IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.02.2023

PRONOUNCED ON : 13.03.2023

CORAM

THE HONOURABLE Mr. JUSTICE N.SATHISH KUMAR

AND

THE HONOURABLE Mr. JUSTICE N. ANAND VENKATESH

CRL.RC.Nos.137/2018,78/2020,616/2015,1213/2016,1217/2016,1214/2016, 1215/2016, 1216/2016,1312/2016,1569/2016,161/2017,1366/2017,1367/2017,1392/2017,1393/2017, 1439/2017,1585/2017,1478/2017,1479/2017,1501/2017,1528/2017,1540/2017 ,1541/2017, 991/2018,1164/2018,1241/2018,970/2018,WP(MD).No.24662/2019, Crl.RC.Nos.1025/2018, 982/2018,1286/2018,1322/2018,1371/2018,72/2019,1386/2018, 1410/2018,1511/2018,54/2019, 1066/2018,1142/2018,87/2019,955/2018,993/2018, 1295/2018,1422/2018,1474/2018, 1476/2018, 26/2020,61/2020,107/2020,117/2020, 251/2020,285/2020,298/2020, 336/2020, 344/2020, 404/2020,472/2020,473/2020, 484/2020, 485/2020, 488/2020, 512/2020,515/2020, 516/2020,528/2020,540/2020, 543/2020, 553/2020,562/2020,564/2020, 567/2020, 569/2020, 577/2020, 580/2020, 592/2020,610/2020, 622/2020, 640/2020, 725/2020, 751/2020, 754/2020, 758/2020, 772/2020, 773/2020,784/2020, 790/2020,817/2020,822/2020, 851/2020, 858/2020, 859/2020,861/2020,865/2020,867/2020, 868/2020, 873/2020,883/2020, 891/2020, 892/2020, 900/2020,921/2020,924/2020,927/2020, 938/2020,947/2020, 954/2020, 954/2020,957/2020, 963/2020,971/2020,978/2020,993/2020, 1013/2020, 1017/2020, 1022/2020,1023/2020, 1027/2020,1028/2020, 1031/2020, 1061/2020, 1063/2020, 1072/2020,1086/2020,1094/2020, 1096/2020,1098/2020,1008/2020, 1116/2020, 1127/2020, 1197/2020,1204/2020,1224/2020, 1243/2020,300/2021,334/2021,335/2021, 353/2021,357/2021,433/2021, 688/2021,778/2021, 781/2021,880/2021, 905/2021, 913/2021,914/2021,916/2021, 923/2021,925/2021,951/2021, 972/2021, 981/2021, 985/2021,1012/2021,1036/2021,1050/2021, 1053/2021,1082/2021,

1098/2021, 1110/2021,3/2022,26/2022,31/2022,35/2022,38/2022,42/2022, 52/2022,62/2022, 115/2022, 118/2022, 121/2022,128/2022,135/2022, 166/2022,180/2022, 183/2022,215/2022, 223/2022,270/2022,286/2022,287/2022, 293/ 2022, 299/2022, 309/2022,317/2022, 345/2022, 365/2022, 397/2022,398/2022, 415/2022,416/2022, 424/2022,439/2022,443/2022, 500/2022, 506/2022, 607/2022,625/2022, 639/2022,653/2022,655/2022, 656/2022,657/200, 659/2022, 661/2022, 684/2022,687/2022,697/2022,701/2022, 703/2022,709/2022,713/2022, 722/2022, 724/2022, 755/2022,813/2022, 817/2022, 823/2022, 829/2022, 833/2022, 849/ 2022, 852/2022, 860/2022,863/2022, 869/2022, 886/2022,887/2022, 890/2022,903/2022,922/2022, 924/2022, 926/2022,975/2022, 984/2022,992/2022, 1005/2022,1006/2022, 1012/2022, 1028/2022, 1040/2022, 1047/2022, 1092/2022, 1104/2022,1116/2022,1119/2022, 1123/2022, 1138/2022, 1144/2022, 1147/2022, 1148/2022, 1161/2022,1170/2022, 1189/2022, 1190/2022, 1208/2022, 1212/2022, 1227/2022,1241/2022, 1245/2022,1259/2022,1282/2022, 1284/2022, 1309/2022, 1320/2022, 1391/2022,1400/2022, 1401/2022, 1408/2022, 1401/2022,1420/2022, 1445/2022, 1475/2022, 1491/2022,1555/2022, 1560/2022, 1569/2022,1580/2022,1600/2022, 1604/2022, 1605/2022,1606/2022, 1607/2022, 1624/2022,1634/2022, 1646/2022, 1649/2022, 1650/2022, 1653/2022, 1664/2022,1665/2022,1672/2022, 1673/2022, 1674/2022, 1676/2022,1688/2022, 1693/2022,1693/2022,5/2023,8/2023, 10/2023, 18/2023, 21/2023, 23/2023, 27/2023, 30/2023, 33/2023, 34/2023, 36/2023, 40/2023, 47/2023,68/2023, 77/2023, 78/2023, 83/2023, 86/2023, 91/2023,94/2023, 95/2023, 104/2023, 112/2023,122/2023, 123/2023, 129/2023, 144/2023, 166/2023,159/2023, 164/2023165/2023,167/2023, 168/2023,169/2023, 183/2023, 184/2023, 194/2023,198/2023, 222/2023, 270/2023,271/2023,312/2023,318/2023,329, 178/2018,150/2021, 304/2021, 650/2021,201/2023, 285/2023,302/2023,316/2023 and 808 of 2021.

AND

Crl.OP.Nos.14872/2021,14883/2021,14909/2021,14993/2021,14919/2021,14926/2021, 15027/2021,15028/2021,15031/2021,25073/2021,1223/2022,3779/2022, 3936 /2022,70/ 2023

AND

Crl.MP.Nos.881/2019, WMP(MD).No.21292, 21293 /2019, Crl.MP.No.2234/2020, Crl.MP.Nos.5520/2020, 9571/2022, 6353/2020,6592/2020,6756/2020,3934/2022, Crl.MP.Nos. 8098,8111,8177,8186 of 2021, 8194, 8179, 8195, 8180, 8196 of 2021, 8324/2022, 16340/2022, 15841/2022,18884/2022,19251/2022,19254/2022,2833/ 2023, 2929/ 2023,642/2023,542/2023,1902/ 2022,1238/ 2023,1291/2023, 1297/2023,1302/2023,1301/ 2023,1303/ 2023, 2555/2023,1403/ 2023, 1404/ 2023,1539/2023,1498/ 2023, 1781/ 2023, 2239/ 2023,2242/2023, 2577, 2597, 368 of 2023

Crl.R.C.No.137 of 2018

P.Sathish @ Sathish Kumar ... Petitioner

.Vs.

1.State rep.by
The Inspector of Police-Law & Order,
H-4, Korukkupet Police Station,
Chennai-600 021.

2.The Administrative Executive Magistrate
& Deputy Commissioner of Police,
Vannarpettai District,
Chennai City. .... Respondents

Criminal Revision Petition filed under Section 397 r/w 401 of Cr.P.C. Seeking to set aside the detention order passed by the administrative Executive Magistrate & Deputy Commissioner of Police, Vannarapettai, Chennai in M.P.No.1 of 2017 in R.C.No.155/Sec.pro/D C WPT/2017 dated 20.11.2017.

For Petitioner Mr.D.Gopikrishnan

For Respondents Mr.E.Raj Thilak
Additional Public Prosecutor
Asstd by:
Mr.V.J.Priyadarshana
Government Advocate
for R1

Mr.Sharath Chandran
Amicus Curiae
for R2

N. SATHISH KUMAR, J.,
and
N. ANAND VENKATESH, J.,

For ease of reference, this order is divided into the following sections:

Once upon a time, under the canopy of justice sat the Judicial Magistrate who exercised preventive jurisdiction under the Code of Criminal Procedure to ensure that law and order prevailed in the areas under his jurisdiction. Docket explosion, delay and other allied reasons in the regular courts necessitated the statutory transfer of this canopy to an Executive Magistrate: a revenue official who exercised jurisdiction upon information being laid by

the police. The canopy rested uneasily over the head of the revenue official as well. The police, like the proverbial camel in the tent, occasionally got their noses into the canopy but were stopped in the tracks by the Courts. Then in 2013, the camel, in its entirety, snuggled itself in and the revenue official/Executive Magistrate was ousted from the canopy and left in the cold. The significance of this short narrative would unfurl in the discussion that follows:

I. BACKDROP TO THE REFERENCE :-

These matters have been placed before this Division Bench pursuant to the orders of the Hon'ble Acting Chief Justice to resolve the conflict between the decisions of V. Parthiban, J in ***Vadivel @ Mettai Vadivel v The State*** (Cr.R.C 982 of 2018 etc., batch) and P. Devadass, J in ***Balamurugan v State*** (2016 SCC Online Mad 23460) on the one hand and that of P.N. Prakash, J in ***Devi v Executive Magistrate*** (2020 6 CTC 157) on the other hand. The reference is occasioned in the backdrop of the following facts:

a. In a batch of cases before V. Parthiban, J in ***Vadivel @ Mettai Vadivel v The State*** (Crl.RC.No.982 of 2018 etc., batch), the question that arose was whether the petitioners, who had executed bonds under 110(e) of the Code of Criminal Procedure (hereinafter the "Cr.P.C"), could be proceeded against and imprisoned by an Executive Magistrate under Section 122(1)(b) Cr.P.C., for breach of the bond conditions. The contention raised before the learned judge was that Section 122(1)(b) was concerned with a case of imprisonment for breach of a bond given under Section 107 and not under Section 110 Cr.P.C. This contention had earlier found favour with Mr.Justice Malai Subramanian in Crl.R.C.No.1791 of 2002 etc., dated 31.10.2002 in ***Malar @ Malarkodi vs The Sub-Divisional Magistrate cum Revenue Divisional Officer*** and Mr. Justice M. Sathyanarayanan in ***Karthigayan @ Pallukarthik vs. The Sub-Divisional Magistrate cum Revenue Divisional Officer and Others*** (2015 SCC Online Mad 2417).

b.V. Parthiban, J differed with the aforesaid views and held that Section 122(1)(b) must be purposively construed to include the breach of a

bond under Section 110 Cr.P.C also. In view of his disagreement with the earlier decisions, the learned judge directed the matter to be placed before the Hon'ble Chief Justice seeking a reference to a Division Bench to answer the following questions:

> *(i) Whether the Executive Magistrate concerned can exercise his power under Section 122(1)(b) for violation of bond executed under Section 110 Cr.P.C.?" and ;*
>
> *(ii) Whether the Executive Magistrate concerned can exercise his power under Section 122(1)(b) for violation of bond executed for good behaviour under Sections 108 and 109 of Cr.P.C. by treating the order of the Magistrate passed under Section 117 Cr.P.C. which explicitly include good behaviour also, as one, by harmonious construction and interpretation of the provisions concerned in order to render purpose and effect to the scheme of Chapter VIII of Cr.P.C.?"*

c.When the aforesaid reference was pending, one Devi, who had the dubious distinction of having 24 previous cases under the NDPS Act was proceeded against by the Executive Magistrate/Deputy Commissioner of

Police under Section 110 Cr.P.C. On 16.12.2019, she executed a good behaviour bond for a period of one year. On 21.12.2019, a fresh case was registered against her in S-11, Tambaram P.S. Cr. No. 989/2019 u/s. 8(c), 20(b)(ii)(A) NDPS Act and 328 IPC. She was arrested in the said case on the same day i.e., 21.12.2019 at 14.15 hrs and remanded to judicial custody by the Judicial Magistrate, Tambaram. On 24.12.2019, the Inspector of Police, S-11 Tambaram Police Station filed a petition under Section 122(1)(b) before the Executive Magistrate/Deputy Commissioner of Police. On 03.01.2020, the Executive Magistrate/Deputy Commissioner of Police passed an order directing her imprisonment until the expiry of the bond. This order was assailed before P.N. Prakash, J in ***Devi v Executive Magistrate*** (2020 6 CTC 157).

d.P.N. Prakash, J held that the breach of a good behaviour bond executed under Section 110 Cr.P.C could not be dealt with under Section 122(1)(b) as the said provision dealt with only bonds executed under Section 107 Cr.P.C. Consequently, the learned judge expressed his

disagreement with the decision of V. Parthiban, J in ***Vadivel @ Mettai Vadivel***. Parallelly, P.N Prakash, J also explored the issue of whether a "khaki-clad officer" could wear the cloak of an Executive Magistrate and exercise judicial powers to incarcerate ordinary citizens. The learned judge found himself in disagreement with the decision of P. Devadass, J in ***Balamurugan v State*** which had upheld the validity of GO Ms 181 dated 20.02.2014 that had appointed jurisdictional Deputy Commissioners of Police in cities other than Chennai as Executive Magistrates to exercise powers under Sections 107 to 110 Cr.P.C. Consequently, the following order was passed by the learned judge on 25.09.2020.

> "*42 Since this Court respectfully differs from V. Parthiban, J. on the issue of applicability of Section 122(1)(b) Cr.P.C. to a good behaviour bond under Section 110(e), the Registry is directed to place this matter before the Hon'ble Chief Justice for appropriate orders.*
>
> *43 Further, as this Court is not in agreement with the view propounded by another learned single judge of this Court in* ***Balamurugan*** *(supra), the following question is framed with a direction to the Registry to place the same before the Hon'ble Chief Justice with a request to constitute a Bench of appropriate*

strength for an authoritative pronouncement:

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

e.Pursuant to the references made by P.N Prakash, J and V. Parthiban, J an office note was placed before the Hon'ble Acting Chief Justice and through an administrative order dated 20.01.2023, these matters were directed to be placed before this Bench.

