Kishan Chand Arora

Vs

Commissioner of Police, Calcutta

Petition No. 22 of 1960

(CJI B.P. Sinha, J.L. Kapur, P.B. Gajendragadkar, K. Subha Rao, K.N. Wanchoo JJ)

09.12.1960

JUDGMENT

WANCHOO, J. -

This petition under Art. 32 of the Constitution challenges the constitutionality of s. 3 of the Calcutta Police Act, No. IV of 1866, (hereinafter called the Act). The facts necessary for our purpose are these. On August 11, 1954, the petitioner entered into an agreement with one Haripada Bhowmick, who is respondent No. 3 with respect to an eating house named 'Kalpatoru Cafeteria', situate in No. 2 Chowranghee Road, Calcutta. The petitioner was appointed a contractor by this agreement and was given and exclusive use and occupation of the said eating house upon certain terms and conditions. A licence has to be taken out with respect to an eating house under s. 39 of the Act. It appears that originally the licence was in the name of Bhowmick, and one of the conditions of the licence was that the eating house should not be sublet without permission of the Commissioner of Police (hereinafter referred to as the Commissioner). On the date of the agreement, Bhowmick held a licence for the eating house, which was to expire on March 31, 1955. It is said that under the agreement the licence was to remain in the name of Bhowmick while the petitioner was to carry on the business as a contractor. The petitioner carried on the business from after the date of the agreement and no application for a fresh licence was made by him before March 31, 1955, when the licence in the name of Bhowmick was to expire. It was only on August 8, 1955, that an application for licence was made by the petitioner on behalf and in the name of Bhowmick, though the business was continued to run by him all the time after March 31, 1955. It appears that the application made in the name of Bhowmick was rejected on December 27, 1956; but in the meantime Bhowmick was prosecuted on September 10, 1955, for running the eating house without a licence and was fined on December 12, 1955. Thereafter a notice was issued to Bhowmick on September 7, 1956, to show cause why his application for licence should not be refused inasmuch as he had not applied in time and violated the condition of the licence by the sub-letting the eating house to the petitioner. Thereafter the petitioner applied on September 21, 1956, for the issue of a licence in his own name. It may be mentioned that in the meantime there had been disputes between Bhowmick and the petitioner and a suit had been filed by Bhowmick against the petitioner in October 1956 in that connection. It masy also be mentioned that though the petitioner applied for the first time on September 21, 1956, for licence he had already been prosecuted in October, 1955, for keeping an eating house without a licence and convicted in November 1955. The application made by the petitioner on September 21, 1956, was eventually rejected on March 30, 1958, though in the meantime the petitioner was all along continuing the business of the eating house without having obtained a licence. After the rejection of his application the petitioner applied to the High Court under Art. 226 of the Constitution challenging the constitutionality of s. 39 and also challenging the order of the Commissioner rejecting his licence on various grounds. This application was dismissed

on August 7, 1958. Thereupon the petitioner went up in appeal to a Division Bench of the High Court which was disposed of on March 4, 1959. The Division Bench held s. 39 to be constitutional. It further held that as extraneous matters had been taken into account in rejecting the application of the petitioner for a licence the rejection was not in accordance with law. However, as the period of one year for which a licence is valid under s. 39 had expired in September 1957, and the judgment was being delivered in March 1959, the appeal was dismissed on the ground that that application could not be considered in 1959. Thereupon the petitioner made another application to the Commissioner on March 30, 1959, for the period from April 1, 1959 to March 31, 1960. During all this time the petitioner was carrying on his business as a keeper of the eating house without a licence. This application was found defective and another application was made on May 14, 1959. In the meantime, the petitioner again applied to the High court on or about May 8, 1959, under Art. 226 of the Constitution in order to compel the Commissioner to issue him a licence or in the alternative to compel him not to prosecute him for keeping an eating house without a licence and for such other orders as the High Court might deem fit to pass. It may be mentioned that day to day prosecution of the petitioner had begun from February 1956 under s. 40 of the Act for continuing to keep an eating house without a licence. This writ application filed in the High Court was withdrawn by the petitioner on May 13, 1959, as his application to the Commissioner of March 30, was defective. On May 30, 1959, the Commissioner rejected the application of the petitioner for a licence on the ground that his antecedents and his present conduct showed that he would not keep good behaviour and further that he would not be able to prevent drunkenness or disorder among the persons frequenting or using the eating house. The petitioner's complaint is that he was not heard before the order rejecting his application was passed. Then on June 15, 1959, the petitioner again applied under Art. 226 of the Constitution to the High Court against the rejection of his application on May 30. On February 11, 1960, the High Court allowed the petitioner to withdraw the application with liberty to move such application as he may be advised before this Court, in case such liberty was necessary. Thereafter the petitioner moved this Court by his present application on February 15, 1960.

