
(2019) 02 BOM CK 0015

In the Bombay High Court

Case No : Criminal Writ Petition No. 1002, 1006, 1249, 2017

Hamid Chhanva Pyariwale And Ors

APPELLANT

Vs

Divisional Commiossioner Amravati And Another

RESPONDENT

Date of Decision : 08-02-2019

Acts Referred:

Bombay Police Act, 1951 — Section 27, 27(1), 56(1)(a), 56(1)(b), 55, 56, 56(1), 57, 58, 59

Citation : (2019) 02 BOM CK 0015

Hon'ble Judges : P.N. Deshmukh, J;Sunil B. Shukre, J;Z.A. Haq, J

Bench : Full Bench

Advocate : J.B. Kasat, M.K. Pathan

Judgement

1. Heard Shri R. R. Vyas, Shri J. B. Kasat and Shri Laique Hussain, learned counsel for the petitioners and Shri M. K. Pathan, learned Additional Public Prosecutor for respondents.

2. These matters have been placed before us upon a reference made by the learned brother Judges for answering two questions formulated in the referral order dated 5th February, 2018.

3. Facts, at their bare minimum, are as under :-

A] The petitioners have been externed by respondent No.1, Deputy Commissioner of Police, Zone-1, Nagpur City, Nagpur, from the area of Nagpur city for different periods subject to maximum of two years. The power invoked by respondent No.1 is under Section 56(1)(a)and(b) of the Maharashtra Police Act (in short, "Act 1951"). Clause (a) of Section 56(1) requires that the movements or activities of a person are causing alarm, danger or harm to the person and property. Clause (b) of the Section comes into play if the authority empowered under the Act 1951 acting reasonably believes that such person is engaged or is about to be engaged in the commission of offences enumerated in this clause and is also of the opinion that the witnesses for fear of reprisal are unwilling to

give evidence in public against such person.

B] During the course of hearing of the petition before the Division Bench it was argued that the impugned order was illegal, irrational and arbitrary it being excessive, showing no application of mind and little respect for the principle of *audi altaram partem*.

C] The Division Bench bearing in its mind the object of this provision of law, the law crystalized over the years as a result of landmark decisions of the Hon'ble Supreme Court in the cases of *Pandharinath Shridhar Ragnekar v. Dy Commr. Of Police, The State of Maharashtra* reported in (1973) 1 SCC 372; *State of NCT of Delhi & anr v. Sanjeev alias Bittoo* reported in 2005 SCC (Cri) 1025, *Tata Celluular v. Union of India* reported in 1994 AIR SCW 3344, *Lt Governor, NCT & ors v. Ved Prakash @ Vedu* reported in 2006 ALL MR (Cri) 2645 and *Gurbachan Singh v. State of Bombay & anr* reported in AIR 1952 SC 221 held that though the decision or action of externment can always be challenged on the ground that it is vitiated by arbitrariness or unfairness or illegality or irrationality all together converging into the famous *Wednesbury* principle, there are well defined limits to the power of judicial review that a writ Court can exercise over such an order passed as a part of administrative functions of the authority.

D] The Division Bench found that the object of externment being to restrain a person from indulging in or continuing with his illegal activities for a certain period of time, it was necessary that the movements of such a person are restricted to such an area as would make it possible for authorities to keep a watch over his activities and if this is to be done effectively, the removal of such a person could possibly and reasonably be from a larger or additional area. The Division Bench held that the legislature itself had taken note of the improved or common means of transport and communication system reducing the impact of externment order and enabling the externnee to easily flout the externment order and that is the reason why not only the Hon'ble Apex Court but also the legislature through amendment made to Section 56 by Maharashtra Act 33 of 1981 made a provision for authorizing the officer to extern a person even outside his area of illegal activities or the jurisdiction of the officer and such larger area need not be contiguous to the actual area of his illegal activities. The Division Bench took the view that the order of externment from the larger or additional area can be justified on the basis of existence of material showing the nature of activities of the externnee in a restricted area and it cannot be vitiated merely because no specific reference is made to the options available to deal with the situation. It also held that there could not be any insistence upon the existence of material to show that the larger or additional area so chosen or selected is intimately connected with the actual area of the activities of the externnee due to improved or common means of transport and communication.

E] During the course of hearing, a further question arose as to whether or not details of the material allegations need be furnished to the person proposed to be externed. The Division Bench, again referring to the cases decided by Hon'ble

Supreme Court and this High Court found that what is required to be furnished to the proposed externnee, as required under Section 59 of the Act 1951, is only general nature of material allegations and nothing more.

F] The Division Bench, however, having been confronted with some divergent views expressed in some of the Judgments rendered by the other coordinate Benches, such as in the cases of Pappu Mishra vs. Union of India, 2017 ALL MR (Cri.) 1, Sanjay Ruptakke vs. State, 2017 ALL MR (Cri.) 3983, Sayyad Jafar vs. Divisional Commissioner, 2017 ALL MR (Cri.) 4303 found itself in a dilemma and, therefore, formulating two questions for their answer by a larger Bench, passed the referral order. The questions framed are thus :

(1) Where the activities of externnee are confined to specific area of the local limits of the jurisdiction of a police station in a district but the order of externment extends to the entire district, rural areas and even beyond the district or districts (irrespective of the fact that it is contiguous or not) wheether such an order needs to show the existence of material - (a) that a larger or additional area so chosen or selected is intimately connected with the actual area of the activities of the externnee due to improved or common means of transport and communication system, (b) that the facts or the material warranting externment from a larger or additional area or neighbouring area exist, and (c) that the externing authority has applied its mind to the factors (a) and (b) while passing an order of externment?

(2) Whether it is necessary to state in the show cause notice the details of in-camera statements recorded by the externing authority to reach to the satisfaction that the witnesses are not coming forward to give evidence or depose in public against the proposed externnee due to fear of alarm, danger or harm to their person or property?

