

VRJ

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

WRIT PETITION NO.1082 OF 2023

Avinash Uttam Katkar,

Age-30 years, Occ-Electronics repairing,

R/at: Katkar Vasti, Rasulwadi,

Kavalpur, Sangli-416306

... Petitioner

V/s.

1. The State of Maharashtra

Through the Sub-Divisional Magistrate,

Miraj Sub-Division, Miraj.

having office at:-Fort Road, Fort Area,

Miraj, Maharashtra.

**2. The Superintendent of
Police, Sangli**

Having Office at:-204,

National Highway,

Sangli_Miraj Road,

Kupwad, Vishrambaug,

Sangli, Maharashtra-416416

**3. Sub-Divisional Police
Officer, Miraj**

Having Office at New

Police Headquarters,

Miraj-416410.

**4. Police Inspector,
Miraj Rural Police Station.**

Having Office:- Near SSVSS Institute,

Maji Sainik Vasahat, Miraj-416410.

... Respondents

Mr. Abhishek R. Avachat with Mr. Siddhant Deshpande
for the petitioner.

Mr. Arfan Sait, APP for the respondent No.1/State.

Mr. D.S. Kumbhar, Incharge SDM, Miraj.

Mr. Dipak K. Mane, Clerk, SDM Office, Miraj.

CORAM : AMIT BORKAR, J.

RESERVED ON : APRIL 28, 2023

PRONOUNCED ON : MAY 4, 2023

JUDGMENT.:

1. The petition takes exception to the order passed by the Sub-Divisional Magistrate, Miraj, in Externment Case (Mag/Extns/Sr. No.23/2022 dated 21st December 2022, externing the petitioner for a period of one year from district Sangli and Kolhapur from the date when he removes himself from those areas, in the exercise of power under section 56(1)(a)(b) of the Maharashtra Police Act, 1951.

2. On 26th August 2022, respondent No.3 issued a show cause notice to the petitioner seeking an explanation as to why the petitioner shall not be externed from districts Sangli, Kolhapur, Satara and Solapur. The petitioner filed a reply to the show cause notice pointing out that he has not committed any Act which would affect public peace or tranquility. The offences referred to in the notice are pending. The petitioner has not been convicted for any offence. Respondent No.3, by the impugned order dated 21st

December 2022, externed the petitioner for a period of one year in the exercise of power under section 56(1)(a)(b) of the said Act.

3. The petitioner had the remedy of statutory appeal. However, the petitioner did not file a statutory appeal within the prescribed time. The appellate authority has no power to condone the delay in filing an appeal. Therefore, the petitioner has invoked the writ jurisdiction of this court, challenging the order passed by the first authority.

4. The question, therefore, arises for consideration is whether, in the facts of the case, this court can entertain the present petition when the petitioner failed to invoke statutory remedy of appeal within the prescribed time.

5. It is well settled that the High Court has a self-imposed restriction refusing to entertain a writ petition in the categories listed as follows:

- (i) Adequate alternative statutory remedy is provided under a statute;
- (ii) Unexplained delay/laches in approaching the court;
- (iii) Petitioner not coming with clean hands;
- (iv) Interest of justice is against the grant of relief;
- (v) When disputed questions of facts are raised, and the proper remedy is to avail remedy of suit or tribunal which can take evidence to decide the question of facts;
- (vi) Where the grant of the writ would be futile;

(vii) However, when it is shown with the error touching jurisdiction is so patent and loud that it leaves on its decision an indelible stamp of infirmity which could not be cured in appeal.

