

(1951) 03 BOM CK 0001

In the Bombay High Court

Case No : Criminal Application No. 99 of 1951

Hasanalli Mohomedhussein Shariffi

APPELLANT

Vs

State of Bombay

RESPONDENT

Date of Decision : 13-03-1951

Acts Referred:

City of Bombay Police Act, 1902 — Section 27(1), 27(7)
Constitution of India, 1950 — Article 13, 19, 19(1), 226

Citation : AIR 1951 Bom 432 : (1951) 53 BOMLR 681

Hon'ble Judges : Chainani, J;Bavdekar, J

Bench : Division Bench

Advocate : A.A. Peerbhoy and M.P. Amin, for the Appellant; H.M. Choksi, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Bavdekar, J.—This is an application under Article 226 of the Constitution in regard to a person for whose externment an order has been made by the Commissioner of Police of the City of Bombay under the provisions of Section 27 (1) of the City of Bombay Police Act, 1902. The order is challenged on various grounds but the only one which it is necessary to state for the purpose of the present application is that Section 27 (1) of the City of Bombay Police Act, 1902, makes it incumbent upon the Police Commissioner, when the externnee is not called upon to remove himself outside the Province, to call upon him to go to such a place within the Province and by such route as the Commissioner of Police shall prescribe. It is said that in this case the order, which has been passed, does not call upon the externnee to remove himself to a particular place nor was called upon to go to that place by a particular route.

2. Now, it is not in dispute that the order does not call upon the applicant to go to a particular place inside the Province nor does it call upon him to go to that place by any particular route. But the learned Government Pleader, who appears for the State, explains that the practice, which is followed, when it is proposed to

extern any one outside Greater Bombay is to leave it to the externee to go to any place he likes outside Greater Bombay and to choose the route which he would like to take. It has to be remembered that if an order u/s 27 (1) is passed, it is not incumbent upon the externee to wait. He may, immediately he is informed that an order has been passed, remove himself outside Greater Bombay and unless the order directs him to go to any particular place, at any rate, he can go anywhere he likes outside Greater Bombay and by such route as he likes. It is in case he fails to remove himself as directed then u/s 27 (3) the Commissioner of Police may cause him to be arrested and removed in police custody to such place outside Greater Bombay as he may in each case prescribe. The learned Government Pleader says that usually it is left to the discretion of the externee to go to the place he likes outside Greater Bombay because as he says if he fails to go to any particular place even if the place were to be named in the order of the Commissioner action cannot be taken against the externee. That is a point upon which we shall express no opinion and we have no doubt that in many cases the order does not tell the externee where he should go and by what route as the Commissioner of Police is not concerned where he goes or what route he takes so long as he leaves Greater Bombay. We do not say as a matter of fact, that the Commissioner of Police should depart from the present practice of leaving it to the externee where he should go if he is to be externed. But the question before us is not whether the Commissioner of Police should not leave it to the externee to go where he likes. He can do that and after ascertaining from him the place and the route mention them in his order. The question before us is whether an order which he passes u/s 27 (1) should not mention, when the Commissioner of Police does not call upon the externee to go outside the Province, as to where he should go and by what route. If we look at the section itself, it is obvious that the order should mention that. It is not contended on behalf of the State before us that the order is a perfectly regular order. It is contended, however, that the mistake is merely an irregularity and does not render the order illegal.

3. The learned Government Pleader says in the first instance that the mistake is not a mistake of procedure which could be called in question under the provisions of Section 27 (7). In the second instance, if it is not a mistake of procedure, but if the order is illegal on the ground that the Police Commissioner did not do what the section calls upon him to do, namely, to specify the place and the route, then the order cannot be called in question because of the provisions of Section 27 (7) of the Act.

