

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.4 OF 2021**

1. SHRI TUKARAM BHARAT PARAB
@ MANOJ PARAB,
S/o Bharat Parab,
Aged 34 years, Indian National,
R/o. H.No. 411,
Kel Wado, Pirna,
Bardez - Goa 403513
2. SHRI VIRESH MUKESH BORKAR,
S/o Mukesh Borkar,
Aged 27 years,
R/o H.No. 332,
Wado Bhat, Neura,
Tiswadi-Goa, 403104
3. SHRI ALEX RICHARDSON D'SOUZA,
S/o Richardson D'Souza,
Aged 28 years,
R/o H.No. 09,
Taliwado, Chandel,
Pernem - Goa 403512. ... Petitioners

Versus

1. STATE,
through Police Inspector,
Valpoi Police Station,
Valpoi-Goa.
2. THE DEPUTY COLLECTOR & SDM
OF VALPOI,
Sattari, Goa.
3. Public Prosecutor
Bombay High Court at Goa,
Panaji Goa. ... Respondents

Mr. C.A. Ferreira with Mr. Dhaval D. Zaveri, Mr. Sujay Kamulkar, Ms. Lawina Costa and Mr. Haston Lourenco, Advocates for the Petitioners.

Mr. S.G. Bhobe, Public Prosecutor for the Respondents.

Coram: M. S. JAWALKAR, J
Reserved on : 9th February, 2021
Pronounced on : 15th February, 2021

JUDGMENT:

Rule. Rule made returnable forthwith at the request and with the consent of the learned Counsel for the parties.

2. Heard Mr. Ferreira, the learned Counsel for the petitioners and Mr. Bhobe, the learned Public Prosecutor for the respondents/State.

3. The petitioners have filed this Petition challenging the order dated 08.01.2021 in Criminal Revision Application No. 47/2020 passed by the learned Additional Sessions Judge, North Goa at Mapusa.

4. It is submitted that on the basis of information of the Valpoi Police dated 04.09.2020, the petitioners

received a notice entitled "Order under Section 111 of Cr.P.C." dated 11.09.2020. By this notice, the petitioners are directed to attend the office of the respondent no. 2 and to show cause as to why they should not be made to execute the bond of ₹10,000/- and to give further security bond by furnishing one surety of the like amount to maintain peace and tranquility for six months.

5. The petitioners appeared and filed their say on 17.09.2020 denying the contents. It is submitted that the learned Deputy Collector vide roznama order dated 17.09.2020 concluded the proceedings without even conducting any enquiry directing the petitioners to execute a bond for maintaining peace. The petitioners were also directed to report on every Wednesday of the week to the P.I. of Valpoi Police Station from 10:00 a.m. to 5:30 p.m. for six months. Being aggrieved by this order dated 17.09.2020, the petitioners preferred Revision Petition before the Sessions Court vide Criminal Revision Application No. 47/2020. The said Revision was dismissed by Additional Sessions Judge vide judgment and order dated 08.01.2021.

6. The said order is being challenged mainly on the ground that learned Additional Sessions Judge failed to appreciate the contentions and has not even bothered to consider the basic parameters required to be applied in dealing with cases under Section 107 of Cr.P.C. Section 107 of Cr.P.C. mandates that action is to be taken “in the manner hereinafter provided” and this clearly indicates that it is not open to the Magistrate in such a case to depart from the procedure to any substantial extent.

7. The learned Counsel for the petitioners relied on citation **Madhu Limaye Vs. Sub-Divisional Magistrate, Monghir & Others** reported in **1970(3) SCC 746**. It is the decision of the Bench constituted of 7 Judges, wherein the Hon'ble Apex Court held that:

“This provision is very salutary because the liberty of the person is involved and the law is rightly solicitous, that this liberty should only be curtailed according to its own procedure and not according to the whim of the Magistrate concerned. It behoves us, therefore, to emphasize the safeguards built into the procedure because from there will arise the consideration of the reasonableness

of the restrictions in the interest of public order or in the interest of the general public”.

8. It is submitted that the other ground for challenge is that the learned Additional Sessions Judge failed to appreciate the plea of the Petitioners that the Magistrate is bound to set forth the “substance of the information” and the notice issued by the Magistrate did not even contain any material particulars, except to state that the proceedings were being initiated on the basis of a report of the Police Inspector, Valpoi Police Station and the other details were neither spelt out nor copy of the report was furnished. It is also submitted that there was no summons along with the order under Section 111 of Cr.P.C., which is mandatory. Though it is permissible to incorporate order in the summons, yet the order must be with proper notice of what has moved the Magistrate to take the action. There is nothing mentioned in the notice about what information is received.

