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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P (CRL) 2039 /2018**

Reserved on: 9th October, 2018
Decided on: 1st November, 2018

ALDANISH REIN .....Petitioner

Through: Petitioner-in-person.

versus

STATE OF NCT OF DELHI & ANR. ....Respondents

Through: Mr Rahul Mehra, Standing Counsel (Crl.) for State with Mr Chaitanya Gosain, Mr Jamal Akhtar and Mr Tushar, Advocates.
Mr Sumer Sethi and Ms Dolly Sharma, Advocates for DSLSA

CORAM: JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Petitioner, an Advocate, has filed this petition under Article 226 of the Constitution of India in public interest, highlighting a serious issue concerning the working of Sections 107 and 151 of the Code of Criminal Procedure, 1973 ('Cr PC').

2. Although the prayers in the petition are in the context of a specific case, the petition itself raises larger issues. These have been encapsulated in an order dated 12th July, 2018 passed by this Court, which reads as under:

"1. Notice. Mr Rahul Mehra, learned Standing Counsel (Crl.)

for the State accepts notice. Notice, without process fee, also be sent to the Secretary, Delhi State Legal Services Authority ('DSLSA') to assist the Court on the next date.

2. The Petitioner, who is a practising Advocate has filed this petition as writ of habeas corpus for directions to the Respondents to produce Narender, son of Ghananand confined in Central Jail No.8/9, Tihar Jail, New Delhi. It is averred in the petition that on 6th July, 2018 Narender was picked up from Swaroop Nagar, Delhi by one Rajiv Tyagi, an officer of Delhi Police attached to PS Swaroop Nagar and a DD No.23-A was recorded. It is further stated that he was booked under Sections 107 and 151 of the Code of Criminal Procedure (Cr PC) and thereafter produced before the Special Executive Magistrate ('SBM'), Jahangir Puri. On the same date, the SEM remanded Narender to judicial custody without supplying any documents or even any copy of the order. Even the relatives of Narender were not informed of his arrest.

3. It happened that the Petitioner, who is appointed as a Jail Visiting Advocate on the panel of the Delhi High Court Legal Services Committee ('DHCLSC') visited Jail No.8/9 as part of his duty assigned to him by DHCLSC. Narender approached the Petitioner and informed him that he has been languishing in jail for the past five days.

4. The Petitioner mentions how he has also filed a Public Interest Litigation ('PIL') being Writ Petition (Crl.) No.93/2016 before the Supreme Court of India which is pending. The Petitioner who appears in person explains that the scope of the PIL is regarding the misuse of powers by the SEMs with regard to preventive detention.

5. This petition was mentioned yesterday before us and we had directed the production of Narender before this Court today.

6. Mr Rahul Mehra, learned Standing Counsel for the Respondents has produced before the Court a communication

dated 12th July, 2018 addressed to the Registrar General of this Court by the Deputy Superintendent, Central Jail No.8/9, Tihar, New Delhi informing that yesterday i.e. 11th July, 2018, Narender was released from jail in compliance with the release order dated 11th July, 2018 of the SEM/ West District, Delhi.

7. The Petitioner urges that this Court should not close this petition since there is another prayer made by Narender for grant of compensation on account of his illegal confinement.

8. Yesterday, while directing the production of Narender, this Court had also instructed the SHO of PS Swaroop Nagar to collect the relevant records from the office of the SEM, Jahangir Puri. That record has been today produced by Mr Rahul Mehra in the Court.

9. The Court proposes to examine the larger issues that arise because it appears that there are large number of similar cases where the powers under Section 107/151 Cr PC are being invoked to preventively detain/arrest persons with there being no guidelines as such as to the procedure that has to be followed and the period for which such persons are to be detained. Also, there appears to be no basis to determine the amount of surety that the detenu is asked to furnish. Considering that the liberty of such persons is being curtailed by use of statutory powers by SEMs, a further question that arises is about the provisions of legal aid to such persons to make them aware of their rights and whether in fact they are being served with notices, being heard and whether their near relatives/friends are being informed about the factum of their arrest as required by law.

10. The Court would therefore like to examine these larger questions. Accordingly, the Court directs that apart from filing a para-wise reply to the petition, the SEM Jahangir Puri should also file a separate affidavit explaining therein as to (i) how he has exactly proceeded in the matter; (ii) whether in fact he ensured the service of notice upon Narender, (iii) heard him

before passing the order under Section 107/151 Cr PC; (iv) the basis on which he required Narender to be kept in custody till 19 July, 2018 upon furnishing surety and (v) also how once notice was issued by this Court, he quickly released Narender yesterday i.e. 1 July, 2018.

11. The Court would also like the Principal Secretary, Home Department, Government of NCT of Delhi to place on affidavit the figures of the number of persons who have been arrested in the National Capital Territory of Delhi in the past one year invoking the powers under Sections 107/ 151 Cr PC and the number of persons who have been actually sent to judicial custody on the same day. A sampling of such orders be placed before the Court to enable it to formulate guidelines regarding the exercise powers under the aforementioned provisions.

12. The Petitioner is permitted to file a rejoinder to the above affidavits before the next date.

13. List on 4th September, 2018.

14. The record from the office of the SEM, Jahangir Puri which has been today produced by Mr Rahul Mehra in the Court has been returned to him. It will be enclosed to the affidavit of the SEM."

Affidavit of the SEM

3. On the following date of hearing i.e. 4th September, 2018, this Court took note of an affidavit dated 29th August, 2018 filed by the SEM (North West) in which it was inter alia stated as under in relation to the circumstances under which the said Narender, son of Ghananand, was ordered to be detained and then subsequently released post issuance of notice by this Court:

"3.That on 06.07.2018, SHO/P.S Swaroop Nagar sent a

Kalandra U/S 1071151 Cr.P.C against one Narender @ Nari S/O Gananand RIO Gali No.9 Veer Bazar Road, LP. Colony, part-I, Delhi through H.C Rajiv Tyagi, who produced the accused before the deponent. As per the police report, he was abusing, quarrelling and threatening to his tenant Sh. Dilip. He was also threatening to kidnap the wife of Dilip and his children and demanding money for drugs. The police staff tried to understand him, but he became more violent and was creating public nuisance and acting against the public order. He was arrested by the local police U/S 107/151 Cr. P.C for preventing to commit any cognizable offence by him as there was apprehension of breach of peace. As per the record submitted by the local police, the respondent has previous involvement in two different criminal cases also. He was produced before the deponent on the same day.

4. That I state that I had gone through the police report and also heard the respondent carefully. He was agitating and shouting in the court and was not ready to listen. There was apprehension of breach of peace. Therefore, I had come to the conclusion that, there are sufficient grounds to proceed further against the Respondent. The deponent therefore ordered that the notice U/S 107/111 Cr. P.C be given to the respondent, asking him to show cause as to why he should not be ordered to execute a personal bond in the sum of Rs.5000/- with one surety of same amount to keep peace for a period of one year. Notice was read over and explained to the respondent in vernacular language. He did not plead guilty and claimed for trial.

5. That I state that I had heard the respondent carefully and tried to make him understand, but he was not ready to listen, instead he was shouting in the court, which was an apprehension of breach of peace. Further, I was satisfied that the respondent may commit any wrongful act as appended in the kalandra, which may lead to breach of peace and commission of any offence.

> 6. That keeping in view the above mentioned facts, during the proceeding, the deponent ordered for the respondent U/S 116 (3) Cr. P.C to execute a personal bond in the sum of Rs.50001- with one surety of the same amount to keep peace, failing which, he shall be detained in judicial custody till such bond is executed or in default of execution until the enquiry is concluded. But the respondent had failed to execute his bail bond as ordered. Hence he was remanded to Judicial Custody till 19.07.2018."

4. In the affidavit, whilst denying that Narender had been quickly released once notice was issued by this Court, the SEM contended that on 11th July, 2018, his surety appeared before the SEM and produced a bond which was accepted and kept on the file and, therefore, he was ordered to be released.

