



Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO.44/2025**

AMBROSIA S. FERNANDES
w/o Late Nelson Salvador Fernandes,
Aged 70 years, Indian National,
Residing at H.No. 56-A/7,
St. Sebastianwado,
Pomburpa, Bardez, Goa.

... PETITIONER

Versus

1. THE STATE OF GOA,
Thr. The Officer In-Charge,
Mapusa Police Station,
Mapusa, Goa – 403507.

2. THE SUB-DIVISIONAL
MAGISTRATE,
Mapusa Sub-Division,
Mapusa, Goa - 403507.

3. MRS. CLENCY CAMILO
FERNANDES,
Rio Kamat Pearl Building,
Aldona Santarxett,
Bardez -Goa.

... RESPONDENTS

Mr Shivraj Gaonkar with Ms S. Veluskar, Advocates for the
Petitioner.

Mr Pravin Faldessai, APP for the State.

Mr Nigel da Costa Frias with Mr V. Surlakar, Advocates for
Respondent No.3.

CORAM: VALMIKI MENEZES, J.

DATE: 8th AUGUST 2025

JUDGMENT :

1. Registry to waive objections and register the matter.
2. Heard.
3. Rule. The rule is made returnable forthwith at the request of and with the consent of the learned counsel for the parties.
4. This petition impugns order dated 04.04.2025 of the Executive Magistrate/Deputy Collector/Sub -Divisional Officer at Mapusa passed under Section 164 BNSS. The impugned order has been passed without recording a preliminary order recording the satisfaction of the Magistrate that the material before him justified the initiation of action under Section 164 BNSS. The notice, on the face of it is contrary to the above provisions.
5. The law as laid down by this Court and the Supreme Court of India, which interprets the provision of Section 164 of the Code and mandates that recording the Magistrate's satisfaction, based on the material that the case justifies initiation of action, as a sine qua non for issuing the notice under Section 164 has not been followed, rendering the entire process of issuing notice, illegal. This Court in *Ambarishchandra Agarwal V/s State of Maharashtra & anr* reported in *2014 SCC OnLine Bom 1548*, has dealt with an identical situation, making the following observations in its judgment:

“10. Indeed, it appears to me that no preliminary order was passed by the Magistrate, particularly because there is absolutely no reference to any preliminary order in the impugned order. Passing of a preliminary order would be necessary as that would signify the satisfaction of the Magistrate about the existence of a dispute (likely to cause breach of peace, and it is his satisfaction about the existence of such dispute that gives him jurisdiction and authority to proceed further by holding inquiry as contemplated under section 145 of the Code. The trend of the authoritative pronouncements of various High Courts, appears to be that proceedings initiated by a Magistrate without passing a preliminary order would be vitiated. There is a special significance to the date of the preliminary order in cases covered by the proviso to Subsection (4) of Section 145, and it therefore appears that such an order is a must. However, in the view that I am taking, it is not necessary to go into the effect of having held an inquiry without passing preliminary order, and whether the order passed by the Magistrate would be bad on that account itself, as the impugned even otherwise, suffers from a patent error committed by the Magistrate.”

6. On a similar note, in ***Vishwanath Kashinath Virkar and others V/s Nitinchand Keshavji Gala and Ors.*** reported in ***1995(2) Mh. L. J. 664***, has taken a view which is quoted below: “

“ I am in respectful agreement with the view taken in Laxman's case. In the instant case, the learned Magistrate

omitted to observe the mandatory provisions of section 145 of the Code and did not draw a preliminary order. Drawing of a preliminary order was sine qua non for initiating action under section 145 of the Code. Since the order was not drawn, the institution of the proceedings stands vitiated. The learned Additional Sessions Judge was ill-advised not to draw his attention to the mandatory provisions of section 145(1) of the Code. He was in error in remanding the case and directing the Magistrate to pass a fresh preliminary order. Whether there was a likelihood of breach of the peace or not has to be seen as on the date when the police report is filed before the Magistrate. If on that date there was no likelihood of breach of the peace, the Magistrate could not assume jurisdiction under this section.”

7. Perusal of the impugned order dated 04.04.2025 reveals that there are no preliminary orders drawn up in terms of Sub-section 1 of Section 164 of BNSS, which corresponds to Section 145 of the Code. The notice itself is contrary to the law as laid down by this Court and by the Supreme Court of India, for want of issuing of a preliminary order, rendering the same to have been passed without any jurisdiction. The entire proceedings would therefore have to be held to be without jurisdiction.

8. Consequently, the impugned order dated 04.04.2025 passed by the Executive Magistrate at Mapusa in Case No.MAG/SR-164 BNSS/DC II/10/2025/4326 is quashed and set aside.

9. Rule is made absolute in terms of prayer clauses (a) and (b) of the petition which read as under:

“ (a) Issue a Writ of Certiorari or any other appropriate writ, order or direction, quashing and setting aside the notice dated 26/03/2025 and the entire proceedings in Case No.MAG/SR-164 BNSS/DC-II/10/2025;

(b) Declare that the proceedings initiate without a preliminary order under Section 164(1) BNSS are without jurisdiction and non est in law;”

VALMIKI MENEZES, J.