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IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No.6542/2011-G

Reserved on : 8.8.2013

Decided on:2.9.2013

Suresh Kumar. ...Petitioner.

Versus

State of Himachal Pradesh and others. ...Respondents.

Coram:

Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting? [1]Yes

For the Petitioner : **Mr. Navlesh Verma, Advocate.**

For the Respondents : **Ms. Meenakshi Sharma, Addl. A.G. with Mr. Neeraj K. Sharma and Mr. Vivek Singh Attri, Dy. A.G. for respondents No. 1 to 3 and 9 & 10.**

Mr. B.C. Negi, Advocate for respondent No.4.

Mr. M.L. Sharma, Sr. Advocate with Mr. Amit Singh Chandel, Advocate for respondent No.5.

Mr. Hamender Chandel, Advocate for respondent No.6.

Mr. Peeyush Verma, Advocate for respondents No. 7 and 8.

Justice Rajiv Sharma, Judge.

"Key facts" necessary for the adjudication of this petition are that the petitioner made a number of complaints dated 21.8.2004, 28.8.2004, 20.4.2005,

[1] Whether reporters of the local papers may be allowed to see the judgment? yes

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26.4.2005, 22.3.2005, 11.8.2009 and 21.8.2009 against respondents No.7 and 8 regarding encroachment made by them on the common land of the village and Government land measuring 60 bighas. According to him, when no action was taken by the statutory authorities, the land was got vacated from respondents No.7 and 8 by Mahila Mandal of the village with the help of concerned Panchayat and Forest Department. However, respondents No.7 and 8 again encroached upon the land. Respondents No.7 and 8 filed a complaint against the petitioner on 7.7.2009 in collusion with respondents No.4 and 5. The same was marked by respondent No.4 to the Incharge of Police Post, Sarswati Nagar, Jubbal with a direction to arrest the petitioner under sections 107 and 151 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code" for brevity sake) and produce him immediately before him. Thereafter, the petitioner was called to the Police Post by respondent No.6. Respondent No.6 also filed a complaint under section 107 and 151 of the Code before the Sub Divisional Magistrate, Rohru. The statements of Deep Sain and Sukh Chain, respondents No.7 and 8, respectively were also recorded by respondent No.6. The petitioner was informed of his arrest. He was kept in Jubbal Jail and was ordered to be

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produced before the Sub Divisional Magistrate, Rohru on 11.7.2009. Petitioner was produced before respondent No.5 since the Sub Divisional Magistrate, Rohru was not available in the court. The petitioner was directed to submit surety bond worth ₹ 10,000/- and one more surety of ₹ 10,000/-. The petitioner moved an application seeking bail on 10.7.2009. He also furnished personal bond and surety bond as per Annexure P-10. However, according to respondent No.5, the surety bond submitted by the petitioner was not of solvent person. He was not satisfied with the petitioner's father solvency since he has failed to submit any evidence of solvency/property, which was mentioned in the affidavit. The surety bond of the petitioner's father was sent for verification by the concerned Patwari. Till the verification of the solvency status of petitioner's father, petitioner was ordered to be kept in judicial custody in Kaithu Jail, Shimla till 13.7.2009. He further ordered if the surety bond submitted by petitioner's father was found satisfactory, petitioner be released immediately. Petitioner's father moved an application for furnishing the documentary proof of his property vide Annexure P-13 dated 13.7.2009. Consequently, the following order was passed by respondent No.5 on 13.7.2009:

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"Accused/Respondent suresh Chand presented by HHC Jeet Ram No. 1189 and constable Mahendersingh No. 841 before this court. The respondent/Accused remanded in Judicial custody u/s 107 & 151 cr.pc vide order dated 10/07/2009 as the accused surety Nathu Ram S/O Jogu Ram R/O Villgae DhadiGhunsa Tehsil Jubbal furnished the affidavit regarding the property for which the Executive Magistrate was not satisfied and sent it for verification.

The surety filed an application today alongwith parcha Jamabandi of his property which is found satisfactory and the personal and the surety bond of the accused/respondent and his surety accepted and considered. Now the Accused/Respondent Suresh is released from the Judicial custody forthwith in compliance with the order dated 10.07.2009. The case file is sent to the SDM Rohru.

2. In sequel to order dated 13.7.2009, petitioner was released. This Court on 12.3.2013 has impleaded the Principal Secretary (Forests) and the Principal Secretary (Revenue) to the Government of Himachal Pradesh as respondents No.9 and 10. They were directed to file affidavits with regard to the allegations made by the petitioner against respondents No.7 and 8. The Conservation of Forests, Shimla Circle, has filed the affidavit. According to the affidavit, respondent No.7 has extracted stone from Khasra No. 1312 and the damage report to this effect was issued on 12.4.2013. It has come in the affidavit that respondent No.7 has encroached upon Khasra Nos. 1298, 1299 and 1300. According to the report, the father of the petitioner has also encroached upon the Government land comprised in Khasra No. 1152.

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It is also stated in the affidavit that these cases were very old and encroachment Missals were prepared by the Revenue Department during settlement operation and the same were under consideration with Settlement Officer, Shimla. The Additional Chief Secretary (Revenue) has also filed the affidavit as per order dated 12.3.2013. According to him also, respondent No.7 has encroached upon Khasra Nos. 1298, 1299 and 1300. According to his affidavit, the encroachment file pertaining to these khasra numbers has already been prepared.

3. According to Mr. Navlesh Verma, procedure prescribed under Chapter-VIII of the Code of Criminal Procedure, 1973 has not been followed by respondents No. 4 to 6. He then contended that the detention of the petitioner with effect from 10.7.2013 till 13.7.2013 was violative of Article 21 of the Constitution of India. He also contended that the entire exercise has been undertaken by respondents No.4 to 6 at the behest of respondents No.7 and 8. He lastly contended that departmental action be taken against respondents No.4, 5 and 6 and exemplary damages/compensation of ₹ 20.00 lakhs be awarded in favour of the petitioner.

4. Mrs. Meenakshi Sharma, learned Additional Advocate General and Mr. Neeraj Sharma, learned Deputy

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Advocate General have argued that the instructions have been issued to all the Magistrates to comply with the mandatory provisions of law.

5. Mr. B.C. Negi, appearing on behalf of respondent No.4, has also referred to section 113 of the Code.

6. Mr. M.L. Sharma, learned Senior Advocate, appearing on behalf of respondent No.5, has vehemently argued that the orders dated 10.7.2009 have been issued strictly in conformity with law. He has also argued that the petitioner has no *locus standi* to file the present petition since the allegations levelled by him against respondents No.7 and 8 are not substantiated in the affidavits filed by respondents No.9 and 10.

7. Mr. Hamender Chandel, appearing on behalf of respondent No.6, has supported the action taken by respondent No.6 against the petitioner.

8. Mr. Peeyush Verma, appearing on behalf of respondents No.7 and 8 has argued that the action against the petitioner has been taken strictly in accordance with law. According to him, the petitioner has filed false complaint against respondents No.7 and 8.

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9. I have heard the learned counsel for the parties and have perused the pleadings as well as records meticulously.

10. What emerges from the facts enumerated hereinabove is that a complaint was filed by respondent No.7 on 2.7.2009 against the petitioner. Respondent No.4 ordered the arrest of the petitioner on 7.7.2009 under section 107 and 151 of the Code and to produce petitioner before him immediately. The case was marked to the Incharge, Police Post, Sarswati Nagar for taking action. Respondent No.6 summoned the petitioner to the Police Post. Petitioner made himself available before the Police Officer, i.e. respondent No.6. Respondent No.6 arrested the petitioner under sections 107 and 151 of the Code of Criminal Procedure, 1973. He filed the complaint before the Sub Divisional Magistrate. This complaint is at page 71 of the paper book. In the complaint, it is specifically stated that the proceedings under section 116 (3) of the Code be initiated against the petitioner and he be bound down for maintaining good behaviour. The statements of respondents No.7 and 8 were also recorded. Petitioner was informed of his arrest. In sequel to the complaint, now what emerges is that the petitioner was produced before respondent No.5. He ordered the petitioner to

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furnish the personal bond worth ₹ 10,000/- and one more surety of ₹ 10,000/-. Petitioner furnished bail bond and also gave surety of his father. The surety bond furnished by the petitioner's father was not accepted only on the pretext that the details of the property were not given. Petitioner was sent to judicial custody. He was released when his father submitted an application Annexure P-13 giving the details of the property.

11. It is clear that respondents No.7 and 8 were inimically deposed against the petitioner. It has come in the affidavits filed by the Conservator of Forests, Shimla Circle and Additional Chief Secretary (Revenue) that respondents No.7 has encroached upon the Government land. The complaint filed by respondents No.7 and 8 was to the effect that the petitioner has given beatings to their niece on 1.7.2009. According to the complaint, the petitioner was a quarrelsome person and consequently action be taken against him. The Sub-Divisional Magistrate, i.e. respondent No.4 has taken cognizance of the same on 7.7.2009 and has immediately ordered the arrest of the petitioner under section 107 and 151 of the Code of Criminal Procedure, 1973. Respondent No.4 has not complied with the mandatory provisions of Chapter-VIII of the Code. Section 107 provides that when an

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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 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. Thereafter, the Magistrate under section 111 is required to make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties, if any, required. Section 112 provides that if the person in respect of whom order under section 111 is made is present in court, it is required to be read over to him or if he so desires, the substance thereof has to be explained to him. Section 113 provides that if the person is not present in the court, the Magistrate is required to issue a summons requiring him to appear, or, when the person is in custody, a warrant directing the officer in whose custody he is to bring him before the court. Proviso to section 113 provides that whenever it appears to the

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Magistrate, upon the report of a police officer or upon other information (the substance of which report or information is to be recorded by the Magistrate) that there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may issue warrant for his arrest. Section 114 provides that every summons or warrant issued under section 113 has to be accompanied by a copy of the order made under section 111 and the copy is to be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under the same. According to sub-section (1) of section 116 when an order under section 111 has been read or explained under section 112 to a person in court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate has to proceed to inquire into the truthfulness of the information upon which action has been taken and to take further evidence as may appear necessary. Sub-section (3) of section 116 provides that after the commencement and before the completion of the inquiry under sub-section (1), the Magistrate, if he considers that

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immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded. Section 117 deals with giving security and section 120 provides for contents of bond. Section 122 provides for imprisonment in default of security.

12. Respondent No.6 has also, as noticed above, filed a complaint before the Sub Divisional Officer under sections 107 and 151 of the Code of Criminal Procedure, 1973. The petitioner was arrested on 10.7.2009 and has been released only on 13.7.2009. According to sub-section (2) of section 151, no person arrested under sub-section (1) is to be detained in custody for a period exceeding twenty four hours from the time of his arrest unless his further detention is required or authorized under any other provisions of the Code or any other law for the time being in force. In the instant case, neither

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respondent No.4 nor respondent No.5 has taken recourse to sections 107, 111, 112, 113 and 116 (1). There is nothing on record to suggest even remotely that respondent No.4 before passing order on 10.7.2009 has issued notice to the petitioner and recorded the substance of information supplied to him before ordering the arrest of the petitioner under sections 107 and 151 of the Code of Criminal Procedure. In sequel to order dated 7.7.2009 passed by the respondent No.4, petitioner was summoned to the Police Post, which led to his arrest under sections 107 and 151. Respondent No.6 filed complaint before the Sub Divisional Magistrate seeking direction to the petitioner to bound him down to maintain good behaviour under section 116 (3). Respondent No.4 was not present in his court and thereafter the matter was placed before respondent No.5. Respondent No.5 without following the procedure provided under sections 107, 111, 112, 113, 114 and 116 ordered the petitioner to furnish bail bond and solvent security. This procedure adopted by respondent No.5 was against the law.

13. In the instant case, since there was no compliance of mandatory provisions of sections 107, 111, 112, 113, 114 and 116 (1), respondent No.5 could not order the petitioner to furnish bail bond and security.

