

Tavinder Kumar and anr. Vs. State

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Court : Delhi

Decided On : Nov-02-1989

Reported in : 1990CriLJ40; 40(1990)DLT210; 1990(18)DRJ182; ILR1990Delhi350

Judge : P.K. Bahri, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 107

Appeal No. : Criminal Miscellaneous (Main) Appeal No. 1422 of 1989

Appellant : Tavinder Kumar and anr.

Respondent : State

Advocate for Pet/Ap. : P.P. Grover and; Usha Kumari, Advs

Judgement :

P.K. Bahri, J.

(1) This petition has been brought under Section 482 of Code of Criminal Procedure seeking quashment of the proceedings pending in the Court of Shri R. Kumar, Special Executive Magistrate, West District Delhi under Sections 107/150 of the Code. I have heard Shri P.P. Grover, learned counsel for the petitioner and Mrs. Usha Kumar for the State for finally disposing of this matter. The perusal of the record show that Smt. Rani Afagh had filed a complaint with S.H.O. of Police

Station Tilak Nagar on July 6, 1989 in which she pleaded that the petitioners Who are accused in case Fir No. 197 of 1986 under Sections 302/307 read with Section 34 Indian Penal Code . and Sections 25/27 of the Art Act have been threatening the complainant and her family members with dire consequences if the witnesses were to depose against them in the aforesaid case.

(2) She alleged that on June 23, 1989 during the day time Hari Ram came at her residence Along with a bad character and held out the threat that if the applicant and other witnesses were not to withdraw their evidence already given in the Court, they shall bear the dire consequences and he threatened that in case other witnesses gave evidence in that case against him and his sons, they will also face the dire consequences, He is also stated to have held out the threats that his son Tavinder Kumar who is on ball and other son Lalit Kumar who is a proclaimed offender in the said case would set them right and that he would also start living in the neighborhood and get the complainant and her witnesses liquidated. It was pleaded by her that she and her family members are feeling unsafe and terrified on account of the said threats and necessary protection be afforded to her and her family members and special efforts be made to apprehend the accused who is proclaimed offender and application may be moved for getting the bail of Hari Ram and his son Tavinder Kumar cancelled from the High Court.

(3) Statements of Mohan Lal, Chander Kanta and of the complainant were recorded on July 22, 1989 by the police and a kalandra dated July 22, 1989 was put in before the Special Executive Magistrate for taking action against Hari Ram and Tavinder under Sections 107/150, of the Code of Criminal Procedure.

(4) The file of the case shows that a cyclostyled proforma stood filled in without any date or signatures of the learned Magistrate which I reproduce below:

'IN the Court of Shri R. Kumar, Sem, West Distt. State Versus Hari Ram S/o Lal Chand Under Section : 107/150 Ipc Police Station : Tilak Nagar Order Sho Tilak Nagar has sent this kalandra under Sections 107/150 Cr. P.C. against the above respondent(s) who is/are present in custody. I have gone through the kalandra other facts and I have come to the conclusion that there are sufficient grounds to proceed against the respondents. I, thereforee, order that Notice under Section

111 Criminal Procedure Code . be issued to the respondents asking him/them to show cause why be/they are not ordered to execute a personal bond in the sum of Rs. 3,000.00 with one surety/two sureties in the like amount for keeping peace for a period of one year Notice(s) have been read over to the respondents in vernacular who have not admitted the contents of the same and claim to be trial. After going through the police report bearing the parties respondent(s) and considering the statement of the Io Public Witness 1. I am satisfied the immediate measures are necessary for the prevention of breach of peace or the commission of any offence pendants of the proceedings. I, therefore, order the respondent(s) under Section 116(3) Code of Criminal Procedure to execute a personal bond in the sum of Rs. 3,000.00 with one surety in the like amount for keeping peace until the conclusion of the proceedings that be/ the shall be detailed in judicial custody under the said bond executed. Case to come on..... Special Executive MAGISTRATE. West District, DELHI' I also find that cyclostyled notice under Section 111 of the Code Criminal Procedure which also are undated and unsigned stood filled in and are lying in the file. One of the notices is in the following terms : In The Court of Shri R. Kumar Sem. West Distt. Delhi. Notice U/s 111 Criminal Procedure Code . Whereas it has been to appear by credible information and from the report of the Ic, Tilak Nagar Police Station that you Tavinder Kumar, son of Hari Ram, R/o 5139, Ramesh Nagar, Delhi was threatening to Rani at Tilak Nagar and that you are likely to do a wrongful act which may result in the breach of peace within the local limit of my jurisdiction and since. I am satisfied from police report that there are sufficient grounds for taking proceedings against you. I. R. Kumar S.E.M. West District, Delhi do hereby require to whom why you should not be ordered to execute a personal bond with one surety in the sum of Rs. 3,000.00 for keeping peace for a period of one year.'

