

(2001) 07 GUJ CK 0042

In the Gujarat High Court

Case No : Special Criminal Application No. 123 of 2001

Chandrashekhar Girdharlal Mehta

APPELLANT

Vs

Sub Divisional Magistrate Junagadh

RESPONDENT

Date of Decision : 06-07-2001

Acts Referred:

Bombay Police Act, 1951 — Section 55, 56, 56B, 57, 59

Citation : (2001) 07 GUJ CK 0042

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Pravin Gondaliya, for the Appellant; H.L. Jani Addl., Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

H.K. Rathod, J.—In the present petition, the petitioner has challenged the order of externment passed by the Sub Divisional Magistrate, Junagadh in externment case No. 9/2000 dated 14th November, 2000 and order of the appeal dated 12th February, 2001 under Article 226 of the Constitution of India. The respondent No. 1 has issued a show cause notice dated 29th April, 2000 to the petitioner and the petitioner has submitted his reply on 3rd July, 2000 and thereafter the order of externment has been passed on 14th November, 2000 u/s 56 of the Bombay Police Act and show cause notice has been issued by the respondent No. 1 u/s 59 of the Bombay Police Act, 1951.

2. Learned advocate Mr. Pravin S. Gondaliya has submitted that various contentions have been raised by the petitioner challenging the externment order but according to him, it is composite order and not severable and therefore one contention is enough to vitiate the order of externment. Therefore, he submitted that contention raised in ground [D] to the effect that the petitioner has not provided with reasonable opportunity against the allegations made in show cause notice as extract of the statement of the confidential witnesses are not supplied to the petitioner. However, the petitioner by his application dated 19th June,

2000 categorically demanded documents to enable him to have proper defence against the allegations. However, the petitioner has not supplied with demanded documents including the extract of the statements of the confidential witnesses. It is further submitted that the statement of the confidential witnesses are also relied upon and considered by the respondent No. 1 and the appellate authority while confirming the order of externment. However, the petitioner is not made aware of all the allegations have been made by the confidential witnesses and therefore, he has been prevented from making effective defence before externing authority and resultantly, principles of natural justice are clearly violated by the externing authority by depriving him of the demanded documents and hence also the order of externment is liable to be quashed and set aside.

3. The respondent - authority has not filed any reply to the present petition. In light of this contention raised by the present petitioner, learned advocate Mr. P.S. Gondaliya has specifically pointed out that in show cause notice dated 29th April, 2000, nowhere it is mentioned by the respondent No. 2 that statement of secret witnesses are obtained by the concerned authority. However, no whisper has been made and no detail has been given to the effect that any statement of secret witness has been recorded and obtained by the concerned authority and therefore, a show cause notice is silent in respect of the statement of secret witnesses. Therefore, Mr. Gondaliya has submitted that in order of externment at page 23, internal page 2, respondent No. 1 has while passing the externment order, considered the statement of the secret witnesses on two occasions, one on page 23 and at page 24. Therefore, Mr. Gondaliya, learned advocate has submitted that fact of recording of statement of secret witnesses not disclosed in show cause notice by the respondent No. 1 which has adversely affected the right of making effective reply by the present petitioner against the show cause notice. Therefore, the petitioner was not able to make an effective reply against the show cause notice. He also submitted that even while rejecting the appeal, the appellate authority has also considered the statement of secret witness. Therefore, the respondent No. 1 and the appellate authority both have taken into account the statement of secret witness which are record and considered by the concerned authority but this fact was not disclosed by the respondent No. 1 while issuing show cause notice to the petitioner. Therefore, reasonable opportunity has not been given in respect of material which has been relied upon and considered against the petitioner and therefore, according to him, order of externment is passed by the respondent No. 1 against the principles of natural justice.

4. Learned APP Mr. H.L. Jani appearing on behalf of the respondents has submitted that the statement of secret witness have been recorded and the same have been relied upon by the respondent No. 1 at the time of passing of externment order against the present petitioner but show cause notice has remained silent and no facts has been disclosed by the respondent No. 1 that a show cause notice has been issued while relying upon the statement of secret witnesses but he submitted that looking to the offence alleged to have

committed by the present petitioner and looking tot he activities and evidence collected by the respondent No. 1, order of externment has been rightly passed by the respondent No. 1 with full application of mind and it is legal and valid order which does not required any interference by this Court.