Report of the DSLSA

5. The Court on 4th September, 2018 also took note of the fact that Mr Sanjeev Jain, the Member Secretary, Delhi State Legal Services Authority ('DSLSA') had filed a detailed report. Inter alia, it was stated therein that even a person who was produced before an SEM is entitled to legal aid in terms of Section 12 of the Legal Services Authorities Act, 1987 ('LSAA'). It is stated that with this objective in view, since June, 2018, Remand Advocates have been appointed in the Courts of SEMs and that these Remand Advocates remain present in those Courts on the days as per the schedule of those courts. The tasks, inter alia, assigned to them are to submit bail bonds and applications/replies before the SEM courts, deal with the cases assigned to them and represent the persons not otherwise able to engage lawyers of their own. The reports stated that till the date of filing of the report, 260 cases had been dealt with by the Remand Advocates. The

report of the Secretary, DSLSA also stated that as per the information provided by the Prison (Headquarters), Central Jail, Tihar, a total of 7119 prisoners were admitted in different jails in Delhi invoking the powers under Sections 107/151 Cr PC. The report noted that the data from Jail No.13 was awaited.

6. Mr Rahul Mehra, learned Standing Counsel for the State informed the Court that the said data was since been made available and if the inmates in Jail No.13 are added, the total figure would work out to 7335 prisoners. He tendered an affidavit dated 1st October, 2018 of the Additional Chief Secretary (Home), Government of NCT of Delhi to that effect.

7. According to the DSLSA, on analyzing the data made available by the prison authorities, it transpired that as many as 1119 persons were incarcerated under the provisions of Section 107/151 Cr PC for more than 7 days during the period 1st July, 2017 to 30th June, 2018. Reference has been made to Section 436 (1) Cr PC, which reads as under:

> "436. In what cases bail to be taken.
>
> (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A."

8. The report of the DSLSA further stated that a meeting was convened on 31st August, 2018 by the DSLSA with the three SEMs of Central, New Delhi and South Districts to know about the working of the SEM Courts. The DSLSA has undertaken that the officers assigned the SEM duties shall be given orientation programmes organized by the police authorities in coordination with the DSLSA.

9. A supplementary report was submitted on 5th October, 2018 by the DSLSA. It was stated that there are 14 SEM Courts working in Delhi. The complete details have been summarized as under:

> "5. That, it was informed that 14 SEM Courts are working in Delhi. The compiled data received from all the SEM Courts reflects that in the past one year (i.e. for the period 01.07.2017 to 30.06.2018), total number of 14529 kalandras were received by SEM Courts under Section 107/151 Cr PC and in respect of these kalandras, 23012 number of persons were arrested. Out of these 23012 arrested persons, total number of 6944 persons were sent to judicial custody. And 3603 persons were discharged during the above said period."

10. It further stated that around 30.17% (i.e. 1/3rd) of the persons arrested in the one year period from 1st July, 2017 to 30th June, 2018, have been sent to judicial custody.

Proceedings in Narender's case

11. The SEM, Jahangirpuri also filed a reply dated 30th August, 2018 (which was, however, filed only on 5th October, 2018) whereby the same facts as stated earlier in relation to the detention of Narender have been furnished. The relevant proceedings have also been enclosed. It is clear that Narender

was brought in police custody before the SEM and there is no presence of any Remand Advocate shown in the proceedings.

12. The time of arrest in the arrest memo is shown as 1.30 am with the place of arrest shown as Veer Bazar Road, IP Colony, Part-I. Only a Constable Rajender seems to have attested the memo, with the relevant section of law under which he was detained being shown as 107/151 Cr PC. The substantive information was that "he was abusing and threatening / quarrelling with public". In the proceedings, it is written that the Respondent was under the influence of liquor, had beaten his neighbour and he was agitated in Court and not ready to listen. It was further noted that "he was shouting in the Court. He can cause breach of peace and disturb public tranquillity if released on bail. He has prior criminal record. Sent to JC till 19.07.2018."

13. The proceedings before the learned SEM indicate that he merely accepted the report of the police officer and sent Narender straightaway to judicial custody for a period of two weeks. The order seems to have been passed mechanically. Also the amount fixed for a personal bond in the sum of Rs.5,000/- under Section 116 (3) Cr PC appeared to be excessive and not based on any particular criteria. If the person was asking "monies for drugs" which was the reason for the quarrel with his tenant, clearly the person needed help medically. Locking him away under Section 107 read with Section 151 Cr PC was hardly going to resolve the issue.

14. What is interesting is that the SEM appeared to use a pre-printed form in which the amount of surety is already fixed irrespective of the person

brought before the SEM even at the time of notice being issued to such person under Section 107 / 111 Cr PC. That pre-printed form reads as under:

> "NOTICE u/s 107/111 Cr.PC
> Whereas from the report of SHQ/P.S._____filed by_____ on dated on the Substance of information is being that
> _____
> _____
> _____
> _____
> which may commit breach of peace or disturb the public tranquility or do any wrongful act which may probably occasion a breach of peace or disturb the public tranquility within the local limit of my jurisdiction. 1 am satisfied that there are sufficient grounds for initiating proceeding against you U/S 107/151 Cr.P.C.
>
> I Special Executive Magistrate North-West Distt, Delhi hereby require you to show cause as to why you should not be ordered to execute personal bond in the sum of Rs. 5000/- with one surety in the like amount for keeping peace for a period of one year. Given under my hand and seal of the court on _____to come up on _____
>
> SPECIAL EXECUTIVE MAGISTRATE
> NORTH WEST DISTT. DELHI.
>
> Notice has been read over and explained to the respondent in vernacular language who admitted/denied the allegations.
>
> SPECIAL EXECUTIVE MAGISTRATE
> NORTH WEST DISTT. DELHI"

15. In Narender's case, apart from merely filling up the blanks and not even

scoring out, for instance, whether he "admitted / denied" the allegations, the SEM proceeded to pass the consequential order sending Narender to judicial custody till 19th July, 2018.

16. The explanation given for advancing the case and releasing Narender as soon as notice was issued by this Court is unconvincing. It appears that but for the filing of proceedings before this Court and the subsequent intervention, the person may have remained in judicial custody, at least till 19th July, 2018. The loss of 14 days of an individual's liberty is indeed a serious issue.

Earlier instances

17. This is not the first time that the Courts have been called upon to examine the abuse of power vested in the Executive Magistrates under Sections 107 and 151 Cr PC. The matter of separation of the executive from the judiciary, as spelt out in Article 50 of the Constitution in light of the above provision of the Cr PC was gone into in ***Sukhdev Singh Dhindsa v. State of Punjab 1985 Crl. L.J 1739*** by a Full Bench of the Punjab and Haryana High Court. The challenge in that decision was to the Punjab Amendment to the Cr PC permitting Executive Magistrates, to the exclusion of any other Magistrate to exercise power in relation to specified offences. These related to maintenance of public order and tranquillity. The Full Bench dwelt on the reports of the Law Commission of India ('LCI'), and in particular, the 14th, 25th, 32nd, 33rd, 36th, 37th and 40th reports. All of these were summarized in the 41st report. One of the main recommendations in that report was to separate the 'judicial' from the 'executive' on an All-

India-basis to achieve uniformity. It was as a result of the said report that the Cr PC was re-enacted in 1973 aiming to fulfil the Directive Principles contained in Article 50 of the Constitution.

