

GUJARAT HIGH COURT

Jawahar Panalal

Vs.

Sub Divisional Magistrate

Criminal Appln. No. 676 of 1961

(Miyabhoy and Mody, JJ.)

24.01.1962

JUDGMENT

Miabhoy, J.

1. This is a petition under Article 226 of the Constitution of India, in which an order, dated 29.11.1961, passed by the Sub-Divisional Magistrate, Dohad, in C. R. No. 2 of 1961, externing the petitioner from the revenue limits of Dohad Sub-Division and the surrounding talukas is being challenged. The petitioner is a resident of Devgadhi Baria. It is an admitted fact that he has a radio shop at that place and that he is a platoon commandant in the Taluka Home Guard Unit and a member of the Taluka Prohibition Committee. The Sub-Divisional Magistrate issued a notice on 4th September, 1961, calling upon the petitioner to show cause why an order under section 56 of the Bombay Police Act 1951, should not be passed against him. The allegations which were made in this notice were, broadly speaking, four in number : (i) that the petitioner caused thefts to be committed and helped thieves in disposal of stolen property (ii) that he took undue liberty with the females of the place; (iii) that, if anyone admonished the petitioner, he used to threaten them with murder : and (iv) that he was a dangerous and a desperate person and used to achieve his nefarious objects by encouraging permanent 'gundas' of the village, taking advantage of the positions which he occupied as a businessman, as a member of the prohibition committee and as a platoon commandant. The notice further alleged, inter alia, that because the petitioner was a dangerous and a desperate person and because the majority of the population consisted of the Banias and Brahmins, the latter were afraid of giving evidence in open Court against him on account of the apprehension that there would be danger to their persons and properties. The notice also further recited that complaints regarding molestation of females were not being filed because people were afraid of their reputation and because they feared that injury would be caused to their persons and properties. The petitioner appeared before the Sub-Divisional Magistrate in response to this notice and filed a written-statement. In this document, the petitioner complained that the information which was supplied to him was of a very vague

nature and that, if definite information was given to him regarding the various allegations, he would be in a position to meet the same. The petitioner denied each and every allegation which was made in the notice and gave a list of a number of persons whom he intended to examine. These persons were actually examined by the petitioner. Ultimately, the Sub-Divisional Magistrate, Dohad, passed the impugned order. He came to the conclusion that the charges leveled, against the petitioner were correct; that the petitioner was a desperate and a dangerous person, that his activities were causing danger and harm to the persons and properties of the people; that he was engaged in commission of offences involving force, violence and morality and that the witnesses did not come forward to give evidence in public against the petitioner because of the apprehension on their part as regards the safety of their persons and properties.

2. The learned Assistant Government Pleader raised three preliminary points and contended, on the basis thereof, that the petition should be rejected in limine. The first ground which he urged was that, though the petitioner had a right of preferring an appeal from the impugned order to the State Government, the petitioner had not availed himself of that remedy and rushed to this Court and, therefore, he urged that the petitioner not having exhausted all the remedies available to him, this Court should not grant him any relief in the exercise of its high prerogative of issuing writs. The answer of Mr. Shah to this contention was that an exception is made in those cases where a fundamental right is alleged to have been infringed and where principles of natural justice have not been complied with. It was urged that, in these two classes of cases, this Court has taken the view that, though all the remedies may not have been exhausted by a petitioner, his petition should be entertained and considered on its merits. In support of this contention, Mr. Shah relied upon a judgment of a Division Bench of this Court, delivered by Bhagwati, J., on 11th April, 1961, in Special Criminal Appln. No. 450 of 1960 (Guj). In this case, in dealing with a similar contention the Division Bench held that the rule that the High Court will not issue a prerogative writ when an alternative remedy is available, does not apply, when a petitioner comes to the Court with an allegation that his fundamental rights have been infringed and seeks relief under Article 226 of the Constitution, so that, if there is any threat of encroachment upon his fundamental rights, the Court will interfere and not compel him to exhaust his other legal remedies. The Division Bench also pointed out that the other exception which was well established was that, if the authority, against whom the complaint was made, had violated the rule of natural justice, the Court would interfere and protect the petitioner and not insist upon the petitioner to exhaust his alternative remedy. The learned Assistant Government Pleader, however, contended that the first exception had not been recognised by Their Lordships of the Supreme Court in *A. V. Venkateswaran v. Ramchand Sobhraj*¹. We cannot agree with this contention. In this case, their Lordships were examining the validity of two contentions which were urged by the learned Solicitor General. These contentions have been mentioned by their Lordships in paragraph 8 of their judgment at page 1508. The contentions were that the existence of an alternative remedy was a bar to the entertainment of a petition under Article 226 of the Constitution unless (i) there was a complete lack of jurisdiction in the officer or authority to take the action impugned, or (ii) where the order prejudicial to the writ petitioner had been passed in

