

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL WRIT PETITION NO. 124 OF 2008

Shirish s/o Hiralal Choudhary,
Age 38 years, Occu. Business,
R/o Choudhary Galli, Nandurbar,
Taluka and District Nandurbar

.. Petitioner

Versus

1. The State of Maharashtra
2. The Special Executive Magistrate
and Police Inspector of L.C.B.,
Nandurbar
3. Police Inspector,
Nandurbar Town Police Station,
Nandurbar

.. Respondents

Mr C.R. Deshpande, Advocate for petitioner
Mr P.G. Borade, A.P.P. for respondents

**CORAM : T.V. NALAWADE AND
A.M. DHAVALA, JJ**

**DATE OF RESERVING
THE JUDGMENT : 9.10.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 9.11.2017**

JUDGMENT (Per A.M. Dhavale,)

1. This is a petition under Articles 14, 21 and 226 of the Constitution. The petitioner, who is a Corporator at Nandurbar made following prayers :

(B) By issuing writ of certiorari the notice issued by respondent no.2 Special Executive Magistrate and Police Inspector, L.C.B. Nandurbar to the petitioner under Section 110 (e) and (g) of the Cr.P.C. may be quashed;

(C) Any appropriate writ for cancelling the directions to issue interim bond executed by the petitioner on 28.12.2007 for a period of one year;

(D) Issuance of Writ of certiorari for quashing of directions of respondent no.2 dated 22.12.2007 of refusing to accept cash surety.

(E) Issuance of writ of certiorari for quashing of directions of respondent no.2 for sending the solvency certificate for verification to Police Inspector, Nandurbar;

(F) Issuance of writ of mandamus against respondent no.1 State to pay compensation for unjustifiable action of arrest and detention (from 21.12.2007 to 23.12.2007).

2. As per the documents on record on 22.12.2007, P.I. Nandurbar City and Special Executive Magistrate made proposal for initiating action under Section 110 (e) and (g) of Cr.P.C. against the present petitioner. In the said proposal, it was pointed out that on 14.12.2007 at 21.40 Hrs., Head Constable Vijay Kulkarni of railway police station had arrested two ladies in connection with illegal transport of country liquor. At that time, the petitioner along with ten to twelve persons entered the railway police station at Nandurbar by forming an unlawful assembly and scuffled with police officials and intimidated them. He held collar of Police Head Constable and damaged the articles of police station and succeeded in taking away two arrested ladies. That time cash of Rs.3,000/- of Head Constable Vijay Kulkarni

and 200 bottles of illicit country liquor were also taken away. Accordingly, F.I.R. at C.R. No.186/2007 under Sections 395, 353, 186, 147, 149, 504, 506 of Indian Penal Code and Sections 4 and 5 of the Prevention of Damage to Public Property Act, 1984 came to be filed.

3. Earlier, in the year 2006, in a meeting held for celebration of Sant Jagnade Maharaj Punyatithi, the petitioner along with 25 to 30 persons had assaulted Pravin Makkanrao Choudhari and his family members by using sticks, lathis, iron rod and sword and attempted to kill him and caused grievous injuries to them. Crime at C.R. No.12/2006 was registered against the petitioner under Sections 307, 452, 143, 147, 148, 149, 325, 324, 323, 504, 506 of Indian Penal Code and under Section 3/25 of Arms Act. One more offence at C.R.No.105/2006 was also pending against the petitioner under Sections 468, 471, 406 read with Sec.34 of Indian Penal Code and N.C. Case No.547/2007 under Section 506 of Indian Penal Code was also pending against the petitioner. The petitioner was running several businesses in wine, permit room and beer bar in Nandurbar. He on the basis of his huge income was maintaining ten to twelve persons in order to commit serious offences. He threatened to disturb the public piece and tranquility. He was not abiding by the provisions of law and the orders issued under the provisions of law. He was using dangerous arms and committing offences against public servants. Hence, it was necessary to initiate proceedings against him and direct him to execute bond with two sureties of Rs.2 lakhs under Section 110 (e) (g) of the Cr.P.C. The report itself shows that on earlier day, at 7.45 p.m., the petitioner was arrested under Section 41 (2) of Cr.P.C.

