

ALLAHABAD HIGH COURT

Smt. Shama Bai

Vs.

State of U.P

Civil Misc. Writ Nos. 1405 and 1371 of 1958

(J. Sahai, J.)

26.05.1958

JUDGMENT

J. Sahai, J.

1. The points involved in this writ petition are similar to those in Civil Misc. Writ No. 1371 of 1958 which I have disposed of today. Both these writ petitions were heard together and no separate arguments were addressed in either of them. In my order in writ petition No. 1371 of 1958 I have dealt with the questions raised in these two petitions in some detail, and for the reasons given in that order I reject this petition.

Civil Miscellaneous Writ No. 1371 of 1958. The petitioner has come to this Court on the allegation that she is a prostitute aged 24 years and is also a singer. She resides in premises No. 54-A, Mohamad Ali Park, Allahabad, of which the respondent No. 5 is the landlord and the respondent No. 4 the chief tenant. Her allegation is that prostitution is her hereditary trade and the only means of her livelihood as also that of her cousin sister and two younger brothers who are her dependants and who wholly live on her earnings made by prostitution. She complains that the Suppression of Immoral Traffic in Women and Girls Act, 1956, (hereinafter referred to as the Act) is ultra vires of the Constitution of India, as it illegally prohibits the petitioner from carrying on her trade and in any case imposes unreasonable and illegal restriction on the same. She alleges that the result of the enforcement of the Act would be that she would be left to starve as she has no other source of livelihood and the chances of her being rehabilitated as a good house-wife in society are nil. There is an averment in the petition as also in the affidavit filed in support of it that she knows no other trade or profession and consequently can not carry on any other profession or trade. On these facts she has prayed for the issue of a writ of mandamus or any other writ, order or direction commanding the respondents Nos. 1 to 3 to restrain from interfering with the petitioner's carrying on her trade of prostitution or from interfering with the visit of her customers to her place. It is also prayed that the respondents Nos. 4 and 5 be restrained from taking any action against the petitioner or her customers under the said Act. It is also prayed that

the respondents Nos. 4 and 5, be restrained from taking any action for forcible eviction of the petitioner from the premises in which she is at present living pending the disposal of the petition. There is also another interim prayer that during the pendency of the present writ petition the respondents Nos. 1 to 3 be restrained from taking any action against the petitioner under the Act and respondents Nos. 4 and 5 from taking steps to evict the petitioner from the premises in which she is living and carrying on the profession of a prostitute.

2. It is true that the profession or trade of a prostitute has existed in all civilized countries from the earliest times though it has always been subject to regulation by law or custom. It is also true that the number of prostitutes in this country is very large and in most cases it would be impossible for them to get themselves rehabilitated in society if under the law they are stopped from carrying on their profession or the conditions for their existence are made so difficult that they have to leave it. It cannot also be denied that there are several external causes which induce women to turn to prostitution for livelihood over which they have no control. The most important ones are :-

- "(1) difficulty of finding employment;
- (2) excessively laborious and ill-paid work;
- (3) hard treatment of girls at home.
- (4) promiscuous and indecent mode of living among the overcrowded poor;
- (5) the aggregation of people together in large communities and factories, whereby the young are brought into constant contact with demoralized companions;
- (6) the example of luxury, self-indulgence and loose manner set by the wealthier classes;
- (7) demoralising literature and amusements;
- (8) the arts of profligate men and their agents."

It is also true that the society and the Government owe a duty to rehabilitate the prostitutes if they are by law being forced to give up their profession. But considerations of difficulty in rehabilitating thy prostitutes in society or the fact that several causes lead to prostitution over which the girls carrying on prostitution have no control can be no grounds on which the Act can be invalidated if it has been constitutionally passed and is also not otherwise ultra vires. Hardship is no consideration while dealing with the constitutionality of an Act. The Act has been passed "to provide in pursuance of the International Convention signed at New York on the 9th day of May, 1950, for the suppression of immoral traffic in women and girls," which has been ratified by the Government of India. The first ground of attack is that the petitioner's right to carry on her profession of a prostitute is absolute under Article 19 of the Constitution of India and is subject only to such restrictions, which may be considered to be reasonable in the interests of the general public. Article 19(1)(g) of the Constitution of India runs as follows :-

"All citizens have the right - (g) to practise any profession, or to carry on any occupation, trade or business."

Clause (6) of the said Article runs as follows :-

"Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes or prevent the State from making any law imposing in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to -

- (i) The professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise."