His main contention before us is that s. 3 of the Act confers naked and uncanalised powers on the Commissioner to grant or refuse a licence and that no criteria have been laid down anywhere in the Act to guide the discretion of the Commissioner. Further, no opportunity is provided to an application for a licence to be heard either orally or in writing before passing orders on an application for licence; in consequence, the Commissioner has been given completely arbitrary powers either to grant or to refuse a licence and this amounts to an unreasonable restriction on the fundamental right of the petitioner to carry on the trade of eating house keeper. Besides this attack on the constitutionality of s. 39 the petitioner also contends that the order is mala fide and should be struck down on this ground. There are some other grounds in the petition but they have not been pressed before us and it will not be necessary to consider them.

The first question therefore that falls for consideration is whether s. 39 of the Act is a reasonable restriction within the meaning of Art. 19(6) on the fundamental right to practise any profession or to carry on any occupation, trade or business contained in Art. 19(1)(g). Sec. 39 is in these terms:-

> "The Commissioner of Police, may, at his discretion, from time to time, grant licences to the keepers of such houses or places of public resort and entertainment as aforesaid for which no licence as is specified in the Bengal Excise Act, 1909, is required upon such conditions, to be inserted in every such licence, as he, with the sanction of the said State Government from time to time shall order, for securing the good behaviour of the keepers of the said houses or places of public resort or

> entertainment, and the prevention of drunkenness and disorder among the persons frequenting or using the same; and the said licences may be granted by the said Commissioner, for any time not exceeding one year."

Learned counsel for the petitioner contends that the language of s. 39 shows that an absolute discretion, untrammelled by any considerations, is conferred on the Commissioner by this section and there is nothing either in the section or anywhere in the Act to guide the discretion of the Commissioner in the matter of granting such licences. Therefore, according to learned counsel, the power conferred on the Commissioner is arbitrary and unguided and such power is necessarily to be struck down on the ground that it cannot be a reasonable restriction on the fundamental right to carry on trade. There is no doubt that if the section empowers the Commissioner to grant or refuse a licence without any criteria to guide him, it would be an unreasonable restriction on the right to carry on trade. We have therefore to see whether there is any guidance either in the section or in the Act to regulate the exercise of discretion of the Commissioner in the matter of granting such licences. In this connection is must be remembered that the Act was passed in 1866 when there were no fundamental rights and we cannot expect that meticulousness of language which should be found in statutes passed after January 26, 1950. It may also be mentioned that the Act replaced two earlier Acts, namely, Act XIII of 1856 and XLVIII of 1860. The Act of 1860 also contained provisions for licences for eating houses in ss. 11 and 12 thereof, though the language of those sections was somewhat different. Sec. 11 laid down that in the towns of Calcutta, Madras and Bombay no eating house shall be kept without licence and provided for a penalty for the same. Sec. 12 then laid down that the Commissioner shall from time to time grant licences to keepers of such houses upon conditions for securing the good behaviour of the keepers of the said houses and for the prevention of drunkenness and disorder among the persons frequenting or using the same. The language of s. 39, however, is different inasmuch as it provides that the Commissioner may at his discretion from time to time grant licences. The Act of 1860 was interpreted by the Bombay High Court in Rustom J. Irani v. H. Kennedy [(1901) I.L.R. 26 Bom. 396.] as giving no discretion to the Commissioner to refuse a licence if the person applying for the licence was willing to fulfil the conditions imposed thereunder. In the case of Calcutta, however, s. 39 made a change in the language contained in the earlier Act giving discretion to the Commissioner in the matter of grant of licences. The question therefore is whether the word "discretion" introduced by s. 39 means an absolute and unguided discretion and would therefore now become an unreasonable restriction on the fundamental right of a citizen to carry on the trade of keeping an eating house. There is no doubt, as we have already indicated, that the section does not say as many of the provisions of laws passed after January 26, 1950, do that the Commissioner would grant licence on certain specified considerations. The contention on behalf of the petitioner is that the first part of s. 39 confers an absolute discretion on the Commissioner to grant or to refuse a licence just as he pleases and that the second part of the section merely provides for certain conditions to be imposed in case the Commissioner pleases to grant a licence. We are however of opinion that when we are judging a law passed in 1866 to decide whether it satisfies the test of constitutionality based on Art. 19(1)(g) and Art. 19(6), we should take the section as a whole and see whether on a fair reading of the section it can be said that there is no guidance for the Commissioner in the matter of granting or refusing licences and his power is arbitrary. If such guidance can be found on a fair reading of the section, there would be no reason for striking it down simply because it has not been worded in a manner which would show immediately that considerations arising from the provisions of Art. 19(1)(g) and Art. 19(6) were in mind - naturally those considerations could not be in the mind of the legislature in 1866. We have therefore so see whether an Act passed before the Constitution came into force can be reasonably and fairly read as containing guidance in the matter of licensing, as in this case. If it can be fairly

