

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

CRIMINAL WRIT PETITION NO.548 OF 2017

Rajesh s/o. Shamsundar Kejriwal,
Age 45 years, Occ. Business, r/o.
Ashish Tower Flat No.701,
702, Telephone Exchange
Square, Nagpur.

..... PETITIONER

// VERSUS //

1) State of Maharashtra,
Through Commissioner of
Police, Nagpur City,
Nagpur.

2) State of Maharashtra,
through its Special Executive
Magistrate, Lakadganj Zone,
Nagpur City, Nagpur.

..... RESPONDENTS

Mr.A.S.Kesari, Advocate for the Petitioner.
Mr.A.M.Joshi, A.P.P. for Respondents/State.

CORAM : SMT. VASANTI A NAIK
AND M.G.GIRATKAR, JJ.
DATE : 11.8.2017.

ORAL JUDGMENT (Per M.G.Giratkar, J) :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

2. The petitioner has challenged the impugned show cause notice issued by respondent no.2/Special Executive Magistrate, Lakadganj Zone, Nagpur in Case No.155/2017, dated 2nd June, 2017, by which the petitioner is directed to remain present on 2.6.2017 before the Special Executive Magistrate, Lakadganj Zone, Nagpur.

3. It is submitted that the petitioner is a businessman having business of Tours and Travels. The petitioner is not having a past criminal record. On 30.5.2017, one Ashokkumar Chaturbhujdas

Ghiya lodged a complaint against the petitioner, which was registered as non-cognizable Crime No.341 of 2017 for the offences punishable under Sections 504, 506, 427 of the Indian Penal Code at Police Station, Lakadganj.

4. On 31.5.2017, ASI R.P.Upadhyay, who was posted at Lakadganj Police Station, issued a notification wherein it is specifically stated that the proceedings under Sections 107 and 116 of the Code of Criminal Procedure are initiated against him and the petitioner has to appear before respondent no.2 on 2.6.2017 at 11.00 a.m.

5. On 2.6.2017, the petitioner attended the Office of respondent no.2. The petitioner was served with the show cause notice issued by respondent no.2 under Section 111 of the Code of Criminal Procedure directing the petitioner to explain the reason why he shall not execute a bond of Rs.15,000/- for maintaining peace in the society. Being aggrieved by the intimation dt.31.5.2017 and the show cause notice dt.2.6.2017, the petitioner has filed the present petition.

6. It is submitted that, without giving any fair opportunity to rebut the allegations, the respondents have issued the impugned notice.

7. The respondents have not followed the procedure laid down under Sections 107 to 116 of the Code of Criminal Procedure. The respondents have not complied with the mandatory provision. Therefore, the impugned notice is liable to be quashed and set aside.

8. At the stage of admission, heard Mr.A.S.Kesari, learned Counsel for the petitioner and Mr.A.M.Joshi, learned A.P.P. for respondent nos. 1 and 2.

9. Mr.A.S.Kesari, learned Counsel for the petitioner has pointed out the decision in the case of **Sandeep Shivaji Mhatre .vs. The State of Maharashtra** and another reported in 2014 ALL MR (Cri) 3913. The learned Counsel pointed out the observations of the Apex Court in the landmark decision in the case of **Madhu Limaye vs. The State of Maharashtra, AIR 1978 SC 47 : 1978 SCR (1) 749**. Mr.A.S.Kesari, learned Counsel for the petitioner has submitted that except the report lodged by one Ashokkumar Ghiya, there is no

other criminal record of the petitioner. The report lodged by said Ghiya is for a non-cognizable offence. Therefore, the Police Station, Lakadganj registered NCR No.341 of 2017 for the offences punishable under Sections 504, 506, 427 of the Indian Penal Code. The learned Counsel submitted that, without following the procedure, the impugned show cause notice is issued by the respondent and, therefore, the same is liable to be quashed and set aside.

10. Heard learned A.P.P. He has supported the intimation dt.31.5.2017 and the show cause notice dt.2.6.2017.

11. A perusal of the notice dt.2.6.2017 issued by A.S.I. Upadhyay shows that without passing any order under Section 111 of the Code of Criminal Procedure, the notice was issued.

12. On a perusal of the show cause notice under Section 111, dt.2.6.2017 it is clear that the petitioner is directed to show cause as to why a bond should not be executed by him. It is pertinent to note that the procedure given under Sections 107 to 116 is to maintain the peace and tranquility in the society. There is nothing

on record to show that the petitioner is a criminal person and there is likelihood of breach of peace and tranquility.

13. The Executive Magistrate while proceeding under Sections 107 to 116 has to record his satisfaction that there is every possibility of breach of peace and tranquility and therefore, it is necessary to get the bond executed to maintain peace.

14. The Hon'ble Apex Court in the case of Madhu Limaye and another .vs. Sub-Divisional Magistratge, Monghyr and Others, AIR 1971 SC 2486, while considering the scope of Section 107 of the Code of Criminal Procedure, has held as under :

34.The section is aimed at persons who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the public tranquillity. This is an instance of preventive justice which the courts are intended to administer. This provision like the preceding one is in aid of orderly society and seeks to nip in the bud conduct subversive of the peace and public tranquillity. For this purpose Magistrates are invested with large judicial discretionary powers for the preservation of public peace and order. Therefore the justification for such

provisions is claimed by the State to be in the function of the State which embraces not only the punishment of offenders but, as far as possible, the prevention of offences.”