18. Analysing the provisions of the Cr PC 1973, the Full Bench of the Punjab and Haryana High Court in ***Sukhdev Singh Dhindsa v. State of Punjab*** (*supra*) observed as under:

> "After the enactment of the 1973 Code, there is no offence which is triable by an Executive Magistrate. The only power given to the Executive Magistrates is to try the cases referred to in Chapters VIII and X of the Code. It may be interesting to note that the Law Commission in its report even did not favour the trial of cases falling under Sections 108, 109 and 110 of the Code of Criminal Procedure. The relevant portion of the report reads as under:
>
> 8.10. Sections 108, 109 and 110 provide for taking security for good behaviour from persons disseminating seditious matters or matters amounting to intimidation or defamation of a Judge, from vagrants and suspected persons, and from habitual offenders, respectively. The question arises whether this power which is now vested in all senior Magistrates, judicial and executive should be vesied only in Judicial Magistrate or in Executive Magistrates or concurrently in both. The present position in the States where separation of the judicial from the executive has been effected to some extent, is not uniform. In the earlier Report, emphasis was laid on the prevention nature of these security proceedings and on their vital impact on the maintenance of law and order and the recommendation was to the effect that the powers under all the three sections should be vested exclusively in Executive Magistrates.
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> 8.11. This matter was again discussed in detail before us. We are of the view that, having regard to the fact that the final order to be passed in these proceedings affects the liberty of the person

against whom the proceedings are instituted and that sifting of evidence in a judicial manner is required before an order demanding security can justifiably be passed, it is desirable to vest these powers exclusively in Judicial Magistrate. Inquiry under any of these three sections partakes of the character of a trial, though technically the person against whom the proceedings are taken is not an accused person, there is no offence to be inquired into or tried and the ordinary rules of evidence are relaxed to some extent. All Magistrates of the first class may, in our opinion, be given powers under these three sections. At the same time, we do not think that the powers under these sections need be vested concurrently in both Judicial and Executive Magistrates although this is the position in some States at present. Under a statutory scheme of separation, such a system is likely to create confusion and even otherwise has nothing to commend it.

However, it appears that this suggestion was not accepted and cases falling under these sections were also left to be tried by the Executive Magistrates. Now, these cases stricto sensu, in our view, do not really relate to any offence. Be that as it may, the fact remains that after the enactment of the 1973 Code, there has been complete separation of Judiciary and Executive and in this manner the directive principle as contained in Article 50 of the Constitution stands complied with. But surprisingly, for no valid reason (as no indication is available in the Statement of Objects) the position with regard to specified offences has now been reversed in the State of Punjab by enacting Section 4 in the Amendment Act of 1983. under which specified offences have now been made triable exclusively by the Executive Magistrates. It is un-understandable as to why these offences have been made triable by the Executive Magistrates. Faced with this situation, the learned Advocate-General gave out his own reason for taking out these offences and giving their exclusive jurisdiction to the Executive Magistrates that the State Government was anxious that the specified offences be tried speedily and as the Judicial Magistrates were having large pending files, it was not possible for them to decide these cases expeditiously. Repeatedly we asked the learned Advocate-General to give us data to show as to, after

the enactment of this amendment Act, now (how?) expeditiously the cases have been disposed of by the Executive Magistrates, but he failed to supply such a data. Further, the learned Advocate-General has also not placed any material on the record to satisfy us that the Judicial Magistrates did not or were not in a position to dispose of cases pertaining to specified offences expeditiously. The learned Advocate-General has also not been able to point out as to what material gain has been achieved by this amendment and how has the Government succeeded in its object in dispensing justice speedily. Rather our experience during inspection -of the subordinate Courts shows that due to their other preoccupations, the Executive Magistrates have not been able to dispose of even the cases under Sections 107/151, 109, etc., of the Code of Criminal Procedure expeditiously. If the object is to ensure speedy disposal of the cases, then it may be observed with some firmness that our subordinate judiciary can help better in achieving that object. Our subordinate judiciary consists of experienced and legally trained officers. If in a given situation, cases pertaining to some particular type of cases are required to be disposed of expeditiously, then their trial can always be given priority.

26. Further, there is no gainsaying as it is an admitted fact that the Executive Magistrates are under the complete control of the Government. Their promotion, increments and seniority of services, etc. are all dependent on their higher officers, who belong to the Executive. At this stage, it may be observed that we have the highest respect for the Executive, including the Executive Magistrates and we wish to make it clear that nothing said by us in our judgment would be construed as casting any aspersion on them as a class. The Executive Magistrates like Judicial Officers occupy a position of honour and respect in society. But, we cannot shut our eyes to the statutory and constitutional position, that on the Executive Magistrates the High Court has no control and that their promotion, increments and seniority of service, etc. are all dependent upon what reports they earn from their superior officers. The Executive Magistrates are required to do all sorts of administrative work like collection of funds, arranging of functions, etc. In some case the Executive

> Magistrate may not even be legally qualified or trained person to do the judicial work. As is evident from the aims and objects of enacting the Code of Criminal Procedure, 1973, the main emphasis was that an accused person should get a fair and just trial in accordance with the accepted principles of natural justice. In the present set-up when there is complete separation of Judicial from the Executive after 1973 Code and especially when the Executive Magistrates are completely under the control of the Government, we find it very difficult to hold that an accused person charged of the offences which are now triable by the Executive Magistrates, shall ever have a feeling that he would have fair and just trial. Merely the fact that the appeal or revision is to be heard by the Sessions Court or the High Court would not give any satisfaction to the accused as it is of the greatest importance that the basic trial should inspire the confidence of the accused and when under a procedure prescribed confidence cannot be inspired, then such a procedure is to be held as unjust, unreasonable and unfair and violative of the provisions of Article 21."

19. Consequently, Section 4 of the Amendment Act, empowering the Executive Magistrates, to the exclusion of any other Magistrate, to take cognizance of and dispose of cases relating to specified offences was held to be *ultra vires* of Article 21 of the Constitution.

Historical background

20. The origins of Sections 107 and 151 Cr PC take us back to a time when Justices of the Peace (J.Ps) were given powers to ensure the maintenance of peace. Chapter-1 of the Justices of Peace Act, 1361 in the U.K. stated thus:

> "Who shall be Justices of the Peace. Their Jurisdiction over Offenders; Rioters; Barrators; They may take Surety for good Behaviour;
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> First, That in every County of England shall be assigned for the

keeping of the Peace, one Lord and with him three or four of the most worthy in the County, with some learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barators, and to pursue, arrest, take, and chastise them according their Trespass or Offence; and to cause them to be imprisoned and duly punished according to the Law and Customs of the Realm, and according to that which to them shall seem best to do by their Discretions and good Advisement; and to take and arrest all those that they may find by Indictment, or by Suspicion, and to put them in Prison; and to take of all them that be not of good Fame, where they shall be found, sufficient Surety and Mainprise of their good Behaviour towards the King and his People, and the other duly to punish; to the Intent that the People be not by such Rioters or Rebels troubled or endamaged, nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor put in the Peril which may happen of such Offenders."

21. The mere apprehension that a person was likely to commit breach of peace was enough to justify exercise of the powers. It was not necessary that there had to be some overt act.

22. The earliest version of the Cr PC was enacted in 1861 in India. This was almost simultaneous with the bringing into force of the Indian Penal Code ('IPC') with effect from 1st January, 1862. At that stage, Chapter-8 of the IPC dealt with with "offences against the public tranquillity". A mere gathering of five or more persons for an unlawful object was rendered punishable. Chapter-18 of the 1861 Cr PC contained provisions under the title 'of recognizance and security to keep the peace'. Chapter-19 was titled 'security for good behaviour'.

23. The 1861 Cr PC was repealed by the 1872 Cr PC. Section 491 of the

1872 Cr PC vested powers in a Magistrate to require a person to enter into a bond to keep peace. Extending these powers to presidency towns, separate statutes were enacted for the different presidencies vesting similar powers in the Executive Magistrates operating in those presidencies. Section 107 of the 1882 Cr PC was a reincarnation of Section 491 and the last paragraph of Section 502 of the 1872 Cr PC relating to security for keeping the peace.

Section 107 Cr PC

24. The Cr PC 1973 recast the language of the above provision and vested the preventive detention jurisdiction with the Executive Magistrate. In 1978, Section 107 (1) was amended to insert after the words 'order to execute the bond' with the words 'with or without surety'. Section 107 now reads as under:

> "107. Security for keeping the peace in other cases
> (1) When an Executive Magistrate receives information that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity and is of opinion that there is sufficient ground for proceeding, he may, in the manner hereinafter provided, require such 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.
>
> (2) Proceedings under this section may be taken before any Executive Magistrate when either the place where the breach of the peace or disturbance is apprehended is within his local jurisdiction or there is within such jurisdiction a person who is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act as aforesaid beyond such jurisdiction."

