

(2022) 12 PAT CK 0087

Patna High Court

Case No: Criminal Writ Jurisdiction Case No. 1160 Of 2021

Sanjeev Kumar @ Sanjeev Rai

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: Dec. 21, 2022

Acts Referred:

- Constitution Of India, 1950 - Article 226
- Bihar Control of Crimes Act, 1981 - Section 2(d), 2(d)(i), 3, 3(3)
- Arms Act, 1959 - Section 25, 26, 27, 28, 29

Hon'ble Judges: Chakradhari Sharan Singh, J; Khatim Reza, J

Bench: Division Bench

Advocate: Prasoon Sinha, Prabhat Kumar, M. Nasrul Huda Khan

Final Decision: Allowed

Judgement

1. Section 3 of the Bihar Control of Crimes Act, 1981 (hereinafter referred to as 'the Act') confers upon the District Magistrate a jurisdiction to pass an order, inter alia, directing a person, who is an 'anti-social element' within the meaning of Section 2(d) of the Act, to remove himself outside the district or part thereof, as the case may be, by such route, if any, and within such time as may be specified in the order and to resist him from entering the district or the specified part thereof, until, the expiry of such period, not exceeding six months as may be specified in the order; should the conditions specified under the said Section exist.

2. It is in the exercise of said power under Section 3 of the Act that the District Magistrate, Sheohar passed an order of externment dated 17.08.2021 in Case No. 7 of 2021 against the petitioner requiring him to remove himself from the district of Sheohar and to leave the jurisdiction of Piprahi Police Station from 17.08.2021 to 17.02.2022. By the said order, he had further been directed to remain physically present before Fenhara Police Station in the district of East Champaran every day, between 7:00 a.m. to 12:00 O'clock during the aforesaid period of externment i.e. 17.08.2021 to 17.02.2022. The said order of the District Magistrate, Sheohar dated 17.08.2021 is under challenge in the present writ application filed under Article 226 of the Constitution of India.

3. Evidently, the period of externment came to an end on 17.02.2022. This writ petition was filed soon after the impugned order was passed and came to be formally registered on 07.10.2021. One of the stands, which has been taken on behalf of the respondents to oppose the maintainability of the present writ application, is that since the period of externment has already expired, this writ petition has become infructuous and no useful purpose would be served by entertaining the writ petition,

any more.

4. It is the stand of the petitioner in response to the said plea on behalf of the State that declaring a person an 'anti-social element' is an essential condition precedent for exercise of jurisdiction under Section 3 of the Act. By the impugned order, the petitioner has been declared to be an anti-social element which is stigmatic in character and, therefore, the petitioner's right to challenge the conclusion of the District Magistrate that the petitioner is an anti-social element still survives. For this reason, the writ petition deserves to be entertained by this Court despite termination of the period of externment, learned counsel for the petitioner has contended.

5. In view of the controversy relating to maintainability of the writ petition with reference to the period of operation of the impugned order having lapsed and the petitioner's contention that the finding recorded by the District Magistrate, while passing the order is stigmatic, we have considered it apt to address the question as to whether an order passed under Section 3 of the Act is stigmatic or not, in the light of the definition of the expression 'anti-social element' underlying Section 2(d) of the Act. Only if the Court reaches a conclusion that the declaration of a person as an anti-social element is stigmatic in character, the Court would be required to consider the grounds set out by the petitioner to assail the impugned order; else it would be an exercise in futility to proceed with the matter, term of externment having already expired. We are proceeding, therefore, to deal with this aspect first.

6. In the background of the submissions which have been advanced on behalf of the parties on this point, to begin with, we need to take note of the definition of the expression 'anti-social element' falling under Section 2(d) of the Act, which reads as under :-

"(d) "Anti-social elements" means a person who-

(i) either by himself or as a member of or leader of a gang, habitually commits or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code; or

(ii) habitually commits or abets the commission of offences under the Suppression of Immoral Traffic in Women and Girls Act, 1956:

(iii) who by words or otherwise promotes or attempts to promote, on grounds of religion, race, language, caste or community or other grounds whatsoever, feelings of enmity or hatred between different religions, racial or language groups or castes or communities; or

(iv) has been found habitually passing indecent remarks to, or teasing women or girls; or

(v) who has been convicted of an offence under sections 25, 26, 27, 28 or 29 of the Arms Act of 1959."

