
(2012) 05 BOM CK 0006

In the Bombay High Court

Case No : Criminal Writ Petition No. 3953 of 2011

Baburao Changa Patil

APPELLANT

Vs

State of Maharashtra and Another

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Bombay Police Act, 1951 — Section 56, 56(1)(a), 56(1)(b), 59(1)
Criminal Procedure Code, 1973 (CrPC) — Section 107

Citation : (2012) 05 BOM CK 0006

Hon'ble Judges : Thipsay A.M., J

Bench : Single Bench

Advocate : Irfan A. Shaikh, for the Appellant; R.M. Gadhvi, APR, for State, for the Respondent

Final Decision : Allowed

Judgement

Thipsay A.M., J.—Heard. Rule. By consent rule is made returnable forthwith. Learned APP waives service of notice.

2. By this writ petition, the petitioner is challenging the externment order passed by the Dy. Commissioner of Police, Zone-I, Thane, under the provisions of section 56(1)(a) and 56(1)(b) of the Bombay Police Act, 1951 (hereinafter referred to as "the said Act") and confirmed in appeal by the State of Maharashtra.

3. The petitioner is a resident of Dighar Naka, Village Padle, District Thane. There are five cases pending against him as per the following details:

1.

Mumbra

325/02

454, 457, 380, 34

Pending in Court.

2.

Mumbra

194/04

326,323,

34

"

3.

Shildighar

27/10

324,504, 506,336, 34

"

4.

"

110/10

384,385,

34

"

5.

"

66/11

341,323, 336,427, 504,506,

143,147, 149

Investigation

6.

"

Ch.95 /19

107 of Cri.P.C.

Bond.

4. On 17/8/2011, the petitioner was served with a show cause notice u/s 59(1)

of the said Act, informing him that it had been proposed to extern him from Thane District, for a period of two years and asking him to show cause as to why he should not be externed from the Districts of Thane, Mumbai and Raigad for a period of two years. It was alleged that the activities of the petitioner were dangerous to the residents of Thane, Dighargaon, Kalyan Phata, Shilroad, Goteagaon and surrounding areas, and that the residents of the said localities had a danger to their safety and property from the petitioner. The general nature of the allegations against the petitioner was specified in the said notice and reference to the pending cases was also made. It was also mentioned that the victims and witnesses were not willing to come forward to make a complaint or lodge a report against the petitioner due to fear, and that, in-camera statements of two persons had been recorded, before issuing the said show cause notice. It was also mentioned that a bond for good behaviour, as contemplated u/s 107 of the Code of Criminal Procedure had been taken from the petitioner but in spite of the same, further cases had been registered against him. The petitioner submitted his reply to the show cause notice, denying the allegations. He submitted that he was residing at Dighargaon with his family, consisting of his wife, four children and parents. The petitioner submitted that he was an agriculturist and had also been doing some business. The petitioner also offered certain explanations with respect to the pending cases against him as referred to in the show cause notice.

5. After hearing the petitioner and after considering the material before him, the Dy. Commissioner of Police, Zone-I, 4/18 Thane, passed an order externing the petitioner from the limits of the Districts, Thane, Mumbai and Raigad for a period of one year under the provisions of section 56(1) (a) and b) of the said Act.

6. In the appeal filed before the Hon'ble Home Minister of Maharashtra, the petitioner raised a number of contentions including that the order passed by the Dy. Commissioner of Police, being biased, cryptic and without application of mind. It is not necessary to mention all the grounds on which the externment order was challenged by the petitioner in the appeal. The appeal was dismissed with the observation that the order passed by the externing authority appeared to be proper and, therefore, no interference in the matter was required.

7. Before this Court, the petitioner has contended that the externment order is bad as the same fails to give any reasons in support thereto. A number of other grounds, challenging the externment order have also been taken. These grounds are not pressed during the oral hearing. Only one ground was pressed during the oral hearing, namely:-that the order suffers from the vice of being excessive. It is submitted that when the alleged activities of the petitioner were confined to the areas within the jurisdiction of Mumbra Police Station and Shildighar Police Station, which formed a small part of Thane District, it was unreasonable to extern the petitioner from three districts namely, Thane, Mumbai and Raigad. Besides, on this basis, it is also submitted that the order, therefore, suffers from non-application of mind.

8. It has been already observed above that the show cause notice dated 17/8/2011, at one place mentioned that the proposal was to extern the petitioner from the Thane district but at another place the same requires him to show cause as to why he should not be externed from the Districts of Thane, Mumbai and Raigad.

