

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIJAY KUMAR SHUKLA

ON THE 15th OF SEPTEMBER, 2022

WRIT PETITION No. 15488 of 2022

BETWEEN:-

**JAMNALAL @ JAMNA S/O SHRI AMBARAM JI, AGED ABOUT 40
YEARS, OCCUPATION: LABORER 56 BLOCK NAGDA,
DISTRICT - UJJAIN (MADHYA PRADESH)**

.....PETITIONER

***(SHRI MAKBOOL AHMAD MANSOORI, LEARNED COUNSEL FOR
THE PETITIONER)***

AND

- 1. HOME DEPARTMENT THROUGH PRINCIPAL SECRETARY
VALLABH BHAWAN BHOPAL (MADHYA PRADESH)**
- 2. THE DISTRICT MAGISTRATE AND COLLECTOR UJJAIN
(MADHYA PRADESH)**
- 3. SUPERINTENDENT OF POLICE UJJAIN (MADHYA PRADESH)**
- 4. COMMISSIONER UJJAIN DIVISION UJJAIN (MADHYA
PRADESH)**

.....RESPONDENTS

(MS. VINITA PHAYE, GOVERNMENT ADVOCATE)

*This petition coming on for order this day, the court passed
the following:*

ORDER

1. The instant petition has been filed under Article 226 of the Constitution of India challenging the legality and validity of the order dated 06.06.2022 (Annexure-P/1) passed by Commissioner-Ujjain Division, Ujjain whereby dismissing the appeal preferred by petitioner under Section 9 of Madhya Pradesh Surksha Adhiniyam, 1990 (hereinafter refer as “Act”, 1990) whereby the petitioner has been externed from revenue District Ujjain and its adjoining districts for a period of one year.
2. The Superintendent of Police, Ujjain submitted a report on 10th March 2021 to District Magistrate, Ujjain about the criminal activities of the petitioner. In the report he had given the details of the criminal cases alleged to have been committed by the petitioner from year 2003 to 2021 and had made a request to pass an order of externment against the petitioner under Act, 1990.
3. Based upon the aforesaid report, District Magistrate, Ujjain registered a case on 19.03.2021. A notice was issued to the petitioner under Section 8 of the Act, 1990 to show-cause why a proceeding for order of externment should not be initiated against him. Counsel for the petitioner submits that the petitioner did not receive the said show-cause notice. The Collector has recorded in the order that despite service of notice, the petitioner did not appear in the proceedings and therefore, the matter was proceeded *ex-parte*. On the basis of report of Superintendent of Police, Ujjain, the District Magistrate, Ujjain passed an order of externment under

Section 5 (a) and (b) of the Act, 1990 externing the petitioner from District-Ujjain and also adjoining revenue limits of adjacent Districts for a period of one year. Being aggrieved by the said order the petitioner preferred an appeal under Section 9 of the Act, 1990 before Commissioner (Revenue). The said appeal was also dismissed by impugned order dated 06.06.2022 affirming the order of externment.

4. Counsel for the petitioner assailed the order of externment on the ground that as per the report of Superintendent of Police, Ujjain 12 cases are registered from year 2003 to 2020 and out of which one proceeding is of preventive against the petitioner. It is submitted that out of 11 cases, 3 cases are of year 2003. One case each of year 2004 and 2005. One case registered in the year 2005. In the said case, the petitioner has already been acquitted. One case is registered in year 2007. All these cases are old and Stale. Further one case is registered under Gambling Act in the year 2014 and 3 cases are registered in the year 2020 and one case under Gambling Act is registered. In the year 2021 preventive proceedings under Section 110 of Cr.P.C. was instituted against the petitioner.