violation of the principles of natural justice. Their Lordships in this case were not called upon to consider the validity of the submission that, where an infringement of a fundamental right is alleged, the failure on the part of the petitioner to exhaust all his remedies, is or is not a bar. Under the circumstances, this particular question was not considered by Their Lordships of the Supreme Court in this case at all. However, the observations which their Lordships have made in this particular case do show that the propositions formulated by the Solicitor General were not exhaustive and that there may be other circumstances

¹ AIR 1961 SC 1506

which may induce the Court to entertain and consider a petition, even though all the remedies are not exhausted. In this connection, their Lordships have pointed out that the rule about the failure to exercise an alternative remedy, when one is in existence, is a rule relating to the discretion of the Court, and that that rule does not act as a bar to the jurisdiction of the Court to entertain and grant a writ petition. Therefore, the fact that the petitioner has not exhausted all his remedies does not bar the jurisdiction of the Court to entertain and consider the petition, but, is a factor to be taken into account for the purpose of considering whether the discretion should or should not be exercised in favour of the petitioner, and, having regard to the judgment of this Court on which Mr. Shah relies, and which we have mentioned above, in our judgment, the fact that the petitioner had not filed an appeal, although he was entitled to file one, by itself, does not disentitle him to a consideration of his case, except that that may be one of the considerations that ultimately may weigh with us when determining the question as to whether the discretion to grant the relief should or should not be exercised in favor of the petitioner, and, having regard to the same judgment, if the petitioner succeeds in showing that the result of the impugned order, being bad in law, is that his fundamental right of freedom of movement is affected, that discretion would necessarily be exercised in favor of the petitioner.

3. The second point which the learned Assistant Government Pleader urged was that the petitioner was guilty of two misstatements and, therefore, the petition should be rejected. The two misstatements are alleged to be that the petitioner had stated that he wanted to examine some more witnesses, but that he was not permitted to do so by the Sub-Divisional Magistrate. The learned Assistant Government Pleader relied upon the affidavit of the Sub-Divisional Magistrate in which he had stated that no such request was made to him and that he had not refused to examine any witness whom the petitioner intended to examine. The petitioner further stated in his petition that, after the impugned order was passed, the petitioner was not given any opportunity to obey the order voluntarily, and that, as soon as the order was served upon him, he was removed, under police custody, to Baroda. The Sub-Divisional Magistrate, in his affidavit, has relied upon a document signed by the petitioner himself and, in that document, the petitioner stated that, during the period of externment, he wanted to stay at Baroda and he would go by a train which was known as Fast Train from Dohad, which started therefrom at 6-30 P. M. The Sub-Divisional Magistrate, further, stated in the affidavit that the petitioner had not asked for any time to go to his place to arrange his affairs and that he had voluntarily obeyed his order and agreed to leave Dohad and go straight to Baroda. The petitioner, however, in his rejoinder has stated that his departure from Dohad was not a voluntary one. According to him, when he asked

for time to obey the order, he was told that one police constable had been specially called from Baria to Dohad for the purpose of externing the petitioner and another person that four railway warrants had been prepared, and that, petitioner and that other person were sent through police custody to Baroda and were reported there to a police station at Baroda. Having regard to these allegations and counter allegations, the matter appears to us to be a disputed one and, on the record as it stands, it is not possible for us to say with definiteness that the statements made by the petitioner in his petition were misstatements. It is true that the petitioner signed a document in which he stated that he wanted to leave by a train. But, if that document was written by him under the circumstances mentioned in his rejoinder, it cannot be stated that his statement in the petition, that he had not been given an opportunity to obey the order voluntarily, is a misstatement.