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Despite the fact that the petitioner could not be ordered to furnish bail bond and surety, he furnished the personal bond and his father stood surety for him. Respondent No.5 without application of mind has not accepted the security given by the petitioner's father. The petitioner could not be detained for more than 24 hours, but despite that respondent No.5 ordered the detention of the petitioner in judicial custody from 10.7.2009 to 13.7.2009. Petitioner was released only when his father gave the details of his property on 13.7.2013. Petitioner has been detained in custody without authority of law for more than 72 hours. The entire exercise undertaken by respondents No. 4, 5 and 6 smacks of mala fide. Respondents No.4, 5 and 6 have not applied at all their minds before taking action against the petitioner. It is evident that respondents No.4, 5 and 6 have acted at the behest of respondents No. 7 and 8, which led to the deprivation of the personal liberty of the petitioner. Respondents No.7 and 8 wanted to teach a lesson to the petitioner for filing complaints against them. They have succeeded in their design by falsely implicating the petitioner. Sections 107 111, 112, 113, 114 and 116 (1) are mandatory. Section 121 (3) provides for rejection of surety but there has to be due application of mind. However, in the instant case,

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respondent No.5 has rejected the surety furnished by the petitioner's father in order to detain him from 10.7.2013 to 13.7.2013. He could ask the petitioner's father to furnish the security by giving the details of the property on the same day instead of delaying the matter for three days. The imprisonment under section 122 can be ordered if any person ordered to give security under section 106 or section 117 does not give such security on or before the date on which the period for which such security is to be given commences. It is reiterated that the imprisonment for default of security could be attracted only if the provisions of sections 107, 111, 112, 113, 114 and 116 (1) have been followed in letter and spirit. The petitioner could not be ordered to furnish personal bond or security without following the mandatory provisions of law, as discussed hereinabove.

14. It is evident from the affidavit filed by the respondent-State that instructions have been issued to all the Executive Magistrates the manner in which the power has to be exercised by them under Chapter-VIII. Despite that, as noticed above, the provisions have been violated.

15. The Full Bench of Orissa High Court in ***Prahalad Panda*** vs. ***Province of Orissa***, AIR (37) 1950 Orissa 107 has held that the authority of Police-officer

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under section 151 of the Code of Criminal Procedure is only limited and exceptional power to prevent the commission of a cognizable offence by the individual concerned and is in no sense analogous to the power of preventive detention. The Full Bench has further held that neither has the police officer power to keep a person under arrest in anticipation of and pending a contemplated order of detention. The Full Bench has further held that what is required is knowledge of a design, i.e. of a plan for the commission of a particular offence and the particular person sought to be arrested must have been a party to that design, i.e. must have been associated with it in some way, however slight. The Full Bench has held as under:

> **"11. It has been held in a resent case by a Beach of the Madras High Court in In re Om Prakasha Gupta, (1949) 1 M. L. J. 554: (A. I. R. (36) 1949 Mad. 744), that the question whether the police officer had the knowledge required and whether the commission of the designed offence could have been prevented otherwise than by the arrest are matters entirely within the purview of the police officer and are not capable of independent investigation by the Court. It is unnecessary to say whether this is correct. (See Gaman v. Emperor, A. I. R. (17) 1980 Lah. 348: (31 Cr. L. J. 894).) But no such difficulty arises where as in this case there is an affidavit from the very police officer who has made the arrest setting out his own justification for the arrest. It appears to me clear under Section 151 that a mere general information about the programme or tendency of the Communist Party be commit offence even if these offences were cognizable is not enough to justify the invoking of the powers**

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under Section 161. What is required is "knowledge" of a design i. e., of a plan for the commission of a particular offence and the particular person sought to be arrested must have been a party to that design, i. e., must have been associated with it in some way, however slight. To arrest a person because he belongs to a party and that party has a programme be commit some offences in general, is to exercise the power of preventive detention. The authority of a police officer under Section 151, Criminal P. C., is only a limited and exceptional power to prevent the commission of a cognizable offence by the individual concerned and is in no sense analogous be the power of preventive detention. But that is exactly what has been done on the Sub-Inspector's own showing when he says in his affidavit that he arrested the petitioner "in order to prevent him from joining and pursuing the policy and programme of voilence and lawlessness of the C. P. I. "Neither has the police officer power to keep a person under arrest in anticipation of and pending a contemplated order of detention; but that is what has been done in this case as appears from what the Government itself has abated in its grounds for detention, dated 5th September 1949, wherefrom it appears that the petitioner "has been arrested for fresh detention" because there is information of his intention be escape from jail and to go underground. It is, therefore, clear to my mind that the arrest of the petitioner by the Sub-Inspector of Police at 6 P.M., on 22nd August 1949, is illegal and is an abuse of his alleged powers under Section 151, Criminal P. C."

16. In the instant case, the case is tried to be made out by respondent No.6 that the petitioner intimidated respondents No.7 and 8 in the Police Station. It is not believable. The person already in the Police Station could not dare to intimidate respondents No. 7 and 8 at whose behest the proceedings have been initiated against him. Respondent No.6 has not realized that section 116 (3) could only be invoked if provisions to sections 107, 111, 112, 113, 114 and 116 (1) had been followed by the

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Magistrate. The petitioner was informed of his arrest on 10.7.2009. It was specifically stated that the petitioner shall be produced before the Magistrate on 11.7.2009. However, the fact of the matter is that the petitioner was produced before the Executive Magistrate on 10.7.2009. Why he ordered that the petitioner shall be produced on 11.7.2009 instead of 10.9.2009 is not discernible from the record. This was done by respondent No.6 to further harass the petitioner at the behest of respondents No.7 and 8.

17. Learned Single Judge in ***Narsayya Lachmayya*** v. ***The State,*** AIR 1953 Nagpur 292 while interpreting sections 112 and 114 of the Code of Criminal Procedure (old) has held that the Magistrate has no jurisdiction to issue a warrant under section 114, Cr.P.C. unless he complies with the terms of section 112 and passes an order under that section. Learned Single Judge has held as under:

> **"12. The failure of the Magistrate to pass an order was not a mere irregularity, but constituted an illegality. There is an express breach of a mandatory provision of law if a warrant is issued without making an order in writing under Section 112. In Emperor v. Antoo Cri. Revn. No. 472 of 1946, D/- 10.1.1947 (Nag) (C), the point was whether a warrant of arrest could be issued under Section 117(3) without an order under Section 112. Sub-section (3) of Section 117 reads as follows:**
> **Pending the completion of the inquiry under Sub-section (1) the Magistrate if he considers that immediate measures are**

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necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under Section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed, or in default of execution, until the inquiry is concluded:

Provided that:

(a) no person against whom proceedings are not being taken under Section 108, Section 109, or Section 110, shall be directed to execute a bond for maintaining good behaviour, and

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under Section 112.

Hemeon, J. held as follows:

"Section 117 clearly contemplates that the order under Section 117(3) shall be passed after the order under Section 112 has been made and read or explained to the person concerned under Section 113 and it follows that an order passed under Section 117(3) before such reading or explanation is passed prematurely. This too was the view taken in- Emperor v. Sidik Ghulam AIR 1943 Sind 163 (D) and in-Emperor v. Yusif Jumo AIR 1943 Sind 175 (E), in which it was also held that the failure to comply with the provisions of Section 117(1) was not a mere irregularity but an illegality which went to the root of the proceedings.

The same principle is applicable here. I consider that the Passing of an order under Section 112 cannot be regarded as a mere formality. A Magistrate-cannot proceed further unless he passes such an order. It is the duty of Magistrate to conform strictly to the provisions of law relating to the issue of warrants for arrest. I hold that the warrant P-22 issued for the arrest of the applicant was invalid. Pandharinath. sub-inspector, who took the warrant and was attacked in the course of execution of the warrant could not, therefore, he said to be acting in discharge of his duties. In-Provincial Govt. C.P. and Berar v. Nonelal AIR 1946 Nag 261 (F), it was held:

The words 'in the discharge of his duty as such public servant' mean in the discharge of a duty imposed by law on such

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public servant in the particular case and do not cover an act done by him in good faith under colour of his office."

The conviction and sentence under Section 332 cannot, therefore, be sustained and the applicant must be acquitted of the charge. It is not necessary in this view to consider the remaining arguments regarding the mode of execution of the warrant."

18. In the instant case, no order was passed by the Magistrate under sections 111, 112, 113 and 116 (1) of the Code of Criminal Procedure.

19. Learned Single Judge of Mysore High Court in ***Mrs. Charles De Courpalay and another*** vs. ***The State of Mysore***, 1961 (1) Cri. L.J. 536 has explained sections 112 and 117 (3) of the Code of Criminal Procedure, 1898 as under:

"6. It appears to me that the contentions in regard to both the orders, i.e., one under Section 113 and the other under Section 117(3) are well founded. The learned advocate for the petitioners has relied upon several decisions in support of these contentions. But it is hardly necessary to refer to them as the position is well settled and is, indeed, quite clear from the language of the sections themselves. The need to set forth the substance of the information received is not only for the purpose of showing that the Magistrate has applied his mind to the circumstances of the case before initiating preventive action, but also to see that the person sought to be proceeded against has notice of the case he has to meet.

These objects cannot be achieved unless the order contains in specific and concrete terms the nature of the information which would show that a person is likely to Commit a breach of the peace or disturb the public tranquillity or to do any wrongful act which may have such results. All that the learned Magistrate has done in the order in question is to repeat the language of Section 107, the only addition being that the wrongful acts were continuously endangering the lives of Sri

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Charlesi De Courpalay and his personal staff. There is no indication to show what those wrongful acts are. Even in repeating the wording of Section 107, the learned Magistrate directs the present petitioners to show cause why they should not be called upon to give security not only for keeping the peace but also good behaviour. Apparently he has failed to notice the difference between security for keeping the peace and security for good behaviour, that while the former is dealt with under Section 107 the latter may arise under different circumstances which are separately dealt with under Sections 108, 109 and 110. It is clear, therefore, that the learned Magistrate has not applied his mind to the provisions of law governing the matter and that his order under Section 112, Cr.P.C. cannot be supported.

7. As regards the order under Section 117(3), it is not in all cases in which an order is made under Section 112 that an order under Section 117(3) also is to be made. It is meant to meet an emergency. Only when the Magistrate is satisfied independently of the order under Section 112 that immediate measures are necessary for the prevention of the breach of the peace or disturbance to public tranquillity or the commission of any offence or for the public safety until the conclusion of the enquiry initiated under Section 112, such an interim order can be made.

And it is necessary that the reasons for making the order should be recorded in writing. It can be made only after the requirements of Section 117(1) are fulfilled, i.e., after the order under Section 112 has been read or explained if the person is present at the time the latter order is made; or after he appears or is brought before the Magistrate in compliance with a summons or warrant. In the present case the learned Magistrate made both the orders together.

The order under Section 117(3) was therefore made by him even before the petitioners appeared before him. Nor has he recorded his reasons in writing for making that order. There is nothing to indicate that he applied his mind to the question whether there was an emergency such as to call for an interim order. He has therefore failed to. fulfil both the requirements necessary for making] an interim order.

Hence that order also cannot be sustained. But, as mentioned above, the very foundation for such an order is lacking, since the order under Section 113 itself as it stands

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now, has been found unsustainable and it is only if that order is a valid one, an order under Section 117(3) can be made. Hence the interim order also has to be set aside."

20. Learned Single Judge of Delhi High Court in ***Balraj Madhok*** v. ***The Union of India through its Secretary Ministry of Home Affairs, New Delhi and another***, AIR 1967 Delhi 31 has explained the term 'knowledge' or 'design' to commit an offence and apprehension of detention under section 151 of the Code of Criminal Procedure, 1898 as under:

"(5) The first question that arises for decision is whether on the facts stated by the respondents, the arrest of any of the petitioners can be considered legal. For deciding this question, t is necessary to examine the reason given by the officers, who arrested the petitioners, for arresting them/ As the reason given in all the cases is more or less identical. It would be sufficient if I quote the relevant passages from the affidavit filed in one of these petitions. Shri Bhim Singh, Inspector Police, who arrested Shri Balarj Madhok, the petitioner in Writ Petition No. 2 of 1966 had stated thus in his affidavit.

That on 9th November, 1966, I arrested Shri Balraj Madhok, the petitioner, and Sarvashri Amrit Lal son of Shri Lackhman dass, mela Ram son of Ladha Ram and Ram Saroop son of mangal sain, all residents of new Rajinder nagar, new Delhi under S 107/151 of the Code of Criminal Procedure, on apprehension of imminent danger of breach of peace from then and informed them the reason for their arrest. The question is whether any arrest under Section 151 of the Code, could have been made for the aforementioned reason. That section says:

"A police officer knowing of a design of commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to

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such officer that the commission can not be otherwise prevented".

