

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.09.2020
DELIVERED ON : 25.09.2020

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.R.C. No.78 of 2020 & Crl.M.P. No.464 of 2020

Devi

Petitioner

vs.

1 The Executive Magistrate-cum-
Deputy Commissioner of Police
St. Thomas Mount District

2 State represented by
the Inspector of Police – Law & Order
S.11 Tambaram Police Station
Chennai 600 045

Respondents

Criminal Revision filed under Sections 397 and 401 Cr.P.C. seeking to set aside and revise the order dated 03.01.2020 passed by the first respondent in Na.Ka.No.564/Exe/Mag.DC.St.T.M./2019 in S-11 Tambaram P.S. Cr. No.82 of 2019 under Section 110 Cr.P.C.

For petitioner Mr. K.S. Kaviarasu

For respondents Mrs. P. Kritika Kamal
Govt. Advocate (Crl. Side)

Amicus Curiae Mr. Sharath Chandran

ORDER

This criminal revision, seeking to set aside the order dated 03.01.2020 passed by the first respondent in Na.Ka.No.564/Exe/Mag.DC.St.T.M./2019 in S-

11 Tambaram P.S. Cr. No.82 of 2019 under Section 110 Cr.P.C, raises a legal conundrum that touches upon the power of the khaki-clad officers to wear the cloak of an Executive Magistrate to exercise judicial powers for incarcerating ordinary citizens.

2 Facts of the case:

2.1 The detainee in this case is one Devi who has a dubious distinction of having 24 previous cases under the NDPS Act for peddling ganja in and around the Tambaram area. The police opened a history sheet *vide* H.S. No.14 of 2014 and she was detained under Act 14 of 1982 around five times. The last of these brushes with the law, immediately preceding the impugned proceedings, was S.11 Tambaram P.S. Cr. No.76 of 2019 under Section 8(c) read with Section 20(b)(ii)(B) of the NDPS Act, for allegedly possessing 1.100 kgs. of ganja. She was arrested on 17.01.2019 and released on bail by the Special Court for NDPS Act Cases on 01.03.2019. The final report is yet to be filed in this case.

2.2 While that being so, she was found suspiciously moving around the Tambaram area on 04.11.2019, which was spotted by a police party led by the Inspector of Police, S.11 Tambaram Police Station. She was apprehended and brought to the police station. Thereafter, what transpired deserves to be stated in

the words of the Inspector of Police himself set out in the counter affidavit sworn to by him:

“3. I submit that on 04.11.2019 when I along with police party was on patrol duty, I spotted her behind GRT, West Tambaram. On seeing us, she attempted to escape. I submit that when I questioned her, she gave contradictory answers and it came to light that she was involved in a case in S-11, Tambaram P.S. Cr. No. 76/2019 u/s. 8(c), 20(b) (ii)(B) NDPS Act. Hence, I brought her to police station with the help of Woman Sub-Inspector of Police Koshya and entered her particulars in Good Behaviour Register of S-11, Tambaram P.S. vide Sl.No. 82/S11PS(L&O)/BO/2019 u/s. 110 Cr.PC. I submit that I informed Devi orally that on receipt of summons from the Executive Magistrate/Deputy Commissioner of Police, she must appear before him for enquiry.

4. I submit that on 09.12.2019, I submitted a requisition to the Executive Magistrate/Deputy Commissioner stating the above particulars and requesting initiation of action under S. 110 Cr.P.C against the Petitioner Devi. On 09.12.2019, a show cause order U/s 111 CrPc issued by the Executive Magistrate/Deputy Commissioner was served on her to appear for enquiry on 16.12.2019 and her signature was obtained as proof of service.

5. I submit that on 16.12.2019, the petitioner Devi appeared for enquiry before the Executive Magistrate. In compliance with S. 112 Cr.P.C, the gist of the enquiry was read over and explained to her and a proceeding was drawn up served on the petitioner and her signature was obtained after explaining the contents of the proceeding. On 16.12.2019, the petitioner Devi was directed to execute a bond for good behaviour for a period of one year under Section 110 Cr.PC with two sureties by the first respondent. Pursuant to the said order, on the same day i.e. 16.12.2019, she executed the bond for good behaviour for a period of one year and has given two sureties for the same.

6. I submit that the petitioner Devi involved herself in a fresh case on 21.12.2019 which was registered in S-11, Tambaram P.S. Cr. No. 989/2019 u/s. 8(c), 20(b)(ii)(A) NDPS Act and 328 IPC. I submit that she was arrested in the said case on the same day i.e. 21.12.2019 at 14.15 hrs and remanded to judicial custody by the Judicial Magistrate, Tambaram.

7. I submit that I filed a petition on 24.12.2019 (along with enclosures) before the Executive Magistrate-cum-Deputy Commissioner of Police, St. Thomas Mount District u/s. 122(1)(b) of Cr.PC, in M.P. 10 of 2019 to take action against the petitioner for breach of the bond executed by her for good behaviour.

8. I submit that pursuant to my petition dated 24.12.2019, the Executive Magistrate-cum-Deputy Commissioner of Police, St. Thomas Mount District, on 26.12.2019 directed the Superintendent, Special Prison for Women, Puzhal, Chennai-66 to produce the petitioner Devi on 30.12.2019. On 30.12.2019, a detailed order was passed by the Executive Magistrate/DC directing the petitioner Devi to show cause on 03.01.2020 regarding the breach of her good behaviour bond. The same was served on her and her signature was obtained. I submit that on the same day, summonses were issued for the appearance of witnesses on 03.01.2020.

9. I submit that on 03.01.2020, the statements of the witnesses i.e. myself, Woman Sub-Inspector Koshya, HC 47529 Sundaravadivel and WPC 40469 Navamani were recorded and the petitioner Devi was also questioned. I submit that based on the statements of witnesses and the materials adduced, the Executive Magistrate-cum-Deputy Commissioner of Police has, on 03.01.2020, under S. 122(1)(b) Cr.P.C directed to imprison the petitioner until the expiry of the period of the bond i.e 365 days for breach of the good behaviour bond executed by her. The period of 5 days of her good behaviour subsequent to bond dated 16.12.2019 and 6 days of remand from 30.12.2019 to 03.01.2020 has been taken into consideration and she has been ordered to be detained for a period of 354 days and is now lodged in Special Prison for Women, Puzhal, Chennai.”

2.3 Calling into question the legality and validity of the order dated 03.01.2020 passed by the Deputy Commissioner of Police-cum-Executive Magistrate (for brevity “the DCP-cum-EM”), Devi has preferred the present criminal revision petition.

3 Heard Mr. K.S. Kaviarasu, learned counsel for the petitioner and Mrs.P.Kritika Kamal, learned Government Advocate (Crl. Side) for the respondents/State.

4 The provisions in Chapter VIII of the Cr.P.C. relating to security for keeping the peace and for good behaviour, have a chequered history. When the East India Company took over the administration of the Madras Presidency, the situation that prevailed is best explained in the preamble to Regulation XXXII of the Madras Regulations, 1802, which is as under:

“A Regulation for prohibiting affrays reflecting disputed boundaries in the British Territories subject to the Presidency of Fort St. George.