On the day of arrest, from 8.15 p.m. to 10.00 p.m., the petitioner filed four applications to P.I./P.I. Local Crime Branch, Nandurbar for releasing him on bail, but no order was passed thereon. On the same night, he also filed application before respondent no.2 Special Executive Magistrate, Nandurbar for releasing him on bail, but since no proceeding was filed before him, he did not pass any order. On 22.12.2007 at 5.30 p.m., P.S.I. Chhagan Patil of Nandurbar police station produced the petitioner before the Special Executive Magistrate, Nandurbar and submitted a report that since there was election for the post of President and Vice-President of Municipal Council and order under Section 37 (1) (3) of Bombay Police Act was promulgated and considering the nature of offence committed by the petitioner, he be directed to execute interim bond of Rs.40,000/- with two sureties of Rs.20,000/- each. Those should be from his locality and should be reputed persons (प्रतिष्ठीत) of clean character (निष्ठावान). Thereafter, on the same day, a notice under Section 111 of Cr.P.C. was issued by the Police Inspector, Local Crime Branch and Special Executive Magistrate, which was served on the petitioner at 7.30 p.m. It refers to the contents of the proposal of police and the personal satisfaction of the Special Executive Magistrate that there was likelihood of breach of public piece and tranquility. He was called upon to show cause why bond for keeping piece and good behaviour with sureties should not be taken from him. The petitioner immediately filed application stating that the office of Tahsildar was closed and he was ready to deposit cash surety of Rs.40,000/-, but the said application came to be rejected. One more order was passed on 22.12.2007 that Police Inspector should verify whether the solvency

certificate submitted is of competent solvent surety of clean character and whether he had earlier appeared as a surety. He was called upon to submit report on or before 24.12.2007 at 8.00 a.m.

4. On 23.12.2007, the petitioner again submitted application stating as follows. He was never convicted for any offence. No charge-sheet was submitted in Crime No.12/2005 whereas the enquiry in Crime No.105/2006 was stayed by the orders of this Court. In C.R.No.186/2007, the petitioner has got interim anticipatory bail. The petitioner did not fall under the category of habitual offender. On the next day, i.e. 24.12.2007, he was contesting election for the post of Vice-President of Municipal Council and he was certain that he would be elected, but if he would remain in jail, he would be deprived of his right to contest the election and to vote. He would be subjected to irreparable loss. Hence, he be released on cash surety of any amount. On 23.12.2007, respondent no.2 allowed the application of cash surety of Rs.40,000/- for the time being and directed the petitioner to furnish two competent sureties of Rs.20,000/- each before 31.12.2007. The petitioner submitted his own interim bond along with two sureties furnishing similar bond in respect of the petitioner. The petitioner through his Advocate called information under Right to Information Act about number of cases in which respondent no.2 had sent the documents of surety for verification and the reply disclosed that this was the only case in which such type of surety was taken from 22.7.2006 till 29.7.2007.

5. The reply filed by respondent no.2 does not dispute the factual matrix discussed hereinabove. He claimed that brother of the petitioner had submitted cash surety of Rs.40,000/- but he was involved in case of making false documents with corrupt tendency and was wanted in a case, where bogus fax message in the name of Gujarat government was issued. Even the father of the petitioner had furnished his surety, which was not acceptable, as he had a criminal history. It is claimed that before the election on the earlier date, petitioner was released on cash surety. There are grave allegations against the petitioner as disclosed in the proposal. He claimed that he has followed all the necessary guidelines governing the law and the petition deserves to be rejected.

6. Learned Advocate Mr C.R. Deshpande for the petitioner submitted that there was no material on the basis of which proceedings under Section 110 (e) and (g) of Cr.P.C. could have been initiated against the petitioner. The respondent no.2 has not followed proper procedure as laid down for initiating such proceedings. He has wrongfully directed the petitioner to submit interim bond and wrongfully imposed conditions for surety of proper character and wrongfully rejected the application for cash surety. The petitioner was not a habitual offender nor he was so desperate and dangerous as to invoke powers under Section 110 (g) of Cr.P.C. He submitted that the petitioner is not interested in compensation of any substantial amount and a token compensation of Rs.1/- would be also sufficient, but he seeks a finding that the action taken by respondent no.2 was illegal and arbitrary. Respondent no.2 has not recorded the necessary

satisfaction that immediate measures were necessary for calling interim bonds and no reasoned order was passed. In fact, the directions for interim bond was issued even before issuing the show-cause notice under Section 110 (e) and (g) of Cr.P.C. He, therefore, submitted that the petition should be allowed in terms of the prayers made.