and reasonably read to contain guidance it should not be struck down. If, on the other hand, on a fair and reasonable construction of the section as a whole, we come to the conclusion that there is no guidance in it and the discretion vested in the Commissioner is absolute and arbitrary it will have be struck down.

What then does the section provide ? It certainly gives powers to the Commissioner to grant licences at his discretion. Those words, however, by themselves do not necessarily mean that the Commissioner has the power to act arbitrarily and grant licences where he pleases and refuse where he does not please to do so. The section provides further that the licence has to be granted upon certain conditions and those conditions have to satisfy two objects, namely, (i) securing of the good behaviour of the keepers of the said houses or places of public resort and entertainment and (ii) the prevention of drunkenness and disorder among the persons frequenting or using the same. Of course, it is implicit in the section that a licence will only be granted to a person who is the keeper of an eating house. We cannot read the section as laying down that the discretion is absolute and that the imposing of conditions for the aforesaid two objects only arises after that absolute discretion has been exercised in favour of the grant of licences. We see no unfairness or unreasonableness in reading the section to mean that the Commissioner shall satisfy himself (i) that the person applying for a licence is the keeper of an eating house, meaning thereby that he has a place where he can carry on the business or trade and that he actually and effectively has control and possession of that place, (ii) that the keeper is a person of good behaviour so that the eating house may not become a resort of criminals and persons of ill-repute, and (iii) that the keeper is in a position to prevent drunkenness and disorder among those who come to the eating house. This section appears in the Police Act, the purpose of which is to maintain law and order and that is why we find that the two objects to be secured when granting licences are the good behaviour of the keeper himself and the prevention of drunkenness and disorder among those who frequent the eating house. It seems therefore to us that s. 39 clearly provides that the Commissioner will use his discretion in deciding whether the person applying for a licence is in actual and effective control and possession of the place where the eating house is to be kept and is thus the keeper thereof. He will also satisfy himself that the keeper is a person of good behaviour and further that he is able to prevent drunkenness and disorder in the eating house. If he is satisfied on these three matters, it seems to us that the section contemplates that the discretion will be exercised in favour of the grant of a licence. We cannot accept that even though the Commissioner may be satisfied that the person applying for a licence has actual and effective control of the place where he is going to keep the eating house, is a person of good behaviour and can prevent drunkenness and disorder among the clientele, he will still go on to refuse the licence. The discretion that is given to him is to satisfy himself on these three points and if he is satisfied about them he has to grant the licence. On the other hand if he is not satisfied on any one or more of these points he will exercise the discretion by refusing the licence. As for the conditions which will be inserted in the licence, they are only for the purpose of carrying on the two objects specified in the section. They will naturally be more detailed in order to carry out the two objects aforesaid. But these two objects in our opinion along with the obvious implication in the section that the person applying must have actual and effective control of the place where he is going to keep the eating house are the criteria which will govern the exercise of discretion by the Commissioner in the matter of granting or refusing a licence. We cannot agree with the learned counsel for the petitioner that the two parts of s. 39 should be read separately, as if one has no effect on the other. Reading them together, it is in our opinion fair and reasonable to come to the conclusion that the discretion of the Commissioner in this matter is guided by the two objects mentioned in the section and by the necessary implication contained in it that the person applying must be in actual and effective control and possession of the place where he is going to keep the

eating house. The argument therefore that s. 39 confers an arbitrary and uncanalised power without any criteria for guiding the discretion of the licensing authority must fail and the section cannot be held to be an unreasonable restriction on the right to carry on trade on this ground.

Then it is urged that even if there is guidance in the section it provides for no hearing either oral or written of the person applying for a licence. Further it provides for no grounds to be given for refusing a licence. Therefore, though there may be some guiding principle in the matter of granting licences, the absence of a provision for hearing and for giving reasons for refusal would also make the provision unconstitutional as an unreasonable restriction on a fundamental right. Reference in this connection was made to State of Madras v. V. G. Row [[1952] S.C.R. 597.] where it was observed that -

> "In considering the reasonableness of laws imposing restrictions on fundamental right, both the substantive and procedural aspects of the impugned law should be examined from the point of view of reasonableness and the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases."