4. We have heard Shri Vyas, learned counsel for the petitioner in Criminal Writ Petition No.1002/2017, Shri Kasat, learned counsel for the petitioner in Criminal Writ Petition No.1249/2017, Shri Trivedi, learned counsel for the petitioner in Criminal Writ Petition No.1006/2017 and Shri Mehroz Pathan, learned Additional Public Prosecutor for the respondent State. We have gone through the provisions made under Sections 56 and 59 of the Act 1951 being relevant for consideration of the points raised by the questions referred to us and made an endeavour to find out the answers as reasonably as we could.

5. It is the contention of Shri Vyas and Shri Kasat, learned counsel for the two petitioners that it being the settled law that an order passed in exercise of the executive authority of the State can be challenged on the ground of it being unreasonable, arbitrary, illegal or procedurally improper, the order which puts a restrain upon the fundamental right of freedom of movement guaranteed to a citizen of India must clear the hurdle of trinity comprising illegality, reasonableness and procedural propriety entrenched as Wednusbury test. They further submit that it is for this reason that the order of externment removing a

person not only from the actual area of his illegal activities but also from a larger area, even beyond the limits of jurisdiction of the authority must show existence of material warranting such larger externment. They further submit that the order must also reflect consideration by the authority of material available on record or application of mind by the authority to the existing material. They further submit that even though, the amended provision of Section 56 of the Act, 1951 confers the power upon the officer to direct removal of a person from an area bigger than the domain of his unlawful activities, the power must be exercised in a reasonable manner or otherwise it would agitate against the doctrine of *Wednesbury* consistently followed by Courts in India. They also submit that existence of such material must be seen either from the facts present on record which show that the suburban areas or satellite towns of big city which are, by reason of improved means of transport and communication, are intimately connected with the actual area of operation of the externee or the special facts available on record showing that if an expansive order of externment is not passed, the very object of externing the person would be difficult to reach. They further submit that the externment order must also show application of mind of the authority to such facts or special facts.

6. Learned counsel would further submit that for the very reason of the need for being reasonable, fair and proper, the show cause notice issued under Section 59 of the Act 1951 must give details of in-camera statements recorded by the officer to reach the satisfaction that the witnesses are unwilling to come out in public and give evidence against the externee for the fear of causing of harm to the life or property of the persons. They submit that if such details are not given, the person would be deprived of an effective opportunity of hearing before an adverse order is passed against him and that would frustrate the very object of issuance of prior notice.

7. Shri Trivedi, learned counsel for the third petitioner has, adopting the argument of Shri Vyas and Shri Kasat, learned counsel, argued on the lines drawn by the latter. In addition, he submits that the show cause notice must also mention the date and place of incident which has given rise to the envisaged apprehension in the mind of the witnesses.

8. Shri Pathan, learned Additional Public Prosecutor submits that the law has been well settled by the Hon'ble Apex Court in its leading cases and, therefore, it is no longer *res integra* on the question as to whether or not the order issued under Section 56(1)(a) and/or (b) must also show that there exists some material which indicates that there is a need for externing a person from larger areas. He further submits that the settled law would show that there is no need for the authority to make a reference to those facts or the material in the order itself as would warrant externment from a larger area. He further submits that what is required to be informed to the proposed externee under Section 59 of the Act 1951 is the general nature of material allegations made against him and, therefore, neither any details of in-camera statements recorded by the officer to

satisfy himself that the witnesses are unwilling to come forward to give evidence or depose in public against the externee due to fear of alarm, danger or harm to their person or property be stated nor is there any need to make a mention of in-camera statements in the order. The leading cases Shri Pathan speaks of are of Pandharinath, Sanjeev @ Bitto and Ved Prakash @ Vedu (supra).

9. The first question is about the need for an externment order being reflective of the existence of material on record justifying externment from a larger area much beyond the actual area of the illegal activities of a person and the externing authority being conscious of such material and being convinced at least subjectively about the necessity of banishing a person to a distant area.

10. Previously, there was no express power conferred upon the externing authority to direct removal of a person from an expansive area so as to make implementation of the order of externment much effective, easier and convenient. Even then, the law settled by the Hon'ble Apex Court favoured such spacious externment in some cases with a view to facilitate the effective implementation of the order of externment. In the case of Pandharinath (supra), one of the challenges involved was based on the ground that the order of externment was excessive and unreasonable. The Hon'ble Apex Court held that an excessive order can undoubtedly be struck down because no greater restraint on personal liberty than is reasonable in the circumstances of the case can be permitted. But, it also found that there could be cases and cases where inclusion of a bigger area for externment could be justified. Further holding that no general formulation could be made about the proposition that the order of externment must always be restricted to the area to which the illegal activities extend, it further observed in paragraph 15, "..... A larger area may conceivably have to be comprised within the externment order so as to isolate the externee from his moorings." It held that with the rise in industrialization and urbanization simultaneously witnessing improvement in the means of transportation and communication, the surrounding areas of industrial towns and urban centres have got themselves intimately connected with such industrial towns and urban cities thereby facilitating hassle-free movement of persons. It also found that a fair proportion of the multitudinous populace streaming in and out of such big cities in the pursuit of their daily avocations is a factor relevant that must be borne in mind by Courts. It observed that an order of externment restricted to a particular area chosen by the externee for his unlawful activities and to a small periphery thereof would, therefore, in such circumstances fail of its true purpose. The Hon'ble Apex

Court observed that it would be impossible to secure obedience to an order extending to field of illegal activities only at least in such cases and its enforcement would raise practical problems which would impair the efficacy of the order. In doing so, the Hon'ble Supreme Court upheld similar view taken by different Division Benches of this Court. These cases were -

(1) Criminal Application No. 1427 of 1968, decided on 17th March 1968.

(2) Criminal Applications No. 30 and 93 of 1970, decided on 23rd February 1970 and

(3) Criminal Application No. 149 of 1972, decided on 3rd March 1972.