5. Learned counsel for the petitioner submits that apart from non-service of notice on petitioner, the order of externment has been passed without compliance of the provisions of Section 5-B of Act, 1990. It is argued that the District Magistrate has not recorded his satisfaction that the witnesses are not willing to come forward to give evidence in public due to apprehension of their safety and therefore, the order of externment is bad in law. In support of his

submission, he places reliance of the judgment of Division Bench in the case of **Ashok Kumar Patel Vs. State of MP and Ors reported in 2009 (4) MPLJ 434** and also the judgment passed by the co-ordinate bench in the case of **Meena Sonkar Vs. State of MP and Ors reported in 2017 (2) MPLJ 565** and in the case of **Jahangeer Alvi Vs State of MP and Ors reported in 2017 (3) MPLJ 667** and also the judgment in the case of **Istfaq Mohammad Vs. State of MP and Ors reported in 2018 (3) MPLJ 349.**

6. Per contra, learned counsel for the respondent/state denied the submissions of the learned counsel for the petitioner and submitted that the externment order and the appellate order passed on the basis of material available against the petitioner. He relied on the report of the Superintendent of Police.

7. Before advertng to the contentions of the counsel for the petitioner as discussed earlier and examining them on the anvil of the law prevailing in the field of externment, it is apt to refer the provisions of the Adhiniyam, 1990. Section 5 of the Act under which the order of externment has been passed is quoted hereinbelow:-

"5. Removal of persons about to commit offence.-
whenever it appears to the District Magistrate

(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 reasonably 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, 4 XVI, or XVII or

under Section 506 or 509 of the Indian Penal Code, 1860 (45 of 1860) or in the abetment of any such offence, and when in the opinion of the District Magistrate 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; or

(c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant; the District Magistrate, may by an order in writing duly served on him or by beat of drum or otherwise as the District Magistrate thinks fit, direct such person or immigrant

(a) so as to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease; or (b) to remove himself outside the district or any part thereof or such area and any district or districts or any part thereof, contiguous thereto by such route within such time as the District Magistrate may specify and not to enter or return to the said district or part thereof or such area and such contiguous districts, or part thereof, as the case may be, from which he was directed to remove himself.”

8. A plain reading of Section 5 (b) of the Act quoted above, would show that for passing an order of externment against a person, two conditions must be satisfied :-

(i) There are reasonable grounds for believing that a person is engaged or is about to be engaged in commission of an offence involving force or violence or an offence punishable under Chapter XII, XVI, or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 or in the abetment of any such offence; and

(ii) In the opinion of the District Magistrate, 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.”

9. At this stage, I think it condign to survey the authorities on the legal issues canvassed on behalf of the petitioner.

10. Division Bench of this Court in the case of **Ashok Kumar Patel vs. State of M.P. & others, 2009(4) MPLJ 434** after considering Section 5 of the Act held thus:

“8. The expression is engaged or is about to be engaged" in the commission of offence involving force or violence or an offence punishable under Chapter XII, XVI or XVII or under Section 506 or 509 of the Indian Penal Code, 1860 or in the abetment of any such offence, shows that the commission of the offence or the abetment of such offence by the person must have a very close proximity to the date on which the order is proposed to be passed under Section 5(b) of the Act of 1990. Hence, if a person was engaged in the commission of offence or in abetment of an offence of the type mentioned in section 5 (b), several years or several months back, there cannot be any reasonable ground for believing that the person is engaged or is about to be engaged in the commission of such offence.”

11. In the case of **Ramgopal Ragjhuwanshi vs. State of M.P. and others, 2014(4) MPLJ 654** this Court after considering the earlier judgments in respect of Section 5 of the Act held that the order of externment cannot be passed on the basis of old and stale cases. A co-ordinate Bench of this Court at Indore in the case of **Bhim @ Vipul vs. Home Department, (W.P. No.4329/2015, decided on 14-09-2015)** has also considered the judgments

rendered in the cases of **Ashok Kumar (supra) and Ramgopal Ragjhuvasni (supra)** and held that the expression “engaged or is to be engaged” used in Section 5(b)(i) of the Act, 1990 shows that commission of offence or the abetment of such offence by the person must have close proximity to the date on which the order is proposed to be passed under Section 5(b) of the Act, 1990. In the case of **Sanju @ Sanjay Ben Vs. State of M.P. and others, 2005 (4) MPHT 102** while considering the provisions of the Act, 1990, the court held that the provision is not punitive in its nature and a person cannot be externed for his past acts. Although past activities of a person may afford a guide as to his behaviour in future, they must be reviewed in the context of the time when the order is proposed to be made. The past activities must be 7 related to the situation existing at the moment when the order is to be passed. In the present case from the facts it is noted that the same cases were being repeatedly considered by the authority and on earlier occasions, he found that the same material cannot formed a basis for passing an order of externment but by the impugned order is passed on the basis of most of the same cases which are old and stale which has already been held by this Court in number of cases as discussed above that the old and stale activities cannot be grounds of externment.”