The position therefore is that every person has normally got a right to practice any profession or carry on any occupation, trade or business of his choice but such right is subject to the right of the State to make laws imposing, in the interests of the general public, reasonable restrictions on the exercise of the right to practice that profession or to carry on that occupation, trade or business. I have used the word 'normally' in the preceding sentence because this rule has some exceptions and I would at the appropriate place in this judgment consider those of the exceptions which are relevant for the purposes of the present case. It cannot be denied that the work of a prostitute is a profession, occupation or trade within the meaning of Article 19(1)(g) of the Constitution of India. In fact it would be seen that in the Act itself on several occasions the word "trade" has been used with reference to prostitution, (see Section 7(2)(a)). The use of the word "any" in Article 19 of the Constitution before the words "profession, or to carry on any occupation, trade or business" clearly indicates that normally a citizen is free to carry on any profession, trade or occupation whatsoever. Therefore the first question that has to be examined is whether the Act prohibits the carrying on of the profession or occupation or trade of a prostitute or only imposes restrictions on it which are reasonable. It may be said at once that where the effect of a restrictive legislation is to totally prevent a citizen from carrying on a trade, business or a profession such a restriction is unreasonable and void *Chintaman Rao v. State of M.P.*¹, *Rashid Ahmed v. Municipal Board Kairaua*², and *T.B. Ibrahim v. R.T.A. Tanjore*³, It is also settled law that restrictions imposed in an Act are subject to judicial scrutiny and it will be open to courts to say whether a particular restriction is reasonable or not (see *Chintaman Rao v. State of M.P.*) (referred to above). It is not necessary to multiply cases on this point because it is now settled beyond controversy that the question whether a restriction is reasonable or not is justiciable. It may also be remembered in this connection that under the provisions of the Penal Code. Prostitution is not an offence. Section 372 of the Penal Code only prohibits the sale, letting to hire, or otherwise disposing of any person under the age of 18 years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse

with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose. After having read the Act carefully I am of the opinion that it is not quite correct to say that the Act prohibits the carrying on of the profession or trade of a prostitute though it cannot also be denied that it has imposed restrictions on the same. This Act has got twenty five sections in all. Of these some are penal. Section 3 of the Act provides for punishment for keeping a brothel or allowing premises to be used as

¹ AIR 1951 SC 118 ³ AIR 1953 SC 79

² AIR 1950 SC 163

a brothel. Section 4 of the Act makes it punishable for any person over the age of 18 years who knowingly lives, wholly or in part, on the earnings of prostitution of a woman or girl. Section 5 prohibits the procuring, inducing or taking of a woman or girl for the sake of prostitution, and makes the same punishable. Section 6 makes a person liable for punishment if he or she detains a woman or girl in premises where prostitution is carried on. Section 7 renders any person liable to punishment who carries on prostitution, or with whom prostitution is being carried on, in any premises which is within a distance of 200 yards of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other place of any kind as may be notified in this behalf by the Commissioner of Police (where there is such a Commissioner) or by the District Magistrate. This section also provides for punishing the keeper of any public place who knowingly permits prostitutes for purposes of their trade to resort to or remain in such place, or being the tenant, lessee, occupier or person in charge of any premises knowingly permits the same or any part thereof to be used for prostitution, or being the owner, lessor or landlord of any premises or the agent of such owner, lessor or landlord, lets the same or any part thereof with the knowledge that the same or any part thereof may be used for prostitution, or is willfully a party to such use. Section 8 provides, for punishing a person who in any public place or within sight of, and in such manner as to be seen or heard from, any public place, whether from within any building or house or not (a) by words, gestures, wilful exposure of her person (whether by sitting by a window or on the balcony of a building or a house or in any other way), or otherwise tempts or endeavors to tempt or attracts or endeavors to attract the attention of any person for the purpose of prostitution, or (b) solicits or molests any person or loiters or acts in such manner as to cause obstruction or annoyance to persons residing nearby or passing by public place or to offend against public decency, for the purpose of prostitution. Section 9 makes the seduction by any person having the custody or care of a woman or girl or who causes or aids or abets the seduction of a woman or girl for prostitution, punishable Section 10(1)(a) authorizes a court to release under certain specified circumstances a person convicted of an offence punishable under the Act on probation of good conduct. Section 10(1)(b) permits a court to let off certain offenders under the Act after admonishing them in the manner provided for in Sub-Section (IA) of Section 562, Cr. P.C. Section 10(2) however authorizes a court to detain a person convicted of an offence punishable under Section 7 of the Act in the protective home for a period of not less than two years and not more than five years in lieu of sentence of fine or imprisonment. Sub-Section 3 of Section 10 lays down that in no case a person convicted under section 3 or Section 6 or Section 9 shall be released on probation or with admonition. Section 12 authorizes a court to bind down

persons who have been habitually committing, or attempting to commit, or abetting the commission of offences punishable under the Act, and who have been convicted under any of the provisions of the Act. Section 18 authorizes a Magistrate on receipt of information from the police or otherwise that any house, room, place or any portion thereof within a distance of two hundred yards of any public place referred to in Sub-Section (1) of Section 7 is being run or used as a brothel by any person, or is being used by prostitutes for carrying on their trade, to issue notice to the owner, lessor or landlord of such house, room, place or portion or the agent of the owner, lessor or landlord or the tenant, lessee, occupier of, or any other person in charge of such house, room, place or portion, to show cause within seven days of the receipt of the notice why the same should not be attached for improper user thereof, and if after hearing the person concerned the Magistrate is satisfied that the house, room, place or portion is being used as a brothel or for carrying on prostitution then the Magistrate may pass orders directing the eviction of the occupier within seven days of the passing of the order from the house, room, place, or portion, or directing that before letting it out during the period of one year immediately after the passing of the order, the owner, lessor or landlord or the agent of the owner lessor or landlord shall obtain the previous approval of the Magistrate. Section 20 authorizes the removal by a Magistrate of any woman or girl who is carrying on the trade of a prostitute if it appears to him that such woman or girl is a prostitute and that it is necessary in the interest of the general public that such woman or girl be removed from the local limits of his jurisdiction and be prohibited from entering the same. At this stage, I am not referring to the other sections of the Act because the impugned sections are only these and it is with regard to these sections that it is complained that they have the effect of completely stopping the profession, or trade of a prostitute.