11. So, the power of the officer to extern a person from a much larger area than the area to which his illegal activities are confined, has always been seen by the courts to be implicitly present in the power of the authority to extern a person under Section 56 of the Act, 1951. These judicial pronouncements got the legislative sanction when in the year 1981, by the Maharashtra Act 33 of 1981, an amendment was introduced to Section 56 (1). This amended provision conferred power upon the officer to extern a person from an area larger than the area of his actual activities notwithstanding the fact that the larger area is beyond local limits of the jurisdiction of the officer and/or not even contiguous. However, while doing so, the authority, as per the amendment, is required to indicate the route by which and the time within which the person directed shall remove himself from the area prohibited for him to be in for the time being.

12. The amended provision, however, lays down no guidelines as to how the discretion so conferred upon the officer be exercised by him. It does not say anything about the existence or otherwise of the material on record to justify an order made for a commodious space. It also does not indicate any criteria on which such an excessive order could be justifiably passed by the officer. These deficiencies have given rise to what could be called as conflict of opinion amongst the superior courts. It would be necessary for us, therefore, to once again refer to the case of Pandharinath (*supra*) and also to the subsequent decisions of the Hon'ble Supreme Court, in an endeavour to resolve the conflict of opinion.

13. In Pandharinath, Hon'ble Supreme Court has considered contiguity of suburban areas to the areas of a bigger city, villages adjoining to a big city and satellite towns of the industrial areas, as a factor relevant for passing spacious externment order. This would definitely show that in such cases, there may not be any direct material present on record to justify the externment order made for larger area. But, it can be further understood, that if the facts of a case show that the actual area of the illegal activities of the externnee fall in such a city as having suburbs or such immediate outskirts or such adjoining towns as would enable a Court to take judicial notice of they having been intimately connected with the area of the illegal activities or its surroundings, the order of externment could not be found to be falling foul of Wednesbury reasonableness. In other words there could be facts and circumstances present on record of the case which are so prominent as would emphatically indicate that externment of a person from a small area would be futile unless a bigger area is included therein because of the intimate connection between the area of illegal activities and adjoining greater areas. In such a case the proposed externnee, in order to remove him from his moorings, could be justifiably relegated to suffer the restriction of his movement from a larger area, and if this is done, it would lend purpose to and prevent frustration of the externment order.

14. At the same time, as held in *Pandharinath* (supra), general formulation for passing or not passing what is called an excessive order, cannot be made and it all depends upon the data collected by the authority. Such data, as could be further understood from the said case could bring to light some relevant factors such as the character of the proposed externee, the habits formed by him, the actual area of his illegal activities, the nature of surrounding area, the impact of the illegal activities and their extent and intensity, the capacity of the proposed externee and so on and so forth. Then, in order to scrutinize the subjective satisfaction of the externing authority, with a view to find out it's any connection with objective criterion, the law which has now been crystalised by several decisions of the Hon'ble Apex Court, would show that what can at the most be gone into by the High Court as a Court of secondary review, would only be the question of existence of the material and not of sufficiency or otherwise of the material. If some material is seen to be present on record, the scrutiny of the High Court would not go further so as to even examine the adequacy or otherwise of the material for reaching the subjective satisfaction of the authority. In paragraph 15 of *Pandharinath* (supra) judgment, the Hon'ble Supreme Court has removed all the doubts whatever they have been in this regard when it held that it is primarily for the externing authority to decide how best the externment order can be made effective, for how long, should it last, within what time frame subject to the statutory limit of two years should it operate and to what territories within the statutory limitations of Section 56 should it extend so as to subserve its real purpose. These principles have only been reinforced by the Hon'ble Supreme Court by its further judicial pronouncements in the cases of *Sanjeev alias Bittoo and Ved Prakash @ Vedu* (supra).

15. In the case of *Sanjeev alias Bittoo*, the Hon'ble Supreme Court reiterated the principle that it is only the existence of material and not sufficiency of material which can be questioned as the satisfaction is primarily subjective, somewhat similar to the one required to be arrived at by the detaining authority under the preventive detention laws, the scope of judicial review of an administrative order being limited only to the legality of the decision-making process and not legality of the order per se. In *Ved Prakash @ Vedu* also the Hon'ble Supreme Court took a similar view holding that the satisfaction of the authority although primarily subjective, should be based on objectivity, but sufficiency of material as such may not be gone into by a writ court. The only exception made by the Hon'ble Apex Court is that when the impugned order fails to take into consideration the relevant facts or is based upon irrelevant factors and in such a case, it is held, an interference with the externment order could and must be made. But, the Hon'ble Supreme Court also sounded a warning against uncalled for intrusion when it said that mere possibility of another view may not be a ground for declaring an administrative action invalid. Of course, the Hon'ble Supreme Court has also made an allowance for interference in case of an order shown to be actuated by malice.

16. What we have said thus far, in our attempt to cull out the principles, is only a

summary of various observations of Hon'ble Supreme Court made in its afore-stated cases and we think that we would be more profited if we refer to these observations of the Hon'ble Apex Court in these leading cases, which to our mind are relevant.

17. In *Pandharinath* (supra), the Hon'ble Apex Court observed thus -

"16. An excessive order can undoubtedly be struck down because no greater restraint on personal liberty can be permitted than is reasonable in the circumstances of the case. The decision of the Bombay High Court in *Balu Shivling Dombé v. The Divisional Magistrate, Pandharpur* (supra), is an instance in point where an externment order was set aside on the ground that it was far wider than was justified by the exigencies of the case. The activities of the externee therein were confined to the city of Pandharpur and yet the externment order covered an area as extensive as districts of Sholapur, Satara and Poona. These areas are far widely removed from the locality in which the externee had committed but two supposedly illegal acts. The exercise of the power was therefore arbitrary and excessive, the order having been passed without reference to the purpose of the externment.

17. But *Balu Shivling's* case (supra), furnishes no analogy in the instant matter. A vast city like Bombay presents its own peculiar problems of law and order. It has an over-growing industrial complex and the city has spread its arms far and wide. A fair proportion of its teeming population is mobile, with large multitudes streaming in and out of the city in the pursuit of their daily avocations. An order of externment restricted to the particular area chosen by the externee for his unlawful activities and to a small periphery thereof would in such circumstances fail of its true purpose. It would be impossible to secure obedience to such an order and its enforcement would raise practical problems which would impair the efficacy of the order. An order in the instant case if restricted, say, to the areas within the jurisdiction of the Vile Parle Police Station and its periphery would not serve its purpose. Rather than solving a problem of law and order, it would create yet one more.

