

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO. 908 OF 2023

Datta s/o Mallikarjun Mohalkar

Petitioner

Versus

The State of Maharashtra & others

Respondents

Mr. R. S. Deshmukh, Senior Counsel instructed by Mr. T. M. Venjane,
Advocate for the petitioner.

Mrs. G. L. Deshpande, APP for the State.

CORAM : R. M. JOSHI, J.

RESERVED ON : 12th SEPTEMBER, 2023.

PRONOUNCED ON : 14th SEPTEMBER, 2023.

ORDER

1. This petition filed under Articles 226 and 227 of the Constitution of India takes exception to the order dated 12th June, 2023, passed by the Sub Divisional Magistrate, Nilanga, Dist. Latur, under Section 56 of Maharashtra Police Act directing externment of the petitioner from districts of Latur and Osmanabad for the period of one year.

2. Petitioner claims himself to be a social worker and member of a political party. According to him, on that count,

offences are registered against him. It is the case of petitioner that on 25th December, 2020, a proposal was submitted for externment of petitioner through the Superintendent of Police, Latur. He claims that the Sub Divisional Police Officer, behind the back of the petitioner, conducted an inquiry and submitted report on 28th October, 2021 to Sub Divisional Magistrate, Nilanga, in respect of the proposal of externment. It is alleged therein that in all nine offences are pending against the petitioner which involve offence against body and property. On 23rd November, 2021, the Sub Divisional Magistrate, Nilanga, sent notice of externment proceeding to the petitioner. Petitioner filed his say informing that in Crime No. 68/2013 and 102/2023, he is acquitted by the Criminal Court. In respect of remaining offences, it is claimed that he is released on bail and he is abiding the conditions of bail. It is further claimed that he is an agriculturist with responsibility of mother, old aged grandfather and other family members including wife and children. The petition is filed essentially challenging the order passed by the Sub Divisional Magistrate on the ground that after closing the proceeding for order, impugned order came to be passed after 1 year 4 months and on that ground, the order is not sustainable. Apart from this, various other grounds are raised in order to challenge the said order.

3. At the outset, learned APP raised objection with regard to the maintainability of the petition on the ground that statutory remedy of appeal is provided against the impugned order under Section 60 of Maharashtra Police Act and hence present petition is not maintainable.

4. Learned Senior Counsel appearing for the petitioner submits that the petition involves the issue of liberty of the petitioner which is a fundamental right and in view of the same, it cannot be allowed to be argued that this Court has no jurisdiction to entertain such petition. To support his submissions, he placed reliance on judgment in the case of Nasir Beg s/o Sabdar Beg Mirza vs. The State of Maharashtra, Criminal Writ Petition No. 693/2007, wherein it is held that although the alternate efficacious remedy was available to the petitioner by way of an appeal, the petitioner is entitled to challenge the order of externment passed by the Sub Divisional Magistrate by filing writ petition. Thus, relying upon these submissions, it is his contention that there is no embargo in entertaining the petition inspite of the fact that there is statutory remedy of appeal provided under the act. He further submitted that even otherwise, perusal of the impugned order shows that the same

has been passed belatedly and as held by Division Bench of this Court in case of Dilip Laxman Kokare vs. S. M. Ambedkar and another, **2013 ALL MR (Cri) 4357**, the order of externment was quashed in view of abnormal delay caused in passing the order. The said judgment has been followed in case of Gajanan Kashinath Kamble, in Criminal Writ Petition No. 652/2017 and Kishor Rambhaoji Narad vs. State of Maharashtra and another, **2017 DGLS (Bom.) 2035**. Thus, it is his submission that in view of the law laid down by this Court in the aforesaid judgments, the impugned order is not sustainable as the same is passed on 12th June, 2023 after closing the proceeding on 11th February, 2022. Thus, according to him, there is no propriety in calling upon the petitioner to approach the appellate authority for taking exception to the said order. Otherwise on merits also, it is contended that the proposal made by the concerned police station for externment of petitioner falsely records that Crime No. 68/2013 and 102/2023 are pending trial when the petitioner was already acquitted in the said crime. It is further argued that all the crimes are registered against the petitioner at police station Nilanga and hence it does not stand to any reason as to how proposal can be forwarded for his externment from three districts. Similarly, the order passed by Sub Divisional

Magistrate externing petitioner from Latur and Osmanabad districts is not sustainable.

