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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of Decision: 15th January, 2024***+ **W.P.(CRL) 1978/2022 & CRL.M.A.17120/2022****VIVEK KUMAR** PetitionerThrough: **Mr. Shreshth Jain, Advocate.**

versus

STATE GOVT. OF NCT OF DELHI & ANR. RespondentsThrough: **Ms. Rupali Bandhopadhyya, ASC with
Mr. Abhijeet Kumar, Advocate with SI
Ghanshyam, P.S. S.B. Dairy
Mr. Nitin Goel, Advocate for R-2.****CORAM:****HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J. (ORAL)**

1. This petition has been filed by the Petitioner under Article 226 of the Constitution of India read with Section 482 Cr.P.C. seeking quashing of notice under Sections 107/111 Cr.P.C. and Kalandra dated 24.04.2022.
2. The chronology of dates and events to the extent necessary and relevant and as emerging from the narrative in the petition is that father of the Petitioner namely, Sh. Rakesh Kumar is the owner of Flat bearing No. 402, Block-D, Sector-29, Fourth Floor, Rohini, New Delhi (hereinafter referred to as the "Subject Premises"), right and title to which flows from the Conveyance Deed executed on 22.02.2013 between Petitioner's father and husband of Respondent No. 2 herein. It is averred that Sh. Anil Kumar, the husband of Respondent No. 2 works as a TTE, with the Indian Railways and had approached Petitioner's father in October, 2018 to take the flat on



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rent for residential purposes. It was portrayed by Respondent No. 2 and her husband that they require the premises for their self-use and will be taking care of the flat in the best possible manner.

3. It is further stated that believing the words of Respondent No. 2 and her husband, Petitioner's father agreed to rent out the flat for a period of 22 months commencing from 15.09.2018 and a Rent Agreement was executed on 20.10.2018 between Respondent No. 2's husband and father of the Petitioner and subject premises was let out at a monthly rent of Rs.15,000/- for 11 months and at a rent of Rs.16,500/- for the next 11 months. Rs.30,000/- was agreed to be deposited as security by the tenant.

4. It is the case of the Petitioner that on 15.07.2020, the tenancy came to an end and despite repeated requests by the Petitioner, the subject premises was not vacated by the tenants and therefore, their status was of unauthorized occupants post 15.07.2020. In February, 2022, husband of Respondent No. 2 informed that he had been allotted a flat in Sonipat but despite this they did not vacate the tenanted premises. On 24.04.2022, Petitioner's father went to inspect the subject premises and found that a stranger was occupying the said premises and it was clear that the tenanted premises had been sub-let. Immediately, Police was called to ascertain the status of the person occupying the premises. Later in the evening, a statement was made by Respondent No. 2 and her husband before the Police that the third person was their servant and accordingly, the complaint was closed. Again on 16.08.2022, when the Petitioner and his father went to the subject premises, they found a fourth person residing therein and on contacting Respondent No. 2's husband, there was no response.



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5. Instead of vacating the subject premises, to the utter surprise of the Petitioner, Respondent No. 2 and her husband made a complaint against the Petitioner that he was threatening them with dire consequences and pursuant thereto, Petitioner received a notice on 02.08.2022 via WhatsApp under Sections 107/111 Cr.P.C. for appearing before the Special Executive Magistrate ('SEM'). Copy of the Kalandra was not supplied to the Petitioner despite filing an RTI application. It is this notice and the Kalandra, which are subject matter of challenge in the present petition.

6. Contentions raised on behalf of the Petitioner are that the impugned notice is illegal as the alleged incident or threatening never took place and a false complaint was made by Respondent No. 2 and her husband only to illegally occupy the subject premises and escape from the liability of paying the damage rent. Perusal of the notice shows that it is a pre-printed format and only the name, date and certain other particulars relating to the present case have been filled up. Section 107(1) Cr.P.C. requires some kind of an enquiry by the SEM before the notice is issued which has apparently not happened in the present case. The SEM has failed to adhere to the mandatory precautions and safeguards required for exercising power under Section 107 Cr.P.C. laid down by the Supreme Court in ***Madhu Limaye and Another v. Ved Murti and Others, AIR 1971 SC 2481***. Learned SEM has also overlooked that the complaint leading to the Kalandra and the impugned notice emanates from a landlord-tenant dispute and therefore, the SEM ought to have followed the decision of this Court in ***Ram Prakash & Anr. v. State, 1996 SCC OnLine Del 314***, as held by this Court in ***Sushma Arora v. State & Ors. in CRL.M.C. 3581/2006*** decided on 15.02.2008. It is



strenuously contended on behalf of the Petitioner that the SEM has issued the notice in contravention of the guidelines laid down by this Court in *Asha Pant v. State & Ors., 2008 SCC OnLine Del 367*, without even a minimal enquiry into the matter and this mechanical exercise cannot be countenanced and thus the impugned notice and the Kalandra require to be quashed.