18. That is why, on similar facts, the Bombay High Court has consistently repelled challenges made to externment orders on the ground that they extended not only to the district of Greater Bombay but to the district of Thana as well. In Criminal Application No. 1427 of 1968 of a Division Bench (Kotval, C. J., and Kamat, J.) observed in their judgment of March 17, 1968:

"In the present case the area of activity of the externee was undoubtedly stated to be Santacruz, but Santacruz is a fairly wide area. Moreover, it is very intimately connected with the surrounding area of Thana district. It is common knowledge that Thana town in the surrounding area is also an area where large industries have grown contiguous with the industrial area of Greater Bombay and that the entire industrial area is connected together by several means of communication including suburban trains of which there are several during each

day, by taxis plying to and from Greater Bombay and by bus services operating between Greater Bombay and several parts of Thana Distict. Therefore, the Police could reasonably have thought that it would not be sufficient to ask the petitioner to keep off only from the area of Greater Bombay which has an equally busy and highly industrialised area contiguous to it. Therefore, the order was extended to Thana District."

18. In Sanjeev alias Bittoo (supra), referring to the principle of Pandharinath (supra) that it is primarily for the externing authority to decide how best the order can be made effective so as to serve its real purpose, the Hon'ble Apex Court observed in paragraph 14 thus :

"14. As regards the period, it was held that it is primarily for the externing authority to decide how best the order can be made effective, so as to subserve its real purpose. How long within the statutory limit of two years fixed by Section 58, the order shall operate and to what territories within the statutory limitations of Section 58 it should extend are matters which must depend upon its decision on the nature of the data which the authority is able to collect in the externment proceedings.

No general formulation can be made that the order of externment must always be restricted to the area of the illegal activities of the externee. There can be no doubt that the executive order has also to show when questioned that there was application of mind. It is the existence of material and not the sufficiency of material which can be questioned as the satisfaction is primarily subjective somewhat similar to one required to be arrived at by the detaining authority under the preventive detention laws. The scope of judicial review of administrative orders is rather limited. The consideration is limited to the legality of decision- making process and not legality of the order per se. Mere possibility of another view cannot be ground for interference.

19. These principles of law to be followed by the courts in undertaking a judicial review of the action of externment of a person, as we gather, have been moulded by the Hon'ble Supreme Court on the anvil of Wednesbury doctrine. This is seen from its observations in paragraphs 19 and 20, reproduced thus :

"19. Before summarising the substance of the principles laid down therein we shall refer to the passage from the judgment of Lord Greene in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. (KB at p. 229 : ALL ER pp. 682 H-683 A). It reads as follows:

"... It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He

must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers of the authority. ... In another, it taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed (KB p. 230: All ER p. 683 F-G)

"... it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. ... The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."

(emphasis supplied)

Therefore, to arrive at a decision on "reasonableness" the court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the court to substitute its view.

20. The principles of judicial review of administrative action were further summarised in 1985 by Lord Diplock in CCSU case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows: (All ER p. 950h-j)

"Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;"

Lord Diplock explained "irrationality" as follows: (All ER p. 951 a-b)

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person

who had applied his mind to the question to be decided could have arrived at it."

20. The Hon'ble Supreme Court has further emphasized upon the manner in which these principles be put into effect while examining correctness or otherwise of the externment order. We would get the enlightenment in this regard from paragraphs 24 and 25 of the said judgment reproduced thus :

"24. It is true that some material must exist but what is required is not an elaborate decision akin to a judgment. On the contrary the order directing externment should show existence of some material warranting an order of externment. While dealing with the question mere repetition of the provision would not be sufficient. Reference is to be made to some material on record and if that is done, the requirements of law are met. As noted above, it is not the sufficiency of material but the existence of material which is *sine qua non*.

25. As observed in Gazi Saduddin case satisfaction of the authority can be interfered with if the satisfaction recorded is demonstratively perverse based on no evidence, misreading of evidence or which a reasonable man could not form or that the person concerned was not given due opportunity resulting in prejudice. To that extent, objectivity is inbuilt in the subjective satisfaction of the authority.

21. These principles came to be reiterated by the Hon'ble Supreme Court in its subsequent decision in the case of Ved Prakash @ Vedu (*supra*). The observations made in paragraph 21, being relevant, are reproduced thus -

"21. An order of externment must always be restricted to the area of illegal activities of the externnee. The executive order must demonstrate due application of mind on the part of statutory authority. When the validity of an order is questioned, what would be seen is the material on which the satisfaction of the authority is based. The satisfaction of the authority although primarily subjective, should be based on objectivity. But sufficiency of material as such may not be gone into by the writ court unless it is found that in passing the impugned order the authority has failed to take into consideration the relevant facts or had based its decision on irrelevant factors not germane therefor. Mere possibility of another view may not be a ground for interference. It is not a case where malice was alleged against the third appellant.

22. The opening line of the above-referred paragraph, of course, prescribes that an order of externment must always be restricted to the area of illegal activities of the externnee. The observation has to be understood in the light of the observations made in other paragraphs of the judgment and the principles of law that this case reaffirms. Referring to various cases previously decided by the Hon'ble Supreme Court, in particular, the case of Pandharinath (*supra*), Gazi Saduddin v. State of Maharashtra reported in 2003 SCC (Cri) 1637 and Sanjeev @ Bittoo (*supra*), the Hon'ble Supreme Court held that primarily the satisfaction has to be of the authority passing the order and it should be based on the material on record and that interference with the order can be made only if it is

either demonstratively perverse based on no evidence or passed as a result of misreading of the evidence or is illogical or has been arrived at without giving due opportunity of hearing, resulting in causing of prejudice to the person against whom the order is passed. The Hon'ble Supreme Court, as we have seen from the observations made in paragraph 21, has emphatically stated that sufficiency of material as such may not be gone into by the writ court unless it is found that while passing the order, the authority has failed to take into consideration the relevant facts or considered irrelevant facts and made it clear that mere possibility of another view can never be a reason for making interference though malice could be one such reason.

