

(2015) 07 DEL CK 0261
In the Delhi High Court
Case No : Writ Petition (Crl) 1148 of 2015

Akash Kashyap

APPELLANT

Vs

Lt. Governor of Delhi and Others

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 445, 446, 447, 448, 70
Delhi Police Act, 1978 — Section 46, 47, 48, 50, 51
Penal Code, 1860 (IPC) — Section 290, 308, 34, 489A

Citation : (2015) 9 AD 609 : (2015) 4 CCR 60

Hon'ble Judges : Ashutosh Kumar, J

Bench : Single Bench

Advocate : Mrinal Madhan and Tarvnesh Kumar, for the Appellant; Rajesh Mahajan, Addl. SC and C.P. Singh, SI, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Ashutosh Kumar, J—By order dated 10.3.2015 passed by the Additional Deputy Commissioner of Police, the petitioner was externed from the territory of NCT for a period of two years.

2. The appeal preferred by the petitioner before the Lieutenant Governor failed. The appellate authority (LG) by order dated 5.11.2015 sustained and affirmed the externment order.

3. The present petition is directed against the aforesaid externment order dated 10.3.2015 as also the order passed by the LG dated 5.5.2015.

4. The petitioner was noticed under Section 50 of Delhi Police Act, 1978 (hereinafter referred to as the "Act") on 30.8.2011, on the Additional Deputy Commissioner of Police, East despite being satisfied by the externment proposal under Section 47 of the Act of the SHO of Gandhi Nagar police station through the ACP, Gandhi Nagar. The petitioner was given a list of 8 cases in which he was involved during the period 2007 to 2011 and an explanation was sought from

him as to why he should not be externed from the limits of NCT.

5. During the pendency of the proceeding, the petitioner was served a supplementary notice, listing three other cases apart from the eight referred to above, two of the year 2012 and one of the year 2011 in which also the petitioner, allegedly, was involved.

6. Pursuant to the notice/direction, petitioner appeared before the Additional DCP on 3.10.2011, when he was explained about the charges for proposed externment, to which he did not plead guilty. The petitioner submitted his reply and also appeared along with his counsel.

7. The petitioner specifically took the plea that two of the eight cases cited in the first notice were of the year 2007 and had ended in acquittal. In one case of 2010 which was registered under the provisions of Gambling Act, the petitioner was convicted. Apart from these cases, all other cases were pending trial. It was further submitted by the petitioner that he has been falsely implicated in all such cases because of the machinations of the police of Gandhi Nagar police station and Farsh Bazar police station. Additionally, it was contended by him that his parents are old and ailing and he, being a person of tender age was responsible for their well being and also for maintaining the family as a sole bread earner.

8. The SHO who had proposed the externment appeared before the Additional Deputy Commissioner of Police and sought to defend such externment proposal on the ground that the petitioner was continuing with his criminal activities despite the notice to him and that his modus operandi is gambling and sale of illicit liquor. It was submitted that because of his being a habitual offender, he has become a terror in the area and witnesses in general are not willing to come forward against him as they apprehend onslaught at his hands. On these reasons, the SHO maintained, that the externment proposal was made for the purposes of maintaining law and order in the area.

9. On behalf of the petitioner, two witnesses were examined namely Pawan Anand and Pradeep Kumar Tiwari, both of whom spoke about the good conduct of the petitioner.

10. The Additional Deputy Commissioner of Police after hearing the parties and perusing the records vide his order dated 10.3.2015 held that the petitioner had become a habitual offender and, therefore, he was a dangerous person. The Additional Deputy Commissioner of Police took note of the fact that even during the pendency of the proceeding, the proceedee involved himself in three other cases about which a supplementary notice was given to him. The DCP was, therefore, of the opinion that the presence of the petitioner in the community would be hazardous to the society. Consequently, he was directed to remove himself from the limits of NCT of Delhi for a period of two years within seven days from the date of passing of the order. The petitioner has been prevented from entering the area of NCT except for the purposes of attending to the cases in which he is being tried, and that also only on the date of hearing in the Court

and return beyond the limits of Delhi immediately thereafter.

11. The petitioner appealed before the LG under Section 51 of the Act and reiterated the same grounds before the appellate authority. The appellate authority agreed with the assessment of the Additional DCP that the petitioner is a notorious criminal and, therefore, sustained and affirmed the order of externment.

12. In order to appreciate the contention of the parties, it is necessary to list the cases in both the notices in which the petitioner was found to be involved.