25. In ***Madhu Limaye v Sub-divisional Magistrate, Monghyr (1970) 3 SCC 746***, the Supreme Court analysed Section 107 Cr PC in the context of the Article 22 of the Constitution and observed as under:

> "34. The gist of Section 107 may now be given. 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 tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity. 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 a person in custody pending further action by him
>
> 37. We have seen the provision of Section 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.

> 45. 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, not 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.
>
> 50. There is also no question of bail to the person because if instead of an interim bond bail for appearance was admissible Chapter VIII would undoubtedly have said so. Further bail is only for the continued appearance of a person and not to prevent him from committing certain acts. To release a person being proceeded against under Sections 107/112 of the Code is to frustrate the very purpose of the proceedings unless his good behaviour is ensured by taking a bond in that behalf."

26. The nature of the proceedings under Section 107 Cr PC appears to be inquisitorial in the sense that what is conducted thereunder is an inquiry and not a trial. However, judicial decisions have clarified the procedure expected to be followed. This Court would first like to refer to the decision of this Court in ***Sunil Batra v. Commissioner of Police (1985) ILR 1 Delhi 694***.

An application was received from the Petitioner in this Court from the Tihar jail pointing out that "a large number of persons are unjustifiably arrested by the Police apparently under Section 107 Criminal Procedure Code without complying with the provisions of law and that they are kept in jail without being offered the facility of being released on bail. It was also stated that none of these persons were supplied the reasons for which apparently the proceedings were being taken against them. We then issued notice to the Delhi Administration."

27. An affidavit was filed on 25th November, 1983 which pointed out that

> "The prisoners who are committed to jail custody under Section 114 Cr.PC are not supplied the reasons and the warrants which accompanied them are in blank form which is the violation of the statute. Further affidavit were filed by persons who were in jail taking the stand that they were not guilty and that they have been wrongly picked up by the police and remanded to judicial custody, that they do not have knowledge of the bail order having been passed in their favour and in any case could not have finished bail because they have no resources nor any friends who could do so."

28. This Court in ***Sunil Batra v. Commissioner of Police*** (*supra*) then called for the full record and files of some of the cases. Affidavits were called in certain individual cases from the Assistant Commissioner of Police ('ACP/SEM') dealing with the case. This Court again dwelt on the requirement of the State having to take steps to separate the judiciary from the executive. The Court noted that in its 41st report published in 1969, the LCI had observed that it was not necessary to vest the powers under Section 107 Cr PC in judicial magistrates concurrently. This Court then observed as under:

> "How one little gateway which destroys the concept of separation of executive and judiciary can result in wider power being snatched by the Executive is clear from the history of legislation of Sections 108 to 110 of the Criminal Procedure Code. In that very report (41st) the Law Commission had noted that as power under sections 108 to 110 affects the liberty of the person against whom the proceedings are instituted, it is desirable to vest those powers exclusively in judicial magistrates. The Law Commission also did not think that the powers under these sections need be vested concurrently in both the judicial and executive magistrates although this was the position in some States at present. According to the Law Commission under a statutory scheme of separation, such a system is likely to create confusion and even otherwise has nothing to commend it. The Law Commission, however, did not realise that having provided an opening that the proceedings under Section 107 which also deal with liberty of citizens, may vest in the Executive Magistrates, this argument had lost its punch. Though in the unamended Code of Criminal Procedure 1973 Sections 108 to110 require proceedings to be taken before a judicial magistrate of the first class the said part was amended by Act No.63180 by substituting the word "Executive Magistrate" for a "Judicial Magistrate". It is indeed ironical that though the legislature may seek to justify the provision of a "Executive Magistrate" in Section 107 by seeking aid from the report of the Law Commission, yet at the same time it should have overturned it when amending the Code in 1980 and thus acting against the specific recommendation of the Law Commission with regard to Sections 108 to 110 Criminal Procedure Code."

29. This Court ***Sunil Batra v. Commissioner of Police*** (*supra*) observed that the position in Delhi was "even worse". After noticing that Delhi was governed by the Delhi Police Act, 1978 ('DPA') which was in force since 1st July, 1978, it noticed that Section 70 of the DPA authorized the Central Government "to empower the Commissioner or any other subordinate to the Commissioner of Police not below the rank of an Assistant Commissioner of

Police to exercise and perform in relation to Such area in Delhi as may be specified in the notification, the powers and duties of an Executive Magistrate under such of the provisions of the said code us may be specified in the notification."

30. It was further noticed that every ACP/DCP/Additional DCP/ Assistant CP have been authorized to exercise and perform in relation to the Union Territory of Delhi the powers and duties of an Executive Magistrate under Sections 107 and 111, 113, 115, 116, 117, 118 and 121 of the Cr PC. This Court then observed as under:

> "Thus in Delhi the capital of Republic of India proceedings which have serious repercussions concerning the liberties of the citizens of India are to be controlled by police officers exercising the powers of executive magistrates. A more serious in-road on the concept of separation of powers between instrumentalities States, namely the judiciary and executive is hard to imagine though unfortunately the ancestry for then situation may be traced back to peculiar recommendation of law commission report. But whatever the source, the seriousness of the situation is not lessned. Need one be surprised at the consequences which must inevitably flow from such a retrogressive step."

31. In ***Sunil Batra v. Commissioner of Police*** (*supra*), this Court noticed that the proforma used by the SEM were cyclostyled. The observations in this regard read as under:

> "The file of Balbir Singh shows that on that date i.e. 10/10/1983 he was asked whether he had received the order under Section 111 and whether he has understood the order and to both of them the answer is yes. The peculiarity and the surprising feature of this record is that the whole Performa is cyclostyled. Even the answers whether the notice under Section 111 has been served on him is already cyclostyled with only one answer namely 'yes'. It

is rather curious because this would seem to show that the cyclostyled forms have already put the answers of the persons arrested as 'Yes'. This does show the unsatisfactory manner in which the proceedings are taking place. One could understand a cyclostyled form containing questions, especially as possibly a number of persons may have to be examined. But then proceedings must show that the Executive Magistrate has applied his mind. There should at least be a column containing answers both ‘yes' and 'no' because it is the answers of persons which has to be put there and it cannot always be assumed that the answer is 'yes' in all the cases as seems to be the practice as indicated in the cyclostyled form. Moreover, the form is in English and the' person arrested Balbir Singh apparently was totally illiterate because his thumb impression is there meaning that he could not ever write any of the Indian languages. The questions posed by the applicant cannot be brushed aside. As to what kind of a proper procedure was being followed by the Executive Magistrate when disposing of the matter like this we then have on the record the statement allegedly made by the police officer to show how and why he arrested Balbir Singh and noting that opportunity for cross examination was given but none was availed of. This again is a strange phenomenon. A person brought in police custody could not have been in a position to engage a counsel. And to expect him to cross examine himself would be to make a mockery of his rights to have a fair trial. The record also discloses that proceedings are initiated without any seriousness it appears the purpose is to arrest on a particular day. 'The immediate purpose having been served the case is forgotten and in the course of time both the police and the Magistrate loss sight of him and ultimately, as is clear from the record of this ease the proceedings are terminated without any proceedings having taken place. One can well imagine the harassment and the inconvenience and the loss of liberty that is occasioned to the person concerned. This aspect needs to be looked into seriously.”