23. The cases of Pandharinath and Sanjeev @ Bittoo (supra) have also shown to us that an externment order can be made not only for the actual area of the illegal activities of the externnee, but also for a much larger area, depending upon the facts and circumstances of the case. These cases, in particular, the case of Pandharinath give a reasonable hint that there could be some facts present on record of which judicial notice can be taken, as for example, a surrounding area being contiguous and so intimately connected with the actual area of operation of the externnee that it is impossible to effectively remove the externnee from the area in which he carries on his illegal activities, thereby giving birth to a need for passing of a spacious order so as to include much more area than ordinarily would have been. There could be, however, some other cases wherein the facts and circumstances present on record may not be of such a nature as to enable the authority to draw an inference or form an opinion regarding the contiguity of areas or inter-connection between them necessitating externment from a bigger area and it is in such cases that it would be necessary that some more material is present on record to enable the authority to reach a subjective satisfaction justifying a more generous order. But, even in such cases, as has been consistently held in the cases of Pandharinath and Sanjeev @ Bittoo and even Gazi Saduddin (supra) that it is only the existence of the material and not its sufficiency which could be gone into for testing the externment order for its validity or otherwise. In Sanjeev @ Britto, the Hon'ble Supreme Court also held that the externment order should show existence of some material justifying the order. But, such reflection in the order, it is further clarified, need not be akin to that of a reasoned order and it is enough that reference is made to some material on record and if that is done, the requirements of law are met. These principles of law are further explained by the Hon'ble Apex Court by noting that it is a matter of legitimate inference that the authority while considering the material to adjudicate upon the question of need for externment, also considered the options available to it and adopted one of them and that there could not be any "hair-splitting in such matters". These observations appearing in paragraph 26 of the judgment in Sanjeev @ Bitto are reproduced thus -

"26. The material justifying externment can also throw light on options to be exercised. If referring to the materials, the authority directing externment also indicates the option it thinks to be proper and appropriate, it cannot be said to

be vitiated even though there is no specific reference to the other options. It is a matter of legitimate inference that when considering materials to adjudicate on the question of desirability for externment, options are also considered and one of the three options can be adopted. There cannot be any hair-splitting in such matters. A little play in the joints is certainly permissible while dealing with such matters."

24. A combined reading of the principles of law laid down in all the aforesaid cases would show that ordinarily the externment order be restricted to the area of illegal activity of externnee. In a given case, the order can be capacious which would include more area than the actual field of the illegal activities of the externnee so as to shake the externnee off his roots and this may be so necessary in a particular case for achieving the object of externment order. While making such an expansive order, sufficient leeway has been granted to the officer and it includes the power conferred under amended provision of Section 56 of the Act, 1951 to remove a person from a much bigger area than the area of his actual activity and such a larger area may not necessarily be contiguous to the area of illegal activities or may not be falling within the local limits of the jurisdiction of the officer. But, this discretion is always subject to the limits drawn by the *Wednesbury* triad of unreasonableness, already elaborated upon in the previous paragraphs.

25. Thus, we can now reasonably say that although the officer is having the discretion to extern a person from a much larger area, the discretion is neither unfettered nor uncanalized nor unrestricted. The discretion is rather guided by the sound principles of judicial review of administrative action or statutory discretion which have now been called the *Wednesbury* principle of unreasonableness. That would mean that an externment order must be based upon some material, that it must refer to some material on record, and if that is done, the requirements of law are met and the judicial review would go no further to examine sufficiency or otherwise of such material. In a given case, it may also happen that the externment order does not refer to some material on record. Still, the externment order could be seen as unassailable. Such possibility would arise when the situation of surrounding areas is such as to give rise to an impression upon taking of judicial notice of the situation that these areas are contiguous or adjacent to each other or inter-connected with each other through the improved means of transport and communication warranting externment of a person from a larger area in order to sweep the person off his moorings, just to make the order of externment effective and practicable, as held in *Pandharinath* (supra). But, some time the facts and circumstances may not be so self-speaking and in such a case, no judicial notice could possibly be taken. It is in such a case, there would be need for the externment order to refer to some material on record, though not eloquently, and if that is done, the externment order would clear the validity test of *Wednesbury* doctrine. Once such reference to some material on record is seen, the judicial review has to stop as no further enquiry into sufficiency or otherwise of the material to pass a spacious externment order

is permissible. This is on account of the cardinal principle of judicial review that when exercise of discretion is questioned as being arbitrary, a secondary reviewing Court, a High Court examining the challenge on the ground of arbitrariness of administrative action or statutory discretion would be a secondary court of review unlike in a situation where it considers the challenge based on grounds of inequality and discrimination when it turns into a primary court of review, cannot substitute its own view for the view taken by the authority whose decision is under review just because another view is possible, unless the view of the authority subject to review is shown to be illegal or perverse or illogical or impossible, or procedurally improper. These are all nothing but part of Wednesbury principle of unreasonableness.

26. The discussion made so far would lead us to record our conclusions as follows :

(i) The externment order directing externment of a person from a much larger area than the one of his illegal activities, must be based upon some material which provides an objective criteria to the authority for reaching a subjective satisfaction regarding the need for externing a person to an expansive area though it may not always directly or elaborately refer to that material in the order itself, as it all depends upon facts and circumstances of the case which need be vetted through the judicial process of drawing of legitimate inference following the law of *Pandharinath and Sanjeev @ Brittoo* (supra).

(ii) The order of externment need not necessarily refer to the details of the material considered by it so as to show independently that larger or additional area chosen by it is intimately connected with the actual area of the activities of the externee due to improved or common means of transport and communication.