5. I have heard the learned advocates appearing on behalf of the respective parties. In the present petiton, one contention which has been raised by the learned advocate Mr. Gondaliya in Ground [D] of the petition on page-5 that statement of secret witnesses which have been recorded by the concerned authority and the same has been relied by the respondent No. 1 at the time of passing the externment order but this fact has not been disclosed by the respondent No. 1 in show cause notice, no statements were supplied to the present petitioner inspite of the demand made by the petitioner by letter dated 19th June, 2000 and therefore according to Mr. Gondaliya, effective reasonable opportunity which required to be given by the respondent No. 1 before passing the externment order as per Section 59 is not given to the petitioner and therefore, the order of externment is required to be set aside.

6. The relevant provision of Section 59[1] of the Bombay Police Act, 1951 which is relevant to the facts of the present case, are quoted as under :-

"59. Hearing to be given before order u/s 55, 56 or 57 is passed :-

[1] Before an order u/s 55, 56 or 57 is passed against any person the officer acting under any of the said sections or any officer above the rank of an Inspector authorised by that officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. If such person makes an application for the examination of any witness produced by him, the authority or officer concerned shall grant such application; and examine such witness, unless for reasons to be recorded in writing, the authority or officer is of opinion that such application is made for the purpose of vexation or delay. Any written statement put in by such person shall be filed with the record of the case. Such person shall be entitled to appear before the officer proceeding under this section by an advocate or attorney for the purpose of tendering his explanation and examining the witnesses produced by him.

(2)"

7. While reading sub section referred to above, it is important to note that it is the duty of the respondent No. 1 to give reasonable opportunity to the petitioner before passing the externment order against the petitioner. The language which has been used in a particular section is provided that the officer shall inform the person in writing of the general nature of the material allegations against him and give him a reasonable opportunity of tendering an explanation regarding them. Therefore, this is a reasonable opportunity of tendering explanation given by the petitioner which requires to be satisfied before passing the externment order against the present petitioner.

8. In the present case, there is no dispute on record that in show cause notice, no such material is referred by the respondent No. 1 that statement of the secret witnesses were recorded and obtained by the concerned authority. This fact has not been disclosed in the show cause notice which has been served to the petitioner. In light of this undisputed fact, the view taken by the division bench of this Court in case of RAMBHAI KHIMCHAND V. STATE OF GUJARAT reported 1990 [2] GLH 617, this Court has made observations in para-9 are as under :-

"9. As far as the present case is concerned, it cannot be said that unsubstantial or non existent ground has been taken into consideration, but a ground which is germane for the purpose of externing a particular person has been taken into consideration by the externing authority without putting the externee on notice as regards that ground. If that be so, the Court cannot substitute objective judicial test for the subjective satisfaction of the executive authority and come to the conclusion that the executive authority, dehors the said ground which has not been put on notice to the externee was able to arrive at a decision for the purpose of externing the person concerned in that particular case. Thus, it is clear that reference to a particular instance such as persons of status and means have shifted from the locality so that they may not become the victim of such tort committed by the petitioner herein is a clear instance to show that the activities of the petitioner concerned have reached that degree of harm to the society that the interest of the society or even of that particular locality required that this individual who has become a publici menace should be externed from the locality. This particular instance has not been put on notice to the externee though it finds place in the externment order. Natural justice requires that the person affected should have notice of the relevant materials on which the authority concerned bases its conclusion. The fact that the persons with status and means have shifted from their place so that they may not become victim of such torts by the externee concerned is one of the essential and relevant circumstance of externing a person. This essential circumstance on which the externing authority relied was not put on notice to the externee. As we have stated already this circumstance finds place in the order of externment. The failure on the part of the externing authority to put on notice to the externee regarding this particular circumstance, in our opinion, clearly vitiates the order of externment and offers the principle of fair play and justice. For all these reasons the order of externment is quashed and set aside. Rule is made absolute."