3. None of the sections mentioned above have the effect of stopping the profession or trade of a prostitute altogether. The only question therefore is whether the restrictions which are imposed upon the trade or profession of a prostitute by means of the provisions of the Act are reasonable restrictions.

"In order to determine the reasonableness of the restrictions regard must be had to the nature of the business and the conditions prevailing in the trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down." (See the case of *Cooverjee v. Excise Commissioner, Ajmer*⁴).

It cannot be denied that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community." It must also be noticed that with respect to the suppression of the traffic in women and children, several International instruments are in force. They are enumerated below :

1. International Agreement of 18th May, 1904 for the suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3rd December 1948;

2. International Convention of 4th May, 1910 for the suppression of the White Slaves Traffic, as amended by the above mentioned Protocol;
3. International Convention of 30th September, 1921 for the Suppression of the Traffic in Women and Children, as amended by the Protocol approved by the General Assembly of the United Nations on 20th October, 1947;
4. International Convention of 11th October, 1933 for the Suppression of the Traffic in Women of Full Age, as amended by the aforesaid Protocol.

4. In 1937 the League of Nations prepared a draft Convention extending the scope of the above mentioned instruments. In 1950 a Convention for the Suppression of the

⁴ AIR 1954 SC 220

Traffic in persons and of the Exploitation of the Prostitution of others was signed at New York by several nations including ours. In this convention the above mentioned instruments as also the draft Convention prepared by the League of Nations in 1937 were consolidated and embodied. The present Act has been passed with a view to implement the International Convention signed at New York on 9th of May, 1950. Therefore while considering the reasonableness or otherwise of the restrictions imposed on the trade or profession of a prostitute by this Act we have to keep in mind that prostitution is slur on human dignity and a shame to human civilization. Its eradication by gradual and evolutionary process is ultimate aim of all civilized nations. So long as it is not possible to completely abolish it it has got to be tolerated as an evil necessity, but it is only reasonable that restrictions should be imposed to mitigate so far as possible the civil effects of the trade or profession and to protect the interest of the general public.

5. Before I come to consider the question whether the restrictions are reasonable restrictions I may notice Article 23(1) of the Constitution of India. It runs as follows :

"Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

This Article therefore declares traffic in human beings to be an offence punishable in accordance with law. Traffic in women for immoral purposes has been held to be covered by the expression "traffic in human beings" in Article 23(1) of the Constitution of India, see *Raj Bahadur v. Legal Remembrancer of the Government of West Bengal*⁵, In the case of AIR 1954 Supreme Court 220, Mahajan, J., while dealing with a case arising out of the rules framed under the (Aimer) Excise Regulation (1 of 1915) observed as follows :

"Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously

subject to such reasonable condition as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupation by the noise made in their pursuit, some by the odours they engender, and some by the dangerous accompanying them, require regulations as to the locality in which they may be conducted....."

6. Article 35(a)(ii) of the Constitution of India runs as follows :

"Notwithstanding anything in this Constitution, -

(a) Parliament shall have, and the Legislature of a state shall not have, power to make laws -

(ii) for prescribing punishment for these acts which are declared to be offences under this Part;"

⁵ AIR 1953 Cal 522

This means that Parliament alone could legislate for prescribing punishments for the offences contemplated by Article 23 of the Constitution of India. A mere perusal of Sections 3 to 10 and 18 of the Act shows that the acts made punishable under these sections are acts which result in traffic in human beings. Therefore, quite apart from all considerations of reasonable restrictions, these sections have been validly enacted by Parliament under Articles 23 and 35 of the Constitution of India. Even if it be assumed (though I am holding to the contrary) that the enactment of these provisions to some extent curtails the fundamental rights of prostitutes to carry on their trade or profession, these provisions would none-the-less be valid provisions because if there is any conflict between a fundamental right guaranteed under Article 19 of the Constitution and what is prohibited under Article 23 the prohibition contained in the latter Article will prevail over the fundamental right conferred by the former article. Quite apart from it I am inclined to hold that the restrictions which have been imposed by these sections as also by Section 12 of the Act are reasonable restrictions.

We have to look to the restrictions enforced by the various sections mentioned above in the context of the legislation and avowed purpose of which is to suppress immoral traffic in women and girls and to mitigate, as far as possible, the evils of prostitution. Section 3 only punishes the running of a brothel. A brothel has been defined in the Act by Section 2(a) as follows :

"In this Act, unless the context otherwise requires, "brothel" includes any house, room, or place or any portion of any house, room or place, which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes;"

It would be noticed that what has been prohibited is not the profession or trade of a prostitute but the carrying on of that profession for the gain of another person or for mutual gain of two or more prostitutes. This section has obviously been enacted to prohibit exploitation of a prostitute by a person who is not a prostitute, or by one prostitute of another. This section will also have the

effect of mitigating much of the evils of the prostitution because it is well known that upkeep of brothels not only encourages prostitution but also leads to the commission of various other offences.