The power given under this provision impinges on one of the important liberties of an individual. Hence it is necessary that exercise of that power, there should be strict compliance with the requirements, of the law. In these cases, as mentioned earlier, the arrests of the petitioners were said to have been made under section 107 of the code, S. 107 does not deal with any offence. That provides for taking preventive steps to restrain a person from committing breach of the peace or from disturbing the public tranquillity, or doing any wrongful act that may probably occasion a breach of the peace. Or disturb the public tranquillity. Proceedings under section 107 of the code cannot be considered as prosecutions for offence. The term 'offence' is defined in section 4 of the Code thus -

"offence means any act or omission made punishable by any law for the time being in force."

Section 107 does not provide for any punishment. A person proceeded against under that provision cannot be said to be prosecuted for an offence, nor any action taken under that provision can be considered as a punishment. What is required under section 151 of the code is that the officer concerned must know that the person to be arrested is designing to commit a cognizable offence. An "apprehension" that he may commit an offence is not sufficient under that provision, apprehension is not the same thing as knowledge. The former is a mere feeling. Latter is a definite conclusion. Further eve, mere knowledge that the person concerned would endanger peace or tranquillity need not result in a cognizable offence. Again, the possibility of the commission of a cognizable offence does not mean that he is designing to commit such an offence. Lastly, it is not said that it appeared to the officer concerned that the commission of the offence could be otherwise prevented. From the facts proved, it is clear, there was enough time to seek orders from Magistrate. From whichever angle we see, it is clear that the arrests of the petitioner were not in accordance with law."

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21. Learned Single Judge of Patna High Court in ***Balkishun Sao and others*** v. ***Munno Khan***, AIR 1970 Patna 107 has explained sections 107 and 112 of the Code of Criminal Procedure, 1898 as under:

> **"3. Under Section 107 of the Code, whenever a Magistrate is informed that any person is likely to commit a breach of the peace he may 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 a period not exceeding one year. This has to be done in the manner provided in the subsequent sections and the manner is provided in Section 112 of the Code. That section requires a Magistrate to make an order in writing setting forth the substance of the information received.**
>
> **Here, in the instant case, it appears that the learned Magistrate has not given the substance of the information received in the order. He has simply passed orders in the following terms:**
>
> **"Perused the police report of Malsalami P. S. and duly forwarded by D. I. Police, Patna City, for action under Section 107 Cr. P. C.**
>
> **Whereas, I am satisfied from the police report of Malsalami P. S. that there is a serious apprehension of breach of peace at the hands of members of O. P. due to old enmity for piece of land which is graveyard which may disturb the public peace and tranquility in a place which lies within the local limits of my jurisdiction.**
>
> **Draw up proceeding under Section 107 Cr. P. C. against the members of O. P. . . . ."**
>
> **It is not stated in this order as to what was the substance of the report of the police and in what manner the petitioners were likely to commit breach of the peace. It is also not stated as to with regard to which graveyard there was apprehension of breach of the peace. All these things have been left vague. The notices to show cause served on the petitioners were in these very terms. Therefore, it was not clear from the contents of the notices as well as to what allegations the petitioners were to answer.**
>
> **Such order which does not contain the substance of the information received has been held to be bad in a decision of**

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the Calcutta High Court in the case of Birdhaj Roy v. State, AIR 1953 Cal 491, which has been referred to by the learned Counsel for the petitioners. It has been held therein that the order of the Magistrate not indicating the nature of the information received which induced him to take action under Section 107 of the Code is bad. No decision counter to it could be pointed out by the learned Counsel for the opposite party."

22. The entire gamut of Chapter-VIII of the Code of Criminal Procedure, 1898 has been explained by their Lordships of the Hon'ble Supreme Court in ***Madhu Limaye*** vs**. *Sub Divisional Magistrate, Monghyr and others***, 1970 (3) SCC 746 as under:

"35. We have seen the provisions of S. 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 recording to the whim of the Magistrate concerned. It behoves us, therefore, to emphasise the safeguards built into the procedure because from them will arise the consideration of the reasonableness of the restrictions in the interest of public order or in the interest of the general public.

36. The procedure begins with S. 112. It requires that the Magistrate acting under S. 107 shall make an order in writing, setting forth the substance of the information received, the amount of the bond, the term for which it is to be in force and the number, character and class of sureties (if any) required. Since the person to be proceeded against has to show cause, it is but natural that he must know the grounds for apprehending a breach of the peace or disturbance of the public tranquility at his hands. Although the section speaks of the 'substance of the information' it does not mean the order should not be full. It may not repeat the information bodily but it must give propose notice of what has moved the Magistrate to take the action. This order is the foundation of the jurisdiction and the word

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'substance' means the essence of the most important parts of the information.

37. Next follow three sections - Ss. 113-115. They deal with the person's presence. Section 113 deals with the situation when the person is present in court, then the order shall be read over to him and if he so desires, the substance of it shall be explained to him. This is not a mere formality. The intention is to explain to the person what the allegations against him are. The next section (S. 114) deals with a situation when the person is not present in court. There the option is two-fold. Ordinarily a summons must issue to him but in cases where the immediate arrest of the person is necessary a warrant for his arrest may issue. This is however subject to the qualification that there must be a report of a Police Officer or other information in that behalf and the breach of the peace cannot otherwise be prevented. The Magistrate must not act on an oral information but must record the substance of it before issuing a warrant. The section also envisages a situation in which the person is already in custody. In that case the Magistrate shall issue a warrant directing the Officer having the custody to produce that person. The provisions of this section are quite clearly reasonable in the three circumstance it deals with. If the presence of the person is to be secured, a summons to him is the normal course except in the other two cases.

38. Section 115 then provides that such summons or warrant under S. 114, as the case may be, must be accompanied by the order under S. 112 and the person serving or executing the summons or warrant must serve the order on the person. There is enabling power in S. 116 under which the Magistrate may dispense with the presence of the person in Court and allow him to appear by a pleader.

39. Then follows S. 117. That section (omitting the proviso to the third sub-section and omitting sub-sections (4) and (5) which do not concern us) may be read here:

"117. Inquiry as to truth of information-

> **(1) When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with or in execution of a summons or warrant issued under S. 114, the Magistrate shall proceed to inquire into the truth of the information upon**

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which action has been taken, and to take such evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases.

(3) Pending the completion of the inquiry under sub-section (1), the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety may for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or in default of execution, until the enquiry is concluded".

40. The first sub-section read with the second requires the Magistrate to proceed to inquire into the truth of the information. The third sub-section enables the Magistrate to ask for an interim bond pending the completion of the inquiry by him. This is conditioned by the fact that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for prevention of public safety. This is applicable where the person is not in custody and his being at large without a bond may endanger public safety etc. The Magistrate has to justify his action by reasons to be recorded in writing. If the person fails to execute a bond, with or without sureties, the Magistrate is empowered to detain him in custody.

41. A question was raised before us whether the Magistrate can defer the inquiry and yet ask for an interim bond. There is a difference of opinion in the High Courts. Some learned Judges are of opinion that this action can be taken as soon as the person appears because then the Magistrate may be said to have entered upon the inquiry. Other learned Judges are of the opinion that sub-ss. (1) and (2) envisage that the Magistrate must proceed to inquire into the truth of the information and only after prima facie satisfying himself about

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the truth and after recording his reasons in writing can the interim bond be asked for. Some of the cases on the previous view are - Emperor v. Nabibux, AIR 1942 Sind 86, Dulal Chandra Mondal v. State, AIR 1953 Cal 238, Gani Ganai v. State, AIR 1959 J & K 125 and Laxmilal v. Bherulal, AIR 1958 Raj 349. Those representing the other view are - In re Muttuswami, ILR (1940) Mad 335=(AIR 1940 Mad 23) (FB), In re, Venkatasubba Reddy, AIR 1955 Andh Pra 96, Jagdish Prasad v. State, AIR 1957 Pat 106, Jalalludin Kunju v. State AIR 1952 Trav Co. 262, Shravan Kumar Gupta v. Superintendent District jail, Mathura, AIR 1957 All 189, Jangir Singh v. The State, AIR 1960 Punj 225, Rama Gowda v. State of Mysore, AIR 1960 Mys 259 and Ratilal Jasraj v. State, AIR 1956 Bom 385.

42. In our opinion the words of the section are quite clear. As said by Straight J. in Empress v. Babua, (1883) ILR 6 All 132, the order under S. 112 is on hearsay but the inquiry under S. 117 is to ascertain the truth of the necessary information. Subsection (1) contemplates an immediate inquiry into the truth of the information. It is pending the completion of the inquiry that an interim bond can be asked for if immediate measures are necessary, and in default it is necessary to put the person in custody. Therefore, as the liberty of a person is involved, and that person is being proceeded against on information and suspicion, it is necessary to put a strict construction upon the powers of Magistrate. The facts must be of definite character. In Nafar Chandra Pal v. Emperor, 28 Cal WN 23 = (AIR 1924 Cal 114) there was only a petition and a report and these were not found sufficient material. In some of the cases before us no effort was made by the Magistrate to inquire into the truth of the allegation. The Magistrate adjourned the case from day to day and yet asked for an interim bond. This makes the proceedings entirely, one sided. It cannot be described as an inquiry within an inquiry as has been said in some cases. Some inquiry has to be made before the bond can be ordered. We therefore, approve of those cases in which it has been laid down that some inquiry should be made before action is taken to ask for an interim bond on placing the person in custody in default. In an old case reported in A. D. Dunne v. Hem Chunder, (1869) 12 Suth WR Cr 60 (FB) a Full Bench of the Calcutta High Court went into the matter. The case arose before the present Code of Criminal Procedure and, therefore, there was no provision for an interim bond. But what Sir Barnes

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Peacock C. J. said applies to the changed law also not only with regard to the ultimate order but also to the interim order for a bond. The section even as it is drafted today, is hedged in with proper safeguards and it would be moving too far away from the guarantee of freedom, if the view were allowed to prevail that without any inquiry into the truth of the information sufficient to make out a prime facie case a person is to be put in jeopardy of detention. A definite finding is required that immediate steps are necessary. The order must be one which can be made into a final order unless something to the contrary is established. Therefore it is not open to a Magistrate to adjourn the case and in the interval to send a person to jail if he fails to furnish a bond. If this were the law a bond could always be insisted upon before even the inquiry began and that is neither the sense of the law nor the wording or arrangement of the sections already noticed.

44. Section 118 then lays down that if upon inquiry it is proved that the person be called upon to execute a bond for keeping the peace or maintaining good behaviour the Magistrate may call upon him to execute a bond. The security must not be more than that stated in the order under S. 112, nor excessive. Under S. 119 the Magistrate may discharge the person or release him from custody if the necessity for keeping him bound over is not proved."

23. Learned Single Judge of Gauhati High Court in ***Abdul Latif*** v**. *Amanat Ali Choudhary***, 1974 Cri.L.J. 1092 has explained section 117 (3) of the Code of Criminal Procedure, 1898 as under:

"4. An interim order under Sub-section (3) of Section 117 can be made only on the commencement of the enquiry, i. e. after compliance with the provisions of subsection (1). As held by the Supreme Court in Madhu Limaye v. Ved Murti AIR, 1971 SC 2481 : 1971 Cri LJ 1715 the words 'pending completion of enquiry' occurring in Section 117(3) postulates a commencement of the enquiry, which means commencing of a trial according to the summons procedure. In that case the order under Section 117(3) made by the Magistrate without

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examining any witness was set aside by the Supreme Court with the following observation:-

It will be noticed that before the Magistrate took action to call for an interim bond, he did not make any efforts to enquire into the truth of the information as is required by Section 117(3) of the Code. He only saw the Police report and was satisfied from it, without even questioning the Sub-Inspector. He did question him with regard to Narender Shastri who is described in the Order as O. P. No. 3 but not others. It is also to be noticed that the case was fixed on the following day for statements of Madhu Limaye and Ram Adhar Giri and there is no mention that any witnesses were to be present. In fact even on the next day the Magistrate was not going to try case but only take statements from the petitioners.

It appears therefore that the Magistrate used the powers under Section 117(3) without commencing to enquire into the truth of the information. No sworn statement of any kind was obtained by him and he adjourned the cases for the examination of the petitioners without summoning the witnesses in support of the information. He however, asked the petitioners to furnish an interim bond or go to jail.