II.QUESTIONS FOR CONSIDERATION:

2.On 30.01.2023, we heard the learned counsel for some of the petitioners, the State Public Prosecutor, and the learned Amicus Curiae and with their assistance, the questions under reference were reformulated as under:

i. Whether G.O.Ms.No.659, Home (Cts.VIA) Department, dated 12/9/2013 and G.O.Ms.No.181, Home (Cts.VIA) Department, dated 20/2/2014 violate

the scheme of separation of powers and are ultra vires the proviso to Section 6 of the Tamil Nadu District Police Act, 1859 (Central Act XXIV of 1859)?

ii. Whether the Executive Magistrate concerned can exercise his power under Section 122 (1) (b) for violation of bond executed under Section 110 of the Code of Criminal Procedure?"

iii. Whether the power to issue G.O.Ms.No.659, Home (Csts.VIA) Department, dated 12/9/2013 and G.O.Ms.No.181, Home (Cts.VIA) Department, dated 20/2/2014 should be traced to Section 20 sub-Clause 4 and sub-Clause 5 of the Code of Criminal Procedure, r/w Sections 6 and 7 of the Madras City Police Act, 1888?

iv. Whether the Executive Magistrate has power to impose sentence and direct payment of fine without there being a specific power conferred under the Code of Criminal Procedure?

III.SUBMISSIONS :

3. Mr. V.C.Janardhanan, learned counsel who appeared for some of the petitioners in this batch submitted as under:

a. The judgment in ***Vadivel @ Mettai Vadivel v The State*** (Cr.R.C 982 of 2018 etc., batch) requires reconsideration in as much as the learned judge has not appreciated the distinction between a bond under Section 107 Cr.P.C., and one under Section 110 Cr.P.C.

b.The vesting of power under Section 110, which is judicial in nature, is violative of the principle of separation of powers. The decision of this Court in ***Meera Nireshwalia v State of Tamil Nadu***, (1990) 2 SCC 621 was pressed into service to highlight the point that discretionary powers when vested with the police are prone to abuse.

c. Our attention was drawn to the decisions in S***. Bharat Kumar v Chief Election Commissioner***, 1995 Cr LJ 2608, ***Surendra Ramachandra Taori v State of Maharashtra,*** 2001 4 Mah LJ 601, ***State of Karnataka v Praveen Bhai Thagodia***, 2004 4 SCC 684, ***Sidhartha Sarawgi v Board of Trustees***, 2014 16 SCC 248.

4.On behalf of the State, Mr. E. Raj Thilak, the learned Additional Public Prosecutor, made the following submissions:

a.GO.Ms.No.659 and GO.MS.No.181 have been passed by the Government of Tamil Nadu in exercise of powers conferred on it under Section 20(1) of the Cr.P.C and Section 6 of the Madras City Police Act. GO.Ms.No. 659 applies to the City of Chennai which is governed by the provisions of the Madras City Police Act, 1888. Hence, there can be no violation of the provisions of the Madras District Police Act, 1859 in so far as this GO, is concerned.

b. Section 20(1) authorises the State Government to appoint as may Executive Magistrates as it deems fit. This provision was explained by the Supreme Court in ***Suresh Sham Singh's case***, (2006) 5 SCC 745.

c.Section 122(1)(b) authorises the Executive Magistrate to detain a person who has violated the bond executed under Section 107. These provisions have been upheld by the Supreme Court in ***Madhu Limaye's case*** (1970) 3 SCC 746.

d. The power to initiate proceedings under Section 108 to 110 Cr.P.C., was given to the Executive Magistrates pursuant to an amendment made to the Cr.P.C in 1980. Our attention was invited to the Parliamentary debates for the purposes of gleaning the objective of the amendment. According to the learned Additional Public Proseuctor, the petitioners must challenge the 1980 Amendment if they want powers under Sections 108 to 110 to be exercised by Judicial Magistrates alone. Alternatively, it is for the State to exercise its discretionary power under Section 478. Cr.P.C.

e. If the Executive Magistrate is not empowered to imprison people under Section 122 then the whole purpose of Chapter VIII would be defeated. The Supreme Court has upheld an order passed by the Executive Magistrate under Section 122(1)(b) in ***Devadassan v Second Class Executive Magistrate***, (2022 SCC Online SC 280).

f. Our attention was invited to the decision in ***State of Maharashtra v Mohd Salim Khan***, 1991 1 SCC 550, for the purpose that the investing of powers under Section 107 Cr.P.C with the Assistant

Commissioner of Police in Bombay to act as Special Executive Magistrates under Section 21 of the Cr.P.C had been upheld.

5. Mr. Sharath Chandran, the learned Amicus Curiae, made the following submissions:

a.Section 122(1)(b) deals with violation of a bond executed to keep the peace. A bond under Section 110 is not a bond to keep the peace. That apart, the Forms under Schedule II Cr.P.C for both bonds are different. The decision in Vadivel @ Mettai Vadivel v The State (Cr.R.C 982 of 2018 etc., batch) is, therefore, erroneous as it has treated the bond under Section 110 and 107 to be identical which is contrary to the decision of the Division Bench in ***Krishnasawmi Thatachariar v Vanamamalai Bashiakar*** (1907 5 Cr LJ 397). Consequently, violation of a bond executed under Section 110(e) can be dealt with under Section 446 Cr.P.C and not under Section 122(1)(b).

b. Executive Magistrates cannot exercise powers under Section 122(1)(b) as that would be contrary to the decision of the Supreme Court in

Gulam Abbas v State of Uttar Pradesh, wherein it was held that an Executive Magistrate has no power to punish for breach of their executive orders.

c. An interpretation of a provision must be construed in consonance with the directive principles of state policy (***UPSEB v Hari Shankar Jain***, (1978 4 SCC 16). The principle of separation of powers enshrined under Article 50 is the axel pin of the Cr.P.C 1973. The vesting of the powers of investigation, prosecution, and adjudication in the hands of the police, who are admittedly a branch of the executive, is destructive of the principle of separation of powers and the principle of rule of law under Article 14, as has been held by a Division Bench of the Andhra Pradesh High Court in ***VM Ranga Rao v State of A.P***, 1985 2 AP LJ 361.

d.GO.Ms.No.659 makes a reference to GO.Ms.No.736 dated 28.03.1974 as its source of power. However, GO.Ms.No.736 dated 28.03.1974 identifies Revenue Officials and the Commissioner of Police, Madras alone as Executive Magistrates. Notification IV of the GO specifically authorises the exercise of only the powers under Section 133

and 144 Cr.P.C., by the Commissioner of Police. However, GO.Ms.No.659 has conferred powers under Section 107 to 110 on Deputy Commissioners when the Commissioner of Police himself has not been exercising such powers.

e. The expression "any person" occurring in Section 20(1) must be construed keeping in mind the principle of separation of powers. That apart, the decision in ***Suresh Sham Singh***, which was relied on by the learned single judge in Balamurugan, did not concern the provisions of Section 107 to 110 Cr.P.C at all. Hence, the Court in Balamurugan has placed reliance on ***Suresh Sham Singh*** to decide something which was never considered by the Supreme Court in that case.

6.The aforesaid line of submissions were adopted and supplemented by Mr.Vivekanandan, and Mr.M.Santhanaraman, learned counsel appearing for some of the petitioners.

IV. DISCUSSION :

RE: Questions (ii) and (iv):

7.Questions (ii) and (iv) are inter-connected and are, therefore, taken up first. In order to deal with these questions, we begin by examining the relevant provisions in the Code.

8.Chapter VIII of the Cr.P.C, which comprises of Sections 106 to 124, deals with powers which are commonly known as the preventive jurisdiction of the Magistrate. For the sake of clarity, the bonds contemplated under these provisions may be grouped under two heads (i) security for keeping the peace (Sections 106 and 107) and (ii) security for good behaviour (Sections 108-110).

9.The execution of bonds as a security for keeping the peace can be further classified into two kinds: (a) security for keeping the peace *on conviction* (Section 106) and (b) security for keeping the peace *in other cases* (Section 107). In the former category, the Court of Sessions or the

Magistrate of the First Class may, at the time of sentencing the accused for the offences or abetment of offences specified in Section 106(2), take a bond for keeping the peace for a period not exceeding three years. A bond in the latter category ie., under Section 107 , is contemplated in cases of a likely breach of peace or disturbance of public tranquillity or the doing of any wrongful act that may probably occasion a breach of peace or disturbance of public tranquillity. Therefore, unlike Section 106 where the execution of a bond follows the conviction and sentence, Section 107, on the other hand, is purely preventive in nature. The power to initiate proceedings under Section 107 lies with the Executive Magistrate.

10. The execution of bonds as security for good behaviour are of three kinds: (i) security for good behaviour from persons disseminating seditious libel (Section 108) (ii) security for good behaviour from suspected persons (Section 109) and (iii) security for good behaviour from habitual offenders (Section 110). The power to *initiate* proceedings under the aforesaid provisions are vested with the Executive Magistrate.

11.We now come to the stage post the initiation of proceedings under Sections 106 to 110. Section 111 contemplates the passing of a preliminary order in case the Executive Magistrate decides to proceed under Sections 107 to 110, which is followed by an inquiry under Section 116 which is then followed either by an order to give security (Section 117) or a discharge (Section 118). The procedure for inquiry under Sections 111 to 118 do not apply to a bond under Section 106 for the simple reason that in such cases the execution of a bond is already preceded by a full trial followed by a judgment of conviction and sentence. Section 122(1)(a) makes this clear when it states that "*any person ordered to give security under Section 106 or Section 117*" meaning thereby that an order to give security under Section 117 covers only the bonds under Section 107 to 110 and not a bond under Section 106.

12. The object of executing a bond under Section 117 has been explained by the Supreme Court in a recent decision in ***Istkar v State of Uttar Pradesh***, 2022 SCC Online SC 1801, wherein it has been observed thus:

> "*12. Moreover, the object of furnishing security and/or executing a bond under Chapter VIII of the Code is not to augment the state exchequer but to avoid any possible breach of peace for maintaining public peace and tranquillity. It is also explicitly stipulated under Proviso (b) to Section 117 that the amount of bond shall be fixed with due regard to the circumstances of the case and shall not be excessive. The Magistrate while ordering security under Section 117 has to take into consideration the status and position of the person to decide the quantum of security/bond; and cannot alter the purpose of the provisions from preventive to punitive by imposing heavy quantum of security/bond, which a person might be unable to pay. The demand of excessive and arbitrary amount of security/bond stultifies the spirit of Chapter VIII of the Code, which remains impermissible."*

13.The consequences for failing to comply with an order for security either under Section 106 or 117 is dealt with under Section 122(1)(a) which contemplates simple imprisonment or rigorous imprisonment in case the bond is under Sections 109 or 110 (vide under Sections 122(7) and (8)).

14.Section 122(1)(b), on the other hand, deals with imprisonment for breach of a bond for keeping the peace. As stated supra, the execution of bonds as security for keeping the peace is contemplated only under two situations ie., Section 106 and 107. However, Section 122(1)(b) does not cover a case under Section 106 but is confined to a case of a bond for keeping the peace executed pursuant to an order under Section 117 alone. As explained above in paragraph 11, an order under Section 117 does not cover the execution of a bond under Section 106. The following observations from the decision of P.N Prakash, J in ***Devi*** (supra), clearly strengthen and bring out the inter-connection between Section 107 and 122(1)(b):

> "*Section 107(1) Cr.P.C., as originally enacted, contemplated only execution of a bond and in the absence of the expression "with sureties", one can legitimately infer that the person was required to execute bond without sureties. That is why, in Section 122(1)(b) Cr.P.C, the expression "without sureties" finds place. However, Section 107(1) Cr.P.C. was amended by Act 45 of 1978 and the expression*

"with or without sureties" was added in clause (1). But strangely, Section 122(1)(b) Cr.P.C. was left untouched. This resulted in a serious anomaly whereby a breach by a person executing a bond without sureties was covered by Section 122(1)(b), but, a more serious case of a breach by a person with sureties was left untouched. This led the Law Commission (headed by Justice K.K. Mathew) to devote an entire report (102nd Report) in 1984, recommending an amendment to Section 122(1)(b). The Law Commission recommended the insertion of the words "with or without sureties" in Section 122(1)(b) in order to bring it in line with the 1978 Amendment to Section 107. The link between Section 107 and 122(1)(b) was clearly brought out in the following observation of the Commission in its 102nd Report:
"*It is obvious that sections 107 and 122 are inter-connected with each other, and matters covered by section 107, which represents the initial stage of the proceedings, should be covered by section 122, which represents the final stage. Unfortunately, however, section 122(1) falls short of that. While section 107 contemplates a bond with or without sureties, section 122(1)(b) addresses itself only to a bond executed without sureties. In this manner, there arises an anomaly. A person who, under section 107, has been required to execute a bond without sureties can, if there is a*

default, be imprisoned under section 122(1), but not a person who has executed a bond with sureties.

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

15.Thus, an analysis of the statutory scheme under Chapter VIII leads to the conclusion that the violation of a bond for good behaviour (Section 108 to 110) does not come within the four corners of Section 122(1)(b). The scheme of the Code makes it clear that Section 122(1)(b) deals exclusively with a case emanating out of a bond executed under Section 107 pursuant to an order under Section 117. Besides the decision of this Court in ***Malar @ Malarkodi vs The Sub-Divisional Magistrate cum Revenue Divisional Officer*** and ***Karthigayan @ Pallukarthik vs. The Sub-Divisional***

Magistrate cum Revenue Divisional Officer and Others (2015 SCC Online Mad 2417), our attention was also drawn to the decision of the High Court of Punjab in ***Anoop Singh v State of Punjab***, 2015 SCC Online P&H 12402 and the decision of the High Court of Madhya Pradesh in ***Meenu v State of M.P***, 2017 SCC Online MP 2115 which have held that Section 122(1)(b) has no application for violation of a bond executed under Section 110 Cr.P.C.

16.We now turn to the decision of this Court in ***Vadivel @ Mettai Vadivel v The State*** (Crl.RC.No.982 of 2018 etc., batch) which has taken a contrary view. At paragraph 15 of the order, the learned judge has opined as under:

> "*15. As rightly contended by the learned Government Advocate appearing for the State, by giving a constricted meaning to Section 122(1)(b) Cr.P.C., it would only result in creating a legal vaccum in cases of violation of bond executed under Section 110 Cr.P.C., which virtually amount to rendering the provisions otiose or nugatory. Sub Clause (e) of Section 110 Cr.P.C. clearly deals with the offences involving a breach of peace and in such event, the scheme of Section 110 Cr.P.C. has to be cumulatively construed as one including*

keeping peace as provided under Section 107 Cr.P.C."