4. On the merits, Mr. Shah raised several contentions. He contended (i) that the notice was vague and the information contained therein was not sufficient to afford him a reasonable opportunity to tender an explanation regarding the allegations against him; (ii) that the notice contained several irrelevant materials which were not germane to the enquiry under section 59, (iii) that the evidence of the petitioner was wrongly and illegally rejected in the sense that the Sub-Divisional Magistrate had not given any reasons, except vague ones, as to why he was rejecting the testimony adduced by the petitioner; and (iv) that, in any case, the order was bad, because the order did not give any reasons as to why the petitioner was being externed even from the contiguous areas.

5. In our judgment, the third ground relates to the sufficiency of the materials on which the order was based. That is entirely a matter which it was for the Sub-Divisional Magistrate to consider. This Court is not an appellate Court and it is not open to it to consider whether the order which was passed by the Sub-Divisional Magistrate was justified by the evidence on record. If the petitioner intended to contend that the materials at the disposal of the Sub-Divisional Magistrate were not sufficient, then, he should have preferred an appeal to the State Government and got the matter thrashed out there. In view of the conclusion, that we have arrived at, it will not be necessary for us to consider the fourth point as to whether the order was or was not bad because it did not furnish any reasons why the petitioner was being externed from the contiguous areas. In our judgment, the petitioner has been able to substantiate that the information given in the notice is of such a character that it was not reasonably possible for him to tender an explanation to the allegations made against him. Therefore, it will not be necessary to consider if the notice contained some irrelevant matters.

6. Before we proceed further, we may say that we have read the notice more than once and that we have found difficulty in exactly comprehending all the allegations which were contained therein. In fact, the learned Assistant Government Pleader had to struggle to state to us definitely as to whether the notice was one under section 56 (a) or not. At first, the learned Assistant Government Pleader stated that the notice seemed to be under section 56 (a); but, later on, he was more definite in his submission and submitted that he relied upon the following allegations in the notice to say that it was one which was given under section 56 (a); (1) that the petitioner was a

dangerous and a desperate person; (2) that his acts were cruel and ferocious; and (3) that he outraged the modesty of women. We find it difficult to say that these allegations bring the case within the purview of section 56 (a). The relevant part of section 56 (a) stated that when it shall appear to a District Magistrate or a Sub-Divisional Magistrate that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to person or property, he may proceed to make an externment order. Therefore, in order that a case may be made out under clause (a), it is necessary that two things must be stated. Firstly, reference must be made to the movements or the acts of the person concerned, and, secondly, it must be stated that, by reason of those movements or acts, alarm, danger or harm to person and property was being caused or was calculated to be caused. Now, if we turn to the aforesaid three allegations on which reliance is placed by the learned Assistant Government Pleader and read it in the context of the other allegations in the notice, we have no doubt whatsoever that the allegation that alarm, danger or harm to a person or property was caused or was calculated to be caused is totally absent. The learned Assistant Government Pleader relied upon one sentence in sub-para (2) of the notice in which it was stated, after referring to the activity of the petitioner about outraging the modesty of women and the failure of people to come forward and complain about his activity on account of prestige, that, if anything was said to the petitioner, it was feared that the petitioner might cause injury to person and property. But, we have no doubt whatsoever that this particular latter allegation has nothing to do with an intention to cause alarm to person and property by reason of the acts or movements of the petitioner. The allegation in this particular part of the notice is made in terms of the second part of clause (b), which stated that witnesses were unwilling to come forward to give evidence in public by reason of apprehension on their part as regards the safety of their person and property. Under the circumstances, we are disposed to hold that the enquiry against the petitioner was one under section 56 (b) and not under section 56 (a). The Sub-Divisional Magistrate in his order has stated that he was satisfied that the activities of the petitioner were causing danger and harm to the person and property of the people. Having regard to our aforesaid conclusion, this particular finding, in our judgment, cannot be supported inasmuch as it went beyond the purview of the notice which was issued to the petitioner. In the notice, there was no reference to any allegation that danger and harm to person and property of the people was being caused by reason of the activities of the petitioner.

