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W.P(MD)No.27952 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.11.2023

CORAM :

THE HONOURABLE MR.JUSTICE G.ILANGO VAN

W.P(MD)No.27952 of 2023
and W.M.P.(MD).Nos.24063 and 24065 of 2023

A.Sivalingam

... Petitioner

Vs.

1.The Sub-Divisional Magistrate and Revenue Divisional Officer,
Office of the Sub-Divisional Magistrate and Revenue Divisional
Officer,
Kulithalai,
Karur District.

2.The Inspector of Police,
Thogamalai Police Station,
Karur District.

... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, by call for the entire records of the proceedings initiated by 1st respondent in Na.Ka.Aa3/(M.C.No.121/2023), dated 06.11.2023 and quash the said proceedings as against the petitioner.

For Petitioner : Mr.D.Rajaboopathy

For Respondents : Mr.R.M.Anbunithi
Additional Public Prosecutor



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ORDER

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This writ Petition has been filed to quash the proceedings of impugned order in Na.Ka.Aa3/(M.C.No.121/2023), dated 06.11.2023, on the file of the 1st respondent.

2.A batch of writ Petitions and Writ petitions are disposed of by this Court touching the matters involved in this issue. The operative portion runs like this.

“2.Right to know the accusation emanates not from any law. It is not a gift by any law or of law. It inherently exists in every human being. It can be even said that human right emanates only from right to know. If the accused does not know the substance of the accusation, he need not answer the same. It cannot be construed as accusation at all. When the accusation is of criminal nature as said in Article 21 of the Constitution of India, it must be strictly adhered to. The right of the accused has travelled a much longer distance. The present society lives more on information than on any other factors. We will confirm whether this observation of this Court has been recognized judicially.

3.All these cases have been challenging the



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proceedings undertaken by the respondents/Executive Magistrates under Section 110 Cr.P.C.

4. Section 110 Cr.P.C. falls under Chapter VIII of the Code of Criminal Procedure. Section 106 Cr.P.C. speaks about the security for keeping the peace on conviction. Section 107 Cr.P.C. speaks about the security for keeping the peace in other cases. Section 108 Cr.P.C. speaks about the security for good behaviour from persons disseminating seditious matters. Section 109 Cr.P.C. speaks about the security for good behaviour from suspected persons. Section 110 Cr.P.C. speaks about the security for good behaviour from habitual offenders.

5. We are here to deal with Section 110 Cr.P.C. which speaks about the case, in which the above said security can be ordered. Section 111 Cr.P.C. deals about the procedure to be adopted while acting under Sections 107, 108, 109 and 110 Cr.P.C. Section 110 Cr.P.C. reads as under.

“110. Security for good behaviour from habitual offenders:- *When an Executive Magistrate receives information that there is within his local jurisdiction a person who—*

(a) is by habit a robber, house-breaker, thief, or



forged, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves, or aids in the concealment of disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the Commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code (45 of 1860), or under section 489A, section 489B, section 489C or section 489D of that Code, or

(e) habitually commits, or attempts to commit, or abets the Commission of, offences, involving a breach of the peace, or

(f) habitually commits, or attempts to commit, or abets the commission of—

(i) any offence under one or more of the following Acts, namely:—

(a) the Drugs and Cosmetics Act, 1940 (23 of 1940);

(b) the Foreign Exchange Regulation Act, 1973 (46 of 1973);

(c) the Employees' Provident Funds and Family Pension Fund Act, 1952 (19 of 1952);



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- (d) *the Prevention of Food Adulteration Act, 1954 (37 of 1954);*
- (e) *the Essential Commodities Act, 1955 (10 of 1955);*
- (f) *the Untouchability (Offences) Act, 1955 (22 of 1955);*
- (g) *the Customs Act, 1962 (52 of 1962); or*
- (ii) *any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or*
- (g) *is so desperate and dangerous as to render his being at large without security hazardous to the community, such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit.*

Amendment Act, 2005:- *In order to effectively deal with offences under the Foreigners Act, 1946 a need has been felt to strengthen the hands of States authorities by empowering them to take action under Section 110 of the Code against persons assisting infiltration. This will help to check the flow*



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of undesirable foreigners into the Country. The Foreigners Act, 1946 is, accordingly, being added as item (h) of Sub-clause (I) of Clause (f). ”

6.Procedure set out in Section 111 Cr.P.C. as under:

“111. Order to be made:- *When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show cause under such section he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.”*

7.Reading of the above said two provisions make the position clear to the effect that specific information must be received by the Executive Magistrate to take action under Section 110 Cr.P.C. So, for initiating the above said action, show cause notice must be issued. The substance of the information must be set out in the notice namely, 1) The amount of the bond to be executed 2) Duration of the time and 3) The number and character and class of the



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sureties. So thereupon he must make an order. Opportunity must be given to the respondent. Subjective satisfaction must be recorded by the Executive Magistrate and that order also must be accompanied by the summons or the warrant as the case may be.

8. Section 116 Cr.P.C. speaks about the procedure to be followed. Again he must record the subjective satisfaction with regard to the information received. After that the final order must be passed under Section 117 Cr.P.C. We will stop here, since these Sections are not relevant for our discussion now.

9. While dealing similar matters, in a batch of cases in ***Syed Ibrahim and others Vs. Deputy Commissioner of Police Law and Order cum Executive Magistrate, Madurai City***, dated 23.12.2021, this Court relied and extracted the history of the provisions. Let me produce the above said paragraph.

