

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CRIMINAL APPLICATION NO. 2348 of 2018**

=====

MUSTAQUHUSSAIN MOHAMMADHUSSAIN KAZI

Versus

STATE OF GUJARAT

=====

Appearance:

MR VAIBHAV N SHETH(5337) for the PETITIONER(s) No. 1

DS AFF.NOT FILED (R)(71) for the RESPONDENT(s) No. 3

PUBLIC PROSECUTOR(2) for the RESPONDENT(s) No. 1

RULE SERVED BY DS(65) for the RESPONDENT(s) No. 2

=====

CORAM: HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 31/07/2018

ORAL ORDER

1. The present petition is filed under Article 226 of the Constitution of India for the purpose of seeking following relief.

" A). This Hon'ble Court may be pleased to admit and allow the present petition;

B). This Hon'ble Court may kindly be pleased to issue a writ of mandamus or a writ of certiorari or a writ in the nature of mandamus or certiorari or any other appropriate writ, order or direction thereby quashing and setting aside the impugned order dated 11.12.2017 passed by Joint Secretary, Home Department in Externment Appeal No. 23 of 2017 in rejecting the same as well as the impugned externment order dated 17.01.2017 being No. HADPA/79/2016 by learned Deputy Police Commissioner, Surat City, Zone-IV which is confirmed, whereby the petitioner is ordered to be externed from the districts of Surat City falling in the limits of police Commissioner Surat City, Surat Rural,

Tapi, Bharuch, Navsari, Valsad and Narmada being a 'dangerous' in the interest of justice.

(C) Pending admission, hearing and final disposal of this petition, this Hon'ble Court may kindly be pleased to stay the implementation, execution and operation of the impugned order dated 11.12.2017 passed by Joint Secretary, Home Department in Externment Appeal No. 23/2017 and the impugned externment order dated 17.01.2017 being No. HADPA/79/2016 by learned Deputy Police Commissioner, Surat City, Zone-IV in the interest of justice.

(D) Any other order/s that may be deemed fit and proper in the interest of justice may kindly be passed by this Hon'ble Court.

2. The case of the petitioner is that pursuant to the solitary offence registered against the petitioner being I-C.R.No.243/2015 registered with Varachha Police Station, Surat City, for the offence punishable under Sections 379, 356, 114 of the Indian Penal Code. A show cause notice came to be served under Section 59 of the Bombay Police Act, 1951 on 10.11.2016 by the respondent no. 2 with a view to extern the petitioner for a period of two years from the Surat City as well as from contiguous districts. It is this order which was carried out by way of appeal before the appellate authority which is registered as Externment Appeal No. 23 of 2017 was dealt with the and ultimately the appellate authority has confirmed the order of externment while dismissing the appeal preferred by the petitioner.

3. It is this exercise of jurisdiction is made subject matter of the present petition under Article 226 of the Constitution of India. The Court has admitted the matter on 23/03/2018 and granted ad-interim relief.

4. Learned advocate Mr. Vaibhav Sheth for the applicant has vehemently contended that order in question reflects non-application of mind and is also in complete violation of principles of natural justice. To contend this, learned advocate for the petitioner has stated this power of Section 59 is entrusted with the Deputy Police Commissioner, Zone-VI, Surat City has been reflecting in the show cause notice but unfortunately the hearing has been given before another police officer designated as Assistant Police Commissioner, Surat. So instead of Zone-IV, hearing has been extended by Police Commissioner and upon such hearing, straightway Deputy Police Commissioner, Zone-IV has passed order and, therefore, ex-facie hearing is given by one authority, and order is passed by another authority, which is completely violative of principles of natural justice.

