IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL WRIT PETITION NO. 219 OF 2023

1. Narayan Sitaram Pawar
   Age – 70 years, Occupation – Agriculture
2. Shantaram Narayan Pawar
   Age – 27 years, Occupation – Agriculture

   Both R/o. Antraj, Taluka – Khamgaon
   District – Buldhana.

... Petitioners

Versus

1. Superintendent of Police
   Buldhana
2. Sub Divisional Police Officer,
   Khamgaon, District - Buldhana
3. Police Station Officer
   Rural Police Station, Khamgaon,
   District – Buldhana

... Respondents

Mr. Amit Bhate, Advocate for petitioners.
Mr. S.S. Doifode, APP for respondent Nos.1 to 3.

CORAM : VINAY JOSHI, AND
VALMIKI SA MENEZES, JJ.
RESERVED ON : 28.06.2023.
PRONOUNCED ON : 12.07.2023.

ORAL JUDGMENT: (PER: Valmiki Sa Menezes, J)

Rule. Rule made returnable forthwith. Heard finally with the consent of learned counsel appearing for the parties.

(2) By this writ petition, the petitioners seek to challenge the order of externment dated 15.12.2022 passed by the Superintendent of Police, Buldhana in terms of the provisions of Section 55(1) of the Maharashtra Police Act, 1951 (for short, 'the Act'). The order of externment has been imposed on the petitioners for a period of one year from the date of passing of impugned order.

(3) The main grounds on the basis of which the order of externment has been challenged are as under:

(a) That the show cause notice dated 13.08.2022 which formed the basis for passing of the impugned order, itself being issued more than a year and two months after the last incident alleged against the petitioners in FIR No.166/2021, there was no live link between the offence alleged against the petitioners and the notice issued under Section 55(1) of the Act; thus, the respondent No.2 lacked the jurisdiction to proceed with any action under the Act;

(b) That the essential jurisdictional facts required for exercising jurisdiction under Section 55 of the Act did not exist as on the date of issuance of the show cause notice; moreso, in the light of the fact that there was not a single crime reported or registered against the

petitioners between 06.05.2021 when the petitioners were last arrested in Crime No.163/2021 and the passing of the impugned order on 15.12.2022 and;

(c) That in view of total lack of explanation by the authorities under the Act, for the abnormal delay in filing proposal as on 09.08.2022 and the passing of the impugned order on 15.12.2022, the impugned order suffers from total arbitrariness and amounts to denial of the petitioners' fundamental rights under Article 19(1) of the Constitution of India; hence, the order is in direct contravention of the petitioners' fundamental rights freedom of movement guaranteed under Article 19(1)(d) of the Constitution of India.

(4) After service of notice of the petition on the respondents, no affidavit came to be filed by the respondent No.2 in support of the impugned order. Apart from supporting the findings of the subjective satisfaction recorded in the impugned order, the respondents have taken up a preliminary objection of maintainability of writ petition under Article 226, there being an alternate and equally efficacious remedy provided in terms of Section 60 of the Act, where the petitioner can take recourse to the filing of an appeal, if aggrieved by the impugned order. There is no explanation offered regarding the inordinate delay in filing proposal of externment of

petitioners by the Police Station Khamgaon (Rural), District–Buldhana, as late as 09.08.2022 more than one year after the last offence alleged against the petitioners in FIR No.166/2021.

(5) We have heard the learned counsel for the parties and perused the record of the petition.

(6) Mr. Bhate, learned counsel for the petitioners submits that the show cause notice on the basis of which the impugned order was passed relies upon eight crimes alleged against the petitioners who the respondents claimed are part of a gang of ten members ; the petitioners, who are father and son, have been alleged to have committed various offences, the last two of which are Crime No.165/2021 and 166/2021, both registered at Khamgaon (Rural), District – Buldhana ; he submits that in Crime No.166/2021, the petitioners were granted anticipatory bail by order dated 12.10.2021 passed by the Additional Sessions Judge, Khamgaon, District – Buldhana. Prior to registration of Crime No.166/2021, the petitioner No.1 was arrested on 06.05.2021 in Crime No.163/2021, while, in a subsequent offence registered in Crime No.166/2021, no arrest was effected by the police. Effectively, more than a year has passed since the last arrest of the petitioners on 06.05.2021 and a year has elapsed since anticipatory bail was granted by order dated 12.10.2021.