13. The list of cases in which the petitioner is said to be involved reflects that in two cases of the year 2007, one being under the Punjab Excise Act and the other registered under Section 308/34 of the IPC, the petitioner was acquitted.

14. The two cases of 2012, which are also pending trial are under Delhi Excise Act and Gambling Act. It appears that after 2007, the petitioner was made accused in 2010. Thereafter, in the year 2011 there were three cases whereas in the year 2012, two cases were reported against him.

15. The petitioner, let it be noted, was noticed on 10.3.2015 on the basis of the externment proposal by the SHO of Gandhi Nagar police station.

16. It would be apposite to refer to the relevant provisions of the Delhi Police Act, 1978 to appreciate the submissions made on behalf of the parties.

"Section 47 - Removal of persons about to commit offences Whenever it appears to the Commissioner of Police--

(a) that the movements or acts of any person are causing or are calculated to cause alarm, danger or harm to person or property; or

(b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, Chapter XVI, Chapter XVII or Chapter XXII of the Indian Penal Code (45 of 1860) or under section 290 or sections 489A to 489E (both inclusive) of that Code or in the abetment of any such offence; or

(c) that such person-

i) is so desperate and dangerous as to render his being at large in Delhi or in any part thereof hazardous to the community; or

ii) has been found habitually intimidating other persons by acts of violence or by show of force; or

iii) habitually commits affray or breach of peace or riot, or habitually makes forcible collection of subscription or threatens people for illegal pecuniary gain for himself or for others; or

iv) has been habitually passing indecent remarks on women and girls, or teasing them by overtures, and that in the opinion of the Commissioner of Police witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property, the Commissioner of Police may, by order in writing duly served on such person, or by beat of drum or otherwise as he thinks fit, direct such person to so conduct himself as shall seem necessary in order to prevent violence and alarm or to remove himself outside Delhi or any part thereof, by such route and within such time as the Commissioner of Police may specify and not to enter or return to Delhi or part thereof, as the case may be, from which he was directed to remove himself.

Explanation.--A person who during a period within one year immediately preceding the commencement of an action under this section has been found on not less than three occasions to have committed or to have been involved in any of the acts referred to in this section shall be deemed to have habitually committed that act.

Section 50 - Hearing to be given before order under section 46, 47 or 48 is passed

(1) Before an order under section 46, section 47 or section 48 is made against any person, the Commissioner of Police shall by notice in writing inform him of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them.

(2) If such person makes an application for the examination of any witness to be produced by him, the Commissioner of Police shall grant such application and examine such witness, unless for reasons to be recorded in writing, the Commissioner of Police is of opinion that such application is made for the purpose of causing vexation or delay.

(3) Any written explanation put in by such person shall be filed with the record of the case.

(4) Such person shall be entitled to be represented in the proceeding before the Commissioner of Police by a counsel.

(5) (a) The Commissioner of Police may for the purpose of securing the attendance of any person against whom any order is proposed to be made under section 46, section 47 or section 48 require such person, by order in writing, to appear before him and to furnish a security bond with or without sureties for attendance during the inquiry.

(b) The provisions of sections 1.19 to 1.24 (both inclusive) of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply in relation to the order under clause (a) to furnish security bond.

(6) Without prejudice to the foregoing provisions, the Commissioner of Police,

while issuing notice to any person under sub-section (1) may issue a warrant for his arrest and the provisions of sections 70 to 89 (both inclusive) of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply in relation to such warrant.

(7) The provisions of section 445, section 446, section 447 or section 448 of the Code of Criminal Procedure, 1973 (2 of 1974), shall, so far as may be, apply in relation to all bonds executed under this section.

Section 51 - Appeal against orders under sections 46, 47 or 48

(1) Any person aggrieved by an order made under section 46, section 47 or section 48 may appeal to the Administrator within thirty days from the date of the service of such order on him.

(2) An appeal under this section shall be preferred in duplicate in the form of a memorandum, setting forth concisely the grounds of objection to the order appealed against, and shall be accompanied by that order or a certified copy thereof.

(3) On receipt of such appeal, the Administrator may, after giving a reasonable opportunity to the appellant to be heard either personally or by a counsel and after such further inquiry, if any, as he may deem necessary, confirm, vary or set aside the order appealed against:

Provided that the order appealed against shall remain in force pending the disposal of the appeal, unless the Administrator otherwise directs.

(4) The Administrator shall make every endeavour to dispose of an appeal under this section within a period of three months from the date of receipt of such appeal.

(5) In calculating the period of thirty days provided for an appeal under this section, the time taken for obtaining a certified copy of the order appealed against, shall be excluded.