It having been a practice of proprietors, and farmers of land, poligars, under-farmers, and ryots, to seize or order their agents and dependants to take possession by force of disputed lands or crops, under a pretended claim of right thereto; and affrays having been in consequence caused, attended with bloodshed, and with the loss of lives; and recourse to these violent means either for enforcing or resisting such pretended claims of private right, being injurious to the peace of civil society, and contrary to good Government; the civil Courts of Judicature shall be competent to hear, try and decide, causes so founded on disputed boundaries, and imperfect landmarks.”

5 The East India Company maintained law and order through these Regulations until the Crown took over the administration of India in 1858, after the Sepoy Mutiny. One of the first acts of the newly created Legislative Council of India was to enact Act XXIV of 1859 (for clarity “the District Police Act, 1859”) for the better regulation of the police within the Presidency of Fort St.

George. The Act, earlier known as the Madras District Police Act, was rechristened as the Tamil Nadu District Police Act in 1969. For the Presidency Town of Madras, the Madras City Police Act, 1888 (for clarity “the City Police Act, 1888”) was passed and the office of the Commissioner of Police was created under whom the administration of the Madras City police vests even now.

6 The Code of Criminal Procedure, 1861, and the subsequent Codes vested the Magistrates, both Executive and Judicial, with powers to prevent breach of the peace and for keeping a watch on the behaviour of habitual offenders. The evolution of these provisions has been set out in detail in the Division Bench judgment of the Delhi High Court in **Aldanish Rein vs. State of NCT of Delhi and another**¹ and it will, therefore, be superfluous to recount them here. Suffice it to say that under the 1898 Code, both the executive officers and judicial officers were exercising powers under Part IV - *Prevention of Offences* - Chapter VIII – *Of security for keeping the peace and for good behaviour*. In fact, during the reign of the Raj, the Executive Magistrates, including the District Collectors, were exercising these powers against freedom fighters in order to protect the commercial interest of the ruling English class. Nevertheless, even during these times, the police were not given these powers as could be seen from the provisions of the District Police Act, 1859 and the City Police Act, 1888. In fact, even prior

¹ 2018 SCC OnLine 12207

to the coming into force of the Evidence Act, 1872, the Code of Criminal Procedure, 1861, made confession to police irrelevant and inadmissible, save only for proving the discovery of a fact. The relevant provisions in the District Police Act, 1859 and the City Police Act, 1888, will be discussed in detail below. Suffice it to say here that what the Raj loathed to do, the Indian State now does with the least compunction.

7 At this juncture, it will be very interesting to refer to the Section 107 Cr.P.C. proceedings that was initiated by Mr.Wynch, District Collector of Tirunelveli against Subramania Siva (A.1) and V.O.Chidambaram Pillai (A.2), which has been extensively quoted in the judgment dated 07.07.1908 by Arthur F.Pinhey Esq., Additional Sessions Judge, Tirunelveli, in S.C. No.1 of 1908, which relates to the trial of the duo for the offence under Section 124-A IPC and their eventual conviction and sentence. The circumstances under which the Section 107 Cr.P.C. proceedings was initiated is as under:

“On 29th February the District Magistrate (refers to Mr. Wynch) arrived from Tinnevely and after a walk through the town, during which he found it quiet, held a conference of the leading Town’s people including the 2nd accused (refers to Mr.V.O. Chidambaram Pillai) The result was that, deceived by the apparent peaceful condition of affairs during his short visit, he directed cancellation of the order forbidding meetings. The public meetings accordingly were recommenced on 1.3.1908. There was little change in the tone of the speeches and a procession was announced for the 9th March in honor of B.C.Pal who was to be released from gaol on that day. To prevent the breach of the peace, the procession was forbidden and notices were served on the 2 accused (and also on another named Padmanabha Iyengar who had recently

joined in the campaign) calling them into Tinnevely on the 9th March to answer charges under section 108 C.P.C. On March 9th, the accused being absent, no procession was held at Tuticorin; but a procession, originally fixed for the 14th, was held that night at Tinnevely after the Court was closed and speeches were again made by both accused in the bed of the Tambrapurni river opposite the Court house. On the 10th morning, the 2 accused and Padmanabha Iyengar were back again in Tuticorin and the prohibited procession with B.C. Pal's photo came off in the forenoon, the 3 men riding in a phaeton with the photo. Catching the 12.30 train, they were back in Tinnevely in time to attend the District Magistrate's Court the same afternoon. On the 11th evening, the two accused went straight from the District Magistrate's Court to the river bed in front of it and again, addressed a meeting; while the District Magistrate, who had found 'Bande Matharam' inscribed on the walls and punkahs of his Court, was followed to his house by a mob shouting the same war-cry. On the 12th, the District Magistrate considering that the 2 accused could no longer with safety be allowed to be at large caused to be initiated fresh proceedings under section 107 C.P.C., arrested the three men and had them confined. This proceeding, imperative as it seemed at the time, was held to be illegal by the High Court at a subsequent date. On the 13th March the shops in Tuticorin never opened. At Tinnevely before noon, but after the arrival of the Tuticorin train, the bazaars were also closed and a riot of a serious character occurred. Every public building (except the Sub-Registrar's Office) was attacked and fired including the Police Station, Municipal Office, Additional District Munsif's Court, etc. And the riot was only quelled by calling out the Reserve Police and using fire arms. All the time, Tuticorin remained quiet but with bazaars closed. In the evening, a prohibited meeting was held at the Bandy Petta which the Divisional Magistrate (now Mr. Ashe who had relieved Mr. Bracken) had to disperse also with an armed force.

On 25.3.1908, a High Court Order directing the release of the speakers on bail was received, but on 23.3.1908 the long awaited order of Government had been received authorizing the filing of complaints under section 124A and other sections. The accused were accordingly rearrested the moment they came out of the Palamcotta gaol."

8 The conversation that transpired between Mr. Wynch, District Collector, Tirunelveli and V.O.Chidambaram Pillai (A.2) has been contemporaneously penned in a poem by Subramania Bharathi and the official

English translation of it has been set out in the dissenting judgment of Mr. Justice Chettur Sankaran Nair in **King Emperor vs. Nilakanta and 13 others**² (Divisional Magistrate Ashe murder case):

S.No.	Words addressed by Mr. Wynch to Mr.V.O. Chidambaram Pillai	Reply to Mr. Wynch by Mr.V.O.Chidambaram Pillai
1	You have spread the desire for liberty throughout the land and started the conflagration, and I will put you in the jail and torment you there and establish my strength.	We will no longer be serfs to foreigners in our own land – fear we will not hereafter – will this injustice be tolerated in any land? Will the Almighty tolerate (this)?
2	You collected crowds and shouted Vandemataram and abused us and you have steered ships and produced wealth for us to run away.	We will bow and until death cry Vandemateram. Is it base and degrading to praise our dear mother?
3	You spoke truths to the timid people and you transgressed the law, you mockingly said that dying with poverty in the country is peace.	Is this perpetual plundering of our wealth to continue and are we to die? Shall we be weeping? Are we not men and is life (sweet as) jaggery?
4	You made men of slaves and dispelled (their) wretchedness and you redeemed those that were content with poverty and gave them hopes.	Are the thirty crores of us curs? And young ones of pigs? Are you alone men? Is it just? Why this stubbornness?
5	You incited those who were content with servitude as a profession and thirsted for glory. You showed the way to learn all sorts of industries and drove away lassitude.	Is it sinful to love India? Why do you misunderstand us? Is it wrong to seek deliverance from our poverty? Is this hateful?
6	You induced this desire for Swaraj everywhere and you sowed the seeds (of discontent). Can the tiny rabbit do the work of the lordly lion and thrive for ever more?	We have considered and understood well that the way of unanimity is the only way. We will no longer be afraid of all your cruelties and lose heart.
7	It will teach order and sense by firing (on the mob?) and will kill and stab. Who is there to obstruct? I will put you in prison and wreak vengeance.	Can you gain your object even though you cut us to pieces and our life perish thereby? The great love that shines in our hearts – will that go away? Will our hearts grieve?