In a decision rendered by the Bombay High Court in case of MEHMOOD BABU KAWAL @ DAWARYA SHAIKH VS. ASSISTANT COMMISSIONER OF POLICE, CITY STATIN, PUNE reported in 1991 Cri.L.J.359, wherein the The Bombay High Court has made following relevant observations :

"2. With the Assistance of the learned counsel of both the parties, we have gone through the show cause notice dated 9th January, 1990 issued u/s 56-B of the Bombay Police Act as well as the Order of Externment passed u/s 56 of the said Act. On perusal of the show cause notice and the order of externment, we find

that the order of externment specifically catalogued three criminal cases under Prohibition Act registered and pending against the Externee. The said cases were not referred to at all in the show cause notice. A perusal of the impugned order further shows that the Externment Authority has in fact taken into consideration the fact that the petitioner deals in the sale of liquor and has been involved in offences under the Prohibition Act which is clear from his satisfaction recorded below the catalogue. He has stated that after considering the entire evidence placed before him and the reply advanced, he is satisfied that the proposed externment deserves to be granted. It is thus apparent that material extraneous to the show cause notice was taken into consideration at the time of passing of the Order of Externment and therefore, the Order of Externment is vitiated having been passed against the principles of natural justice. On this ground alone, the impugned order is liable to be set aside. We further find that in the show cause notice about 5 incidents of criminal acts of the proposed externment were cited but the date and the time of the incidents had been mentioned without reference to the locality where the alleged incident had taken place. A general nature of material particulars is necessary to be given to the proposed Externee so as to offer him adequate opportunity to show cause against the allegations. In the instant case, since various localities of Pune City are allegedly affected by the prejudicial activities of the proposed externment, it was necessary to give general particulars of the area where the alleged incidents had taken place. For all these reasons, stated above, we find that the order of externment is vitiated and has to be set aside."

In one more decision rendered by this Court in case of ASWIN CHANDULAL JAISHWAL Vs. THE DEPUTY COMMISSIONER OF POLICE, VADODARA CITY reported in 1989 Cri.L.J 517, wherein this Court has in para-9 made following relevant observations :

"9. Shri has also stated in his affidavit that the Inspector, Police Station, Vadodara, had recorded statements of 11 persons in confidence. He further stated that he had applied mind on the relevant material of the case produced before him, which includes the statement of the persons recorded by the police. It is not stated in the notice that the statements of the witnesses were recorded by the police. If at all any such statements would have been recorded and intended to be relied upon, such statements would have been recorded and intended to be relied upon, at least, reference of the statements, without disclosing the names, with the time and place of such alleged illegal activities of the petitioner should have been made in the notice so that the petitioner could have got an opportunity to explain the said circumstances or lead evidence. Without giving him an opportunity or even letting the petitioner know that statements were recorded, the Deputy Commissioner of Police has relied on statements of 11 persons. It is true that general allegations are only required to be made in the notice, but when statements are relied upon for the externment order at least, the person to be affected by such order should be given an opportunity to explain at least the general nature of allegations in the statements.

The petitioner was, therefore, deprived of the opportunity to explain the circumstances, which weighed considerably with the Externment authority and, therefore, also the order vitiates."

9. I have considered the observations made by the division bench of this Court as well as the Bombay High Court. The material question is that before passing the externment order, show cause notice is necessary and the same has been considered to be as mandatory then it is the duty of the respondent No. 1 to give effective and reasonable opportunity to the petitioner referring all the materials taken into consideration by the respondent No. 1. If any material is left out and not disclosed in the show cause notice and the same is considered in the externment order, then it amounts to not giving an effective and reasonable opportunity for tendering explanation against the show cause notice and the real purpose an object of Section 59[1] as enacted by the legislature will be frustrated. If any material which has been taken into account by the respondent No. 1 while passing the externment order, in that case, it ought to have been disclosed to the petitioner in the show cause notice so that the petitioner can effectively represent his case against the adverse material which has been collected and considered by the respondent No. 1. Therefore, according to my opinion, the respondent No. 1 has not given an effective reasonable opportunity to the petitioner and the order of externment which has been passed by the respondent No. 1 against the petitioner is in fact passed in violation of principles of natural justice and therefore the order of externment dated 14th November, 2000 and the order of the appellate authority dated 12th February, 2001 deserve to be quashed and set aside.

10. In the result, the present petitioner is allowed. The order of externment passed against the present petitioner dated 14th November, 2000 and the order passed by the appellate authority dated 12th January, 2001 are hereby quashed and set aside. Rule is made absolute accordingly.