PREVENTIVE EXECUTIVE POWERS AND PERSONAL LIBERTY IN INDIA: A CRITICAL STUDY OF SPECIAL EXECUTIVE MAGISTRATES UNDER THE BNSS, 2023

Nischay Agarwal, B.A. LL.B., St Xavier's University, Kolkata

"It is better that ten guilty persons escape than that one innocent suffer."
- William Blackstone

ABSTRACT

"Detention places the body within the custody of the State; it must never place personal liberty beyond the protection of the law."

To what extent does the legal framework governing Special Executive Magistrates under the Bharatiya Nagarik Suraksha Sanhita, 2023, adequately balance the requirements of public-order administration with constitutional safeguards and individual liberty? What is the legal basis, scope and purpose of appointing Special Executive Magistrates in India and how the Indian courts have addressed the exercise and limitations of preventive executive powers are some of the questions which we will be answering in this article

I. Introduction

Today, Section 15 of BNSS, 2023 gives the legal basis for the appointment of special executive magistrate in India. The section reads that '***The State Government may appoint, for such term as it may think fit, Executive Magistrates or any police officer not below the rank of Superintendent of Police or equivalent, to be known as Special Executive***

Magistrates, for particular areas or for the performance of particular functions and confer on such Special Executive Magistrates such of the powers as are conferrable under this Sanhita on Executive Magistrates, as it may deem fit.' On the comparative reading of this section with section 21 of CrPC, we see the difference between the two statutes is that the newer section only allows the appointment of police officers not below the rank of superintendent or equivalent to serve as special executive magistrates. On a basic comparison of this sections, we can deduce that there is a unease on the legislature's part in appointing a

police officer below the rank of superintendent as special executive magistrates. Under this section, the special executive magistrate has the same powers as of an executive magistrate which are conferred on him by the state but the powers may be limited to the extent to the performance of particular functions and/or to particular areas

A. History/Origin of this section

We should first understand the historical background of Section 21 of the Code. The 37th

Report of the Law Commission (1967)[1] recommended the creation of a class of Special Executive Magistrates. The Law Commission in that Report also indicated a draft section to be inserted while amending the Code. The draft Section 14-A as indicated by the Law Commission provided that the State Government may also appoint Executive Magistrates who shall be called as Special Executive Magistrates for particular areas or for the performance of particular functions and confer upon them such powers conferred or conferrable by or under this Code on an Executive Magistrate of the first or second class as it deems fit.

A Bill was introduced in the Parliament apparently but did not contained a provision for appointment of Special Executive Magistrates. The Bill was referred to the Joint Select Committee which upon deliberation seems to have accepted the line of suggestion made by the Law Commission in its 37th Report. The Committee made a report dated 14th December, 1972 stating that a provision to enable the appointment of Special Executive Magistrates to meet Special needs in relation to particular areas or for the performance of particular duties should be incorporated. Accordingly, the Parliament has enacted Section 21.[2]

B. Executive Magistrates Powers and Their Limitations

The powers of preventive detention can be classified into 2 branches, one under Article 22 of Indian constitution and the other under BNSS involving section 126-143 of chapter IX. For the purpose of this article we will only talk about the preventive detention powers under BNSS.

The preventive powers of executive magistrate on a brief reading of the bare sections can be understood in the following manner**.** Sections 126–143 empower Executive Magistrates to

[1] Law Commission of India, Rep. No. 37, *The Code of Criminal Procedure, 1898 (Sections 1 to 176),* para,117–118, at 38 (1967)
[2] State of Maharashtra v. Mohammed Salim Khan*,* (1991) 1 S.C.C. 550 (India)

initiate preventive proceedings where the statutory conditions indicate that a person may breach the peace, disturb public tranquility or fall within specified categories requiring security for good behaviour. Depending on the applicable provision, the Magistrate may require the person to show cause why they should not execute a bond or bail bond for keeping the peace or maintaining good behaviour. The Magistrate must follow the prescribed procedure, including making the required preliminary order, informing the person of the grounds, conducting an inquiry into the truth of the information and deciding whether security is justified. The provisions also regulate the amount and duration of security, sureties, discharge where allegations are not established, and the consequences of failing to furnish security.

We can infer that these powers are preventive rather than punitive: their purpose is to avert anticipated breaches of peace, not to punish a person merely on suspicion or past conduct. But is it the case so in real practical life

II. How the Indian courts have addressed the exercise and limitations of preventive executive powers in relation with personal liberty

The Indian constitution has provided its citizens the right to life and personal liberty under Article 21, Dicey described "personal liberty" as "a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification".[3] But can personal liberty be taken away , the question was answered in

Maneka Gandhi case[4] where Justice Beg, said, " Both substantive and procedural laws and actions taken under them will have to pass tests imposed by Articles 14 and 19 whenever facts justifying the invocation of either of these articles may be disclosed. In order to apply the tests contained in Articles 14 and 19 of the Constitution, we have to consider the objects for which the exercise of inherent rights recognized by Article 21 of the Constitution are restricted as well as the procedure by which these restrictions are sought to be imposed." Till today this remains the position of Supreme Court on the issue of Personal Liberty.