² ILR 1912 (Madras Series) Volume XXXV 247 at P.330

9 Freedom fighters, including Mahatma Gandhi, were victims of executive excesses under Section 107 Cr.P.C. and other allied proceedings. Therefore, when the Constitution of India was drafted, the Constituent Assembly consciously decided to separate the judiciary from the executive. The driving force behind Draft Article 39-A, presently Article 50, was none other than Dr. Ambedkar himself. The following extract of the speech by Dr. Bakshi Tek Chand, rising to support the introduction of Draft Article 39-A, aptly captures the evils that the Constituent Assembly was seeking to redress.

"One word more I have to say in this connection and that is, that with the advent of democracy and freedom, the necessity of this reform has become all the greater. Formerly it was only the district magistrate and a few members of the bureaucratic Government from whom interference with the judiciary was apprehended, but now, I am very sorry to say that even the Ministers in some provinces and members of political parties have begun to interfere with the free administration of justice. Those of you, who may be reading news paper reports of judicial decisions lately, must have been struck with this type of interference which has been under review in the various High Courts lately. In one province we found that in a case pending in a Criminal Court, the Ministry sent for the record and passed an order directing the trying Magistrate to stay proceedings in the case. This was something absolutely unheard of. The matter eventually went up to the High Court and the learned Chief Justice and another Judge had to pass very strong remarks against such executive interference with the administration of justice.

In another province a case was being tried against a member of the Legislative Assembly and a directive went from the District Magistrate to the Magistrate trying the case not to proceed with it further and to release the man. The Magistrate who was a member of the Judicial Service and was officiating as a Magistrate had the strength to resist this demand. He had all those letters put on the record and eventually the matter went up to the High

Court and the Chief Justice of the Calcutta High Court made very strong remarks about this matter.

Again in the Punjab, a case has recently occurred in which a Judge of the High Court, Mr. Justice Achru Ram, heard a habeas corpus petition and delivered a judgment of 164 pages at the conclusion of which he observed that the action taken by the District Magistrate and the Superintendent of Police against a member of the Congress Party was *mala fide* and was the result of a personal vendetta. These were his remarks.

In these circumstances, I submit that with the change of circumstances and with the advent of freedom and the introduction of democracy, it has become all the more necessary to bring about the separation of the judiciary from the executive at the earliest possible opportunity."

From the above speech, it is obvious that after the British left, Indian politicians started brazenly interfering in judicial matters through executive officers.

10 At this juncture, it may be worthwhile to quote the speech of Dr.B.R.Ambedkar in the Constituent Assembly on Draft Article 39-A. (now Article 50).

"With regard to the question of separating the Executive from the Judiciary, as I said, there is no difference of opinion and that proposition, in my judgement, does not depend at all on the question whether we have a Presidential form of Government or a Parliamentary form of Government, because even under the Parliamentary form of Government, the separation of the judiciary from the Executive is an accepted proposition, to which we ourselves are committed by the article that we have passed, and which is now forming part of the Directive Principles."

Thus was born Article 50 of the Constitution of India.

11 After the Constitution of India came into force on 26.01.1950, the first general elections were held across the country in 1952. The Congress party came to power with a fractured majority in the Madras Presidency and C.Rajagopalachari became the Chief Minister. One of the first measures of the Rajaji Ministry was to issue G.O.Ms.No.2304, Public (Separation) Department dated 24.09.1952 titled *“Separation of the judiciary from the executive – Instructions to the Judicial and Executive Magistrates under the Scheme and Police Officers – Re-issued”*, the essential features of which are as under:

“3 Under the Criminal Procedure Code and various other statutes, the functions of a Magistrate fall into three broad categories, viz.,—

- a) Functions which are “police” in their nature, as for instance the handling of unlawful assemblies;
- b) Functions of an administrative character, as for instance the issue of licences for firearms, *etc*; and
- c) Functions which are essentially judicial, as for instance, the trial of criminal cases.

Prior to the scheme, all these functions were concentrated in the Collector of the district and a number of magistrates subordinate to and controlled by him. The essential feature of the new scheme is that purely judicial functions coming under category (c) above are transferred from the Collector and magistrates subordinate to him, to a new set of officers who will be under the control not of the Collector but of the High Court. Functions under (a) and (b) above will continue to be discharged by the Collector and the Revenue Officers subordinate to him. The new set of officers as well as the officers of the Revenue Department in charge of the executive administration will all be designated as “magistrates” to satisfy statutory requirements. To indicate the difference between them, officers in the former category will be called “Judicial Magistrates” and those in the latter category will be called “Executive Magistrates” in this memorandum.

19. Chapter VIII of the Criminal Procedure Code.—This consists of sections 106,107,108,109 and 110 which are dealt with seriatim below:—

(1) Section 106 can be invoked only after a Magistrate has convicted an accused person and therefore necessarily falls outside the purview of the Executive Magistrate and remains exclusively within the purview of the Judicial Magistrate.

(2) With regard to section 107, it has been decided for special reasons to vest jurisdiction exclusively in the Executive Magistrate. The entire proceedings under the section in all its stages, including trial, will be by the Executive Magistrate and the Judicial Magistrate will not have anything to do with it.

(3) In regard to the other sections 108,109 and 110, the rule is that only the Judicial Magistrate will have the jurisdiction to conduct proceedings. The “Information” to which reference is made in these sections originate almost always from the police, and they can lay the “information” directly before the Judicial Magistrate. It is only very rarely that a private person seeks to initiate proceedings under these sections and he can be referred to the Judicial Magistrate if through ignorance or mistake, he approaches the Executive Magistrate. No question of emergency in respect of any of these sections can possibly arise and the question of taking interim bonds under section 117 will hardly arise. Section 108 deals with the spreading of seditious, *etc.* matters, section 109 with persons who have no ostensible means of livelihood or who cannot give a satisfactory account of themselves and section 110 with habitual offenders. These sections are shown under the heading “concurrent jurisdiction” to provide for all contingencies.”

12 For the first time, the expression “judicial function” was expounded in the above Government Order as involving “the recording and sifting” of evidence. The Schedule appended to the Government Order invested powers under Section 107 Cr.P.C. on Executive Magistrates and the powers under Section 108 Cr.P.C. to 126-A Cr.P.C., concurrently on the Executive and Judicial Magistrates.

This was, however, subject to the instructions in paragraph 19 of the said Government Order, extracted supra.