The provisions of Section 4 are justifiable on the ground that to allow a person over the age of eighteen years to live on the earnings of a prostitute is not only to encourage parasitism but also to offer inducement to the prostitute to any on her profession or trade which she may not be inclined to carry on otherwise. Similarly the presumption against touts and pimps or persons who exercise control, direction or influence over a prostitute or aid, abet or compel her to carry on the trade or profession of a prostitute is a reasonable presumption and is in the interests of the public at large. But the same cannot be said in respect of persons mentioned in Section 4(2)(a) of the Act. I shall deal with this matter later on. Similarly the bar against procuring, inducing or taking a woman or girl for the sake of prostitution enacted by Section 5 is a bar justifiable in public interest and is a restriction which must be held to be reasonable. The same thing may be said about the bar against detaining a woman or girl in premises where prostitution is carried on, enacted by Section 6 of the Act. The restrictions imposed by Section 7 of the Act on a prostitute not to carry on her trade or profession in any premises which are within a distance of two hundred yards of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified in this behalf by the Commissioner of Police or District Magistrate is also a bar in the interest of the general public. Nobody can seriously doubt that it is not in public interest to allow prostitution to be carried on in the places mentioned above.

No one has a fundamental right to carry on business wherever he chooses and his right must be subject to any reasonable restrictions imposed by the State in the interest of the general public. (See AIR 1953 Supreme Court 79). It was contended that even though there may be nothing unreasonable in prohibiting prostitution within 200 yards of a place of public religious worship or educational institution, hostel, hospital or nursing home, there was an option with the Commissioner of Police or the District Magistrate to notify other public places within 200 yards of which prostitution cannot be carried on and those places may not be of such a nature as mentioned above. In my opinion this argument is not correct. The use of the words "or such other public place" before the words "of any kind as may be notified in this behalf by the Commissioner of Police or District Magistrate" clearly show that the places to be notified must be similar in nature to those mentioned above, i.e., places of public religious worship, educational institutions, hostels, hospitals, nursing homes etc. The words "such other public places" are ejusdem generis with those mentioned above. The idea behind the enactment of Section 7 is that the atmosphere of places of public religious worship or educational institutions or hostels or hospitals or nursing homes or other such institutions should be kept pure and free from the contaminated atmosphere of a place where prostitution is being carried on. It cannot be denied that this is a reasonable restriction. The bar created against a tenant, lessee, occupier, lessor or landlord of any premises which falls within 200 yards of the places mentioned above and where prostitution is carried on is also reasonable restriction.

Coming to Section 8 of the Act the bar against attempting or attracting or endeavoring to attract

the attention of any person for the purpose of prostitution by words, gestures of wilful exposure of person or by any other method, or solicitation or molestation of a person for purposes of prostitution or loitering for the purpose of prostitution in a manner which causes obstruction or annoyance to any person residing near by or passing by such public place or to offend against public decency for the purpose of prostitution is a bar which must be accepted to be a reasonable one in the interest of society as a whole. Similarly no objection can be had against the provisions of Section 9 which prohibit the seduction or the aiding or abetting for seduction of a person to prostitution. I am leaving Section 10 for the present. To my mind no objection can be had also against Section 12 on the ground of unreasonableness when that section authorizes a Magistrate while convicting a person who is a habitual offender under the Act to bind him over for a period not exceeding three years. I have already held that Section 7 embodies reasonable restrictions. That being so it must be held that Section 18 which confers on a Magistrate the power to close brothels and to evict offenders from premises which are situated within 200 yards of any public place referred to in Section 7 of the Act, is also constitutional.

7. The last section which we have to consider in connection with reasonable restrictions is Section 20. No doubt very wide powers have been given to a Magistrate to remove any woman or girl who is a prostitute from any place within the limits of his jurisdiction if he considers that it is necessary to do so in the interests of the general public and also to prohibit her from re-entering it again. This section has been attacked on three grounds. The first ground is that it infringes Article 14 of the Constitution of India inasmuch as it has conferred unrestricted powers on a Magistrate and there is no reasonable basis or classification. The second ground is that it is not reasonable restriction as contemplated by Article 19(6) of the Constitution of India. The third ground is that the section infringes Article 19(1)(d) and Article 19(1)(e) of the Constitution of India.

8. I will take the first objection first. It would be noticed that there is nothing in Section 20 of the Act to guide a Magistrate in deciding which prostitute to remove outside his jurisdiction and which not to remove. In other words, there is no rational classification and it is left to the sweet will of the Magistrate to remove one prostitute and not to remove another though her case may be quite similar to the case of the one who is being removed. There is no indication whatsoever in any provision of the Act or the preamble which will guide the Magistrate in determining as to in which cases "it is necessary in the interests of the general public that such woman or girl should be required to remove herself there from and be prohibited from re-entering the same." It appears to me that the present case would fall in the rule laid down by their Lordships of the Supreme Court in the Case of State of West Bengal of Anwar Ali, AIR 1952 Supreme Court 75. In that case Section 5 of the West Bengal Special Courts Act was impugned. Section 5 of that Act reads as follows :

"5(1) A special court shall try such offences or classes of offences or cases or classes of cases, as the State Government may by general or special order in writing, direct.