“47.The gist of the Chapter is the prevention of crimes and disturbances of public tranquillity and breaches of the peace. There is no need to prove overt acts although if overt acts have taken place they will have to be considered. The action being preventive is not based on overt act but on the potential danger to be averted. These provisions are thus essentially conceived in the interest of public order in the sense defined by us. They are also in the interest of the general public. If prevention of crimes, and breaches of peace and disturbance of public tranquillity are directed to the maintenance of the even tempo of community life there can be no doubt that they are in the interest of public order. As we have shown above 'public order' is an elastic expression which takes within it various meanings according to the context of the law and the existence of special circumstances.”

It is thus, well settled that the preventive measures under Section 107 of the Cr.P.C. have to be necessarily preceded with (i) information that there is likelihood of breach of the peace or disturbance of the public tranquillity, (ii) formation of opinion of the

Magistrate that there is sufficient ground for proceeding under Section 107 of the Cr.P.C. (iii) order in writing setting forth the substance of the information received, the amount of the bond to be executed, the terms on which it is to be enforced and the number, character and class of sureties, if any, required. (iv) Communication of the order under Section 111 of the Cr.P .C. and (vi) inquiry into the truth of information and to take evidence, as may be necessary. These judicial powers vested in the Special Executive Magistrate for preservation of the peace and public tranquility have to be exercised with great care and caution, in strict adherence to the procedure prescribed in the Code and not according to the whims and fancies of the concerned Magistrate.”

15. From the perusal of the procedure laid down in Sections 107 to 116 of the Code of Criminal Procedure, it is clear that the Executive Magistrate shall record the evidence and come to the conclusion that there is every possibility of committing breach of peace and public tranquility. The Executive Magistrate shall make an order in writing setting forth the substance of the information received and the amount of bond in terms of which it is to be in force as per Section 114 of the Code of Criminal Procedure and the

Magistrate shall proceed to inquire into truth of the information upon which action has been taken and to take such evidence as may appear necessary. Such inquiry shall be made as merely as may be practicable, in the manner prescribed for conducting trials and record evidence in summons case. There is also mandate that inquiry has to be completed within a period of six months.

16. It is pointed out by the learned Counsel for the petitioner that, without passing any preliminary order by the Executive Magistrate, the show cause notice was issued. Before issuing the show cause notice, the Executive Magistrate shall record its decision that there is likelihood of breach of peace and public tranquility. There is no such preliminary order passed by the respondent.

17. The intimation dt.31.5.2017 issued by A.S.I. R.P.Upadhyay clearly shows that it is issued before issuance of the show cause notice dt.2.6.2017.

17. In the case of Sandeep Shivaji Mhatre (cited supra), this Court has observed thus :

“ It is also pertinent to note that in the present case, the proceedings are initiated under Section 107 of the Cr.P.C. on 05.03.2014 solely on the basis of C.R. No.250 of 2013, which was registered by Byculla Police Station on 19.11.2013 and which is pending trial before the Metropolitan Magistrate, Mazgaon. The said dispute was essentially between two individuals and does not involve any community or public at large. There is nothing in the Rozanama entry or the notice to indicate that the petitioner was a habitual offender or that he was involved in criminal activity or that his conduct during the interregnum period was subversive of the peace and public tranquility. The Magistrate has not conducted minimal required preliminary inquiry to arrive at a satisfaction that the alleged incident or the conduct of the petitioner was likely to cause breach of the peace or disturbance of the public tranquility but has formed his opinion mechanically, solely on the basis of solitary FIR and the report forwarded by the Police. It is a settled principle that powers under Section 107 of the Cr.P.C. have to be exercised only in cases of serious nature likely to occasion breach of the peace or disturbance of the public tranquility and not as a vehicle for private vendetta. Since foundation of an order is an apprehension or likelihood of a breach of the peace or public tranquility, such order could not be justified merely on the basis of solitary incident of violence between two individuals. ”

18. In the present case, it is clear that the dispute between the petitioner and one Ashokkumar Ghiya is the dispute essentially between two individuals and does not involve any community or public at large. There is nothing in the impugned notice to indicate that the petitioner is a habitual offender or that he is involved in a criminal activity or that his conduct during the interregnum period was subversive of peace and tranquility.

19. From the perusal of the impugned notice, it is clear that the respondents have not applied it's mind properly and mechanically issued the show cause notice without any satisfaction that there is every likelihood of breach of peace and public tranquility. Hence, the impugned intimation dt.31.5.2017 and the notice dt.2.6.2017 are liable to be quashed and set aside.

20. Hence, we allow the petition in terms of prayer clause (a) and quash and set aside the impugned notice dt.2.6.2017 issued by respondent no.2/Special Executive Magistrate, Lakadganj Zone, Nagpur City, Nagpur. No order as to costs.

JUDGE

JUDGE

[jaiswal]