ Petition (No. 119/90) where in a road was sought to be constructed across the petitioners' property. It has been alleged that the Sarpanch who was at the back of the construction of the road was obstructed by the first petitioner and that is how he is hauled up in the Criminal No. 32/90. Again, it must be seen that this is a case in relation to one individual namely the Sarpanch. One therefore, falls to understand as to how the public at large could be said to have been affected by the events in the criminal case. The last reference is Criminal No. 49/90 which enlists various offences under sections 143, 147, 148, 149, 323, 324, 143, there must be an unlawful assembly. Unlawful assembly is of not less than five persons. Mr. Kakodkar therefore is right in pointing out that four persons are accused under these sections and therefore, the offence of unlawful assembly can never be attracted to them. The Magistrate has not recorded his satisfaction that the information brought to his notice or which has come in his possession is, in the first place, likely to cause the breach of peace or public tranquility or that the unlawful activity of the petitioners is likely to cause breach of the peace or public tranquility and in the second place the Executive Magistrate has failed to record that in his opinion, it is necessary to draw up proceedings under section 107. I see therefore, no justification for the impugned order on all these grounds. I accept the challenge of the petitioners. The petition succeeds. The impugned Order dated 1st August, 1990 under section 111 Criminal Procedure Code and proceedings in the Case No. JM/MAG/39/90 are quashed. The interim order made on 9th August, 1990 is vacated. Rule accordingly made absolute.