(2) No direction shall be made under Sub-Section (2) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any Court, but, save as aforesaid, such direction may be made in respect of an offence, whether such offence was committed before or after the commencement of this Act."

The majority view (per Fazl Ali, Mahajau, Mukherjea, Chandra Sekhara Aiyar and Bose, JJ.), was that the provisions of Section 5(1) were ultra vires the Constitution by reason of their being in conflict with Article 14 of the Constitution. The minority judgment was by Sastri, C.J., who held that provision to be intra vires. Das, J., held the provisions of Section 5(1) ultra vires only so far as it allowed the State Government to direct any case to be tried by the Special Court; the rest of it he held to be valid, in this case Mukherjea, J. observed as follows :

"In the case before us, the language of Section 5(1) is perfectly clear and free from any ambiguity. It vests an unrestricted discretion in the State Government to direct any case or classes of cases to be tried by the Special Court in accordance with the procedure laid down in the Act. It is not stated that it is only when speedier trial is necessary that the discretion should be exercised.

"In the second place, assuming that the preamble throws any light upon the interpretation of the section, I am definitely of opinion that the necessity of a speedier trial is too vague, uncertain and elusive a criterion to form a rational basis for the discriminations made. The necessity for speedier trial may be the object which the legislature had in view or it may be the occasion for making, the enactment. In a sense quick disposal is a thing which is desirable in all legal proceedings. The word used here is 'speedier' which is a comparative term and as there may be degrees of speediness, the word undoubtedly introduced an uncertain and variable element. But the question is; how is this necessity of speedier trial to be determined ? Not by reference to the nature of the offences or the circumstances under which or the area in which they are committed, nor even by reference to any peculiarities or antecedents of the offenders themselves, but the selection is left to the absolute and unfettered discretion of the executive government with nothing in the law to guide or control its selection. This is not a reasonable classification at all but an arbitrary selection.

"A line is drawn artificially between two classes of cases. On one side of the line are grouped those cases which the State Government chooses to assign to the Special Court; on the other side stand the rest which the State Government does not think fit and proper to touch. It has been observed in many cases by the Supreme Court of America that the fact that some sort of classification has been attempted will not relieve a state from the reach of the equality clause.

It must appear that not only that a classification has been made but also that it is based upon some reasonable ground - some difference which bears a just and proper relation to the attempted' classification': Vide *Gulf Colorado etc. Co. v. Ellis*⁶.

"The question in each case would be : whether the characteristics of the class are such as to provide a rational justification for the differences introduced ? Judged by this test, the answer in the present case should be in the negative; for the difference in the treatment rests here solely on arbitrary selection by the State Government."

9. In the present case the provisions of the Act can be no guide to the Magistrate to decide in which cases he should consider it necessary to remove a prostitute. The preamble only says as follows :

"An Act to provide in pursuance of the International Convention signed at New York on the 9th day of May, 1950, for the suppression of immoral traffic in women and girls."

It has not been mentioned anywhere in the Act as to what are the guiding principles on which a Magistrate has to make up his mind that it is reasonable to remove a particular prostitute. There is no classification at all in the Act. The Act gives a Magistrate discretionary power not to be exercised upon a consideration of the circumstances of the case but a naked and arbitrary power to remove a prostitute outside the limits of his jurisdiction and to prohibit her from re-entering it.

"An Act which gives uncontrolled authority to discriminate can be hit by Article 14". Prim a facie therefore there appears some substance in the petitioner's contention that it is not a reasonable classification but an arbitrary selection where the selection is left to the absolute and unfettered discretion of

⁶(1897) 165 US 150

the executive government "with nothing to guide or control its action."

10. The present case is quite different from the case of *Kathi Raning Rawat v. State of Saurashtra*⁷, where the clear recital of a definite objective furnished a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquility. In that case Section 11 of the Ordinance was challenged. That section reads as follows :

"A Special Judge shall try such offences or class of offences or such cases or classes of cases as the Government of the United State of Saurashtra may, by general or special order in writing, direct."

The majority view was that that section was intra vires of the Constitution of India. Fazl Ali, J., who was one of the Judges who took that view observed as follows :

"As regards the present Ordinance, we can discover a guiding principle within its four

corners, which cannot but have the effect of limiting the application of the special procedure to a particular category of offences only and establish such a nexus (which was missing in the West Bengal Act) between offences of a particular category and the object with which the Ordinance was promulgated, as should suffice to repel the charge of discrimination and furnish some justification for the special treatment of those offences.