13 Thus, from 1952 onwards, in the Madras State, the powers under Sections 108 Cr.P.C. to 126-A Cr.P.C. under the 1898 Code were exercised both by Judicial as well as Executive Magistrates and never by the police. This has been alluded to in the 37th Report of the Law Commission of India headed by Justice J.L. Kapur in paragraph 56 which reads as under:

“56. Allocation under Madras Scheme.— The Madras Scheme has been designed as to operate within the framework of the Code without statutory amendment, and without much change in the nomenclature of Magistrates. The broad principle on which the Madras scheme is based, is that matters which involve the recording and sifting of evidence are strictly within the purview of Judicial Magistrates. But concurrent jurisdiction is provided in for some cases. Thus, powers under Ch. 9, (Ss. 127 to 132-A) and Ch. 11 (S. 144) are kept with both Judicial and Executive Magistrates but Judicial Magistrates shall exercise them only in emergency and only until an Executive Magistrate is available. Conversely, powers under Ss.108 to 110 are assigned to Judicial Magistrates, but Executive Magistrates are given concurrent jurisdiction to provide for all contingencies. Again, in cases under S.145, the initiation of proceedings will be before an Executive Magistrate, but, if it is necessary to hold an inquiry, proceedings will be transferred to Judicial Magistrates.”

14 In 1969, the Law Commission of India was entrusted with the task of revamping the 1898 Code, and to make it in tune with the mandates of Article 50 of the Constitution of India. Based on the 41st Report of the Law Commission submitted under the Chairmanship of K.V.K.Sundaram, I.C.S., the 1898 Code was replaced by the 1973 Code. The bedrock of the 1973 Code is the spatial separation

of powers between the judicial and executive branches of the State, as could be seen from the statement of objects and reasons of the Code, which runs as under:

"One of the main recommendations of the Commission is to provide for the separation of the Judiciary from the Executive on an all-India basis in order to achieve uniformity in this matter. To secure this, the Bill seeks to provide for a new set up of criminal courts. In addition to ensuring fair deal to the accused, separation as provided for in the Bill would ensure improvement in the quality and speed of disposal, as all Judicial Magistrates would be legally qualified and trained persons working under close supervision of the High Court."

15 In the newly introduced 1973 Code, barring Section 107, the Judicial Magistrates were empowered to exercise powers under Sections 106 to 110 and the Executive Magistrates had no role to play in those proceedings.

16 At this juncture, it may be essential to state that in the draft Cr.P.C. Bill, the present Section 122(1)(b) Cr.P.C. did not find a place. When the Bill was debated in the Lok Sabha on 30.08.1973, an amendment was introduced to Section 122 Cr.P.C. by Mr. Shambhu Nath to provide for imprisonment for breach of bond and thus was born Section 122(1)(b) Cr.P.C., which is the epicenter of the present lis.

17 For the sake of convenience and ready reference, Sections 107, 110, 122(1)(b) and 478 Cr.P.C., as they stood when the Code was enacted in 1974, deserve to be extracted:

Section 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 tranquility or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquility 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 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 tranquility or to do any wrongful act as aforesaid beyond such jurisdiction.

Section 110. – Security for good behaviour from habitual offenders:

When a Judicial Magistrate of the first class receives information that there is within his local jurisdiction a person who –

- a) is by habit a robber, house-breaker, thief, or forger, or
- b) is by habit a receiver of stolen property knowing the same to have been stolen, or
- c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or
- d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code, or under section 489A, section 489B, section 489C or section 489D of that Code, or
- e) habitually commits, or attempts to commit, or abets the commission of, offences, involving a breach of the peace, or
- f) habitually commits, or attempts to commit, or abets the commission of–
 - i) any offence under one or more of the following Acts, namely:–
 - a) the Drugs and Cosmetics Act, 1940;

- b) the Foreign Exchange Regulation Act, 1973;
- c) the Employees' Provident Funds & Family Pension Fund Act, 1952
- d) The Prevention of Food Adulteration Act, 1954;
- e) The Essential Commodities Act, 1955;
- f) The Untouchability (Offences) Act, 1955;
- g) The Customs Act, 1962; or
- ii) Any offence punishable under any other law providing for the prevention of hoarding or profiteering or of adulteration of food or drugs or of corruption, or
- g) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in the manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit."

Section 122:– Imprisonment in default of security:

1(b) If any person after having executed a bond, *without sureties* for keeping the peace in pursuance of an order of a Magistrate under section 117, is proved, to the satisfaction of such Magistrate or his successor-in-office, to have committed breach of the bond, such Magistrate or successor-in-office may, after recording the grounds of such proof, order that the person be arrested and detained in prison until the expiry of the period of the bond and such order shall be without prejudice to any other punishment or forfeiture to which the said person may be liable in accordance with law."

(emphasis supplied)

Section 478.–Power to alter functions allocated to Judicial and Executive Magistrates in certain cases:

If the State Legislature by a resolution so requires, the State Government may, after consultation with the High Court, by notification, direct that—

- a) References in sections 108, 109 and 110 to a Judicial Magistrate of the first class shall be construed as references to an Executive Magistrate;

- b) References in sections 145 and 147 to an Executive Magistrate shall be construed as references to a Judicial Magistrate of the first class.

18 Section 107(1) Cr.P.C., as originally enacted, contemplated only execution of a bond and in the absence of the expression “with sureties”, one can legitimately infer that the person was required to execute bond without sureties. That is why, in Section 122(1)(b) Cr.P.C, the expression “without sureties” finds place. However, Section 107(1) Cr.P.C. was amended by Act 45 of 1978 and the expression “with or without sureties” was added in clause (1). But strangely, Section 122(1)(b) Cr.P.C. was left untouched. This resulted in a serious anomaly whereby a breach by a person executing a bond without sureties was covered by Section 122(1)(b), but, a more serious case of a breach by a person with sureties was left untouched. This led the Law Commission (headed by Justice K.K.Mathew) to devote an entire report (102nd Report) in 1984, recommending an amendment to Section 122(1)(b). The Law Commission recommended the insertion of the words “with or without sureties” in Section 122(1)(b) in order to bring it in line with the 1978 Amendment to Section 107. The link between Section 107 and 122(1)(b) was clearly brought out in the following observation of the Commission in its 102nd Report:

“It is obvious that sections 107 and 122 are inter-connected with each other, and matters covered by section 107, which represents the initial stage of the proceedings, should be covered by section 122, which

represents the final stage. Unfortunately, however, section 122(1) falls short of that. While section 107 contemplates a bond with or without sureties, section 122(1)(b) addresses itself only to a bond executed without sureties. In this manner, there arises an anomaly. A person who, under section 107, has been required to execute a bond without sureties can, if there is a default, be imprisoned under section 122(1), but not a person who has executed a bond with sureties.”

19 However, these recommendations remained in paper only to be reiterated by the Law Commission in its 154th Report. Section 122(1)(b) was eventually amended only in 2005 *vide* Act 25 of 2005 to bring it in line with the 1978 Amendment to Section 107 Cr.P.C. by adding the expression “with or without sureties” in it. All these clearly show beyond doubt that the umbilical cord of Section 122(1)(b) Cr.P.C. emanates from Section 107 and not from Section 110.

20 There was a major development in 1980 when there was a change of guard in the Centre. Sections 108 to 110 Cr.P.C. were amended by Act 63 of 1980 by which the Judicial Magistrates were denuded of the powers under those sections and in their place, the Executive Magistrates were substituted. There was an acrimonious debate in the Lok Sabha on this amendment and it will be befitting to cite a passage from the speech of Satish Agarwal, M.P., in the Parliament, when the Cr.P.C. Bill was tabled before the Lok Sabha.

Speech of Mr. Satish Agarwal, M.P.