7. We will be reproducing Section 3 of the Act later. There is no gainsaying that an order of externment under Section 3 of the Act can be passed by the District Magistrate only against a person who is an anti-social element, in his opinion.

8. It is apparent from Section 2(d) of the Act that for holding a person to be an anti-social element, either of the five conditions mentioned therein must exist. So as to bring an order of externment within the ambit of the first condition, the District Magistrate is required to record his opinion that the person against whom the externment order is to be passed either by himself or as a member of or leader of a

gang, 'habitually' commits or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code. For the second condition, the District Magistrate has to record his satisfaction that the person 'habitually' commits or abets the commission of offences under the Suppression of Immoral Traffic in Women and Girls Act, 1956. For the third condition, the District Magistrate is required to record his satisfaction that the person, by words or otherwise, promotes or attempts to promote, on the ground of religion, race, language, caste or community or other grounds whatsoever, feelings of enmity or hatred between different religions, races or language groups or casts or communities. In order to satisfy the fourth condition, the District Magistrate is required to record his satisfaction that the person has been found 'habitually' passing indecent remarks to, or teasing women or girls. For fulfilling condition No. 5, the District Magistrate is required to record that the person has been convicted of an offence punishable under Sections 25, 26, 27, 28, or 29 of the Arms Act of 1959. In the background of aforesaid statutory requirement we need to consider whether recording of satisfaction by the District Magistrate with reference to Section 2(d) of the Act, while passing an order under Section 3 of the Act, would be stigmatic or not.

9. The Supreme court in case of Kamal Kishore Lakshman vs Management of M/s Pan American World Airways Inc. and others reported in (1987) 1 SCC 146 has noticed the dictionary meaning of the word 'stigma' as something that detracts from the character or reputation of a person. It is a blemish, a disgrace and imputation, a mark or label indicating a deviation from a norm. It would be useful here to reproduce paragraph 8 of the said decision, which reads as under :

"8. According to Webster's New World Dictionary it is something that detracts from the character or reputation of a person, a mark, sign, etc. indicating that something is not considered normal or standard. The Legal Thesaurus by Burton gives the meaning of the word to be blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame. Webster's Third New International Dictionary gives the meaning as a mark or label indicating a deviation from a norm. According to yet another dictionary "stigma" is a matter for moral reproach."

10. Similarly, in case of Allahabad Bank Officers' Association and another vs. Allahabad Bank and others, reported in (1996) 4 SCC 504, the Supreme Court again referred to the dictionary meaning of the word 'stigma' which is something that detracts from the character or reputation of a person, a mark, sign etc. indicating that something is not considered normal or standard. The Supreme Court reiterated in case of Allahabad Bank Officers' Association(supra) that it is a blemish, defect, disgrace, disrepute, imputation, mark of disgrace or shame or mark or label indicating deviation from a norm.

11. It would be worthwhile mentioning that in the abovementioned cases, the Supreme Court had the occasion to address the meaning of expression 'stigma' in the matters relating to public service. However, the generic meaning of the term 'stigma' shall have application while testing the legality of any administrative or quasi judicial order passed by an authority exercising statutory powers.

12. Calling a person, an anti-social element with reference to Section 2(d) of the Act is palpably stigmatic in character as it is incumbent upon the competent authority, passing an order under Section 3 of the Act to record that the condition(s) precedent for passing of such order available under Section 2(d) of the Act, does/do exist. Such finding cannot be without casting aspersions on the conduct/ character and dignity of the person. This is the apparent reason why Section 3 of the Act requires the District

Magistrate to inform a person against whom the order under the said Section is proposed to be passed, by way of notice, the general nature of materials/ allegation against him to conclude that he is an anti-social element and, inter alia, his movements or acts in the district or any part thereof are causing or calculated to cause alarm, danger or harm to the persons or property. It would be apt to reproduce at this juncture Section 3 of the Act, which reads as under :

" 3. Externment, etc. of Anti-social Elements. - (1) Where it appears to the District Magistrate that-

(a) any person is an anti-social element, and

(b) (i) that his movements or acts in the district or any part thereof are causing or calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of any offence punishable under Chapter XVI or Chapter XVII of the Indian Penal Code, or under the Suppression of Immoral Traffic in Women and Girls Act, 1956, or abetment of such offence;