17.With all due respect, we cannot subscribe to the aforesaid conclusion. A bond under Section 107 is a security for keeping the peace, whereas a bond under Section 110(e) is a security for good behaviour from habitual offenders involved in the commission, abetment or attempts to commit offences involving a breach of peace. By no stretch of imagination could a bond under Section 110 (e) include a bond for keeping the peace under Section 107. We are fortified in taking this view in the light of the decision of a Division Bench of this Court in ***Krishnasawmi Thatachariar v Vanamamalai Bashiakar*** (1907 5 Cr LJ 397), wherein it has been held as under:

> "*We are unable to agree with the argument of the Public Prosecutor that notice issued with reference to section 110 (e) should be held to be sufficient as a preliminary to the Magistrate making an order under section 107. The facts necessary to be proved in order to make the accused liable under section 110 (e) are different from those necessary to be proved in order to make him*

liable under section 107, and the party proceeded against should have due notice of the facts on which the Magistrate proposed to proceed against him."

18.The purpose of a bond under Section 110 (e) has been very lucidly explained by Newsam, J in **re K.S. Rathinam Pillai (AIR 1938 Mad 35)** in the following words:

"*But there is another and I think an even stronger ground for quashing the present proceedings. Neither of the petitioners has ever been convicted of any crime. A mere perusal of S. 110 is sufficient to show that it is intended to deal with ex-convicts or habitual criminals and dangerous and desparate outlaws who are so hardened and incorrigible that the ordinary provisions of the penal law and the normal fear of condign punishment for crime are not sufficient deterrents or adequate safeguards for the public. As an additional measure of protection against this hopelessly irresponsible class of persons, the section provides that they may be called upon to find truly responsible and reliable persons willing and able to answer for the good behaviour of their proteges. In other words, persons so addicted to crime that the ordinary sanctions of*

law are powerless to control their incurable proclivities are placed in much the same category as lunatics. They must either find eligible and responsible guardians or be temporarily confined for the public safety.

It is only necessary to repeat that S. 110, Criminal P. C., is intended to protect the public against irresponsible criminal maniacs and desperadoes and that the weapon of public opinion is the only one adapted to the suppression of undisciplined local dictators."

19.Consequently, we are unable to accede to the view of the learned judge in ***Vadivel @ Mettai Vadivel v The State*** (Crl.RC.No. 982 of 2018 etc., batch) that the requirements for obtaining a bond as security under Section 107 must be read into Section 110(e).

20. The learned judge in ***Vadivel @ Mettai Vadivel v The State*** (Crl.RC.No. 982 of 2018 etc., batch) has also observed as under:

16. This Court has also been informed during the course of arguments that the bond format is the same for Section 110 Cr.P.C. as a whole and it does not make

> *any specific categorization in respect of Sub Clause provided under Section 110 Cr.P.C. It is all the more reason that Sub Clause (e) has to be read as an integral part of Section 110 Cr.P.C. and in which event, the bond is executed not only for good behaviour, but also for keeping peace, in respect of habitual offenders."*

Unfortunately, the aforesaid observations are incorrect as the relevant forms contemplated under Schedule II of the Code are not the same. The form for a bond under Section 107 (Form 12) is different from a form for a bond under Section 110 (Form 13).

21. The learned judge has then invoked the principle of purposive interpretation by placing reliance on the decision of Denning, J in ***Seaford Court Estates Ltd v. Asher*** (1949) 2 All E.R.155 and has held that a bond under Section 110 must be read into Section 122(1)(b). We are unable to agree. In the above case, Lord Denning was not dealing with a case involving a penal statute. In fact, the case pertained to a tenancy statute. It

cannot be forgotten that Section 122(1)(b) authorizes the deprivation of personal liberty and must, therefore, be construed strictly. In ***W.H. King v. Republic of India*****, (1952) 1 SCC 147,** a Constitution Bench of the Supreme Court had observed as under:

> "*As the statute creates an offence and imposes a penalty of fine and imprisonment, the words of the section must be strictly construed in favour of the subject. We are not concerned so much with what might possibly have been intended as with what has been actually said in and by the language employed.*"

22.A proceeding under Section 122(1)(b) can result in imprisonment. We cannot, therefore, read in words which are not found in the four corners of the said provision for that would run counter to the basic tenet of Article 21 which permits deprivation of personal liberty only under express authority of law. It is, therefore, not possible to accept the view of the learned judge in ***Vadivel @ Mettai Vadivel v The State*** (Crl.RC.No. 982 of 2018 etc., batch) that Section 122(1)(b) must be construed purposively to include bonds under Section 110 Cr.P.C as well. As was observed by Marshall, CJ in ***United States v Wiltburger***, 18 US 76:

> "*To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other cases".*

23.The learned judge in ***Vadivel @ Mettai Vadivel v The State*** (Crl.RC.No. 982 of 2018 etc., batch) has also pondered over the fact that unless Section 110 is read into Section 122(1)(b), a breach of bond under Section 110(e) cannot be effectively dealt with. This conclusion overlooks the fact that a breach of a bond under Section 110(e) would result in initiation of proceedings under Section 446 Cr.P.C., for forfeiture and recovery of the sum covered by the bond. Form 49 in Schedule II of the

Code prescribes a notice to the surety of forfeiture of a bond for good behaviour under Section 446. In case, the sum payable under the bond amount is not paid or recovered, the surety can be proceeded against under the proviso to Section 446(2) and imprisoned. If we were to hold that a bond under Section 110(e) is covered under Section 122(1)(b), the procedure prescribed under Section 446 read with Form 49 would become otiose.

24.For all the aforesaid reasons, the decision of the learned single judge in ***Vadivel @ Mettai Vadivel v The State*** (Crl.R.C.No. 982 of 2018 etc., batch) cannot be said to have laid down the correct law and will accordingly stand overruled.

25. The next question is whether an Executive Magistrate has the power to impose sentence under the Code. Though the question was originally formulated in rather generic terms, during the course of arguments it was agreed that the issue can be confined to whether imprisonment for breach of a bond executed under Section 107 can be

ordered by an Executive Magistrate under Section 122(1)(b). Therefore, the question is whether an Executive Magistrate has power to imprison a person under Section 122(1)(b) for violation of the conditions of the bond executed under Section 107.

26.The contention raised by the State is that Section 122(1)(b) specifically states that where an order of a Magistrate under Section 117 is proved to have been breached "*such Magistrate or his successor-in-office*" may order arrest and detention until the expiry of the bond period. The expression "*such Magistrate*" occurring in Section 122(1)(b) could only mean the Magistrate acting under Section 117 which, in the context of a proceeding under Section 107, is an Executive Magistrate. It is, thus, contended that the Code has vested powers with Executive Magistrates under Chapter VIII to authorise detention. Our attention was also drawn to the decision of the Supreme Court in ***Devadassan v Second Class Executive Magistrate*** (2022 SCC Online SC 280), wherein an order passed by the Executive Magistrate detaining a person under Section 122(1)(b) was

upheld.

27. The Executive Magistrate is a creation of the Code of Criminal Procedure, 1973. Under the Code of Criminal Procedure, 1898 proceedings under Section 107 could be initiated by a Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or Magistrate of the First Class. The Code of 1898 did not envisage any separation of functions between the judicial and the executive branches of the State. Consequently, the executive branch as well as the judicial branch could exercise powers under Section 107 and pass orders under Section 118 (present Section 117).

28. In fact, the absence of any separation of judicial and executive functions between the various Courts of Magistrate was one of the primary reasons for the Law Commission to recommend the overhaul of the 1898 Code in its 37th Report. In its 41st Report, the Law Commission recommended that the old nomenclature be done away with and that the Magistracy be reorganised on the lines of Judicial and Executive

Magistrates. In the Metropolitan areas, the Code created a class of Magistrates called Metropolitan Magistrates who exercise the jurisdiction of Judicial Magistrates in a Metropolitan area (as notified under Section 8). The Law Commission, in its 41st Report, has specifically adverted to the proposed functions of Executive Magistrates under the new Code and had observed as under:

> "*As regards the Executive Magistrates, we do not see any point in maintaining the distinction of first and second class. The functions to be performed by Executive Magistrates under the Code are very few and they hardly admit of being divided into more important functions that will have to be performed by Executive Magistrates of the first class and less important ones that could be left to junior magistrates put in the second class. In fact, the day-to-day, routine work of an executive magistrate under the Code arising in any sub-division may not require more than one officer to handle- We notice that in Bombay, according to the amendment of the Code made in 1951, executive magistrates are not divided into those of the first class and of the second class nor is there a division of functions between senior and junior magistrates. Provision is made for a category designated Taluka Magistrates who are presumably subordinate revenue officers in charge of talukas. We propose that there need be only one class "of executive magistrates under the Code, that the chief officer in charge of the administration of the district (whether known as District Collector, District Officer or Deputy Commissioner) should continue, as at present, to be the District Magistrate, and that the institution of Sub-divisional Magistrates on the executive side should also be retained. If*

> *there is need for an executive magistrate at the taluka or tahsil level in any State, an executive or revenue officer of the Government can be appointed simply as Executive Magistrate to exercise functions under the Code".*

29.Section 107 of the Code undoubtedly vests power with the Executive Magistrate to *initiate* proceedings under the said provision, followed by the passing of a *preliminary order* under Section 111, and an inquiry under Section 116. If the Magistrate chooses to pass an order directing security to be furnished, a *final order* to that effect may be made under Section 117. Thus, a proceeding initiated under Section 107 may either end up with a final order under Section 117 or with an order of discharge under Section 118.

30.It appears that the Law Commission, in its 41st Report, had recommended the vesting of powers in Executive Magistrate for the following reasons (pp 50):

> "*In order to be effective, proceedings under the section have to be taken urgently, and as they are immediately concerned with maintenance of peace and order, the functions should, in our opinion, be assigned to executive magistrates."*

Thus, what appears to have weighed with the Law Commission as well as Parliament is that proceedings under Section 107 must be carried out with a sense of immediacy. Thus, the initiation, conduct of inquiry and passing of final orders either under Section 117 or discharge under Section 118 was vested with the Executive Magistrate. In fact, when Parliament passed the Amendment Act of 1980 taking away the powers under Section 108 to 110 from Judicial Magistrates and vesting them with Executive Magistrates, the justification given by the Minister of State for Home Affairs, who moved the Amendment bill on the floor of the Lok Sabha was as follows:

> "*Some of the hon. Members are suffering from a misconception that these are all of a punitive nature. As a matter of fact, they are security proceedings, designed to play a role only in the prevention of crime and especially assisting the maintenance of law and order. It is only a preventive sort of measure**. It is not designed to be a punitive nature and as a matter of fact any action taken under these sections can be referred for an appeal to the Sessions Judge**."*

It is, therefore, clear that even before Parliament, vesting of jurisdiction with Executive Magistrates under Sections 108 to 110 was on the understanding that it is preventive and not punitive in nature. This is

because a final order under Section 117 only involves the taking of security by executing a bond under Sections 107 to 110. In other words, at the Section 117 stage there is no interference to personal liberty as the person concerned is merely required to execute a bond either under Form 12 or Form 13 of the Second Schedule of the Code.

31. The punitive element is only in Section 122 which deals with a failure to execute a bond (Section 122(1)(a) and consequences of a breach of a bond executed under Section 107 (Section 122(1)(b). Nevertheless, proceedings under Section 122 are clearly separate and distinct from the proceedings which culminate with the passing of a final order under Section 117.

32.The question then is whether the Executive Magistrate can proceed to authorize detention under Section 122(1)(b) if it is proved that a bond executed under Section 107 to 110, pursuant to an order under Section 117, has been breached. Section 122(1)(b) reads as follows:

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

We have already concluded that the breach of a bond under Section 122(1)(b) would result in initiation of proceedings under Section 446 Cr.PC., for forfeiture and recovery of the sum covered by the bond. Thus, only a bond executed under Section 107 pursuant to an order under Section 117 comes within the net of this provision. Section 122(1)(b) does not use the expression Executive Magistrate, but merely states "Magistrate". Section 3(1) (a) of the Code reads as follows:

> "*3. Construction of references.—(1) In this Code,—*
>
> *(a) any reference, without any qualifying words, to a Magistrate, shall be construed, unless the context otherwise requires,—*
>
> *(i) in relation to an area outside a metropolitan area, as a reference to a Judicial Magistrate;*

(ii) in relation to a metropolitan area, as a reference to a Metropolitan Magistrate;……..”

Therefore, where the Code merely uses the expression Magistrate it must be read, unless the context otherwise requires, as referring to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be. The question is whether the meaning of the expression “Magistrate” in the context of Section 122(1)(b) warrants a departure from the aforesaid construction.

33.It is no doubt true that Section 122(1)(b) read literally requires proof of breach to be proved before “*such Magistrate or his successor-in-office*” before whom the bond was executed under Section 117. The larger question, however, is whether an Executive Magistrate is invested with powers under the Code to inflict punishment. Our attention was invited by the Amicus Curiae to Section 167(2-A) of the Code which authorizes the detention of an accused by an Executive Magistrate. It was pointed out that to exercise powers of detention Section 167 (2-A) requires that an Executive Magistrate must be specifically invested with the powers of a Judicial or

Metropolitan Magistrate. This can be done by the High Court on a request made by the State Government under Sections 13 or 18 of the Code. This itself would show that the detention of a person, which is an interference with his personal liberty, cannot be done by an Executive Magistrate without being specially invested with the powers of a Judicial Magistrate.