It appears to us that the powers of the Magistrate to ask for an interim bond were not properly exercised in this case and consequently the order to the petitioners to furnish interim bond could not be made. That stage had not been reached under the scheme of the Code of Criminal Procedure. The Magistrate could only ask for an interim bond if he could not complete the enquiry and 'during the completion of the enquiry; postulates a commencement of the enquiry, which means commencing of a trial according to the summons procedure. It has not given to the Magistrate power to postpone the case and hear nobody and yet ask the petitioners to furnish a bond for good conduct. The Magistrate should have made at least some effort to get a statement from Brij Mohan or Ved Murti Bhatta or any of the witnesses named in the challan. Nothing of this was done. Therefore the proceedings for asking for an interim bond were completely illegal.

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The foregoing observations of the Supreme Court make it abundantly clear that without making an attempt to ascertain the truth of the allegations by examining at least a few witnesses, the Magistrate cannot merely ion perusal of a police report, pass an order under Section 117(3) asking the person proceeded against, to execute an interim bond for keeping the peace pending completion of the enquiry. In the instant case, that is what has been done by the learned Magistrate. He did not examine even the first party at whose instance the proceeding has been initiated, not to speak of any other witness. It appears from the order that the learned Magistrate passed the impugned order simply relying on a statement made in the police report on the application of the first party dated 15-10-1971 that the petitioner damaged an Auto Rickshaw belonging to a nephew of the first party. No opportunity was given to the petitioner to say what he has got to say about the allegation. In these circumstances I find that the first contention of the learned Counsel for the petitioner has got sufficient force.

6. The last contention of Mr. Sen is equally strong. Section 117, Criminal P.C. requires a Magistrate to record his reasons while directing a person to execute an interim bond. In recording the impugned order which has been quoted earlier, in extenso, the learned Magistrate has not assigned, any reason whatsoever. He has simply narrated the case of the respective parties, the fact that the first party has got mutation in respect of the disputed land and that the name of the petitioner is seen in the police report regarding the dispute over a rickshaw. There is nothing to indicate any emergency or that there is any apprehension of breach of the peace from the petitioner during the pendency of the enquiry if he is not bound down. In Jagdish Prasad v. The State it was held:

Before a Magistrate contemplates making such an emergency order, he is bound to direct his consideration to the question of such an emergency and the necessity of a prompt and immediate measure. Such an order must also have a direct relation to the object for which the proceedings are taken. If he does not state his reasons in writing prior to his taking an emergency measure under Section 117(3), it will be extremely difficult for a superior Court to know what fact or facts during

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the enquiry under Section 117(1) influenced the Magistrate to pass an ad interim order.

The discretion exercised under this Subsection has always to be examined to ascertain whether it has been done judiciously or capriciously and this is impossible to be done in absence of any reason recorded by the Magistrate. In this particular case, the learned Magistrate did not give any reason, whatsoever, when demanding ad interim bonds from the petitioners. Later, on the date fixed for execution of the ad interim bonds, he merely expressed that the police report indicated that the members of the opposite party were likely to create a breach of the peace. To my mind, even this reason is not sufficient to pass an order under Section 117(3). The Magistrate is bound to state the reasons for which he thought there was likelihood of those persons committing a breach of the peace during the proceeding period itself. I am satisfied, therefore, that the order passed under Section 117(3) was bad in law.

I am in respectful agreement with this view. In the instant case non-disclosure of my reason by the Magistrate for taking such emergency measure is a serious infirmity in the impugned order warranting interference in revision."

24. Their Lordships of the Hon'ble Supreme Court in ***Natabar Parida and others*** v. ***State of Orissa***, AIR 1975 SC 1465 have held that no police officer can detain a person in custody, arrested without a warrant for a period longer than 24 hours. Their Lordships have held as under:

"5. A person arrested without warrant could not be detained by a police officer for a period exceeding 24 hours as provided in Section 61 of the Old Code. Section 167 (1) required the police officer to forward the accused to the nearest Magistrate if the investigation could not be completed within the period of 24 hours fixed by Section 61 and if there were grounds for

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believing that the accusation or information was well-founded. Sub section (2) provided:

> **"The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:"**

The Magistrate to whom the accused was forwarded could remand him to police custody or jail custody for a term not exceeding 15 days in the whole under Section 167 (2). Even the Magistrate who had jurisdiction to try the case could not remand the accused to any custody beyond the period of 15 days under Section 167 (2) of the Old Code. There was no other section which in clear or express language conferred this power of remand on the Magistrate beyond the period of 15 days during the pendency of the investigation and before the taking of cognizance on the submission of Charge-Sheet. Section 344, however, enabled the Magistrate to postpone the commencement of any enquiry or trial for any reasonable cause. The explanation to Section 344 of the Old Code read as follows:

> **"If sufficient evidence has been obtained to raise, a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.**
>
> **"Various High Courts had taken the view that a Magistrate having jurisdiction to try a case could remand an accused to jail custody from time to time during the pendency of the investigation in exercise of the power under Section 344; to wit, The Superintendent and Remembrancer of Legal Affairs, Government of West Bengal v. Bidhindra Kumar Roy, AIR 1949 Cal 143 = (50 Cri LJ 231); Chandradip Dubey v. The State, 1955 BLJR 323; Dukhi v. State. AIR 1955 All 521 =(1955 Cri LJ 1305); Shrilal Nandram v. R. R. Agrawal, AIR 1960 Madh Pra 135 - (1960 Cri LJ 608) and State of Kerala v. Madhavan Kuttan, AIR 1964 Ker 232 = (1964-2 Cri LJ 300). A contrary view was taken by the Orissa High Court**

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in the case of Artatran Mahasuara v. State of Orissa (AIR 1956 Orissa 129 = (1956 Cri LJ 909). It may be emphasised here that the Court will have no inherent power of remand of an accused to any custody unless the power is conferred by law. In the order under appeal the High Court without reference to Section 344 of the Old Code, seems to have assumed that such a power existed. That is not correct.

8. Let us now examine the position of law under the New Code. No police officer can detain a person in custody arrested without a warrant, for a period longer than 24 hours as mentioned in Section 57 corresponding to Section 61 of the Old Code. Section 167 occurring in chapter XII bearing the heading "Information to the police and their powers to investigate" the same as in chapter XIV of the Old Cod-has made some drastic departure. Similar is the position in regard to Section 309 of the New Code corresponding to Sec. 344 of the Old Code. While retaining the provision of forwarding the accused to the nearest Magistrate (of course, under the New Code to the Judicial Magistrate), and while authorising the Magistrate to remand the accused to either police or judicial custody for a period not exceeding 15 days, proviso (a) has been added in these terms:

"Provided that-

(a) the Magistrate may authorise detention of the accused person, otherwise than in custody of the police, beyond the period of fifteen days if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this section for a total period exceeding sixty days and on the expiry of the said period of sixty days, the accused person shall be released on bail if he is prepared to and does furnish bail; and every person released on bail under this section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;"

The expression "the Magistrate" in the proviso would mean the Magistrate having jurisdiction to try the case. Section 309 (2) says:

"If the Court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for

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reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:"

Although the expression 'reasonable cause' occurring in sub-section (1A) of section 344 is nowhere to be found in Section 309 of the New Code, the explanation to Section 344 of the Old Code has been retained as Explanation 1 to Section 309 in the identical language. The law as engrafted in proviso (a) to section 167 (2) and Section 309 of the New Code confers the powers of remand to jail custody during the pendency of the investigation only for the former and not under the latter. Section 309 (2) is attracted only after cognizance of an offence has been taken or commencement of trial has proceeded. In such a situation what is the purpose of Explanation-I in Section 309 is not quite clear. But then the command of the Legislature in proviso (a) is that the accused person has got to be released on bail if he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 60 days even if the investigation may still be proceeding. In serious offences of criminal conspiracy- murders, dacoities, robberies by inter-state gangs or the like, it may not be possible for the police, in the circumstances as they do exist in the various parts of our country, to complete the investigation within the period of 60 days. Yet the intention of the Legislature seems to be to grant no discretion to the court and to make it obligatory for it to release the accused an bail. Of course, it has been provided in proviso (a) that the accused released on bail under Section 167 will be deemed to be so released under the provisions of Chapter XXXIII and for the purposes of that Chapter. That may empower the court releasing him on bail, if it considers necessary so to do, to direct that such person be arrested and committed to custody as provided in sub-section,(5) of S. 437 occurring in Chapter XXXIII. It is also clear that after the taking of the cognizance the power of remand is to be exercised under Section 309 of the New Code. But if it is not possible to complete, the investigation, within a period of 60 days then even in serious and ghastly types of crimes the accused will be entitled to be released on bail. Such a law may be a "paradise for the criminals," but surely it would not be so, as sometimes it is supposed to be, because of the courts. It would be so under the command of the Legislature."

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25. Learned Single Judge of Patna High Court in ***Amit Pal Singh*** vs ***Anil Kumar Mishra and another***, 1978 Cr. L.J. 1066 has held that the expression "in the manner hereinafter provided" in section 107 are essential words and the Magistrate cannot discover a manner of his own. The manner provided is clearly laid down under section 111 of the Code. The learned Single Judge has held as under:

> **"6. Now, I will take up for consideration the argument of the learned Counsel appearing on behalf of opposite party No. 1 that it was a show case to the petitioner as to why a proceeding should not be started against Mm. In other words, according to the learned Counsel, the Magistrate wanted to be satisfied before initiating the proceeding against the petitioner. In my opinion, this procedure will also be wholly without jurisdiction. I may better quote Section 107 of the Code.**
>
> **"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, for keeping the peace for such period, not exceeding one year, as the Magistrate thinks fit.**
>
> **The words in the manner hereinafter provided' are essential words and the Magistrate cannot discover a manner of his own as he has done in this case. The manner provided is clearly laid down under S. III of the Code. Issue of a preliminary notice to show cause apart from what is provided in S. III does not appear to be justified, Before the Magistrate two courses are open to him. If he is satisfied on such report or information, he will immediately draw up a proceeding under Section 107 of the Code, but If he is not satisfied, then he will not take any action**

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and leave the matter as it is. He cannot adopt a third course unknown to law and issue show cause to person sought to be proceeded against for being satisfied whether a proceeding should be started or not, I am supported in my views by a Bench decision of the Calcutta High Court in S.M. Tulsibala Rakshit v. N.N. Khosal where in a similar circumstance, a notice of show cause as to why a proceeding should not be started was held to be wholly illegal and unjustified and was quashed. Considering the facts and circumstances of this case and the point which I have discussed above, the order of the learned Sub-divisional Magistrate, Patna City, dated 29-12-1975 is set aside and also the notice as contained in Annexure-1 and the entire proceeding is quashed."

26. Learned Single Judge of Punjab and Haryaqna High Court in ***Ram Parkash Bali etc.*** vs. ***State of Punjab etc***., 1979, Current Law Journal 199 has held that Magistrate has no power under section 107 of the Code of Criminal Procedure to detain a person and when a person is produced before a Magistrate under this section, it is the duty of the Magistrate to serve a notice under section 111 justifying a recourse to section 116 (3). Unless that is done the Magistrate is not clothed with any power to demand a personal bond or surety for appearance in the court. Learned Single Judge has held as under:

"4. Section 107 of the Code, as it is worded, does not authorize the Magistrate acting under this section to detain a person sent up to him by the police for maintenance of the peace, in custody. Under section 151 of the Code a Police officer knowing of a design to committing cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, to prevent the commission of that offence

and when the person so arrested is produced before the Executive magistrate under section 107 of the Code, the Magistrate has to serve on him a notice under section 111 of the Code, after satisfying himself about the reasons justifying for a recourse to section 116 (3) of the Code. Unless that is done, the Magistrate is not clothed with any authority to demand from such a surety or personal bond to secure his release from custody for appearance in his Court on the dates fixed in the case, or, in case of failure to furnish such bonds to detain him in custody. In Madhu Limaya v. Sub-Divisional Magistrate, Monghyr and other, AIR 1971 S.C. 2486 on similar facts, it was observed:

"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."

In Vidya Sagar Singh and others v. State of Punjab, a case based on similar facts, P.S. Pattar, J., took a similar view:

"The legal position is that in cases under sections 107, Criminal Procedure Code, the procedure laid down in Chapter VIII of the Code as prescribed in sections 111 to 118 of that Chapter is to be followed. Section 116 (3) enjoins that as soon as the persons proceeded against under section 107, Criminal Procedure Code are produced before him he should immediately start the enquiry and pass the orders under section 111, Criminal Procedure code and thereafter he is to act under sections 112, 113 and 116 of the Code and the Magistrate has no power to order such persons to execute bonds with or without surety for appearance in Court during the pendency of the enquiry and in case of default to remain in judicial custody, as there is no such provision in Chapter VIII of the code. There is no question of bail to such persons because if instead of an interim bond under section 116 (3) bail for appearance was admissible then chapter VIII would undoubtedly have said so."