4. Now Section 27 (7) says that an order passed by the Commissioner of Police under Sub-section (1) or (2) . . . shall not be called in question in any Court except on the ground that the Commissioner of Police, or the officer authorised by him under Sub-section (4), had not followed the procedure laid down in the said sub-section or that there was no material before the Commissioner of Police upon which he could have based his order or on the ground that the Commissioner of Police was not of opinion that witnesses were unwilling to come

forward to give evidence in public against the person in respect of whom an order was made under Sub-section (1). The sub-section obviously prevents the validity of an order passed under Sub-section (1) to be called in question except on the specific grounds mentioned in Sub-section (7). The ground, upon which the order is challenged, namely, that it does not specify the place to which the externee is to go and the route by which he is to go, is not one of the grounds upon which the order could be challenged in accordance with the terms of Sub-section (7). In such cases sometimes a question does arise as to the meaning of the words "an order passed by the Commissioner of Police under Sub-section (1)." When there was a similar provision in the Defence of India Rules, in the case of *Emperor v. Sibnath Banerji* 48 Bom. L. R. 1 their Lordships of the Privy Council pointed out that an order made in exercise of the power conferred by or under the Act could be called in question notwithstanding the provisions of Section 16, Sub-section (1), if the order was not made in conformity with the power conferred. But there is an obvious difference between the language of Section 16 (1) of the Defence of India Act and the language which has been used by Section 27 (7) of the City of Bombay Police-Act, 1902. The former referred to an order made in exercise of the power conferred by or under the Act. Before it could be said, therefore, that the order could not be called in question in any Court, it has got to be shown that the order was made in exercise of the power conferred by or under the Act and was not in excess of the power. The question really therefore was of power or jurisdiction. There being no such words in Section 27 (7) of the Act, the question is what is the interpretation to be placed upon the words "an order passed by the Commissioner of Police under Sub-section (1) or (2) or (2A)." In the first instance it is obvious that if the order is in excess of the power possessed by the Commissioner of Police u/s 27 (1), then it could not possibly be said that the order was an order passed by the Commissioner of Police under Sub-section (1). Assuming, however, that the order was within jurisdiction, two possible interpretations are to be thought of. One is that the order must be strictly in accordance with the provisions of the sub-section. It is obvious that if we were to accept this interpretation, then Sub-section (7) is rendered nugatory. The section must be given a meaning which will leave it some scope and it is obvious that in order to give some purpose to the section, it is necessary to interpret the words, "An order passed by the Commissioner of Police u/s 27 (1)" to mean an order necessarily within his powers, but if it is within his powers then even an order which purported to be made under the powers conferred by that sub-section. This will be quite clear from the fact that the order is allowed to be challenged subsequently on some of the grounds upon which it could be said that the order was not passed in conformity with Section 27 (1) but not on others. Take for example an order made by the Commissioner of Police when he is not of the opinion that witnesses are not willing to come forward to give evidence as mentioned in that section. As one of the conditions precedent for the Commissioner to follow the procedure as mentioned in the section is that he should be of the opinion that witnesses are willing to come forward to give evidence in public against the proposed externee

an order passed when he is not of that opinion is an order not in conformity with the section. Similarly, where there has been failure to observe the procedure mentioned in Sub-section (1) it cannot be said that the order is passed without jurisdiction and the words "An order passed by the Commissioner of Police under Sections 1, 2, or 2A" must be interpreted to mean an order purporting to be passed under these sub-sections provided however it is within his powers.

