

## Balasaheb Kushaba Kadam and Others Vs State of Maharashtra and Others

**Court:** Bombay High Court (Aurangabad Bench)

**Date of Decision:** Feb. 28, 1991

**Acts Referred:** Bombay Police Act, 1951 " Section 56, 59, 59(1), 59(2), 62(2)  
Criminal Procedure Code, 1973 (CrPC) " Section 107

**Citation:** (1991) 4 BomCR 565 : (1991) 93 BOMLR 988

**Hon'ble Judges:** N.P. Chapalgaonker, J

**Bench:** Single Bench

**Advocate:** A.M. Kanade, Mustafa Momin, in W.P. Nos. 365 and 366, R.M. Borde, in W.P. Nos. 364, 369 and 370, K.B. Bhise, in W.P. No. 388, for the Appellant; D.H. Wagh, Assistant Public Prosecutor, for the Respondent

**Final Decision:** Allowed

### Judgement

N.P. Chapalgaonker, J.

All these petitions raise common questions of fact and law are, therefore, decided and disposed by this common judgment.

2. Criminal Writ Petition No. 332 of 1990 filed by Balasaheb Kushaba Kadam challenges order of the Sub-Divisional Magistrate, Ahmednagar, in

Externment Proceeding No. 22/88 directing petitioner to execute a bond for Rs. 1,00,000/- with two solvent sureties for Rs. 50,000/- each for

ensuring good behaviour for a period of two years and dismissal of appeal by the State Government against the said order. He was served with a

notice u/s 59 of the Bombay Police Act, 1951, pointing out that the activities of the petitioner in Deolali Pravara habitation and around it have

caused alarm, danger and harm and 4 criminal cases have been filed against him and the petitioner is trying to create communal tension by

instigating Hindus and Muslims and therefore, he should show cause as to why he should not be externed from the limits of Ahmednagar, Nasik,

Aurangabad and Pune Districts. It appears that after the enquiry and giving hearing to the petitioner, Sub-Divisional Magistrate was pleased to

direct him to execute the bond as mentioned above.

3. In Criminal Writ Petition No. 333 of 1990 filed by Vasant Baburao Kadam---petitioner challenges the order of the Sub-Divisional Magistrate,

Rahuri, dated 31st March, 1990 in Externment Proceedings No. 16 of 1988 directing the petitioner to execute a bond for Rs. 1,00,000/- with two

sureties for Rs. 50,000/- ensuring good behaviour for a period of two years and the dismissal of his appeal by the State Government. In a notice

served on the petitioner u/s 59, it was alleged that petitioner's activities in Deolali Pravara habitation and surrounding areas has caused alarm,

danger and harm and there are two criminal cases pending against him and he is instigating Hindus against Muslims and attacking commoners in the

name of Shiv Sena. After giving hearing to the petitioner and holding enquiry. Sub-Divisional Magistrate directed the petitioner to execute the bond

as aforesaid.

4. In Criminal Writ Petition No. 364 of 1990 filed by Nisar Ahmed Khatib s/o. Gulam Rabbani, petitioner challenges the order of the Sub-

Divisional Magistrate, Ambajorgai, in file No. 89-Externment 10 dated 31-10-1990 directing the petitioner to furnish cash security of Rs. 5000/-

with two sureties for the amount from different communities ensuring good behaviour for a period of two years. In a notice issued on him u/s 59 of

the Bombay Police Act, 1951, it was alleged that the petitioner is instigating Muslims against Hindus and his behaviour has created communal

tension in Pathrud village of Majalgaon taluka. On enquiry, learned Magistrate found that there is sufficient evidence to extern petitioner and

therefore, he found it necessary to direct petitioner to execute bond as aforesaid.

5. In Criminal Writ Petition No. 365 of 1990 filed by Kazi Mujibuddin s/o Kazi Mehbobuddin, petitioner challenges an order passed by the Sub-

Divisional Magistrate, Ambajorgai, in File No. 89 Externment 40 dated 31-10-1990 directing petitioner to furnish cash security of Rs. 5000/- with

two sureties from different communities to ensure his good behaviour for a period of two years. In a notice served on the petitioner u/s 59 of the

Bombay Police Act, 1951, it was alleged that the communal attitude of the petitioner is creating communal tension in pathrud village and instigation

of the petitioner is endangering the life and property of the Hindus. On enquiry, the Sub-Divisional Magistrate found that sufficient evidence is not

there justifying externment, however, it is necessary to direct petitioner to execute bond as aforesaid.