There is no doubt that procedural provisions of a statute also enter into the verdict as to its reasonableness; but at the same time there can be no abstract or general principles which would govern the matter and each statute has to be examined in its own setting. It is undoubtedly correct that no provision has been made for giving a hearing to a person applying for a licence and the Commissioner has not to give reasons when refusing the licence; but it cannot be laid down as a general proposition that where in the case of licensing statute no provision is made for hearing and there is no provision for giving reasons for refusal the statute must be struck down as necessarily an unreasonable restriction on a fundamental right. No case has been cited before us which lays down such a general proposition. We have therefore to examine the section in its setting to decide whether the absence of a provision for hearing and for requiring the Commissioner to give reasons for refusal would make this section unconstitutional. The section appears in the Police Act, which deals generally with matters of law and order and the two objects specified in the section are also for the same purpose. The discretion is vested in a high police officer who, one would expect, would use it reasonably. There is no provision for appeal and there is no lis as between the person applying for a licence and the Commissioner; the exercise of the discretion depends upon the subjective satisfaction of the Commissioner as to whether the person applying for a licence satisfies the three conditions mentioned above. It is true that the order when made one way or the other affects the fundamental right of carrying on trade, but in the circumstances it cannot but be an administrative order (see, Nagendra Nath Bora v. The Commissioner of Hills Division and Appeals, Assam [[1958] S.C.R. 1240, 1253.]), and though the Commissioner is expected to act reasonably there is no duty cast on him to act judicially. In Nakkuda Ali v. M. F. De S. Jayaratne [[1951] A.C. 66.], the Privy Council pointed out that it was quite possible to act reasonably without necessarily acting judicially and that it was a long step in the argument to say that because a man is expected to act reasonably he cannot do so without a course of conduct analogous to the judicial process. The compulsion of hearing before passing the order implied in the maxim 'audi alteram partem' applies only to judicial or quasi-judicial proceedings : (see, Express Newspapers (P.) Ltd. v. The Union of India [[1959] S.C.R. 12, 106.]). Therefore, the fact that no hearing is required to be given by the Commissioner before he decides to grant or refuse a licence would not make the provisions as to licensing in the circumstances of this case unreasonable restrictions on the fundamental right of carrying on a trade. For the some reasons it cannot be said that because the reasons for refusal are not communicated to

the person applying that would make the licensing provision unconstitutional. The person applying knows that under the law there are three conditions (already set out above) which the Commissioner has to consider in granting or refusing the licence. If he thinks that he fulfills the three conditions and the Commissioner has acted unreasonably in rejecting his application he is not without a remedy; he can apply to the High Court under Art. 226 and compel the Commissioner to disclose the reasons for refusal before the Court and if those reasons are extraneous or are not germane to the three matters arising under s. 39, the High Court will compel the Commissioner to act within the scope of s. 39. We are therefore of opinion that in the circumstances of this case and in the setting in which s. 39 appears the mere absence of a provision for a hearing or a provision for communicating the reasons for refusal to the person applying, does not make s. 39 unconstitutional as an unreasonable restriction on a fundamental right. The attack therefore on the constitutionality of s. 39 must fail.

The we turn to the question of mala fides. It is not the case of the petitioner that the Commissioner has any personal animus against him or that he is favouring Bhowmick. What he says in ground 41 of his petition in this connection is that the reasons given by the Commissioner in his order dated May 30, 1959, for refusing the licence are not correct and that the Commissioner is annoyed with him because he went to the High Court by means of a writ application. These in our opinion are no grounds for holding that the order of the Commissioner passed in this case on May 30, 1959, is mala fide.

The petition therefore fails and is hereby dismissed with costs.

SUBBA RAO, J. -

We regret our inability to agree with Wanchoo, J. Our learned brother in his judgment has stated the facts fully and it is not necessary to restate them here.

The petitioner applied to the Commissioner of Police, Calcutta, for a licence to enable him to carry on the business of an eating house known as "Kalpatoru Cafeteria". The Commissioner by his order dated May 30, 1959, rejected the application made by the petitioner for a licence on two grounds, namely, that he was not satisfied that from "the antecedents and present conduct" of the petitioner it would be reasonable to think that the petitioner would keep good behaviour and would be able to prevent drunkenness or disorder among the persons frequenting the eating house. The application was rejected under s. 39 of the Calcutta Police Act, No. IV of 1866 (hereinafter called the Act). The short question raised is whether s. 39 of the Act is constitutionally valid. Section 39 of the Act reads :

> "The Commissioner of Police, may, at his discretion, from time to time, grant licenses to the keepers of such houses or places of public resort and entertainment as aforesaid for which no licence as is specified in the Bengal Excise Act, 1909, is required upon such conditions, to be inserted in every such license, as he, with the sanction of the said State Government from time to time shall order, for securing the good behaviour of the keepers of the said houses or places of public resort or entertainment, and the prevention of drunkenness and disorder among the persons frequenting or using the same; and the said licences may be granted by the said Commissioner, for any time not exceeding one year."