9. Undoubtedly section 56 of the said Act enables the externing authority to extern a person, even from an area outside the local limits of the jurisdiction of the externing authority. In fact, the externing authority has been conferred with a power to direct a person to remove himself outside any area or areas in the State of Maharashtra. However, it is obvious that the basic object of the externment proceedings is to keep a person, whose activities are causing problems in a particular area, out of that area. The externment order affects the fundamental rights of a citizen and, therefore, it has to be reasonable. A person cannot be put under a greater restraint than would be absolutely necessary. Even if there would be a case for externment of a person, he cannot be externed from the entire State or from an area greater than what would be necessary for preventing the activities of such person taking place in a particular area or locality. If the action is more drastic than is necessary for attaining the desired result, it cannot stand the Judicial scrutiny.

10. The courts have consistently taken a view that an externment order, which covers an unreasonably more area than what would be necessary for the purpose of achieving the object of the relevant provision, would be bad and cannot be allowed to stand. A reference may be made to the decision of this Court in the case of (Umar Mohammed Malbari Vs. K.P. Gaikwad & anr.),¹ 1988(2) BC Report 724, where the externment order was, inter alia, challenged on the ground that it was excessive. In that case, the activities alleged against the externee, were in the localities of Nadinaka, Vanjarpati Naka, Bhiwandi. He was, however, externed out of the limits of Thane Commissionerate, Greater Bombay, Raigad and Nasik Districts. On behalf of the State it was argued in that case, while replying to the contention of excessiveness, that Greater Bombay, Raigad and Nasik districts were contiguous to the Thane Commissionerate. It was contended that having regard to modern means of transport, the order passed was fully justified. This Court did not accept the said contention. It was held that the order was excessive.

11. It is not necessary to multiply the authorities. What needs to be observed is that, whenever it has appeared to this Court that the area from which a person has been externed is unreasonably bigger, when the activities leading to the externment order had been taking place in a limited area or locality, such externment orders have been set aside on the ground of excessiveness. To be certain that this is the consistent view taken, the undernoted reported cases may be referred to::

(1) (Bharat Dhondba Tarare Vs. Sub-Divisional Officer & ors.)², reported in 2008(1) Bom.C.R.(Cri.) 111(N.B.): 2007 All.M.R.(Cri.) 3036

(2) (Mallu @Malva Niyaj Alli Siddhique Vs. State of Maharashtra & ors.)³, reported in 2006 (soft) B.C.I. 426(N.B.) : 2007 All.M.R.(Cri.) 1630

(3) (Silva @ Gora Silva Ayanar Arjun Vs. Nawal Bajaj & anr.)⁴, reported in 2007(1) Bom.C.R.(Cri.) 331: 2007All.M.R.(Cri.) 84

12. In the instant case, there is no discussion as to why the concerned authority felt it necessary to extern the petitioner from the Districts of Thane, Mumbai, Raigad, when the activities of the petitioner were allegedly taking place only within the jurisdiction of Dighargaon Police Station and Mumbra Police Station. As to from which area the petitioner should be externed, does not appear to have been seriously considered by the externing authority.

13. It is well settled that, even the orders which are of quasi judicial or even of administrative nature, would be bad and unsustainable in law, if the concerned authority has failed to apply mind with respect to an important aspect of the matter. The impugned order, therefore, indeed, suffers from the vice of being excessive and is liable to be set aside on that ground.

14. There is also another aspect of the matter which was not specifically raised by the petitioner but was discussed in the course of hearing of the petition. Admittedly, there are five cases pending against the petitioner and though one of them is still at investigation stage, four others are said to be pending in the courts. Obviously, the petitioner is on bail in all these cases. The petitioner's presence before the concerned Court would be essential for the progress of the said cases. Naturally, due to the externment order, the petitioner would not be in a position to attend the Court in connection with cases pending against him, as the Court is situated in the area from which the petitioner has been externed.

15. In my opinion, this effect of the externment order is quite serious and raises several important issues. Whether the externing authority would be justified in totally disregarding the consequences of the externment order, in relation to the criminal cases said to be pending against the person, cannot be answered in affirmative. Though this aspect does not seem to have been settled by any authoritative pronouncement of the Supreme Court of India or of this Court or any other High Courts; and though no authorities dealing with this aspect are known, in my opinion, this requires serious consideration.