7. Learned A.P.P. for the State supported the impugned orders and contended that the allegations in the proposal disclosed that the petitioner had no regards for the law and order. He was taking the law in his hands and was engaged in serious crime of attacking Police Officers and causing escape of two accused ladies involved in illegal transport of country liquor and has also committed offence of dacoity. Respondent no.4 has properly exercised powers under Section 110 (g) of Cr.P.C. for preservation and maintenance of public order. Respondent no.2 had jurisdiction to direct the petitioner to furnish interim bond with surety as directed and the orders passed by respondent no. 2 are legally sound and proper. There was no malafide as the petitioner was released well in time for contesting the election and for voting in the election. Hence, the petition is devoid of merits and deserves to be dismissed.

8. The points for our consideration with our findings are as follows:

- (I) Whether there was patent miscarriage of justice by respondent no.2 in the proceedings initiated against the petitioner warranting invoking powers under Article 226 of Constitution ? .. In the negative

- (II) Whether the procedure followed by respondent no.2 in effecting the arrest and detaining the petitioner is legal and proper as per the provisions of law ? .. Does not survive
- (III) Whether the petitioner deserves to get token compensation of Re.1/- for illegal arrest and detention ? .. In the negative
- (IV) Whether the impugned order dated 22.12.2007 and interim bond taken from the petitioner deserves to be quashed as per prayer clause (B), (C), (D), and (E) ? .. In the negative
- (V) What order ? .. The petition is dismissed

9. Learned Counsel Mr C.R. Deshpande for the petitioner relied on following rulings :

- 1) Mohan Khatri Vs. M.G. Ingle & Ors., 2004 ALL MR (Cri) 68
- 2) Chandrakant Vs. Spl. E.M. 2004 ALL MR (Cri) 81
- 3) Bhumraj Vs. Sr. I.P. 2004 ALL MR (Cri) 40
- 4) Vasantkumar Vs. State of Mah. 2005 ALL MR (Cri) 2951
- 5) Rajesh Vs. State of Maharashtra 2006 (2) Bom. Cr C 849
- 6) Surendra Vs. State of Maharashtra 2001 ALL MR (Cri) 2079

- 7) Lalookhan Vs. M.M. Kamble, Spl.E.M. 1996 Cri.L.J. 801
- 8) Parvatibai Vs. State of Maharashtra 2003 ALL MR (Cri) 1645
- 9) Chandrabhan Vs. Indirabai 1998 (1) Mh.L.J. 234
- 10) Vimladevi Tiwari Vs. State of Mah. 1999 ALL MR (Cri) 406

10. We rely on :

10-A) Mudhu Limay Vs. Vedmurti, AIR SC 2481

- 11) Madhu Limaye Vs. S.D.M. Monghyr & Ors. AIR 1971 SC 2486
- 12) Ram and ors. Vs. State of M.P. AIR 1978 SC 1594
- 13) Tavinder Kumar and anr. Vs. The State 1990 Cri.L.J.40
- 14) Jwala Prasad Vs.State of Bihar 2000 SCC Online Pat 159
- 15) Raghunath Vs. Jagannath Panda 1982 SCC Online 182
- 16) Jarnail Singh Vs. Khushbakht 2009 SCC Online P & H 2917
- 17) State of M.P. Vs. Savji Hima Bhil, 1986 M.P.L.J. 509
- 18) Abdul Aziz and ors. Vs. State of U.P., 1981 SCC Online All 722
- 19) Prakash Awasthi Vs.State of U.P. 1986 SC Online All 6

11. The legal proposition laid down in these cases may be stated as follows :

- 1) The liberty of citizens should be respected – Sr.No.1 & 5
- 2) The provisions are preventive and not penal in nature-Sr.No.18 & 1
- 3) Strict compliance of procedure is essential -Sr.No.3, 8,10-A,15 & 19
- 4) No detention without preliminary order – Sr.No.11