The District Magistrate shall by notice in writing inform him of the general nature of the material allegation against him in respect of clauses (a) and (b) and shall give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires and also of examining any other witnesses that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) The District Magistrate on being satisfied that the conditions specified in clauses (a) and (b) of sub-section (1) exist, may by order in writing-

(a) direct him to remove himself outside the district or part thereof, as the case may be, by such route, if any, and within such time as may be specified in the order and to resist from entering the district or the specified part thereof, until the expiry of such period, not exceeding six months as may be specified in the order;

(b) (i) require such person to notify his movement, or to report himself, or to do both, in such manner, at such time and to such authority or person as may be specified in the order;

(ii) prohibit or restrict possession or use by him of any such article as may be specified in the order;

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order;"

13. In such view of the matter, even after lapse of the term of the externment order, the petitioner can maintain his challenge to an order of externment passed by the District Magistrate on legally permissible grounds in a proceeding under Article 226 of the Constitution of India. The preliminary objection taken on behalf of the State against maintainability of the writ petition after expiry of the period of externment, in the Court's opinion, is untenable and is accordingly rejected.

14. We have heard at length Mr. Prasoon Sinha, learned counsel for the petitioner and Mr. M. Nasrul Huda Khan, learned SC-1 for the State of Bihar.

15. Counter affidavits have been filed on behalf of the respondents-State.

16. Mr. Prasoon Sinha, learned counsel appearing on behalf of the petitioner has submitted that it is manifest from the impugned order dated 17.08.2021 that the said order has been passed in the light of a report submitted by the Sub-Divisional Police Officer, Sheohar (respondent No. 4) to the effect that the petitioner is an anti-social element and commits offences punishable under Chapters XVI and XVII of the Indian Penal Code and that due to presence of the petitioner in the locality the people were scared and felt unsafe. He further mentioned in his report that the petitioner was on bail and his movements were found to be suspicious. He suspected that the petitioner might influence law and order situation during the forthcoming Panchayat Elections, 2021 and on that apprehension two sanhas had been registered on 18.02.2021. The report refers to four cases of 2011 in which the petitioner had been implicated. Mr Sinha submits that a notice was issued to the petitioner asking him to file his explanation with respect to the allegations made against him for taking action under Section 3(3) of the Act. In response to the said notice the petitioner had filed an explanation on 19.04.2021 stating, inter alia, that in all the four criminal cases mentioned in the notice the petitioner had been falsely implicated and finally acquitted in all of them by a competent court, after holding trial. He has argued that the District Magistrate mechanically passed the impugned order without even noticing the petitioner's reply by referring to four cases registered ten years before passing of the order. He accordingly contends that the impugned order suffers from the vice of non-application of mind.

17. Learned SC-1, representing the State has, in his submission, reiterated that the present writ application has lost its purpose after expiry of the period of the petitioner's externment. He has further submitted that an order passed under Section 3 of the Act cannot be treated to be stigmatic and that the submission that there is no application of mind by the authority while passing the impugned order is unfounded. He has submitted that it is an undisputed fact that there were four criminal cases registered against the petitioner in 2011 and anticipating that the petitioner's presence in the area would disturb peace during the ensuing local body election, the District Magistrate rightly passed the impugned order under Section 3 of the Act.

18. We have noticed hereinabove the definition of an anti-social element falling under Section 2(d) of the Act and we have also reached a conclusion that an order passed under Section 3 of the Act is stigmatic in nature, as such order would essentially contain statement(s) casting aspersions on the conduct, character and dignity of the person against whom such order is passed.