A. Madhu Limaye and Ors. Vs. Sub-Divisional Magistrate, Monghyr[5]

The case arose from two writ petitions under Article 32 of the Constitution (Nos. 77 and 307

[3] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 207 (E.C.S. Wade ed., 10th ed. 1959).
[4] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248, [672] (India).
[5] *Madhu Limaye v. Sub-Divisional Magistrate, Monghyr*, (1970) 3 S.C.C. 746

of 1970), heard together by a seven-judge Special Bench of the Supreme Court. The second was filed by Madhu Limaye, a Member of Parliament and a leader of the Samyukta Socialist Party, and Ram Adhar Giri, the party's Secretary for Varanasi district.

According to the petitioners, Madhu Limaye arrived at Varanasi Airport from Calcutta, and Giri and others went to receive him. While the petitioners were travelling by car to the city, police stopped them at a level crossing and arrested them, along with one Narendra Shastri. The petitioners said they were not told the grounds of arrest. They were taken to Varanasi Police Station and then to the City Magistrate's court. On the way, police officers showed them the report that had been made to the Magistrate seeking action under Sections 107, 117 and 151 of the Code of Criminal Procedure, 1898.

The report alleged that members of the Samyukta Socialist Party and the Samajvadi Yuvjan Sabha had been involved in violent activities, including damage and looting at the Radio Station at Sarnath and the P.T.I. teleprinter, and that further violence and destruction were apprehended once the party's leaders reached Varanasi. The arrest was made without a warrant under Section 151. No proceedings under Section 107 had been drawn up before it. The police took the petitioners to court to be bound over.

Before the City Magistrate, who relied on the police report, a notice under Section 112 was read out. It called on the petitioners to show cause why they should not execute a bond for Rs. 5,000, with two sureties for the same amount, to keep the peace for one year. Narendra Shastri was discharged because it was not established that he was the right person. The petitioners refused to accept the notice, and when they also declined to give bail, the Magistrate adjourned the case to the next day and remanded them to jail.

On 10 August 1970 the case was adjourned again, to 17 August 1970. The Magistrate did not take any evidence or examine any witness in support of the information. The petitioners approached the Supreme Court, and since the remand was never extended, they became free while the petition was pending. After hearing arguments, the Court held that their detention from 9 August 1970 was illegal and declared them entitled to be free. It gave its reasons later, on 28 October 1970.

The framework of preventive detention under CrPC (now BNSS) can be first understood in this case where the validity of Chapter VIII of CrPC (now Chapter XI of BNSS) was challenged

which laid down that if the procedures laid down by the statute is not strictly followed by the magistrate, the order or detention would be considered illegal, though the chapter was held to be constitutionally valid by the court there is ever increasing misuse of preventive detention powers especially under the hands of SEM.

B. Surendra Ramchandra Taori v. State of Maharashtra[6]

The petitioner was a journalist, a reporter for the Daily Hindusthan, who lived at Malkapur in Buldhana district. He wrote reports criticising the police at Malkapur, including on a sensational murder case in September 1999. On 24 September 1999 a police sub-inspector threatened him, and the City Police Station refused to register his complaint, so he sent it to the SDPO.

On 22 October 1999, police constable Baban Sangade took him to Malkapur Rural Police Station, where he was beaten by the police respondents and seriously injured, including right eye. The Court accepted this, because the State filed no reply and the police did not explain why his complaints were not acted on.

On 23 October 1999 , he was shown as arrested and was produced before the Special Executive Magistrate, who was a Police Inspector of the Local Crime Branch, Buldhana. The proceedings were under Section 110 CrPC (habitual offenders), with the police saying they feared a breach of the peace during Durga idol immersion processions.

The Magistrate's order was a few lines. It did not question him, did not record any grounds under S. 111, and did not say which clause of S. 110 applied. It required a bond of Rs 10,000 with a surety for one year, and since he could not furnish sureties, sent him to magisterial custody until 1 November 1999. He asked to be released on a personal bond and to be given time for sureties, and he told the Magistrate he had been beaten. He was not allowed legal aid. He stayed in jail from 23 to 30 October 1999, and was released only after the High Court ordered his release on 29 October.