“... I would also appeal to the Minister for Parliamentary Affairs that this should not be a party question. If you are going to replace or substitute the Judicial Magistrate, First Class, then, at least, substitute something at par. It cannot be a donkey for a horse, or a khachhar. Anyway, I leave it to

the good sense of the Parliamentary Affairs who is looking after the whole parliamentary business. I leave it also to the good conscience of the Hon'ble Minister of State for Home Affairs Shri Venkatasubbaiah. It is for him to meet out that point."

21 In the present form, the powers under Sections 107 to 110 Cr.P.C. are exercisable by Executive Magistrates pursuant to the 1980 Amendment. The said Amendment also amended Section 478 Cr.P.C. as under:

"478. Power to alter functions allocated to Executive Magistrates in certain cases:

If the Legislative Assembly of a State by a resolution so permits, the State Government may, after consultation with the High Court, by notification, direct that references in sections 108,109,110,145 and 147 to an Executive Magistrate shall be construed as references to a Judicial Magistrate of the first class."

22 Immediately after the 1973 Code was brought into force, the State of Tamil Nadu issued G.O. Ms.No.736, Home Department, dated 28.03.1974 (for brevity "G.O.Ms.No.736") under Section 20(1) of the Code, appointing the District Collectors, District Revenue Officers, P.A. (General) to the Collectors, Revenue Divisional Officers and Tahsildars of various districts as Executive Magistrates. In the said Government Order, the Commissioner of Police, Madras, was also appointed as an Executive Magistrate under Section 20(1) of the Code. Even prior to the Code, the Commissioner of Police, Madras, was a Presidency Magistrate by virtue of Section 7 of the City Police Act, 1888 and he was

exercising certain judicial powers under the old Code, including hearing bail applications in some cases. The new Code abolished the office of Presidency Magistrates and therefore, the Commissioner of Police, Madras, ceased to exercise the powers of a Presidency Magistrate. Section 20(5) of the 1973 Code permitted the State Government to confer, under any law for the time being in force, the powers of an Executive Magistrate on a Commissioner of Police in relation to a metropolitan area. The substantive law alluded to in Section 20(5) in this context would be Section 7 of the City Police Act, 1888. Section 7 of the City Police Act, 1888, was amended by Tamil Nadu Act 35 of 1981 to bring it in line with the 1973 Code by replacing the expression “Presidency Magistrate” with “Executive Magistrate”. The amended provision reads as follows:

“7. Commissioner’s powers as Magistrate.— The Commissioner shall, by virtue of his office, be Executive Magistrate, for the purposes of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), and shall exercise the powers as an Executive Magistrate, subject to such orders as the State Government may, from time to time, issue.”

By virtue of this amendment, though the Commissioner of Police is an Executive Magistrate, the State Government has the power to limit his powers as an Executive Magistrate. The use of the expression “by virtue of his office” in Section 7 of the City Police Act, 1888, means that the Commissioner of Police is an *ex officio* Executive Magistrate.

23 Now, the question is, at what stage, did the Deputy Commissioners of Police become Executive Magistrates in the State of Tamil Nadu.

24 The answer to the above question lies in G.O.Ms.No.659, Home (Courts VIA) Department dated 12.09.2013 (for brevity “G.O.Ms.No.659”). By virtue of this Government Order, the Deputy Commissioners of Police in the city of Chennai heading the various police districts were appointed as Executive Magistrates. Since the constitutional validity of this Government Order was not challenged by anyone, the Government was emboldened to extend it to other Commissionerates, viz., Madurai, Tirunelveli, Coimbatore, Trichy, *etc.*, by issuing G.O.Ms.No.181, Home (Cts.VIA) Department dated 20.02.2014 (for brevity “G.O.Ms.No.181”). Thus, the Deputy Commissioners of Police of all the Commissionerates are now Executive Magistrates and are exercising powers under Sections 107 to 110 and 122 Cr.P.C.

25 The legality of G.O. Ms.No.181 (*supra*) came up for discussion before a learned single judge of this Court in **Balamurugan vs. State**³. The learned single judge referred to the judgment of the Supreme Court in **A.N. Roy, Commissioner of Police and another vs. Suresh Sham Singh**⁴ and observed that the Supreme Court had upheld the appointment of the Commissioner of

³ 2016 SCC OnLine Madras 23460

⁴ (2006) 5 SCC 745

Police, Mumbai, as an Executive Magistrate by holding that the expression “as many persons” employed in sub-section 1 of Section 20 Cr.P.C. was adequately elastic to include the Commissioner of Police. The learned judge felt that when the expression “as many persons” could be extended to the Commissioners of Police, there is no limitation for the Government to extend it to the Deputy Commissioners of Police as well.

26 With due respect, this Court is unable to persuade itself to agree with the said inference of the learned judge for the reasons set out below:

26.1 In **Suresh Sham Singh** (supra), the Supreme Court was primarily concerned with the exercise of the powers of an Executive Magistrate by the Commissioner of Police, Bombay, for controlling immoral trafficking in women under the Immoral Traffic (Prevention) Act, 1956. It is indeed doubtful if the *ratio decidendi* in **Suresh Sham Singh** (supra) can be stretched to such an extent so as to clothe the Deputy Commissioners of Police with the powers of Executive Magistrates for exercising powers under Sections 108 to 110 Cr.P.C. In this context, it is worth quoting the oft repeated words of the Lord Chancellor, the Earl of Halsbury in **Quinn vs. Leatham**⁵:

“A case is an authority for what it decides. It cannot be quoted for a proposition that may seem to logically flow from it.”

5 1901 AC 495

26.2 As alluded to above, principally, there are two enactments in the State of Tamil Nadu governing the substantive powers of police. They are the District Police Act, 1859 and the City Police Act, 1888. Vide Section 7 of the City Police Act, 1888, the Commissioner of Police is the *ex officio* Executive Magistrate by operation of law. No such contemporaneous provision exists in the Maharashtra Police Act, 1951. That is, perhaps, the reason why the Maharashtra Government had to confer the powers of an Executive Magistrate on the Commissioner of Police, which conferment was set aside by the Bombay High Court, but, eventually reversed by the Supreme Court in **Suresh Sham Singh** (supra). Therefore, on this ground too, **Suresh Sham Singh** (supra) can have no application for extending the executive powers to the Deputy Commissioner of Police.

27 As stated above, the Commissioner of Police is an Executive Magistrate *ex officio* and he cannot delegate his powers to the Deputy Commissioners of Police. Of course, the Commissioner has not done this delegation in Tamil Nadu and it is only the Government, which has, by G.O.Ms.No.659 and G.O.Ms.No.181, appointed all Deputy Commissioners of Police as Executive Magistrates. These appointments are clearly in violation of the proviso to Section 6 of the District Police Act, 1859, which reads as under:

“6. Powers of police, etc.— All powers not inconsistent with the provisions of this Act which upto the passing of this Act belonged by law to the existing police authorities shall be vested in the police authorities appointed under this Act:

Provided always that no police functionary so appointed shall possess or exercise any judicial or revenue authority.” (emphasis supplied)