6. In Criminal Writ Petition No. 366 of 1990 filed by Anwarul Haq Sirajuddin, the petitioner challenges an order passed by the Sub-Divisional

Magistrate, Ambajorgai dated 31-10-1990 in File No. 89 Externment- 36 directing petitioner to furnish cash security of Rs. 5,000/- with two

sureties for the like amount from different communities to ensure his good behaviour for a period of two years. In a notice served on the petitioner

u/s 59 of the Bombay Police Act, 1951, in it was alleged that the communal attitude of the petitioner is creating communal tension in Pathrud village

and instigation of the petitioner is endangering the life and property of the Hindus. On enquiry the Sub-Divisional Magistrate found that sufficient

evidence is not there justifying externment, however, it is necessary to direct the petitioner to execute bond as aforesaid.

7. In Criminal Writ Petition No. 369 of 1990 filed by Syed Musa s/o Syed Wahabuddin, petitioner challenges an order passed by the Sub-

Divisional Magistrate, Ambajogai, dated 31-10-1990 in File No. 89-Externment-7 directing the petitioner to execute a surety bond worth Rs.

20,000/- with two sureties for the like amount to ensure his good behaviour for a period of two years. In a notice issued on him u/s 59 of the

Bombay Police Act, it was alleged that the petitioner is instigating Muslims against Hindu and on his instigation, a procession of Hindu youths was

attacked by Muslims and his activities are causing great danger to the peace and public order. On enquiry, learned Sub-Divisional Magistrate

found that there is no sufficient evidence to extern the petitioner but it is necessary to get the security as aforesaid.

8. In Criminal Writ Petition No. 370 of 1990 filed by Sk. Ayub Sk. Mahboob, petitioner challenges an order dated 31-10-190 in File No. 89-

Externment-8 passed by Sub-Divisional Magistrate, Ambajogai, directing the petitioner to furnish security of Rs. 5,000/- with two sureties for the

like amount different communities to ensure his good behaviours for a period of two years. In a notice served on him u/s 59 of the Bombay Police

Act, 1951, it was alleged that the petitioner is obstructing construction of Hindu temple at Pathrud even when judicial pronouncement declared it

to be a temple and is instigating Muslims against Hindus. On enquiry, it was found by the learned Magistrate that Enquiry Officer has not submitted

sufficient evidence of justify the proposed externment. However, he found that the directions to execute the bond as aforesaid is necessary.

9. In Criminal Writ Petition No. 388 of 1990 filed by Prabhakar s/o. Dashrath Chavan, petitioner challenges an order dated 15-11-1990 in File

No. 90-Externment-4 passed by Sub-Divisional Magistrate, Ambajogai, directing the petitioner to furnish security of Rs. 5,000/- with two cross

sureties to ensure his good behaviour for a period of two years. In a notice served on the petitioner u/s 59 of the Bombay Police Act, 1951, it was

alleged that petitioners activities in Dharur village has caused alarm, danger and harm to the public peace and tranquility and there are 13 criminal

cases pending against him. On enquiry, the Sub-Divisional Magistrate found that sufficient evidence is not there justifying externment, however, it is

necessary to direct the petitioner to execute bond as aforesaid.

10. I have heard S/Shri A.M. Kanade; R.M. Borde; Mohd. Mustafa Ahmad Momin; and K.B. Bhise, learned Counsel for petitioners and Shri

D.H. Wagh, learned Addl. Public Prosecutor for respondent-State. It was urged by the learned Counsel for petitioners that the orders directing to

execute the bond for keeping good behaviour cannot be passed u/s 56 of the Bombay Police Act, 1951, as the provision does not authorize. They

further submitted that the Magistrate acting u/s 56 has jurisdiction to take such actions as are intimated to the persons concerned by a notice u/s

59. Since in none of these cases, notice u/s 59 did speak about direction to execute a bond for good behaviour, no order to this effect can be

passed u/s 56. It was also submitted by Shri Borde and Shri Momin in that if a Magistrate records a finding that evidence collected by the police

officials is insufficient, Magistrate cannot ask to execute the bond for good behaviour as a lesser punishment.