It is further submitted that in this regard, it is not the case of the respondents that the petitioners have committed any crime for an entire year prior to the passing of the impugned order, or that they have reached any of the conditions of bail granted to them by the competent Court. Consequently, there was no incident for an entire year, thus the impugned order has been passed without any jurisdiction or live link shown between the last offence and the necessity to extern the petitioners.

(7) The next submissions of the petitioners was that the impugned order externs the petitioners from the limits of three districts namely Buldhana, Akola and Washim while all the offences registered against them, more than a year prior to the show cause notice issued, are at Khamgaon (Rural) Police Station, situated in Buldhana District. It is thus submitted that the impugned order is in gross violation of the petitioners fundamental rights under Article 19 of the Constitution of India, as it would impinge upon the petitioners freedom of movement guaranteed under the Constitution of India.

The learned counsel for the petitioners has relied upon the following judgments in support of the contention raised in the petition :

(a) Umar Mohammed Malbari Vs. K.P. Gaikwad and anr. reported in ***(2000) ALL.M.R. (Cri.) 578,***

(b) Hanuman Rajaram Mhatre Vs. State of Maharashtra, reported in ***(2013)***

ALL.M.R. (Cri.) 1646,

(c) Ganpat 'Ganesh' Tanaji Katare Vs. Assistant Commissioner of Police, reported in *(2005) ALL.M.R. (Cri.) 2717*

(8) Per contra, Shri S.S. Doifode, learned APP for the respondents has submitted that even if the area within which the impugned order was required to operate, i.e. three districts was found to be excessive, this Court could limit the area of operation of the impugned order to Buldhana District or to Khamgaon Taluka. He submits that this Court could not exercise jurisdiction to substitute the subjective satisfaction that the authority has arrived at while passing the impugned externment order, to take a different view in the matter, only because such a view were possible. It was further by the learned APP for the respondents that the petitioners has an efficacious alternate remedy in the form of an appeal under the Maharashtra Police Act, 1951, in terms of Sections 60 thereof, and in that light the petition under Article 226 of the Constitution of India ought not to be entertained.

(9) Undisputably, the facts before us are that the last crime alleged against the petitioners was as contained in FIR No.166/2021 after which anticipatory bail was granted to the petitioner No.1 by the Sessions Court on 12.10.2021. According to the record, the petitioners were last

arrested on 06.05.2021 in Crime No. 163/2021 after which in Crime No.166/2021, no arrest was effected. Thus, the record reveals that prior to the proposal filed by the concerned Police Station before the respondent No.2 and the date of issuing show cause notice on 13.08.2022 for externment of the petitioners and other alleged members of their gang. There was no complaint or any incident alleged against the petitioners of the nature that would require any action in terms of Section 55 of the Act. This was for a period of more than one year since the anticipatory bail was granted on 05.08.2021 and, since, the petitioners last arrest on 17.06.2021. There is no explanation offered by the authorities before the respondent No.2 during the course of hearing of the notice issued under section 55, which was dated 13.08.2022 as to why there was such a long delay in requesting of the externment of the petitioners since the last alleged offence.

(10) An enquiry was conducted into the proposal prior to issuance of notice, which from the record does not specify any criminal activity at the behest of the petitioners from17/06/2021, the date of the last alleged crime committed by them until 13.08.2022, when the show cause notice purportedly issued under Section 55 of the Act was served on the petitioners. There is, therefore, clearly no allegation made of any offence or unlawful activity by the petitioners for more than one year prior to the show cause notice, which forms the factual basis for the respondent No.2 to

exercise jurisdiction under Section 55 of the Act to record the subjective satisfaction at such activity to form the basis that the act could cause any danger, alarm or reasonable suspicion that unlawful designs are entertained by such gang or body or by members thereof of which the petitioners were part.