7. *Per contra*, learned ASC appearing on behalf of the State submits that although a pre-printed format was used, the particulars in the notice were not mechanically filled and the SEM had applied his mind to the complaint made before taking a decision to issue the impugned notice. Learned counsel for Respondent No. 2, on instructions, candidly submits that he has no objection to the petition being allowed, in view of the observations made by this Court in *Asha Pant (supra)*.

8. At this stage, it needs to be mentioned that when this petition was taken up for admission on 13.08.2022, Court had directed that proceedings before the concerned SEM shall remain stayed till the next date of hearing and the interim order has continued till date, as a result of which no further proceedings have taken place pursuant to the impugned Kalandra and notice.

9. Section 107(1) Cr.P.C. gives power to an Executive Magistrate to issue a show cause notice to a person upon receipt of information that such person is likely to commit breach of peace or disturb public tranquillity or to do any wrongful act that may probably occasion a breach of peace or disturb the public tranquillity. The significant words in Section 107(1) Cr.P.C. are ‘*is of opinion that there is sufficient ground for proceeding*’. Therefore, from a plain reading of Section 107(1) Cr.P.C., it is clear that before issuing notice, the Magistrate, upon receiving information, must form an opinion



that there is a ground for proceeding and only once this opinion is formed, he can proceed to issue notice. The formation of the opinion should normally be based on some preliminary enquiry by the Magistrate which would justify the formation of this opinion. This Court in *Asha Pant (supra)*, while examining the legality of a notice under Sections 107/111 Cr.P.C. held that issuance of notice is a two-step process. First, the Magistrate receives an information, on which he forms an opinion and on the basis of this opinion, he issues the notice, which is the second step. It was also held that the opinion must be based on some preliminary enquiry *albeit* this cannot be straightjacketed since there may be cases where an SEM may require to form an opinion right away to prevent breach of peace or public tranquillity, but that should be an exception and not the rule. The Court also emphasised on the mandatory nature of the precautions to be observed by an SEM while exercising powers under Section 107 Cr.P.C. and referring to the judgment of the Constitution Bench of the Supreme Court in *Madhu Limaye (supra)*, held that the powers must be exercised with great care and caution and at every stage the SEM will be required to state reasons for taking such action. The decision in *Asha Pant (supra)* is particularly relevant to the present case as the Court also penned another note of caution that where the dispute is essentially between a landlord and a tenant, notice under Section 107 Cr.P.C. should not be issued only upon a perusal of the Kalandra prepared by the Police and such a mechanical exercise without the SEM forming an independent opinion on the basis of some sort of preliminary enquiry would render the exercise of the power vulnerable to be invalidated. Relevant paragraphs of the judgment are as follows:-



“13. Section 107 (1) CrPC gives the power to the SEM to issue a show cause notice to a person as to why “he should not be ordered to execute a bond with or without surety for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.” The Section envisages that the SEM should base the above action on the information that he has received that such person is likely to commit breach of peace, disturb public tranquility and on receipt of such information he should form “opinion that there is sufficient ground for proceeding à.” The very wording of the above Section indicates that it is a two step process. First, the Magistrate receives information on which he forms an opinion. On the basis of such opinion, he issues a notice. This is the second step. It was only after the person to whom such notice is issued response or fails to respond, as the case may be, the provisions of Section 111 will come into play and an order can be made asking such person to furnish a bond.

14. The mandatory nature of the precautions to be observed by an SEM while exercising the powers under Section 107 Cr. P.C. has been explained by the Supreme Court in Madhu Limaye v. Ved Murti, AIR 1971 SC 2481. The Constitution Bench explained that Section 107 “is in aid of orderly society and seeks to nib in the bud conduct subversive of the peace and public tranquility. For this purpose Magistrates are invested with large judicial discretionary powers for the preservation of the public peace and order. “The Court then proceeded to explain the significance of the procedural safeguards in para 36 of that judgment which reads as under:—

“36. We have seen the provisions of S. 107. That section says that action is to be taken “in the manner hereinafter 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 restrictions in the interest of public order or in the interest of the general public.”