32. This Court in ***Sunil Batra v. Commissioner of Police*** (*supra*) then issued the following directions:

> "In our view, it is necessary that when the person is produced before the Magistrate should be supplied the reasons why the Magistrate wants a "bond to be executed. In our view it is also absolutely necessary that when a person is sent to jail on his inability to pay the surety, the warrant that is sent must be accompanied by a copy of the order made under Section 111. The Superintendent of Jail should sec to it that when any warrant is received it must contain the reasons as required by Section 111 Cr. Pc as is the requirement of Section 114 Cr PC. The Superintendent of Jail and his staff should satisfy themselves that this requirement is satisfied because if it is not then it is a moot question whether such a custody would be legal at all. We need not in these proceedings go any further because as all the applicants who had applied and whose names had been given are no longer now being proceeded against and therefore, no directions are necessary. But we are very anxious, to see that the various lacunae and procedural violations must stop at once. We hope immediate appropriate steps will be taken by the appropriate authorities. Let A copy of this order be sent to the Delhi Administration and to the Commissioner of Police, Delhi so that proper directions and remedial measures are taken by the authorities concerned at the earliest.

33. Going by what has happened in Narender's case, which has resulted in the present petition, nothing much appears to have changed since then.

34. This Court revisited the issue within five years in ***Tavinder Kumar v. State 40 (1990) DLT 210***, where the learned Single Judge found that a cyclostyled proforma was filled in by the SEM while ordering notice to be issued under Section 111 Cr PC requiring the Petitioners to execute a personal bond in the sum of Rs.3,000/- with one/two sureties in the like amount. The Court also noticed that a cyclostyle noticed under Section 111 of the Cr PC which was undated and unsigned stood filled and was lying in the file. Analysing Section 107 Cr PC, the Court observed as under:

"(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 find 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 inch 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 be 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 hound 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 stag 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 bad commenced. It is really surprising that the learned Magistrate bad got ready an order under Section 116(3) of the Code before, even be bad 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."

Section 151 Cr PC

35. At this stage, a reference may also be made to Section 151 of the Cr PC which reads as under:

"151. Arrest to prevent the commission of cognizable offences.

(1) A police officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.
(2) No person arrested under sub- section (1) shall be detained in custody for a period exceeding twenty- four hours from the time of his arrest unless his further detention is required or

authorised under any other provisions of this Code or of any other law for the time being in force."

36. As far as the history of this provision is concerned, it was the replacement of Section 97 of the Code of 1872, Section 151 of the Code of 1882 as well as 1898. Section 151(2) of Cr PC, 1973 brings the provision in tune with Article 22(1) of the Constitution inasmuch as it requires the person arrested under Section 151(1) not to be detained for a period exceeding 24 hours from the time of his arrest unless further detention is required or authorized under any other provisions of the code or any other law for the time being in force.

37. The LCI in its 41st report had not recommended a change to chapter 13 of the Cr PC. However, the Joint Committee of Parliament in its report dated 4th December 1972 clarified as under:

> "The Committee considers it necessary to clarify certain points relating to preventive arrests made by a police officer under the provisions of this clause so as to reduce the scope for abuse or misuse of the power. Firstly, it is necessary to clarify that all the provisions of the Code applicable to arrest without warrant, *e.g.* production before Magistrate within a stipulated time informing the arrested person on the grounds of arrest, etc. should as far as may be, apply to any person arrested under this provision. Secondly, the person arrested should have the right to be released on bail if he otherwise entitled to be so released. The intention is that if after the arrest no proceedings are instituted against him either to demand a security bond from him or for launching proceedings against him as an accused in connection with an offence, he should be discharged. Finally, it is also necessary that the release from arrest should be under the orders of a Magistrate as otherwise the provision is likely to be abused.
>
> New sub-clause (2) added to the clause seeks to provide for the above."

38. Clearly, therefore, the Parliament itself was conscious of the possible misuse of the above powers. The NHRC in its 'Guidelines for Police Personnel on various Human Right Issues, 2010' placed reliance on the LCI's Consultation Papers on the law relating to arrest and observed as under:

> "Studies show that the number of preventive arrests and arrests for petty offences were substantially large, the percentage of under trial prisoners was unusually high and most of them were there because they were not able to post bail or furnish sureties."

39. In ***R.D. Upadhyay v State of Andhra Pradesh 1999 (1) SCALE 139***, the Supreme Court noticed the reality in the State of Punjab as of that date and ordered as under:

> "3. On a perusal of the various charts filed by the State of Punjab in response to the orders passed by this Court from time to time, it has come to our notice that in the State of Punjab, there are 140 under trial prisoners for offences under Sections 107/151 Cr.P.C. Out of this 36 have been released on bail and 104 have not been released on bail and are in jail for more than 6 months.
>
> 4. We direct that these under prisoners shall be released on bail on furnishing personal bonds to the Chief Judicial Magistrates concerned. This direction will be effective in respect of other States also where the under trials prisoners for offences under Sections 107/151 Cr.P.C. are in jail for more than 6 months."

40. Meanwhile, other High Courts too were expressing their concern about the misuse of the provisions under Section 107, 116 and 151 Cr PC. The Indore Bench of the Madhya Pradesh High Court in ***Arursingh v. State of MP 1984 Crl LJ 1616 (MP)*** issued the following directions to be followed by all the Magistrates while dealing with cases under the above provisions**:**

> "(A) The Magistrate should stress upon the recording of statements to the investigation officer/witness before initiating any proceedings u/s 107/116/151 CrPC.
>
> (B) The Magistrate should not order furnishing of surety in the absence of statements of IO/witnesses.
>
> (C) The Magistrate should not send the detune to jail for failure to furnish surety as directed by him, in case statements of IO/witnesses have not been recorded.
>
> (D) The Magistrate should not sign the order in a mechanical manner on a cyclostyled paper but it should be well reasoned and detailed one."

41. This Court took *suo motu* action in Crl. Reference No.1 of 2007 and endorsed the above directions issued by the MP High Court.

Standing Orders of the Delhi Police

42. In 2007 this Court came across several instances of SEMs exceeding their jurisdiction in the matter of not accepting sureties and not giving reasons therefor. These have been noticed in the standing order No.189 of 2008 issued by the Commissioner of Police, Delhi on 11th June 2008 as under:

> "Similarly in the matter of Sanjeev Kumar Singh vs. State of NCT of Delhi – W.P (Crl) 264/2007, the Hon'ble High Court of Delhi, held that the S.E.M had exceeded his jurisdiction by not accepting the surety order for Rs.5000/- and later accepted surety of Rs.15000/- Despite recovery of a PAN card and visiting cards from arrested person, bail bonds were sent for verification which was not necessary. In W.P (Crl.) 2448/2007, Keshav Kumar vs. State, the Hon'ble High Court of Delhi had observed that while a perusal of the complaint did not disclose the commission of cognizable offence, but on the same

complaint, police officials went to the petitioner's house and arrested him U/S 107/151 CrPC. In this case also no reason was given by the S.E.M.as to why the bail bond and surety produced were not accepted on the same day in W.P (Crl.) 1392-2007 Purshottam Ramanani vs Government of NCT of Delhi, the Hon'ble High Court of Delhi had held that the informant who gave a call at '100' to the police and made a complaint about locks being broken was wrongly arrested U/S 107/151 Cr PC and sent to jail whereas the appropriate course of action should have been action U/S 145 Cr PC. The Hon'ble High Court of Delhi had taken a suo motu action in Criminal Reference No. 01/07 and directed all detenues U/S 107/151 Cr PC to be released on personal bond to avoid overcrowding of Tihar Jail."

43. The instructions issued to the police officers in the said standing order read as under:

> "All the police officers while dealing with cases U/S 107/151 Cr PC should keep in the mind the above mentioned guidelines/directions mentioned above before initiating any action. They must have the prior concurrence from the concerned ACPs I/C subdivisions before effecting any arrest U/S 151 Cr PC. This must be meticulously observed. The ACPs should not give their approval in mechanical manner but must act strictly as per the law/direction given by various courts to ensure that there is no misuse of these provisions of the law. The SEMs must realise the onerous responsibility they carry and act in a fair and transparent manner in accordance with guidelines laid down by the courts and summarised in this S.O."

44. In the meanwhile, on 17th March 2008, this Court in ***Asha Pant v. State 2008 (102) DRJ 216*** came across another instance of misuse of the powers under Section 107 Cr PC. After noticing the earlier decisions this Court summarised the legal position as under:

> "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 Cr PC 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 neighbours in a property, or between a landlord and tenant residing in the same premises, the notice under Section 107 Cr PC 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."