5. But even though the words of Section 27 (7) prevent the order of the Commissioner of Police from being challenged except on the grounds mentioned in that sub-section and even though the ground which is relied upon on behalf of the applicant is not one of those grounds, in our view, Section 27 (7) is void after the Constitution of the Republic to the extent mentioned below. Under Article 13, all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III shall, to the extent of such inconsistency, be void. Then under Article 19, Sub-article (1), Clause (d) and (e), all citizens shall have the right to move freely throughout the territory of India and to reside and settle in any part of the territory of India, provided that nothing in these Sub-clauses (d) and (e) will, under the provisions of Article 19(5), affect the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any scheduled tribe. That Sub-section (1) of Section 27 of the City of Bombay Police Act, 1902, abridges the freedom guaranteed to every citizen under Article 19, Sub-article (1), Clauses (d), and (e) is obvious and the only question therefore is as to whether that section is saved by Article 19(5). But this sub-article is interpreted by this Court in *Emperor v. Jeshingbhai Ishwarlal* 52 Bom. L R. 544 and the view which the majority of the Full Bench took was that under Article 19 Sub-article (5), it is open to the Court to declare not only any piece of legislation is void of the Constitution after its commencement which imposes restrictions which are per se reasonable but also whether any legislation which imposes any restrictions upon the fundamental rights guaranteed under Article 19(1), Sub-clause (d) and (e), is a reasonable piece of Legislation. That is obviously implied in the view that the Bombay Public Security Measures Act which permitted the externment of a person without hearing him was void under Article 13 after the commencement of the Constitution. Now, if we examine the provisions of Section 27 (1) in the light of this decision, it is obvious that there is nothing whatsoever in that subsection which can be declared to be void of the Constitution after its commencement. The sub-section leaves it to the Police Commissioner to decide whether a particular person should or should not be externed. The Supreme Court has however, now decided that the mere fact that it is left to an executive officer whether to take action of the nature of detention is not an adequate ground for holding that the restriction is unreasonable. But when we refer to Section 27 (7) what we find is that not content with leaving it to the executive officer namely, the Commissioner of Police, to decide whether an order of externment should be

made the sub-section goes further and prevents the impugment of the orders of externment made even when it does not appear to the Commissioner of Police as required by Section 27 (1), Clause (a), first part. We fail to understand why after leaving to an executive officer to decide upon the determination of certain objective facts whether an order for externment should be made or not, it should have been felt necessary that it should not be challenged that the executive officer was not really of the view that an order for externment should be made but was acting capriciously, oppressively or mala fide. Then again, assuming for example that the Commissioner of Police passed an order calling upon a person to remove himself to a place within the province and by a particular route and within a particular time and asking him not to enter not only the City of Bombay but the adjoining district of Thana, a literal interpretation of Section 27 (7) will prevent the calling into question of such an order. It may be of course that in both the cases mentioned above it could be said that such orders can be called in question not on the ground that the order was not passed in conformity with Section 27 (1) but on other grounds. In the first case upon the ground that the order was without jurisdiction when it did not appear to the Commissioner as mentioned in Section 27 (1), Clause (a), first part. In the second case on the ground that the powers of the Commissioner of Police were limited to calling upon the person against whom an order u/s 27 (1) is made not to enter only Greater Bombay when the order was not an order of externment from the Province. But in any case Section 27 (7) would not allow an order to be challenged on the ground relied upon in the present case, i.e. it does not call upon the detenu to go to a particular place and by a particular route. I fail to understand why after the question of the externment of a person was left to the discretion of an executive officer, it was further found necessary to abridge the liberty of a subject by directing that even the executive officer was not acting strictly in accordance with Section 27, the order could not be challenged.

6. This sub-section was not in the City of Bombay Police Act at the time when the Act was enacted and it would not be out of place to refer to the history of the Act by which Section 27 (7) was added to the City of Bombay Police Act. Section 27 as it stood originally came up before this Court for an interpretation in *Emperor v. Yarmahomed Ahmedkhan* 40 Bom. L. R. 483 Sir John Beaumont, who delivered the judgment of the Full Bench in that case, observed (p. 493) :

" . . . it is a well established principle that where an Act of Parliament confers upon an authority power to make an order in certain conditions, and it is sought to impose a penalty for breach of an order made by the authority, it is incumbent upon the Court hearing the charge to consider whether the order was properly made and to be satisfied on two points : first, that the authority has acted reasonably and not capriciously or oppressively; and, secondly, that the conditions imposed by the statute have been observed."

He had held clearly that when a charge was made (p. 493) :

" . . . Under Section 128, City of Bombay Police Act, it is . . . incumbent upon the

Magistrate to be satisfied, first, that the accused was informed by the Commissioner of ? the charge against him with sufficient particularity to enable him to answer the charge, and that he was given an opportunity of so answering; and, secondly, that there was material before the Commissioner of Police on which he could properly hold that the conditions of Section 27 had come into operation."