(iii) Application of mind to the material present on record by the authority passing the externment order is necessary, but any reflection of application of mind in the externment order in a specific manner, as if to pass a reasoned order, would not be necessary. It would be enough if the order discloses that the subjective satisfaction has been reached by considering the material available on record and it would and should be a matter of legitimate inference that the authority, while considering materials to satisfy itself about the need for and extent of externment to be ordered, also considered all the options available to it and selected in its wisdom the one which it thought to be most appropriate. This would also mean that authority, in this way, can select a larger area for being covered under its externment order, as one of the options available to it, whether such larger area has within it contiguous or inter-connected or intimately connected pockets of areas or not. Question no. (1) having three aspects enumerated in clauses (a), (b) and (c), is answered specifically through the three conclusions made as above.

27. Having answered question no. (1) in the above terms, we find that the view taken by the Division Bench of this Court in the case of *Pappu @ Akhilesh*

Shivshankar Mishra v. The State of Maharashtra & anr reported in 2017 ALL MR (Cri) 1 in terms that facts and factors looked into by the authority for reaching the subjective satisfaction as envisaged under Section 56 (1) of the Act, 1951 must be capable of supporting the need for an order of externment to be made beyond the area of jurisdiction of such authority and that the need for the same must be evaluated by that authority and that this must be done through the process of application of mind to the material present on record which application of mind must surface in the main order, cannot be said to be completely laying down a correct position of law. We have already made the conclusions in this regard and accordingly answered the first question referred to us. We, therefore, hold that to the extent the view taken in Pappu Mishra (supra) is inconsistent with the conclusions made by us, is not a good law and to that extent, it is overruled.

28. Now, we would take up the second question for its resolution. Upon consideration of the provision of Section 59 of the Act, 1951 and the law settled over a period of time by the Hon'ble Supreme Court on the subject, we do not think that answer to the question is very difficult to come by. The provision of law as well as its clarification given in different judgments of the Hon'ble Supreme Court do not leave any doubt about the answer that must be given to the question. But, as the answer we must give, we begin the effort with relevant portion of Section 59 as contained in sub-section (1) reproduced here and it reads thus:

"59. Hearing to be given before order under sections 55, [56m 57 or 57A] is passed

(1) Before an order under section 55 [56, 57 or 57A] 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 witness produced by him." (emphasis supplied).

29. A plain reading of the above-referred provision of law would indicate that what is required to be informed in writing is only the general nature of the material allegations in order to give the person proposed to be externed a reasonable opportunity of tendering an explanation regarding the allegations. When it is said that the material allegations against the person be communicated to him generally or in a manner as to give an idea of the general nature of

material allegations, it necessarily means that the material allegations with all their details regarding the date, place and specific facts of the incident must not be disclosed and only as much indication of these allegations be made in general terms as is sufficient to give notice to the proposed examinee about what he has to face and explain in the enquiry. Such information must contain in general terms the main allegations made against the proposed examinee and not all the details of the allegations. Such requirement of the notice to be given under Section 59 (1) of the Act, 1951 applies when the examination proceedings are initiated either under Section 55 or Section 56 or Section 57 or Section 57A of the Act, 1951. In all these proceedings, the notice to be issued under Section 59 should contain as much of material allegations stated in general terms as would be necessary for constituting a sufficient notice contemplated under Section 59 of the Act, 1951.

30. It has been argued on behalf of the petitioners that the effective opportunity of hearing is the basic groove of the principle of rule of law on which the stylus of our Constitutional philosophy plays the hymn of justice and, therefore, if the notice served upon the proposed examinee under Section 59 is so vague and devoid of essential particulars as to leave the proposed examinee confused and confounded regarding the explanation that he should give, the notice would be arbitrary and the whole action taken following the notice, would be arbitrary. It is submitted that such notice denying the proposed examinee of his right of reasonable hearing would be no notice in the eye of law. This has been disagreed to by Shri M. K. Pathan, learned Additional Public Prosecutor appearing for the State contending that nature and reasonableness of the limited notice required to be given under Section 59 has already been considered by the Hon'ble Apex Court in its cases discussed earlier and has been explained by it and, therefore the argument deserves outright rejection.

31. Although there can be no doubt about the essentiality of adequacy of show-cause notice as a part of principle of effective hearing to be given to an affected person, the rule, we must say, assumes different forms and shapes exhibiting different contours and limits, in its application to myriads of fact situations as well as legal settings. The concept of sufficiency of notice for its comprehension does not depend only on the form of notice but also, rather more, on the nature of discretion or power conferred upon the authority, the object underlying the discretion or the power, the limits prescribed thereon by the legislature and the attending facts and circumstances of the case. It is the law settled by Hon'ble Supreme Court in its various judgments which now has given us the benefit of having with us a clear exposition of the idea of sufficient notice contemplated in Section 59 of the Act, 1951, which indicates that the discretion and duty of the authority are both guided by law, an attribute fundamental to system directed by rule of law.

32. It would be useful for us here to refer to what Hon'ble Apex Court said in the case of S. G. Jaisinghani v. Union of India reported in 1967 AIR (SC) 1427,

decided by the Constitution Bench. It emphasized that in a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. It is further held that the rule of law from this point of view means, the decisions should be made by the application of known principles and rules and in general, such decisions should be predictable and the citizen should know where he is. The Hon'ble Apex Court quoted with approval Lord Mansfield's classic analysis of the principle of rule of law in the case of John Wilkes (1770) 4 Burr 2528 at p. 2539 thus - "means sound discretion guided by law. It must be governed by rule not by humour, it must not be arbitrary, vague and fanciful".

33. As stated earlier, the body of principles governing the nature of notice that must be given under Section 59 is already developed and this area no longer remains a field either overrun by doubts or freed of fetters and shackles.

34. In *Gurbachan Singh v. State of Bombay & anr* reported in AIR 1952, SC 221, another Constitution Bench of the Hon'ble Apex Court repelling the challenge to the validity of the procedure prescribed for externing a person under Section 27 (1) of the Bombay Police Act (4 of 1902), which was in substance no different from Section 56 of the Act, 1951, the Hon'ble Apex Court found that the law was extraordinary in its nature and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the society or the public residing therein. With such purpose of the Bombay Police Act, 1902, the Hon'ble Apex Court found that if the proposed externee is to be given a right to confront or cross-examine the witnesses, the object of the Act would be wholly defeated.