45. In 2009, in ***Moinuddin v. State*** [decision dated 27th October 2009 in WP (C) 6046/2008] the Division Bench of this Court reproduced the aforementioned standing order as part of its order and felt that no further directions were required to be issued. This was under the expectation that the aforementioned directions would be scrupulously observed.

46. The Bombay High Court has also on several occasions noticed the misuse of the powers by SEMs in Maharashtra. A sampling of those decisions are ***Christalin Costa v. State of Goa 1993 (1) Bom CR 688, Chandrabhan s/o Rama Dhengle v. Indarbai s/o Chandrabhan Dhengle 1998 (1) Mh LJ 234, Surendra Ramchandra v. State of Maharashtra 2001***

(4) Mh LJ 601 and ***Pravin Vijaykumar Taware v. The Special Executive Magistrate 2009 (111) Bom LR 3166.*** In the last mentioned decision the Bombay High Court took judicial notice of the ground reality and observed:

> "Number of cases are coming before this Court complaining of an abuse of powers by the Executive Magistrate under Chapter VIII of the Criminal Procedure Code. These cases come from the cities or bigger towns. This Court has not seen a case coming from a remote village.
>
> Obviously, the people living in such areas do not find it possible to reach the High Court. Therefore, this Court presumes that these powers may be abused with impunity as the persons suffering under these areas may not be able to reach the High Court."

47. Further, in ***Pravin Vijaykumar Taware v. The Special Executive Magistrate*** (*supra*) the Bombay High Court issued the following directions:

> "(1) That the State Government shall immediately take steps to train its all Executive Magistrates so that they understand as to how the provisions of Chapter VIII of the Criminal Procedure Code have to be applied.
>
> (2) We understand that there is a police academy in the State. All the Executive Magistrate should undergo a crash course. Preferably the Sessions Judges should be invited to teach these Magistrate about the nuances of law, so that the powers are not abused or misused by the Executive Magistrate.
>
> (3) Whenever, an order is passed by a Magistrate at interim stage or at final stage requiring a person to give a bond, he shall be given sufficient time to furnish the bond and the surety.
>
> (4) At the stage of inquiry, the Magistrate shall not ask for an interim bond pending inquiry unless the Magistrate has satisfied himself about the truth of the information sufficient to make out a case for seeking a bond.

(5) Whenever, an Executive Magistrate passes an order under sub-section (3) of Section 116 of Chapter VIII of the Criminal Procedure Code directing a person to be sent to jail, a copy of the order shall be sent to the learned Principal Sessions Judge immediately.

(6) On receiving copy of the order, the learned Principal Sessions Judge shall go through the order and if he finds a case of revision, he may intervene under Section 397 of the Criminal Procedure Code.

(7) A copy of the order directing a person to be sent to jail under Chapter VIII of the Criminal Procedure Code shall also be sent to the immediate superior of the Magistrate in his Department."

48. In ***Medha Patkar v. State of Madhya Pradesh 2008 Crl LJ 47***, the Madhya Pradesh High Court was dealing with a letter petition dated 26th July, 2007 sent by the Petitioner from the District Jail, Indore, on behalf of the people affected by the Sardar Sarovar Project while agitating for the demands for rehabilitation. These people had been arrested under Section 151 Cr PC and detained in the Bharwani and Indore Jails. The Division Bench of the Madhya Pradesh High Court noted that this was at the instance of wrongful exercise of powers under Sections 107 and 151 Cr PC and held such actions violate Articles 19 (1) (a) and (1) (b) as well as Article 21 of the arrested persons. It ordered the State of Madhya Pradesh to pay Rs.10,000/- as compensation.

Issues of access to justice

49. To revert to the facts of the present case, apart from a very large number of persons being kept incarcerated (7335 persons in just one year from 1st

July 2017 to 13th June 2018) by arresting them under Sections 107/151 Cr PC, and this just being the figure in the capital city, the Court finds that there is also a palpable bias in the exercise of these powers because a significant percentage of those so incarcerated belong to the minority community. It is also apparent that many of them belong to the economically weaker sections of society and are unable to provide the sureties required. Time and again, this Court has had to intervene to order their release on personal bonds. It is, therefore, a rampant and indiscriminate use of the aforementioned powers notwithstanding the standing orders issued from time to time and notwithstanding the numerous judgments referred to hereinbefore.

50. In this context, one aspect of the matter which has not been adequately addressed is the lack of legal aid to a person arrested under the above provisions. Although the DSLSA appears to have stepped in and ordered, from 1st June 2018 onwards that Remand Advocates be appointed in the Courts of the SEMs who are supposed to remain present in the Courts of SEMs on the days as per the schedule of such SEMs, the proceedings of the SEM in Narender's case do not record the presence of any such Advocate which includes the proceedings that took place on 6th July 2018 and even 19th July 2018.

51. The proceedings of 19th July 2018 record that Narender is absent and directs the issuance of bailable warrants for 16th August 2018. This was after an order passed on 11th July 2018 (which was not a date on which a hearing had been scheduled) to the following effect:

> "Surety of respondent Narender is appeared in the court and heard executed his bail bond as ordered which is accepted and

kept on file. Respondent may be released from jail on bail. Issued release warrants to Supdt. of Central Jail."

52. Clearly the above order was passed because this Court had on that very date, i.e. 11th July 2018, directed the production of Narender in the Court and directed the SHO of PS Swaroop Nagar to collect the relevant papers from the concerned SEM. Thereafter on 16th August 2018 the following order was passed:

"16.08.18
Respondent Narender is present in the court. Heard the respondent in detail. During hearing respondent plead guilty as per kalandara report. His confessional statement is recorded. Therefore, I order U/S 107/117 Cr.P.C. for the respondent to execute his personal bond in the sum of Rs. 5,000/- with one surety of same amount for keeping peace m future for a period of one year. Respondent has executed his personal bond with surety bond as ordered which is accepted and kept on file. Respondent is hereby bound down U/S 107/117 Cr.P.C. as ordered above. Announced in the open court. Case file be consigned to record."

53. The orders have been reproduced in full to indicate how the law actually works. In the first instance, it should be noticed that there was no presence of any advocate for the person who was arrested. The SEMs did not even bother to tell him that he has a right to be represented by an advocate. Secondly, notwithstanding the DSLSA's orders for Remand Advocates to be present from 1st June 2018 onwards, there was no such Remand Advocate present before the SEM (North-West) when the above order was passed on 16th August 2018. It further records that the person confessed and his confessional statement was recorded. This was after he pleaded guilty "as per *kalandra* report." There is no indication that the Respondent was told

that he has a right against self-incrimination. After all, the recording of such an admission of guilt would go into his past record and adversely affect him as far as any possible future action by the police or the SEM is concerned. Clearly Narender did not understand the consequences and the SEM also did not bother to apprise him of the same.

What the Constitution mandates

54. Under the Constitution, an individual's liberty is granted the highest protection. Article 21 of the Constitution guarantees that no person shall be deprived of his life or liberty except in accordance with the procedure established by law. The provisions that are being discussed in this judgment i.e. Sections 107, 111, 116 and 151 Cr PC and the other provisions under the Chapter of Preventive Arrest in the Cr PC when invoked do affect the life and liberty of the persons ordered to be arrested therein. Therefore, these provisions are amenable and have to be tested on the touchstone of Article 21 of the Constitution. The procedure has to be just, fair and reasonable.

55. What are the elements that constitute the fair and reasonable procedure? Here the Constitution itself and in particular part-III provides the answer. Article 22 of the Constitution which is relevant for the present purpose reads as under:

> "22 (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
>
> (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary

for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply (a) to any person who for the time being is an enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention."