9. It is submitted that the object of the proceedings under Section 107 of Cr.P.C. is preventive and not for

punishment of the offence. The enquiry is necessary under Section 116 of Cr.P.C., which is necessarily a full fledged judicial enquiry. The Additional Sessions Judge failed to appreciate that on the day of filing the reply itself, without conducting any enquiry, the Magistrate has passed the order. The learned Sessions Judge has also failed to consider that the learned Magistrate has exceeded his jurisdiction by imposing the condition to report to Valpoi Police Station on every Saturday for six months. It is submitted that there was no enquiry conducted and the impugned order confirming the order of Magistrate is totally erroneous and illegal.

10. The learned Counsel also relied on the following citations:

(i) Jitendra R. Deshprabhu & Others Vs. Executive Magistrate & Another, 1992 (1) Bom.C.R 233;

(ii) Rajesh Suryabhan Nayak Vs. State of Maharashtra and Others, 2006(5) Mh.L.J. 243 and

(iii) Vasantkumar Jivrambhai Majithia Vs. State of Maharashtra and Anr. 2006 Cri. L.J. 1135

11. The learned Public Prosecutor, Mr. S.G. Bhobe fairly conceded that some procedure is not followed as per the requirement of the law. To that extent the order passed by the Magistrate can be set aside. However, order under Section 111 of Cr.P.C. and summons can be there in one show cause notice and there is nothing illegal.

12. I have considered the arguments of the petitioners as well as the respondents. The order under Section 111 of Cr.P.C. appears to be issued and the petitioners are directed to remain present on 17.09.2020 to show cause as to why they should not be made to execute a bond of ₹10,000/- and further give security bond of the like amount to maintain peace and tranquility for six months. It appears that the Magistrate proceeded to issue a show cause notice only on the basis of the report of the Police Inspector of Valpoi Police Station. However, there is nothing mentioned in the order/notice that what are the facts on the basis of which the Magistrate is satisfied. Secondly on receipt of reply on 17.09.2020 itself, the learned Magistrate passed the order without conducting

any enquiry as contemplated under Section 116 of Cr.P.C. The petitioners preferred revision before the Additional Sessions Judge. The learned Additional Sessions Judge, Mapusa rejected the revision on the ground that applicants personally appeared and filed their reply admitting the facts stated by the Valpoi Police Station, as such, the enquiry is not required to be conducted.

13. I have gone through the reply filed to the show cause notice. The reply nowhere admits the allegations. They have admitted only that they are the members of the registered Society known as “Revolutionary Goans”, which Society is involved in protecting the rights of the Goans and also creating awareness amongst the Goans. What is referred to as “admitted” are not the admission of allegation. Para 10 of reply runs as follows:

“The respondents state that the respondents kept calming down the agitated villagers and pleaded with the villagers not to take law in their hands.”

This statement of fact cannot be termed as admission of allegation to bypass the enquiry. Roznama

shows that there was no enquiry conducted as contemplated under the provisions of Cr.P.C. nor any hearing was granted to the petitioners.

14. In the case of **Rajesh Nayak** (supra), the Bombay High Court observed that:-

“Though the incidents of the various proceedings under this Chapter (Sections 106 to 110 of the Code) differ in material respects, there is one aspect, namely, that all these proceedings have for their object - the prevention, and not punishment of a crime. The other common aspect of all these proceedings is that they are not obligatory but confer the discretionary power on the specified Court or magistrate to exercise such power in the specified circumstance being an interference with the liberty of the individual, such power must be exercised judicially, and strictly in accordance with the procedure laid down in the relevant Sections.”

15. It is further observed that:

“We may remind the Presiding Officers of the Courts of Executive Magistrates that both the orders i.e. 1) Under Section 111 and other

under Section 116(3) of the Code has to be passed by the learned Magistrate on due application of mind. Insofar as order under Section 111 of the Code is concerned, it enjoins upon the Magistrate to make an order in writing, setting forth the “substance of information” received, the amount of the bond to be executed, term for which it is to be in force, and the number, character and class of sureties (if any required) and the Magistrate can only proceed to pass an order under Section 111 of the Code on the basis of substance of the information received by him, which has to be spelt out in the order, which requires that there must be information of a nature which convinces him that there is likelihood of a breach of peace. The person, who gave information might not be in a position to give details, but the source of information might be sufficient to convince the Magistrate that the breach of the peace was likely and if he was convinced, the law required him to take action. Needless to say, the substance of information must be set forth in the order which depends in each case upon the circumstances of the case. Without an order under Section 111 of the Code, the Magistrate has no competence to deal with such person.”