Upon such reasoning, the Hon'ble Apex Court upheld that the validity of Section 27 of the Bombay Police Act. The relevant observations of the Hon'ble Apex Court appearing in paragraph 7 are reproduced for the sake of ready reference as under:

"7.....As regards the procedure to be followed in such cases. S. 27(4) of the Act lays down that before an order of externment is passed against any person; the Commissioner of Police or any officer authorized by him shall inform such person, in writing, of the general nature of the material allegations against him and give him a reasonable opportunity of explaining these allegations. He is permitted to appear through an Advocate, or an Attorney and can file a written statement and examine witnesses for the purpose of clearing his character. The only point which Mr. Umrigar attempts to make in regard to the reasonableness of this procedure is that the suspected person is not allowed to cross-examine the witnesses who deposed against him and on whose evidence the proceedings were started. In our opinion, this by itself would not make the procedure unreasonable having regard to the avowed intention of the legislature in making the enactment. The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or

property are willing to depose publicly against certain bad characters whose presence in certain areas constitute a menace to the safety of the public residing therein. This object would be wholly defeated if a right to confront or cross-examine these witnesses was given to the suspect. The power to initiate proceedings under the Act has been vested in a very high and responsible officer and he is expected to act with caution and impartiality while discharging his duties under the Act. This contention of Mr. Umrigar must, therefore, fail."

35. The above-referred observations, we think, provide clear insight into the concept of notice that may be given under Section 59. It should effectively perform a balancing act. In other words, it must be of such nature as would be a sufficient compliance with rule of adequate prior hearing on the one hand and would not disclose the identity of the witnesses so as to expose the witnesses to some danger or harm to them or their property thereby defeating the very object of the proposed action, on the other.

36. In subsequent case of Pandharinath (*supra*), the Hon'ble Supreme Court specifically dealt with the question about the nature of notice required to be given under Section 59 (1) of the Act, 1951. The Hon'ble Supreme Court held that such notice need not give any full and complete disclosures of particulars in a way as would be required in the open prosecution. It further held that if the show-cause notice were to furnish to the proposed externee concrete data like specific dates of incidents or the names of persons involved in those incidents, it would be easy enough to fix the identity of those who out of fear of injury to their person or property are unwilling to depose in public. If such details are to be given, Hon'ble Supreme Court further observed, it would defeat the very purpose of an externment proceeding. The observations, which are relevant for the present purpose, are found in paragraph 9 and it would be useful for us to refer to them. They are reproduced thus :

"9. These provisions show that the reasons which necessitate or justify the passing of an externment order arise out of extraordinary circumstances. An order of externment can be passed under clause (a) or (b) of Section 56, and only if, the authority concerned is satisfied that witnesses are unwilling to come forward to give evidence in public against the proposed externee by reason of apprehension on their part as regards the safety of their person or property. A full and complete disclosure of particulars such as is requisite in an open prosecution will frustrate the very purpose of an externment proceeding. If the show-cause notice were to furnish to the proposed externee concrete date like specific dates of incidents or the names of persons involved in those incidents, it would be easy enough to fix the identity of those who out of fear of injury to their person or property are unwilling to depose in public. There is a brand of lawless element in society which it is impossible to bring to book by established methods of judicial trial because in such trials there can be no conviction without legal evidence. And legal evidence is impossible to obtain, because out of fear of reprisals witnesses are unwilling to depose in public. That explains why Section

59 of the Act imposes but a limited obligation on the authorities to inform the proposed examinee "of the general nature of the material allegations against him". That obligation fixes the limits of the co-relative right of the proposed examinee. He is entitled, before an order of externment is passed under Section 56, to know the material allegations against him and the general nature of those allegations. He is not entitled to be informed of the particulars relating to the material allegations."

37. Now, some doubt may arise about the distinguishing line between "a statement of general nature of material allegations" and "a statement giving all the details of material allegations.". The Hon'ble Apex Court in the case of Pandharinath (supra) has removed the doubt by referring to the illustrations given in its earlier judgment in the case of State of Gujarat & anr etc. v. Mehboob Khan Usman Khan etc. reported in AIR 1958 SC 1468. The relevant paragraphs read thus :

"12. In State of Gujarat and Another, etc. v. Mehboob Khan Usman Khan etc. (supra), this court, reversing the judgment of the High Court of Gujarat, rejected the argument that a notice substantially similar to the one in the instant case was bad for vagueness. It was held that the person proposed to be externed was entitled to be informed of the general nature of the material allegations and not to the particulars of those allegations. As to the meaning of the phrase "general nature of the material allegations", it was observed :

"Without attempting to be exhaustive we may state that when a person is started to be a 'thief' that allegation is vague. Again, when it is said that 'A' stole a watch from X on a particular day and at a particular place', the allegation can be said to be particular. Again, when it is started that 'X is seen at crowded bus stands and he picks pockets' it is of a general nature of a material allegation. Under the last illustration, given above, will come the allegations, which, according to the Gujarat High Court, suffer from being too general, or vague. Considering it from the point of view of the party against whom an order of externment is proposed to be passed, it must be emphasised that when he has to tender an explanation to a notice, under Section 59, he can only give an explanation, which can be of a general nature. It may be open to him to take a defence, of the action being taken, due to mala fides, malice or mistaken identity, or he may be able to tender proof of his general good conduct, or alibi, during the period covered by the notice and the like."

"13. We must therefore reject the argument that the particulars contained in the notice are vague. We endorse the view of the High Court that Criminal Application No. 332 of 1971 in which judgment was delivered on April 29, 1971, by another Division Bench of that court was not correctly decided, to the extent to which the notice therein was held to be vague. The view taken in that case is inconsistent with the view expressed by this court in Mehboob Khan's case (supra)."