28 This provision has been there since 1859 and that is why, stalwarts like Rajaji knew the specific statutory bar and carefully crafted G.O. Ms.No.2304, (supra). The Government of the day, in 1974, was also aware of this provision and that is why, except the Commissioner of Police, no other police officer was appointed as Executive Magistrate *vide* G.O. Ms.No.736 (supra). Therefore, the Government Orders, *viz.*, G.O.Ms.Nos.659 and 181 (supra) appointing the Deputy Commissioners of Police as Executive Magistrates, in the teeth of the prohibition contained in the proviso to Section 6, are illegal. In the opinion of this Court, the said Government Orders are, therefore, clearly *ultra vires* the proviso to Section 6 of the District Police Act, 1859, as it vests judicial authority with the Deputy Commissioners of Police to inquire and determine cases under Section 107 to 110 Cr.P.C. The issue as to the applicability of the provisions of the District Police Act, 1859, to the city police, is no more *res integra* in the light of the judgment of this Court in **In Re. Baggiam**⁶, the relevant portion of which is extracted below:

“3. In revision two points of law were canvassed before me: (1) s 47 is a provision in the Madras District Police Act and it is not applicable to

⁶ AIR 1953 Madras 507

the City as a separate City Police Act governs the conduct of the police officers in the City, and therefore S. 47 cannot be invoked in respect of the allegations made against the city constable; and (2) as under S. 16 of the Police (Madras City) Act any police officer appointed under the provisions of Act XXIV of 1859 Madras District Police Act), if employed in the city, shall have the same duties, powers and privileges as police officers under the Police (Madras City) Act, and as S. 47 confers a privilege only on a constable employed in the district and that this privilege is not conferred on a city constable by the Police (Madras City) Act, this S. 47 cannot apply in respect of a city constable in the absence of a similar provision in the Police (Madras City) Act. So far as the first point is concerned, it must not be forgotten that the Madras District Police Act is a Central Act passed in 1859 for the better regulation of the police within the territories subject to the presidency of the Fort St. George. Under S. 55 of the Act, it can be made applicable to any or every district by a notification of the Provincial Government published in the official gazette. By S. 2 of the Madras Act VIII of 1867, the provisions of Act XXIV of 1859 (Madras District Police Act) have been made applicable to the persons, who at that time belonged to or would thereafter belong to the town police. By virtue of this provision, since 1st September 1867, when the Madras Act VII of 1867 came into force, the District Police Act (Act XXIV of 1859) is in force in the City of Madras. This is further clear from another Act of the Central Legislature, viz, Act XV of 1874. That is an Act for declaring the local extent of certain enactments and for other purposes. S. 4 of the above Act is as follows:

“The enactments mentioned in the second schedule hereto annexed are now in force throughout the whole of the territories now subject to the Government of the Governor of Fort. St. George in council, except the scheduled district subject to such Government.”

Act XXIV of 1859 is one of the Acts referred to in the second schedule (vide page 257 of Vol. I of the Unrepealed Central Acts, 2nd Edn.) *Apart from the Madras Act VIII of 1867, the Central Act XV of 1874 makes it clear that this Madras District Police Act is applicable to the police in the City of Madras.* This covers practically the second point also, though I will deal with it separately.

4. As regards the second point about S. 16 of the City Police Act, I do not see how it takes away the rights under the Madras District Police Act, which as stated already is applicable to the police in the City of Madras.”
(emphasis supplied)

29 The issue can be looked at from yet another dimension too. It is beyond cavil that the proceedings under Sections 107 to 110 Cr.P.C. are judicial in nature. The law in this regard is well settled. Exactly a century ago, a Full Bench of this Court, in **Yeluchuri Venkatachennaya and Others vs. Emperor**⁷, noticed that the proceedings under Section 107 Cr.P.C. approximated to a regular trial under the Code. Speaking for the Court, Wallis, C.J. held:

“I agree with the opinion of Ayling and Coutts Trotter, JJ, which I have had the advantage of reading, as to the effect of the proviso to S.350 read with S.117 and will only add that in my opinion, trial generally means the determination of the issues arising in the particular case. As pointed out in History of English Law, Pollock and Maitland, Vol.2, p.598, the word “trial” comes from the French trier, Latin tritare, and was first used by the testing or trial of challenges to jurors. Triers of challenges are still appointed when necessary in English criminal trials. Though we talk of the trial of persons, what are really tried both in civil and criminal cases are issues. An ordinary criminal trial in England is, in the language of the common law, a trial of the general issue joined between the Crown and the accused on the latter’s plea of “not guilty” of the charge preferred against him. See Archbold’s Criminal Pleading, Cl.4, S.5. “The general issue.” P.161, Edn.25. On the other hand, the preliminary magisterial inquiry which is of comparatively modern origin, forms no part of the trial. I think the framers of the Code had this distinction in mind when they framed the definition of ‘inquiry’ so as to exclude “trial”. *In the present case, an issue undoubtedly arises between the Crown and the accused as to whether he should be dealt with under the sections and I see no sufficient reason why the determination of that issue should not be regarded as a trial.*”

(emphasis supplied)

In his lead opinion, Coutts Trotter, J.(as he then was) observed thus:

7 AIR 1920 Madras 337

“.....If we adopt such a procedure here, there could hardly be any doubt that the proceedings under Sec. 107 and the cognate sections have all the features of a trial. A person against whom they are taken has repeatedly been held to be an accused within the meaning of the Code though he is not expressly so described. *He has been held to have the right to be professionally represented* and if he cannot be said to be ‘charged’ with an offence, it is at least sought to be proved against him that he is a person with criminal or undesirable propensities. Finally the consequences to him, if he neglects or is unable to furnish security, are so serious as to entail loss of liberty for a very considerable period.....” (*emphasis supplied*)

Thus, way back in 1920 itself, the Madras High Court had recognized the right of a person facing proceedings under Section 107 Cr.P.C. to have legal assistance. The Delhi High Court, in **Aldanish Rein** (supra) and the Madras High Court, in **P.Sathish vs. State**⁸, have, in no uncertain terms, held that the State Legal Services Authority should provide free legal aid to a person facing Section 107 Cr.P.C. proceedings. It is indeed sad to note that the Deputy Commissioners of Police are not providing legal aid and are instead, recording that the person was informed that he can have legal assistance, but, he did not choose to have one.

30 In Bibhuti Bhusan Chatterjee vs. State of Bihar⁹, the Supreme Court noticed that proceedings under Section 107 Cr.P.C. were undoubtedly judicial. Gajendragadkar, J. held as under:

“7. It cannot also be disputed that the proceeding in a criminal court is a judicial proceeding. Section 4, sub-section (m), of the Code of Criminal Procedure defines a judicial proceeding as including any proceeding in the course of which evidence is, or may be, legally taken on

8 2019 SCC OnLine Mad 20285

9 AIR 1960 SC 128

oath. Thus, there can be no doubt that an order passed in a criminal proceeding is an order passed in a judicial proceeding, and it is common ground that orders like those in the present appeal are not otherwise provided for by the Act. It is not contended before us that the judgments delivered by the courts below in proceedings taken under Section 107 of the Code are not orders, or do not constitute a part of the judicial proceeding.”
(emphasis supplied)

31 In Thekkittil Gopalankutty Nair vs. Melepurath Sankunni

Ezhuthaseah¹⁰, P.T.Raman Nayar, C.J., in his concurring opinion for the Full Bench, opined thus:

“I have no doubt that a proceeding taken by a Magistrate under provisions like Sections 107 to 110, 133,144,145 and 488 of the Cr.P.C. is a judicial proceeding (See *Babulal Parate vs. State of Maharashtra*, AIR 1961 SC 884 and *State of Uttar Pradesh vs. Kaushailiya*, AIR 1964 SC 416;) indeed, the contrary has not been urged before us....”