(11) Section 55 of the Act reads as under :-

> "55. ***Dispersal of gangs and bodies of persons*** - *Whenever it shall appear in Greater Bombay and in other areas in which a Commissioner is appointed under section 7 to the Commissioner and in a district to the District Magistrate, the Sub-Divisional Magistrate or the Superintendent empowered by the State Government in that behalf, that the movement or encampment of any gang or body of persons in the area in his charge is causing or is calculated to cause danger or alarm or reasonable suspicion that unlawful designs are entertained by such gang or body or by members thereof, such officer may, by notification addressed to the persons appearing to be the leaders or chief men of such gang or body and published by beat of drum or otherwise as such officer thinks fit, direct the members of such gang or body so to conduct themselves as shall seem necessary in order to prevent violence and alarm or disperse and each of them to remove himself outside the area within the local limits of his jurisdiction [or such area and any district or districts, or any part thereof, contiguous thereto] within such time as such officer shall prescribe, and not to enter to area [for the areas and such contiguous districts, or part thereof, as the case may be,] or return to the place from which each of them was directed to remove himself."*

(12) Section 55 of the Act, therefore clearly postulates that there has to be certain jurisdictional fact in existence before the authority, can proceed with issuing the show cause notice to a person alleged to be a member of the gang, such facts being, that the movement or encampment of such gang in the area is causing or is calculated to cause danger or alarm or reasonable suspicion, and their externment is immediately required from that area. The provisions of Section 55 of the Act, therefore, presupposes that such danger is eminent and requires immediate action in terms of that Section; the provisions can be resorted to only if the proposal for externment contained such incidence which are of occurrence, immediately in point of time prior to the invoking of jurisdiction of the authority and not as late as over a year from the last alleged crime committed by the petitioners.

(13) In the case of **Deepak s/o Laxman Dongre (supra)**, the Hon'ble Supreme Court was considering the provisions of Section 56 of the Maharashtra Police Act, 1951 and whether an unexplained inordinate delay in filing a proposal for externment of the petitioners under those provisions, from the date of last offence alleged, would amount to denial of the offenders' fundamental rights under Article 19(1)(d) of the Constitution of India. In that case, the last offence alleged against the petitioner was on 02/06/2020 while the impugned order was passed on 15/12/2020 more

than six months from the last alleged offence. In that case also, the first offence relied upon was from 2013 and 2018 which was a stale offence in the sense that there was no live link between the offence and necessity to pass orders for externment. In that set of facts, the Hon'ble Supreme Court has held as under :

> *"4. We have given careful consideration to the submissions. Under clause (d) of Article 19(1) of the Constitution of India, there is a fundamental right conferred on the citizens to move freely throughout the territory of India. In view of clause (5) of Article 19, State is empowered to make a law enabling the imposition of reasonable restrictions on the exercise of the right conferred by clause (d). An order of externment passed under provisions of Section 56 of the 1951 Act imposes a restraint on the person against whom the order is made from entering a particular area. Thus, such orders infringe the fundamental right guaranteed under Article 19(1)(d). Hence, the restriction imposed by passing an order of externment must stand the test of reasonableness.*
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> *7. There cannot be any manner of doubt that an order of externment is an extraordinary measure. The effect of the order of externment is of depriving a citizen of his fundamental right of free movement throughout the territory of India. In practical terms, such an order prevents the person even from staying in his own house along with his family members during the period for which this order is in subsistence. In a given case, such*

