

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

921 CRIMINAL WRIT PETITION NO.1282 OF 2021

**SHAIKH JAVID SHAIKH ISMAIL
VERSUS
THE DIVISIONAL COMMISSIONER, AURANGABAD AND OTHERS**

Mr.K.D. Mundhe, Advocate for the petitioner.

Mr.P.N. Kutti, APP for the respondent/State.

**CORAM : KISHORE C. SANT, J.
DATED : 10.01.2023**

PC :-

01. Heard learned Advocates for both the sides. The petition is taken up for final hearing by consent of the parties.

02. The petitioner is before this Court challenging an order dated 09.08.2021 passed by the Divisional Commissioner, Aurangabad, rejecting externment appeal of the petitioner, thereby confirming the order dated 02.06.2021 passed by the Superintendent of Police, Hingoli. The petitioner is externed from Hingoli district for a period of two years, as the petitioner's activities are found to be dangerous to the society and it is the opinion formed by the authorities, based upon enquiry conducted by the sub-ordinate officer that the petitioner and other persons are creating terror in the society and therefore no one is coming forward to give statement against these persons

openly and for this reason there are no offences registered against these persons. Four offences are in the show cause notice i.e. Crime Nos. 11/2015, 444/2018, 424/2020 and 511/2020 registered with City Police Station, Hingoli. There are also two statements of persons "A" and "B", wherein these persons have deposed before the authorities only on the condition that they will not go to the Court of law or they will not make statement before any other authority on the condition of maintaining anonymity. Both the statements are also considered by the authority as stated in the order.

03. Learned Advocate for the petitioner vehemently argued that present petitioner is not shown as accused in two cases i.e. Crime No.11 of 2015 and 444 of 2018 registered with City Police Station, Hingoli. So far as Crime No.511 of 2020 is concerned, he submits that now charge is framed. The Court though has framed charge for the offences on the basis of material, however, the Court has not framed charge in respect of offence punishable under section 307 of the Indian Penal Code. He, thus, submits that the action taken is illegal, as there is no sufficient record available against the petitioner. He pointed out first notice dated 25.01.2021, wherein only two offences are mentioned as stated above. The petitioner replied the first notice that the crimes are in respect of only one person. He is released on bail in those crimes. He submitted that looking to the nature of offences, those are not of

the nature of preventing or causing damage to the public peace. Second notice was issued on 18.02.2021. It is informed by said notice that there appears to be gang of petitioner and other persons, who are involved in total four offences. It is further stated that proposed externees are creating terror in the society by indulging into anti-social activities like pelting stones and assaulting persons. Third notice is dated 13.04.2021 issued by the competent authority cum Police Superintendent, Hingoli, wherein again four offences are mentioned against these persons. On 02.06.2021 the authority took a decision directing externment of the petitioner for two years.

04. On these bases, learned Advocate for the petitioner submits that statements of two anonymous persons are recorded by the sub-ordinate authority and not by the authority which passed the order. It was necessary to record statement by the authority itself. He submits that the name of the petitioner is not shown in two offences which are mentioned in the notice and it is clearly non-application of mind. In the first and second notice, there is no mention of the statements of the persons "A" and "B". Thus, the material which is not provided to the petitioner has been considered by the authority, which is clearly beyond the powers of the authority. Illegality is thus committed. The order does not pass the test of subjective satisfaction. In the order though it is mentioned that these persons, against whom action is

sought and order is passed, are indulged into activity, abusing in the name of caste, however, these are not the allegations seen in the offences. Learned Advocate submits that all these grounds were also taken while arguing appeal before the Divisional Commissioner, however, the learned Divisional Commissioner has not properly applied his mind and has passed order. It is submission that both the authorities below have failed to appreciate requirements of section 55 of the Maharashtra Police Act.

05. The learned Advocate placed his reliance on the judgment in the case of Sanjay Pandurang Nagpure Vs. State of Maharashtra & Anr., 2007 ALL MR (Cri) 3147, wherein this Court has set aside the externment order by observing that there was non-application of mind by the authority. As the material which was referred in the order was not referred in the show cause notice. He also relies upon judgment of Division Bench of this Court in the case of Shri Sandeep @ Shankar Vasant Khalase Vs. The Commissioner of Police, Pune City & Ors., 2018 ALL MR (Cri) 251. The case was under the provisions of MPDA Act. However, it was held considering various judgments that there has to be proper application of mind by the authorities competent to take action under the law. He also relies upon judgment reported in the case of Rauf Khan Wahab Khan Patel Vs. The State of Maharashtra, 2018 ALL MR (Cri) 3972. Learned Advocate also pointed out that in the case bearing

RCC No.91 of 2015 the petitioner is acquitted, which clearly shows that he was not involved in the activities as alleged by the prosecution.

06. The respondents have filed affidavit-in-reply opposing the petition. The learned APP has vehemently opposed the petition stating that the involvement of the accused is seen in Crime No. 511 of 2020 and 424 of 2020, which clearly shows that he is a person, who is implicated in various cases involving offences affecting public tranquility and public peace. He further relies upon notice dated 25.01.2021 and 18.02.2021 and a note prepared by police inspector, Local Crime Branch, Hingoli and he justifies the action taken against the petitioner. Learned APP has also produced copies of statements secretly recorded of anonymous persons. This Court has gone through the said statements, which are given in sealed envelope. On going through the statements, it appears that these statements are almost stereotype statements. Both the statements are recorded on same day i.e. on 18.12.2020. Common allegation is made that both the accused and other gang members have taken Rs.200/- and Rs.300/- for consumption of liquor.

07. Considered the judgments and submissions of both the sides. It is seen that though the notice was given, initially there was no mention of this material at the time of passing of the final order. The petitioner, thus, was

deprived of opportunity to make proper representation and to reply said notice. Certainly, the material which authority has considered, ought to have been supplied to the petitioner. It was necessary for the authority to record the reasons to show that they have arrived rightly to the subjective satisfaction. This Court finds that for the reasons stated above, the impugned action is in violation of the principles of natural justice and the material on the basis of which action is taken was not supplied or was not referred in the show cause notice given to the petitioner.

08. For the reasons stated above, the petition succeeds and therefore same is allowed in terms of prayer clause (B).

[KISHORE C. SANT, J.]