11. Shri A.M. Kanade, learned Counsel appearing on behalf of some of the petitioners, submitted that the provisions of Chapter V(II) of the

Bombay Police Act, 1951 being restrictions on the fundamental right of liberty guaranteed by the Constitution of India, will have to be construed

strictly. He submitted that unless there is specific power given by a statute to pass an order requiring a person to give security for keeping peace,

no jurisdiction can be assumed by an authority to pass such an order. Shri Kanade submitted that in Sub-Chapter II of Chapter V of the Bombay

Police Act, 1951 there are two provisions wherein the security can be obtained. Sub-section (2) of section 59 authorizes passing of an order to

execute security bonds with or without surety for attendance during the enquiry. Sub-section (2) of section 62 also empowers authority making

order under sections 55, 56, 57 or 57-A to permit the re-entry of the person removed from that area on conditions including entering into a bond

with or without security for the observance of the conditions imposed. Shri Kanade, therefore, submits that an authority acting under Chapter V(II)

of the Bombay Police Act, 1951 can require a person to execute the bond only for two purposes, firstly for his presence before the Officer during

the enquiry and secondly for observance of the conditions imposed, in case, re-entry of the said person is to be permitted after the order of

externment is passed. Therefore, there is no provision which authorizes the Magistrate or the authority acting under this Chapter to direct a person

to execute a bond for his good behaviour as an alternative to the externment for which section 56 is provided.

12. In answer to this submission of Shri Kanade, Shri D.H. Wagh, learned Addl. Public Prosecutor, appearing for respondents invited my attention

to a judgment of Division Bench of Gujarat High Court in the case of Mukesh Gopaldas Patel Vs. A.I. Saiyed and Another, , and submitted that

u/s 56 of the Bombay Police Act it is open to the authority either to extern the respondent or to bind him over for good behaviour.

13. In this case, contention was raised before the Division Bench of Gujarat High Court that u/s 56 of the Act, two remedies are provided in cases

of persons who are alleged to be strong head and terror to the society. One is preventive action and another is punitive action. Externment is a

punitive action and taking suitable bond for good behaviour is a preventive action. Division Bench rejected the contention that externment is a

punitive action. It opined that both the action of externment and taking bonds are preventive in nature. While dealing with this submission, the

Division Bench did say that u/s 56 of the Bombay Police Act, it is open to the authority in case of a concerned head strong person who is of

menace to the society either to extern or to bind him over for good behaviour. With great respect to the learned Judges, these observations as

obiter are hard to be accepted. Jurisdiction resorted upon Magistrate acting under the Bombay Police Act to get suitable bond is only for the

limited purpose and it is not alternative to the action of externment.

14. Section 56 of the Bombay Police Act after listing in detail the circumstances in which the power under this section is to be exercised, lays

down that:

56. ...., the said officer may, by an order in writing duly served on him or by beat of drum or otherwise as he thinks fit, direct such person or

immigrant so to conduct himself as shall seem necessary in order to prevent violence and alarm or such prejudicial act, or the outbreak or spread

of such disease or notwithstanding anything contained in this Act or any other law for the time being in force, to remove himself outside such area

or areas in the State of Maharashtra (whether within the local limits of the jurisdiction of the officer or not and whether contiguous or not), by such

route, and within such time, as the officer may specify and not to enter or return to the area or areas specified (hereinafter referred to as "" the

specified area or areas"" ) from which he was directed to remove himself.

Relying on the clause ""direct such person or immigrant so to conduct himself as shall seem necessary"", Shri Wagh submitted that this clause is wide

enough to cover an order requiring the person concerned to execute a bond and furnish security for good behaviour.

15. Scope of the directions which can be give u/s 56 of the Bombay Police Act were considered by a Division Bench of this Court in the case of

Mrs. Marry Kutty Thomas v. State of Maharashtra and others 1987 Cri.L.J. 1612. Sawant, J., speaking for the Bench observed thus :

In other words, the order u/s 56 may either direct the person concerned only to conduct himself in a particular manner without leaving his present

place or direct him to remove himself from the said place.

A direction to conduct himself in a manner which shall seem necessary can only be interpreted to mean that he may be directed to refrain from a

particular act which according to the Magistrate is objectionable. This can never be interpreted to mean that he can be asked to execute a bond for

keeping good behaviour for the future period. The very nature of the provisions of Chapter V(II) of the Bombay Police Act and the provisions of

Chapter VIII of the Code of Criminal Procedure 1973 are distinct and different. It is true that both are preventive in nature. But the main purpose

of the powers under the Bombay Police Act is to remove that person from the troubled spot, and the main purpose of provisions of section 107 of

the Code of Criminal Procedure, is to allow the person to be in the same place but bound over him for keeping peace and good behaviour. The

Legislature has not provided in section 56, power to require a person to execute a bond with or without surety for his good behaviour. Such a

power would have been redundant in view of the fact that Chapter VIII of the Code of Criminal Procedure, 1973 is applicable in the area in which

Bombay Police Act, 1951 applies. Provision of execution of bonds or security was made in this Chapter in sub-section (2) of section 59 and sub-

section (2) of section 62 for the purposes other than keeping good behaviour. They are for securing attendance of the person during the enquiry

and for obedience of the condition imposed not to enter in the area specified after the externment order is passed. Thus, with respect to the learned

Judges of the Gujarat High Court, the observations that section 56 would also authorise the execution and order directing the execution of the

bond, cannot be accepted. The plain reading of section 56 would not permit such an interpretation particularly in the light of the Division Bench

judgment of this Court in Mrs. Marry Kutty Thomas's case (cited supra).