7. Therefore, we shall consider the first point of Mr. Shah with reference to clause (b) of section 56 of the Bombay Police Act, 1951. The relevant allegations in the notice have already been summarised by us. In paragraph 1, it was stated that the petitioner achieved his own object through the permanent 'gundas' of the village by encouraging them. The submission of Mr. Shah was that this allegation did not give any indication of even a general nature as to what objects were sought to be achieved, what was the nature of the encouragement which was being given and who were the persons who were stated to be permanent 'gundas'. It was contended that the allegation did not even make it clear that the object which was sought to be achieved was illegal or that the encouragement was of that character. In paragraph 3, it was stated that, if anything was stated to the petitioner, then, he would threaten the person telling him of murder. Mr. Shah contended that this allegation was also too vague to permit the petitioner to give an explanation.

No indication was given whatsoever as to who were those persons to whom threats were being given, or whether those persons belonged to the village Devgadh Baria or at any other place. In the fourth paragraph, it was stated that the petitioner caused thefts to be committed and that he helped thieves in disposal of stolen property. Mr. Shah pointed out to us that, apart from the fact that this allegation was also of too general a nature, the order of the Sub-Divisional Officer showed that he had not been satisfied about the existence of reasonable grounds for believing in this allegation. In the summary of the final conclusion, which we have mentioned above, of the Sub-Divisional Magistrate, we have, said that he had stated that he was satisfied that the petitioner was engaged in the commission of offences involving force, violence and morality. There was nothing in this order from which it could be stated that a specific conclusion was reached that the petitioner was engaged in commission of offences relating to property. In the same paragraph 4, it was stated that the petitioner was taking undue liberties with sisters and daughters. In respect of this allegation, Mr. Shah raised two contentions. Firstly, he contended that the allegation did not come within the purview of Chapter XVI, and that, even if the allegation were true, the offence would be one under section 509, Indian Penal Code. On the other hand, the learned Assistant Government Pleader contended that the Gujarati expression used in the notice connoted not merely an indecent overture, but an indecent assault. In our judgment, there is force in the contention of the learned Assistant Government Pleader. Alternatively, Mr. Shah contended that this allegation was also too general to permit the petitioner to tender an explanation.

8. The question as to what information is to be supplied to a person against whom proceedings under sections 55, 56 and 57, Bombay Police Act, 1951, have been instituted, has to be answered with reference to the provisions contained in section 59 of the Act. In section 59, it is stated that, before an order under section 55, or 57 is passed against any person, the officer concerned should 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. The contention of the learned Assistant Government Pleader, therefore, is that the statute itself makes it clear that particulars of the allegations have not to be supplied by the officer concerned. He contends that the proceedings under sections 55, 56 and 57 are special proceedings which are initiated essentially with a view to protect the society from the depredations of dangerous and desperate characters. It is also pointed out to us that such proceedings and specially those under clause (b) of section 56, are to be started because witnesses do not come forward on account of the danger which they apprehend from the person concerned and it is, therefore, contended that if exact particulars were to be given, then, the very purpose for which the enquiry is being made will be frustrated and it is therefore, that the Legislature has deliberately stated in section 59 that the information which is to be supplied is to be only of the general nature of the material allegations and not full particulars of such allegations. We can see the force of this submission of the learned Assistant Government Pleader. But, at the same time, in interpreting the aforesaid part of the section, we must bear in mind and give a reasonable meaning to the latter part of the same subsection, which says that the officer concerned must give a reasonable opportunity to the person