(emphasis supplied)

15. Thereafter, in para 44 the Court explained the need for the Magistrate to state his reasons in writing at every step which reads as under:—



“44. The power which is conferred under this Chapter is distinguished from the power of detention by executive action under Article 22 of the Constitution. Although the order to execute a bond, issued before an offence is committed, has the appearance of an administrative order, in reality it is judicial in character. Primarily the provision enables the Magistrate to require the execution of a bond and not to detain the person. Detention results only on default of execution of such bond. It is, therefore, riot apposite to characterise the provision as a law for detention contemplated by Article 22. The safeguards are therefore different. The person sought to be bound over has rights which the trial of summons case confers on an accused. The order is also capable of being questioned in superior courts. For this reason, at every step the law requires the Magistrate to state his reasons in writing. It would make his action purely administrative if he were to pass the order for an interim bond without entering upon the inquiry and at least prima facie inquiring into the truth of the information on which the Order calling upon the person to show cause is based. Neither the scheme of the chapter nor the scheme of Section 117 can bear such an interpretation.”

(emphasis supplied)

16. *It is abundantly clear from the above observations of the Supreme Court that the powers under Section 107 and the Section that follow are to be exercised by Executive Magistrate with great care and caution. At every stage an SEM would be required to state reasons for taking such action.*

17. *This Court in Tavinder Kumar and another v. State, 40 (1990) DLT 210 also emphasized the need for caution while exercising the powers under Section 107 and 111 CrPC. After noticing the prevailing law on the topic and analyzing the scope of the powers under the above provisions, this Court observed as under:—*

“(9) In nutshell the above provisions, of law show that on receipt of the information in the present case kalandra given by the police, the Magistrate was bound to record his opinion as contemplated by Section 107 and thereafter was to prepare the notice under Section 111 which must contain the substance of the information so received and was bound to send the copy of such notice along with the summons to the person concerned. The stage for passing any order under Section 116(3) could arise only after the summons and notice as required by Sections 111 and 113 had been served on the petitioners and the enquiry had commenced. It is really surprising that the learned Magistrate had got ready an order under



Section 116(3) of the Code before, even he had applied his mind regarding holding of inquiry or before even commencement of the inquiry. This is not a judicial approach expected of a judicial officer who is bound to decide such matters in a judicial manner.”

18. *The sum total of the above discussion is that in every case, it would be incumbent upon the SEM to follow the steps envisaged in Section 107 strictly in accordance with the procedure outlined in the provisions of the CrPC set out thereafter. Such steps should be preceded by the formation of an opinion in writing by an Magistrate which should be discernable when the decision is challenged in the Court. Such formation of the opinion should, normally, be based on some preliminary enquiry that should be made by an SEM to justify the formation of an opinion. Of course this cannot be straitjacketed since there may be cases where an SEM may to form an opinion rightaway to prevent the breach of peace or public tranquility. However, that should be the exception and not the rule. For instance, as in the present case, where the dispute is essentially between the neighbors in a property, or between a landlord and tenant residing in the same premises, the notice under Section 107 CrPC should not be issued only upon a perusal of the Kalandara prepared by the police. Such a mechanical exercise without the SEM forming an independent opinion on the basis of some sort of a preliminary enquiry would render the exercise of the power vulnerable to being invalidated.*

19. *This Court had very recently in Sushma Arora v. State (Order dated 15th February, 2008 in Crl.M.C. 35281 of 2006) held that the decision of this Court in Ram Prakash v. State, 62 (1996) DLT 628 ought to have been followed by the SEM in that case, which was really a dispute between a landlord and tenant. This Court has cautioned the SEMs against using their powers under Section 107 CrPC in such a situation.*

20. *There is nothing in the impugned notices issued by the SEM to indicate that the SEM had formed an opinion as required under Section 107 prior to issuing such notices. The minimal enquiry that was required on the facts and circumstances of the present case was not undertaken. On the face of it, therefore, neither of the notices and summons can be sustained in law. In any event the question of issuing a summons under Section 113 did not arise at all, since that was a subsequent step and not to be exercised simultaneously with the issuance of a notice under Section 107 CrPC.*

21. *Although more than 2 years have elapsed and the impugned notices and summons are no longer operative, since on the face of it they are unsustainable in law, it becomes necessary to declare them to be*



illegal and quash them as such. In view of the passage of time both the Kalandaras are directed to be closed. The petitions and applications are accordingly disposed of.”