The Ordinance, as I have already stated, purported to amend another Ordinance, the object of which was to provide for public safety, maintenance of public order and preservation of peace and tranquility in the State. It was not disputed before us that the preamble of the original Ordinance would govern the amending Ordinance also and the object of promulgating the subsequent Ordinance was the same as the object of promulgating the original Ordinance. Once this is appreciated, it is easy to say that there is something in the Ordinance itself to guide the State Government to apply the special procedure not to any and every case but only to those cases of offences which have a rational relation to or connection with the main object and purpose of the Ordinance and which for that reason become a class by themselves requiring to be dealt with on a special footing. The clear recital of a definite objective furnishes a tangible and rational basis of classification to the State Government for the purpose of applying the provisions of the Ordinance and for choosing only such offences or cases as affect public safety, maintenance of public order and preservation of peace and tranquillity. Thus under Section 11, the State Government is expected to select only such offences or class of offences or class of cases for being tried by the special Court in accordance with the special procedure as are calculated to affect public safety, maintenance of public order, etc., and under Section 9, the use of the special procedure must necessarily be confined to only disturbed areas or those areas where adoption of public safety measures is necessary."

⁷ AIR 1952 SC 123

Mukherjea, J.,

11. who also held Section 11 of the Ordinance to be *intra vires* observed as follows :

"In my opinion, if the legislative policy is clear and definite and as an effective method of carrying out that policy a discretion is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons the statute itself cannot be condemned as a piece of discriminatory legislation. After all the law does all that is needed when it does all that it can, indicates a policy..... and seeks to bring within the lines all similarly situated so far as its means allow! Vide, *Buck v. Bell*⁸,

In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy, to effectuate which the direction is

given and it is in relation to that objective that the propriety of the classification would have to be tested. If the administrative body proceeds to classify persons or things on a basis which has no rational relation to the objective of the legislation, its action can certainly be annulled as offending against the equal protection clause. On the other hand, if the statute itself does not disclose a definite policy or objective and it confers authority on another to make selection at its pleasure, the statute would be held on the face of it to be discriminatory irrespective of the way in which it is applied. This, it seems to me is the true principle underlying the decision of the Supreme Court of America in *Yick Wo. v. Hopkins, (1880) 118 US 356*. The preamble to the Ordinance sets out the objective of the Ordinance in identical terms. It is to be noted that the integration of several States in Kathiawar which now forms the State of Saurashtra, was completed sometime in February, 1948.

It appears from the affidavit of an officer of the Home Government of the Saurashtra State that soon after the integration took place an alarming state of lawlessness prevailed in some of the districts within the State. There were gangs of dacoits operating at different places and their number began to increase gradually. As ordinary law was deemed insufficient to cope with the nefarious activities of those criminal gangs, the Saurashtra Public Safety Measures Ordinance was promulgated by the Rajpramukh on 2-4-1948. The Ordinance, as stated already, provided principally for preventive detention and imposition of collective fines; and it was hoped that armed with these extraordinary powers the State Government would be able to bring the situation under control. These hopes, however, were belied, and the affidavit gives a long list of offences in which murder and nose-cutting figure conspicuously in addition to looting and dacoity, which were committed by the dacoits during the year 1948 and 1949. If Special Courts were considered necessary to cope with an abnormal situation it cannot be said that the vesting of authority in the State Government to select offences for trial by such Courts is in any way unreasonable. In the light of the principles stated already, I am unable to hold that Section 11 of the Ordinance insofar as it authorises the State Government to direct "classes of offences or cases to be tried by the Special Court offends against the provision of the equal protection clause in our Constitution."

⁹(1927) 274 US 200 at p. 208

11. The present case is also dissimilar to the case of *Kedar Nath v. State of West Bengal*¹⁰, where after considering the background of the legislation and its preamble, purpose and the provisions of the Supreme Court came to the view that the impugned legislation was based on a perfectly intelligible principle of classification having a clear and reasonable relation to the object sought to be attained.

12. Our case is also different from the case of *Gurbachan Singh v. State of Bombay*¹¹, of the City of Bombay Police Act was challenged on the ground that it contravened Article 14 of the Constitution of India. Section 27(1) of that Act runs as follows :

"Whenever it shall appear to the Commissioner of Police,

(a) that the movements or acts of any person in the Greater Bombay are causing or

calculated to cause alarm, danger or harm to person or property, or 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 an offence punishable under Chapters XII, XVI, or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of the Commissioner witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property;

(b) the Commissioner of Police may, by an order in writing duly served on him. direct such person to remove himself outside the State or to such place within the State and by such route and within such time as the Commissioner of Police shall prescribe and not to enter the State or as the case may be the Greater Bombay."

The Supreme Court repelled the plea that this provision was hit by Article 14 of the Constitution of India in the following words :

"The last point made by Mr. Umrigar does not seem to us to be tenable. It is true that a procedure different from what is laid down under the ordinary law has been provided for a particular class of persons against whom proceedings could be taken under Section 27(1) of the City of Bombay Police Act, but the discrimination if any is based upon a reasonable classification which is within the competency of the legislature to make. Having regard to the objective which the legislature has in view and the policy underlying it, a departure from the ordinary procedure can certainly be justified as the best means of giving effect to the object of the legislature."

It would be noticed that in Section 27(1) of the Bombay Act no vague expression as "in the interest of the general public" was used. The classes of persons who were likely to be removed were described with exactitude and precision and the removal was for a maximum period of two years which could be cancelled earlier.