34. The decision of a three-judge bench of the Supreme Court in ***Gulam Abbas v State of Uttar Pradesh***, (1982) 1 SCC 71, is a direct authority for the proposition that an Executive Magistrate under the new Code has no power to punish. Speaking for the Court, Tulzapurkar, J has observed as under:

> "***24.****Turning to the 1973 Code itself the scheme of separating Judicial Magistrates from Executive Magistrates with allocation of judicial functions to the former and the executive or administrative functions to the latter, as we shall presently indicate, has been implemented in the Code to a great extent. Section 6 provides that there shall be in every State four classes of criminal courts, namely, (i) Courts of Session, (ii) Judicial Magistrates of the First class and, in any metropolitan area, Metropolitan Magistrates;(iii) Judicial Magistrates of the Second Class; and (iv) Executive Magistrates; Sections 8 to 19 provide inter alia for declaration of*

*metropolitan area, establishment of Courts of Session, Courts of Judicial Magistrates, Courts of Metropolitan Magistrates and appointments of Sessions Judges, Additional Sessions Judges, Assistant Sessions Judges, Chief Judicial Magistrates, Judicial Magistrates, Chief Metropolitan Magistrates and Metropolitan Magistrates together with inter se subordination, but all appointments being required to be made by the High Court, while Sections 20, 21, 22 and 23 deal with appointments of District Magistrates, Additional District Magistrates, Executive Magistrates, Sub-Divisional Magistrates and Special Executive Magistrates and their respective jurisdictions in every district and metropolitan area together with inter se subordination, but appointments being made by the State Government**. Chapter III comprising Sections 26 to 35 clearly shows that Executive Magistrates are totally excluded from conferment of powers to punish, which are conferred on Judicial Magistrates; this shows that if any one were to commit a breach of any order passed by an Executive Magistrate in exercise of his administrative or executive function he will have to be challaned or prosecuted before a Judicial Magistrate to receive punishment on conviction.**"*

In the very same paragraph, the Supreme Court has also observed as under:

"*Further, if certain sections of the present Code are compared with the equivalent sections in the old Code it will appear clear that a separation between judicial*

*functions and executive or administrative functions has been achieved by assigning substantially the former to the Judicial Magistrates and the latter to the Executive Magistrates. For example, the power under Section 106 to release a person on conviction of certain types of offences by obtaining from him security by way of execution of bond for keeping peace and good behaviour for a period not exceeding three years — a judicial function is now exclusively entrusted to a Judicial Magistrate whereas under Section 106 of the old Code such power could be exercised by a Presidency Magistrate, a District Magistrate or Sub-Divisional Magistrate; but the power to direct the execution of a similar bond by way of security for keeping peace in other cases where such a person is likely to commit breach of peace or disturb the public tranquillity — **an executive function of police to maintain law and order and public peace** which was conferred on a Presidency Magistrate, District Magistrate, etc. under the old Section 107 is now assigned exclusively to the Executive Magistrate under the present Section 107."*

A close reading of the aforesaid passages from the decision in ***Gulam Abbas*** would show that (i) the power to direct the execution of a bond under Section 107 Cr.P.C is an executive function and (ii) if any one were to commit a breach of any order passed by an Executive Magistrate in exercise of his administrative or executive function, which includes an order under Section 117 directing the execution of a bond under Section 107, he will have to be prosecuted before a Judicial Magistrate to receive punishment. This decision, being a decision of a bench of three judges of the Supreme Court, is clearly binding on us.

35. The learned Additional Public Prosecutor attempted to distinguish this decision on the ground that the case emanated from a writ petition filed before the Supreme Court in 1978 which was prior to the Code of Criminal Procedure (Amendment) Act, 1980. In our opinion this distinction is of no relevance for the simple reason that the power to initiate proceedings under Section 107 has always remained with the Executive Magistrate prior to and post the 1980 Amendment. That apart, the decision in ***Gulam Abbas*** was

delivered on 3rd November, 1981 much after the coming into force of the Amending Act of 1980.

36.The learned Additional Public Prosecutor sought to distinguish Gulam Abbas on the ground that the case related to Section 144 Cr.P.C which may not have a bearing on the case at hand. However, paragraphs 23 and 24 of ***Gulam Abbas's case*** contains a detailed discussion on the powers of the Executive Magistrate and the concept of separation of the judicial functions from the executive as the objective of the Cr.P.C of 1973. The Court has characterised the powers under Section 107 and 144 as being executive in character. It has also added that the breach of an administrative or executive order passed by an Executive Magistrate will have to be dealt with and punished only by the Judicial Magistrate. These are not merely passing remarks but are findings returned after carefully examining the Law Commission Reports and the relevant provisions of the Cr.P.C. We are, therefore, not persuaded to hold that the decision in ***Gulam Abbas*** is inapplicable to the case on hand.

37.We also notice that a similar view was echoed by a Division Bench of this Court (S. Natarajan and Ratnavel Pandian, JJ) in ***Elumalai v State of Tamil Nadu***, (1983) LW (Cri) 121, wherein, in the context of Section 109 and 110 Cr.P.C it was observed as under:

> "*Hitherto the power of taking security in the proceedings initiated under S. 109 or S. 110 of the Code, vested only with the Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate or the Magistrate of the First Class under the old Code, and with a judicial Magistrate of the First Class under the old code and with a Judicial Magistrate of the first class under the New Code. But, by Ss. 2 and 3 of Central Act 63 of 1980, the expression 'an Executive Magistrate' is substituted for the words 'a judicial Magistrate of the First Class' which came into effect from 23rd September, 1980 and hence, as both the sections stand at present, the power of initiating the proceedings is vested with the Executive Magistrates, and the Judicial Magistrates have no authority to initiate security proceedings under Ss. 109 and 110.* ***But an Executive Magistrate has no power, except under S. 167(2-A) introduced by Act 45 of 1978, to order detention to custody of a person brought or produced before him in a proceeding taken under S. 109 or S. 110 of the Code, by availing of S. 167, since the power to order detention or to extend the detention is given only to a Judicial Magistrate***."

We may only add that detention contemplated under Section 167 (2-A) by an Executive Magistrate is of an accused arrested in the course of an investigation under Chapter XII of the Code.

38.It was, however, argued at the behest of the State that even though the Executive Magistrate has not been empowered under Chapter III of the Code to pass sentences of imprisonment, what is contemplated under Section 122 (1)(b) is not a sentence but a detention. On a first blush, this is an attractive argument. However, on a closer analysis the contention does not hold water. The Supreme Court, in ***Gulam Abbas***, has clearly held that the Executive Magistrate cannot punish for breach of an administrative or executive order passed by him. Breach of Section 122(1)(b) results in arrest and imprisonment which is certainly a form of punishment. It cannot be maintained with any degree of seriousness that imprisonment does not amount to punishment.

39. That apart, as pointed out above, wherever Parliament has thought it fit to invest powers of detention on an Executive Magistrate, it has expressly prescribed the procedure. Section 167(2-A) also empowers an Executive Magistrate to detain an accused. However, Section 167-(2-A) has

expressly stipulated that an Executive Magistrate must be invested with the powers of a Judicial Magistrate or Metropolitan Magistrate for this purpose. If the Executive Magistrate could straightway authorize detention, the requirement of investing powers of a Judicial Magistrate on an Executive Magistrate would sound pointless. Thus, under the scheme of the Code, the power to authorise detention, by its very nature, involves the deprivation of personal liberty and is, therefore, the function of a Judicial/Metropolitan Magistrate. That is precisely the reason why Section 167-2A requires the conferment of judicial powers on an Executive Magistrate to authorise detention.

40. It was, however, urged on behalf of the State that the decision of the Supreme Court in ***Devadassan v Second Class Executive Magistrate***, (2022 SCC Online SC 280), is an authority for the proposition that an Executive Magistrate can detain a person in exercise of power under Section 122(1)(b). This decision emanated out of an order passed by a learned single judge in the Madurai Bench of this Court in Cr.R.C (MD) 379 of 2021. The

order of the learned single judge discloses that the only point raised before the Court was that no opportunity was given to the accused before the bond was forfeited. The Court negatived the contention and dismissed the revision. On appeal, the only point urged before the Supreme Court, as is evident from paragraph 4 of the order, was that the appellant had been jailed without due enquiry and without affording reasonable opportunity. The Supreme Court upheld the order observing that "*in the facts of the case at hand, nothing has been brought on record that how and in what manner the procedure contemplated under Chapter VIII has not been followed*." That apart, more importantly we notice that the decision in ***Gulam Abbas***, which was by a bench of three Hon'ble Judges, was not brought to the notice of the two Hon'ble Judges who decided ***Devadassan***. Under these circumstances, as a measure of judicial discipline we are bound by the dicta of the larger bench of the Supreme Court in ***Gulam Abbas***.

41.In view of the aforesaid discussion, we hold that an Executive Magistrate cannot authorize arrest and detention of a person under Section

122(1)(b) for violation of a bond under Section 107 Cr.P.C. In view of the decision of the Supreme Court in ***Gulam Abbas***, a person violating the bond under Section 107, executed pursuant to an order under Section 117, will have to be challaned or prosecuted before a Judicial Magistrate to receive punishment under Section 122(1)(b).

RE: QUESTIONS (i) and (iii)

42. The third question is whether the power to issue G.O.Ms.No.659, Home (Csts.VIA) Department, dated 12/9/2013 and G.O.Ms.No.181, Home (Cts.VIA) Department, dated 20/2/2014 should be traced to Section 20 sub-Clause 4 and sub-Clause 5 of the Code of Criminal Procedure, r/w Sections 6 and 7 of the Madras City Police Act, 1888? This issue need not detain us for long since a perusal of both GO's indicate that the State has issued the same not in exercise of powers under Section 20 (4) and (5) Cr.P.C, read with Sections 6 and 7 of the Madras City Police Act, 1888 but by exercising powers under Section 20(1) of the Cr.P.C. Consequently, there is no necessity to second guess an answer to this question when the same is

available on the face of the GO itself.

43. The first question framed for consideration can now be taken up. This question is whether G.O.Ms.No.659, Home (Cts.VIA) Department, dated 12/9/2013 and G.O.Ms.No.181, Home (Cts.VIA) Department, dated 20/2/2014 violate the scheme of separation of powers and are ultra vires the proviso to Section 6 of the Tamil Nadu District Police Act, 1859 (Central Act XXIV of 1859).

44.The theory of separation of powers has been an integral part of constitutional theory for over three centuries. The idea is often attributed to Baron Montesquieu who alluded to the three branches of Government in his Book “Esprit Des Lois” (The Spirit of the Laws) in 1748. Montesquieu defined three types of government: republican, monarchical, and despotic. In the first the people are possessed of the supreme power; in a monarchy a single person governs by fixed and established laws; and lastly in a despotic government a single person directs everything by his own will and caprice.

45. Much confusion has resulted in the use of the term “powers”. A close analysis of Montesquieu’s idea would show that what he contemplated was separation of “functions” as between the three branches of Government. This was lucidly explained by James Madison in the Federalist Paper No 47. Explaining Montesquieu’s theory Madison says ;

> “*it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed* the supreme judiciary, or the supreme executive

authority."

He then goes on to add:

"When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest THE SAME monarch or senate should ENACT tyrannical laws to EXECUTE them in a tyrannical manner. " Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR. Were it joined to the executive power, THE JUDGE might behave with all the violence of AN OPPRESSOR. "

46.Thus, the basis of the principle of separation of powers is the separation of functions ie., the executive cannot play the judge and vice versa. The Constitution of India has incorporated the principle of separation of powers in Article 50 which reads as follows:

"***Separation of judiciary from executive***

The State shall take steps to separate the judiciary from the executive in the public services of the State."

The rationale behind Article 50 has been explained by Dr Ambedkar in his address to the Constituent Assembly on 25th November 1948, in the

following words:

> "*It is, therefore, thought that this article would serve the purpose which we all of us have in view, if the article merely contained a mandatory provision, giving a direction to the State, both in provinces as well as in the Indian States, that this Constitution imposes, so to say, an obligation to separate the judiciary from the executive in the public services of the State, the intention being that where it is possible, it shall be done immediately without any delay, and where immediate operation of this principle is not possible, it shall, none the less, be accepted as an imperative obligation, the procrastination of which is not tolerated by the principles underlying this Constitution. I therefore submit that the amendment which I have moved meets all the points of view which are prevalent in this House, and I hope that this House will give its accord to this amendment."*

In ***Union of India v. Sankalchand Himatlal Sheth*****, (1977) 4 SCC 193,** the Supreme Court has observed as under:

> "*And hovering over all these provisions like a brooding omnipresence is Article 50 which lays down, as a Directive Principle of State Policy, that the State shall take steps to separate the judiciary from the executive in the public services of the State. This provision, occurring in a chapter which has been described by Granville Austin as "the conscience of the Constitution" and which embodies the social philosophy of the Constitution and its basic underpinnings and values, plainly reveals, without any scope for doubt or debate, the intent of the Constitution-*

makers to immunise the judiciary from any form of executive control or interference.

47. In ***State of T.N. v. State of Kerala*, (2014) 12 SCC 696,** a Constitution Bench of the Supreme Court has observed as under:

> "***126.1.****Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs—legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of powers, the separation of powers between the legislature, executive and judiciary is not different from the Constitutions of the countries which contain express provision for separation of powers."*

The Supreme Court has also clarified that a law which violates the principle of separation of powers would be violative of Article 14 as well. The Court

has observed as follows:

> "***126.3.*** *Separation of powers between three organs—the legislature, executive and judiciary—is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution."*

We may add that a breach of the principle of separation of powers would amount to arbitrariness on the part of the State thereby amounting to an infraction of Article 14 as well.

48.Our attention was also invited to the Code of Criminal Procedure (Punjab Amendment) Act, 1983 (Punjab Act 22 of 1983). Section 4 of the said Act empowered an Executive Magistrate to take cognizance and try, to the exclusion of all other Magistrates, the cases relating to certain specified offences. Consequential amendments were made to insert Section 190A and

29A Cr.P.C to enable Executive Magistrates to take cognizance and also pass sentences. This amendment, inserting Section 29-A was made on 27.07.1984, shortly after the decision in ***Gulam Abbas***, since the Supreme Court had already held that under the Code the Executive Magistrate had no power to punish.

