

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 887 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements? YES
 2. To be referred to the Reporter or not? YES :
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? NO
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? NO
 5. Whether it is to be circulated to the Civil Judge? : NO
NO

HEMANT RAMSINGH PARDESHI

Versus

DEPUTY COMMISSIONER OF POLICE

Appearance:

MR NM KAPADIA for Petitioner

MR HH PATEL, APP, for Respondent No. 1

PUBLIC PROSECUTOR for Respondent No. 2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 09/12/1999

ORAL JUDGEMENT

1. The petitioner is an externee who by an order passed on 5th July, 1999 by Deputy Commissioner of Police, Surat city, Surat has been externed from the jurisdiction of Police Commissionerate, Surat city and

the territories of Districts of Surat Rural and Navsari for a period of two years. He has challenged the order of externment by this petition under Article 226 of the Constitution of India.

2. A show cause notice u/s 56 clause [a] and [b] came to be issued on the petitioner on April 02, 1998, as required u/s 59 of the Bombay Police Act ['the Act' for short]. On April 22, 1998, the Deputy Commissioner of Police passed an order directing the petitioner to give security for good conduct. Thereafter, on July 05, 1999, the impugned order of externment came to be passed. No fresh notice nor audience was given to the petitioner before passing that order. The said order was challenged in appeal u/s 60 of the Act to the State Government on July 26, 1999. The appeal came to be dismissed by an order dated September 17, 1999.

3. The petitioner challenges the impugned order of detention and the order in appeal mainly on the ground that the order in question has been passed without any audience. The authority concerned has taken into consideration certain factors which are extraneous to the original notice. The authority could not have passed this order on the basis of notice served earlier, as, pursuant to the notice, an action of taking security for good conduct has already been taken and therefore, the order is passed in total neglect of section 59 of the Act. It is denial of a legal right of the petitioner and therefore, the same may be quashed.

4. Mr. Kapadia, learned advocate appearing for the petitioner has drawn attention of this Court to sequence of events narrated above. Mr. Kapadia submitted that, if the impugned order is seen, it is very clear that the authority has passed the order after holding that "all the allegations are proved against the petitioner." If the allegations are seen in the impugned order, they include registration of three offences with Chowk Bazaar police station, subsequent of taking of security for good conduct. Mr. Kapadia submitted that, for these three offences, no notice is given and therefore, reliance placed on it by the externing authority is without compliance to section 59 of the Act. He submitted that the order, having been passed without giving an audience, is bad in law. Mr. Kapadia's second fold of argument is that the notice, that is issued, has been acted upon by the authority by asking the petitioner to furnish security for good conduct and further action, therefore, could not have been taken on basis of first notice, as has been done and therefore, the reliance placed on, by

the externing authority, while passing the impugned order on the grounds / allegations stated in the notice, is also bad in law.

4.1 Mr. Kapadia submitted further that the opinion formed on the basis of subjective satisfaction by the externing authority that witnesses in general are not prepared to depose against the petitioner in public is falsified by the fact that the three offences are admittedly registered against the petitioner, after taking of security for good behavior. Mr. Kapadia, therefore, submitted that the order must fall on merits and the petition may be allowed.

5. Mr. H. H. Patel, learned APP submitted that if the externment order and the order of the appellate authority are read, they clearly indicate that the petitioner has been involved in nefarious activities for a long time. The subjective satisfaction is arrived at by the externing authority on basis of the offences which are registered against the petitioner and therefore, the order may not be disturbed. He submitted that the subjective satisfaction is recorded and the order is passed in public interest, which calls for no interference. He placed reliance on the decision of this Court in the case between *Abedin Rasul Bombaywala v/s Commissioner of Police, Surat*, as reported in 1986 GLH 986. He has placed reliance on head note [c] and [d]. Head note [c] runs as under :-

Head Note [c] :: Bombay Police Act, 1951 -
Section 56 Allegations in the show cause notice not vague irrelevant material not taken into consideration externment order not vitiated.

Head Note [d] :: Bombay Police Act, 1951 Section 56 - Subjective satisfaction of the externing authority on proper materials cannot be interfered with in writ petition.

He submitted that the petition may, therefore, be dismissed.

6. The externment order is passed by the externing authority in exercise of powers u/s 56 of the Act. Section 59 of the Act requires that, before an order u/s 55, 56 or 57 is passed against any person, the officer acting under any of the said sections or any officer above the rank of an inspector, authorised by the officer shall inform that person in writing of the general nature of material allegations against him and give him a

reasonable opportunity of tendering an explanation regarding them. Thus, it is necessary that, before passing any order, the externing authority is required to inform the proposed externee, general nature of material allegations against him, in writing. Then only, the action can be taken, if other requirements are fulfilled.

7. In the instant case, notice as required u/s 59 of the Act has been given on April 4, 1998. The allegations in the notice refer to the offences registered with Chowk Bazaar police station vide Cr.R. No. I - 128/97 and certain other incidents dated 14th March 1998, 25th February 1998 and 2nd March 1998, besides a Chapter Case under Code of Criminal Procedure, filed with Chowk Bazaar police station, vide Cr.R. No. II 87/98. It transpires that, after the above notice was served on the petitioner, an order came to be passed on October 22, 1998 to give security for good conduct. It appears that the order for giving security for good conduct was passed pursuant to the notice and in lieu of the proposed action of externment. Although the order of furnishing security for good conduct is not on record, the above aspect is reflected from the impugned order of externment. In para-6 of the said order, it is stated that, although the petitioner was involved in number of offences stated therein above, the chance was given to him to improve his conduct by an order dated October 22, 1998 by ordering him to furnish security for good conduct for two years and still, he has involved himself in three offences registered with Chowk Bazaar police station vide Cr.R. No. II - 3201/99, II 3221/99, besides Chowk Bazaar police station N.C. No. 47/99.

