

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 589 OF 2021

1. Annasaheb Baburao Teke
Age : 70 years, Occu. Agri.,
2. Amol Annasaheb Teke
Age : 40 years, Occu : Advocacy,
3. Vishal Annasaheb Teke
Age : 36 years, Occu : Agri.,

All R/o. Wari, Tq. Kopargaon,
Dist. Ahmednagar

... Petitioners
(Orig. Accused)

VERSUS

1. The State of Maharashtra
2. The Tahashildar and Executive Magistrate,
Kopargaon, Tq. Kopargaon,
Dist. Ahmednagar
3. Uddhav Baburao Teke
Age : 50 years, Occu : Agri.,
R/o. Wari, Tq. Kopargaon,
Dist. Ahmednagar

... Respondents
(Resp.No.3 Orig. Applicant)

Mr N.V. Gaware, Advocate for petitioners;
Mr R.V. Dasalkar, A.P.P. for respondent nos.1 & 2

**CORAM : DIPANKAR DATTA, CJ
AND
RAVINDRA V. GHUGE, J.**

DATE : JUNE 19, 2021

ORAL ORDER (PER - DIPANKAR DATTA, CJ.)

1. The challenge in this criminal writ petition under Articles 226 and 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (hereafter 'the Cr.P.C.', for short) is to the legality and validity of a notice dated 9th March, 2021 issued by the Executive Magistrate, Kopargaon, respondent no.2, under section 107 of the Cr.P.C. in connection with Chapter VIII Case No. 288 of 2021. The only ground on which the petitioners have prayed for quashing and/or setting aside the impugned notice dated 9th March, 2021 is that, no separate order has been recorded by the respondent no. 2 as is statutorily ordained by section 111 of the Cr.P.C.

2. Mr. Gaware, learned advocate representing the petitioners while referring to the impugned notice and questioning it on the ground noticed above, submits that an order under section 111 of the Cr.P.C is a pre-condition for issuance of a notice under section 107 thereof; and absence of such an order in the file renders the proceedings initiated by the respondent no. 2 vitiated.

3. It is also submitted by Mr. Gaware that the issue raised in this writ petition is no longer res-integra. Relying on the decision of a Full Bench of this Court reported in 2019 (5)

Mh.L.J. 884 (**Farhan Nasir Khan Vs. State of Maharashtra and another**), he submits that since the notice dated 9th March, 2021 issued by the respondent no. 2 was not accompanied by the order passed under section 111 thereof, such an action is in the teeth of the opinion rendered by the Full Bench in **Farhan Nasir Khan** (supra) and, therefore, the petitioners are entitled to the relief as claimed in the petition.

4. The petition has been opposed by Mr. Dasalkar, learned AGP for the State, respondent no. 1, as well as the respondent no. 2. According to him, the respondent no. 2 has issued an order complying with the requirements of section 111 of the Cr.P.C. and such order by itself calls upon the petitioners to show-cause by 17th March, 2021 why they should not be directed to furnish P.R. bond of Rs.25,000/- valid for the next six months with equal amount of surety, as a preventive measure, having regard to the opinion formed by the respondent no. 2 that the petitioners by their alleged acts as recorded in the first part of the order have created a situation which, in the opinion of the respondent no. 2, is likely to endanger public tranquility and public peace, thereby causing a serious offence. According to Mr. Dasalkar, since the petitioners were asked to show cause and it was served upon the petitioners, no exception can be taken to such action of the respondent no. 2. In support of his submission that though the

provision contained in section 111 of the Cr.P.C. is mandatory in terms but the Court ought to endeavor to ascertain whether such provision has been complied with in substance, and also that such section does not speak of a notice different from the order mentioned therein, Mr. Dasalkar has relied on the Bench decision of the Allahabad High Court reported in AIR 1963 Allahabad 4 (**Zahir Ahmad Vs Ganga Prasad, A.S.D.M., Ballia**). He has, accordingly, prayed that the writ petition be dismissed.

5. While hearing the parties, we had the occasion to read the opinion of the Full Bench in **Farhan Nasir Khan** (supra) in between the lines. The Full Bench was constituted pursuant to a reference made by a Bench of this Court vide its order dated 23rd December, 2014 in Criminal Writ Petition No. 1218 of 2014 (hereafter 'the Referring Bench'). The questions formulated for an answer by the Full Bench read as under :

“(1) Whether, before issuing the show cause notice under Section 111 of the Criminal Procedure Code for initiating chapter proceedings under Sections 107 to 110, is it mandatory for the Magistrate to pass a separate order in writing?