order may deprive the person of his livelihood. It thus follows that recourse should be taken to Section 56 very sparingly keeping in mind that it is an extraordinary measure. For invoking clause (a) of sub-section (1) of Section 56, there must be objective material on record on the basis of which the competent authority must record its subjective satisfaction that the movements or acts of any person are causing or calculated to cause alarm, danger or harm to persons or property. For passing an order under clause (b), there must be objective material on the basis of which the competent authority must record subjective satisfaction that there are reasonable 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 offences punishable under Chapter XII, XVI or XVII of the IPC. Offences under Chapter XII are relating to Coin and Government Stamps. Offences under Chapter XVI are offences affecting the human body and offences under Chapter XVII are offences relating to the property. In a given case, even if multiple offences have been registered which are referred in clause (b) of sub-section (1) of Section 56 against an individual, that by itself is not sufficient to pass an order of externment under clause (b) of sub-section (1) of Section 56. Moreover, when clause (b) is sought to be invoked, on the basis of material on record, the competent authority must be satisfied that witnesses are not willing to come forward to give evidence against the person proposed to be externed by reason of apprehension on their part as regards their safety or their property. The recording of such subjective satisfaction by

the competent authority is sine qua non for passing a valid order of externment under clause (b).

11. In the facts of the case, the non-application of mind is apparent on the face of the record as the order dated 2nd June 2020 of the learned Judicial Magistrate is not even considered in the impugned order of externment though the appellant specifically relied upon it in his reply. This is very relevant as the appellant was sought to be detained under sub-section (3) of Section 151 of Cr. PC for a period of 15 days on the basis of the same offences which are relied upon in the impugned order of externment. As mentioned earlier, from 2nd June 2020 till the passing of the impugned order of externment, the appellant is not shown to be involved in any objectionable activity. The impugned order appears to have been passed casually in a cavalier manner. The first three offences relied upon are of 2013 and 2018 which are stale offences in the sense that there is no live link between the said offences and the necessity of passing an order of externment in the year 2020. The two offences of 2020 alleged against the appellant are against two individuals. The first one is the daughter of the said MLA and the other is the said Varsha Bankar. There is material on record to show that the said Varsha Bankar was acting as per the instructions of the brother of the said MLA. The said two offences are in respect of individuals. There is no material on record to show that witnesses were not coming forward to depose in these two cases. Therefore, both clauses (a) and (b) of sub-section (1) of Section 56 are not attracted."

(14) In the facts of this case, the non-application of mind is apparent on the face of the record. There is no reference in the impugned order to any incident, alleged crime or activity of the petitioners between the date of the last arrest on 06.05.2021 in Crime No.163/2021 with respect to petitioner No.1 or in the case of the petitioner No.2, wherein was released on bail on 05.08.2021 in Crime No.166/2021 in which he was last arrested on 17.06.2021. There is also no mentioned in the impugned order, of the fact that since the above referred date there has not been any fresh incident or criminal activity of the nature which required action under Section 55 against the petitioners, as members of a gang.

(15) Dilip Kokari (supra) also considers the similar case of abnormal delay of one and half year in passing of externment order. In that case, it has held as under :

> *"4. It needs to be reiterated in these cases that the law visualises a situation where an offender has become so persistently troublesome or dangerous to society around him that his physical presence in that area has to be done away with in the public interest. Delay in implementation, therefore, runs counter to and frustrates the objective behind these provisions. More importantly, a reviewing authority such as a Court, is unable in cases of gross delay, to ascertain as to whether the situation complained about is still in*

existence at the latter point of time when the order was passed. In the likely event of the wrongdoer at least in a few cases, having completely ceased indulgence in the offensive acts after service of the preliminary notice, and a prolonged period of good behaviour having followed the earlier activity that was complained of, the passing of an adverse order even if earlier justified may no longer be valid. Alternately, in the case of hardened and habitual offenders, with whom the police are most concerned, it is imperative that their activities are curbed at the earliest point of time. Dragging on enquiries for months and years will subject society to the torture from the offenders right through that long period and seriously undermine public confidence in the administration opening it to the inevitable charge of collusion. The casual and cavalier manner in which these proceedings were hitherto conducted, will have to be replaced by a sense of purpose and vigour. In serious matters of public security, such as these, speed is the watchwords, where the eye should be guided by the clock rather than the calendar, if at all there is honesty of approach.