32 When the proceedings under Sections 107 to 110 Cr.P.C. are judicial in nature, the bar under the proviso to Section 6 of the District Police Act, 1859, follows suit, thereby disentitling the khaki personnel from exercising judicial powers. Seemingly, the provisions of Section 6 of the District Police Act, 1859, were not noticed by the learned single judge in **Balamurugan** (supra). As stated supra, the reliance placed on **Suresh Sham Singh** (supra) is clearly misplaced as that case arose from Maharashtra where the Maharashtra Police Act, 1951 does not contain any *in pari materia* provision like Section 6 of the District Police Act,

¹⁰ AIR 1971 Ker 280 (FB)

1859. That the Code will not prevail over the provisions of the District Police Act, 1859, is fairly evident from Section 5 Cr.P.C. which reads as under:

“5. Saving. – Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

33 In **Ajmer Singh & others vs. Union of India & Others**¹¹, the Supreme Court has held as under:

“The effect of Section 5 of the Code of Criminal Procedure is to render the provisions of the Code of Criminal Procedure inapplicable in respect of all matters covered by such special law.”

When there exists a limitation under the substantive law, *i.e.*, Section 6 of the District Police Act, 1859, which incidentally is also a Central enactment, it would be wholly impermissible to clothe police personnel with judicial powers by an executive fiat under Section 20 Cr.P.C., particularly in the light of the saving clause contained in Section 5 of the Code.

34 The next seminal question that arises for consideration is whether Section 122(1)(b) Cr.P.C. would include a bond taken for good behaviour under Section 110 Cr.P.C. This issue has been considered by Brother V. Parthiban, J. in **Vadivel @ Mettai Vadivel**¹², wherein, it has been held that non-inclusion of the bond for good behaviour is a *casus omissus*. After having held so, the learned

¹¹ (1987) 3 SCC 340

¹² Crl.Rev.Case Nos.982 of 2018 *etc.* batch decided on 24.11.2018

judge found himself unable to subscribe to the earlier decisions of this Court and has referred the matter to the Hon'ble Chief Justice for an authoritative pronouncement by a Division Bench or by a Larger Bench. In the opinion of this Court, a bond for good behaviour was never envisaged to fall within the net of Section 122 (1)(b) Cr.P.C. in the light of the extensive discussions made above. That apart, in a criminal statute which seeks to impinge on the liberty of a citizen guaranteed by Article 21 of the Constitution of India, the principle of *casus omissus* cannot be ordinarily invoked. In this context, it will be profitable to quote the Constitution Bench judgment of the Supreme Court in **M. Narayanan Nambiar vs. State of Kerala**¹³, wherein, at paragraph 10, the Supreme Court has hit the nail hard as under:

“10. A decision of the Judicial Committee in *Francis Hart Dyke (Appellant) and Henry William Elliott, and the owners of the steamtug or Vessel 'Gauntlet'* cited by the learned counsel as an aid for construction neatly states the principle and therefore may be extracted: Lord Justice James speaking for the Board observes at p. 19:

“No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, *and must not strain the words on any notion that there has been a slip, that there has been a casus omissus, that the thing is so clearly within the mischief that it must have been intended to be included if thought of.* On the other hand, the person charged has a right to say that the thing charged although within the words, is not within the spirit of the enactment. But where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common sense meaning of the

¹³ AIR 1963 SC 1116

language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.”
(emphasis supplied)

35 Of course, in **Directorate of Enforcement vs. Deepak Mahajan**¹⁴, the Supreme Court invoked the principle of *casus omissus* to supply the missing link in Section 167 Cr.P.C., because, persons arrested by non police officers had to be dealt with in one way or the other, especially when the special statutes like the Customs Act had given the arrest power to non police officers. The Supreme Court was very cautious in **Deepak Mahajan** (supra) and invoked the principle of *casus omissus*, because, absurd results would have followed had literal interpretation been adopted. In Section 122(1)(b) Cr.P.C., there is no ambiguity at all and no absurd results will follow if the bond for good behaviour is not included therein, because, breach of bond will entail only forfeiture of the bond amount and not imprisonment. Otherwise, Form No.13 in Schedule II of Cr.P.C., which is the prescribed form for obtaining a bond for good behaviour, would have indicated that the executant would suffer imprisonment if he breaches the terms of the bond.

36 Unlike the expression “breach of the peace”, where “subjectivity” is the basis, good behaviour rests on “objectivity”. All the clauses of Section 110 Cr.P.C., except clause (g), underpin the existence of a previous case. In fact, they

¹⁴ (1994) 3 SCC 440

use the expression “habit / habitual” which is conspicuously missing in clause (g). Such a requirement is not there under Section 107 Cr.P.C. Section 110(e) Cr.P.C. which contemplates offences committed habitually involving breach of the peace cannot be used as a window to enter into Section 122(1)(b) Cr.P.C., for the simple reason that, Section 122 (1)(b) Cr.P.C. is predicated on the nature of the bond, viz., bond for breach of the peace and not on clause (e) of Section 110 Cr.P.C. Thus, textually and contextually, a bond for good behaviour can, by no stretch of imagination, be telescoped into Section 122(1)(b) Cr.P.C.

37 In **Anoop Singh vs. State of Punjab**¹⁵, a learned single judge of the Punjab and Haryana High Court has held that imprisonment under Section 122(1)(b) Cr.P.C. was not contemplated for the breach of a good behaviour bond under Section 110 Cr.P.C.

38 There is yet another reason as to why the Parliament did not include breach of a good behaviour bond in Section 122(1)(b) Cr.P.C. Section 120 Cr.P.C. states what amounts to breach of a bond. It states that commission or attempt to commit or the abetment of any offence punishable with imprisonment, would amount to breach of a bond for good behaviour. This means that the person will have to face a regular trial in a criminal Court for the act which gave rise to the breach of the bond for good behaviour. If a good behaviour bond is included in

¹⁵ 2015 SCC OnLine P & H 12402

Section 122(1)(b) Cr.P.C., there is every likelihood of the person being imprisoned twice, viz., one for breach of the bond and the other for the commission or the attempt to commit the substantive offence. Supposing such a person is imprisoned for the breach of bond, but is acquitted for the criminal act which gave rise to the breach of bond, the imprisonment suffered by him cannot be compensated. That is why, the Legislature had thought it fit to mulct a person who commits breach of good behaviour bond only with civil liability, viz., forfeiture of the bond amount and not imprisonment.

39 Further, the entire proceedings of the DCP-cum-EM stands vitiated on yet another short ground that G.O. Ms.No.659 (supra) and G.O.Ms.No.181 (supra) limit the powers exercisable by Deputy Commissioners of Police, to Sections 108 to 110 and do not clothe them with the powers under Section 122 Cr.P.C.

40 Coming to the case at hand, the impugned order deserves to be set aside on all the aforesaid grounds as well as on facts, inasmuch as, there is no material to show that an inquiry under Section 116 Cr.P.C. was conducted by the DCP-cum-EM before passing an order under Section 117 Cr.P.C. That apart, there are other subsidiary infirmities, inasmuch as free legal aid was not provided to the

petitioner as mandated by the Legal Services Authority Act, which is indubitably applicable to a proceedings under Section 110 Cr.P.C.