6. The issue involved concerning the power of this court to entertain writs under Article 226 or 227 of the Constitution of India after the expiry of the prescribed period of limitation provided under the statute is no more *res integra* in view of the judgment of the Apex Court in the case of **Assistant Commissioner (CT) LTU, Kakinada & Ors. vs M/s. Glaxo Smith Kline Consumer Health Care Limited** in **Civil Appeal No.2413 of 2020**. The Apex Court, in paragraph 11, has held that even though the High Court can entertain a petition against any order/direction passed/action taken by the State under Article 226 of the Constitution of India, it ought not to do so as a matter of course when the aggrieved persons could have availed an effective alternative remedy in the manner prescribed by law. It is held that the constitutional court would take note of legislative intent manifested in the provisions of the Act and would exercise its jurisdiction consistent with the provisions of the Act. The fact that the High Court has wide jurisdiction under Article 226 of the Constitution of India does not mean that it can disregard substantive provisions of a statute and pass orders which can be settled only through mechanisms prescribed by the statute.

7. Learned advocate for the petitioner submitted that the gist of statements of secret witnesses was not provided to the petitioner. He submitted that the order of respondent No.3 was excessive. He

submitted that there was no live link between the action initiated and the offences registered against the petitioner. Extraneous material is taken into consideration. He submitted that violation of the fundamental right of the petitioner to move throughout the country creates a right of judicial review under Articles 226 and 227 of the Constitution of India. He relied on the judgment of the Apex Court in the case of **Radha Krishan Industries vs. State of Himachal Pradesh and Others** reported in (2021) 6 SCC 771.

8. Per contra, learned APP for the State submitted that having failed to avail statutory remedy of appeal, the present petition is not maintainable. On merits, the petitioner had threatened nearby residents, and the residents of the area are apprehensive of the petitioner and not willing to depose against him. The competent authority had recorded subjective satisfaction that the movement of the petitioner was causing or calculated to cause alarm and danger to the residents of the area. He submitted that the order directing the externment does not show the existence of material. Sufficiency of material cannot be gone into at this stage. He relied on the judgment of the Apex Court in the case of the **State of NCT of Delhi and Anr. vs. Sanjeev @ Bittoo** reported in (2005) 5 SCC 181.

9. Having considered the submissions by the learned counsel and going through the record, in my opinion, the petition cannot be entertained.

10. It is well settled that the appellate authority, under the

provisions of the Maharashtra Police Act, 1951, has no power to condone the delay. Provisions of section 29(2) of the Limitation Act do not apply to the authorities, which are not the court. Neither the competent authority nor the appellate authority under the Act can be termed a Court. Hence, section 5 of the Limitation Act is not applicable. When authority is constituted under statute, it is expected to go into the issues of fact and law, including a statutory violation. A question as to whether such a violation would be over a mandatory prescription as against a discretionary one is primarily within the domain of such authority. The petitioner is aware of this legal position. The petitioner avers in the petition that there is a delay in filing the appeal. Since the appellate authority has no power to condone the delay, he is filing the petition. The alternative remedy has been consistently held by Apex Court not to operate as a bar in at least four contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

11. I wish to quote the decision of the Apex Court relied on by the Petitioner in the case of **Radha Krishan Industries v. State of Himachal Pradesh.**, (supra).

“27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where : (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.”

12. Moreover, as held in the case of **M/s. Glaxo Smith Kline Consumer Health Care Limited** (supra), the Constitutional Court need to take note of legislative intent and exercise power consistent with the provisions of the statute. This court cannot disregard substantive provisions of appeal provided in a statute. This court needs to pass orders as prescribed through a mechanism provided in a statute.

13. In the present case, undisputedly, the statutory appeal of the petitioner was barred by limitation. The Maharashtra Police Act, 1951 provides complete machinery to challenge the order of the externment. The order of externment can only be challenged by the mode prescribed under the Act and not by the petition under Article 226 of the Constitution of India unless a writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction, or the vires of an Act is challenged. The prescription regarding limitation provided under a statute has a binding effect, and the same has to be followed regarding its mandatory nature. It is not the petitioner's case that the remedy provided under a statute is not effective. It is also not the ground raised in the petition nor argued by the respondent. No.3 has not acted in accordance with provisions of section 56 of the Maharashtra Police Act, 1951. The fundamental principles of judicial procedure appear to have been followed. The violation of fundamental rights as alleged by the petitioner is based on adjudication of factual grounds. Such factual grounds need to be raised before the Appellate Authority and based on such adjudication on factual grounds, alleged breach of fundamental rights can be considered. When alleged breach of fundamental rights is based on undisputed questions of fact and is based on inference on admitted fact, writ petition can be entertained in absence of statutory remedy being availed by the petitioner. The impugned order has not been passed in total violation of the principles of natural justice. The grounds raised by