16. The pending prosecutions are serious affairs and the State is not expected to take a light or casual approach in respect of such prosecutions. It would be more so, when the petitioner is alleged to be a person of notorious character and indulging repeatedly into offences. If the State would be able to secure a conviction of the petitioner, in any of the pending cases, it would have more serious and drastic consequences for the petitioner, and it would be more effective than the externment order. As such, the State is expected to be keen on successful prosecution of the petitioner. If the petitioner would not be able to attend the Court, the criminal cases against him would remain pending, reducing the chances of successfully establishing the charges against the petitioner,

because of the time gap. Moreover, the concerned Court is not expected to be aware that the petitioner has been externed and, therefore, likely to view his absence as serious, taking various coercive steps against him. Even if the Court is, later on, informed that the petitioner is unable to attend because he has been externed, the Court is not obliged to stay the trial on that ground. Though, theoretically, it is possible to contend that the petitioner should inform the concerned Court about the externment order by sending his representative to the Court and/or that he should apply to the externing authority or the State of Maharashtra for permission to enter the area for the purpose of attending to the Court cases, in practice, it would be impossible to successfully do so. Different dates might be given by the court's for different cases and sometimes there may not be sufficient time to apply to the externing authority or to the State and to get the requisite permission.

17. Thus, though this point seems to be uncovered by any authoritative judicial pronouncement, in my opinion, considering the repercussions of the externment order on the pending cases, from the point of view of administration of justice as well as of the petitioner, the externing authority must grant a general permission, to be specified in the externment order itself, that the person externed shall be permitted to enter the area out of which he has been externed, for the purpose of remaining present in the courts, in connection with the criminal cases pending against him. The person externed should be allowed to remain present before the Court on the dates of hearing of the cases against him, as may be fixed by the concerned courts. That a person externed might seek permission of entry for the purpose of remaining present before a Court of law in connection with pending criminal cases, cannot be an answer for not granting such permission.

18. As there had not been sufficient discussion on this issue, I decline to express a final opinion as to whether the order of externment would necessarily be bad, if the same does not provide that the person externed shall be entitled to enter within the specified area of externment for the purpose of attending to the criminal cases pending against him. What can be safely stated, however, is that, at any rate, the externing authority should appear to be aware of the obstacles or the interference which the externment order would cause in the pending criminal case. The authority must apply its mind to this important aspect, and for that purpose, may require information about the stages of the pending cases. If a case is at the final stage and likely to be disposed of within a week or so, the knowledge of this, in a given case may affect the decision of the externing authority. Sometimes the decision may be properly postponed to see what happens in the criminal case.

19. At the cost of repetition, it may be observed that the externing authority cannot consider the pending prosecutions against a person as a secondary or unimportant matter so that the effect of the externment order on the pending prosecutions would be of no consequence at all. Thus what can be safely stated is that, the awareness on the part of the externing authority that because of the

externment order, the pending proceedings against the accused would be delayed: that it might create problems for the accused on account of not being able to attend the Court on the dates of such cases, would be necessary and this must be reflected in the externment order itself. Needless to say that, if the authority would apply its mind to this aspect of the matter, it is likely to grant a general permission to the person externed of entering into the specified area for the purpose of remaining present before the courts of law in connection with pending criminal cases against such person. In some cases, the authority may delay the passing of the order in view of the likelihood of one or more cases against the person to be externed, getting decided within a short time, and take a decision after moving the outcome of such criminal cases or cases. In this case, the impugned order does not seem to have been passed by taking into consideration its effect on the pendency of the criminal cases against the petitioner and the aforesaid angles of the matter, which amounts to leaving out relevant considerations. In my opinion, the impugned order is bad in law on this count also.

20. In any case, the order is held to be suffering from the vice of excessiveness with respect to the area from which the petitioner has been externed. Similarly, not modifying the general prohibition to enter the specified area, even for the purpose of attending the courts in connection with the criminal cases pending against the petitioner, is also rather harsh and unreasonable. The restraint can be termed as "excessive", in this context also.

21. The impugned order, therefore, cannot be construed as legal and proper. It is required to be set aside. The appellate order also does not show any application of mind with respect to the aforesaid two aspects discussed above.

22. The petition is allowed.

23. The order dated 11/10/2011 passed by the Dy. Commissioner of Police, Zone-A, Thane, as also the order dated 28/11/2011 passed by the Principal Secretary, Home Department, Mumbai, in Appeal No. EXT/ 2011 / 197VS-3(A) are quashed and set aside. Petition is disposed of in the aforesaid terms.