5. Learned APP opposed the said submissions by reiterating objection to the maintainability of the present petition for want of availability of statutory remedy of appeal. To support her submissions, she placed reliance on judgment of learned Single Judge of this Court in the case of Avinash Uttam Katkar vs. The State of Maharashtra and others, **2023(2) Bom.C.R. (Cri) 709** wherein it is held that the substantive provision of Statute cannot be bypassed in order to exercise jurisdiction under Article 226 of Constitution of India. She further submits that all the issues/objections sought to be raised against the impugned order would be available to the petitioner before the appellate authority. It is submitted that this is not an exceptional case wherein extraordinary jurisdiction of this Court can be exercised when there is remedy provided by the Statute. By referring to the record it is submitted that though the initial proposal was for externment of petitioner from three districts and for two years, the impugned order clearly shows that after application of mind the said proposal has been accepted only to the extent of one year and two districts. It is

submitted that though the offences are registered with Nilanga Police Station, the place where the petitioner resides is abutting to Osmanabad district too. thus, having regard to these facts, the Sub Divisional Magistrate has rightly externed the petitioner by passing the impugned order. It is also submitted that three serious offences punishable under Section 307 of Indian Penal Code are registered against him. In view of the same, there would be no reason or justification to interfere into the impugned order.

6. Before entering into the merits of the case, this Court finds it necessary to decide the issue of maintainability of the petition at threshold. In the latest judgment of Hon'ble Apex Court in case of M/s Godrej Sara Lee Ltd. vs. The Excise and Taxation Officer, **AIR 2023 Supreme Court 781**, distinction has been drawn in 'maintainability' of writ petition and 'entertainability' thereof. In paragraph No. 4 of the judgment it is observed by Apex Court thus :-

"4. Before answering the questions, we feel the urge to say a few words on the exercise of writ powers conferred by Article 226 of the Constitution having come across certain orders passed by the High Courts holding writ petitions as "not maintainable" merely because the alternative remedy provided by the relevant

statutes has not been pursued by the parties desirous of invocation of the writ jurisdiction. The power to issue prerogative writs under Article 226 is plenary in nature. Any limitation on the exercise of such power must be traceable in the Constitution itself. Profitable reference in this regard may be made to Article 329 and ordainments of other similarly worded articles in the Constitution. Article 226 does not, in terms, impose any limitation or restraint on the exercise of power to issue writs. While it is true that exercise of writ powers despite availability of a remedy under the very statute which has been invoked and has given rise to the action impugned in the writ petition ought not to be made in a routine manner, yet, the mere fact that the petitioner before the High Court in a given case, has not pursued the alternative remedy available to him/it cannot mechanically be construed as a ground for its dismissal. It is axiomatic that the High Courts (bearing in mind the facts of each particular case) have a discretion whether to entertain a writ petition or not. One of the self-imposed restrictions on the exercise of power under Article 226 that has evolved through judicial precedents is that the High Courts should normally not entertain a writ petition, where an effective and efficacious alternative remedy is available. At the same time, it must be remembered that mere availability of an alternative remedy of appeal or revision, which the party invoking the jurisdiction of

the High Court under Article 226 has not pursued, would not oust the jurisdiction of the High Court and render a writ petition “not maintainable”. In a long line of decisions, this Court has made it clear that availability of an alternative remedy does not operate as an absolute bar to the “maintainability” of a writ petition and that the rule, which requires a party to pursue the alternative remedy provided by a statute, is a rule of policy, convenience and discretion rather than a rule of law. Though elementary, it needs to be restated that “entertainability” and “maintainability” of a writ petition are distinct concepts. The fine but real distinction between the two ought not to be lost sight of. The objection as to “maintainability” goes to the root of the matter and if such objection were found to be of substance, the courts would be rendered incapable of even receiving the lis of adjudication. On the other hand, the question of “entertainability” is entirely within the realm of discretion of the High Courts, writ remedy being discretionary. A writ petition despite being maintainable may not be entertained by a High Court for very many reasons or relief could even be refused to the petitioner, despite setting up a sound legal point, if grant of the claimed relief would not further public interest. Hence, dismissal of a writ petition by a High Court on the ground that the petitioner has not availed the alternative remedy without, however, examining whether an exceptional

case has been made out for such entertainment would not be proper.

By referring to case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai, 1998(8) SCC 1, exceptions carved out on existence whereof a writ Court would be justified in entertaining a writ petition despite the party approaching it not having availed the alternative remedy provided by Statute are recorded to say that :-

- (i) where the writ petition seeks enforcement of any of the fundamental rights;
- (ii) where there is violation of principles of natural justice;
- (iii) where the order or the proceedings are wholly without jurisdiction; or
- (iv) where the vires of an Act is challenged.

In paragraph No. 8 of judgment following observations are made indicating the circumstances in which writ jurisdiction can be and not to be exercised, which read thus :-

“8. That apart, we may also usefully refer to the decisions of this Court reported in (1977) 2 SCC 724 : (AIR 1977 SC 1132) (State of Uttar Pradesh and ors. v.

Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 : (AIROnline 1998 SC 137) (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the High Court could entertain a writ petition in its discretion even though the alternative remedy was not availed of, and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the High Court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only question of law, then it should be decided by the High Court instead of dismissing the writ petition on the ground of an alternative remedy being available.”

Keeping in mind the principles of law enunciated by Apex Court, facts of the present case need to be appreciated to hold whether the present petition would be entertainable or not.