The view expressed buy Pattar, J. was followed in Joginder Singh v. State of Punjab and others, 1976 Chandigarh Law Reporter 159. It is thus manifest that section 107 of the Code does not justify the detention in custody of a person, sent up before a Magistrate for maintenance of peace or any demand for a personal or surety bond for appearance in Court.

5. Shri I.S. Tiwana, learned counsel for the respondents, citing State v. Santokh Singh, AIR 1960Punjab 31 urged that section 436 of the code, which is equivalent to section 496 of

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the Code of Criminal Procedure, 1898, applies to the persons sent up before the Executive Magistrate under section 107 of the Code and justifies the orders of such Magistrate demanding surety and personal bonds. In Santokh Singh's case (supra) the matter before the Court was regarding the recovery of the amount of the absence on the date fixed in the case Harbans Singh, J. as he then was, was interpreting the provisions o f the Code of Criminal Procedure, 1898, in regard to section 107(4 of that Code. Under section 107 of the Old Code, a Magistrate no t empowered to proceed under sub-section(1) of section 107, in order to avoid the breach of the peace in case it was imminent, could, for the reason to be recorded, issue warrant for the arrest of a person against whom an accusation for the breach of peace was made. When that person was produced before a magistrate could in his discretion detain such a person in custody pending further action by him under Chapter VIII of the old Code. Such a provision does not exist in the new Code of 1973 and for that reason, except section 116(3), no other section is referred in the proviso of section 436 of the Code. I am not in agreement with the learned Additional Advocate General to hold, as contended by him, that with the aid of proviso to section 436 of the Code, an executive Magistrate can detain a person in custody and also ask for a surety or personal bond, for his appearance in Court on each date, from him, especially when the language of section 107 is not worked in that manner.

6. It is an admitted fact that the petitioners were produced before the Executive Magistrate in December, 1978 and no show cause notice under section 111 of the code was served on them till January 31, 1979. In Vidya Sagar's case (supra) it was observed that such a notice has to be served without any delay. In the absence of the proceeding under section 111 of the code, the learned Magistrate, could not validly detain the petitioners in custody nor could ask for a bond from them. Their detention in custody is not in accordance with law and, therefore, the orders demanding the personal bond are hereby quashed. The petitioners should be released from custody forthwith."

27. In the instant case when the petitioner was produced before respondent No.5, he has directed the

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petitioner to submit a surety bond worth ₹ 10,000/- and one more surety of ₹ 10,000/- without any notice to the petitioner to execute the bond as provided under sections 107 of the Code.

28. The gamut of sections 107, 111, 113 and 114 of the Code has been explained by the learned Single Judge of the Gauhati High Court in ***Kadir Ali Dewan and others*** v. ***Wahab Ali and others***, 1980 Cri. L.J. 507 as under:

> **"16. In the instant case apart from that it was not a proper case for a proceeding under Section 107, Cr. P. C. I find that the learned Magistrate misdirected himself in every stage of the proceeding failing to comply with the requirements of Sections 111, 113, 114 and 116 of the Cr. P. C. in issuing non-bailable warrant of arrest without complying with Section 111, and ordering the execution of ad interim bond without complying with the provisions of Section 116.**
>
> **17. It should be remembered that Section 107 may act as an engine of injustice and oppression, if it is not properly used It is not an alternative to Section 145. Where there is misuse of the Section, the proceeding may be quashed (1943) 47 Cal WN 731. The Magistrate has to follow the prescribed procedure. In 1978 Cri LJ 1066 (Pat) it is aptly observed- "the words 'in the manner hereinafter provided' in Section 107 are essential words and the Magistrate cannot discover a manner of his own. The manner provided is clearly laid down under Section 111 of the Code.**
>
> **18. In the instant case none of the above provisions having been complied with and the proceeding having resulted in injustice, it is liable to be quashed, and it is accordingly quashed. Petition is allowed. The Rule is made absolute."**

29. The Division Bench of Gujarat High Court in ***Divyajit Mehta*** v. ***S.S. Katara and others***, 1983 Cri.

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L.J. 315, has held that no person arrested under section 151 could be detained in custody for a period exceeding twenty four hours from the time of his arrest unless his further detention was required or authorized under any law. The Division Bench has further held that the applicability of section 116 (3) could not arise for consideration as the Executive Magistrate had not passed any order under section 111. The Division Bench has held as under:

> **"7. The aforesaid submission of Mr. Patel appears to be well founded. It is true that the first respondent in exercise of his power under Section 151 of the Cr. P.C. arrested the concerned three persons, but as provided by Section 151(1) of the said Code, no person arrested under- Sub-section (1) of Section 151 could be detained in custody for a period exceeding twenty-four hours from the time of his arrest unless his further detention was required or authorised under any other provisions of this Code or of any other law for the time being in force. Under these circumstances, when the concerned three persons were produced before the second respondent who was an Executive Magistrate and before whom proceedings under Section 107 of the Cr. P.C. were not initiated, no question of second respondent releasing these three persons on bail at that stage could ever arise for consideration. It is necessary to note in this connection that the proceedings under Section 107 of the said Code are concerning proper bonds to be taken from the concerned persons by way of security for keeping peace. These proceedings are popularly known as chapter proceedings. There is no question of any person being accused of any offence in such proceedings. Definition of the word 'offence' as per Section 2(n) of the Code shows that proceedings under Section 107 of the Code cannot have anything to do with any accusation regarding any offence as .such. It is also necessary to note that the Executive Magistrate in exercise of his power under Section 107 was not acting and could not have acted as a judicial**

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Magistrate. Applicability of Section 116 (3) of the Code could obviously not arise for consideration as the Executive Magistrate had not passed any order under Section 111 of the Code. Applicability of Section 107 was also ruled out before the Executive Magistrate. Similarly, applicability of the provisions of Section 436 or Section 437 also equally got ruled out of consideration. Under these circumstances the second respondent had obviously no power jurisdiction or authority to direct the first respondent to send the concerned three persons to jail unless they could furnish bail. The impugned order passed by the second respondent, therefore, obviously was without jurisdiction and null and void and on this limited ground only, this petition will have to be allowed."

30. The Division Bench of Madhya Pradesh High Court in ***Arusingh*** v. ***State of Madhya Pradesh, Bhopal and others***, 1984 Cri. L.J. 1616 has held that when the Magistrate exercising the jurisdiction under section 107, 116 and 151 did not commence any enquiry, did not record the statement of the Investigating Officer or the witnesses which were named in the challan and the Magistrate in a mechanical manner signed the cyclostyled order directing the detenu to furnish interim security in the sum of ₹ 10,000/- to keep the peace during the pendency of the case and the next date on which the detenu was to be produced before the Magistrate for further enquiry was also not mentioned in the order as it was left blank, the order passed by the Magistrate being patently illegal the detenu's custody for non furnishing of

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the interim security was declared to be illegal. The Division Bench has held as under:

> **"9. In our opinion the learned Magistrate did not apply his mind to the relevant provisions of the Code and mechanically signed the cyclostyled order and without commencing the enquiry directed the detenu to furnish interim security. As the order passed by the learned Magistrate is patently illegal the detenu's custody after 19.7.84 for non-furnishing of the interim security is illegal and he is entitled to be set at liberty forthwith."**

31. In the instant case, neither the statements of the police officer nor respondents No.7 nor 8 were recorded by respondent No.5 before ordering the petitioner to furnish the bond. This could only be done after complying with sections 107, 111, 112, 113, 114 and 116 (1).

32. Learned Single Judge of Orissa High Court in ***Ratnakar Sahu and others*** v. ***The State of Orissa***, 1988 (1) Crimes 551 has held that the Magistrate has no jurisdiction to direct the petitioner to execute interim bonds before the commencement of enquiry. Learned Single Judge has held as under:

> **"4. The operative part of the order dated 4.7.1983 directing the petitioner to execute interim bonds had been quoted. An interim bond is envisaged in section 116(3) and can only be passed after commencement of the enquiry. Section 116(3) has been interpreted by a full Bench of this Court in a decision Sona Khan and others v. State and it was held in clear terms that an order under sub-section (3) of section 116 for an interim bond can be made only after the commencement of the enquiry and before its completion. The decision ha s consistently been**

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followed by the Court in cases such as, Raghunath Subudhi v. Jagannath Panda and four others, and M. Bhimarao Dora v. Bhajaram Swain and others. The record of the proceeding shows that on 4.7.1983 no enquiry was held. Therefore, the interim order directing the petitioners to execute bonds was in excess of the jurisdiction vested in the Magistrate in law and hence must be held to be illegal.

5. As already referred to above, a period of four years has already elapsed. After long lapse of time apprehension of breach of peace may no more exist. It would cause hardship to the petitioners to face the pain of a proceeding initiated and intended to curtain their freedom after lapse of a long period. I am, therefore, of the opinion that in the interest of justice, the proceeding should not be allowed to continue. It is, however, made clear that if the magistrate would be satisfied according to law that there is still apprehension of breach of peace on the subject of the proceedings, he shall be free to initiate a fresh proceeding under section 107 and dispose of the same, according to law."

33. The same principles have been reiterated by the learned Single Judge of Orissa High Court in ***Fakir Charan Singh and others*** v. ***State of Orissa and another***, 1988 (2) Crimes 935.

34. The Division Bench of this Court in ***Babu Ram and others*** vs. ***State of H.P. and others***, 1988 (2) Sim. L.C. 141 has explained sections 107 and 150 of the Code of Criminal Procedure in depth. The Division Bench has held as under:

"19. All the foregoing facts and the circumstances lead to no other conclusion but the one that the employees of respondent no. 6 were out of technical necessity and feasibility required to take the electric lines over the lands of the petitioners and for that purpose they resorted to digging-in electric poles on the lands of the petitioners without their consent or permission and

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when the petitioners offered resistance they sought the help of the government officials like the police and the respondent no, 2 to force and coerce them (petitioners) to let the electric poles be dug in on their lands and the respondent no, 2 and the S. H. O. Nadaun, respondent no. 3 actively conuived at in this illegahact on their part by initiating false proceedings against them under sections 107/150. It is also strange to note that despite the order of this Court dated December 1, 1986, whereby these proceedings under sections 107/150 before the respondent no. 2 had been stayed and the said order was delivered in the office of the respondent no. 2 on December 8, 1986, the respondent no. 2 continued with the proceedings and issued an order on that very date whereby some of the respondents therein who were absent, were summoned through bailable warrants in the sum of Rs. 500 each returnable on January 5, 1987 and the petitioners have deposed on sworn affidavit that electric poles were removed from the land of the petitioners only on December 6, 1986.

21. We may now take a look at the relevant provisions pertaining to the proceedings in question. The genesis of the proceedings of this nature relates to the provisions of section 107 of the Criminal Procedure Code which envisages that the Executive Magistrate is empowered to initiate such proceedings when he receives information that any person is likely to commit breach of the peace or disturb the public tranquillity or he is likely to do any wrongful act that may probably occasion a breach of the peace or disturb public tranquillity and he is of opinion that there is sufficient ground for proceeding against such person(s) and he is then empowered to require such person is) 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 he thinks fit.

Sections 108, * * * * 109, * * * * 110 * * * * Then section 111, Cr. P. C. says:

"When a Magistrate acting under section 107, section 108, section 109 or section 110, deems it necessary to require any person to show-cause under such section, he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it

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is to be in force, and the number, character and class of sureties (if any) required."

Then section 112 lays down that if the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he %o desires, the substance thereof shall be explained to him and in case he is not present in the Court then according to the provisions of section 113 such Magistrate shall issue a summons requiring him to appear before the Court.

There is a proviso to section 113 which also vests the Magistrate with powers to issue warrant of arrest if upon the report of the police officer or other information (the substance of which report or information shall be recorded by the Magistrate) there is reason to fear the commission of a breach of the peace and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person.

Under section 114, it has been enjoined upon the Executive Magistrate to send a copy of the order made under section 111 with the summons or warrant as the case may be for service upon the person concerned.