Learned counsel for the petitioner contends that the petitioner has under Art. 19(1)(g) of the

Constitution a fundamental right to carry on the business of an eating house and that the provisions of s. 39 of the Act impose unreasonable restrictions on the exercise of his right and, therefore, the said section is void.

Before scrutinising the provisions of that section it would be convenient at the outset to notice the relevant aspects of the law vis-a-vis the concept of reasonable restrictions on a fundamental right. The concept of reasonableness has been clearly defined by Patanjali Sastri, C.J., in State of Madras v. V. G. Row [[1952] S.C.R. 597, 607, 608.] thus :

> "It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict."

There the constitutional validity of s. 15(2)(b) of the Indian Criminal Law Amendment Act, 1908, was impugned on the ground that it fell outside the scope of authorized restrictions in Art. 19(4) of the Constitution. The issue of a notification by the State Government declaring an association unlawful was made to depend upon its subjective satisfaction of certain objective factors. The Act also provided for an enquiry before an Advisory Board and the subsequent review of the order by the Government on the basis of the said enquiry. It was pressed upon this Court to hold that the said restriction passed the test laid down in Art. 19(4) of the Constitution. In rejecting the contention, Patanjali Sastri, C.J., observed thus :

> "The formula of subjective satisfaction of the Government or of its officers, with an Advisory Board thrown in to review the materials on which the Government seeks to override a basic freedom guaranteed to the citizen, may be viewed as reasonable only in very exceptional circumstances and within the narrowest limits, and cannot receive judicial approval as a general pattern of reasonable restrictions on fundamental rights."

The learned Chief Justice adverting to the procedural aspect of the restriction criticised the absence of a provision in the impugned Act for personal service on the association and thus depriving its members of the opportunity to make their representations.

Compared with s. 39 of the Act, the impugned provisions of the Criminal Law Amendment Act impose more stringent control on the exercise of the discretionary power by the Government. Yet the Court struck down the provisions. The attempted made to distinguish that decision on the ground that it related to the fundamental right of freedom of speech cannot be justified as the freedom to do business is also one of the important fundamental rights under the Constitution.

The case of Thakur Raghubir Singh v. Court of Wards, Ajmer [[1953] S.C.R. 1049, 1055.] was concerned with the question of the reasonableness of the provisions of s. 112 of the Ajmer Tenancy and Land Records Act (XLII of 1950) which provided that "if a landlord habitually infringes the rights of a tenant under this Act, he shall, notwithstanding anything in s. 7 of the Ajmer Government Wards Regulation, 1888 (I of 1888), be deemed to be a 'landlord who is disqualified to manage his own property' within the meaning of s. 6 of the said Regulation and his property shall be

liable to be taken under the superintendence of the Court of Wards." The determination of the question whether a landlord habitually infringed the rights of a tenant was left to the Court of Wards. This Court held that the section was void as being unreasonable restriction on the right in property as the restriction made the enjoyment of that right to depend upon the mere discretion of the executive. Mahajan, J., as he then was, observed as under :

> "When a law deprives a person of his possession of his property for an indefinite period of time merely on the subjective determination of an executive officer, such a law can, on no construction of the word "reasonable" be described as coming within that expression, because it completely negatives the fundamental right by making its enjoyment depend on the mere pleasure and discretion of the executive, the citizen affected having no right to have recourse for establishing the contrary in a civil court."

Though s. 112 of the Ajmer Tenancy and Land Records Act laid down an objective test, namely, "a landlord habitually infringing the rights of tenants under that Act", and, therefore, may be said to have laid down some police for the exercise of the discretion by the Court of Wards, the section was struck down as the discretion was uncanalised and no effective procedure was prescribed to remedy the grievance of an aggrieved party.

It cannot be said that the Commissioner of Police has a higher status than the Court of Wards or that the taking over of the management of an estate affects a larger right than preventing a person from doing his business.