4.... Way back in 1950, the Hon'ble Supreme Court in the judgment reported in AIR 1951 SC 674 (Gopalanachari Vs. State of Kerala), has observed the ill-effect of Section 110 Cr. P.C. Paragraph No.5 of the said judgment is extracted hereunder:-

A closer look at Section 110 of the Code in the setting of peril to personal liberty thus becomes a necessity in this case. Counsel for the State, Shri Francis, amicus curiae Shri Abdul Kader and Senior Advocate Shri Tarkunde, agreed that unless the preventive power under Section 110 were prevented from pervasive misuse by zealous judicial



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vigilance and interpretative strictness, many a poor man, maybe cast into prison by sticking the label of 'habitual' or by using such frightening expressions as 'desperate', 'dangerous' and 'hazardous to the community'. Law is what the law does, even as freedom is what freedom does. Going by that test, Section 110 cannot be permitted in our free Republic to pick up the homeless and the have-nots as it did when under British subjection because to-day to be poor is not a crime in this country. George Bernard Shaw, though ignorant of 110, did sardonically comment that "the greatest of evils and the worst of crimes is poverty".

10.After that the following concluding remark was made by the Honourable Supreme Court.

"Let us allay misunderstandings. We are clear in our mind that prevention is better than cure, in criminal law as in medicines, especially when there is judicial supervision. Society cannot be left at the mercy of predators and bandits who, like wild beasts, prey upon the weak and the innocent and become a menace to peace and security of society. But liberty is a prized value and that is why we have insisted not merely upon the Police having to be careful before marching poor people into court under Section 110 but the Court itself having to be gravely concerned about using preventive provisions against helpless persons, not on formal testimony readily produced to order as we have noticed in a recent case, [Prem Chand Vs. Union of India, Writ Petition No.3050 of 1950 decided on 11.11.1950, M.A.NU/SC/194/1950:1951 Cr.L.J. (SC)] but on convincing testimony of clear and present danger to society. "

11.So the Honourable Supreme Court was of the considered view that Article 21 of the Constitution of India must be kept in mind while dealing with the above said matters.

12.With this background let us go to the other aspects, as to whether the summon that was used to be issued by the Executive Magistrate must enforce separate order. The above said issue was referred to the Full Bench



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of Bombay High Court in the case of ***Farhan Nasir Khan Vs. State of Maharashtra and Others*** reported in **2020 (206 (AIC))**.

13.After going through the entire law on that point, it was decided that a separate order must be passed by the Magistrate. That order must be enclosed along with show cause notice. Apart from that, the substance of the information received must also be set out. So what is essential according to the Honourable Full Bench of Bombay High Court is that subjective satisfaction of the Executive Magistrate must be recorded soon after receiving the information from the source for the purpose of initiating action. Not only the order but also the notice must have the character of information furnished by the respondent about the information received.

14.Before that the Honourable Supreme Court in the case of *Madhu Limaye Vs. S.D.M. Morghe*, reported in *AIR 1971 SC 2486*, has observed as under:

We have seen the provisions of Section 107. That section says that action is to be taken in the manner here-in-after provided and this clearly indicates that it is not open to a Magistrate in such a case to depart from the procedure to any substantial extent. This 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 emphasise the safeguards built into the procedure because from there will arise the consideration of the reasonableness of the



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restrictions in the interest of public order or in the interest of the general public. In this very case the Apex Court went on to observe in Para 37 as under:-

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 tranquillity at his hands. Although the section speaks of the 'substance of the information' it does not mean the order should not be full. It may not repeat the information verbatim 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."

15.This Judgment of the Honourable Supreme Court will highlight the importance of due process. Much prior to the above said three judgments, a Full Bench of the Bombay High Court in the case of *Suleman Adam Vs. Emperor* reported in *M.S.N.V.M.H.0054/1909* has held that the notice must accompany a copy of the order made by the Executive Magistrate.

16.With regard to the nature of proceedings, it was held by the Full Bench of Kerala High Court in the case of *Thekkittil Gopalankutty Nair Vs. Melapurath Santhunni Eshuthaseah* reported in *A.P. 1971 Nov 280 (F.B.)*.

17.With regard to the satisfaction of the Executive Magistrate, it was observed that breach of peace requires a subjective satisfaction, while good behaviour requires objective satisfaction. It was also further held that except clause (g), Section 110 Cr.P.C. can be invoked only in cases where previous case is pending against the petitioner. Now it is more or less well settled that



the show cause notice issued must accompany a separate order, which would consists of the substance of the information received from the source and even if any one of these or both of these are not available, then the proceedings will get vitiated.”

3. With this background let us see the present case. In this case the summon was issued on the basis of the informations given by the second respondent, to show cause as to why the petitioner should not be directed to execute a bond for keeping good behaviour for a period of one year for Rs.1,00,000/-, with a direction to appear before him on a particular date. Except the above said contents, no other materials have been enclosed to satisfy the requirement of law.

4. As mentioned above, it does not satisfy the requirement of law. On that ground, this petition is liable to be allowed. But, however, liberty is granted to the first respondent to initiate fresh action, if sufficient information is received from the second respondent, if any necessity arises.



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5. With the above said liberty, this writ petition is allowed and the proceedings initiated by the first respondent in this petition is hereby quashed. Consequently, connected miscellaneous petitions are closed.

28.11.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes/ No
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To

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Office of the Sub-Divisional Magistrate and Revenue Divisional
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Kulithalai,
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- 2.The Inspector of Police,
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- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGO VAN, J

TM

Order made in
W.P(MD)No.27952 of 2023

Dated : 28.11.2023