Section 27, City of Bombay Police Act, as well as the corresponding provisions of the Bombay District Police Act were consequently amended by addition of clauses preventing an order which was passed under the provisions of these two enactments being called in question in Court except on certain specified grounds. This history of the legislation shows therefore quite clearly as to what the intention was in enacting Section 27 (7). That was to prevent the Court from inquiring into the question as to whether the order was not passed capriciously or oppressively. At the time when this legislation was passed, there were no limitations upon the powers of the Legislature when acting in the field allotted to it by the Government of India Act, 1935, to pass any legislation restricting for example the freedom of movement. But after the present Constitution came into force, there is a limit placed upon the right of the Legislature to enact laws abridging certain freedoms which are guaranteed to the subjects. And even when a legislation is passed by a Legislature constituted under the Government of India Act, 1935, before coming into force of the Constitution the Constitution has declared the laws void to the extent that they are inconsistent with the provisions of the part of the Constitution relating to the fundamental rights. In my view, therefore, the sub-section could not have been passed by the Provincial Legislature after the coming into force of the Constitution because it was not reasonable after leaving to an executive officer the decision whether a person should be externed to provide further that the order could not be called in question on the ground that it was not in conflict with the provisions of S. 27 except when the case fell within the categories referred to in Section 27 (7) and to the extent that it could not be passed it is rendered void under Article 13, Sub-cl. (1), of the Constitution.

7. There is another provision of the Constitution to which a reference can usefully be made in connection with the question as to whether Section 27 (7) is ultra vires. That is Article 226 of the Constitution. That article gives this Court a right to issue writs, and orders for the enforcement of the fundamental rights conferred by Part. III. If Section 27 (7) is construed to mean that this Court is not entitled to go into the question as to whether the order is legal in accordance with the provisions of Section 27 (1), then it is obvious that there is a conflict between Section 27 (7) of the City of Bombay Police Act and Article 226 of the Constitution. The learned Government Pleader who appears for the State says that as a matter of fact there is really no conflict. He says that Article 226 deals with entirely a different question. That is a question as to whether there has been an encroachment upon the fundamental right which is conferred upon all citizens by Part. III of the Constitution. He says that, on the other hand, Section

27 (7) does not deal with any such question. That deals with the questions upon which alone an order passed can be called in question in any Court. He says that grounds upon which an order passed by the Commissioner of Police can be called in question in any Court are really speaking a matter for consideration only when the Court starts to exercise its powers under Article 226. He contends, therefore, that there is no conflict between Article 228 & Section 27 (7). But I fail to understand how that can possibly be. If Section 27 (7) is interpreted strictly, then inasmuch as this Court will come within the meaning of the words "any Court" in Section 27 (7) it cannot go into any question of the validity of the order of the Commissioner of Police except upon the grounds mentioned in Section 27 (7). To that extent obviously there would be a conflict between Article 226 and Section 27 (7).

8. Now, whenever, there is an application made to a Court under Article 226 complaining that a citizen's freedom guaranteed to him by the Constitution is taken away, two questions are likely to arise before the Court. One is whether any order which may have been passed is in accordance with any law which would justify the making of the order. If there is no law which would justify the making of the order, no further question will arise and this Court will proceed in exercise of the powers under Article 226 and would issue a suitable writ or pass a suitable order. But it is not a sufficient reply to an allegation that the freedom of the subject is abridged that the order is in accordance with some law which justified its making. The Constitution gives this Court further power to inquire, as has been decided by this Court in *Emperor v. Jeshingbhai* 52 Bom. L. R. 544, into the reasonableness of the law in accordance with which the order is supposed to have been passed. And so far as Section 27 (7) prevents the reasonableness of the City of Bombay Police Act when it places restriction upon the fundamental right of freedom of movement and freedom to reside in any part of the Republic being called into question, is concerned, it is ultra vires of Article 226(i). It is also ultra vires of the section in so far as it presents the challenging of the order on the ground that it is not in accordance with the law, viz. the City of Bombay Police Act. I am myself not in favor of accepting a further contention that this section is ultra vires because not only it takes away the powers of the Court to inquire into the reasonableness of any law under which an order of externment is made, but it takes away the right of the Court to inquire whether, assuming even that the Act under which an action is being taken is a valid Act, the order which is passed is a reasonable order. As I have already mentioned, I think only two questions will arise whenever an application is made to this Court under Article 226 impugning an order alleged to encroach upon the freedom of the subject. Is it an order in accordance with the law which it is claimed justified its making, and if it is, whether the law can be said to be a reasonable law? If the law can be said to be reasonable law, then it appears to me that it is not for this Court to go into the question as to whether the order which complains of the deprivation of his freedom is in its view reasonable. The only question is whether the order is in accordance with law. If restrictions can be placed under the law and the law also