6. In view of the abnormal delay in the passing of the order as far as the present case is concerned, the externment order is liable to be quashed and set aside on this ground alone."

(16) Similarly, in the case of **Shri Rajwardhan Patil (supra)** while deciding the challenge to externment order under Section 55, this

Court has considered that the criminal cases registered against that petitioner range from year 2008 to 2011. The show cause notice was issued on 01/06/2011 and externment order was passed on 06/02/2012. This Court considered the long gap between the time of issuance of show cause notice, the dates of the alleged offences which ranged as far back is 2008 and the date of passing of externment order in the year 2012, and whilst noting that there was no explanation for inordinate delay, has held that such externment orders could not outweigh the constitutional guarantee of fundamental rights. We make reference of Para Nos.9 and 10 of this Judgment as under :

> *"9. The show cause notices tabulate criminal cases registered against the Petitioners. These range from 2008 to 2011. By the time the externment order was passed, these could not be said to have retained any immediacy. We note, too, that in many of the cases, in the intervening period between the show cause notices and the externment order, many of the Petitioners were acquitted in several cases and obtained bail in others, leaving only a few still pending. This, to our mind, is a consideration that both authorities entirely overlooked. In the Affidavit in Reply in Writ Petition 399 of 2013, the fact of such acquittals and compromises is admitted, but the contention is that this was achieved by "turning witnesses hostile on the point of fear". There is no such finding in either the externment order or the appellate order. From the externment order, it appears that some of the Petitioners are co-accused in some criminal cases, while*

others are not; and it is, therefore, difficult to ascertain consistent, continuous, collective offences by all the Petitioners. Had the Petitioners each been dealt with separately and, perhaps, under some other section of the Bombay Police Act, matters may have been different. But as soon as all the Petitioners were joined together in a single externment order, one said to be under Section 55, it was incumbent on the authorities to show that their actions were that of a gang or body of persons acting as such; and that these actions bear a temporal proximity to the externment order.

10. There is, we find, a very long gap between the time of issuance of the show cause notices on 1st June 2011 and the externment order of 6th February 2012. There is no explanation for this at all in the Affidavit in Reply in Writ Petition 399 of 2013. In paragraph 13 of the Affidavit in Reply in the second matter, Writ Petition 459 of 2103, we are told that the delay was because there were multiple proposed externees in a single proposal; service of notices took time; the externees sought adjournments; the interning authority, having other duties, was also busy attending to VIPs and VVIPs, emergent law and order situations elsewhere, security arrangements during festivals and so on. We find this unacceptable. There is not only no specific material of repeated adjournments, but it surely cannot be suggested that the travel plans of a VIP or, for that matter, a VVIP, outweigh constitutional guarantees of fundamental rights."

(17) Similarly, in the case of **Sachin Bhaskar Badgujar**

(supra), the Court considered whether the live link was established between the offences registered between the years 2011 and 2015, while the externment order under Section 55 of the Act was passed only on 21/10/2017 and has observed as under :

> *"9. As rightly contended by learned counsel appearing for the petitioner that, there is no live link between the offences registered and initiation of the present externment proceedings against the petitioner. It appears from the perusal of the original record that while initiating the externment proceedings in the year 2017, the offences registered in the year 2011, 2012, 2013, 2014 and 2015 are also taken into consideration by the Respondent authorities. Therefore, there is no live link and proximity between the registration of the said offences and initiation of the present externment proceedings.*
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> *10. Upon perusal of the original record, it reveals that, the Superintendent of Police has passed the externment order on 27.10.2017 against the petitioner along with other four persons namely, Devendra @ Deva Chandrakant Sonar, Bhushan Chandrakant Sonar, Vijay @ Ladya Bapu Jadhav and Bhushan Rajendra Mali, observing that, all of them were operating as a Gang. Against the said order, the petitioner has filed the appeal before the Divisional Commissioner, Nashik, which came to be rejected by observing that, the petitioner was operating as a member of the gang. It is pertinent to note that, other four persons whose names have been mentioned above, against whom*

