BOMBAY HIGH COURT

Hudsain Saheb Kalawat

Vs.

State, (Bombay)

Criminal Revn. Appln. No. 1674 of 1961, (with Criminal Revn. Appln. No. 1730 of 1961 and Revn. Nos. 165 of 1961, and 12 of 1962)

(Patel and Palekar, JJ.)

12.04.1962

JUDGMENT

Patel, J.

1. These revisional applications have been referred to the Bench as they involve the important question of the vires of Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, 1956. In all these cases the Sub-Divisional Magistrate, Sholapur Division, has directed that the petitioners who are alleged to be prostitutes should remove themselves from the town of Barsi and that they should go to Osmanabad Via Yedshi within three days from the date set by him.

2. Now, Section 20 of the Act enables the Magistrate to record the substance of the information received and issue a notice to the woman or girl residing in or frequenting any place within the local limits of his jurisdiction to show cause. Sub-section (3) says that if upon such inquiry it appears to the Magistrate that such woman or girl is a prostitute and that 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, the Magistrate shall by order in writing direct her to remove herself from the place to such place whether within or without the local limits of his jurisdiction, by such route or routes and within such time as may be specified in the order and also prohibited her from re-entering the place without the permission in writing of the Magistrate having jurisdiction over such place.

3. It is argued by Mr. Lalit that this section is Ultra Vires the powers of the Legislature and is hit by Article 14 as well as by Article 19(1) (d) and (e). He argued that the section gives arbitrary power to a Magistrate to remove any prostitute he chooses without laying down any guiding principles and therefore it is hit by Article 14. So far as Article 19(1) (d), (e) is concerned, he

says that his clients have, as any other citizens have, the right to move freely throughout the territory of India and to reside and settle in any part of India and since the section curtails that right, it is Ultra Vires. According to him, though clause (5) of Article 19 enables reasonable restriction to be imposed, restrictions imposed by the provisions of section 20 are not reasonable for the reason that the remedy intended to be provided by the powers given to the Magistrate is not commensurate with the evil that was intended to be met by the Act.

4. There cannot be any scope for dispute that "prostitution and traffic in human beings for the purpose are incompatible with human dignity and worth of human person." It also cannot be disputed that it adversely affects the society both morally and physically. Even a most tolerant person would not like his or her family and children to come in contact with a prostitute. From time to time International agreements are made for suppression of the traffic in one form or another. The first was as early as on 18th May 1904, second was of 4th May 1910, third of 30-9-1921, fourth of 11-10-1933 and the last in 1950, a convention for the suppression of the traffic in women and girls and of the exploitation of the prostitution of others. This convention was signed by several nations including ours.

5. While dealing with the argument about reasonableness or otherwise, one must remember that women do not choose this vocation because they like it. It has been recognized that in a large measure they are forced in this vocation by social conditions and most often against their will. One may not therefore, judge these cases with any amount of harshness.

6. We will take the first objection first. It is argued that there is nothing to guide the Magistrate to decide which of the several prostitutes operating in an area to remove. Reliance is placed for this argument on *State of West Bengal v. Anwar Ali*[1], where Section 5 of West Bengal Special Courts Act was held to be invalid on the ground that it vested an unrestricted discretion in the State Government to direct any case or classes of cases to be tried by the Special Court. Mukherjee J. observed as follows :

> "In the second place, assuming that the preamble throws any light upon 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........... "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*[2],

7. In *Kathi Raning Rawat v. State of Saurashtra*[3], vires of

[1] AIR 1952 SC 75 [3] AIR 1952 SC 123
[2](1897) 165 US 150

Saurashtra Public Safety Measures (Third Amendment) Ordinance 1952 was challenged and in particular Section 11. The case furnishes a guide to the principles to be applied in the approach to the question. It points out that though Article 14 prevents class legislation it does not prevent reasonable classification for the purpose of legislation. It is also clear from the case that if from the scope and object of the legislation and the other provisions of the Act, it is clear that the discretion given to the authority is to be exercised in reference only to a particular class of persons in order to achieve the object aimed at, then the legislation cannot be regarded as invalid.

8. Even before this Act was enacted, there were provisions for similar purposes and also for preventing prostitution in certain States. Moreover this is not the first time when the International Convention in this respect was signed by different countries. The Articles of 1950 are merely as amendments to the Articles signed on May 4, 1910 for the same purpose at Paris. It is with a view to prevent immoral traffic in women, and girls that the present Act was enacted. Though it is directed at prevention of the immoral traffic in women and children that would not appear to be its only purpose as the reading of the whole Act discloses. It has got also a further purpose and that is to prevent such influences as encourage prostitution.

9. Now, the definition section defines "brothel", "prostitute" and "prostitution" which words very frequently occur in the section of the Act. Section 3 seeks to punish those who keep brothels or allow the premises to be used as a brothel. It not only seeks to punish such person but also provides that any agreement of lease in respect of the premises so used shall become void and inoperative from the date of conviction. Section 4 punishes those who live on the earnings of the prostitution. Section 5 is intended to punish those who are guilty of the offence of procuring, inducing or taking woman or girl for sake of prostitution. Section 6 is intended to punish those who detain a woman or girl in premises where prostitution is carried on. Section 7 makes it an offence for any woman or girl to carry on prostitution in any premises which are within a distance of 200 yards of any public place therein mentioned or such other public places as may be notified by the Commissioner of Police or District Magistrate. Section 8 is intended to punish seducing or soliciting for purpose of prostitution. It is clear from these two provisions that though in the Act there is no section that no woman or girl shall be a prostitute or shall do the trade of a prostitute, yet if it is done in the manner and under circumstances which have an unhealthy influence on the public, then it is intended to be prevented. Section 8 defines seducing or soliciting and the definition is very wide and includes all acts either by words or gestures of soliciting or tempting. Section 9 makes it an offence for seduction of a woman or a girl in