is reasonable, then what restriction should be placed upon the person is a question for the officer to whom the law gives the power to restrict freedom of the citizen. But the section prevents the externee from raising the question as contended by the learned Government Pleader that even assuming that the law is not void the order is not in accordance with the law. To the extent that it does so it is void under Article 226 of the Constitution.

9. In that case, the question which arises is as to whether the order has been passed in conformity with Section 27 (1). Now the order admittedly does not tell the externee the place to which he is to go and the route by which he is to go. I have already referred to the argument which has been advanced on behalf of the State that if it does not, the externee cannot make any grievance because it leaves the externee free to go anywhere provided of course he goes outside the town of Greater Bombay. From the practical point of view, the learned Government Pleader says that it is ascertained from the externee as to where he would like to go, and if the place is on the railway, an arrangement is made to give him the railway fare or a railway ticket is bought for him. Now, I cannot understand this contention. If we look from the practical point of view, the externee does not suffer because of the absence of the place in the order and the absence of the route by which he is to go. But it has after all got to be remembered that the order is an order which deprives the person of his freedom. Whenever there is a provision of the law in accordance with which a person can be deprived of his freedom before an order can be passed, the provision of the Act must be strictly followed. It is true that it is difficult to understand why the Legislature should have put into Section 27 (1) a requirement that where the externee was not to be externed out of the Province, the place where he is to go and the route by which he is to go and the time within which he is to go should also be specified in the order. But the Legislature has thought it fit to impose requirements and I think that it is not for us to speculate as to the objects of the Legislature in imposing those obligations.

10. As I have already mentioned the provisions ought to be strictly followed and in this case these are not followed and in my view it is enough that the order is not in accordance with Section 37 (1) of the City of Bombay Police Act for holding it invalid.

11. We restrain the Commissioner of Police from taking any further action under the order which has been impugned.

Chainani, J.

12. In this case an order has been made against the petitioner under S. 27 (1) of the City of Bombay Police Act directing him to remove himself from Greater Bombay. Section 27 (1) empowers the Commissioner of Police to direct any person to remove himself outside the Province or to such place within the Province and by such route and within such time as he shall prescribe, whenever it shall appear to the Commissioner of Police that the movements or acts of such

person are causing or calculated to cause alarm, danger or harm to person or property, or that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of one of the offences specified in the section and when in the opinion of the Commissioner of Police witnesses are not willing to come forward to give evidence in public against such person. This section, therefore, requires that in cases where a person is not externed outside the Province, the order should specify the place to which the person against whom the order is made, should remove himself and also the route by which he is to remove himself to that place. In this case the order does not specify the place to which the petitioner was to go outside the Greater Bombay or the route by which he was to go to that place. It merely states that he should remove himself out of Greater Bombay within a particular time. It has, therefore, been contended on behalf of the petitioner that the order is invalid.

13. Sub-section (7) of Section 27 of the City of Bombay Police Act provides that an order made under Sub-section (1) shall not be called in question in any Court except on the ground that the Commissioner of Police or the officer authorised by him had not followed the procedure laid down in Sub-section 4, which requires that the person concerned should be informed of the general nature of the material allegations against him and given a reasonable opportunity of explaining those allegations, or that there was no material before the Commissioner of Police upon which he could have based his order or on the ground that the Commissioner of Police was not of the opinion that witnesses were unwilling to come forward to give evidence in the public against the person in respect of whom an order has been made under Sub-section (1). In this case the order has not been challenged on any of the grounds mentioned in Sub-section (7). It has consequently been urged by the learned Government Pleader that it is not open to us to consider the question whether the order is invalid on the ground that it does not specify the place to which the petitioner had to remove himself or the route by which he had to remove himself to that place.