an externment order was passed along with the petitioner mentioning the same offences which have been considered while externing the petitioner, have filed appeal before the Divisional Commissioner, Nashik. The Divisional Commissioner has allowed the said appeal by observing that, the appellants therein were not operating as members of the Gang. Thus it appears that, there is total nonapplication of mind by the Divisional Commissioner while passing the order in the appeal filed by the petitioner and the another appeal filed by the members of the alleged gang."

(18) Applying the ratio laid down in these Judgments to the facts of the present case, there can be no manner of doubt that the respondents have not explained the inordinate delay in filing the proposal for externment dated 15.12.2022 more than a year after the last alleged offence. Without any explanation, the impugned order on the face of it, suffers from arbitrariness and the authority lacked the jurisdictional facts, to proceed in exercising its jurisdiction under Section 55 of the Act. There is no live nexus shown on the face of record between the last act allegedly committed by the petitioners as a part of gang on 06.05.2021, and the notice dated 13.08.2022. The impugned order is therefore, in total violation of of Section 55 as also in violation of the petitioners' fundamental rights under Article 19(1)(d) of the Constitution of India.

(19) This takes us to the next point argued by the petitioner, that the area of operation of the impugned order, externing the petitioners' from three districts of Buldhana, Washim and Akola, when the crimes registered against the petitioners' involved only the jurisdiction of Khamgaon (Rural) Police Station, was excessive and arbitrary. The argument raised by the petitioner was that where there is no material on record of the authority to justify the extent of the operation of the impugned order to an area of three districts, the impugned order has to be struck off in its entirety, and a writ Court, exercising jurisdiction under Article 226 of the Constitution of India would have no jurisdiction to reduce the area of operation of the impugned order by correcting the same.

(20) *Umar Mohammed Malbari (Supra)*, cited by the petitioner was a case where the petitioner therein was involved in activities alleged against him in the area of Bhivandi, while the order of externment, externed the petitioner out of the limits of Thane, Raigad and Nashik districts. Whilst holding that such an order amounts to a case of excessive order under Article 19 of the Constitution of India, the Court has held as under:

> *"7. In our judgment, there is considerable merit in the contention of Shri Mohite and the same will have to be accepted. If the activities indulged in by the petitioner were*

restricted within the Taluka of Bhiwandi within the Thane Commissionerate, the order externing the petitioner out of the Raigad and Nasik Districts which has within them Taluka places at a distance of more than 100 miles will undoubtedly be an excessive order and an excessive order has necessarily to be struck down because no greater restraint on personal liberty can be permitted within than is reasonable in the circumstances of the case. In the case of Balu Shivling Dombe v. The Divisional Magistrate, reported in 71 Bom.L.R. at page 79 which case was cited with approval in the case of Pandharinath Shridhar Rangnekar v. Dy. Commissioner of Police, The State of Maharashtra, on the facts of that case the externment order was set aside on the ground that it was far wider than was justified by the exigencies of the case. The activities of the externee therein were confined to the city of Pandharpur and yet the externment order covered an area as extensive as the districts of Sholapur, Satara, and Poona. These areas were far widely removed from the locality in which the externee had committed his illegal acts. The exercise of the power was, therefore, arbitrary and excessive, the order having been passed without reference to the purpose of the externment was quashed.

