

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**CRIMINAL WRIT PETITION NO. 1470 OF 2018**

Ajj Babu Khan Pathan,  
 Age: Major, Occu: Labour,  
 R/o. Building No.41,  
 Shivaji Nagar, Near Gendalal Mill,  
 Jalgaon, Tq. & Dist. Jalgaon. ... **Petitioner**

**Vs.**

1. The State of Maharashtra  
 Through its Secretary,  
 Home Department,  
 Mantralaya, Mumbai- 32.
2. The District Magistrate,  
 Jalgaon, Dist. Jalgaon.
3. The Sub Divisional Magistrate,  
 Jalgaon Division, Jalgaon.
4. The Sub Divisional Police Officer,  
 Jalgaon Division, Jalgaon.
5. The City Police Station Jalgaon,  
 Through its Police Inspector,  
 Jalgaon, Dist. Jalgaon. ... **Respondents**

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Mr. Girish A. Nagori, Advocate for the Petitioner.  
 Mr. P. G. Borade, A.P.P. for the Respondents / State.

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**CORAM : T.V. NALAWADE &  
 MANGESH S. PATIL, J.J.**

**DATE OF RESERVING THE JUDGMENT : 10.04.2019  
 DATE OF PRONOUNCING THE JUDGMENT : 24.04.2019**

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**JUDGMENT :- (Per: Mangesh S. Patil, J.)**

Heard. Rule. The Rule is made returnable forthwith. Learned A.P.P. waives service for all the respondents. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The petitioner is impugning the order passed by the respondent no.3 dated 10.08.2017 directing his externment in exercise of the powers vested in him under Section 56 (1) (a) and Section 56 (1) (b) of the Maharashtra Police Act, as well as dismissal of the appeal preferred by him under Section 60 of that Act by the Divisional Commissioner, Nashik Division on 29.05.2018.

3. A proposal was forwarded by the Police Inspector, Jalgaon City Police Station to extern the petitioner from Jalgaon, Dhule, Nashik and Buldhana districts for a period of two years pursuant to Section 56 (1) (b) of the Maharashtra Police Act, 1951. The Additional Superintendent of Police, Jalgaon by his letter dated 08.04.2017 approved the proposal and appointed Sub Divisional Police Officer, Jalgaon pursuant to Section 59 of the Act to conduct an inquiry. Accordingly the Sub-Divisional Police Officer, Jalgaon submitted a report on 22.05.2017 to the Sub-Divisional Magistrate, Jalgaon. A notice was served to the petitioner on 01.06.2017 to show cause as to why he should not be externed. He submitted his reply on 30.06.2017. After giving an opportunity of being heard to him, by the impugned order the

learned Sub-Divisional Magistrate, Jalgaon directed the petitioner to be externed from Jalgaon and Dhule districts for a period of two years. Being aggrieved he preferred an appeal under Section 60 of that Act but failed to convince the Divisional Commissioner who dismissed his appeal. Hence this writ petition.

4. The learned advocate for the petitioner submits that there are no sufficient and cogent reasons which would warrant a drastic step curtailing his life and personal liberty. He submits that it was brought to the notice of the Sub-Divisional Magistrate that he was already acquitted in three crimes and no offence was registered against him after the year 2015. He further submits that the petitioner was not shown any adverse material which would have warranted his externment from two districts. The order is excessive and harsh. All the offences relied upon by the Sub-Divisional Magistrate pertain to Jalgaon City Police Station. Therefore, there was no reason mentioned by him and even the appellate authority as to why he was being externed even from Dhule district. There is total non application of mind by both the authorities and the impugned orders may be quashed and set aside.

5. The learned A.P.P. submits that there is no apparent illegality committed by both the authorities in directing externment. The petitioner was duly made known the allegations which were to be considered against him. The impugned orders have been passed by

scrutinizing the adverse material objectively. There is no illegality committed by the two authorities and the petition may be dismissed.

6. At the outset it is necessary to observe that though in the petition at various places it has been mentioned that the impugned order has been passed under Section 56 (1) (a) as well as under Section 56 (1) (b), and even the proposal for externment was filed by the concerned Police Inspector and approved by the Additional Superintendent of Police under both these clauses and even though the impugned order passed by the Sub-Divisional Magistrate in the concluding paragraph has referred to both these clauses, the earlier observations clearly indicate that the powers only under Section 56 (1) (b) were invoked. In this regard, it is also important to note that even in appeal under Section 60 before the Divisional Commissioner, the submissions were made on behalf of the petitioner and it was pointed that the order of externment was not passed under Section 56 (1) (a) but it was an order under Section 56 (1) (b).