In this case the court observed that since this section confers drastic powers to bind down persons suspected; but not proved to have committed any of the offences specified in various clauses, the powers should be used with extreme caution and judicial discretion and strictly

[6] Surendra Ramchandra Taori v. State of Maharashtra, 2001 (4) Mh.L.J. 601 (Bom. H.C.)

according to the procedure laid down, so that it may not be used as an engine of oppressions, blackmail or private vengeance.

The court also noted that record that vesting of powers of Special Executive Magistrate in Police Officers of whatever rank they may, has resulted in blatant misuse of such powers to the detriment of fundamental right of a citizen as enshrined in Article 21 of the Constitution of India. Very few cases reach the High Court relating to the proceedings before Special Executive Magistrate concerned with Chapter VIII of the Criminal Procedure Code.

The court also noted that functions allocated to Executive Magistrates and such powers vested in favour of police officers as Special Executive Magistrates, particularly in reference to Chapter VIII proceedings, should be forwarded to Judicial Magistrates of the first class.

This case is a prime example where a special executive magistrate misused his power for personal enmity though the provisions under Chapter VIII, do provide for a procedure which can be called reasonable, fair and just but it is prone to misuse by the Executive to sub serve their cause and therefore, such appointment of Police Officers as Special Executive Magistrates deserves to be quashed and set aside.

Another case, in Chandrabhan Rama Dhengle v. Indirabai Chandrabhan Dhengle [7], the Court found the Magistrate to have exercised jurisdiction under Section 107 of the Criminal Procedure Code arbitrarily and in clear violation of Article 21 of the Constitution resulting in illegal detention of the petitioner in the said proceedings for a period of 63 days.

Again, in Balamurugan v. State[8], we see the misuse of executive powers by the executive magistrate who was a high ranking police officer, a deputy commissioner which mechanically filed a detention order without allowing the petitioner a chance to be hear or present material, just on merely based upon the reports of the Inspectors of Police.

There are a number of growing examples increasing by the day, where the police officers as executive magistrates have not acted according to procedure and in contravention of the law being violative of Art 19 and 21 of Indian constitution. The Special executive magistrates

[7] Chandrabhan Rama Dhengle v. Indirabai Chandrabhan Dhengle & Ors., 1998 (1) Mh.L.J. 234 (Bom. H.C.)
[8] Balamurugan v. State Rep. by Inspector of Police, Crl. R.C. (MD) No. 535 of 2016 (Madras High Ct. Sept. 2, 2016).

play a quasi-judicial function but they do not adhere to the provisions of the law and act according to the wishes of the government which is wrong and against the spirit of law.

III. What legal or administrative reforms, if any, are warranted?

In the recent case of Aldanish Rein vs. Union of India[9], the judges gave directions to call Special Executive Magistrates (SEM) as Special Executive Officers as the SEMs are likely to be mistaken for Judicial Magistrates which they are not. The court also held that there are at present many police officers who simultaneously function as Assistant Commissioner of Police (ACP). The court also laid down a no. of directions for the SEMs to follow so to ensure that the provisions are not abused or misused.

In its 41st Report (1969)[10], the Law Commission of India examined who should exercise the power to take security for good behaviour under Sections 108, 109 and 110 of the Code of Criminal Procedure, which cover persons disseminating certain matters, vagrants and suspected persons, and habitual offenders. At that time the power lay with both judicial and executive magistrates, and the position varied from State to State. An earlier report had recommended giving it exclusively to Executive Magistrates, because the proceedings are preventive and bear directly on law and order.

The Commission departed from that view. It reasoned that the final order in such proceedings affects the liberty of the person concerned, and that evidence must be sifted in a judicial manner before security can justifiably be demanded. The inquiry, it observed, "partakes of the character of a trial," even though the person is not formally an accused, there is no offence to be tried, and the rules of evidence are relaxed to some extent. It therefore recommended that the powers be vested exclusively in Judicial Magistrates, and that all Magistrates of the first class could exercise them. It also rejected concurrent jurisdiction, finding that under a statutory scheme of separation it would create confusion and had nothing to commend it.

A police officer who presides over a bond proceeding begun by his own force, relies on that same force to verify the sureties, and decides whether to extend custody on its application, does not satisfy the requirements of natural justice. Such an officer is, in effect, a judge in his own

[9] Aldanish Rein v. State (NCT of Delhi) & Anr., 2018 SCC OnLine Del 12207 (India)
[10] Law Commission of India, Forty-First Report: The Code of Criminal Procedure, 1898, para, 8.10–8.11, at 53 (1969)

cause. The maxim *nemo judex in causa sua*, that no one should be a judge in his own case, exists to prevent this. A decision-maker aligned with one side cannot be trusted to weigh the matter impartially, and the person facing the proceeding cannot be confident of a fair hearing. A Special Executive Magistrate who belongs to the same police machinery as the complainant cannot give the appearance of impartiality, and that alone is reason to doubt that the office should exist.