7.2 At first glance, the allegations stated in the notice and the allegations in the earlier part of order of externment appear to be the same. The crux of the matter is that, after referring to the allegations made in the notice, the externing authority proceeds further into the order of externment and makes a reference to Chowk Bazaar police station Cr.R. No. 3201/99 & 3221/99 and N.C. No.47/99 and then holds that all the allegations made in the externment order are found to have been proved. It is very difficult to understand how the externing authority could have recorded that he has found that the allegations in Chowk Bazaar police station Cr.R. No. 3201/99 & 3221/99 and N.C. No.47/99, are proved, when these offences are admittedly alleged to have been committed after the order for security for good conduct dated October 22, 1998 and there is nothing to show that thereafter, any proceedings for externment were conducted by the authority. No notice is given to the

petitioner in respect of these offences to enable him to explain why externment order should not be passed against him on basis of these offences, although these offences have formed basis of the order of externment impugned in this petition.

9. The upshot of the above discussions is that the externing authority has passed an order on basis of Chowk Bazaar police station Cr.R. numbers stated above, without giving a notice to the petitioner in this regard, u/s 59 of the Act, and therefore, the order of externment based on these allegations and grounds would stand vitiated.

10. This Court, at this stage, does not enter into the question as to whether the earlier notice can be said to be valid for passing the impugned order after having acted upon it by resorting to less drastic remedy in form of taking security for good conduct.

11. Considering the decision relied upon by Mr. Patel, learned APP, it appears that the Division Bench was addressing altogether a different question. In the facts of that case, the Division Bench held that it was specifically averred in the show cause notice that the petitioner is committing offences enumerated in the show cause notice and those offences are dangerous acts and as such, the witnesses are not coming forward to depose. It was further alleged in the show cause notice that the witnesses are not coming forward due to fear to their person and property and in view of these averments in the notice, the Division Bench turned down the contention of the petitioner to the effect that the allegations in the notice were vague and that irrelevant material was taken into consideration for passing the externment order. The Division Bench also took into consideration the question of subjective satisfaction of externing authority and found that the subjective satisfaction arrived at by the externing authority was on proper material and therefore, cannot be interfered with in a writ petition.

12. Another aspect that requires to be considered is the fact that the subjective satisfaction recorded and opinion formed by the externing authority that witnesses are not prepared to depose against the petitioner in public, because of fear to their person and property from the petitioner, it was argued by Mr. Kapadia that, that satisfaction is falsified by the fact that, as many as three offences have been registered against the petitioner with Chowk Bazaar police station, subsequent to the order dated October 22, 1998. In this regard, Mr.

Kapadia has placed reliance on the decision of a Division Bench of this Court in the case of Sudhir Makanji Kahar v/s Deputy Commissioner of Police reported in 1991[2] GLH UJ 24. In that case, statements of witnesses were recorded on 20th October 1989, wherefrom the authority derived a subjective satisfaction that the witnesses are not prepared to depose against the petitioner in public out of fear. But in that case, an offence came to be registered at Cr.R. No. 420/89. The offence was dated 12th November 1989 and it was, therefore, argued that if the victims and/or the witnesses were not ready to give depositions, certainly, N.C. complaint of Cr.R. No. 420/89 would not have been registered and therefore, the externing authority has not applied his mind to this aspect of the matter. The Court observed thus;

"This is a very vital aspect of the case and the externing authority was required to be subjectively satisfied himself on the point about ingredients of section 56 of the Bombay Police Act i.e. that the petitioner is involved in offences under Chapter 12, 16 and 17 of the IPC or in the abatement of any such offences, such witnesses were not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the security of their person or property. So far as the impugned order is concerned, it does not specifically throw any light on that point. Only what is stated in the order is that the allegations made in the notice are accepted to be proved. It is important to note that even at the time of issuing notice u/s 59 if the externing authority has applied his mind to the statements recorded in October 1989 and thereafter, the N.C. complaint No. 420/89 could have known that it did not appear to be correct and hence that also disclosing the non-application of mind of the externing authority."

13. The facts of the present case are very similar. The facts of the present case project the non-application of mind of the externing authority more sharply. The externing authority has recorded in the order of externment in unequivocal terms that the offences have been registered after the notice was issued. Reliance is placed on statements of witnesses for arriving at a subjective satisfaction that they are not prepared to depose in public against the petitioner out of fear from him and therefore, while passing the order, the authority ought to have considered that, if this fear was correct

and genuine, the offences would not have been registered against the petitioner. The order of externment therefore, is bad on this count also, as has been held by the Division Bench of this Court in the case of Sudhir Makanji Kahar [supra]

14. In the instant case, as demonstrated above, the externing authority has taken into consideration the extraneous factors like the offences registered against the petitioner with Chowk Bazaar police station, registered subsequent to order for furnishing of security for good conduct; the offences which do not form part of the notices and therefore, in respect of these offences, which have been relied upon by the externing authority, notice as required u/s 59 was not issued and the proposed externee was not given an opportunity to explain why externment action cannot be taken against him. It is also clear that no externment proceedings by way of recording evidence etc. has been undertaken by the authority after the order dated October 22, 1998. The order of externment, therefore, cannot hold grounds and must fall. The petition deserves to be allowed.

15. The petition is, therefore, allowed. The impugned order of externment dated 5th July 1999 passed by Deputy Commissioner of Police, Surat and the order in appeal dated September 17, 1999 are hereby quashed and set aside. Rule is made absolute accordingly, with no orders as to costs.

[A.L.DAVE, J.]

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