Section 52 - Finality of order in certain cases - An order passed by the Commissioner of Police under section 46, section 47 or section 48 or the Administrator under section 51 shall not be called in question in any court except on the ground--

(a) that the Commissioner of Police or the Administrator, as the case may be, had not followed the procedure laid down in sub-section (1), sub-section (2) or sub-section (4) of section 50 or in section 51, as the case may be; or

(b) that there was no material before the Commissioner of Police or the Administrator, as the case may be, upon which he could have based his order; or

(c) in the case of an order made under section 47 or an order in appeal therefrom to the Administrator under section 51, the Commissioner of Police or the Administrator, as the case may be, was not of the opinion that witnesses

were unwilling to come forward to give evidence in public against the person against whom such order has been made."

17. Section 47 of the Act refers to the situation under which a person could be removed from the territory of Delhi. The situation enumerated are that if the movement of such person causes alarm, danger or harm or the proceedee is or about the commit offences under various sections of the Indian Penal Code or that such person is so desperate and dangerous so as to render his roaming at large in Delhi would be hazardous to the community or has been habitually intimidating persons or causing affray or passing indecent remarks on women and girls. If in conjunction with any one of the grounds or all the grounds the competent authority namely the Commissioner of Police frames his opinion that out of fear nobody is coming forward to depose against such person, he could either be directed to behave or to remove himself outside Delhi or to remove himself from any specified part of Delhi for a fixed duration/tenure.

18. The explanation appended to the section defines habitual offender. If a person has involved himself in cases on three occasions or more within one year immediately preceding the commencement of the action, he is a habitual offender.

19. Section 47 of the Act, therefore, refers to two aspects. The Commissioner of Police has first to be satisfied about the proceedee to be a dangerous person and that allowing him to roam at large would be hazardous to the society or cause harm and danger to any person or property or reasonable grounds for believing that he would involve himself in offence affecting human body, property, counterfeiting coins and currency notes. Thereafter, the Commissioner of Police is required to formulate his opinion that witnesses are unwilling to come in open to depose against such person for the fear of their lives. Then only a person/offender/proceedee could either be directed to behave himself or remove himself outside any part of Delhi or remove himself completely outside Delhi.

20. The Additional DCP, from the materials available before him namely the statements of witnesses recorded in camera by one Mr. Asif Mohd.Ali, the then Additional Deputy Commissioner of Police and the records and other relevant materials held the petitioner to be a habitual offender and because of such involvement in offences in quick succession, the petitioner had become a dangerous person. The Additional Deputy Commissioner therefore, held that his presence in the community would be hazardous to the society.

21. The analysis of the nature of cases in which the petitioner is said to be involved makes it very clear that the offences are interspersed over a period of five years namely 2007 to 2012. The proceeding for externment was initiated in the year 2015 as is evident from the notice to the petitioner. There was no reason for the petitioner to have been declared a habitual offender as in the immediately preceding year to the commencement of proceedings, he had not been made accused in any case.

22. What strikes this Court is that from 2012 to 2015, no case has been reported against the petitioner.

23. In view of the explanation added to Section 47 of the Act, it cannot be said that the petitioner is a habitual offender at least when the proceedings were initiated against him.

24. The opinion of the Additional DCP that nobody is coming forward to appear against the petitioner as a witness because of fear is based on the fact that the ACP of the area had recorded the statement of two witnesses in camera.

25. As noted earlier the petitioner has been acquitted in two cases of 2007 and was convicted in one case of 2010. It is difficult to appreciate, under such circumstances, the opinion of the Additional DCP about the witnesses not coming in open against the petitioner for fear. Had it been the case, the trial in three cases against the petitioner would not have concluded.

26. It further appears that majority of the cases in which the petitioner has been made accused relate to Gambling Act and the Excise Act. Offences under these Acts have not been listed as categories of cases, where the involvement of a proceedee would render him a dangerous person.

27. However, even for these offences, if a person is found to be involved repeatedly, that could render the presence of such a person in society hazardous for public peace and tranquility but not when offences under these categories have been spaced out over a period of five years and no case having been reported from 2012 to 2015 when the externment proposal was initiated.

28. It has been contended on behalf of the petitioner that his involvement in such cases which are pending trial over a period of five years do not bear any nexus with the grounds falling under various clauses of Section 47 of the Act. It is difficult, it has been argued, to infer that the movement of the petitioner would cause or is calculated to cause alarm, danger or harm to the person or property. Similarly, the circumstances and the materials available on record do not warrant an inference that the petitioner is so desperate and dangerous that for maintaining an even tempo of life and society, he needs to be externed.

