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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL WRIT PETITION NO.231 OF 2025

Sujit Raosaheb Kadam,
Aged : 45 Years,
Occupation : Agriculturist,
R/o. 3 Shubham Apartment,
Mainde Chowk, Yavatmal.

.... PETITIONER

// VERSUS //

1. The Sub-Divisional Officer,
Ralegaon, Taluka Ralegaon,
District Yavatmal.
2. The Tahsildar / Executive Magistrate,
Ralegaon, Taluka Ralegaon,
District Yavatmal.

.... RESPONDENTS

Mr. A. S. Deshpande, Counsel for the petitioner.
Mr. Amit Madiwale, APP for the respondent /State.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 30.07.2025

ORAL JUDGMENT :

1. **Rule.** Rule made returnable forthwith. By consent of parties, heard finally.
2. By way of the present petition, the petitioner is challenging the order dated 24.02.2025 issued by the respondent No.1, under Section 129 of the Bharatiya Nagrik Surkasha Sanhita, 2023 (in short 'the BNSS Act') (under Section 110 of the Criminal Procedure Code) as well as the detention order dated 17.03.2025.

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3. The petitioner is permanent resident of Yavatmal and there were no criminal antecedents except the offence Crime No.0190/2023 which was registered under Section 379 of the Indian Penal Code. On 03.02.2025 three tractors having no registration numbers were seized from outside of the petitioner's house. It was alleged that petitioner is involved in the illegal excavation of sand. It was also alleged that the offence bearing Crime No.0190/2023 was registered against the petitioner therefore, the respondent No.1 issued a preliminary order on the apprehension that the petitioner is habitual offender and called the petitioner to submit his explanation on 05.02.2025. Subsequent to that, the respondent No.2 has also issued preliminary order against the petitioner on 11.02.2025 called upon him to file explanation on 13.02.2025. On receipt of the above said orders, the petitioner appeared before the respondent No.1 and filed its reply and denied all the allegations and submitted that he is falsely implicated in the above said crime having as he has no concern with the same. Thereafter, without any inquiry, he was directed to execute the bond of Rs.1,00,000/- for a period of six months and a gazetted officer of the same value along with a surety of the same value in Yavatmal district. Thereafter, the respondent No.2 initiated the proceedings against the petitioner under the provisions of Section 126 and 135(3) of BNSS, 2023, also initiated the proceedings against the petitioner under the provisions of Section 129 and 130 of the BNSS.

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4. Heard learned Counsel for the petitioner. He submitted that as per the allegations, on 03.02.2025 three tractors having no registration numbers were seized from the outside of the petitioner's house. It was alleged that the petitioner is involved in the illegal excavation of the sand. In fact, these allegations are not supported by any material, but on the basis of the said allegations the respondent No.2 the Tahsildar, who is also acting as Executive Magistrate issued a preliminary order against the petitioner on 11.02.2025 calling upon him to file explanation on 13.02.2025. On receipt of the above said order, the petitioner appeared before the respondent No.1 – Sub-Divisional Officer and denied the contentions and also submitted that he is implicated falsely in the above said crime, in fact he has no concerned with the same. While passing the impugned order, the respondent No.1 has not issued any separate show cause notice to the petitioner, calling his explanation and on that ground itself the impugned order liable to be set aside. He further submitted that a bare perusal of provisions of Section 130 of BNSS would reveal that the proceedings under Section 130 are taken to prevent committing such acts, a person as mentioned therein. The object of Section 130 is to afford protection to the public against a repetition of crimes against their person or property, not a punishment of the offender for his past offences, but securing good behaviour for the future. The passing of preliminary order under Section 130 of BNSS is a condition precedent for taking

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further steps, no final order can be passed without giving an opportunity to such a person to show cause.

5. The Magistrate can pass such an order on the basis of the evidence which comes to that the prevention is required and thereafter, he can pass an order as which may be in the nature of a preventive order. He submitted that the respondent No.1 failed to consider that the section speaks of the substance of the information, which 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 action. Thus, he submitted that for all the above grounds, the order dated 24.02.2025 passed by the respondent No.1, the Sub-Divisional Officer, Ralegaon, District Yavatmal, requires to be quashed and set aside. He also prayed to quash and set aside the impugned order dated 17.03.2025 issued by the respondent No.1, Sub-Divisional Officer, Ralegaon, detaining the present petitioner.