8. Shri Khothari, the learned Public Prosecutor however, contended that the entire order of externment was not liable to be struck down merely because it covered areas which were excessive than what was justified. This would be a case where appropriate areas of externment can be substituted with the areas contemplated in the impugned order of externment. In our judgment, there is no merit in the aforesaid contention of Shri Kothari. The High Court, when it issues the high

> *prerogative writ of certiorari, it directs the judicial Tribunal against which it is acting to transmit its record to the Court and if necessary to quash the order which the Tribunal has passed. It must not be forgotten that in issuing the writ this Court is not acting as a Court of appeal. It is exercising supervisory powers conferred upon it, and those powers are exercised by means of issuing high prerogative writs. But the power and jurisdiction of the Court is limited and the same cannot extend to the powers of an Appellate Court. This Court is only concerned with the question as to whether the Tribunal exercising judicial or quasi judicial functions has or has not acted without jurisdiction or whether in the exercise of jurisdiction it has acted in excess of jurisdiction. If it has acted in excess of jurisdiction, then the jurisdiction of this Court is to quash the order passed in excess of jurisdiction. There the power of the High court stops. It has no power to go further and to correct an excessive order passed by the authority concerned. Mohamed Usman v. Labour Appellate Tribunal, 54 Bom.L.R. 513."*

(21) Applying the ratio of the above judgment to the facts of the present case, the impugned order would clearly be in excess of jurisdiction vested in the authority under Section 55, in that, it has extended the area of operation to three districts of Buldhana, Washim and Akola, when the crimes registered against the petitioners' involved only the jurisdiction of Khamgaon (Rural) Police Station. As held in Umar Malbari (supra), the jurisdiction of this Court under Article 226 of the Constitution of India would be restricted to quashing the order passed in excess of

jurisdiction and not to correct an excessive order by reducing the area of its operation. Accordingly, the entire impugned order dated 15.12.2022 would be required to be quashed.

(22) Having concluded that the impugned order directly militates against the petitioners' fundamental rights under Article 19 the question of raising a plea of bar to the exercise of the Court jurisdiction under Article 226, there being an alternate remedy under Section 60 of the Act, does not arise.

As held in *Umar Mohammed Malbari (supra)* which considers precisely this point at Para No.9 as under

> *"9. Shri Kothari, however, submitted that this petition does not call for interference in exercise of the jurisdiction under Article 226 of the Constitution inasmuch as the petitioner has not exhausted the remedy of an appeal to the State Government. He further submitted that the present petition suffers from the vice of latches inasmuch as the petitioner has approached this Court about 15 months after the passing of the impugned order. In our judgment, there is no merit in this contention inasmuch as 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 Rule does not act as a bar to the jurisdiction of the Court to entertain and grant petition. Therefore, the fact that the*

petitioner has not exhausted all his remedies does not bar the jurisdiction of the Court to entertain and dispose of 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. 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. When an order of externment is passed against the petitioner, he can undoubtedly come to this Court with a writ petition on the ground that his fundamental right of freedom of movement is affected and this he can do without exhausting the other remedy provided for in the act viz. an appeal to the State Government against the order. In view of the fact that the petitioner has been externed out of the areas covering three Districts as also Greater Bombay, it will have to be held that his fundamental right to move freely throughout the territory of India which is guaranteed under Article 19(1)(d) of the Constitution has been infringed. In this view of the matter, the very fact that the petitioner has not exhausted his alternative remedy of an appeal or merely because he has come here after undue delay can be no hurdles in the matter of entertaining this petition."

(23) The fundamental rights of the petitioners under Article 19 of the Constitution of India having been infringed by virtue of passing of the impugned order, which were held to be arbitrary and contrary to the provisions of Section 55 of the Act, the bar in the form of an alternate

remedy under Section 60 of the Act by way of an appeal would not come in the way of the petitioners for the maintainability of this petition. Accordingly, we reject the preliminary objections raised by the respondents.

(24) In view of what we have held about, we allow this petition.

(25) Rule is made absolute in terms of prayer clause (a) of the petition. No order as to costs.

[VALMIKI SA MENEZES, J.] [VINAY JOSHI, J.]