the petitioner referred to above are questions of facts which need to be adjudicated by the appellate authority provided under the statute; the petitioner is not entitled to raise questions of facts the first time before this court.

14. The Apex Court in **Lt. Governor, NCT vs. Ved Prakash** reported in 2006(5) SCC 228 observed thus:

“18. The law operating in the field is no longer res integra which may hereinafter be noticed:

(i) In a proceeding under the Act, all statutory and constitutional requirements must be fulfilled.

(ii) An externment proceeding having regard to the purport and object thereof cannot be equated with a preventive detention matter.

(iii) Before an order of externment is passed, the procedure is entitled to an opportunity for hearing.

(iv) The test of procedural safeguards contained in the Act must be scrupulously complied with.

(v) The satisfaction of the authority must be based on objective criteria.

(vi) A proceeding under Section 47 of the Delhi Police Act stands on a different footing than the ordinary proceeding in the sense that whereas in the latter, the details of the evidence are required to be disclosed and, thus, giving an opportunity to the procedure to deal with them, in the former, general allegations would serve the purpose.

22.The fundamental right under Article 21 of the Constitution undoubtedly must be safeguarded. But while interpreting the provisions of a statute like the present one and in view of the precedents operating in the field, the court may examine the records itself so as to satisfy its conscience not only for the purpose that the procedural safeguards available to the procedure have been provided but also for the purpose that the witnesses have disclosed their apprehension about deposing in court truthfully and

fearlessly because of the activities of the procedure. Once such a satisfaction is arrived at, the superior court will normally not interfere with an order of externment.
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15. Reverting back to the facts of the present case, the show cause notice specifically refers to three offences under Chapter XVI and XVII of the Indian Penal Code, 1860, which are covered under section 56(1)(a)(b) of the Act. The show cause notice then refers to the in-camera statements, which indicate that the petitioner threatened the residents in the nearby area. The residents are apprehensive of the petitioner and unwilling to depose against him. Specific instances are referred to by four witnesses whose in-camera statements have been recorded about the movements of the petitioner. It is on that basis that the appropriate authority considered the matter. Subjective satisfaction has been recorded that the movements and acts of the petitioner were causing or calculated to cause alarm, danger or harm to the person or property or that there is reasonable ground for believing that the petitioner was engaged in the commission of an offence punishable under the specified chapter of the Indian Penal Code and witnesses were not willing to come forward to depose against the petitioner. Therefore, it is not possible to hold that there was no material to take action against the petitioner.

16. Learned advocate for the petitioner relied on the judgment of the Apex Court in the case of **Radha Krishan Industries vs. State of Himachal Pradesh and Others** reported in (2021) 6 SCC 771. The Apex Court, after considering the judgment in the case of **M/s Glaxo Smith Kline Consumer Health Care**

Limited (supra), has laid down parameters for entertaining the petition. There could not be a dispute about the preposition of law laid down by the Apex Court; however, in the facts of the present case, the finding of a violation of fundamental rights is based on the adjudication of facts to be adjudicated by the appellate authority. Without such adjudication, this court is unable to record a conclusive finding that there is a violation of fundamental rights. The competent authority appears to have exercised its administrative powers based on subjective satisfaction. Hence, the judgment in the case of **Radha Krishan Industries** is of no help to the petitioner.

17. In the facts of the case, therefore, I am satisfied that there is no ex-facie violation of fundamental rights nor principles of natural justice have been violated. Hence, the writ petition cannot be entertained. The same is dismissed. No costs.

(AMIT BORKAR, J.)