The decision in Messrs. Dwarka Prasad Laxmi Narain v. The State of Uttar Pradesh [[1954] S.C.R. 803, 811.] dealt with cl. 4(3) of the Uttar Pradesh Coal Control Order, 1953, whereunder the licensing authority was given absolute power to grant or refuse to grant, renew or refuse to renew, suspend, revoke, cancel or modify any licence under the said Order and the only thing he had to do was to record reasons for the action he took. Under the clause the State Coal Controller could delegate power to any other officer. This Court held that said Order was void as it imposed unreasonable restrictions on the freedom of trade and business guaranteed under Art. 19(1)(g) of the Constitution and not coming within the protection afforded by cl. (6) of the Article. Mukherjea, J., as he then was, observed to the following effect :

> "The power of granting or withholding licences or of fixing the prices of the goods would necessarily have to be vested in certain public officers or bodies and they would certainly have to be left with some amount of discretion in these matters. So far no exception can be taken; but the mischief arises when the power conferred on such officers is an arbitrary power unregulated by any rule or principle and it is let entirely to the discretion of particular persons to do anything they like without any check or control by any higher authority."

We shall now notice some of the decisions cited at the Bar on behalf of the Commissioner in support of the validity of the impugned provisions. In Babul Chandra v. Chief Justice and Judges, High Court of Patna [A.I.R. 1954 S.C. 524.] it was held that the proviso to sub-s. (1) of s. 9 of the Indian Bar Councils Act was not void as being an unreasonable restriction upon the freedom to practise a profession, or to carry on an occupation, trade or calling. The proviso to s. 9(1) states expressly that the rules "shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion". Under s. 8 of the Indian Bar Councils Act, no person is entitled as of right

to practise in any High Court, unless his name is entered in the roll of the Advocates of that Court maintained under the Act. Under s. 9 of that Act, the Bar Council can frame rules with the sanction of the High Court to regulate the admission of persons as Advocates. The proviso saves the overriding power of the High Court to refuse admission in its discretion. It was contended that an unfettered and uncontrolled discretion was given to the High Court and that was unreasonable. This Court pointed out that there could not be a better authority than the High Court in that State to which the discretion could be entrusted. This decision turned upon these considerations, namely, (1) no person was entitled as of right to practise; (2) the discretion to refuse was vested in the highest judicial body in the State; and (3) it was implicit in the power of discretion that the High Court would give notice before rejecting an application. On that basis this Court held that the restrictions imposed by the proviso to s. 9(1) were reasonable.

Nor does the decision in Harishankar Bagla v. The State of Madhya Pradesh [[1955] 1 S.C.R. 380.] lay down any different principle. There this Court was concerned with cl. 3 of the Cotton Textile (Control of Movement) Order, 1948, promulgated by the Central Government under s. 3 of the Essential Supplies (Temporary Powers) Act, 1946, which required a citizen to take a permit from the Textile Commissioner to enable him to transport cotton textiles purchased by him. It was contended in that case that the requirement of a permit was an unreasonable restriction on the citizen's right under sub-cls. (f) and (g) of Art. 19(1) of the Constitution. This Court rejected the contention and affirmed the validity of the law. Mahajan, C.J., speaking for this Court gave four reasons in support of his conclusion and they were : (1) the Legislature passed the Essential Supplies (Temporary Powers) Act during a period of emergency when it was necessary to impose control on the production, supply and distribution of commodities essential to the life of the community; (2) cl. 3 of the Control Order did not deprive a citizen of the right to dispose of or transport cotton textiles purchased by him, but only required him to take a permit from the Textile Commissioner to enable him to transport them; (3) if transport of essential commodities by rail or other means of conveyance was left uncontrolled, it might well have seriously hampered the supply of these commodities to the public; and (4) the policy underlying the Order was clearly enunciated by the provisions therein and that policy governed the exercise of the discretion by the Textile Commissioner. On these considerations this Court maintained the validity of that Order. The said decision has no analogy to the provisions of s. 39 of the Act in question.

The decision in Union of India v. Bhana Mal Gulzarimal Ltd. [[1960] 2 S.C.R. 627, 641.] related to the question of validity of cl. 11B of the Iron and Steel (Control of Production and Distribution) Order, 1941. This Court held, having regard to the provisions of that Order and those of the Essential Supplies (Temporary Powers) Act, 1946, that the Legislature had clearly enunciated its legislative policy and that cl. 11B of the Order laid down the object which was intended to be achieved. Gajendragadkar, J., delivering the judgment of the Court, observed thus :

> "Therefore reading cl. 11B by itself we do not see how it would be possible to hold that the said clause is violative of Art. 19. In fact, if ss. 3 and 4 are valid and cl. 11B does nothing more than prescribe conditions for the exercise of the delegate's authority which are consistent with s. 3 it is only the actual price structure fixed by the Controller which in a given case can be successfully challenged as violative of Art. 19."