38. The illustrations appearing in the above-referred observations, in our view, should serve sufficient guidance for all about the manner in which the show-cause notice must be given by the externing authority and as to how it be scrutinised by the court in its exercise of power of judicial review of administrative action or statutory discretion. That would clear up our mind as to how much show-cause notice speak and what it must avoid speaking on. The only duty cast upon the externing authority is to inform the proposed externee of the general nature of material allegations against him and the sphere of corresponding right of the proposed externee to know, we must say, is limited by the object of externment proceedings. The object is to bring certain kind of bad elements to book who, by their criminal activities, make it impossible or difficult for the criminal justice system to deal with sternly. In their cases, legal evidence hardly comes forth because witnesses are hesitant to depose in public out of fear to their person or property. This is the reason why the corresponding right of the proposed externee has been reduced to the minimum possible in law, and that is what lends sufficiency to show-cause notice under Section 59(1) of the Act, 1951.

39. On going through the referral order of the Division Bench, we find that these principles of law have already been considered in extenso and have also been summarised in paragraph 39 of the order. Items no. (2) and (4) of the summary are relevant for the purpose of second question. In item no. (2), the Division Bench has stated that the law of externment being an extraordinary one and having been made to meet only the exceptional cases where for the fear of violence to their person or property, the witnesses are unwilling to depose publically against certain bad characters, such restraints have to be suffered in larger interest of society. In item no. (4), the order states that the externee is only entitled to be informed of the general nature of the material allegations and neither the externing authority nor the State Government in appeal could be asked to write a reasoned order and if anyone is to insist upon presence of specific or particular allegations in the show-cause notice or existence of a reasoned order akin to a judgment, it would only result in fixing the identity of the witnesses who are otherwise unwilling to come out in public and testify against such bad elements. We cannot but agree completely with the summary of principles concisely made in the referral order.

40. There have been, however, instances wherein some decisions rendered by the different Division Benches of this Court have made a departure from the above-referred principles. These cases are of Mr Pradeep Somnath Gupta v. The State of Maharashtra & ors reported in 2014 ALL MR (Cri) 4845; Ravi s/o Raju Bhalerao v. The State of Mahartashtra reported in 2017 ALL MR (Cri) 4646; Sayyed Jafar Sayyad Nasir v. The Divisional Commissioner, Amravati reported in 2017 ALL MR (Cri) 430 and Sanjay s/o Balasaheb Ruptakke v. The State of Maharashtra & ors reported in 2017 ALL MR (Cri) 3983.

41. In Pradeep (supra) to which one of us (S. B. Shukre, J) was party, it has been held that the show-cause notice which does not make any mention of the

incident and the place of incident and which does not give the material details by summarising confidential statements of the witnesses violates the principles of natural justice. The view is clearly against the principles crystalised by the Hon'ble Apex Court and which have been stated in the earlier paragraphs and, therefore, this view is overruled.

42. In *Ravi, Sayyad and Sanjay* (supra), it has been held that as the show-cause notice as well as the impugned judgments do not make any reference regarding recording of in-camera statements of witnesses, the impugned orders passed by the externing authority and also the orders passed by the appellate authority cannot be held to be legally sustainable. This view, with due respect we would say, does not lay down the correct exposition of law. The principles of law settled by the Hon'ble Apex Court and discussed earlier and also the provisions of Section 59 (1) would all show that what is required to be stated in the show-cause notice is only the general nature of the material allegations and nothing more. They do not show that the show-cause notice must refer to the fact of recording of in-camera statements of the persons, rather, they indicate that it would be a sufficient compliance with the requirement of law if the show-cause notice states in general terms the material allegations made against the proposed examinee. If the show-cause notice makes a disclosure in general terms of the material allegations and does not specifically mention the fact of recording of in-camera statements, we must say, it is an enough compliance with the requirement of law. Thus, the view expressed in *Ravi, Sayyad Jafar and Sanjay* (supra) and reproduced earlier is overruled.

43. In a given case, however, it may be added that at the most, in order to satisfy itself as to whether or not the general statements of material allegations made in the notice are based upon some material or not, the High Court may insist upon production of the record including the statements of witnesses recorded in-camera. In such an eventuality, the High Court would examine the record and make its conclusion about existence or otherwise of the material on record and stop the inquiry. Reason being that there is a bar upon power of the High Court to also consider sufficiency or otherwise of the material on record which is behind the action of issuance of show-cause notice. This bar is of the *Wednesbury* principle of unreasonableness expatiated in *Om Kumar* (supra), *Tata Cellular v. Union of India* reported in AIR SCW 3344, *Sanjeev @ Bittoo* (supra) and many more such decisions of the Hon'ble Apex Court.

44. *Shri Vyas*, learned counsel for one of the petitioners has also referred to us the case of *Rupinder Singh Sodhi & anr v. Union of India & ors* reported in AIR 1983 SC 65 wherein the Hon'ble Supreme Court has struck a word of caution in matters where restraints on personal liberty are placed, observing that all such restraints, if at all they be, have to be commensurate with the object which furnishes their justification and that such restraints must be minimal constraints of a particular situation, either in nature or duration. These principles of law have also been reflected, one way or the other, in the already discussed landmark

cases of the Hon'ble Supreme Court on the issues involved here and as we see, they have gone into shaping the law on the subject, illumining our minds in the process, leaving neither any dark pockets nor any confusion nor any state of perplexity.

45. Having comprehended clearly the issues central to second question of reference, it is time for us to formalize the answer to it and it is as follows :

It is not necessary to state in the show-cause notice the details or the particulars of in-camera statements recorded by the externing authority and only the general nature of material allegations is all that is necessary to be said in the show-cause notice. In other words, it is sufficient compliance with the requirement of law if the show cause notice refers in general terms to the material allegations against the proposed externee and when the action is under Section 56 (1) (b) of the Act, 1951 it also generally says that the witnesses are not coming forward to give evidence in public against the proposed externee due to fear, alarm, danger or harm to the person or property, as the case may be.

46. The Reference is answered in the above terms.