Section 115 gives such Magistrate the powers to permit such person against whom the proceedings have been instituted to appear by a pleader.

Then the last important section is section 116. The relevant provisions whereof are as under:

"116. Inquiry as to truth of information.-(I) When an order under section III has been read or explained under section 112 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant, issued under section 113, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable, in the manner hereinafter prescribed for conducting trial and recording evidence in summons cases.

(3) After the commencement, and before the completion of the inquiry under sub-section (1) the Magistrate, if he considers that immediate measures are

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necessary for prevention of a breach of the peace or disturbance of the public tranquility or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 111 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in

default of execution, until the inquiry is concluded :

Provided that-

(a) no person against whom proceedings are not being taken under section 108, section 109, or section 110 shall be directed to execute a bound for maintaining good behaviour ;

(b) the conditions of such bond, whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 111.

(4) * * * *

(5) * * * *

(6) * * * *

(7) * * * *

23. Thus as the apex Court has ruled, the order that the Magistrate concerned seized of such proceedings, has to pass under section 111 must set forth in writing the substance of the information received, the bond to be executed and the terms for which it is to be enforced and the number, character and class of sureties, if any, required. This is a peremptory requirement of law and any infirmity therein must inevitably vitiate the entire proceedings. The order that the respondent no. 2 has passed in the instant proceedings, however, suffers from glaring infirmities which renders it wholly invalid.

26. The order of November 17, 1986 discloses that the respondent no. 2 purports to have proceeded against the respondents before him under subsection (3) of section 116 'to maintain peace and good behaviour", since as per the report of respondent no. 4, dated October 23, 1986 they did not allow respondent no. 4 to execute the departmental work and he had requested respondent no. 2 to take action against the respondents. Although he noted in the same order that the so-

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called complaint of respondent no. 4 did not specifically mention the name of any of the respondents as having obstructed the execution of the work, but he felt it necessary that all the respondents before him be made to execute bonds under section 116 (3) so that the respondent no. 4 could execute his work/scheme. He then ordered that all the respondents should execute bonds under section 116 (3) for maintaining peace and good behaviour, (underlining supplied) till the conclusion of the enquiry and then adjourned the case to November 19, 1986, that is, for the third day for execution of such bonds. It is clear that this order too is also riddled with illegalities. Obviously till this order, the respondents before him had no notice of the allegations against them and they had in their reply rightly stated that there was no case against them and the proceedings were mala fide. Yet the respondent no. 2 proceeded against them under section 116 (3) as according to him they had obstructed the digging in of poles on the land of respondent no. 5. The respondent no. 2, however, could proceed under section 116 (3) only in case any fresh material had come before him during the course of the enquiry which had impelled him to consider that immediate measures were necessary for prevention of breach of the peace or disturbance of public tranquillity. However, there was no such material before respondent no. 2 except the letter dated October 23, 1986 referred to above. This Court has, however, already held that this letter was not only contemptuous in nature but even disentitled the respondent no. 2 himself from taking up these proceedings any further since it discloses that respondent no. 2 himself was personally interested in getting this scheme of taking electricity to the pump-set of respondent no. 5 and has issued verbal orders in this behalf and at the same time he was keeping the respondents before him under duress through these proceedings to refrain from Agitating the matter even if their own lands were obviously affected by the execution of the scheme. This Court strongly deprecates this action on the part of respondent no. 4 in sending this type of communication dated October 23, 1986 to the respondent no. 2 and further the conduct of respondent no. 2 in acting upon such a communication and treating this as additional evidence in the proceedings as this practice cannot be allowed to be followed in a Court of law. Even if such a communication was to be placed on the record of the file, the proper course for the State should have

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been to make an application through the A. P. P. before respondent no. 2 for permission to allow this type of evidence to be brought on record and even in that case it was imperatively required of the second respondent to record the statement of its author on oath before the same could be acted upon. Further the respondents vide this order were called upon to execute bond for maintaining peace and good behaviour but, apparently, they could be called upon to execute such bonds for 'maintaining good behaviour' only in case they were proceeded against under sections 108 or 109 or 110 which was not the case here and, therefore, the respondent no. 2 was in terms prohibited by the proviso (a) to sub-section (3) of section 116. Again, although no amount has been specified in this order for which the respondents were required to execute bond but respondent no. 2 in his return before this Court has admitted that he had asked the respondents before him to execute bonds in the sum of Rs. 4,000 each. This again he was debarred from doing under proviso (b) to sub-section (3) of section 116 since in the show-cause notice under section ill he had called upon them to show cause why they be not required to execute a bond in the sum of Rs. 2.00J to keep peace for a period of one year and the proviso in terms lays down that the amount of the bond shall not be more onerous than the one specified in order under section 111. The order is thus thoroughly illegal and in view of this the entire proceedings under sections 107 and 150 against the respondents therein are vitiated and are hereby quashed.

27. We may also note, not without certain amount of dismay, that the respondent no. 2 in this entire matter has exhibited a behaviour which cannot be said to be less than presumptuous. We have already observed that the respondents herein proceeded to execute this tube-well/pump-set scheme in such a high handed manner that the petitioners and the other affected persons were driven to institute a civil suit and obtain a restraint order against the concerned respondents restraining them from digging-in electric poles on the lands of the petitioners and despite the fact that an undertaking on June 27, 1986 was given in the Court that this would not be done, the respondent no. 4 continued with such illegal acts as he was detected doing so on June 30, 1986 and then he sought the help of respondent no. 2 for execution of these illegal acts by getting initiated the proceedings before him under section 107 against the petitioners and others through the police. The respondent

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no. 2 then despite the undertaking in the Civil Court continued harassing the petitioners herein and others numbering 18 including 12 ladies through these illegal proceedings in his enthusiasm to see that the water-supply scheme of respondent no. 5 gets through. He even did not care to call for the report of any revenue officer/official to ascertain whether the electric poles were actually being dug in the land of respondent no. 5 or the petitioners and others. In fact this type of proceedings on the facts and in the circumstances were wholly uncalled for and motivated. We have already found that the petitioners and others were offering obstruction only when respondent no. 4, and his labourers wanted to dig-in electric poles on their lands without their consent or permission and they certainly had a right to do so and there was no question of such an act amounting to commission of breach of peace or public tranquillity.

31. We also feel it necessary to observe that the proceedings like the one in question are of a

preventive nature. All the same they impinge upon the liberty of an individual which is of paramount importance and value and a fundamental right guaranteed under our Constitution. It is thus imperative duty of the Court seized of such proceedings to see that all the relevant provisions of law touching those proceedings are strictly complied with and the liberty of the citizen is not allowed to be jeopardised on frivolous and baseless allegations towards achieving a particular end as has been done in the case in band. Thus a legal and pious duty is cast upon such officers while acting judicially in proceedings of this nature to cast away and forget their other executive roles which they might have to play as Executive Officers and not to resort to compulsive acts of this nature to achieve a particular end as administrative officers howsoever laudable, as appears to have been done in the case in hand, as that would amount to gross abuse of his judicial powers."

35. Learned Single Judge of Delhi High Court in ***Tavinder Kumar and another*** v. ***The State***, 1990 Cri. L.J. 40 has held that the order of execution of bond

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passed without complying with the statutory provisions is illegal. Learned Single Judge has held has held as under:

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

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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."

36. In the instant case also, no notice has ever been issued to the petitioner under sections 107. Respondent No.5 has asked the petitioner to furnish the bail bond and security by thoroughly misdirecting himself and without taking into consideration that he was required to comply with sections 107, 111, 112, 113 and 116 (1) before doing so. The entire proceedings initiated by respondents No.4 to 6 against the petitioner are vitiated. The stage of asking the petitioner to furnish the bail bound could only arise if there had been compliance of sections 107, 111, 112, 113 and 116 (1) and not before that. Respondent No.5 had no jurisdiction to order the detention of the petitioner in judicial custody.

37. Learned Single Judge of Madhya Pradesh High Court (Indore Bench) in ***Babulal and another*** v. ***State of M.P.*** 1991 Cri. L.J. 786 has held that the Magistrate has to record the reasons of his satisfaction. Learned Single Judge has held as under:

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"11. The record shows that even orders u/S. 111, Cr.P.C., are passed on pre-cyclostyled proformas. A mere reading of section would show that an order under this Section (Popularly known as a preliminary order is a condition precedent for taking further steps in any proceeding u/Ss. 107—110. Such order, with its required contents, must be recorded and communicated even where the police have brought before the magistrate a person under arrest as a suspected offender (e.g. u/Ss. 41, 56, ante) or u/S.151, even though no summons need be issued because the person is already before the Court.

12. It cannot be denied or disputed that an order made under this provision has a serious repercussion on the individual proceeded against and the record shows the use of pr-cyclostyled proformas with some insertion s here or there in passing such orders. No amount of urgency can b ea substitute of this sort of mechanism in passing judicial orders on serious consideration of facts alleged in the complaint. This is nothing short of a farce. The first thing that a Magistrate is required to do after receipt of information is to apply his mind to such information and if he is satisfied on such application of mind, that there is ground for proceeding under this Chapter, he is required to pass an order in writing. This cannot be reduced to a mechanical process, as is evidenced from the record of this case. It is for this reason (and not for the reason as argued by the learned counsel that notice is defective) that the proceedings as a whole are liable to be quashed and are accordingly quashed.

13. In the end the prevailing practice of using pre-cyclostyled forms/pro forma orders with a few insertions in the space left blank, in such serious matters, which call for judicial application of mind and recording of satisfaction, as contemplated by S. 111 Cr.P.C. must be deprecated in no uncertain terms. It is inconceivable that judicial orders though required to be passed by Executive Magistrates, could be reduced to cyclostyled proformas. Second schedule appended to the Code of Criminal ProOcedure contains Forms of various descriptions. It was never the intention of the Legislature of provide proforma orders to be passed u/S. 111 Cr.P.C. It need s to be impressed upon the sub-divisional Magistrate and Executive Magistrates, making use of such pre-cyclostyled orders u/S. 111, Cr.P.C., that they must shun this practice

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forthwith, last the proceedings may meet the same fate as in this petition."

38. Learned Single Judge of Andhra Pradesh High Court in ***Mathangi Satyanarayana and others*** vs. ***State represented by the Public Prosecutor***, 1996 Cr. L.J. 1809 has explained the scope of section 111 read in conjunction with section 116 (1) as under:

"5. A careful reading of the above provisions leaves no doubt whatsoever that the Magistrate shall proceed with the enquiry only after reading over and explaining the order made under Section 111 to the concerned persons when they present themselves as provided under Section 112 or when they are brought before the Magistrate pursuant to the summons or warrant issued under Section 113. In other words, making an order under Section 111 and reading over and explaining the same to the concerned persons as contemplated under Section 112 are conditions precedent for commencing the enquiry under Section 116 (1) of the Code. But, in the case on hand, no order was made under Section 111 either when the notice dated 22-3-1993 was caused on the petitioners, directing them to appear before the Magistrate on 3-4-1993 or when they appeared before the Magistrate on 3-4-1993. It is not even the case of petitioners that the substance of allegations made against them was explained to then at any time. Admittedly, the order under Section 111 was made only on 24-11-1993. Thus, there would be no difficulty to conclude that the enquiry conducted pursuant to the notice dated 22-3-1993 cannot be treated as enquiry under Section 116. Therefore, the contention that the enquiry shall be deemed to have commenced with effect from 3-4-193 and it stood automatically terminated on expiry of six months thereafter cannot be accepted.

11. It is significant to note that the above notice is not only silent about the substance of the information received against the petitioners but also failed to specify the amount of bond they are required to execute, the term of the said bond they are required to execute, the term of the said bond and the number, character and class of the sureties they are required to

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furnish. Therefore, it has to be seen whether it is permissible for the magistrate to hold an enquiry without making an order under S. 111 and without even notifying the substance of information etc., to the persons proceeded against. Certainly, it is not, in view of the provisions of Section 107 and 111 of the Code. A combined reading of these two sections makes it clear that once a Magistrate forms the requisite opinion under Section 107 that there is sufficient ground to proceed against the persons concerned, he must pass an order under Section 111, 'setting forth the substance of the information received, the amount of bond to be executed, the term for which it is to be in force and the number, character and class of sureties (if any) required." I am of the considered view that unless he complies the said mandatory provision of law, he will have no jurisdiction to direct the person proceed against to appear before him or to secure their presence for the purpose of enquiry. Obviously, he has failed to comply the same before issuing the notice dated 22-3-1993. Therefore, it may, safely be concluded that the enquiry held by the Magistrate from 3-4-1993 onwards is not only in contravention of the relevant provisions of law but also without jurisdiction."