49.The constitutional validity of Section 4 of the Punjab Act 22 of 1983 was assailed before a Full Bench of the Punjab and Haryana High Court in ***Sukhdev Singh Dhindsa v. State of Punjab*, 1985 SCC OnLine P&H 416 : ILR (1985) 2 P&H 380.** The Court, inter alia, held that the transfer of power violated the concept of separation of powers and a fair and impartial trial. The Full Bench observed as under:

> "***26.*** *As is evident from the observations reproduced above, administration of justice has a social dimension and the society at large has a stake in impartial and even-handed justice. In the hands of the Executive Magistrates as they are placed, it would be difficult for the accused to feel that justice would be done to him. As observed by Chief Justice*

Chandrachud, it is of the utmost importance that justice must not only be done but must be seen to be done. To compel an accused to submit to the jurisdiction of a Court, which, in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of natural justice and a denial of fair play. In the instant case, the learned Advocate-General, as earlier observed, has not been able to place any material to show as to what was the compelling need of divesting the Judicial Magistrates of their power to try offences nor triable by the Executive Magistrates, by enacting Section 4 and that what benefit would be derived by undoing the achievement of the directive principles as embodied in Article 50 of the Constitution. Mr. Sidhu, learned Advocate-General, had contended that certain offences triable by the Judicial Magistrates have been made triable by the Gram Panchayat and that if Gram Panchayat could try some offences, why could not the Executive Magistrates be given the power of trying the specified offences. At first flush the argument may look to be attractive but a little scrutiny displays its hollowness. The power of the Legislature to withdraw trial of certain offences from the Courts and give the same to some other authority cannot be disputed. But then, as observed earlier, the

accused should have the satisfaction that the authority trying him is not biased and that he will get a fair and just trial and, as is evident from the discussion in the earlier part of the judgment, the accused in case of specified offences which have been made triable by the Executive Magistrates would not have the satisfaction that his trial would be by an unbiased authority and would be just and fair. As a result of the aforesaid discussion, we find that having separated the judiciary from the executive and having achieved the directive principles as embodied in Article 50, the law now enacted for the trial of certain offences by the Executive Magistrates is neither fair nor just nor reasonable, with the result that the provisions of Section 4 of the Amendment Act empowering an Executive Magistrate, to the exclusion of any other Magistrate, to take cognizance of and to try and dispose of cases relating to specified offences are ultra vires of A.

50.Similarly, the constitutional validity of Section 21 of the Bonded Labour System (Abolition) Act which vested power with Executive Magistrates to try offences under the Act were struck down by a Full Bench of the Madhya Pradesh High Court in ***HanumantsingKubersing v. State of***

***Madhya Pradesh*,: 1996 MP LJ 389**, as being violative of the principle of separation of powers. The Full Bench observed:

> "*Counsel for the respondents could not point out the benefit which would be derived by vesting judicial powers on the Executive Magistrates by the enabling provision under section 21 of the Act which is not only against Article 50 of the Constitution but also against the Articles 14 and 21 and also the scheme of the Code. Therefore, we are of the opinion that section 21 of the Act which enables the State Government to confer on an Executive Magistrate the powers of a Judicial Magistrate of first class or second class for the trial of the offences under the Act, offends Articles 21, 14 and 50 of the Constitution. The Full Bench decision of Punjab and Haryana High Court in the case of Sukhdev Singh v. State of Punjab (supra) supports our view.*"

51.It is, therefore, manifestly clear that the separation of judicial functions from the executive was incorporated as an imperative obligation on the States. This was necessary particularly in the field of criminal procedure where the executive officers were also exercising judicial powers under the Code of Criminal Procedure, 1898. The history of these provisions has been captured with characteristic thoroughness and clarity by

Mr. Justice P.N. Prakash in ***Devi's case***, and we can do no better than to simply extract them here:

> "***4.****When the East India Company took over the administration of the Madras Presidency, the situation that prevailed is best explained in the preamble to Regulation XXXII of the Madras Regulations, 1802, which is as under:*
> "*A Regulation for prohibiting affrays reflecting disputed boundaries in the British Territories subject to the Presidency of Fort St. George.*
>
> *It having been a practice of proprietors, and farmers of land, poligars, under-farmers, and ryots, to seize or order their agents and dependants to take possession by force of disputed lands or crops, under a pretended claim of right thereto; and affrays having been in consequence caused, attended with bloodshed, and with the loss of lives; and recourse to these violent means either for enforcing or resisting such pretended claims of private right, being injurious to the peace of civil society, and contrary to good Government; the civil Courts of Judicature shall be competent to hear, try and decide, causes so founded on disputed boundaries, and imperfect landmarks."*
>
> ***5.****The East India Company maintained law and order through these Regulations until the Crown took over the administration of India in 1858, after the Sepoy Mutiny. One*

of the first acts of the newly created Legislative Council of India was to enact Act XXIV of 1859 (for clarity "the District Police Act, 1859") for the better regulation of the police within the Presidency of Fort St. George. The Act, earlier known as the Madras District Police Act, was rechristened as the Tamil Nadu District Police Act in 1969. For the Presidency Town of Madras, the Madras City Police Act, 1888 (for clarity "the City Police Act,1888) was passed and the office of the Commissioner of Police was created under whom the administration of the Madras City police vests even now.

6.*The Code of Criminal Procedure, 1861, and the subsequent Codes vested the Magistrates, both Executive and Judicial, with powers to prevent breach of the peace and for keeping a watch on the behaviour of habitual offenders. The evolution of these provisions has been set out in detail in the Division Bench judgment of the Delhi High Court in* ***Aldanish Rein vs. State of NCT of Delhi and another*** *and it will, therefore, be superfluous to recount them here. Suffice it to say that under the 1898 Code, both the executive officers and judicial officers were exercising powers under Part IV - Prevention of Offences - Chapter VIII – Of security for keeping the peace and for good behaviour. In fact, during the reign of the Raj, the Executive Magistrates, including the District Collectors, were exercising these powers against freedom*

fighters in order to protect the commercial interest of the ruling English class. Nevertheless, even during these times, the police were not given these powers as could be seen from the provisions of the District Police Act, 1859 and the City Police Act, 1888. In fact, even prior to the coming into force of the Evidence Act, 1872, the Code of Criminal Procedure, 1861, made confession to police irrelevant and inadmissible, save only for proving the discovery of a fact. The relevant provisions in the District Police Act, 1859 and the City Police Act, 1888, will be discussed in detail below. Suffice it to say here that what the Raj loathed to do, the Indian State now does with the least compunction.

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

"On 29th February the District Magistrate (refers to Mr.

Wynch) arrived from Tinnevelly and after a walk through the town, during which he found it quiet, held a conference of the leading Town's people including the 2nd accused (refers to Mr.V.O. Chidambaram Pillai) The result was that, deceived by the apparent peaceful condition of affairs during his short visit, he directed cancellation of the order forbidding meetings. The public meetings accordingly were recommenced on 1.3.1908. There was little change in the tone of the speeches and a procession was announced for the 9th March in honor of B.C.Pal who was to be released from gaol on that day. To prevent the breach of the peace, the procession was forbidden and notices were served on the 2 accused (and also on another named Padmanabha Iyengar who had recently joined in the campaign) calling them into Tinnevelly on the 9th March to answer charges under section 108 C.P.C. On March 9th, the accused being absent, no procession was held at Tuticorin; but a procession, originally fixed for the 14th, was held that night at Tinnevelly after the Court was closed and speeches were again made by both accused in the bed of the Tambrapurni river opposite the Court house. On the 10th morning, the 2 accused and Padmanabha Iyengar were back again in Tuticorin and the prohibited procession with B.C. Pal's photo came off in the forenoon, the 3 men riding in a phaeton with the photo.

Catching the 12.30 train, they were back in Tinnevelly in time to attend the District Magistrate's Court the same afternoon. On the 11th evening, the two accused went straight from the District Magistrate's Court to the river bed in front of it and again, addressed a meeting; while the District Magistrate, who had found 'Bande Matharam' inscribed on the walls and punkahs of his Court, was followed to his house by a mob shouting the same war-cry. On the 12th, the District Magistrate considering that the 2 accused could no longer with safety be allowed to be at large caused to be initiated fresh proceedings under section 107 C.P.C., arrested the three men and had them confined. This proceeding, imperative as it seemed at the time, was held to be illegal by the High Court at a subsequent date. On the 13th March the shops in Tuticorin never opened. At Tinnevelly before noon, but after the arrival of the Tuticorin train, the bazaars were also closed and a riot of a serious character occurred. Every public building (except the Sub-Registrar's Office) was attacked and fired including the Police Station, Municipal Office, Additional District Munsif's Court, *etc*. And the riot was only quelled by calling out the Reserve Police and using fire arms. All the time, Tuticorin remained quiet but with bazaars closed. In the evening, a prohibited meeting was held at the Bandy Petta which the Divisional Magistrate (now Mr. Ashe who had relieved Mr. Bracken) had

to disperse also with an armed force.

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

8.*The conversation that transpired between Mr. Wynch, District Collector, Tirunelveli and V.O.Chidambaram Pillai (A.2) has been contemporaneously penned in a poem by Subramania Bharathi and the official English translation of it has been set out in the dissenting judgment of Mr. Justice Chettur Sankaran Nair in* ***King Emperor vs. Nilakanta and 13 others*** *(Divisional Magistrate Ashe murder case):*

S. No.	Words addressed by Mr.Wynch to Mr.V.O. Chidambaram Pillai	Reply to Mr. Wynch by Mr.V.O.Chidambaram Pillai
1	You have spread the desire for liberty throughout the land and started the conflagration, and I will put you in the jail and torment you there and establish my strength.	We will no longer be serfs to foreigners in our own land – fear we will not hereafter – will this injustice be tolerated in any land? Will the Almighty tolerate (this)?

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

away? Will our hearts grieve?

9.*Freedom fighters, including Mahatma Gandhi, were victims of executive excesses under Section 107 Cr.P.C. and other allied proceedings. Therefore, when the Constitution of India was drafted, the Constituent Assembly consciously decided to separate the judiciary from the executive. The driving force behind Draft Article 39-A, presently Article 50, was none other than Dr. Ambedkar himself."*

52.In the State of Tamil Nadu, efforts were taken, even prior to 1950, to separate the judiciary from the Executive. The Rajah Iyer Committee on the Separation of the Executive from the Judiciary (1952) paved the way for GO Ms 2304 dated 24.09.1952 implementing the scheme of separation contemplated by Article 50. In this connection, the following discussion in ***Devi's case*** is worth noticing:

After the Constitution of India came into force on 26.01.1950, the first general elections were held across the country in 1952. The Congress party came to power with a fractured majority in the Madras Presidency and C.Rajagopalachari became the Chief Minister. One of the first

measures of the Rajaji Ministry was to issue G.O.Ms.No.2304, Public (Separation) Department dated 24.09.1952 titled "Separation of the judiciary from the executive – Instructions to the Judicial and Executive Magistrates under the Scheme and Police Officers – Re-issued", the essential features of which are as under:

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

a) Functions which are "police" in their nature, as for instance the handling of unlawful assemblies;

b) Functions of an administrative character, as for instance the issue of licences for firearms, etc; and

c) Functions which are essentially judicial, as for instance, the trial of criminal cases.

Prior to the scheme, all these functions were concentrated in the Collector of the district and a number of magistrates subordinate to and controlled by him. The essential feature of the new scheme is that purely judicial functions coming under category (c) above are transferred from the Collector and magistrates subordinate to him, to a new set of officers who will be under the control not of the Collector but of the High Court. Functions under (a) and (b) above will continue to be

discharged by the Collector and the Revenue Officers subordinate to him. The new set of officers as well as the officers of the Revenue Department in charge of the executive administration will all be designated as "magistrates" to satisfy statutory requirements. To indicate the difference between them, officers in the former category will be called "Judicial Magistrates" and those in the latter category will be called "Executive Magistrates" in this memorandum."

53. It is, thus, clear that the distinction between Executive and Judicial Magistrates existed in Madras even prior to the 1952 Code. Coming to the cases under Chapter VIII of the Code, the learned judge in ***Devi's case*** has discussed the impact of G.O.Ms.No.2304 in the following passage:

"19. Chapter VIII of the Criminal Procedure Code.— This consists of sections 106,107,108,109 and 110 which are dealt with seriatim below:— (1) Section 106 can be invoked only after a Magistrate has convicted an accused person and therefore necessarily falls outside the purview of the Executive Magistrate and remains exclusively within the purview of the Judicial Magistrate.

(2) With regard to section 107, it has been decided for special reasons to vest jurisdiction exclusively in the

Executive Magistrate. The entire proceedings under the section in all its stages, including trial, will be by the Executive Magistrate and the Judicial Magistrate will not have anything to do with it.

(3) In regard to the other sections 108,109 and 110, the rule is that only the Judicial Magistrate will have the jurisdiction to conduct proceedings. The "Information" to which reference is made in these sections originate almost always from the police, and they can lay the "information" directly before the Judicial Magistrate. It is only very rarely that a private person seeks to initiate proceedings under these sections and he can be referred to the Judicial Magistrate if through ignorance or mistake, he approaches the Executive Magistrate. No question of emergency in respect of any of these sections can possibly arise and the question of taking interim bonds under section 117 will hardly arise. Section 108 deals with the spreading of seditious, etc. matters, section 109 with persons who have no ostensible means of livelihood or who cannot give a satisfactory account of themselves and section 110 with habitual offenders. These sections are shown under the heading "concurrent jurisdiction" to provide for all contingencies." 12 For the first time, the expression

"judicial function" was expounded in the above Government Order as involving "the recording and sifting" of evidence. The Schedule appended to the Government Order invested powers under Section 107 Cr.P.C. on Executive Magistrates and the powers under Section 108 Cr.P.C. to 126-A Cr.P.C., concurrently on the Executive and Judicial Magistrates. This was, however, subject to the instructions in paragraph 19 of the said Government Order, extracted supra.

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

"56. Allocation under Madras Scheme.— The Madras Scheme has been designed as to operate within the framework of the Code without statutory amendment, and without much change in the nomenclature of Magistrates. The broad principle on which the Madras scheme is based,

is that matters which involve the recording and sifting of evidence are strictly within the purview of Judicial Magistrates. But concurrent jurisdiction is provided in for some cases. Thus, powers under Ch. 9, (Ss.127 to 132-A) and Ch. 11 (S. 144) are kept with both Judicial and Executive Magistrates but Judicial Magistrates shall exercise them only in emergency and only until an Executive Magistrate is available. Conversely, powers under Ss.108 to 110 are assigned to Judicial Magistrates, but Executive Magistrates are given concurrent jurisdiction to provide for all contingencies. Again, in cases under S.145, the initiation of proceedings will be before an Executive Magistrate, but, if it is necessary to hold an inquiry, proceedings will be transferred to Judicial Magistrates."