concerned of tendering an explanation regarding them. Therefore, as pointed out in *In re, Govind Pandurang Phalke*, 57 Bom LR 957 at p. 961 : (AIR 1956 Bombay 61 at pp. 62-63), the test which is to be applied for the purpose of finding out whether the information which is supplied is proper or not, is whether the information is of such a character as to enable the person concerned to give a reasonable explanation regarding the allegations made against him. In this connection, it is important to bear in mind that, though the section stated that the information which is to be supplied is of a general character, the explanation which the person concerned is expected to furnish is in regard to the allegations themselves. It must also be borne in mind that the reason for furnishing the explanation is to persuade the officer concerned that the ingredients of the section concerned have not been satisfied. In other words, the information which must be supplied to the person concerned, if the case happens to be one under section 56 (b), must be such as to enable the person concerned to show to the officer if he can, that there are no reasonable grounds in existence for entertaining the belief that the person is engaged or is about to be engaged in the commission of an offence of the kind mentioned in clause (b). Therefore, no hard and fast rule can be laid down as to what information will be sufficient. Each case will have to be decided with reference to its own peculiar facts. On this topic, we may be permitted to make a few observations regarding the way in which an enquiry of the kind is required to be conducted. The power which has been given to the Executive by the Legislature in sections 55, 56 and 57 is an extraordinary power - a power which leads ultimately to the abridgment of a fundamental right guaranteed by the Constitution to the citizen. The result of any order passed by the officer concerned is that the person has to remove himself from the ordinary scene of his activity and is bound to be torn away from his economic, social and political activities. Whilst it is the duty of the officer to see that persons answering the description mentioned in the sections are externed, it must be borne in mind by the officer that, before such an order is passed, the Legislature expects him to assure to the citizen the safeguard which is mentioned in section 59. The officer must bear in mind that it is a very slender safeguard which the Legislature has given. The safeguard has got to be slender because the interests of the society as a whole have got to be protected. But, at the same time, having regard to the consequence of an order to the citizen, it is also the duty of the officer to see that that slender safeguard has been properly assured to the citizen. The officer acts on information supplied to him by sources to which the citizen may not have any access or of which he may have no knowledge whatsoever. The citizen has not been given a right to have access to this information or to test the truth thereof. The Legislature appears to have adopted this as a matter of policy. But, at the same time, it is the duty of the officer, before starting any enquiry, to feel himself satisfied in a case under section 56 (b), about the existence of reasonable grounds, for believing that the person concerned is engaged in any of the activities mentioned in the clause. But, the officer must remember that the information on which his satisfaction may have been based may be false or fabricated or unreliable or malicious. Therefore, the first duty of the officer concerned, when initiation proceedings under section 56 (b), or, under any other section, is to prepare a document which would furnish to the citizen such information as will enable him to refute it if he can. Only the officer knows what the information is on which he has acted. In order that the citizen may have the benefit of such information for refuting it, if he can,