7. It therefore becomes imperative to reproduce the provisions and particularly the two clauses (a) and (b) which reads thus:

***“56. Removal of persons about to commit offence -***

*(1) Whenever it shall appear in Greater Bombay and other areas for which a Commissioner has been appointed under section 7 to the Commissioner and in other area or areas to which the State Government may, by notification*

*in the Official Gazette, extend the provisions of this section, to the District Magistrate, or the Sub-Divisional Magistrate empowered by the State Government in that behalf -*

*(a) that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property or*

*(b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property.”*

A careful perusal of these clauses (a) and (b) would clearly show that there is a certain distinction between the two. Under Clause (a) the movements or acts of person should be causing or calculated to cause alarm, danger or harm to person or property. Whereas under Clause (b) there should be a reasonable ground to believe that a person to be externed is engaged or about to engage in the offences involving violence or offences punishable under Chapter XII, XVI and XVII of the Indian Penal Code or their abetment and when in the opinion of the officer witnesses are not willing to come forward to give evidence in public against such person by reason of threat of their person or property. Taking note of such wording of these two clauses let us now examine the matter in hand.

8. Perusal of the notice served to the petitioner under Section

59 of the Act dated 01.06.2017 is to the effect that a proposal was submitted by the Sub-Divisional Police Officer for externment under Section 56 for a period of two years from Jalgaon district on the ground that 13 cases were registered against him for various offences in Jalgaon City Police Station and in M.I.D.C. Jalgaon Police Station. Besides there were three chapter cases and even once externment proceeding was initiated but it was not approved. It was also made known to him that out of these cases in two cases he was acquitted and the rest were pending whereas couple of chapter cases were dropped and one was pending. It was further informed to him that because of his terror no witnesses were turning up or nobody was coming forward to lodge complaints. The whole purpose of Section 59 is to make the proposed externee known the general nature of material against him so as to enable him to have a reasonable opportunity of tendering explanation. It is important to note the wording of the provision. Section 59 reads thus:

***“59. Hearing to be given before order under Sections 55, 56, 57 or 57A is passed***

*(1) Before an order under section 55, 56 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.*

*(2) The authority or officer proceeding under sub-section (1) may, for the purpose of securing the attendance of any person against whom any order is proposed to be made under sections 55, 56, 57 or 57A require such person to appear before him and to pass a security bond with or without sureties for such attendance during the inquiry. If the person fails to pass the security bond as required or fails to appear before the officer or authority during the inquiry, it shall be lawful to the officer or authority to proceed with the inquiry and thereupon such order as was proposed to be passed against him may be passed."*

9. A careful reading of this provision shows that there is a certain objective of informing the proposed externee the material allegations against him so that he can defend himself or offer an explanation. Bearing in mind this objective, if one examines the impugned orders and the notice served to the petitioner under Section 59, in our considered view there is enough material for us to conclude that there is a total non application of mind by both the authorities i.e. the Sub-Divisional Magistrate who passed the externment order on 10.08.2017 as well as the Divisional Commissioner who decided the appeal under Section 60.

10. As is cursorily mentioned above, the learned Sub-Divisional Magistrate in his impugned order has firstly referred to the proposal.

He then referred to the offences and the cases pending against him. He then referred to the notice issued to the petitioner under Section 59 and then has reproduced the explanation offered by him. He then reproduced the provision of Section 56 and made an observation that taking into account the offences registered against the petitioner there was danger to the person and property of the citizens of Jalgaon and which was likely to create a law and order problem and breach of peace in and around Jalgaon. Going by this wording it appears that the Sub-Divisional Magistrate was apparently resorting to Clause (a) of Sub-section 1 of Section 56. In the latter portion of the impugned order he observed that there was a possibility of petitioner committing similar crimes. He thereafter observed that witnesses were not coming forward due to fear of danger to their person or property and he had examined the statements of the witnesses from the sealed envelope. From those statements he was satisfied that the petitioner was habituated to committing crimes against person and property and therefore he had reached a subjective satisfaction of necessity to extern the petitioner from Jalgaon and Dhule districts under Section 56 (1) (b). In the concluding paragraph he again mentioned that he was passing the order under Section '56 (1) (a) and (b)'.

11. A careful reading of this order is suggestive of the fact that the learned Sub-Divisional Magistrate is oblivious of the distinction under Section 56 (1) (a) and (b), else he would not have resorted to the

wording which is similar to the Clause (a) and also resorted to the wording which is similar to Clause (b) and finally concluded that it was necessary to invoke the powers under the Clause (b) again referring to both these Clauses. He could have very well stated that he was passing the order since he was satisfied about existence of adverse material against the petitioner under both these clauses but that has not been done. This in our view clearly demonstrates a complete non application of mind by the Sub-Divisional Magistrate while passing the impugned order.