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

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

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

54.Three days prior to the coming into force of the Code of Criminal Procedure, 1973 the Government of Tamil Nadu issued GO.Ms.No.736, dated 28.03.1974. Under the said GO, the Government of Tamil Nadu published five notifications : Notification I was effected in exercise of powers under Section 20(1) of the Cr.P.C appointing various officers as Executive Magistrates in the Districts. We noticed that for the metropolitan area of Madras, the Collector of Madras together with the Commissioner of Police, Madras, P.A to Collector and Tahsildars were notified as Executive

Magistrates. The Collectors, P.A to Collectors, RDO's and Tahsildars were notified as Executive Magistrates in the other Districts in the State. Thus, the Commissioner of Police, Madras was the only police official who wielded the power of an Executive Magistrate in the State. Although this notification was pursuant to Section 20(1) Cr.P.C, the Commissioner of Police, Madras is in any event an ex-officio Executive Magistrate by virtue of Section 7 of the Madras City Police Act, 1888.

55. Having thus appointed various officials as Executive Magistrates, Notification II of GO.Ms.No. 736 then proceeded to appoint the Collectors in 15 Districts across the State as a District Magistrate. This was followed by Notification III which proceeds to appoint District Revenue Officers in various Districts as the Additional District Magistrate under Section 20(2) of the Cr.P.C. Then comes Notification IV – which is also in exercise of power under Section 20(2) Cr.P.C- notifying the appointment of the Commissioner of Police, Madras, who was appointed as the Executive Magistrate under Notification-I, as the Additional District Magistrate for the

metropolitan area of Madras. Notification IV is extracted hereunder for better appreciation:

> "*In exercise of the powers conferred by sub-section (2) of section 20 of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), the Government of Tamil Nadu hereby appoints with effect from the first day of April. 1974, the Commissioner of Police and the Executive Magistrate in Metropolitan area to be an Additional District Magistrate in the said area to exercise the following powers:*
>
> *1)* ***The powers conferred by sections 133 and 144 of the said Code****; and*
>
> *2) The powers of the nature specified in clause (b) of sub-section (4) of section 3 of the said Code exercisable by him as a Magistrate immediately before the first day of April 1974, under any special or local law."*

56. It would, thus, be apparent that even under GO.Ms.No.736, the Commissioner of Police, Madras was not authorized to exercise powers under Section 107 to 110 Cr.P.C, but could exercise powers as an Executive Magistrate for initiating proceedings under Section 133 and 144 alone. That apart, even under any local or special law, the Commissioner could exercise only those powers which were specified in Section 3(4)(b) Cr.P.C. Section 3(4) Cr.P.C reads as follows:

> "*(4) Where, under any law, other than this Code, the*

function exercisable by a Magistrate relate to matters,—

(a) which involve the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, they shall, subject to the provisions of this Code, be exercisable by a Judicial Magistrate; or

(b) which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate."

57.Thus, Notification IV of GO.Ms.No.736 has, in our considered opinion, rightly appreciated the conception of separation of powers underlying the Code of 1973 which came into effect from 01.04.1974. It is for this reason that matters relating to "*sifting of evidence"* or any decision which exposed any person to any punishment or detention in custody etc was given to a Judicial Magistrate under Section 3(4)(a). The Commissioner of Police was not given power under Section 3(4)(a) but only under Section

3(4)(b) to deal with matters which did not involve sifting of evidence etc. That apart, powers under Section 107 to 110 Cr.P.C were vested with the concerned Revenue Officials in their capacity as Executive Magistrates. This was the position for almost 40 years from 1974 till 2013 when GO.Ms.No.659 was issued. In this way, separation of powers/functions mandated by Article 50 and the Cr.P.C was ensured by requiring the police to lay the information before the concerned Revenue Official/Executive Magistrate who could then initiate proceedings under Section 107 to 110 Cr.P.C and pass orders under Section 117/118. If there was a breach of a bond executed under Section 107 pursuant to an order under Section 117 Cr.P.C, the violator could be challaned and prosecuted before the Judicial Magistrate for inflicting punishment.

58. Even in the 37th Report of the Law Commission of India which has been extracted in paragraph 23 of the judgment of the Supreme Court in *Gulam Abbas's case,* we find the following discussion:

"*41. The usual way of classifying the functions of*

Magistrates under the Code of Criminal Procedure and various other statutes is to divide them into three broad categories, namely—

(a) functions which are 'police' in their nature, as for instance, the handling of unlawful assemblies;

(b) functions of an administrative character, as for instance, the issue of licences for firearms, etc., etc.; and

(c) functions which are essentially judicial, as for instance, the trial of criminal cases.

The essential features of the scheme for separation (it is stated) would be, that purely judicial functions coming under category (c) above are transferred from the Collector and Magistrates subordinate to him, to a new set of officers who will be under the control not of the Collector but of the High Court. ***Functions under (a) and (b) above will continue to be discharged by the Collector and the Revenue Officers subordinate to him.****"*

Again in para 43 the Law Commission observed thus:

"*43. It is in this background that the concept of separation has to be understood. In its essence, separation means separation of judicial and executive functions in such manner that the judicial functions are exercised by the judiciary which is not*

> *controlled by the executive. This would ensure that influence of the executive does not pollute the administration of criminal justice."*

The aforesaid observations indicate that the exercise of what is commonly known as "*police functions*" which included functions under Chapter VIII Cr.P.C were being carried out by the Revenue officials. This is precisely why GO.Ms.No.736 rightly vested these functions with the Collectors, Tahsildars, Revenue Divisional Officers and other officials of the Revenue and not with the police.

59. In the State of Tamil Nadu, there is not a single instance that has come to our notice of the appointment of a police officer to exercise powers under Section 107 to 110, prior to the issuance of GO.Ms.No. 659, Home (Cts IVA) Department, dated 12.09.2013.

60. For the first time vide GO.Ms.No.659, dated 12.09.2013, the Government purported to exercise power under Section 20(1) to appoint jurisdictional Deputy Commissioners named therein as Executive

Magistrates for the purpose of exercising powers under Section 107 to 110 Cr.P.C. We notice that GO.Ms.No.659 draws inspiration from GO.Ms.No. 736, dated 28.03.1974, which is evident from a reference to the said GO in references cited in GO.Ms.No. 659.

61. GO.Ms.No.659 makes for interesting reading. A reference is first made to the speech made by then Chief Minister on the Floor of the House on the need to arm the police with powers under Section 107 to 110. It then makes a reference to a proposal of the Director General Police requesting the Government to appoint DCP's as Executive Magistrates. Acting on this proposal, the Government exercised powers under Section 20(1) Cr.P.C to notify DCP's as Executive Magistrates. It is rather strange and baffling that the State Government did not take the trouble to read GO.Ms.No.736 carefully for it had it done so, it would have realised that even the Commissioner of Police was authorised by the said GO to exercise only the powers under Section 133 and 144 Cr.P.C. In other words, GO.Ms.No. 659 armed the Deputy Commissioner with powers which was not being

exercised even by a Commissioner of Police as an Executive Magistrate pursuant to GO.Ms.No. 736. We therefore, have no hesitation in concluding, de-hors the argument of breach of separation of powers, that GO.Ms.No.659, dated 12.09.2013 suffers from complete non-application of mind as well.

62. Having accomplished the vesting of powers under Section 107 to 110 with the DCP's in the metropolitan area falling under the jurisdiction of the Greater Chennai Police, the same model was replicated by exercising power under Section 20(1) and issuing GO.Ms.No.181, dated 20.02.2014 whereby Deputy Commissioner of Police, Law and Order in six Police Commissionerate's ie., Madurai, Coimbatore, Tiruchirappalli, Tirunelveli, Salem and Tiruppur were invested with powers under Section 107 to 110 Cr.P.C. GO.Ms.No.181, dated 20.02.2014, also makes a reference to GO.MS.No. 659, Home (Cts IV-A) Department, dated 12.09.2013.

63.The validity of GO.Ms.No.181 came up for scrutiny before a

learned single judge of this Court in ***Balamurugan v State*** (2016 SCC Online Mad 23460). The Deputy Commissioner of Police, Law and Order, Tirunelveli City had passed an order under Section 122(1)(b) Cr.P.C detaining the petitioner for violation of the bond executed by him under Section 110(e) Cr.P.C. The order of detention was challenged by way of a revision before P. Devadass, J in the Madurai Bench of this Court. The contention raised was that under Section 20(5) Cr.P.C only a Commissioner of Police could be appointed as an Executive Magistrate. Consequently, the order having been passed by a Deputy Commissioner was invalid. Devadass, J referred to Section 20(1) Cr.P.C, GO.Ms.No.181 and the decision of the Supreme Court in ***A.N Roy, Commissioner of Police v Suresh Sham Singh***, (2006 5 SCC 745) and observed as under:

> "***26.*** *The police force in a Metropolitan City, area is headed by a Commissioner of Police. He is a Superior Police Officer. Joint Commissioner, Deputy Commissioner, Assistant Commissioner etc. are his subordinates. A Police Officer in the rank of a Superintendent of Police is being appointed as Deputy Commissioner of Police. He is only a deputy to the Commissioner of Police. He is not equal to a Commissioner of*

Police."

64.Unfortunately, GO.Ms.No.736 dated 28.03.1974 was not placed before Court. Consequently, the learned judge did not have the occasion to know that what the State was attempting to do via GO.Ms.No.181 was to confer a deputy with powers which even his superior could not exercise *vide* GO.Ms.No.736 dated 28.03.1974. The Court eventually concluded as under:

> "***36.****Thus reading Section 20(1) and Section 20(5) Cr. P.C. and also the decision in Suresh Sham Singh (supra), it is clear that under Section 20(1) Cr. P.C., Police Officers other than a Commissioner of Police, such as a Deputy Commissioners of Police can also be appointed as Executive Magistrates."*

65. As has been rightly pointed out by P.N. Prakash, J in ***Devi v Executive Magistrate***, supra, ***Suresh Sham Singh*** was not a case concerning the provisions of Chapter VIII of the Cr.P.C or with the powers of Deputy Commissioner of Police. The issue in that case was whether the Commissioner of Police, Brihan Mumbai could be conferred with the

powers of a District Magistrate for the purposes of Sections 18 and 20 of the Immoral Trafficking Act. This is clear from paragraph 9 of the decision, where the question for consideration has been formulated as under:

> "***9.*** *The whole controversy boils down to this issue, as to whether the notification dated 1-10-1999 issued by the State of Maharashtra empowering the Commissioner of Police, Brihan Mumbai, the powers of the District Magistrate for the purposes of Sections 18 and 20 of the Act, has been validly made?"*

The Court concluded as under:

> "***22.*** *Under sub-section (1) of Section 20 the Government has got the power to appoint as many persons as it thinks fit to be Executive Magistrates in every district and in every metropolitan area and shall appoint one of them to be the District Magistrate. The words, "as many persons" employed in sub-section (1) are adequately elastic to include the Commissioner of Police. In other words, the State Government is not precluded from appointing the Commissioner of Police in a metropolitan area as an Executive Magistrate. We have already noted that Brihan Mumbai is a metropolitan area. Once the Commissioner of Police is appointed as an Executive Magistrate in Brihan Mumbai, he can be appointed as an Additional District Magistrate, who shall have the powers of the District Magistrate for the purposes of Sections*

18 and 20 of the Act. In our opinion, this would be the correct reading of the statute. This view of ours is further clarified by sub-section (5) of Section 20 when it is stated that nothing in this section shall preclude the State Government from conferring, under any law for the time being in force, on the Commissioner of Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area."

66.From the aforesaid passage it is evident that the Supreme Court had upheld the power of the Government to appoint the Commissioner of Police as an Executive Magistrate under Section 20(1) Cr.P.C for the purposes of appointment as a District Magistrate under the Immoral Trafficking Act. In the State of Tamil Nadu, the Commissioner of Police, Madras City is an Executive Magistrate vide notification IV of GO.Ms.No. 736, dated 28.03.1974. This has been done by exercising power under Section 20(1). Even otherwise, the Commissioner is an ex-officio Executive Magistrate by virtue of Section 7 of the City Police Act, 1888. However, in Tamil Nadu unlike Maharashtra, GO.Ms.No.736, dated 28.03.1974, limits the power of the Commissioner of Police as an Executive/Additional

District Magistrate to exercise only those powers under Sections 133 and 144 Cr.P.C. This vital difference in the State of Tamil Nadu, which was brought about by GO.Ms.No.736 was not brought to the notice of the Court in ***Balamurugan***.

67.Additionally, we are also in complete agreement with the following observations of P.N.Prakash, J in ***Devi v Executive Magistrate***, supra:

> "***32.****In Suresh Sham Singh (supra), the Supreme Court was primarily concerned with the exercise of the powers of an Executive Magistrate by the Commissioner of Police, Bombay, for controlling immoral trafficking in women under the Immoral Traffic (Prevention) Act, 1956. It is indeed doubtful if the ratio decidendi in Suresh Sham Singh (supra) can be stretched to such an extent so as to clothe the Deputy Commissioners of Police with the powers of Executive Magistrates for exercising powers under Sections 108 to 110 Cr.P.C. In this context, it is worth quoting the oft repeated words of the Lord Chancellor, the Earl of Halsbury in Quinn v. Leathem*[5]*:*
>
> "*A case is an authority for what it decides. It cannot be quoted for a proposition that may seem to logically flow from it."*

> ***33.*** *As alluded to above, principally, there are two enactments in the State of Tamil Nadu governing the substantive powers of police. They are the District Police Act, 1859 and the City Police Act, 1888. Vide Section 7 of the City Police Act, 1888, the Commissioner of Police is the ex officio Executive Magistrate by operation of law. No such contemporaneous provision exists in the Maharashtra Police Act, 1951. That is, perhaps, the reason why the Maharashtra Government had to confer the powers of an Executive Magistrate on the Commissioner of Police, which conferment was set aside by the Bombay High Court, but, eventually reversed by the Supreme Court in Suresh Sham Singh (supra). Therefore, on this ground too, Suresh Sham Singh (supra) can have no application for extending the executive powers to the Deputy Commissioner of Police."*

68.The next question is whether the expression "*any person*" occurring in Section 20(1) could include the Deputy Commissioner of Police as well. It may be recalled that GO.Ms.No.659 and 181 have been issued under this very provision. It is, therefore, necessary to first set out Section 20 of the Code:

> "*20. Executive Magistrates. —*
>
> *(1)In every district and in every metropolitan area, the State*

Government may appoint as many persons as it thinks fit to be Executive Magistrates and shall appoint one of them to be the District Magistrate."