(5) The file also shows that summons had been issued to the petitioners for appearance for the said two dates and Along with summons, signed notices of the Executive Magistrate under Section 111 of the Code of Criminal Procedure also are there on which no reports have been made. On the summons it has been recorded that no personal service has been effected on the respondents.

(6) The learned counsel for the petitioners vehemently contended that the learned S.D.M. had not at all cared to apply his mind to the facts mentioned in the kalandra or in the statements accompanying the kalandra and had already got filled in proforma to serve them on petitioners as soon as petitioners were to appear before him. There is a lot of force in this contention of the learned counsel for the petitioners because the question of taking any immediate measures against the petitioners could arise only after the petitioners had appeared and the Magistrate was to be satisfied that some, immediate measures are required to be taken and for that purpose any bond was required to be obtained from the petitioners under Section 116(3) or not. But the file shows that the learned Executive Magistrate had already made up his mind to require the petitioners to execute bonds as an immediate necessary measure under Section 116(3) of the Code. The learned Executive Magistrate had not recorded his satisfaction with regard to the facts as to whether there exists any apprehension of breach of peace at the hands of the petitioners before directing the issuance of Notices to the petitioners. Even in the notices prepared under Section 111 of the Code the substance of the allegations against the petitioners is not incorporated and only a vague fact has been mentioned in the notice that petitioners have been threatening the complainant at Tilak Nagar. Nothing has been mentioned as to when such threats have been held out by the petitioners. So a substance of the allegations made in the kalandra are not indicated in the aforesaid Notices.

(7) Now coming to the relevant provisions. Section 107 of the Code lays down that the Executive Magistrate on receiving information that if any person is likely to commit a breach of peace etc. and is of the opinion that there is sufficient ground for proceeding, he may require such person to show cause why he should not be ordered to execute a bond with or without for keeping the sureties peace for such period not exceeding one year. In the present case the Executive Magistrate had not recorded his opinion with regard to the sufficiency of grounds for proceedings against the petitioners. The cyclostyled proforma already filled in by him shows that he had a mind to require the petitioners to execute bond for a period of one year.

(8) Section 111 of the Code of Criminal Procedure contemplates that the Magistrate 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 class of sureties (if any) required, after the Magistrate had formed the opinion as contemplated by Section 107 etc. The bare perusal of the notice prepared under section 111 of the Code shows that Magistrate had not bothered to incorporate the substance of the information in the said notices. Section 113 of the Code requires the Magistrate to issue summons for appearance to such persons who are not present and Section 112 contemplates that if the person is present then the notice under Section 111 of the Code can be read over to him. Section 114 further contemplates that every summons issued under Section 111 shall be accompanied by a copy of the order made under section 111 and such copy shall be delivered to the person served. Section 111 of the Code contemplates that Magistrate shall proceed inquire into the truth of the information and to take such further evidence as may appear necessary and after the commencement and before the completion of the inquiry as laid down in Section 116(3), the Magistrate, if he considers that immediate measures are necessary for the prevention of the breach of peace etc., the Magistrate may for reasons to be recorded in writing, direct the person concerned to execute a bond with or without sureties for keeping the peace until the conclusion of the inquiry.

(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 convict such notice Along with the summons to the person concerned. The stage 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.

(10) In the present case-the orders made by the Executive Magistrate on the kalandra and the notices issued under Section 111 of the Code of Criminal Procedure are not in consonance with the provisions of law.