19. We are now proceeding to test to legality of the impugned order passed by the District Magistrate, Sheohar dated 17.08.2021 under Section 3 of the Act. From a plain reading of the impugned order it is manifest that the petitioner has been declared an anti-social element with reference to Section 2(d)(i) of the Act by referring to following four criminal cases which were registered against him in 2011:-

"1- Sheohar P.S. Case No. 07 of 2011 dated 20.01.2011, under Section 395 of the IPC and Section 17 of the CLA Act

2. Sheohar P.S. Case No. 19 of 2011 dated 04.02.2011 under Section 395 of the IPC

3. Sheohar P.S. Case No. 80 of 2011 dated 26.05.2011 under Sections 395/397 of the IPC

4. Sheohar P.S. Case No. 107 of 2011 dated 14.07.2011 under Section 395 of the IPC"

20. We have already discussed Section 2(d) of the Act. With reference to Section 2(d)(i) of the Act, a person can be said to be an anti-social element who either by himself or as a member of or leader of the gang, habitually commits or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code. Section 2(d)(i) of the Act can be applied only if an element of 'habituality' is present. The expression 'habitually' would mean repeatedly or persistently and it implies a thread of continuity stringing together similar repeated acts. [See (2004) 4 SCC 126, Vijay Ambadas Daware vs. Bal Krishna Baman Pandey].

21. In case of Dhanji Ram Sharma vs. Superintendent of Police (AIR 1966 SC 1766), the Supreme Court has stated that a habitual offender or a person habitually addicted to crime is one who is a criminal by habit or by disposition formed by repetition of crimes. In the present case, it is evincible that no case was reported against the petitioner, according to the impugned order, after 2011 nor before 2011. The conclusion arrived by the District Magistrate holding the petitioner to be an anti-social element by referring to Section 2(d)(i) of the Act with the aid of four criminal cases registered against him nearly ten years ago, in the Court's opinion, suffers from inherent legal infirmity.

22. Secondly, there is a categorical statement made in paragraph 6 of the writ petition that in response to the notice issued by the District Magistrate in compliance of the statutory requirement under Section 3 of the Act, the petitioner had filed an explanation on 19.04.2021 before the District Magistrate stating that in all the aforesaid four criminal cases in which he was falsely implicated, he had already been acquitted by the competent courts after trial. He had also stated that he was being victimised for political reasons. There is no denial of this fact in the counter affidavit, though it has been stated that in the light of this Court's order a further report was obtained from the Superintendent of Police, Sheohar which indicated that there were ten cases reported against the petitioner of which nine cases were of Sheohar district and one case registered in the district of East Champaran.

23. Be that as it may, we are testing the correctness of the impugned order based on its own contents. It is well settled principle that the correctness or otherwise of an order passed by the statutory authority is to be decided based on the contents of the order itself, which cannot be improved by filing affidavit(s).

24. Learned counsel for the petitioner appears to be correct in his submission that the impugned order has been passed by the District Magistrate without considering crucial aspect of the petitioner's explanation that he had been acquitted in all the four criminal cases mentioned in the impugned order as the basis for the proposed conclusion that the petitioner was a habitual criminal. The impugned order is silent on the said explanation and, therefore, suffers from non-application of mind.

25. We, at the cost of repetition, observe that the impugned order of externment suffers from the vice of staleness. In case of Shiv Prasad Bhatnagar vs. State of M.P. and another reported in (1981) 2 SCC 456, while dealing with the legality of an order of preventive detention has held, in no uncertain terms, that such order must be proximate and not stale. The Supreme Court added that staleness and vagueness are the vices, any single one of which is sufficient to vitiate the ground of detention.

26. Situated thus, in view of the aforesaid discussions, we come to the following conclusions :-

(i) Declaring a person an anti-social element within the meaning of Section 2(d) of the Act attaches stigma to such person as the expression casts aspersions on his conduct, character, reputation and dignity of such person. It is a blemish, a disgrace and an imputation on such person.

(ii) Unless there is an element of habituality in view of the expression "habitually" in Section 2(d)(i) of the Act, Section 2(d)(i) of the Act cannot be invoked to exercise power under Section 3 of the Act.

(iii) In the present case, the impugned order of externment suffers from the vice of staleness as it is based on the cases registered against the petitioner in 2011. Applying the law laid down by the Supreme Court's in its decision in case of Shiv Prasad Bhatnagar (Supra), the impugned order becomes unsustainable.

(iv) The impugned order also suffers from non-application of mind, inasmuch as, it is silent on the petitioner's explanation given in response to the notice under Section 3 of the Act that he had been acquitted in all the four cases.

27. For the aforesaid reasons the impugned order dated 17.08.2021 requires interference, which is accordingly set aside as illegal.

28. This writ application is accordingly allowed.

29. There shall, however, be no orders as to cost.