5. Additionally, learned advocate has contended that the order suffers from the vice of non-application of mind in view of the fact that material circumstance which were brought before the authority have not at all been dealt with nor any subjective satisfaction on such contention is

reflecting in an order and further despite the fact that there is absolutely no material with respect to other areas, the authority has straightway, in an arbitrary manner, has passed an order externing the petitioner from several areas which are incorporated in an order and thereto for a substantial period of two years completely. In this view of the mater, the order ex-facie reflects arbitrariness as well as suffers from vice of non application of mind and favourable circumstances appear to have not been considered and dealt with. It is in this view of the matter, order requires to be quashed and set aside. As a result of this, stringent powers of externment ought not to have been utilized against the petitioner. Learned advocate has further contended that powers are always coupled with conscious duty not to act arbitrarily and has to act on the touchstone of constitutional mandate and as such principle has been violated, the order in question requires to be corrected. No other submissions have been made.

6. To meet with the stand taken by learned advocate for the petitioner, Mr. Mitesh Amin, learned Public Prosecutor appearing on behalf of the respondent authority has vehemently contended that the order is passed in complete consonance with the principles of justice. The show cause notice was issued, the hearing was made and the order is passed after assigning proper reasons and, therefore, there is substantial compliance of principles of natural

justice. Accordingly, learned Public Prosecutor has further submitted that looking to the status of the petitioner in the society and the material which was brought before the authority, the authority seriously apprehended that if the petitioner will not extend from other contiguous districts also then the activity of the petitioner would not be curbed and hence by way of subjective satisfaction the conclusion arrived at is not possible to be construed as perverse. Mr. Amin, learned Public Prosecutor has further contended that with a view to maintain law and order in the area, if powers are entrusted under the statute and these powers have been exercised after close scrutiny of material on record and, therefore, allegation that exercise of powers is suffering from vice of non application of mind is ill-founded. As a result of this, petition being devoid of merits deserves to be dismissed. No other submissions have been made.

7. Having heard learned advocates appearing for the parties and having gone through the material on record, few circumstances which are not possible to be ignored by this Court are as follow;-

(1) The show cause notice which has been issued is appearing beyond reasonable period,

(2) The foundation which has been made for exercise of externment is of an offence of year 2015 and the notice came to be issued in year 2016. Apart from this, show cause notice has been issued by the Deputy Commissioner of Police Zone-IV, in which it

has been directed that the hearing to be provided to the petitioner before the Assistant Commissioner of Police, Surat and after hearing , the order is passed by the Deputy Police Commissioner Zone-IV Surat, and therefore, this is a gross violation of principles of natural justice.

8. The Court is mindful of some of decisions on such issue and one of such decisions is rendered in case of **(M/s) Shree Ram Packaging vs. Union of India** reported in **1990 (2) GLH 343** which indicates that hearing before one officer and order passed by another officer is not permissible as is violating principles of natural justice and, therefore, hear is a case in which such is the position which is prevailing the order is not sustainable as is violative of principles of natural justice.

9. Apart from this, yet another circumstance which is to be taken note of is that petitioner is arraigned in offence which was lodged before Varaccha Police Station and there is no criminal antecedents of any nature which is reflecting from entire proceedings and, therefore, on account of this private dispute which has resulted into even filing of cross complaint and the case is pending, it cannot be said that any public interest is at jeopardies. Had there been any criminal antecedents, the Court might have not come to this conclusion but this single offence for which such stringent power is to be exercised is reflecting little

arbitrariness. Apart from that there is no material whatsoever in nature with respect to other areas and, therefore, to extern the petitioner for a period of two years from all these areas in absence of any sufficient material order cannot be said to be reasonable in any manner and, therefore, keeping in view well sound propositions of law laid down on this issue also order in question appears to be not sustainable in eye of law. As a result of this, impugned order requires to be quashed and set aside.

10. In view of aforesaid circumstances prevailing on record and in view of the settled position of law propounded by series of decisions on this issue of contiguous areas and districts, the Court is of the view that case is made out by the petitioner and the order passed against the petitioner appears to be not sustainable in eye of law.

11. Accordingly, present petition is allowed. The order of externment in Externment Appeal No. 23 of 2017 as well as order dated 17.01.2017 passed by respondent no. 2 externing the petitioner from the areas and the districts mentioned therein is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to cost. Direct service is permitted.

(A.J. SHASTRI, J)

VISHAL MISHRA