(2) Whether the separate order has to be accompanied with the show cause notice under Section 111?

(3) If the show cause notice which is in writing and which sets forth (i) the substance of the information received, (ii) amount of the bond (iii) term for which it is to be in force, (iv) number character and class sureties, if any, is required, (v) grounds for apprehending breach of peace or disturbance of public tranquility at his hand, then it is not necessary for the Magistrate to pass a separate order in writing and if such a course is adopted, it is sufficient compliance of the procedure which is required to be followed and on that ground show cause notice cannot be set aside.”

6. The reference was occasioned because the Referring Bench did not agree with the opinion expressed in 8 (eight) decisions by previous Benches of this Court (both Division and Single Benches); on the contrary, the Referring Bench relied upon a Bench decision of the Calcutta High Court reported in 1977 Cri. L.J. 1344 (**Bishnupada Jana Vs. The State of West Bengal**) as well as a Bench decision of this Court reported in III Ind Cases 774 (**Suleman Adam Vs. Emperor**) to form an opinion that the previous decisions might not have laid down the law correctly.

7. In **Bishnupada Jana** (supra), the Bench of the Calcutta High Court was seized of the question as to whether the show-cause notice that was signed by the Magistrate and issued to the person in question could be construed as the order of the

Magistrate in writing disclosing the substance of the information as required under section 111 (old section 112) of the Cr.P.C. It was noted by the Bench that instead of recording an order in the order-sheet, the Magistrate had maintained a copy of the show-cause notice signed by him and the said show-cause notice, drawn up and signed by the Magistrate, fulfilled the requirements of section 111 (old section 112) of the Cr.P.C. inasmuch as it disclosed the substance of the information and also recorded the same. According to the Bench, the conditions required to be fulfilled under section 111 (old section 112) of the Cr.P.C are : (i) written order, (ii) substance of the information against the person, (iii) amount of bond, (iv) period for the bond and (v) number, character and class of sureties. All these conditions appeared in the order of the Magistrate described as a show-cause notice. Since such notice formed part of the record, it was held that the notice can be construed as the order of the Magistrate made in due compliance of the conditions laid down in section 111 (old section 112) of the Cr.P.C. Finally, it was held that though the order is described as a show-cause notice, but since it is part of the Magistrate's record and fulfills the conditions of section 111 (old section 112) of the Cr.P.C, it could certainly be construed as an order of the Magistrate in due compliance with the provision of section 111 (old section 112) of the Cr.P.C.

8. The above view of the Calcutta High Court, however, has not been accepted by the Full Bench in **Farhan Nasir Khan** (supra). Reading of paragraph 11 of the decision in **Farhan Nasir Khan** (supra) reveals that the reference was returned unanswered for the reason that the law is well-settled and captured in the 8 (eight) decisions noted in paragraph 3 of the order of the Referring Bench. An opinion is also available on a plain reading of paragraph 9. Although, we are of the considered opinion that the view taken by the Bench in **Bishnupada Jana** (supra) is a reasonable view and is also consistent with the view taken in **Zahir Ahmad** (supra), we feel bound by the opinion rendered in **Farhan Nasir Khan** (supra) to the effect that the opinion rendered by the learned Single Judges or by the Division Benches in the decisions referred to in paragraph 3 of the order of the Referring Bench are not in conflict with the opinion rendered in **Suleman Adam** (supra). In the passing, it may be observed that the decision in **Suleman Adam** (supra) was not concerning an order passed under section 111 (old section 112) of the Cr.P.C. but was under section 115 of the old Cr.P.C., which is *pari materia* with section 114 of the present Cr.P.C. and specifically mandates that an order thereunder must accompany the summons or warrant, as the case may be, issued under Section 113 of the Cr.P.C.

9. Be that as it may, the respondent no.2 in terms of sections 107 and 111 of the Cr.P.C., as interpreted by the Full Bench in **Farhan Nasir Khan** (supra), ought to have taken twin steps of first recording its opinion (why it was necessary to call upon the petitioners to show-cause) and then issue a show-cause notice (seeking explanation why the noticee should not be ordered, *inter alia*, to execute a bond for keeping peace) and annex a copy of the opinion thereto.