7. Maharashtra Police Act is a self contained code. Chapter V of the Act deals with special measures of public order and safety of State. Clause II provides for dispersal of gangs and removal of persons convicted by certain offences. Section 56 deals with removal of persons about to commit offence and it provides elaborate procedure therefor. Section 58 deals with the period of operation of order under Sections 55 to 57A, not exceeding two years. According to Section 59, hearing to be given to person before passing of order is made mandatory. Appeal has been provided under Section 60 against order of externment passed under Section 56, which is required to be filed within 30 days of date of order. The relevant provisions also take care of the procedure in case order of externment is not complied with. On the other hand, it also provides for temporary entry of externed person in prohibited area.

8. Sections 56 to 59 provide for procedure for externment of any person and the authority who can exercise such powers of externment is also provided therein. Perusal of present petition does not show that there is any challenge to the jurisdiction of the authority of Sub Divisional Magistrate, Nilanga to exercise the powers under these provisions and to pass order of externment. Moreover, it

is clear from the petition itself that before passing the impugned order, the petitioner was given show cause notice and an opportunity of hearing was also accorded to him. Thus, it is not a case of blatant violation of principles of natural justice or rule of *audi alterm partem*. Similarly, there is no dispute about the fact that about nine crimes were registered against the petitioner which include three offences for serious crime like attempt to murder under Section 307 of Indian Penal Code. Apparently therefore, this is not a case wherein the Sub Divisional Magistrate has exercised his jurisdiction without any reason or justification.

9. No doubt, inspite of availability of alternate remedy, this Court can exercise writ jurisdiction in cases where petitioner seeks enforcement of any of the fundamental rights and where there is blatant disregard to the principles of natural justice or where the order/proceeding is wholly without jurisdiction. If the contention of learned Senior Counsel for the petitioner is accepted that since the order of externment curtails the liberty of the petitioner, which is a fundamental right and hence writ petition shall become entertainable, then every individual against whom the order of externment is passed needs to be allowed to prefer petition by

bypassing the remedy of appeal provided under Section 60 of the act. Such interpretation will have drastic effect on provision of Statute and for all practical purposes provisions of Section 60 of Maharashtra Police Act shall become otiose. Any interpretation shall be in furtherance of statutory provision rather than to defeat it. In considered view of this Court, such interpretation is not permissible.

10. In cases of Gajanan (supra) Kishor (supra), the Division Bench of this Court was not dealing with the issue as to whether filing of writ petition without challenging the externment order before the appellate authority would be maintainable or not. In the said petitions, this Court has exercised its discretionary powers to entertain the petitions. As far as judgment in case of Sudhakar s/o Mahadeorao Khelkar vs. State of Maharashtra and others, 2013 BCI 1142 is concerned, the orders passed by the Sub Divisional Magistrate as well as appellate authority were challenged in the said petition. Thus, it does not support the submission of learned Senior Counsel that without preferring an appeal, petition can be filed challenging the order impugned.

11. In the case of Bilal Gulam Rasul Patel vs. Divisional Magistrate & others, **2014 ALL MR (Cri) 2161**, the Division Bench of this Court has entertained the petition without the petitioner exhausting the remedy of appeal. The Division Bench however has categorically held that in the peculiar facts of the said case, as an exception, the petition is entertained. Since the said petition has been entertained in the peculiar facts of the case and by way of exception, it does not become a binding precedent.

12. As far as contention of the petitioner that the order impugned is not sustainable on various grounds raised in the petition including the ground of delay, the said ground is always available for assailing the order before the appellate authority.

13. The petitioner has failed to make out any case that the Sub-Divisional Officer has no jurisdiction to pass order or that the impugned order has been passed in utter disregard of the principles of natural justice and has led to miscarriage of justice by procedural fault. It is pertinent to note that there is no time limit prescribed by Statute for passing of the order after the proposal has been forwarded to the concerned authority. Thus, it cannot be said that

here is the case wherein there is no compliance of any statutory provision which automatically leads to setting aside of the impugned order. On the basis of judicial pronouncements it cannot be claimed as matter of right that passing order after a particular time is not sustainable as it depends on facts of each. Thus, arguments which require decision/finding of fact cannot be gone into in the writ petition. There are no exceptional circumstances, to entertain this petition by allowing petitioner to bypass statutory appeal under Section 60 of Act provided against impugned order. In the facts and circumstances of the case and having regard to the provisions of Maharashtra Police Act, pertaining to the externment of an individual, this Court finds present petition to be not entertainable.

14. In view of above discussion, it is held that the petition is not entertainable. It is open for the petitioner to file appeal under Section 60 of Maharashtra Police Act. Period spent in prosecuting this petition shall be excluded and even if the period of limitation to file appeal has lapsed, the appellate authority to entertain the appeal if the same is filed within a period of 15 days from today and then to decide the same as expeditiously as possible, in accordance with law.

15. It is clarified that the above observations are restricted to decision of this petition only and the appellate authority shall not get influenced by the same.

16. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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