(11) 'IN *Batraj Madhok v. The Union of India* Air 1967 Delhi 311 these very provisions of law as they existed in the old Code came up for consideration Section 117(3) of the old Code empowered the Magistrate that if he considers that immediate measures are necessary for prevention of breach of peace etc. he could for reasons to be recorded in writing direct the person concerned to execute a bond for keeping peace during the pendency of the inquiry. It was held that the said provisions could be taken resort to only after the Magistrate had prepared the notice and had served that notice on the person concerned. The Executive Magistrate in the present case was ill advised in filling up the proforma order to be made under Section 116(3) of the Code before even the notice under Section 111 had been served on the petitioners.

(12) In *Dharam Vir v. Lalita Pershad*, 1973 Rajdhani Law Reporter 144 again these provisions of law came up for consideration wherein it was emphasised that it would be only after recording a competent order under Section 107 of the Code that the Magistrate will find his jurisdiction for proceeding further in the matter. It was held that the provisions require that the Magistrate is to pass an order in writing setting forth the substance of the information received by him and also reasons where he is to require any person to show cause. In the cited case also certain cyclostyled proforma have been filled in by the Executive Magistrate. The High Court had quashed all those proceedings and had directed the Magistrate to proceed afresh with the matter from the stage of receipt of the complaint.

(13) In *Chinnaswamy and Others v. State*, it was laid down by a Single Judge of the Madras High Court that before any notice under Section 111 of the Code is issued, the Magistrate should consider the report of the police officer sent to him and if he is satisfied about the truth of the information and about the need to take action under Section 107 then he should pass an order under Section 111 and issue notices to the person concerned. It was emphasised that the order passed under Section 111 has to satisfy a double test. Firstly it must set forth the

substance of the information received as well as the other particulars and secondly the order must reflect that Magistrate has assessed the truth of the information and the need for taking action under Section 107 for preservation of peace etc. In the cited case also the Magistrate without passing any preliminary order had directed for issuance of summons. The proceedings were held to be bad,

(14) In *Roghuvaush Kumar v. Madan Lal & Anr.*; 2nd (1973) Li Delhi 250 a Single Bench of this Court had also considered the similar provisions of the old Code and held that the substance of the information required to be let out not only to enable the person or persons concerned against whom such proposed action is to be taken to know what is stated against them. 'but also to ensure that the Magistrate writes a speaking order setting out the objective facts on the basis of which he is satisfied about the existence of necessity to require a person to show cause against the proposed action. It was held that where the impugned order does not set forth the substance of information received, the same cannot be treated to be in accordance with the requirements of the law which are mandatory. I am also refer to *Banarsi Lal v. Neelam*' Air 1969 Delhi 304 a judgment relied upon in this case wherein it has been held that the compliance with the requirements of Section 112 of the Code was the foundation of the exercise of jurisdiction there under, in other words the requirements also were mandatory. It was also observed in that case that assuming such non compliance is a mere irregularity, the Courts are disinclined to approve or encourage in advance violations of statutory provisions merely because they may be considered to be directory, for even directory provisions of law are intended by the Parliament to be obeyed and the Courts cannot just ignore them. In the base of *Banarsi Lal* (supra) the case was at the stage at which the present case is. and the High Court had intervened to clarify the position and issue necessary directions.

(15) In *Moosa Mohammed v. Amin* 1967 Cri. L.J. 1330 a Division Bench of the Kerala High Court had considered similar provisions and had held that the notice should contain definite particulars and not vague recitals of the words of the section before such a notice can be sustained.

(16) So, in the present case I find that the Executive Magistrate concerned had acted mechanically in directing issuance of summons and notice to the petitioners without applying his mind to the facts appearing in the kalandra and the statements submitted along with the kalandra. It was a legal duty cast on the Executive Magistrate to have applied his mind the facts and he should have recorded die order as contemplated by Section 107 and 111 of the Code before directing for issuance of summons and the notices under Sections 111 and 113 of the Code to the petitioners. The learned Executive Magistrate appears to have already made up his mind to lake immediate measures against the petitioners even before the stage for commencement of the inquiry bad arrived as required, by Section 116(3) of the Code.

(17) Hence I allow the petition and quash the proceedings commenced. from the first order of the learned S.D.M. made on the kalandra. It would be appropriate that the matter is transferred to some other Executive Magistrate for dealing with this kalandra. I direct the Police Commissioner to entrust this case to some other Executive Magistrate who shall then proceed with the kalandra inaccordance with the law in the light of the observations made above in this judgment.