It is contended on behalf of the State that the expression "*any person"* occurring in Section 20(1) includes a Deputy Commissioner as well. It is no doubt true that the expression "*any person*" implies that the State is given wide discretion in the appointment of Executive Magistrates. However, the right to appoint Executive Magistrate is coupled with a corresponding duty to ensure that such appointments do not violate the basic constitutional scheme of separation of powers which, as noticed above, is the very foundation of the Cr.P.C, 1973. Whenever a question of statutory interpretation arises, there exists an obligation on the Courts to interpret its provisions in line with the constitutional goals set out in Part IV of the Constitution. We are fortified in saying so in the light of the decision of the Supreme Court in ***U.P. SEB v. Hari Shankar Jain*****, (1978) 4 SCC 16,** wherein it was observed as follows:

"*The mandate of Article 37 of the Constitution is that*

> *while the Directive Principles of State Policy shall not be enforceable by any Court, the principles are 'nevertheless fundamental in the governance of the country', and 'it shall be the duty of the State to apply these principles in making laws'. Addressed to Courts, what the injunction means is that while Courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of Judges when interpreting statutes which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy.*"

Thus, the width of the expression "any person" occurring in Section 20(1) must necessarily be interpreted consistent with the principle of separation of the judiciary from the executive envisaged in the Code and Article 50 of the Constitution.

69.In the context of the 1973 Code, the following observations made in the 37th Report of the Law Commission headed by Justice J.L Kapur are

apposite:

> "***33.****In the field of criminal law, separation of the judiciary from the executive broadly means the administration of the criminal justice by members of the judiciary who are independent of executive control. This general principal involves two consequences; first, that a Judge or a Magistrate who tries a case must not be in any manner connected with the prosecution or interested in the prosecution, and second, that he must not be in direct administrative subordination to anyone connected with the prosecution."*

The question then is whether a Deputy Commissioner can act as the Executive Magistrate under GO.Ms.No.659 and GO.Ms.No.181 notwithstanding the fact that the Deputy Commissioner of Police is a person who is directly connected with the prosecution agency. Can such adjudication achieve fairness and impartiality?

70.Any adjudicatory process worth its name must perforce pass the test of fairness and impartiality. These are non-negotiable elements in

ensuring purity in the administration of justice. The test applied to executive or quasi-judicial adjudications is one of reasonable likelihood of bias as was explained by the Supreme Court in ***State of Punjab v. Davinder Pal Singh Bhullar*, (2011) 14 SCC 770,** in the following words:

> "***31.*** *The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the adjudicator was likely to be disposed to decide the matter only in a particular way. Public policy requires that there should be no doubt about the purity of the adjudication process/administration of justice. The Court has to proceed observing the minimal requirements of natural justice i.e. the Judge has to act fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality, is a nullity and the trial coram non judice. Therefore, the consequential order, if any, is liable to be quashed. (Vide Vassiliades v. Vassiliades [AIR 1945 PC 38] , S. Parthasarathi v. State of A.P. [(1974) 3 SCC 459 : 1973 SCC (L&S) 580] and Ranjit Thakur v. Union of India [(1987) 4 SCC 611 : 1988 SCC (L&S) 1] .)"*

71.The 37th Report of the Law Commission also contains an interesting suggestion made by one High Court as to whether a police

officer could be appointed as a Presidency Magistrate (present day Executive Magistrate), which runs thus:

> "***<u>132. Section 18(1) and Police Officers</u>***.—*With reference to S. 18, the following suggestion has been made by a High Court:*
> "*A proviso should be added to sub-section (1) of Section 1 to the effect that no police officer of any rank shall be appointed as Presidency Magistrate. The anomalous position of the Commissioner functioning as a Magistrate and performing judicial duties like remanding has been adversely commented upon in judicial decisions. It is not in consonance with the scheme of the separation of judiciary from the Executive. Hence, a proviso is recommended."*

72.Reverting to the case on hand, if we are to accede to the contention of the State that a Deputy Commissioner can be appointed as an Executive Magistrate for exercising powers under Section 107 to 110, we would have a situation where the Inspector of Police would investigate and lay information before the Deputy Commissioner who would then conduct an inquiry under Section 116 and pass an order either under Section 117 or 118. We are perplexed to find from some of the orders in the cases before us

that the Deputy Commissioners have conducted full-fledged trials by examining witnesses, and in one case they have even declared witnesses hostile. In other words, the entire process of investigation, prosecution and adjudication have now been arrogated by one branch of the executive ie., the police. When the khakhi and the judicial robes are blended and cast on one officer, the resultant picture is one of executive anarchy.

73. Our attention was also drawn by the learned Amicus Curiae to Police Standing Order No.738. The Police Standing Orders, we may add, have been recently given statutory flavour by being approved by the Government vide GO.Ms.No.362 Home (Pol 12) Department, dated 28.09.2020, and GO.Ms.No.438, Home (Pol 12) Department, dated 29.10.2020. PSO 738 deals with instructions to the police for security proceedings under Chapter VIII of the Code. Clause (10) of PSO 738 reads as follows:

"*(10) The Court before which proceedings are initiated should be*

promptly moved for an order under Sub-Section (3) of Section 116 of the Code pending completion of the inquiry under Sub-Section (1) of that Section. The Superintendent should ensure that such action is unfailingly taken by the officer conducting prosecution."

In the Commissionerate, the Deputy Commissioner of Police is an officer in the Rank of a Superintendent of Police (See page 44 of paragraph 2 of the Police Standing Orders Volume -1 published by the Government of Tamil Nadu). Therefore, in a given case say in Chennai City, if the Inspector of Police, Flower Bazaar initiates proceedings under Section 107/110 he is required in terms of GO MS 659 to lay the information before the Deputy Commissioner, Flower Bazaar who functions as the Executive Magistrate. In terms of Clause (10) of PSO 738, the Inspector is also required to move the Deputy Commissioner, Flower Bazaar for an order of interim detention under Section 116(3).

74. The icing is the last sentence of Clause 10 of PSO 738 which requires the Deputy Commissioner of Police, who is the adjudicating

Executive Magistrate, to "unfailingly" ensure that the files are placed before him for an order of detention under Section 116(3). In other words, the Deputy Commissioner is required to follow up and ensure that his subordinate the Inspector places the file before him for an order under Section 116(3) Cr.P.C. When the Deputy Commissioner is so directly and vitally interested in the outcome of the security proceedings, can the Deputy Commissioner be trusted to decide impartially?

75. Fairness and impartiality is not merely a matter of optics. In ***P.D. Dinakaran (1) v. Judges Inquiry Committee*****, (2011) 8 SCC 380,** the Supreme Court has observed as under:

> "***71.*** *The principles which emerge from the aforesaid decisions are that no man can be a judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but they must not be seen to be inclined. A person having interest in the subject-matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject-matter of lis, the test of real likelihood of the bias is to be applied. In*

other words, one has to enquire as to whether there is real danger of bias on the part of the person against whom such apprehension is expressed in the sense that he might favour or disfavour a party. In each case, the court has to consider whether a fair-minded and informed person, having considered all the facts would reasonably apprehend that the Judge would not act impartially. To put it differently, the test would be whether a reasonably intelligent man fully apprised of all the facts would have a serious apprehension of bias. In cases of non-pecuniary bias, the "real likelihood" test has been preferred over the "reasonable suspicion" test and the courts have consistently held that in deciding the question of bias one has to take into consideration human probabilities and ordinary course of human conduct. We may add that real likelihood of bias should appear not only from the materials ascertained by the complaining party, but also from such other facts which it could have readily ascertained and easily verified by making reasonable inquiries."

76.As Y.V Chandrachud, CJ observed in the Re: Special Courts Bill, 1978 case, (1979) 1 SCC 380 "*To compel an accused to submit to the jurisdiction of a court which, in fact, is biased or is reasonably apprehended to be biased is a violation of the fundamental principles of*

natural justice and a denial of fair play."

77.Applying, the test of "*a likelihood of bias*" we have no hesitation in concluding that the vesting of powers under Section 107 to 110 with the Deputy Commissioner of Police are wholly arbitrary and suffer from the vice of manifest arbitrariness. Such a procedure, by no stretch of imagination could be termed as one which is just, fair and reasonable so as to pass muster under Article 21 of the Constitution. We are shocked, to say the least, that such proceedings which have a bearing on the liberty of the subject are conducted in a manner that resembles a game of musical chairs within the police department. From the face of the GO's we find no adequate determining principle for vesting powers under Section 107 to 110 Cr.P.C with the police. In fact, the GO's do not contain any reason at all but merely say that this was done because the Chief Minister of the day wanted it to be so. Such an approach is, ex-facie, violative of Article 14. Consequently, the GO's cannot but be branded as suffering from the vice of manifest arbitrariness.

78.PSO 738(10) is also reflective of a fundamental misconception that proceedings under Chapter VIII can be used to indiscriminately detain people. Even before us, in the written note submitted by the State it is stated as under:

> "*There is an immediate need to arrest and detain a person in violation of the law and the bond executed under Chapter VIII".*

79.Preventive detention is a necessary evil but an evil nonetheless. Our Constitution tolerates it by hedging it with procedural safeguards under Article 22 of the Constitution. But since those procedural safeguards impose exacting requirements on the police and the Government, it appears that the police wing of the executive has hit upon an ingenious alternative to invest its officers with powers under Section 107 to 110 Cr.P.C., and thereby give unto themselves the power to play the investigator, prosecutor and the judge and send people to jail. Ergo, such procedure reduces the fundamental constitutional principles of the rule of law and impartial adjudication into a

mere charade. We are of the considered view that this is a textbook case of violation of separation of powers, where the police administration has nakedly arrogated unto itself the powers of adjudication under Chapter VIII thereby violating the overarching principles under Articles 14, 21 and 50 of the Constitution.

80. In ***V.Mohan Ranga Rao v State of Andhra Pradesh***, 1985 2 APLJ 386, a Division Bench of the Andhra Pradesh (K.Jayachandra Reddy and K. Ramaswamy, JJ) were confronted with a similar scenario where a GO had conferred powers on the Superintendent of Police, Vijayawada to act as the Special Executive Magistrate by exercising power under Section 20(1) and 21 of the Cr.P.C for the purposes of exercising power under Section 107 to 110, 133, 144 etc. Speaking for the Court, Ramaswamy, J (as he then was) pointed out:

> "*No instance of appointing an officer or person charged with the duty to maintain law and order was ever invested either under the predecessor Code of 1898 or under the new Code of 1973, with power to be a Judge also is brought to our notice. It is true that revenue officials of the State service were/are invested power of executive Magistrates. But their primary function is revenue*

> *collections and the exercise of the power of executive Magistrate is only incidental."*

The argument that a police officer would come within the net of the term "any person" under Section 20(1) was rejected with the following observations:

> "*It is true, as contended by the learned Addl. Advocate General that the Superintendent of Police is the person well posted with the local factual situations of the persons who have proclivity to involve in offences of disturbing public peace, law and order or committing crimes, etc. and that he is charged with the duty to keep safety and security to the society. They are indisputable. But the question is, in exercising the power under Section 20(1) and Sec. 21 of the Code, though discretionary, can the Government appoint "any person" whomsoever it likes or whether the exercise of the power should be in conformity with statute viz., the designated class of persons or officers. True normally it is an acknowledged fact that the officials from the executive revenue branch i.e. District Collector, RD0 or Tahsildar or Deputy Tahsildar having local jurisdiction are being appointed as Executive Magistrates and have been exercising the powers under the sections referred to earlier. But the question is whether the Superintendent of Police, the handmaid of law and order could be invested with the power to adjudicate upon the same. At the cost of repetition, it is to be remembered that years of ceaseless struggle with the sacrifice of precious lives of countless patriots we have attained*

independence and sovereignty with a Constitution of ours assuring to every citizen justice, liberty and equality with dignity to his person. Therefore the precious personal liberty, freedom of movement, etc. are prized possessions of every citizen to develop his full personality and to secure dignity to him in the society. The exercise thereof could be denied only in the larger interests of the society. So every apparently innocuous or imperceptible attempt on the part of the executive on the pretext of expedience to deny to the citizen of the right to exercise those rights needs to be carefully examined and when bear seeds of extraneous or irrelevant considerations or except in exceptional circumstances, in the larger interest of the society, it shall not be allowed to be prevailed. It is to be remembered that many a citizen from common strata of the society, the poor, the underprivileged and disadvantaged would normally, if not invariably, be caught in the operational net of the quoted provisions of the Code. Poverty social and environmental conditions, emotional upsurge or misguidance by the kingpins operating from behind the scene are motivational factors to entrap them in the gamut. The animation of a jealous officer to put down the rate of crime or recurrance of out-break of law and order or disturbance to public tranquility or a possible tendency to earn appreciation of service from the higher ups to have acceleration of pramotional chances in service, may operate as inducing factors to resort to stringent, if not repressive steps or measures against the alleged 'pests of civil society' 'suspects' lick-spittles of law' and as a part thereof, as an adjudicator, may indulge in imposing unbearable or insecurable excessive bonds etc. This possibility or lurking suspicion

on the efficacy of adjudication cannot be ruled out. Thereby the citizen/citizens is/are not only not denied of the exercise of fundamental right to freedom of movement, liberty of person and reputation, but also render those rights meaningless to them and thereby cripple their very living and livelihood, which is abnoxious to Art. 51-A (j)."

81.It was, however, contended on behalf of the State that the appointment of Additional Commissioners of Police as Executive Magistrates was upheld in Maharashtra in the case of ***State of Maharashtra v. Mohd. Salim Khan*, (1991) 1 SCC 550.** We remind ourselves that the laws regarding the powers and jurisdiction of the police vary from State to State. This is because, the Police Acts in these States are the product of the felt needs and necessities of the demography of the local population. Thus, while the proviso to Section 6 of the Madras District Police Act, 1859 bars a police officer from exercising judicial or revenue powers no such restriction exists under the Maharashtra Police Act, 1951. These observations are necessary since any decision pertaining to the powers of the police in one State cannot be blindly adopted and applied to the police in another State. This is precisely the error that the learned single judge in ***Balamurugan*** had

fallen into. We are not inclined to repeat that error.