39. The Division Bench of this Court in ***Citizen Rights Protection Forum*** vs. ***State of Himachal Pradesh***, 2005 (2) Shim. L.C. 505 has also considered Chapter-VII of the Code of Criminal Procedure and held as under:

"11. Viewed in the aforesaid backdrop of legal provisions contained in Chapter VIII Cr.P.C, what we find in the present case is that without at all following any procedure and without at all proceeding under Section 111 or 116 or 117 Cr.P.C. and without there being any situation contemplated under Section 122, respondent No. 2 in this case ordered the temporary detention of six persons for as much as six days. This order passed by respondent No. 2 was wholly unconstitutional and patently illegal. Whether it was passed in ignorance of above referred statutory provisions or in gross abuse of the power being exercised by respondent No. 2, the result was that these

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six persons were detained in illegal custody, and they were deprived of their personal liberty without any procedure established by law. The impugned order directing temporary detention of these six persons was passed not only in gross violation of all the provisions of Chapter VIII Cr.P.C, it was passed in total derogation of Article 21 of the Constitution of India. As a result of the passing of the impugned order, six persons concerned actually remained in illegal custody uptil 17th May, 2005. It was only on 17th May, 2005 that they were ordered to be released because of the intervention of this Court. They remained in illegal custody from 13th May, 2005 to 17th May, 2005 only because of a patently illegal and unconstitutional order passed by respondent No. 2, he having no jurisdiction at all to pass such an order.

13. Respondents No. 1 and 3 filed their replies originally on 25th June, 2005 and 31st May, 2005 respectively. In these replies these respondents on most untenable grounds defended the action of respondent No. 2 in passing the impugned order and equally on untenable grounds misinterpreted grossly the provisions contained in Chapter VIII Cr.P.C However, respondent No. 1 grew wiser as the case progressed and filed a supplementary reply through the affidavit of Secretary (Home), Government of Himachal Pradesh in which, very wisely and fairly respondent No. 1 admitted that in passing the impugned order respondent No. 2 did not follow/ observe the procedure prescribed under law for holding security proceedings nor did he observe the procedure to reject the surely as contemplated under law. Respondent No. 1 has regretted the non-observance of proper procedure by respondent No. 2. In this affidavit respondent No. 1 has assured this Court that it is going to take remedial measures to avoid re-occurrence of such instances in future. What remedial measures respondent No. 1 would be taking have been spelt out in paras 4 to 7 of the aforesaid reply.

15. As has become evidently clear, because six persons for whose benefit this petition has been filed were kept in illegal detention for five days between 13th May, 2005 to 17th May, 2005, a duty is cast upon this Court to award at least a token compensation in their favour. Actually in this case we should have awarded exemplary compensation in favour of these detained persons but because of change of attitude as far as respondent No. 1 is concerned and because respondent No. 1 has now assured this Court that it proposes to adopt remedial

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measures, we feel that awarding only token compensation would meet the ends of justice. We, therefore, direct that each of these six persons shall be paid an amount of Rs. 5,000/- by way of token compensation. This amount shall be paid by respondent No. 1 to these persons within a period of six weeks from today. We leave it open to respondent No. 1 to recover this amount from respondent No. 2.

We direct the Chief Secretary, Government of Himachal Pradesh to circulate a copy of this judgment to every Executive Magistrate in Himachal Pradesh for information, future guidance and absolute compliance."

40. Learned Single Judge of Bombay High Court in ***Vasantkumar Jivrambhai Majithia*** v. ***State of Maharashtra and another***, 2006 Cri. L.J. 1135, has held that the provisions of sections 107 and 111 of the Code of Criminal Procedure are to be scrupulously followed.

41. It is, thus, evident from the analysis made hereinabove that the actions of respondents No. 4 to 6 were not warranted under the law. They have exercised their authority in the most arbitrary and erroneous manners. They have not cared to protect the liberty of the petitioner enshrined under Article 21 of the Constitution of India. They have not even followed the provisions of Chapter-VIII in letter and spirit. Their unauthorized action has led to illegal detention of the petitioner in jail for more than 72 hours.

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42. The petitioner has the necessary locus standi to file the present petition the manner in which the orders have been passed by respondent No.4 to 6 in complete breach of the mandatory provisions of law. It has come in the reports filed by respondents No.8 and 9 that respondent No.7 has encroached upon the Government land and the case has been prepared against him. Petitioner's liberty under Article 21 of the Constitution of India has been infringed by ordering his detention for more than 72 hours in Kaithu Jail.

43. Their Lordships of the Hon'ble Supreme Court in ***D.K. Basu*** vs. ***State of W.B,*** (1997) 1 SCC 416 have held that the claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to the claim available in private law for damages for tortuous acts of the public servants. Their Lordships have further held that grant of compensation in proceedings under Article 32 or Article 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the courts under the public law jurisdiction for penalizing the wrongdoer and fixing the liability for the

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public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen. Their Lordships have held as under:

> **"44. The claim in public law for compensation for unconstitutional deprivation of fundamental right to life and liberty, the protection of which is guaranteed under the Constitution, is a claim based on strict liability and is in addition to he claim available in private law for damages for tortious acts of the public servants. Public law proceedings serve a different purpose than the private law proceedings. Award of compensation for established infringement of the indefeasible rights guaranteed under Article 21 of the Constitution is a remedy available in public law since the purpose of public law is not only to civilise public power but also to assure the citizens that they live under a legal system wherein their rights and interests shall be protected and preserved. Grant of compensation in proceedings under Article 32 or 226 of the Constitution of India for the established violation of the fundamental rights guaranteed under Article 21, is an exercise of the Courts under the public law jurisdiction for penalising the wrong doer and fixing the liability for the public wrong on the State which failed in the discharge of its public duty to protect the fundamental rights of the citizen.**
>
> **45. The old doctrine of only relegating the aggrieved to the remedies available in civil law limits the role of the Courts too much, as the protector and custodian of the indefeasible rights of the citizen. The Courts have the obligation to satisfy the social aspirations of the citizen because the Courts and the law are for the people and expected to respond to their aspirations. A Court of law cannot close its consciousness and aliveness to stark realities. Mere punishment of the offender cannot give much solace to the family of the victim - civil action for damages is a long drawn and cumbersome judicial process. Monetary compensation for redressal by the Court finding the infringement of the indefeasible right to life of the citizen is, therefore, a useful and at times perhaps the only effective remedy to apply balm to the wounds of the family members of the deceased victim, who may have been the bread winner of the family."**

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44. Their Lordships of the Hon'ble Supreme Court in ***State of West Bengal and others*** vs. ***Committee for Protection of Democratic Rights, West Bengal and others***, (2010) 3 SCC 571 have reiterated that the words "life" and "personal liberty" are used in Article 21 as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of a person's animal existence. Their Lordships have further held that Article 21 in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. Their Lordships have further held that in certain situations even a witness to the crime may seek for and shall be granted protection by the State. Their Lordships have held as under:

> **"39. It is trite that in the Constitutional Scheme adopted in India, besides supremacy of the Constitution, the separation of powers between the legislature, the executive and the judiciary constitutes the basic features of the Constitution. In fact, the importance of separation of powers in our system of governance was recognised in Special Reference No.1 (supra), even before the basic structure doctrine came to be propounded in the celebrated case of His Holiness Kesavananda Bharati Sripadagalvaru Vs. State of Kerala & Anr. (1973) 4 SCC 225, wherein while finding certain basic features of the Constitution, it was opined that separation of powers is part of the basic structure of the Constitution. Later, similar view was echoed in Smt. Indira Nehru Gandhi Vs. Shri Raj Narain & Anr. 1975 (Supp) SCC and in a series of other cases on the point. Nevertheless, apart from the fact that our Constitution does not**

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envisage a rigid and strict separation of powers between the said three organs of the State, the power of judicial review stands entirely on a different pedestal. Being itself part of the basic structure of the Constitution, it cannot be ousted or abridged by even a Constitutional amendment. [See: L. Chandra Kumar Vs. Union of India & Ors. (supra)]. Besides, judicial review is otherwise essential for resolving the disputes regarding the limits of Constitutional power and entering the Constitutional limitations as an ultimate interpreter of the Constitution.

51. The Constitution of India expressly confers the power of judicial review on this Court and the High Courts under Article 32 and 226 respectively. Dr. B.R. Ambedkar described Article 32 as the very soul of the Constitution - the very heart of it - the most important Article. By now, it is well settled that the power of judicial review, vested in the Supreme Court and the High Courts under the said Articles of the Constitution, is an integral part and essential feature of the Constitution, constituting part of its basic structure. Therefore, ordinarily, the power of the High Court and this Court to test the Constitutional validity of legislations can never be ousted or even abridged. Moreover, Article 13 of the Constitution not only declares the pre- constitution laws as void to the extent to which they are inconsistent with the fundamental rights, it also prohibits the State from making a law which either takes away totally or abrogates in part a fundamental right. Therefore, judicial review of laws is embedded in the Constitution by virtue of Article 13 read with Articles 32 and 226 of our Constitution.

57. As regards the power of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 of the Constitution that there is a marked difference in the nature and purpose of the right conferred by these two Articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well, i.e. for enforcement of any legal right conferred by a Statute etc.

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60. Article 21, one of the fundamental rights enshrined in Part III of the Constitution declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It is trite that the words "life" and "personal liberty" are used in the Article as compendious terms to include within themselves all the varieties of life which go to make up the personal liberties of a man and not merely the right to the continuance of person's animal existence. (See: Kharak Singh Vs. State of U.P. (1964) 1 SCR 332)

61. The paramountcy of the right to "life" and "personal liberty" was highlighted by the Constitution Bench in Kehar Singh (supra). It was observed thus:

> **"To any civilised society, there can be no attributes more important than the life and personal liberty of its members. That is evident from the paramount position given by the courts to Article 21 of the Constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order, and consequently, the Legislature, the Executive and the Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the State is in most civilised societies regarded seriously and, recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ."**

64. Thus, the opinion of this Court in A.K. Gopalan (supra) to the effect that a person could be deprived of his liberty by `any' procedure established by law and it was not for the Court to go into the fairness of that procedure was perceived in Maneka Gandhi (supra) as a serious curtailment of liberty of an individual and it was held that the law which restricted an individual's freedom must also be right, just and fair and not arbitrary, fanciful or oppressive. This judgment was a significant step towards the development of law with respect to Article 21 of the Constitution, followed in a series of subsequent decisions. This Court went on to explore the true meaning of the word "Life" in Article 21 and finally opined that all those aspects of life, which make a person live with human dignity are included within the meaning of the word "Life".

68. (ii) Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and

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personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State.

46. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly."

45. Their Lordships of the Hon'ble Supreme court in ***Ramlila Maidan Incident, in Re***, (2012) 5 SCC 1, have held that the term "liberty", which is subject to reasonable restrictions, needs to be examined with reference to the other constitutional rights. Article 21 is the foundation of the constitutional scheme. It grants to every person the right to life and personal liberty and the procedure established by law for deprivation of rights conferred by Article 21 must be fair, just and reasonable. Their Lordships have further held that any action taken by a public authority has to be tested by two standards:- (i)

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the action must be within the scope of the authority conferred by law, and (ii) it must be reasonable. Their Lordships have also ordered disciplinary action against all the erring police officers/personnel, who have indulged in brickbatting, resorted to lathi-charge and excessive use of tear gas shells upon the crowd, exceeded their authority or acted in a manner not permissible under the prescribed procedure. Their Lordships have held as under:

> **"15. I consider it appropriate to examine the term `liberty', which is subject to reasonable restrictions, with reference to the other constitutional rights. Article 21 is the foundation of the constitutional scheme. It grants to every person the right to life and personal liberty. This Article prescribes a negative mandate that:**
>
> > **"No person shall be deprived of his life or personal liberty except according to the procedure established by law."**
>
> **The procedure established by law for deprivation of rights conferred by this Article must be fair, just and reasonable. The rules of justice and fair play require that State action should neither be unjust nor unfair, lest it attracts the vice of unreasonableness, thereby vitiating the law which prescribed that procedure and, consequently, the action taken thereunder.**
>
> **16. Any action taken by a public authority which is entrusted with the statutory power has, therefore, to be tested by the application of two standards - first, the action must be within the scope of the authority conferred by law and, second, it must be reasonable. If any action, within the scope of the authority conferred by law is found to be unreasonable, it means that the procedure established under which that action is taken is itself unreasonable. The concept of `procedure established by law' changed its character after the judgment of this Court in the case of Maneka Gandhi v. UOI [AIR 1978 SC 597], where this Court took the view as under :**
>
> > **"The principle of reasonableness, which legally as well as philosophically is an essential element of equality or non arbitrariness pervades Article 14 like a brooding**

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omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be right and just and fair and not arbitrary fanciful or oppressive otherwise it would be no procedure at all and the requirement of Article 21 would not be satisfied."