14. Article 226 of the Constitution provides that every High Court shall have power to issue directions, orders or writs for the enforcement of any of the rights conferred by Part III. Two of the rights conferred by Part III are the right to move freely throughout, and to reside and settle in any Part of, the territory of India; vide Article 19(1), Sub-clauses (d) and (e) of the Constitution. These rights are limited by Clause (5) of Article 19, which states inter alia, that nothing in Sub-clauses (d) and (e) of Clause (1) shall affect the operation of any existing law in so far as it imposes reasonable restrictions on the exercise of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the Interests of any scheduled tribe. An order of externment abridges the fundamental rights conferred by Article 19(1), Sub-clauses (d) and (e), to move freely throughout, and to reside in any part of, the territory of India. Such an order may be challenged not only on the grounds mentioned in Sub-section (7) of Section 27 of the City of Bombay Police Act, but also on other grounds, e. g., that the provision of law, under which the order was issued, was

unreasonable or that the order per se imposes unreasonable restrictions or that it was made mala fide. Sub-section (7) of Section 27, prevents the Court from inquiring into the question whether the order is invalid on grounds other than those mentioned in the sub-section. Consequently it prevents the High Court from enforcing the fundamental rights conferred by Article 19(1), Sub-clause (d) and (e) of the Constitution, in cases in which the order is invalid not on the grounds mentioned in Sub-section (7) of Section 27 but on other grounds, e. g., that the order imposes unreasonable restrictions or that it was made mala fide. This sub-section is, therefore, repugnant to the provisions of Article 226 and is consequently void under Article 13 of the Constitution. Sub-section (7) is also, in my opinion, ultra vires of the Constitution, because it imposes an unreasonable restriction in the sense that it prevents a person against whom an order of externment has been made from questioning the validity of the order even on the ground that it has not been made in conformity with the provisions of the Statute, which authorised the making of such an order, or that it was passed mala fide.

15. The next question to be considered is whether the order is bad on the ground that it does not specify the place to which the petitioner had to remove himself out of the Greater Bombay and the route by which he had to go to that place. It is not known why the Legislature considered it necessary to provide in the section that these matters should also be specified in the order. Probably the object was to enable the authorities to exercise some check over the person concerned both during the journey to, and at, the place to which he was required to remove himself. An order which specifies the place to which the externnee has to remove himself and the route by which he has to go to that place is obviously more stringent and imposes much greater restrictions than an order which does not specify these matters. In the latter case, the person concerned can go to any place he chooses, outside Greater Bombay and can also travel by any route he likes. The main object of the section is also to empower the Commissioner of Police to remove the undesirable persons from Greater Bombay and in certain cases outside the Province. From this point of view also, it is immaterial to which place outside the Greater Bombay the externnee goes or the route by which he goes to that place. I would, therefore, personally regard the provisions of the section, which require the place and the route to be mentioned in the order, as merely directory and not mandatory. That this was the intention of the Legislature is also clear from the provisions of Sub-section (7) under which an order cannot be called in question on the ground that it does not specify the place to which the externnee has to remove himself or the route by which he has to remove himself to that place. In my opinion, therefore, the order would not be illegal merely because these matters are not specified in the order and merely because it is left to the externnee to choose the place to which he may go outside the Greater Bombay or the route by which he may travel to that place. I am, however, bound by the decision of another bench of this Court in *State v. Vithal Wanaji Mazire*, Cri. Appn. No. 1402 of 1950 (Bom.).

16. The learned Government Pleader has stated that in actual practice a constable is instructed to ascertain from the externee the place to which he desires to go. After the externee has intimated to the police constable the place to which he would like to go, the constable purchases a railway ticket for that place, gives it to the externee and then makes a note of it on the order. This, however, cannot be regarded as compliance with the provisions of the section under which the place and the route are to be mentioned in the order itself.

17. The petition must, however, be allowed in view of the decision in *State v. Vithal Wanaji Mazire*, by which I am bound.