82.The decision in ***Mohd Salim Khan***, supra, turned on whether the Assistant Commissioner of Police could be made a Special Executive Magistrate under Section 21 of the Code. The Supreme Court was not considering a case where a Deputy Commissioner of Police was appointed in exercise of power under Section 20(1) as has been done in the instant case. The observations made therein pertain to Section 21 Cr.P.C which do not fall for consideration in this case. As the Earl of Halsbury reminds us in ***Quinn v Leatham*** (1901 AC 495):

> "*Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ... A case is only an authority for what it actually decides. I entirely deny that it*

can be quoted for a proposition that may seem to follow logically from it."

83.That apart, as pointed out above, the State of Tamil Nadu had always been a forerunner in implementing the scheme of separation of powers until the passing of GO.Ms.No. 659 and 181, which is why even the Commissioner was appointed as the Executive Magistrate vide GO.Ms.No. 736 only for the purposes of exercising powers under Section 133 and 144 of the Code. We have no information of the scheme of separation in Maharashtra. We only observe that even in the 37th and 41st Law Commission Reports there is an elaborate discussion on the differences between the Bombay and Madras systems of vesting powers with Executive Magistrate under Sections 107 to 110. For the aforesaid reasons, the decision in ***State of Maharashtra v. Mohd. Salim Khan*****, (1991) 1 SCC 550,** cannot be of any assistance to the State.

84.In view of the above, the issue of whether GO.Ms.No.659, dated

12.09.2013 and GO.Ms.No.181, dated 20.02.2014 violates the proviso to Section 6 of the Madras District Police Act, 1859 becomes academic. All the same, we are in complete agreement with the following observations in ***Devi v Executive Magistrate (2020 6 CTC 257):***

> "***34.*** *As stated above, the Commissioner of Police is an Executive Magistrate ex officio and he cannot delegate his powers to the Deputy Commissioners of Police. Of course, the Commissioner has not done this delegation in Tamil Nadu and it is only the Government, which has, by G.O.Ms. No. 659 and G.O.Ms. No. 181, appointed all Deputy Commissioners of Police as Executive Magistrates. These appointments are clearly in violation of the proviso to Section 6 of the District Police Act, 1859, which reads as under:*
>
> "***6. Powers of police, etc****.— All powers not inconsistent with the provisions of this Act which upto the passing of this Act belonged by law to the existing police authorities shall be vested in the police authorities appointed under this Act:*
> *Provided always that no police functionary so appointed shall possess or exercise any judicial or revenue authority."*
>
> *(emphasis supplied)*

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

"*3. In revision two points of law were canvassed before me : (1) s 47 is a provision in the Madras District Police Act and it is not applicable to the City as a separate City Police Act governs the conduct of the police officers in the City, and therefore S. 47 cannot be invoked in respect of the allegations made against the*

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

for other purposes. S. 4 of the above Act is as follows:

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

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

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

85. From the aforesaid discussion, it would be apparent that the provisions of the District Police Act, 1859 have been made applicable to the City of Madras way back in 1874 itself. That apart, in Babulal Parate v State of Bombay, (AIR 1960 SC 51) proceedings under Section 107 Cr.P.C have

been characterised by a Constitution Bench as being a judicial function. Similarly, proceedings under Section 108 to 110 Cr.P.C have been characterised as judicial functions by a Full Bench of the High Court of Kerala in ***Thekkittil Gopalankutty Nair vs Melepurath Sankunni*** (AIR 1971 Ker 280). Consequently, the bar under the proviso to Section 6 of the Madras District Police Act, 1859 would operate to bar the exercise of judicial functions by the police. In fact, the bar has been respected and adhered to in the Districts by the Executive since they have no case that police officials have been appointed Executive Magistrates other than the areas falling under the Police Commissionerate's covered by GO.Ms.No. 659, dated 12.09.2013 and GO.Ms.No.181, dated 20.02.2014.

86.Though obvious, we only notice that GO.Ms.No.659 and GO.Ms.No.181 draw their sustenance from Section 20(1) Cr.P.C on the footing that the said provision enables the State Government to appoint "any person" as an Executive Magistrate. However, if we were to hold that the word "any person" cannot include a police officer, it must follow as a

natural corollary that the GO's would be ultra vires and without jurisdiction. Superadded, if the GO's violate any of the constitutional provisions under Part III of the Constitution, they would be void and unenforceable by virtue of Article 13(2) of the Constitution. Once the GO is found to be infringing Part III, and is, to that extent, a nullity under Article 13(2) its validity can be set up even collaterally as has been done in these proceedings. The learned Additional Public Prosecutor very rightly did not contest the aforesaid legal position which is borne out from the decision of the Supreme Court in ***NawabkhanAbbaskhan v. State of Gujarat*, (1974) 2 SCC 121**, wherein it was observed as follows:

> "*But we do hold that an order which is void may be directly and collaterally challenged in legal proceedings.*"

87. For all of the aforesaid reasons, we unhesitatingly declare that GO.Ms.No. 659, dated 12.09.2013 and GO.Ms.No.181, dated 20.02.2014 is manifestly arbitrary and ultra vires the provisions of Articles 14, 21 and 50 of the Constitution of India and the proviso to Section 6 of the Madras

District Police Act. Consequently, the status quo ante that prevailed prior to the issuance of GO.Ms.No.659, dated 12.09.2013 and GO.Ms.No.181, dated 20.02.2014, will stand restored forthwith.

V. CONCLUSIONS :-

88. Now that we have ousted the camel and put the canopy of justice back to where it belongs, our answers to the questions formulated in paragraph 2 are as under:

(a) GO.Ms.No.659, dated 12.09.2013 and GO.Ms.No.181, dated 20.02.2014 vesting Deputy Commissioners of Police with the powers of an Executive Magistrate for the purposes of Section 107 to 110 Cr.P.C, suffer from manifest arbitrariness and violates the principle of separation of powers under the Constitution. The GO's are consequently violative of Articles 14, 21 and 50 of the Constitution of India and the proviso to Section 6 of the Madras District Police Act. Resultantly, we declare GO.MS.No.659, dated 12.09.2013 and GO.MS.No.181, dated 20.02.2014 as unconstitutional and ultra vires the aforesaid provisions. Consequently, the

status quo ante that prevailed prior to the issuance of GO.MS.No.659, dated 12.09.2013 and GO.MS.No.181, dated 20.02.2014 stands restored forthwith.

(b) *Ex-consequenti*, the decision in ***Balamurugan v State***, 2016 SCC Online Mad 23460, will stand overruled.

(c) Violation of a bond executed under Section 110 of the Cr.P.C., can be dealt with under Section 446 of the Code and not under Section 122(1)(b) of the Cr.P.C. Consequently, we affirm the judgment of Mr. Justice P.N Prakash in ***Devi v Executive Magistrate*** (2020 6 CTC 157) in its entirety. The decision of the learned single judge to the contrary in ***Vadivel @ Mettai Vadivel v The State*** (Crl.R.C.No. 982 of 2018 etc., batch) will stand overruled.

(d) GO.Ms.No.659, dated 12.09.2013 and GO.Ms.No.181, dated 20.02.2014 were issued only in exercise of powers under Section 20(1) of the Cr.P.C, and these Government Orders have been held to be unconstitutional. And ;

(e) In the light of the law laid down in paragraph 24 of the three judge bench decision of the Supreme Court in ***Gulam Abbas v State of Uttar Pradesh*** (1982) 1 SCC 71, an Executive Magistrate cannot authorize imprisonment under Section 122(1)(b) for violation of a bond under Section 107 Cr.P.C. A person who has violated the bond executed before the Executive Magistrate under the said provision will have to be challaned or prosecuted before the Judicial Magistrate for inquiry and punishment under Section 122(1)(b) Cr.P.C.

89. Coming to the individual cases, in light of the declaration issued in paragraph 82(a), supra, it must necessarily follow that the impugned orders in all cases where the Deputy Commissioners of Police have exercised powers to initiate proceedings under Section 122(1)(b), will have to be quashed. Accordingly, Crl.R.C.Nos.1366, 1367, 1392, 1393, 1439, 1585,1478,1479,1501,1528,1540,1541 of 2017 Crl.RC.Nos.1295,1422, 1474, 1476, 178 of 2018, Crl.Rc.No.61,117,251,285,336,344, 472,473, 512, 515, 543, 553,577,592,1017,1008,1116,1127,1197,1204,1224,1243 of 2020, Crl.Rc.No.300,

353,778,781,880,905,923,925,951,972,981,985,1012,1036,1050,1053,1098,150, 808 of 2021, Crl.Rc.No.984 of 2022, Crl.Rc.Nos.26, 52,118, 180,183,215,223,286, 299,397,415,506,639,659,661,687,697,709,713,722,755,817,823, 829, 833, 849, 863,869,903,924,1005,1116,1123,1138,1144,1147,1148,1161,1189,1190,1208, 1227,1241,1245,1259,1282,1320,1391,1401,1408,1410,1475,1491,1555,1580, 1600,1607,1634,1649,1672,1673,1674,1676, 1688,1693 of 2022,Crl.RC.Nos.5,10, 18,21,23,27,30,33, 83,86, 122,123,129,144, 159,165,183,194,198,222,201,285,302 and 316 of 2023 are allowed, and the impugned orders therein are set aside. The petitioners will be released forthwith, if their presence is not otherwise required in connection with any other case.

90.In the light of the declaration issued in paragraph 82(a), supra, it must necessarily follow that the proceedings initiated by the Deputy Commissioner of Police under Section 107-110 Cr.PC., must be held to be non-est since they lack jurisdiction. Accordingly, Crl.RC.Nos.751,754,772, 773,790,822,858,859,861,865,867,868,873,891,892,921,924,938,954,957, 963,993,1013,1022,1023,1027,1028,1031,1061,1072,1086,1094,1096,1098

of 2020, Crl.OP.Nos.14993,15027,15028,14926,14919,15031,916 of 2021, Crl.RC.Nos.317, 724, 1006,1604, 1012 of 2022 and Crl.RC.Nos.329, 701 of 2023. are allowed and the proceedings initiated by the concerned Deputy Commissioner will stand set aside.

91. We, however, make it clear that this will not preclude the law enforcement agencies from moving the concerned Revenue Authority/Executive Magistrate for initiation of proceedings under Section 107-110 afresh, if there exists the requisite material for laying information before the concerned Executive Magistrate under the aforesaid provisions.

92.In the light of the law declared in paragraph 84(e), supra, orders passed even by the Revenue Authorities acting as Executive Magistrates, by exercising powers under Section 122(1)(b) Cr.P.C., will have to be quashed. Accordingly, Crl.Rc.No.616 of 2015, Crl.Rc.Nos.1216,1217,1215,1213, 1214,1312,1569 of 2016, Crl.RC.No.161 of 2017,Crl.RC.No.26,107,404, 484,485,488,516,528,540,562,564,567,569,580,927 of 2020, Crl.RC.No.

334, 335,357,433,688,913,914,1082,1110 of 2021, Crl.OP.No. 25073 of 2021,Crl.RC.Nos.3,31,35,38,42,62,115,121,128,135, 166,270, 287,293,309, 345,365,398,416,424,439,443,500,607,625,653,655,656,657,684,701,703, 860,886,887,890,922,926,975,992,1028,1040,1047,1092,1104,1170,1212, 1284,1309,1400,1445,1560,1569,1624 of 2022, are allowed and the impugned orders therein are set aside. The petitioners will be released forthwith, if their presence is not otherwise required in connection with any other case.

93.In all those cases where proceedings have been initiated by Revenue Authorities acting as Executive Magistrates, under Section 107-110 Cr.PC., we deem it fit to remand those cases back to the file of the learned Single Judge to enable the learned Single Judge to deal with each case on its own merits and in accordance with law and pass final orders. Accordingly, Crl.RC.Nos.610,622,640,725,758,784,817,851,883,900,947, 978, 1063 of 2020, Crl.OP .Nos.14872,14883,14909 of 2021, Crl.RC.Nos. 852,1119,1605,1606 of 2022, Crl.OP.No.3936 of 2022 and Crl.RC.No.95 of

2023, are remanded back to the file of the learned Single Judge. Registry is directed to post these Criminal Revision Cases, before the learned Single Judge.

94.Crl.RC.Nos.298 of 2020, 813 of 2022, 971 of 2020 and Crl.RC.No. 1420 of 2022, were also posted along with this batch. These cases do not form part of this batch and it has been wrongly posted. Hence, these cases are delinked from this batch and the Registry is directed to post these cases before the concerned portfolio Judge.

95.Justice V.Parthiban and Justice P.N.Prakash, had disposed of the cases posted before them, but, however since they referred the matter to be placed before a Division Bench, the cases which they disposed of were also listed before us. Since the cases in Crl.RC.Nos.137, 955, 970, 982, 991, 993, 1025, 1066, 1142, 1241,1286, 1322, 1371, 1386, 1410, 1511, 1164 of 2018, Crl.RC.Nos.87, 54, 72 of 2019, Crl.RC.No.78 of 2020, have already been disposed of, no further orders are required to be passed in these cases.

96.Before drawing the curtains, we place on record our appreciation for the assistance rendered by the learned counsel for the petitioners, the learned Additional Public Prosecutor and the Amicus Curiae. We were dealing with a very important issue directly touching upon the liberty of an individual under Article 21 of the Constitution of India and we could not have written this exhaustive judgment and answered the questions that were referred to us, without the able assistance of the Bar.

[N.S.K.,J.] [N.A.V.,J.]
13.03.2023

Index : Yes
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes
KP
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To

1.The Inspector of Police-Law & Order,
H-4, Korukkupet Police Station,
Chennai-600 021.

2.The Administrative Executive Magistrate
& Deputy Commissioner of Police,
Vannarpettai District,
Chennai City.

3.The Public Prosecutor
High Court, Chennai.

N.SATHISH KUMAR, J.

AND

N.ANAND VENKATESH, J.

KP

Pre-Delivery Common Order in

Crl.RC.No.137 of 2018 etc., cases And
Crl.RC.No.78 of 2020 etc., cases

13.03.2023

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