12. There is one more aspect which needs a specific reference. If the learned Sub-Divisional Magistrate was invoking the power under Clause (b) of Sub-section 1 of Section 56, it was necessary for him to have made known to the petitioner that there were witnesses whose statements were recorded and who had stated that they were afraid of coming forward in public to depose against him due to his fear. It has been vaguely mentioned in the notice under Section 59 that nobody was turning up to depose against him because of his terror. Saying that nobody was turning up to give deposition in public is altogether different than saying that the statements of such witnesses have been recorded in-camera as they were not ready to come out in public. In our considered view, there is a complete non compliance with the requirement of Section 59. The whole purpose and object is defeated by such an approach of not informing the proposed examinee that the

statements of witnesses have been recorded in-camera who are perceiving danger to their person or property but have adverse material to depose against him. This necessary concomitant is completely missing and for this reason alone the impugned order passed by the Sub-Divisional Magistrate suffers from gross illegality.

13. As a corollary to this circumstance it clearly indicates that the Sub-Divisional Magistrate has not at all applied his mind to the fact situation and the contents of the notice served to the petitioner under Section 59.

14. Surprisingly, the Divisional Commissioner to whom appeal under Section 60 was preferred has also failed to mark the distinction between Clause (a) and (b) of Sub-section 1 of Section 56 correctly. As can be seen a specific submission was advanced before him by the learned advocate for the petitioner that in the notice served to him under Section 59 there was no reference about recording of the statements of witnesses in-camera. To meet this submission the learned Divisional Commissioner has observed that the impugned order passed by the learned Sub Divisional Magistrate was being passed under Section 56 (1) (b) and was not passed under Section 56 (1) (a). Needless to observe that in fact Clause (a) does not require any statements of witnesses to be recorded in-camera much less of informing the proposed examinee about it. It is under Clause (b) that this

circumstance is covered wherein it is mentioned that the witnesses are reluctant to come out in public to depose against the proposed externee. If at all the impugned order was passed under Section 56 (1) (b), it was indeed a valid argument that the petitioner ought to have made known the fact that the statements of witnesses were recorded in-camera as they were apprehending danger to their person or property.

15. In this regard one can easily appreciate the fact that for the obvious reasons a proposed externee is not supposed to be informed the names of the witnesses which would run a foul to the very purpose and object of the provision of Section 56 (1) (b). However, as has been laid down in the case of **Pandharinath Shridhar Rangnekar V/s. Dy. Commissioner of Police, The State of Maharashtra; (1973) 1 SCC 372**, it was a bare requirement of law to inform the proposed externee that there were witnesses whose statements were recorded in-camera as they were apprehending danger at his hands. Even the Division Bench of this Court **Viajy Bandu Gajare Vs. State of Maharashtra in Criminal Writ Petition No.1082 of 2017** decided on 11.10.2017 to which one of us was a party (Mangesh S. Patil, J.) has concluded that the notice under Section 59 served to the proposed externee must make a reference to the fact of recording of statements of witnesses in-camera on the ground that they were apprehending danger to their person or property at his hands. We therefore have no hesitation to conclude that the impugned order passed by the Sub-Divisional Magistrate as well as the order

confirming it in appeal under Section 60 have been passed without any application of mind and are not sustainable in law.

16. There is one more aspect which needs a specific reference. A careful perusal of the impugned order passed by the Sub Divisional Magistrate shows that it is devoid of even a cursory reference as to why when all the offences registered against the petitioner pertained to Jalgaon City Police Station or M.I.D.C. Jalgaon Police Station and there was not a single case or even a chapter case proceeding initiated against him arising from Dhule district, what was that material which persuaded the learned Sub Divisional Magistrate to pass the impugned order externing the petitioner even from Dhule district. The learned Divisional Commissioner while deciding the appeal has also missed the point. This circumstance in our view further corroborates our conclusion that there is total non application of mind by both the authorities which goes to the root of the jurisdiction vested in them.

17. The writ petition therefore deserves to be allowed and is accordingly allowed. The impugned order passed by the Sub Divisional Magistrate dated 10.08.2017 and the one passed by the Divisional Commissioner confirming it on 29.05.2018 are quashed and set aside. The rule is accordingly made absolute in above terms.

**(MANGESH S. PATIL, J.)**

**(T.V. NALAWADE, J.)**