The learned Judge considered the price structure fixed by the notification and observed that the respondents therein did not seriously challenge the validity of the notification in respect of price structure and, that apart, it was not proved that the notification adversely affected a large class of

dealers taken as a whole. The judgment, therefore, does not help the respondents.

Nor is the decision of this Court in Mineral Development Ltd. v. State of Bihar [[1960] 2 S.C.R. 609, 619.] of any help to the respondents. There the constitutional validity of s. 25(1) of the Bihar Mica Act (10 of 1948) was impugned as violating the petitioners' fundamental right under Art. 19(1)(f) and (g), of the Constitution. Under s. 25(1)(c) of that Act discretion was given to cancel a licence to the State Government, but cl. (c) was hedged in by two important restrictions, namely, (i) the failure to comply with the provisions of that Act or the rules made thereunder should be a repeated failure and not a mere sporadic one, i.e., the defaulter must be a recalcitrant one; (ii) before cancelling the licence the State Government should afford reasonable opportunity to the licensee to show cause why his licence should not be cancelled. This Court in upholding the validity of the said section observed thus :

> "The power given to the State Government is only to achieve the object of the Act, i.e., to enforce the said provisions, which have been enacted in the interest of the public; and that power, as we have indicated, is exercisable on the basis of objective tests and in accordance with the principles of natural justice. We cannot, therefore, hold that s. 25(1)(c) of the Act imposes an unreasonable restriction on the petitioner's fundamental rights under Art. 19(1)(f) and (g) of the Constitution."

This decision far from helping the respondents is, to some extent, against their contention.

The result of the discussion may briefly by summarized in the form of the following propositions : A fundamental right to do business can be controlled by the State only by making a law imposing in the interest of the general public reasonable restrictions on the exercise of the said right; restrictions on the exercise of a fundamental right shall not be arbitrary or excessive or beyond what is required in the interest of the general public; the reasonableness of a restriction shall be tested both from substantive and procedural aspects; an uncontrolled and uncanalised power conferred on an officer is an unreasonable restriction on such right; though a legislature policy may have been clearly expressed in a statute, it must also provide a suitable machinery for implementing that policy in accordance with the principles of natural justice; whether a restriction is reasonable or not is a justiciable concept and it is for the Court to come to one conclusion or the other having regard to the considerations or the other having regard to the considerations laid down by Patanjali Sastri, C.J., in State of Madras v. V. G. Row [[1952] S.C.R. 597.] and similar others; in taking an overall picture of the relevant circumstances, the Court may legitimately take into consideration the fact that the discretion is entrusted to a State Government or a highly placed officer, but that in itself is of minor importance for the simple reason that the fundamental right itself is guaranteed against the action of the State, which is defined to include not only the Union or the State Governments but also Parliament, Legislatures and all local or other authorities within the territory of India; the distinction between an administrative authority and a judicial authority is not of much relevance in the context of a reasonable restriction, except perhaps a Court may more readily be inclined to uphold a restriction if a matter is entrusted to an impartial judicial authority than to an executive authority.

Bearing the aforesaid principles in mind, let us look at the impugned provisions of the Act. The section has been extracted supra. The first part of the section confers a free and unqualified discretion on the Commissioner to grant a licence. A discretionary power to issue a licence necessarily implies a power to refuse to issue a licence. The word "may" is an enabling one and in its ordinary sense means "permissible". When coupled with the words "at his discretion" it emphasises the clear intention of the legislature to confer on the Commissioner an unrestrained