13. It is true that in Section 20 of the Act it is provided that a Magistrate may pass an order removing a prostitute from a place within his jurisdiction only if he considers

¹⁰ All 1953 SC 404,

¹¹ AIR 1952 SC 221, where Section 27(1)

that it is necessary to do so in the interests of the general public. Prima facie, again, it appears that the expression "necessary in the interests of the general public" is "too vague, uncertain and elusive a criterion to form a rational basis for the discrimination made." Public interest may be the object which the Legislature had in view or it may be the occasion for making the enactment but it seems that there is no reasonable classification in Section 20 but only an arbitrary selection is provided for. It therefore appears prima facie that Section 20 is hit by Article 14 of the Constitution, but I express no final opinion on this point because I have not heard the other side and it is only proper that before a provision of a Central Act is held unconstitutional

notice must go not only to the respondents but also to the Attorney General of India (Vide Order 27-A of the Code of Civil Procedure). The casual expression of my opinion, which is only tentative, has been made simply because these points were urged before me and it was only fair that I said something about the submissions made before me and not to ignore the argument. Besides, under the Rules of the Court this order of mine is appealable to a Division Bench as of right. It was therefore necessary to consider in my judgment the various submissions that, had been made before me. I would have been inclined to issue notice to the respondents and to the Attorney General but in view of the fact that the petition is not maintainable and is liable to be dismissed for the reasons which I shall mention in the last portion of my judgment, I have not issued notice.

14. There is also some substance (and I do not put it higher because I have not heard the other side) in the petitioner's submission that Section 20 is also hit by Article 19(1)(g) of the Constitution of India. It would be noticed that there is no period fixed in that section for which a person can be removed or prohibited from re-entering. Under the provisions of this section a person can be removed for all time and can be prohibited from re-entering for all time and if the order of removal or the order prohibiting re-entry is disobeyed the person disobeying is liable to be punished. Any person who harbours or conceals a person ordered to be removed or prohibited from re-entering is also liable to be punished. The result of an order removing a prostitute from a city or area where she is carrying on her profession or trade and prohibiting her from re-entering the same for an indefinite period or for all time would lead to her not being able to carry on her profession or trade. It would therefore result in the denial of the fundamental right guaranteed under Article 19(1)(g) of the Constitution. Besides, the power to remove or prohibit re-entry has no reasonable relation to the object in view, i.e., the suppression of traffic in persons and of the exploitation of the others (see the preamble to the Convention of 1950 and the preamble to our Act).

15. So far as the last point in connection with this matter is concerned viz., that Section 20 infringes Clauses (d) and (e) of Article 19(1) of the Constitution it appears to me (and I am saying that only tentatively) that there seems to be force in this objection to the constitutionality of Section 20 of the Act. Clauses (d) and (e) of Article 19(1) runs as follows.

"All citizens shall have the right -
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India."

I have already said above that under Section 20 of the Act a Magistrate has the power to remove a prostitute from a particular place for all time to come. It may also be noticed that no appeal or revision is provided against that order. In the Full Bench case of *Jeshingbhai v. Emperor*¹², the validity of Section 2(1)(b) of the Bombay Public Security Measures Act (VI of 1947) was challenged. Clause (b) of that Sub-Section reads as follows :

"directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or person as may be specified therein, he shall not be in any such area or place in the Province as may be specified in the order."

The majority of the Judges (Chagla C.J., and Bavdekar, J.) held that unreasonable restrictions have been placed by that section on the right of a person to reside in any part of the country and move freely throughout the country, and Clauses (d) and (e) of Article 19(1) of the Constitution of India had been infringed. This case in my opinion applies to the facts of our case. The other Full Bench decision of the Bombay High Court in the case of *Abdul Rahiman v. Emperor*¹³, where the validity of Section 48(3) of the Bombay District Police Act was challenged and was held to be valid, is not applicable to the facts of our case. To my mind the case of Gurbachan Singh (L) referred to above is also distinguishable because in the section impugned in that case there was a maximum period for which a person could be removed unlike our case. Therefore, prima facie, it appears to me that there is some force in this objection also against the constitutionality of Section 20.

16. One of other sections impugned is Section 10 of the Act. It is contended that Sub-Section (2) of that section is ultra vires because it authorizes a Court to put a person in detention for a period of not less than two years and not more than five years. It is contended that under the provisions of Article 22(4) of the Constitution no one can be detained for a period extending over three months. It is also contended in this connection that the power to legislate in respect of matters of preventive detention conferred on the Union Government by the provisions of Article 246 and List I of the Constitution are confined to the background of such laws for preventive detention which are connected with defense, foreign affairs or security of India. Item No. 9 in List I runs as follows :

"Preventive detention for reasons connected with Defense Foreign Affairs, or the security of India; persons subjected to such detention."