29. The previous acquittals and conviction in one case clearly belie the assertion of the police and the formation of opinion of the Additional DCP that witnesses are not coming forward to depose against the petitioner for his dangerous disposition. The mere fact that the ACP of Gandhi Nagar recorded the statement of two witnesses in camera would not and does not justify such an opinion.

30. Mr. Mahajan, learned Additional Standing Counsel, while defending the orders submitted that the Additional DCP was satisfied about the criminal proclivity of the petitioner. It is only the subjective satisfaction of authorities based on materials available on record that the externment order has been passed. It is further submitted by him that the sufficiency of the material on which the externment order was passed cannot be gone into. What is required to be seen is

the existence of materials and not the sufficiency of materials. If the materials available on record, satisfies the competent authority to arrive at such conclusion, the same ought not be interfered with.

31. The scope of judicial review of the administrative order, it has been argued, is limited to the legality of the decision making process and not the legality of the order per se and no judicial interference is required in the event of the possibility of any plausible view with regard to the petitioner being dangerous and hazardous to the society.

32. The position of law with respect to judicial interference in matters of administrative decisions has been well crystallized by now. The oft quoted and referred decision in this regard is in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*, (1948) 1 K.B. 223 . The principle enunciated in the aforesaid case is popularly known as *Wednesbury principles*. The aforesaid decision takes note of the fact that in order to test the "reasonableness" of the order, the Court has to find out whether relevant factors have been taken into account for coming to any conclusion. What is important to see is whether the action of the executive is within the parameters of law and that the decision passes the test of reasonableness. If the administrative order is irrational, or has been arrived at without taking into consideration relevant factors which ought to have been taken into account and/or suffers from the procedural irregularities, the same can definitely be reviewed and corrected.

33. True it is that the sufficiency of the material for the police authority to come to the conclusion about the petitioner being dangerous cannot be gone into; nonetheless such executive order cannot be sustained if it is based on distorted/ illogical grounds.

34. The relevant provisions of the Delhi Police Act have been enacted for the purpose of preventing crime and making society worth living. Keeping this object in mind, even before the threshold of the commission of crime by any person, considering his criminal dispensation and proclivity, he could be removed from the confines of Delhi.

35. Nonetheless, there can be no dispute that an externment order brings in societal and personal deprivation and is a great blow on the finances of the externnee. An order of externment makes an inroad into the cherished and valuable right of a person to have his domicile at the place of his choice.

36. This Court is mindful of the fact that unless such stringent measures are taken against such law breakers, it would be difficult for police authorities to maintain an even tempo of the society. At the same time the rights and liberties of a person cannot be lightly interfered with and has to be guarded with utmost zeal.

37. The provisions of Section 47 and 50 therefore, have to be read strictly. Considering the strain that it puts on an externnee, the considerations for

externing a person ought to be in consonance with the requirements of law and the satisfaction arrived at by the executive authorities must pass the test of reasonableness. Any executive order which is not informed with fairness cannot be sustained on any account.

38. There must be a clear and present danger in allowing the petitioner to remain at large in jail for countenancing the order of externment.

39. From the perusal of the externment order as also the appellate order, this Court is of the opinion that there was no sufficient reason to believe that the petitioner was so desperate and dangerous that his presence in NCT or any part thereof would be hazardous to the community and its safety. Both the orders referred to above, suffer from vice of non application of mind with respect to relevant considerations namely

- i. the frequency of the cases in a particular year,
- ii. consideration of the fact whether the petitioner has improved himself,
- iii. the urgency of externing the petitioner in 2015,
- iv. requirement of the petitioner to be Delhi to attend to cases which are pending trial,
- v. the financial burden on the proceedee in coming from outside Delhi to Delhi Courts,
- vi. the possibility of delay in disposal of cases and, therefore, delay in vindication of the assertion of either i.e. the petitioner or the prosecuting agency,
- vii. two acquittals and one conviction of the petitioner and so on and so forth.

40. There does not appear to be any material so as to justify the assessment that witnesses are not daring to come in open to depose against the petitioner.

41. Tested on the touchstone of aforementioned facts and principles, the externment and the appellate orders cannot be sustained in the eyes of law.

42. The externment order dated 10.3.2015 passed by the Additional DCP and the appellate order dated 5.5.2015 passed by the LG, Delhi are, therefore, quashed.

43. The petition stands disposed of accordingly.

CrI. M.A. No. 8199/2015

44. In view of the main petition having been allowed, this application becomes infructuous.

45. This application is disposed of accordingly.