56. It is mandatory that under Article 22(1), every person who is arrested has to be produced before a Magistrate within 24 hours and after being so produced has to be informed of the grounds of his arrest and also has to be told of his right to be defended by a lawyer of his choice. These are two non-derogable rights and there is no exception to this requirement even by the arrest under Sections 107/151 Cr PC or under any of the other provisions concerning preventive arrest under the Cr PC.

57. Reference has already been made to the LCI's report Nos.37 and 41. In its 177th report titled 'Law relating to arrest', the LCI noted the suggestion received by it that Section 151 Cr PC has to be reviewed "to ensure against its misuse and that in case a human rights defender is arrested thereunder he must be produced before a Judicial Magistrate within 24 hours."

58. In ***Joginder Kumar v. State of Uttar Pradesh (1994) 4 SCC 260***, the Supreme Court clarified that 'an arrested person being held in custody, is entitled, if he so requests to have one friend, relative or other person, who is known to him or likely to take interest in his welfare, told, as far as practicable, that he has been arrested and where he is being detained. The police officer shall inform the arrested person of this right, when he is

brought to the police station.'

59. Although the right to free legal aid is a Directive Principle under Article 39-A of the Constitution, the right of access to justice has now been recognised to be a fundamental right by the Supreme Court in a series of decisions including ***Anita Kushwaha v. Pushap Sudan (2016) 8 SCC 509; Tamilnad Mercantile Shareholders Welfare Association v. SC Sekar (2009) 2 SCC 784*** and ***Imtiyaz Ahmad v State of Uttar Pradesh (2012) 2 SCC 688***. This right enures at all stages of the criminal justice process as has been repeatedly emphasised by the Supreme Court including its latest pronouncement in ***Md. Ajmal Kasab v. State Of Maharashtra (2012) 9 SCC 1.*** In the last mentioned decision, the Supreme Court observed as under:

> "484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.
>
> 485. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police

> interrogation. According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 Code of Criminal Procedure; to represent him when the court examines the chargesheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the Miranda principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice."

60. The right to free legal aid is recognised statutorily under Section 12 (d) of the Legal Services Authorities Act, 1987 (LSAA). That provision guarantees that every person in custody will be provided free legal aid. This also explains how, even if the person is unable to engage a lawyer of his choice, he will be nevertheless provided with free legal aid when he is first produced before a Magistrate be it a Judicial Magistrate or an Executive Magistrate. The DSLSA sought to operationalise this by issuing instructions effective from 1st June 2018 that Remand Advocates would be available for proceedings before SEMs on the days that those Courts were functioning.

61. However, as can be seen in Narender's case, the above instructions have not been complied with. Apart from other illegalities vitiating the orders in the said case, it is plain that Narender was denied the fundamental right of access to justice and not provided with legal representation. Narender,

coming from an economically weaker section of society, was entitled to be informed in terms of Article 22 (1) of the grounds of his arrest. The summons was issued to him in English. It is not clear if he even understood what was written therein. It was incumbent, therefore, for the SEM to first satisfy himself that Narender had been communicated of the grounds of his arrest in a language understood by him. There is no indication in any of the proceedings that this mandatory requirement of the Constitution was complied with by the SEM.

62. These are not merely directory provisions, noncompliance of which can be overlooked by public officials exercising coercive criminal power of arrest and remand. They are duty bound, as public officials exercising statutory powers to be not only aware of the requirements of constitutional law but also scrupulously follow them in every instance of exercise of such power. The mere fact that a large number of persons have been brought before SEMs after being arrested under Sections 107, 111, 116 and 151 Cr PC will constitute no excuse whatsoever for overlooking the above statutory requirements.

63. Further, the SEM has to apply his mind to the application for remand made before him by the arresting officer and find out in fact if an order of judicial remand is warranted. Despite several decisions of the Courts decrying the use of cyclostyled forms, even till date this practice is being followed. The SEMs simply do not appear to apply their minds and seriously consider whether the remand is required at all and for what period is it actually required. The very nature of the provisions for 'Preventive Arrest'

i.e. Sections 107 and 151 Cr PC, and other similar provisions in the same chapter of the Cr PC, is that they are to be exercised in cases of emergency under imminent threat to law and order. By their very nature, these are temporary measures. Sections 107 and 151 Cr are not meant to be used to lock up a person for long periods of two weeks and above under the garb of 'preventing them' from committing a crime. As it may be noticed, mere unruly behaviour in a public place can attract this provision. There need not be actual commission of a crime. The mere apprehension of breach of peace is sufficient. This explains how easy it is to misuse these powers and lock away persons for long periods. In ***Sathi Sundaresh v. State 2007 (4) Kar LJ 649***, the Karnataka High Court notes that "Provisions of Chapter (VIII) may be easily made an engine of injustice and oppression and the High Court will exercise the closest scrutiny to prevent the same."

64. The persons sought to be locked away under 'preventive arrest' provisions invariably belong to the economically weaker sections of the society. Therefore, the SEM will have to apply his mind even as regards fixing the sum in which the person arrested has to provide a personal bond and/ or surety. The past experience of this Court as noted in various decisions hereinbefore and even in the standing orders issued by the police reveals that these surety amounts are fixed at an unreasonably high figure which generally makes it impossible for the person arrested to provide the bond and the surety as directed. This is the reason that such persons continue to remain in jail for long periods which has been found to be arbitrary and an unreasonable use of these powers.

65. In the present case, the third difficulty with the orders passed by the SEM is recording the plea of guilt of the person arrested without advising him about his constitutional right against self incrimination spelt out in Article 20(3) of the Constitution which reads as under:

> "(3) No person accused of any offence shall be compelled to be a witness against himself."

66. The Court expresses its doubts whether the SEMs who are exercising the above powers are even aware of the requirements of Articles 20, 21 and 22 of the Constitution. They also do not appear to be aware of the requirements of the LSAA or the schemes announced by the National Legal Services Authority (NLSA) or the DSLSA. All of the above provisions in the Constitution of India and the Cr PC as explained by several decisions of the Court and the LSAA appear to remain on paper. Meanwhile, the rights against arbitrary denial of life and liberty of persons continue to be violated with impunity.

67. The Court is concerned that this should not become another judgment where a large number of directions have been issued, reiterating the earlier directions in the firm hope that the behaviour on the ground will change. Enough has been said on the matter of misuse.

Challenge to the constitutional validity of Sections 107 and151 Cr PC

68. In ***Ahmed Noormohmed Bhatti v. State of Gujarat AIR 2005 SC 2115***, the Supreme Court dealing with the correctness of the decision of the Gujarat High Court which had negated the challenge to the constitutional validity of Section 151 Cr PC observed as under:

> "10. Counsel for the petitioner submitted that such requirements must be laid down in the case of an arrest under Section 151 of the Code of Criminal Procedure. Counsel for the respondents conceded that the requirements laid down in Joginder Kumar (supra) and D.K. Basu (supra) apply also to an arrest made under Section 151 of the Code of Criminal Procedure. As we have noticed earlier, Section 151 of the Code of Criminal Procedure itself makes provision for the circumstances in which an arrest can be made under that Section and also places a limitation on the period for which a person so arrested may be detained. The guidelines are inbuilt in the provision itself Those statutory guidelines read with the requirements laid down by this Court in Joginder Kumar (supra) and D.K. Basu (supra) provide an assurance that the power shall not be abused and in case of abuse, the authority concerned shall be adequately punished. A provision cannot be held to be unreasonable or arbitrary and, therefore, unconstitutional, merely because the authority vested with the power may abuse his authority. Since several cases of abuse of authority in matters of arrest and detention have come to the notice of this Court, this Court has laid down the requirements, which have to be followed in all cases of arrest and detention.
>
> 11. We, therefore, find no substance in the contention that Section 151 of the Code of Criminal Procedure is unconstitutional and ultra vires the constitutional provisions."