On the basis of the above noted provision it is contended that the Parliament has no power to enact a law allowing detention of a person who has been held guilty of an offence connected with traffic in women and in any case the law so made must conform to Article 22 of the Constitution. In my opinion there is no force in this contention. Article 22 of the Constitution deals with preventive and not punitive detention. Section 10(2) of the Act deals with punitive detention. Detention under Section 10(2) can be ordered only after a person has been tried and convicted of an offence punishable under the provisions of the Act by a competent Court. It is not a

¹² AIR 1950 Bom 363

¹³ AIR 1950 Bom 374

case of detention without trial. Under the provisions of Section 10(2) of the Act a person is detained in lieu of a term of imprisonment or imposition of fine. In my opinion the

Parliament could legislate in respect of this matter both because of Article 35(a)(ii) of the Constitution as also entry 93 in List I of the Schedule.

17. Lastly I come to Section 4(2)(a) of the Act, read with clause (c) of Section 4(2). Section 4 runs as follows :

"(1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of a woman or girl shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

(2) Where any person is proved -

(a) to be living with, or to be habitually in the company of, a prostitute; or

(b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding, abetting or compelling her prostitution; or

(c) to be acting as a tout or pimp on behalf of a prostitute, it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of Sub-Section (1);

Provided that no such presumption shall be drawn in the case of a son or daughter of a prostitute, if the son or daughter is below the age of eighteen years."

18. Unlike most of the other countries in our country there is a practice under which members of a family usually live together e.g., father and mother, and their children live together. It is quite conceivable, in fact it must be so, that there would be hundreds of prostitutes whose parents or other family members live with them, though they may not be economically dependent upon them and may not in any manner be encouraging, aiding, abetting or helping them in the carrying on of their profession or trade. In the absence of there being any evidence that they are either living on the income of the prostitutes with whom they are living or are encouraging, aiding, abetting or helping them towards prostitution, it would be extremely risky and not free from danger to draw any presumption as-contemplated by the above Sub-Section. This Sub-Section imposes a restriction which appears to have no reasonable relation to the object in view i.e., the suppression of immoral traffic in women, or at any rate no proximity or close relation, and for that reason the restriction appears to be unreasonable. I therefore find some substance in the submission of the learned counsel for the petitioner that this particular Sub-Section of Section 4 is not constitutional. However, I am expressing no final opinion.

19. It is not necessary to consider the other provisions of the Act because the validity of no other section has been challenged before me.

20. The result of the foregoing discussion is that there appears to be some substance (and I do not put it higher) in the petitioner's complaint about the unconstitutionality of Section 20 as also a part of Section 4 of the Act. But these sections or Sub-Sections can be served from the rest of the Act

and even if the contention of the learned counsel for the petitioner is upheld the entire Act does not fall I because the impugned Act minus these sections can remain unaffected. The omission of Section 20 and part of Section 4 will not change the structure or the object of the legislation (see *Gopalan v. State of Madras*¹⁴). It may be noticed that the original Bill did not contain Section 20 of the Act and it was added by the Select Committee. I would have been inclined to issue notice in this case to the respondents and also to the Attorney General of India in view of my observations with regard to Section 20 and a part of Section 4 of the Act, but to my mind the present petition has been filed prematurely and it cannot be entertained.

21. So far, no order adverse to the petitioner has been passed in the present case. A person is not entitled to file a writ petition until any of his rights have been infringed. While considering whether or not the rights of a particular person have been infringed it is open to a Court to consider the Constitutionality of a statute under which the impugned orders are passed, but in a case where no orders have been passed under an impugned Act and no rights of the petitioner have been invaded a mere declaration that the impugned Act is unconstitutional cannot be given. In the case of *Charanjit Lal v. Union of India*¹⁵, Mukherjea, J., made the following observations (pp. 52-53) with regard to Article 32 of the Constitution of India;

"To make out a case under this Article, it is incumbent upon the petitioner to establish not merely that the law complained of is beyond the competence of the particular Legislature as not being covered by any of the item in the legislative lists, but that it affects or invades his fundamental rights guaranteed by the Constitution of which he can seek enforcement by an appropriate writ or order A proceeding under this Article cannot have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the shape of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32."

This decision is binding upon me as on all other Courts in India. It was followed in the case of *Anumati Sadhukhan v. Assistant Regional Controller, Procurement, Alipur*¹⁶, The question whether advisory opinion or declaratory judgment on the constitutionality of a legislation can be given, apart from some concrete injury or controversy, was considered by a Full Bench of the Nagpur High Court in the case of *Sheoshankar v. M.P. State Government*¹⁷. and it was held that it could not be done. In this case reliance was placed upon several English and American cases. In the present case there is no allegation made that any order adverse to the petitioner has been passed and all that is said is that "the petitioner is being threatened with legal proceedings under this Act both by opposite party Nos. 4 and 5". No notice has yet been issued by either of the respondents Nos. 4 and 5 and no tangible action has yet been taken. It must therefore be held that none of the rights of the petitioner have either been infringed or invaded. The argument that "if there is a potential threat to the exercise" of a person's fundamental rights by the

¹⁴ AIR 1950 SC 27

¹⁶ AIR 1953 Cal 187

¹⁵ AIR 1951 SC 41

¹⁷ AIR 1951 Nag 58

existence of an unconstitutional provision a writ should be issued was repelled by the Calcutta

High Court in the case of Anumati Sadhukhan, referred to above. I follow this decision with respect.

22. The petition is accordingly rejected.

Petition dismissed.