12. Counsel for the respondents supported the order of externment and the appellate order and submitted that considering the cases against the petitioner, the District Magistrate, Ujjain has already passed an order of externment and the same has been

affirmed by the appellate authority and therefore, no interference is called for.

13. I have heard learned counsel for the parties. The learned counsel for the petitioner submitted that no notice was served on the petitioner. In the record filed by the respondents, there is one report by the S.H.O. to the Additional District Magistrate stating that on the address the petitioner was not found at residence. He was intimated on telephone but he did not turn-up to take notice. He has earlier also refused to take notice. Apart from this report, there is no service report on record to indicate that the notice was affixed on the residence of petitioner before the Panchs. There is no *panchnama* to the effect of service of notice or affixure of notice in the record therefore, it cannot be held that the service of notice on the petitioner was a valid service of notice.

14. Apart from that, upon perusal of the impugned order it is also manifest that the District Magistrate has only baldly stated the list of the offences registered against the petitioner to reflect that the petitioner is a daring habitual criminal but he did not record any opinion on the basis of the materials that in his opinion witnesses are not willing to come forward to give evidence in public against the petitioner by reason of apprehension as regards to their safety. Hence, in absence of any existence of material to show that witnesses are not coming forward by reason of apprehension to give evidence against the petitioner in respect of the alleged offences, an order u/s 5 (b) of Act, 1990 cannot be passed by the District Magistrate as held in the case of **Ashok Kumar Patel Vs.**

State of M.P. by the Division Bench that for a passing an order of externment against the person both the conditions mentioned under Section 5 (b) (i) and (ii) of Act, 1990 have to be satisfied.

15. This Court in the case of **Meena Sonkar vs. State of M.P. and others, 2017(2) MPLJ 565** and also in the case of **Anek alias Anil Nageshwar vs. State of Madhya Pradesh & four others [W.P. No.9297/2017, decided on 8-8-2017]** held as under:

“The second requirement is also necessitated to pass an order of externment that on account of the activities of a person, who is externed, the witnesses amongst public are not coming forth to depose in the criminal cases against him either under apprehension of person or property. But in the order impugned existence of such material is not on record, more so, no such finding has been recorded by the competent authority to record satisfaction. Therefore, the order impugned do not fulfill the second requirement of Section 5(b) of the Act.”

16. In the present case there is no satisfaction of the District Magistrate in the impugned order regarding second requirement of Section 5(b) of the Act 1990. He has not recorded his satisfaction on the basis of materials that witnesses are not willing to come forward to give evidence in the public against the petitioner by the 12 reasons of apprehension as regards to their safety. The authority has not discussed the nature of cases, the date of registration of cases and their present status. Most of the cases are old and stale.

17. Under the provision of Section 5 of the Act, if a detention order has to be passed, there has to be sufficient material for passing the order as fundamental right of freedom of a person is

involved. The order passed by the appellate Authority is nothing but repetition of the order passed by the District Magistrate without any application of mind.

18. In the aforesaid circumstances, the impugned order externment dated 30.09.2021 passed by District Magistrate, Ujjain and order dated 06.06.2020 passed by the Commissioner, Ujjain are unsustainable having been found in violation of the requirements of the Act, 1990 and the judgments passed by this Court which have been noted hereinbefore.

19. Accordingly, the writ petition is allowed. The impugned orders dated 30/09/2021 passed by District Magistrate, Ujjain and the order dated 06/06/2022 passed by Commissioner, Ujjain are quashed.

No order as to costs.

(Vijya Kumar Shukla)
Judge

Aiyer*

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