69. Recently, in ***Rajender Singh Pathania v. State (2011) 13 SCC 329*** the Supreme Court was dealing with an appeal against the judgment of the Delhi High Court where the plea to quash the proceedings under Sections 107 and 151 Cr PC had been negated. The Supreme Court observed as under:

> "14. The object of the Sections 107/151 Code of Criminal Procedure are of preventive justice and not punitive. Section 151 should only be invoked when there is imminent danger to peace or likelihood of breach of peace under Section 107 Code

> of Criminal Procedure. An arrest under Section 151 can be supported when the person to be arrested designs to commit a cognizable offence. If a proceeding under Sections 107/151 appears to be absolutely necessary to deal with the threatened apprehension of breach of peace, it is incumbent upon the authority concerned to take prompt action. The jurisdiction vested in a Magistrate to act under Section 107 is to be exercised in emergent situation.
>
> 15. A mere perusal of Section 151 of the Code of Criminal Procedure makes it clear that the conditions under which a police officer may arrest a person without an order from a Magistrate and without a warrant have been laid down in Section 151. He can do so only if he has come to know of a design of the person concerned to commit any cognizable offence. A further condition for the exercise of such power, which must also be fulfilled, is that the arrest should be made only if it appears to the police officer concerned that the commission of the offence cannot be otherwise prevented. The Section, therefore, expressly lays down the requirements for exercise of the power to arrest without an order from a Magistrate and without warrant. If these conditions are not fulfilled and, a person is arrested under Section 151 Code of Criminal Procedure, the arresting authority may be exposed to proceedings under the law for violating the fundamental rights inherent in Articles 21 and 22 of Constitution."

70. In view of the above decisions of the Supreme Court, this Court is, therefore, not persuaded to examine the constitutional validity of the Section 107 or 151 Cr PC.

Directions

71. Nevertheless, it finds it necessary to issue series of directions to ensure that the provisions are not abused or misused by the SEMs as under:

(i) As far as the NCT of Delhi is concerned, the Lieutenant Governor

('LG') will consider setting up an oversight mechanism to periodically review the exercise of powers by the SEMs under Sections 107 and 151 Cr PC. Such mechanism can consist of retired District Judges. Corrective action requires to be taken to check the abuse of powers. The LG will also consider calling these public officials as Special Executive Officers rather than SEMs as the appellation Magistrate is likely to be mistaken for a Judicial Magistrate which SEMs clearly are not. They are, at present, invariably police officers who simultaneously function as ACPs.

(ii) Since the arrest is only 'preventive', the LG will consider issuing instructions to the prison authorities to create separate spaces within the jail so that the persons who are arrested are not mixed up with the other persons arrested for actual commission of offences.

(iii) The period of judicial custody under Sections 107/151 Cr PC at any one given point in time, will never exceed more than seven (7) days. There must be a weekly review by the SEMs exercising the powers concerned, of the need to continue detention.

(iv) In particular, after directing the release of a person upon furnishing a personal bond and not insisting on surety where such a person is not in a position to furnish surety, the SEM's task will not end. The SEM will keep the matter pending for follow-up on whether the person has actually been released on having furnishing a personal bond and / or surety. If within two days of the order of release, if a person has actually not come out of the jail, the SEM should inquire into the situation and pass further orders to ensure the release of such persons by either accepting a personal bond of such person and/or surety of a

lesser sum, if at all, that can be afforded by such person.

(v) No order of remanding a person to a judicial custody can be passed by the SEM without satisfying himself:

(a) That the person arrested has been informed of his constitutional rights under Articles 20, 21 and 22 of the Constitution. The SEM should himself explain or have it explained to the person in his presence in a language understood by that person of the aforementioned constitutional rights.

(b) The SEM must ask the person arrested whether he has been informed, in the language understood by him, of the grounds of his arrest and this record this in the order that he is going to pass.

(c) The SEM will ask the person whether he wishes to engage a lawyer of his choice and also inform him that he can avail the services of a remand advocate who will remain present when these proceedings are being conducted.

(d) The SEM will allow the remand advocate to interact with the person arrested outside the hearing distance of the police officers who have got the person arrested in order to enable the remand advocate to obtain the necessary instructions.

(e) The SEM will ensure that the remand advocate is performing his functions as required under the LSAA i.e. he is also a person aware of the constitutional rights of a person arrested and will act accordingly.

(f) The SEM will record in his proceedings that all of the above provisions have been effectively complied with.

(vi) Despite the numerous orders passed and reports given by LCI and NHRC, the ground situation does not appear to have changed. One clear pointer is to the lack of the training of the SEMs in the provisions of the Constitution and the Cr PC and the various judgments pronounced by the Courts from time to time. Consequently, the following directions are issued by the Court:

(a) Not later than from two months from today, the DSLSA in association with Delhi Judicial Academy will conduct a three-day training workshop for a batch of at least 20 SEMs who are currently holding those positions and train them on the constitutional requirements of their role. The background reading material prepared will comprise the aforementioned decisions of the Court with the reports of the LCI, NHRC as well as this decision and a detailed set of instructions as to how the SEMs should exercise the powers under Sections 107 and 151 Cr PC and even the model orders that they could follow.

(b) The training, apart from lectures, should involve engaging the participants in role play so that there is a practical hands-on experience of how to deal with a real-life situation.

(c) The participants in the training workshop will also include the ACPs of the different areas. Former police officers of senior ranks, former District Judges and former IAS officers will all form part of the resource persons to impart such training apart from former academics, serving judges and senior lawyers well-versed in the area of criminal law.

(d) Within a period of six months from today, such training workshops will be conducted at regular intervals so that a maximum number of SEMs exercising powers under Sections 107 and 151 Cr PC receive the training. This exercise will be repeated after a period of one year with the next set of SEMs when they are vested with the powers under Section 151 and 107 Cr PC.

(vii) The Principal Secretary, Home will periodically visit the Courts of SEMs on a spot checking on a surprised check basis accompanied by the Secretary, DSLSA to ensure that the misuse of the powers of the SEMs is curbed. This should happen at least once or twice in every month.

(viii) When a person is booked under Chapter-8 proceedings and asked to furnish surety bonds, the practice at present is to send the surety bonds to the concerned SHO for verification. The person is not released till such a verification is complete. Instead, it is directed that the person arrested should be released on his personal bond till such time the verification is complete instead of sending him to judicial custody.

(ix) A board should be placed outside the office of the SEM not only in English and Hindi but also in other languages spoken by a sizeable population in the area concerned which would display the requirements under law i.e. the Constitution, the Cr PC and the LSAA. It will caution the person arrested to beware of touts. The board will also display the name of the remand advocate along with

his/her contacts and details. The board will inform the person arrested that the amount to be filled in a bail bond is not to given in cash to anyone and that the SEM is not a Judicial Magistrate.

(x) The Superintendent of the Tihar Jail, the Rohini Jail and the Mandovi Jail will ensure that whenever a prisoner is received as a result of the judicial remand order of the SEM, such prisoner shall not be kept in the same ward or in the same place where other undertrials or convicts are kept, but in a separate wing and provided easy access to the legal aid counsel, particularly of lawyers from the DLSA.

72. In the present case, the Court finds that the arrest of Narender and his judicial remand orders were illegally passed by the SEM. The said orders are declared illegal. The Government of NCT of Delhi is directed to pay Narender compensation of Rs.25,000/- within a period of two weeks from today. The petition is disposed of in the above terms.

73. This judgment should be circulated to all the SEMs, DLSA, Delhi Judicial Academy, the LG, the Principal Secretary (Home), Principal Secretary (Law), the Law Secretary to immediate act upon the directions issued.

74. The Court expresses its appreciation of the competent presentation of the case by the Petitioner Mr. Aldanish Rein and of the efforts of two young law students - Ms. Vasundhara of the Amity Law School, Delhi and Mr. Shashank, of the Tamil Nadu National Law University - who interned with the presiding judge, and undertook the background research which was of considerable assistance to the Court. The Court also thanks Mr. Sanjeev

Jain, the Secretary, DSLSA and Mr Rahul Mehra, Standing Counsel for the State for their reports and inputs which were of immense assistance to the Court in rendering this judgment.

S. MURALIDHAR, J.

VINOD GOEL J.

NOVEMBER 01, 2018
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HIGH COURT OF DELHI
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