16. Thus, the first step in the proceedings is passing of preliminary order under Section 111 of Cr.P.C., which is a condition precedent for taking further steps in any proceedings under Sections 107 to 110 of the Code of Criminal Procedure. The first thing that the Magistrate must do after receipt of the information is to apply his mind to such information if he is satisfied that there is a 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 the 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 is not present, a copy of summons must be enclosed with the summons or warrant, as the case may be. Thus, one thing is clear that unless and until steps as contemplated under Section 111 of Cr.P.C. are taken, that is an order requiring a person to show cause under such Section, it should be in writing setting forth the substance of the information received, the amount of bond to be executed, the term for which it is to be enforced and the number, character and class of sureties required, no

further steps can be taken. The fact that the Police in the Court indicated that the members of the opposite party were likely to create breach of peace is not sufficient to pass an order. It cannot be said that the Magistrate has given a careful consideration to the existence of facts.

17. The learned Counsel also relied on citation **Jitendra Deshprabhu** (supra) wherein Bombay High Court while discussing various citations relied on by the petitioners held that “all these authorities refer to the giving of substance of information received by the Magistrate on the basis of which he takes the action as also the application of mind, that too judiciously.

18. Thus, in my considered opinion, the learned Magistrate has not recorded his satisfaction that the information brought to his notice is likely to cause the breach of peace or public tranquility. The order under Section 111 of Cr.P.C. requires any person to show cause, which should be in writing “setting forth the substance of the information received”. This part is missing in the order passed by the Magistrate under Section 111 of Cr.P.C.

Though, it would be well within his competence in a given case, to take into account the police report for what it is worth in forming its own conclusion on the material legally available to him. But this exercise must indisputably be seen to be done and the order of the Magistrate must clearly reflect application of the Magistrate's own judicial mind to the facts and circumstances properly placed before him. The learned Magistrate failed to apply his mind and also failed to mention in the order substance on which he is relying. The learned Magistrate also failed to follow proper procedure and on the day he received reply, closed the proceedings without conducting any enquiry into the truth and passed the order. Moreover, the condition imposed of reporting P.I. for further six months is also not the part of the show cause notice. Show cause notice must be as per form prescribed in Schedule II of Cr.P.C. The Magistrate cannot deviate from the provisions of Cr.P.C. specifically Section 107 and 111 of Cr.P.C. If in the opinion of the Magistrate, any person is likely to commit a breach of peace or disturb the public tranquility and there is sufficient ground to proceed, he should require such person to show cause why he should not be

ordered to execute the bond. While doing so, he has to proceed in the manner provided in the Cr.P.C. and not otherwise. There is a scheme which is in preventive nature. Thus, the order under Section 111 of Cr.P.C. should necessarily be in writing setting forth the substance of the information received, details of amount of the bond to be executed and number, character and class of sureties. Section 116 of Cr.P.C. mandates that when an order under Section 111 of Cr.P.C. is passed, the Magistrate shall proceed to inquire into the truth of the information, upon which action has been taken and to take such further evidence while conducting enquiry, which shall be made as if it is a summons case. The learned Magistrate failed to follow the mandates of these provisions and the learned Additional Sessions Judge also did not properly appreciated the facts and passed an erroneous order.

19. In the case of **Madhu Limaye** (supra), the Hon'ble Apex Court held that:

“The Procedure begins with Section 112. It requires that the Magistrate acting under

Section 107 shall make an order in writing, setting forth the substance of the information received, the amount of the bond, the term for which it is to, be in force and the number, character and class of sureties (if any) required. Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the “substance of the information” it does not mean that the order should not be full. It may not repeat the information bodily but it must give proper notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word “substance” means the essence of the most important parts of the information.”

20. The learned Additional Sessions Judge ought to have in his supervisory jurisdiction set aside the order passed by the Magistrate taking into account the scheme of Section 106 to 117 of Cr.P.C. The learned Additional Sessions Judge erred in holding that allegations are admitted and therefore, no enquiry is required. As such,

the order of Additional Sessions Judge dated 08.01.2021 passed in Criminal Revision Application No. 47/2020 is liable to be set aside along with the order passed by the Magistrate/S.D.M. dated 17.09.2020. Accordingly, I proceed to pass the following order:

O R D E R

- (i) The Petition is allowed.
- (ii) The order passed by the learned Additional Sessions Judge in Criminal Revision Application No. 47/2020 dated 08.01.2021 is hereby quashed and set aside.
- (iii) Roznama order dated 17.09.2020 passed by the Magistrate/S.D.M. in Case No. MAG/SAT/CH-107/68/2020 alongwith notice dated 11.09.2020 is hereby set aside.
- (iv) The Magistrate/S.D.M. is at liberty to issue fresh order in accordance with the provisions of law afresh.
- (v) Rule is made absolute in the aforesaid terms with no order as to cost.

M. S. JAWALKAR, J.

EV/jfd/-