it is the duty of the officer to prepare the notice in such a manner that a layman will be in a position to comprehend the nature of the allegations made against him. The officer must realise that if the notice happens to be prepared in a slipshod manner, it is bound to lead ultimately to failure of justice. Of course, the notice can be of a general nature. But, it must be remembered that it is of the material allegation of which the generality is to be mentioned. In couching the notice, in a general way, the materiality of the allegations cannot be allowed to be so sacrificed as to frustrate the object for which the notice is to be given. It must be remembered that whilst the notice is to be general, what is required of the citizen to refute is the material allegation. Therefore, the materiality of the allegation is not an irrelevant, unnecessary or useless adjunct of the information. Whilst notice may be general, it must not be too general, too abstract so as to smother the materiality of the allegations. An examination of sections 55, 56 and 57 reveals that the satisfaction which the Legislature expects under each of these sections is of a different kind. In a proceeding under section 55, even a reasonable suspicion can be the basis of an action. In a proceeding under section 56 (a), a mere appearance that a person is likely to cause an alarm can bring the citizen within the mischief of the clause. In a proceeding under section 56 (b), the satisfaction must be the appearance of the existence of reasonable grounds for a certain belief and, in a proceeding under section 57, the basis of action can be the entertainment of a reasonable belief. Having regard to these different degrees of satisfaction, the notice must be prepared in such a manner that the citizen has a reasonable opportunity to show that that degree of satisfaction cannot be attained by the officer concerned as required by the sections having regard to the information at his disposal. It is in the light of these facts that the notice must be prepared and information conveyed to the person concerned. We are constrained to hold that the information which has been conveyed is not merely of a general nature, but, it is of too general a nature. The information is so skeletal and so sparse that, beyond making a general statement that the petitioner had committed crimes in general of abatement of theft or disposal of stolen property or of outraging the modesty of women or that he had threatened people with murder, no facts are revealed as such in respect of which the petitioner can be expected to render a reasonable explanation. On account of the way in which the allegations are couched in the notice, the petitioner cannot have led any evidence before the officer concerned except evidence of general repute and character to dislodge the officer from the satisfaction which he had arrived at as a result of the information given to him by the reporting authority. In our judgment, therefore, whilst bearing in mind that, in a proceeding under Section 56(b), it is not necessary that precise particulars of the allegations are required by law to be given to the petitioner, we must hold that the information which was actually conveyed to the petitioner was actually so very skeletal that it was almost impossible for him to render an explanation which could have satisfied the Sub-Divisional Officer that there were not in existence reasonable grounds for believing that the petitioner was engaged in any of these activities. The injustice done to the petitioner is apparent from the fact that his defence has been totally rejected by the officer on the ground that the defence was of a general nature. But, if the information itself is too general, we fail to see how the petitioner could have led any evidence other than of a general nature. We are mentioning this, not with a view to show that the order is bad on the ground that the petitioner's evidence was

wrongly rejected, but, with a view to show that the information was of such a character that nothing particular and precise could have been adduced against the prima facie view taken against him by the officer concerned. Under the circumstances, even bearing in mind that the legislation is intended to deal with persons of dangerous and desperate characters and is intended to protect the society from the depredations of such persons, we must hold that, in the present case, the order was not justified inasmuch as the slender safeguard, which was accorded to the petitioner by the Legislature, has not been respected.

9. In the above view of the matter, it is not necessary for us to consider the question relating to the irrelevancy of the allegations made against the petitioner. But, we may mention that, for the reasons already given by us, we cannot uphold the contention of Mr. Shah that the information regarding the molestation of women was outside the purview of the mischief of the Act. Having regard to our conclusion that the allegation amounted to an allegation of outraging the modesty of females, the offence mentioned was one under section 354, Indian Penal Code, and, as such, under Chapter XVI of the Code.

10. Mr Shah has also contended before us that two of the reasons given by the officer as to why the witnesses were not available for giving evidence against the petitioner was not germane to the section. It is mentioned in the notice that because the majority of the population consisted of Banias and Brahmins, they were not giving evidence against the petitioner. As regards the alleged offences against the females, it was alleged that people did not give evidence because the reputation of the women would come to be tarnished. But, in our judgment, it would not be proper to read the allegations in the notice in a disjointed manner. The allegations must be read as a whole and reading those allegations in that manner, the allegation on this part of the subject appears to be that, both on account of the alleged desperate and dangerous character of the petitioner and on account of the nervousness of the members of the aforesaid communities and the fear of the loss of prestige, people were not giving evidence against the petitioner.

11. It was also further urged by Mr. Shah that the allegation that the people did not give evidence in Court could not be true because it was not alleged that any case had ever been filed in a Court of Law. In our judgment, this would be too literal a reading of the allegation. The substance of the allegation appears to be that, even if the cases were to be filed, people would not give evidence in the Court because of the fear inspired by the petitioner.

12. For the aforesaid reasons, in our judgment, the order is bad on the ground that the notice, dated 4.9.1961, was too vague to permit the petitioner to render an explanation of the allegations made against him. Therefore, the petition is allowed and a writ of certiorari in terms of prayer (A) should issue in favour of the petitioner. Rule made absolute.

Petition allowed.