10. After hearing the parties in the first half yesterday, we had called for the proceedings file from the office of the respondent no. 2. Such file was placed before us in the second half. On perusal of the documents in the file of the proceedings it appears that there is no separate order that the respondent no.2 passed; but, the order and the direction to show-cause are contained in a single composite document. It further appears that the petitioners upon receipt of the show-cause notice entered appearance. There are subsequent orders recorded by the respondent no. 2 granting time on the prayer of the petitioners. Ultimately, a detailed explanation to the show-cause notice appears to have been filed by the petitioners on 10th June, 2021 before the respondent no.2. Perusal of such explanation reveals that the petitioners did not disclose pendency of this writ petition before the respondent no. 2. Although, nothing much turns on such non-disclosure, what is

relevant and material is that there is not a single statement in the explanation of the petitioners that the petitioners did not understand the accusations that they were called upon to meet; on the contrary, the explanation appears to be a detailed one dealing with the points that the petitioners were required to explain to the respondent no. 2 for his consideration.

11. Having satisfied ourselves that the order is in the nature of a show-cause notice but contains all relevant particulars and is a document available in the file of the proceedings maintained by the respondent no. 2, we had called upon Mr. Gaware to submit as to whether by reason of adoption of a procedure by the respondent no. 2, apparently inconsistent with the opinion expressed by the Full Bench in **Farhan Nasir Khan** (supra), there has been any failure of justice. Not only could Mr. Gaware not point out any failure of justice, even no prejudice that the petitioners had suffered by reason of the show-cause notice dated 9th June, 2021 not being accompanied by a separate written order drawn up in terms of section 111 of the Cr.P.C. was demonstrated before us.

12. It is bearing in mind the above circumstances that we need to decide whether the petitioners are entitled to relief or not.

13. Challenge to a show-cause notice is ordinarily not entertained unless, of course, such notice suffers from a complete lack of jurisdiction of the officer/authority issuing it, or that the accusations in the notice are so vague and lacking in material particulars that it would defeat the purpose of eliciting a reply from the noticee.

14. It has not been contended by Mr. Gaware that the respondent no.2 lacked the jurisdiction to initiate the proceedings. Once this position is accepted that the respondent no. 2 did have the jurisdiction to initiate proceedings under Chapter VIII of the Cr.P.C., the failure and/or omission complained of by the petitioners is at best an error committed by the respondent no.2 within the exercise of his jurisdiction. Such an error is significantly different from an act, which is inherently lacking in jurisdiction. The scrutiny of the Court would be more intrusive in the latter case, for, the allegation, if proved, would render the act complained of *void ab initio*. That is, however, not the case here.

15. Next, what we are required to consider is whether the failure and/or omission of the respondent no. 2 to record a separate order drawn up in terms of section 111 of the Cr.P.C. would have the effect of vitiating the proceedings. It is required to be answered bearing in mind that the petitioners, without any reservation, have submitted before the respondent

no. 2 their detailed explanation and no point has been raised therein to the effect that either such order is not comprehensible, in the sense that it is in a language which the petitioners do not understand, or that the substance of accusations and/or the other conditions do not appear, thereby having the effect of compelling the petitioners to respond to a notice which is vague and lacking in material particulars and, thus, creates a situation where the petitioners are disabled from knowing the case they are required to meet. Such a situation is conspicuous by its absence, since the petitioners do appear to have understood what was required of them.

16. Since we are of the considered opinion that because of failure and/or omission on the part of the respondent no.2 to annex a copy of his opinion to the show-cause notice issued to the petitioners, which is the requirement of law as expressed in paragraph 11 of the decision of the Full Bench in **Farhan Nasir Khan** (supra), has not occasioned a failure of justice and no prejudice is demonstrated to have been suffered by the petitioners due to such failure/omission, this is not a fit case deserving interference; hence, the writ petition stands dismissed without any order for costs.

17. Needless to observe, the proceedings as initiated shall be taken to its logical conclusion by the respondent no.2.

18. The file of the proceedings shall be returned to Mr. Dasalkar.

[RAVINDRA V. GHUGE, J.]
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[CHIEF JUSTICE]