6. In support of his contention he placed reliance on **Aslam Alamgir Ali Malkani Vs. State of Maharashtra and Ors. in Criminal Writ Petition No.41 of 2024 decided on 11th January, 2024, Sandeep Shivaji Mhatre and Ors. Vs. State of Maharashtra and anr.** reported in **2014(3) Bom. C.R. (Cri.) 306**, and **Farhan Nasir Khan Vs. State of Maharashtra and another** reported in **2019 SCC OnLine Bom 1777**.

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7. Per contra, learned APP strongly opposed the said petition on the ground that the answering respondents i.e. respondent No.1 and 2 have followed the procedure as laid down under the BNSS, while passing the order dated 24.02.2025 as well as the subsequent order dated 17.03.2025. He submitted that as the petitioner failed to comply with the order dated 05.02.2025 and thereafter, he was given an opportunity but he has not availed the said opportunity and therefore, the subsequent order is passed and therefore, writ petition itself is devoid of merits and liable to be dismissed.

8. On perusal of the entire record, the question which requires to be answered whether the Special Executive Magistrate and Sub-Divisional Officer have passed the order under Section 111 of the Code of Criminal Procedure (in short 'the CrPC') (under Sections 129 and 130 of BNSS) and had thereby complied with the mandatory provision of the above said sections.

9. I have considered the submissions advanced by the learned Counsel for the petitioner and the learned APP for the State. Before advertng to the present case and the material available it would be appropriate to have a look on the law relating to the scope and object of Sections 129 and 130 of BNSS. Chapter IX of the BNSS is the Security for keeping the peace and for good behaviour. Section 125 speaks about the security for keeping peace on

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conviction, whereas Section 126 deals with security for keeping peace in other cases. Section 125 is equivalent to old Section 106 of the CrPC, whereas Section 126 is equivalent to the old Section 107 of the CrPC.

10. The gist of Section 126 is that it enables certain specified classes of Magistrates to make an order calling upon a person to show cause why he should not be ordered to execute a bond, with or without sureties for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix. The condition of taking action is that the Magistrate is informed and he is of opinion that there is sufficient ground for proceeding that a person is likely to commit a breach of the peace or disturb the public tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility. The Magistrate can proceed if the person is within his jurisdiction or the place of the apprehended breach of the peace or disturbance is within the local limits of his jurisdiction. The section goes on to empower even a Magistrate not empowered to take action, to record his reason for acting, and then to order the arrest of the person (if not already in custody or before the Court) with a view to sending him before a Magistrate empowered to deal with the case, together with a copy of his reasons. The Magistrate before whom such a person is sent may in his discretion detain such person in custody pending further action by him.

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11. Thus, the section deals with the situation that at persons who cause a reasonable apprehension of conduct likely to lead to a breach of the peace or disturbance of the public tranquility. This is an instance of preventive justice which the courts are intended to administer. This provision like the preceding one is an aid of orderly society and seeks to nip 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 public peace and order. The old provision 107 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.

12. The procedure begins with old Section 112 and new Section 131 of CrPC which 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

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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.

13. The subsequent Sections 132 to 135 deal with the persons presence and the inquiry. The old Section 113 deals with the situation when the person is present in court, then the order shall be read over to him and if he so desires, the substance of it shall be explained to him, which is not a mere formality. The intention is to explain to the person what the allegations are levelled against whom.

14. Section 114 deals with a situation that copy of order to accompany summons or warrant which states that every summons or warrants shall be accompanied by copy of the order made under Section 111 of CrPC. The intention behind this procedure is that the one should know the allegation levelled against him. Thereafter Section 115 then provides that such summons or warrant under Section 114 as the case may be, must be accompanied by the order under Section 112 and the person serving or executing the summons or warrant must serve the order on the person and the

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Section 117 and the new Section 135 speak about the inquiry as to truth of information. The first sub-section of Section 135 read with the second requires the Magistrate to proceed to inquire into the truth of the information. The sub-section 3 enables the Magistrate to ask for an interim bond pending the completion of the inquiry by him. This is conditioned by the fact that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for protection of public safety. This is applicable where the person is not in custody and his being at large without a bond may endanger public safety etc. The Magistrate has to justify his action by reasons to be recorded in writing. If the person fails to execute a bond, with or without sureties, the Magistrate is empowered to detain him in custody. Thus, the power conferred under which Chapter is distinguished from the power of detention by executive action under Article 22 of the Constitution.