10. It would be useful to allude in this context to another judgment of this Court in ***Ram Prakash & Anr. (supra)*** which has been followed by this Court in ***Sushma Arora (supra)***. In ***Ram Prakash & Anr. (supra)***, this Court was in *seisin* of a challenge to the Kalandra and notice under Section 107 Cr.P.C. on the ground that it did not fulfil the ingredients of the Section and there was complete non-application of mind by the Executive Magistrate, who had picked up the language of the Section and had verbatim incorporated the same in the notice without indicating what was the sufficient ground for initiating the proceedings by his own independent assessment. The notice emanated from a landlord-tenant dispute and the Court while observing that the power under Section 107 Cr.P.C. can be exercised only when the Magistrate forms an opinion on the basis of the information received, also observed that no instance was brought on record by the tenant to show that the landlord disturbed public tranquillity or peace and merely repeated complaints and counter complaints would not constitute an offence for which provisions of Section 107 Cr.P.C. could be invoked.

Relevant paragraphs of the judgment are as follows:-

“4. Grievance of the petitioners is that the Executive Magistrate without application of mind took cognizance and issued notice to them under Sections 107/111Cr. P.C. This Kalandara does not fulfil the ingredients of Section 107Cr. P.C. Hence issuance of notice under Section 111Cr. P.C. shows complete non-application of mind on the part of the Special Executive Magistrate. The reason assigned at the time of issuing the notice is as under:—

“Whereas from the report of the S.H.O. Kotla Mubarakpur, it appears that you, Ashutosh, S/o Ram Prakash, r/o 212, Sukhdev Vihar, a dispute



with D.N. Srivastava, r/o B-48, N.D.S.E-I, New Delhi over possession/vacation of property No. B-48, NDSE-I. You are at logger head and have indulged in wrongful acts and as a result thereof cross cases vide F.I.R. No. 469/95 under Sections 341/5061. P.C, F.I.R. No. 484/95 under Section 341 I.P.C, F.I.R. No. 507/95 under Sections 448/427/323, F.I.R. No. 541/95 under Sections 448/323 I.P.C. have been registered at P.S. Kotla Mubarakpur, Delhi. Still you have been intimidating and threatening to D.N. Srivastava and causing disturbance in the area of P.S. Kotla Mubarakpur. From your wrongful acts, there is an apprehension of breach of peace and public tranquillity.

That you are likely to do a wrongful act, which may result in breach of peace within the local limits of my jurisdiction and since I am satisfied from the police report that there are sufficient grounds for taking proceedings against you.”

5. *Bare reading of this notice shows that Executive Magistrate only picked up the language of the section and used the same in his notice. He of his own has not given any ground for taking cognizance.*

6. *I have heard petitioner No. 1 and Counsel for the State and perused the record. Admittedly the notice under challenge issued by the Special Executive Magistrate dated 18th December, 1995 shows non-application of mind. He has picked up the language of the section and verbatim incorporated in his notice without indicating as to what was the sufficient ground for initiating these proceedings. By merely incorporating the language of the section will not form his expressed opinion. There has to have a sufficient ground for initiating these proceedings which in this notice are Jacking. Section 107Cr. P.C. is aimed at persons who cause a reasonable apprehension of conduct likely to lead to a breach of peace or a disturbance of public tranquillity. It is an instance of preventive justice which the Courts are intended to administer. It is like Section 106, in aid of orderly society and seeks to prevent conduct subversive of peace and public tranquillity. For that purpose it invests Magistrates with large judicial discretionary powers. The power under Section 107 would apply where the Magistrate affirms his opinion on the basis of the information that unless prevented from so acting the person would act to the detriment of public peace and public tranquillity. But in the instant case, the dispute is primarily between a landlord and a tenant. The two individuals have nothing to do with public tranquillity or breach of peace. No instance has been brought on record to show that by lodging a complaint against the tenant and the landlord disturbed the public tranquillity or was going to disturb the peace. Repeated complaints and counter complaints would not constitute an offence for which purpose the provisions of Section 107Cr.*



P.C. could be invoked.