- 5) Executive Magistrate must record satisfaction about necessity setting forth the substance of information in writing - Sr.No.15,19,10-A, 3, 4 & 5
- 6) Normally summons has to be issued to which copy of order should be annexed. Warrant to be issued in case the accused is in custody or in exceptional case recording reasons that otherwise breach of public peace cannot be prevented - Sr. No.4
- 7) The provisions of bail under Section 88 and 309 Cr.P.C. are not applicable to the proceeding under Chapter VIII of Cr.P.C. - Sr.Nos.11, 18, 16, 10-A
- 8) As per Section 115 Cr.P.C. the personal appearance of the party can be dispensed with.
- 9) On appearance of the party, the proceeding should be initiated as per Section 116 (1), (2).
- 10) Interim bond cannot be taken on the basis of police report or before commencement of the proceeding. It can be taken after commencement of the proceeding if the competent authority feels that immediate measures are necessary to prevent breach of public peace. The reasons for such satisfaction should be recorded in writing. The interim bond can be, with or without sureties - Sr.No.1,10-A, 15, 19, 14, 5, 6, 8.
- 11) The conditions for bond should not be onerous looking to the facts of the case and the status of the party - Sr.No.1, 10-A, 15, 19, 14, 5, 6, 8.

- 12) The verification of surety should be carried out by the authority in person as provided under Sections 441 (4), 441-A and Rules 14 and 15 of Chapter I of Criminal Manual. The competent authority has discretion to accept cash surety.
- 13) If there is illegal detention, the Court can impose compensation on the State.
- 14) As per Section 110 (e), the proceedings can be initiated only against habitual offender, which means there should be conviction against such person. The same is not applicable for invoking powers under Section 110 (g) of Cr.P.C – Sr.Nos.9, 10.

12. We find substance in the arguments of learned Advocate Mr C.R. Deshpande that while initiating proceedings against the petitioner, the procedure was not properly followed. But we find that there was no malafides on the part of the Special Executive Magistrate as the petitioner was released by him on cash surety well in time so that he could participate in the elections.

13. However, we find that in this case, the conduct of the petitioner was such that initiation of proceedings under Section 110 (g) of Cr.P.C. was essential for the maintenance of public peace. The petitioner had gone along with some Gunda persons to the police station and manhandled the Police Officers. He has seriously interfered with the investigation of a crime and had removed two accused ladies from the custody of Police along with huge quantity of Muddemal liquor seized

from them. In **Raju Thapar Vs. Madanlal 2013 Cri.L.J. SC**, it has been held that the powers under Section 482 of Cr.P.C. and Article 226 of Constitution should be exercised sparingly and in order to prevent the miscarriage of justice or to prevent the abuse of process of law. Invoking these powers is at the discretion of the Court and it should be used in appropriate cases only. In **Amit Kapoor Vs. Ramesh Chander, (2012) 8 SCC 460**, it is held :

“27.4 Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

27.15 Coupled with any or all of the above, where the Courts finds that it would amount to abuse of process of the Code or that the interest of justice favours, otherwise it may quash the charge. The power is to be exercised *ex debito justitiae* i.e. to do real and substantial justice for administration of which alone, the courts exist.”

14. In **Varala Bharath Kumar and anr., Vs. State of Telangana and anr., 2017 SAR (Cri) 975**, it is held :

7. **It is by now well settled that the extraordinary power under Article 226 or inherent power under Section 482 of the Code of Criminal Procedure can**

be exercised by the High Court, either to prevent abuse of process of the court or otherwise to secure the ends of justice.

15. We find that the petitioner did not wait to get a decision on merits in respect of the allegations made against him and had rushed to this Court immediately after he was released on bail. Since the cases were of 2007 or earlier to that, those must have been disposed of. He has not produced copies of judgments to show that the prosecution initiated against him was false and he was acquitted.

16. We find that the preventive action against the petitioner was essential. The facts of the case and initiation of such action was neither miscarriage of justice nor abuse of the process of the Court. However, such power should have been exercised by the Special Executive Magistrate in strict compliance of the provisions of law. The precedents laid down by the High Courts and Supreme Court in the matter should have been followed. If the Special Executive Magistrates do not follow the provisions of law as explained in the various rulings, the State as well as the concerned Officers can be personally held liable for payment of compensation. With these observations, we record that our judicial conscience does not persuade us to exercise the inherent powers under Article 226 or Section 482 of Cr.P.C. Those can be exercised *ex debito justitiae*.

17. We find that this is not a fit case to invoke our powers under Article 226 of Constitution or under Section 482 of Cr.P.C.

18. With the above observations, in the facts and circumstances, we decline to invoke our powers and hence, the petition is dismissed.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

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