15. The Division Bench of this Court has dealt with this issue in detailed in **Sandeep Shivaji Mhatre and Ors. Vs. State of Maharashtra and anr.**(supra) and it is held that it is settled that preventive measures under Section 107 of the Cr.P.C. have to preceded (i) information that there is likelihood of breach of the peace and public tranquility, (ii) formation of opinion by Magistrate that sufficient ground for proceeding under Section 107 exist (iii) order in writing should set forth substance of information and

amount of bond to be executed are necessary. This was on the basis of the information from Senior Police Inspector as offences under Sections 324, 323, 403 of the Indian Penal Code were registered. Roznama entry does not record the substance of information nor reasons for recording satisfaction. It is held that recording of mechanical transcription of police report is not a satisfaction for passing order under Section 100 of Code without issuing notice under section 111 of CrPC, which is condition precedent for initiating proceedings. Non-compliance with it, vitiates notice and all further proceedings.

16. In the case of **Farhan Nasir Khan Vs. State of Maharashtra and another** referred supra, wherein also it is held that Section 111 mandates that when a Magistrate proceeding under Section 107 deems it necessary to require any person to show cause, 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.

17. In the instant case, no such separate order envisaged under Section 111 of the Cr.P.C. recording the opinion being passed, the Division Bench of this Court in paragraph 3 noted as many as 8 judgments passed by learned Single Judges or Division Bench of this Court holding that before proceeding to issue a show

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cause notice envisaged under Section 107 of the Cr.P.C., the opinion contemplated by Section 111 had to be separately authored. The Division Bench also noted the contra view taken by the Calcutta High Court in the decision reported in **1977 Cr.L.J. 1344 Bishnupada Jana Vs. The State of West Bengal** and by referring the provision under Section 111 this Court observed that to put it simply, the requirement of law is that the Magistrate has to form an opinion in writing contemplated by Section 111 of the Cr.P.C. and thereafter proceed to issue a show cause notice as contemplated by Section 107 and along with the show cause notice annex the opinion.

18. In the case of **Aslam Almgir Ali Malkani Vs. State of Maharashtra and Ors** (referred supra) after referring the Section 116 of the CrPC it is held that in absence of any Order under Section 116(6) the proceedings cannot continue. The Special Executive Magistrate has nowhere contended a passed any Order directing extension on the ground that proceedings were stayed by High Court for about two months. It is further held that in the case of **Sandeep Shivaji Mhatre and Ors. Vs. State of Maharashtra and anr.**(supra) it was observed that proceeding under Section 107 of Cr.P.C were initiated without adhering to the procedure provided under the Code. The Special Executive Magistrate has totally deviated from the procedure provided under the Code. In the case of **Dwarkanath Ramchandra Angachekar and others V/s. The**

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State of Maharashtra and another reported in 1977 CRI. L.J.

120 wherein also it is observed that having regard to the provisions of Section 112 and Sub-Section (1) of Section 116, and the fact that a summons procedure is prescribed for an enquiry by Sub-Section (2) of Section 116 it would appear that in the case of a person who is present in Court when the Order under Section 111 is passed the said Order must be read over to him and the substance thereof explained to him if so desired by him, on that very day and therefore the inquiry in his case shall be deemed to have commenced on that very day irrespective of the fact whether the Magistrate records his plea or not.

19. Thus, in view of the observation of the Division Bench in the case of **Sandeep Shivaji Mhatre and Ors. Vs. State of Maharashtra and anr.**(supra) the proceeding under Section 107 of Cr.P.C were initiated without adhering to the procedure provided under the Code. The Sub-Divisional Officer has totally deviated from the procedure provided under the Code and therefore, the order passed by the respondent No.2 - Executive Magistrate as well as the order passed by the Sub-Divisional Officer dated 24.02.2025 and 17.03.2025, deserves to be quashed and set aside. In view of that, I proceed to pass following order:

ORDER

- (i) The writ petition is allowed.

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(ii) The orders passed by the respondent No.1 Sub-Divisional Officer, Ralegaon, District Yavatmal dated 24.02.2025 is hereby quashed and set aside. The further order passed by the Sub-Divisional Officer, Ralegaon District Yavatmal dated 17.03.2025 is also hereby quashed and set aside.

Rule is made absolute.

The writ petition is disposed of.

(URMILA JOSHI-PHALKE, J.)

Sarkate.