7. *Mrs. Santosh Kohli appearing for the State contended that petitioners had given threat to kill the tenant and trespassed the tenanted premises. It was only after the Investigating Officer recorded the statement of the tenant and his wife on 17th December, 1995 that Kalandra was lodged. This argument is not only surprising but startling. It reveals the abuse of the power by the police. Instead of verifying the facts from the neighbours or the alleged plumber in whose presence it was stated the petitioners gave threat, the Investigating Officer relying on the testimony of tenant and his wife booked the petitioners. This shows scant regard by the police to the authority of law. The Investigating Officer did not bother to verify the facts instead he adopted easy method to curb the complaints and lodged Kalandras. Can on the basis of Mr. Srivastava's complaint and of the statement of his wife it could be called sufficient material to form an opinion that public tranquillity was going to be disturbed or there was breach of peace. On this material, to my mind, no action could have been taken. Section 107Cr. P.C. requires that there has to be a sufficient ground for proceeding against the person. But in this case, I find no sufficient ground except the complaint by the tenant against the landlord. As already pointed out above, the case for non-payment of rent, for unauthorised occupation of the passage, for non-payment of electricity dues are matters **subjudice** before the appropriate Courts. Now by issuing this Kaiandra against petitioner, the police has tried to favour one party against the other. That is not the scope of the provisions of Sections 107Cr. P.C. The purpose of Section 107 is preservation of public peace and tranquillity which question in the facts of this case did not arise. This Section does not confer any power on the Special Executive Magistrate to adjudicate or decide disputes of civil nature or to decide the question of titles to property or entitlement to rights. The exercise of this power must be in aid of those rights and against those who interfere with the lawful exercise therefore and even in case where there are no declared or established rights. The power cannot be exercised in a manner that would give material advantage to one party to the dispute over the other. It would not be proper exercise of discretion on the part of the Special Executive Magistrate to interfere with the lawful exercise of the right by a party on consideration. Legal right should be regulated and not prohibited altogether. In the instant case, except the complaint lodged by the present petitioner thereby exercising their rights to inform the police that the tenant D.N. Srivastava has forcibly occupied their portion in breach of the contract for lease nothing else has been done by the petitioners. Sh. D.N. Srivastava on the other hand lodged complaints against the petitioners which petitioners say was by way of retaliation. This possibility on the basis of facts on record may be correct. When Smt. Meena Srivastava, wife*



*of the tenant gave her written statement, she nowhere stated that the petitioners committed any assault or threw their utensiles. But when her statement under Section 161 Cr. P.C. was recorded she changed her entire statement by adding that her luggage was also thrown out by the present petitioners. It was done in the presence of a Plumber. The police did not enquire from the said plumber about the authenticity of her statement. **Prima facie**, on the scrutiny of the police file, I find no material to substantiate the allegations in the complaint nor these allegations constitute a threat of breach of peace or public tranquillity. I find it a fit case where this Court in exercise of its inherent jurisdiction must quash the proceedings initiated under Sections 107/111 Cr. P.C. because by initiating these proceedings, to my mind, prejudice has been caused to the petitioners who alleged to have been 'wronged rather than to be the wrong doers.'"*

11. It would be highly relevant to allude to a judgment of the Constitution Bench of the Supreme Court in **Madhu Limaye (supra)**, wherein the Supreme Court observed that it is not open to a Magistrate to depart from the procedure laid down in Section 107 Cr.P.C., which is salutary because the liberty of a 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 whims of the Magistrate concerned. Applying the *binding dictum* of the Supreme Court and the observation of this Court in the aforementioned judgments to the facts of the present case, this Court is of the view that the impugned notice cannot be sustained in law for more than one reason. A bare perusal of the impugned notice shows that it is a pre-printed format and only the dates, names, etc. have been filled in hand. Petitioner has seriously averred that no preliminary enquiry preceded the issuance of notice and no independent opinion was formed by the SEM, which is a first step towards issuance of the notice under Section 107 Cr.P.C. and this position was not controverted by the learned ASC. The



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notice is premised entirely on the report of the SHO that Petitioner threatened and quarrelled with Respondent No. 2 and there is no material placed on record on behalf of Respondent No.1, which even remotely indicates that an independent assessment was made by the SEM and/or that an opinion was formed that there was a threat of breach of peace or public tranquillity, prior to issuance of notice under Section 107 Cr.P.C. to the Petitioner. In *Asha Pant (supra)*, this Court has deprecated the practice of the Magistrate issuing notice under Section 107 Cr.P.C. only on the basis of a Kalandra prepared by the Police in a landlord-tenant dispute and the Court observed that such a mechanical exercise without the SEM forming an independent opinion at least on a minimal enquiry would render the notice vulnerable. The impugned notice cannot thus be sustained in law. Counsels for the Respondents also do not dispute the fact that since one year has elapsed from the time the impugned notice was issued, the same is even otherwise no longer operative in view of the express language of Section 107(1) Cr.P.C.

12. For all the aforesaid reasons, the impugned notice is hereby declared illegal and quashed and in view of passage of time, the Kalandra is directed to be closed.

13. Petition is allowed and disposed of along with the pending application. Interim order dated 13.08.2022 is made absolute.

JYOTI SINGH, J

JANUARY 15, 2024
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