This was also noted in the case of Madhav Hayawadanrao Hoskot v. State of Maharashtra (1978) 3 SCC 544 where this Court took the following view:

"Procedure established by law are words of deep meaning for all lovers of liberty and judicial sentinels."

286.17(a) Take disciplinary action against all the erring police officers/personnel who have indulged in brick-batting, have resorted to lathi charge and excessive use of tear gas shells upon the crowd, have exceeded their authority or have acted in a manner not permissible under the prescribed procedures, rules or the standing orders and their actions have an element of criminality. This action shall be taken against the officer/personnel irrespective of what ranks they hold in the hierarchy of police."

46. Their Lordships of the Hon'ble Supreme Court in ***Mehmood Nayyar Azam*** vs. ***State of Chhattisgarh and others***, (2012) 8 SCC 1, have held that right to reputation is a facet of the right to life of a citizen under Article 21 of the Constitution of India and have also laid down the principles for awarding compensation for custodial humiliation and mental torture as under:

"19. We have referred to the aforesaid paragraphs to highlight that this Court has emphasized on the concept of mental agony when a person is confined within the four walls of police station or lock-up. Mental agony stands in contradistinction to infliction of physical pain. In the said case, the two-Judge Bench referred to Article 5 of the Universal Declaration of Human Rights, 1948 which provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Thereafter, the Bench adverted to Article 21 and proceeded to state that the expression "life or

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personal liberty" has been held to include the right to live with human dignity and thus, it would also include within itself a guarantee against torture and assault by the State or its functionaries. Reference was made to Article 20(3) of the Constitution which postulates that a person accused of an offence shall not be compelled to be a witness against himself.

20. It is worthy to note that in the case of D.K. Basu (supra), the concern shown by this Court in Joginder Kumar v. State of U.P. [(1994) 4 SCC 260] was taken note of. In Joginder Kumar's case, this Court voiced its concern regarding complaints of violation of human rights during and after arrest. It is apt to quote a passage from the same: -

> **"The horizon of human rights is expanding. At the same time, the crime rate is also increasing. Of late, this Court has been receiving complaints about violations of human rights because of indiscriminate arrests. How are we to strike a balance between the two? A realistic approach should be made in this direction. The law of arrest is one of balancing individual rights, liberties and privileges, on the one hand, and individual duties, obligations and responsibilities on the other; of weighing and balancing the rights, liberties and privileges of the single individual and those of individuals collectively; of simply deciding what is wanted and where to put the weight and the emphasis; of deciding which comes first - the criminal or society, the law violator or the law abider..."**

21. After referring to the case of Joginder Kumar (supra), A.S. Anand, J. (as his Lordship then was), dealing with the various facets of Article 21, stated that any form of torture or cruel, inhuman or degrading treatment would fall within the ambit of Article 21 of the Constitution, whether it occurs during investigation, interrogation or otherwise. If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchy. No civilized nation can permit that to happen, for a citizen does not shed off his fundamental right to life, the moment a policeman arrests him. The right to life of a citizen cannot put in abeyance on his arrest. The precious right guaranteed by Article 21 of the Constitution of India cannot be denied to convicts, under trials, detenus and other prisoners in custody, except according to the procedure

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established by law by placing such reasonable restrictions as are permitted by law.

22. At this juncture, it becomes absolutely necessary to appreciate what is meant by the term "harassment". In P. Ramanatha Aiyar's Law Lexicon, Second Edition, the term "harass" has been defined, thus: -

> **"Harass.**
>
> **"injure" and "injury" are words having numerous and comprehensive popular meanings, as well as having a legal import. A line may be drawn between these words and the word "harass" excluding the latter from being comprehended within the word "injure" or "injury". The synonyms of "harass" are: To weary, tire, perplex, distress tease, vex, molest, trouble, disturb. They all have relation to mental annoyance, and a troubling of the spirit."**

The term "harassment" in its connotative expanse includes torment and vexation. The term "torture" also engulfs the concept of torment. The word "torture" in its denotative concept includes mental and psychological harassment. The accused in custody can be put under tremendous psychological pressure by cruel, inhuman and degrading treatment.

24. In Bhim Singh, MLA v. State of J & K [(1985) 4 SCC 677], this Court expressed the view that the police officers should have greatest regard for personal liberty of citizens as they are the custodians of law and order and, hence, they should not flout the law by stooping to bizarre acts of lawlessness. It was observed that custodians of law and order should not become depredators of civil liberties, for their duty is to protect and not to abduct.

25. It needs no special emphasis to state that when an accused is in custody, his Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatosed. The right to life is enshrined in Article 21 of the Constitution and a fortiorari, it includes the right to live with human dignity and all that goes along with it. It has been so stated in Francis Coralie Mullin v. Administrator, Union Territory of Delhi and others [(1981) 1 SCC 608] and D.K. Basu (supra).

48. On a reflection of the facts of the case, it is luculent that the appellant had undergone mental torture at the hands of insensible police officials. He might have agitated to ameliorate

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the cause of the poor and the downtrodden, but, the social humiliation that has been meted to him is quite capable of destroying the heart of his philosophy. It has been said that philosophy has the power to sustain a man's courage. But courage is based on self-respect and when self-respect is dented, it is difficult even for a very strong minded person to maintain that courage. The initial invincible mind paves the path of corrosion. As is perceptible, the mindset of the protectors of law appears to cause torment and insult and tyrannize the man who is helpless in custody. There can be no trace of doubt that he is bound to develop stress disorder and anxiety which destroy the brightness and strength of the will power. It has been said that anxiety and stress are slow poisons. When torment is added, it creates commotion in the mind and the slow poisons get activated. The inhuman treatment can be well visualized when the appellant came out from custody and witnessed his photograph being circulated with the self-condemning words written on it. This withers away the very essence of life as enshrined under Article 21 of the Constitution. Regard being had to the various aspects which we have analysed and taking note of the totality of facts and circumstances, we are disposed to think that a sum of Rs.5.00 lacs (Rupees five lacs only) should be granted towards compensation to the appellant and, accordingly, we so direct. The said amount shall be paid by the respondent State within a period of six weeks and be realized from the erring officers in equal proportions from their salary as thought appropriate by the competent authority of the State."

47. Their Lordships of the Hon'ble Supreme Court in ***Raghvansh Dewanchand Bhasin*** vs. ***State of Maharashtra and another***, (2012) 9 SCC 791 have declared that courts have ample power to award adequate compensation to an aggrieved person, not only to remedy wrong done to him, but also to serve as a deterrent for wrongdoers. Their Lordships have held as under:

"17. It is trite principle of law that in matters involving infringement or deprivation of a fundamental right; abuse of

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process of law, harassment etc., the courts have ample power to award adequate compensation to an aggrieved person not only to remedy the wrong done to him but also to serve as a deterrent for the wrong doer.

18. In Rudul Sah Vs. State of Bihar & Anr. (1983) 4 SCC 141 , Y.V. Chandrachud, CJ, speaking for a Bench of three learned Judges of this Court had observed thus:

> **"One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt."**

19. In Bhim Singh, MLA Vs. State of J & K & Ors. (1985) 4 SCC 677 , holding illegal detention in police custody of the petitioner Bhim Singh to be violative of his rights under Articles 21 and 22(2) of the Constitution, this Court, in exercise of its power to award compensation under Article 32, directed the State to pay monetary compensation to the petitioner. Relying on Rudal Sah (supra), O. Chinnappa Reddy, J. echoed the following views:

> **"When a person comes to us with the complaint that he has been arrested and imprisoned with mischievous or malicious intent and that his constitutional and legal rights were invaded, the mischief or malice and the invasion may not be washed away or wished away by his being set free. In appropriate cases we have the jurisdiction to compensate the victim by awarding suitable monetary compensation".**

20. In Nilabati Behera (Smt) Alias Lalita Behera Vs. State of Orissa & Ors. (1993) 2 SCC 746 , clearing the doubt and indicating the precise nature of the constitutional remedy under Articles 32 and 226 of the Constitution to award compensation for contravention of fundamental rights, which had arisen because of the observation that "the petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial" in Rudul Sah (supra), J.S. Verma, J. (as His Lordship then was) stated as under:

> **"It follows that 'a claim in public law for compensation' for contravention of human rights and fundamental**

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freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is 'distinct from, and in addition to, the remedy in private law for damages for the tort' resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226 of the Constitution. This is what was indicated in Rudul Sah and is the basis of the subsequent decisions in which compensation was awarded under Articles 32 and 226 of the Constitution, for contravention of fundamental rights."

21. In the same decision, in his concurring judgment, Dr. A.S. Anand, J. (as His Lordship then was), explaining the scope and purpose of public law proceedings and private law proceedings stated as under:

"The public law proceedings serve a different purpose than the private law proceedings. The relief of monetary compensation, as exemplary damages, in proceedings under Article 32 by this Court or under Article 226 by the High Courts, for established infringement of the indefeasible right guaranteed under Article 21 of the Constitution is a remedy available in public law and is based on the strict liability for contravention of the guaranteed basic and indefeasible rights of the citizen. The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds

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> **the relief by granting "compensation" in proceedings under Article 32 or 226 of the Constitution seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalising the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, of not protecting the fundamental rights of the citizen. The compensation is in the nature of 'exemplary damages' awarded against the wrongdoer for the breach of its public law duty and is independent of the rights available to the aggrieved party to claim compensation under the private law in an action based on tort, through a suit instituted in a court of competent jurisdiction or/and prosecute the offender under the penal law."**
>
> **22. The power and jurisdiction of this Court and the High Courts to grant monetary compensation in exercise of its jurisdiction respectively under Articles 32 and 226 of the Constitution of India to a victim whose fundamental rights under Article 21 of the Constitution are violated are thus, well-established. However, the question now is whether on facts in hand, the appellant is entitled to monetary compensation in addition to what has already been awarded to him by the High Court. Having considered the case in the light of the fact-situation stated above, we are of the opinion that the appellant does not deserve further monetary compensation."**

48. In the instant case, petitioner's personal liberty has been infringed. He has been humiliated by ordering his detention without authority of law. The actions of respondents No.4 to 6 have also caused him mental torture. Respondents No. 4 to 6 are also liable to be

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proceeded departmentally for dereliction of their duties. This Court vide order dated 23.5.2013 has ordered the suspension of respondents No.4 and 5 and to take disciplinary action against them. Ms. Meenakshi Sharma, learned Additional Advocate General has informed that respondents No.4 and 5 have already been put under suspension and the disciplinary proceedings have been initiated. She has also informed that a sum of ₹ two lakhs stood deposited in the Registry of the Court.

49. Accordingly, in view of the discussion and analysis, made herein above, the writ petition is allowed. Annexures P-7 dated 7.7.2009, P-12 dated 10.7.2009 and P-14 dated 13.7.2009 are quashed and set aside. Respondent No.1 is directed to pay compensation of ₹ two lakhs to the petitioner. However, it shall be open to respondent No.1 to recover the same from respondents No.4 to 6. The disciplinary proceedings already initiated against respondents No.4 and 5 are ordered to be continued and the same be concluded within a period of three months from today. The disciplinary proceedings be also initiated against respondent No.6 and the same be concluded within a period of three months from today. Needless to add that respondent No.6 shall also be put under suspension at par with respondents No.4 and 5.

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Newly added respondents No.9 and 10 are also directed to take action against the petitioner's father for encroaching upon Government land comprising Khasra No. 1152 and against respondent No.7 for encroaching upon Government land comprising Khasra Nos. 1298, 1299 and 1300 within a period of three months from today. Pending application(s), if any, also stand disposed of. There shall, however, be no order as to costs.

(Justice Rajiv Sharma),
Judge.

2.9. 2013
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