16. Shri R.M. Borde, learned Counsel on behalf of some of the petitioners, contended that the arena of the jurisdiction of the authority acting u/s

56 of the Act of 1951, would be determined by the contents of the notice issued u/s 59. He further submitted that no restrictions wider than are

intimated as proposed order in the notice u/s 59 can be imposed u/s 56. The nature of the requirement of the valid notice u/s 59 is two-field.

Firstly, the general nature of the material allegation against the person will have to be communicated to him to offer him a reasonable opportunity to

tender an explanation regarding them. The second purpose of the notice is to make aware the person whose liberty is to be restricted, the nature of

the proposed order. Shri Wagh submits that section 59(1) of the Bombay Police Act merely requires that the general nature of the material

allegations is to be informed out it does not require that the proposed order should also be intimated by this notice. Since provisions of section 56

to section 57-A impose restrictions on the personal liberty of the citizen guaranteed under Article 21 of the Constitution of India, not only that the

statute will have to be construed strictly, but the provisions of the hearing incorporating the rule of natural justice will also have to be construed

sufficiently wide to provide meaningful hearing. The opportunity to be given to the person concerned is to explain the alleged misdeeds and also to

submit his say about the proposed action. Therefore, if any of these two elements is absent, the notice will not be a valid notice. In neither of the

notices which have preceded the impugned orders in all these writ petitions, any whisper about the proposed order to execute bond for keeping

good behaviour can be heard. What was proposed is that the petitioner is to be externed. They were not intimated any time that it is likely that the

authority would ask them to execute the bond to secure their good behaviour for a particular period. The proposed order is the basis on which a

man would like himself to be defended. The point raised by Shri Wagh is no more res interga. The Division Bench of this Court in Mrs. Marry

Kutty Thomas's case (cited supra) have already repelled the contention. The Division Bench considering the provisions of section 59(1) observed

thus:

This language of the section implies that the person concerned must at least know that the order proposed is under either of the said section. It

therefore, legitimately follows that he should also know the kind or the nature of the order and its essential particulars. The ultimate order that may

be passed may not in all respects be the same as was proposed. But that may be because after applying his mind to the material which comes

before him in the enquiry, the officer may come to the conclusion that the action proposed is not warranted in the circumstances of the case. But

this eventuality also enjoins upon the officer that he should intimate the person concerned the extreme action that is proposed against him. The

person concerned is entitled not only to tender his explanation for the allegations but also for the action proposed against him.

Since notices issued to the petitioners in these petitions u/s 59(1) do not contain an intimation that the order requiring the petitioners to execute the

bond for good behaviour is likely to be passed, no such order could have been passed by the authority concerned even assuming that section 56

authorizes the order requiring execution of the bond for good behaviour. Therefore, failure to communicate the proposed order, nullifies the

provisions of section 59 incorporating the doctrine of audi alteram partem and, therefore, any order passed in furtherance of such notice, nature of

which was not intimated to the person whose liberty is infringed can never be a valid order.

17. In the result, all the petitions are allowed. Order passed by Sub-Divisional Magistrate, Rahuri, on 31st March, 1990 in Externment Proceeding

No. 22/88 and confirmed by the Government of Maharashtra in File No. EXT/1490/158/Visha-5, dated 25th September, 1990 are both hereby

quashed. Order passed by Sub-Divisional Magistrate, Rahuri, on 31st March, 1990 in Externment Proceeding No. 16/88 and confirmed by the

Government of Maharashtra in File No. EXT/1490/157/Visha-5, dated 20th June, 1990 are both hereby quashed. Similarly, orders passed by

Sub-Divisional Magistrate, Ambajogai, in File Nos. 89-Externment-10; 89-Externment-40; 89-Externment-36; 89-Externment-7; 89-Externment-

8, dated 31st October, 1990 and No. 90-Externment-4, dated 15th November, 1990 are all hereby quashed. Rule is made absolute in the above

terms.