freedom to act according to his own judgment and conscience. If the section stops there, it is common case that the power of the Commissioner is uncontrolled and uncanalised. The second part of the section deals with the nature of the conditions to be inserted in the licence. The conditions to be imposed are for securing the good behaviour of keepers of public resort and for the prevention of drunkenness and disorder among the persons frequenting or using such places. No doubt the said conditions must have the sanction of the State Government. This part, therefore, ensures the peaceful and orderly conduct of business. The section is clear and unambiguous in terms and it is not disputed that the plain terms of the section will not enable the conditions of a licence to be projected into the matter of the exercise of the discretion. But what is contended is that the conditions laid down a precise policy for guiding the discretion of the Commissioner to give or not to give a licence. There are many objections to this approach to the problem. Firstly, it is to rewrite the section. If the legislature intended to guide the discretion by laying down objective criteria it would have stated so in express terms; it would not have left the matter to the absolute discretion of the Commissioner. Secondly, if the two conditions only of the licence control the exercise of the discretion, the Commissioner cannot travel beyond the said two conditions. As a result the amplitude of the discretion is drastically cut down. The Commissioner would be able to refuse a licence only if he was satisfied that the applicant could not be relied upon to comply with the said conditions; if he was so satisfied, he could not refuse a licence in spite of the fact that there were many other good and relevant reasons for doing so. Thirdly, if the conditions are not exhaustive but only illustrative, the section would continue to suffer from the same vice, as it would still be open to the Commissioner to refuse a licence for any other reason. Fourthly, discretion based upon an anticipatory breach of conditions will be as arbitrary as in the case of absolute discretion, particularly in the case of new applicants, as more often than not it will have to be exercised on the basis of surmises, gossip or information, which may be false or at any rate untested. Lastly, by this unwarranted search for an undisclosed policy in the crevices of the statute, this Court will not only be finding an excuse to resuscitate an invalid law but also be encouraging the making of laws by appropriate authorities in derogation of fundamental rights.

The provisions of ss. 47 and 48(3) of the Motor Vehicles Act, 1939, bring out in bold relief the distinction between the exercise of a discretion to issue a licence and the imposition of conditions in a licence. Section 47 enjoins on the Regional Transport Authority in considering an application for a stage carriage permit to have regard to the matters enunciated in that section. Section 48(3) enables the Regional Transport Authority to attach to the permit the conditions detailed in that sub-section. While the former section regulates the exercise of the discretion of the Regional Transport Authority issuing a permit, the latter describes the nature of the conditions to be inserted in the permit. These provisions no doubt cannot be invoked to construe the provisions of s. 39 of the Act, but we are referring to them only to show the legislative practice in such matters and to emphasize the fact that the scope of the discretion to issue a licence and that of the power to impose conditions in a licence are different. Therefore, on a true construction of the plain words of the statute we cannot hold that any policy reasonably capable of controlling the discretion of the Commissioner has been laid down.

Even if the two conditions can be read into the first part of s. 39, the arbitrariness is writ large in the manner of exercising the so-called guided discretion. In this context it is not necessary to come to a definite conclusion on the question whether the discretion is judicial or executive, for whatever be the nature of the discretion it must be tested from the standpoint of reasonableness of the restrictions imposed on a person's right to do business. A citizen of India, for the purpose of eking out his livelihood, seeking to do an extensive business of an eating house, applies to the Commissioner for a licence, for without that licence he cannot do business, and if he does he will be liable to

prosecution. The Commissioner can reject the application on two grounds, namely, (1) from his antecedents and present conduct it would be unreasonable to think that the petitioner would keep good behaviour, and (2) the Commissioner is not satisfied that the petitioner would be able to prevent drunkenness and disorder among the persons frequenting or using the eating house. Admittedly this order is made without giving any opportunity to an applicant to prove that he would satisfy both the tests laid down by s. 39 of the Act. The Commissioner is not legally bound to give any reasons for his refusal to give a licence. Even if reasons are given, there is no machinery for getting such an order revoked or vacated. The section does not impose a duty on the Commissioner to give reasonable opportunity to an applicant to clear his character or to disprove any unwarranted allegations made against him or to prove that he would satisfy both the test laid down by s. 39 of the Act. Nor does the section provide for an appeal against the order of the Commissioner to an appropriate authority. The suggestion that the authority is a high officer in the police department and that he can be relied upon to exercise his discretion properly does not appeal to us for two reasons, namely, (1) as we have already pointed out, the Constitution gives a guarantee for the fundamental right against the State and other authorities; and (2) the status of an officer is not an absolute guarantee that the power will never be abused. Fundamental rights cannot be made to depend solely upon such presumed fairness and integrity of officers of State, though it may be a minor element in considering the question of the reasonableness of a restriction. Therefore, it is clear to our mind that the exercise of the power also suffers from a statutory defect as it is not channelled through an appropriate machinery. We have, therefore, no hesitation to hold that s. 39 of the Act infringes the fundamental right of the petitioner under Art. 19(1)(g) of the Constitution both from substantive and procedural aspects.

The next question is whether a mandamus will issue against the Commissioner. The Commissioner admittedly has launched criminal proceedings against the petitioner under the provisions of the Act for not taking out a licence under s. 39 of the Act. As we have held that s. 39 of the Act is constitutionally void, a writ of mandamus will issue against the Commissioner of Police, Calcutta, directing him not to take any further proceedings against the petitioner for not taking out a licence under the provisions of the Act.

BY COURT. In accordance with the opinion of the majority, this Petition is dismissed with costs.

</html