41 What is the justification proffered by the police to exercise the powers under Section 110 Cr.P.C.? The police say that they cannot maintain the law and order without it and that Tamil Nadu may become a haven for habitual offenders. One can have no two opinions that Tamil Nadu is, by and large, a peaceful State when compared with several other States, as could be inferred from the data published by the National Crime Records Bureau. The reason for it is two-fold. Firstly, people in Tamil Nadu are inherently peaceful and law-abiding and secondly, the Tamil Nadu police machinery is efficient and their handling of the law and order situation during the present crisis-ridden COVID-19 pandemic situation bears ample testimony to it. However, rule of law cannot be sacrificed at the altar of expediency. Public cooperation is essential for effective policing. If the police resort to sharp practices, they will get alienated from the citizens. Now, at least, the fruit vendor and street hawker are obliging the police by offering to stand as seizure witnesses. The police will lose them too because Section 122(1)(b) Cr.P.C. is mostly clamped on the marginalized and not on the mainstream gang lords. Going to prison for the first time alone will be a matter of shame and thereafter, a matter of pride. As our society metamorphoses into a

middle class one, which is inevitable, anachronistic methods will be frowned upon by the public. To quote Abraham Lincoln, *“You can fool all the people some of the time and some of the people all the time, but you cannot fool all the people all the time.”* There are umpteen means to maintain law and order within the framework of the law. The State can follow the guidelines given by the Supreme Court in **Prakash Singh & others vs. Union of India & others**¹⁶ by repealing the colonial Police Acts and enacting new Police Acts to make the police force thoroughly professional and independent. Several Police Commissions have recommended that the Crime Investigating Wing should be separated from the Law and Order Wing and they should be given a free hand to detect offences and bring criminals to book. The State can appoint competent and apolitical persons as Prosecutors in Courts instead of doling out such assignments as political patronage. If the State is of the view that bails are being granted by the Courts liberally to notorious criminals, Prosecutors can be directed to file their counter in each case and despite opposition, if bail is granted, they can take up the matter to the superior Court. The police can inform the victims in Sessions Cases about the bail application hearings so that they can intervene and articulate their sufferings better. The recent amendment to the Code recognises the rights of victims of a

16 (2006) 8 SCC 1

crime. The police can also invoke Section 229-A IPC to prosecute persons who have jumped bail. Application for cancellation of bail can also be filed against a repeat offender. With all these avenues available to them, they cannot be heard to say that resort to Section 122(1)(b) Cr.P.C. is the only panacea for maintaining law and order in the State. Section 107 Cr.P.C. proceedings were grossly misused during the British times, as noticed above, to stifle the voice of freedom fighters. It is on record that both V.O. Chidambaram Pillai and Subramania Siva were ready and willing to furnish the security demanded by Mr. Wynch. Yet, he declined to accept it and made it appear as though they were not willing to furnish the security and ordered their imprisonment. History repeats itself with more vigour now. India should never become a police State. Today, the Government has empowered the Deputy Commissioners of Police and tomorrow, it could be the Assistant Commissioners, Inspectors, *et al.* That this has been done in blissful ignorance of the provisions of Section 6 of the District Police Act, 1859, only compounds the error.

42 Since this Court respectfully differs from V. Parthiban, J. on the issue of applicability of Section 122(1)(b) Cr.P.C. to a good behaviour bond under Section 110(e), the Registry is directed to place this matter before the Hon'ble Chief Justice for appropriate orders.

43 Further, as this Court is not in agreement with the view propounded by another learned single judge of this Court in **Balamurugan** (supra), the following question is framed with a direction to the Registry to place the same before the Hon'ble Chief Justice with a request to constitute a Bench of appropriate strength for an authoritative pronouncement:

Whether G.O.Ms.No.659, Home (Cts. VIA) Department dated 12.09.2013 and G.O. Ms.No.181, Home (Cts.VIA) Department dated 20.02.2014 violate the scheme of separation of powers and are *ultra vires* the proviso to Section 6 of the Tamil Nadu District Police Act, 1859 (Central Act XXIV of 1859)?

44 In view of the aforemade discussion, this criminal revision succeeds and the impugned order detaining the petitioner is set aside. The Superintendent, Central Prison, Puzhal, Chennai, is directed to release the petitioner from custody, provided she is not required in connection with any other case. Connected Crl.M.P. stands closed.

Before parting, this Court places on record its deep appreciation to Mr.Sharath Chandran, learned *Amicus Curiae*, for his erudition and able assistance to the Court, especially for placing the various Parliamentary debates on the topic.

25.09.2020

cad

To

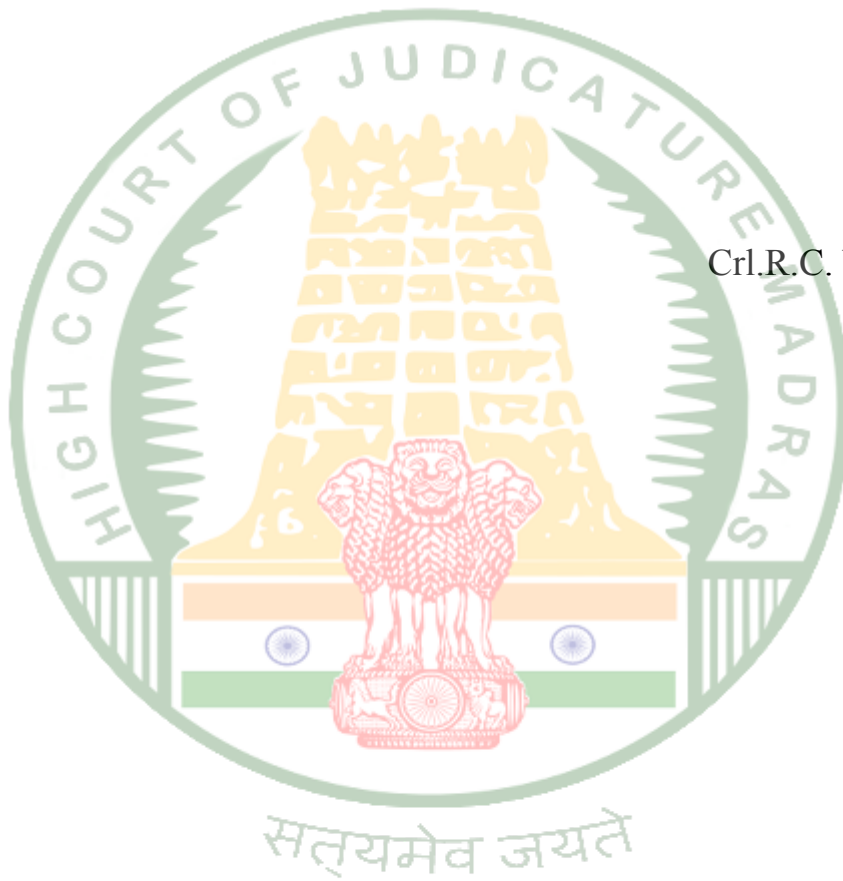
- 1 The Registrar (Judicial)
Madras High Court
Chennai 600 104
- 2 The Executive Magistrate-cum-
Deputy Commissioner of Police
St. Thomas Mount District
- 3 The Inspector of Police – Law & Order
S.11 Tambaram Police Station
Chennai 600 045
- 4 The Superintendent
Central Prison
Puzhal, Chennai
- 5 The Public Prosecutor
Madras High Court
Chennai 600 104



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