custody. Section 10 enables the Court to make an order under Section 562 of the Code of Criminal Procedure and releasing the person concerned on probation of good conduct and detention in protective home. Section 11 enables the Court to require a person convicted as mentioned in that section to notify the address and the change of address of such person. Section 12 enables the Court to direct security for good behaviour from habitual offenders. Section 16 enables a Magistrate to direct a police officer to enter brothel and to remove there from such girl who he believes is carrying on prostitution and produce her before him. Section 17 makes a consequential provision for the custody of such girl so produced. Section 18 enables the Magistrate to direct eviction of a prostitute who utilizes a room or house for the purpose of prostitution and which is situated within a distance of two hundred yards of public places mentioned in Section 7. Sub-section (2) of Section 18 also provides that a Court convicting a person of any offence under Section 3 or Section 7, may pass orders under sub-section (1) without any further notice to such person. Section 19 enables the woman or a girl to make an application for being kept in a protective home and then comes Section 20.

10. It is clear from the provisions to which we have referred, that what is intended by this legislation is not only to suppress traffic in women and girls but also to curtail the activities of prostitutes if their activities have got a tendency to tempt young persons or cause annoyance to even grown up persons who visit place of worship, hospitals, Nursing Homes and educational institutions and affect their susceptibilities.

11. As observed by the learned Chief Justice Chagla, in *Emperor v. Jesinghbhai*[4]*,)*, the expression "interests of the general public" is of wide connotation and has got several implications. Though it is an expression of large import and may leave the Magistrate without much rational guidance by themselves, as used it is not possible to regard the words "interests of the general public" to be in any manner vague. If one has regard to the whole purpose of the Act, not only as given in the preamble, but by the amplitude of the other provisions referred to above, it would clearly appear that the words are intended to have application in the circumstances similar to those created by Sections 7, 8, and 18. In other words, if it is found that a prostitute is carrying on her trade in such a place and in such a manner as to affect the morals of young and unwary who have frequently to use the locality where she carries on her activities or hurts the susceptibilities of large number of even grown up persons having occasion to be in the locality then it can be said that "it is necessary in the interest of the general public that such woman or girl should be required to remove herself there from ....." Viewed from this point of view it cannot be said that the discretion is unguided and undefined. Only such prostitute whose activities are such as to fall within the limits stated above that can be removed by this order. The provision therefore would not be hit by Article 14.

12. The next question is whether the restrictions are reasonable. In this connection reference is made to *Chintamanrao v. State of Madhya Pradesh*[5]*,* and the *State of Madras v. V. G. Rao*[6]*,* In the latter case principles to be applied were stated with some elaboration and they have been

subsequently followed in other cases. There the learned Chief Justice said,

> "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 prevalling conditions at the time, should all enter into the Judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can

[4] 52 Bom LR 544 : (AIR 1950 Bom 363) (FB) [6] AIR 1952 SC 196

[5] AIR 1951 SC 118

> only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorizing the imposition of the restrictions, considered them to be reasonable."

It has been also an accepted principle while determining reasonableness of the restrictions to take into account the procedural and temporal aspects of a matter. As has been observed in, 52 Bom LR 544 : (AIR 1950 Bombay 363)(FB), by Chagla C. J. "Reasonable" is an objective expression and its objectivity is to be determined judicially by the Court of law. There is no limit placed upon the power of the Court to consider the nature of the restrictions. The Court must look upon the restrictions from every point of view. It being the duty of the Court to safeguard fundamental rights, the greater is the obligation upon the court to scrutinize the restrictions placed by the Legislature as carefully as possible. In order to decide whether a restriction is reasonable or not, the Court must look at the nature of the restriction, the manner in which it is imposed, its extent both territorial and temporal, and if after considering all this the Court comes to the conclusion that the restriction is unreasonable, then the restriction is not justified and the Court will not uphold that restriction. We may also at this stage refer to his observations in respect of the expression "interests of general public" where he says that that expression in Article 19(5) is a very wide expression "much wider than any of the expressions used in sub-clauses (2), (3) and (4). It embraces public security, public order and public morality, and therefore much wider power is given to the Legislature under sub-clause (5) to restrict the right given under Article 19(l)(d) and (e). The wider the power given to the Legislature, the greater is the duty of the Court to see that the restrictions placed upon the liberty are reasonable restrictions."

13. It is indeed true that if the only object of the Act were to suppress immoral traffic in women and girls, then the power given to a Magistrate to remove a prostitute from his jurisdiction to any other jurisdiction would apparently appear to be unjustified because no possible relationship can be found between the purpose to be achieved and the remedy provided by this section. We are

not, however, prepared to hold that the only purpose is to prevent traffic in women and girls. It has wider aims and the provisions referred to above show that though total prohibition of prostitution is not intended, it is intended to be discouraged. Moreover, the purpose is to prevent any one acting in such a way as to influence others and tempt them into falling in the vocation. Necessity for controlling and even preventing prostitution must be admitted by every one. In view of the limited meaning given by us to the words "in the interests of general public" it cannot be said that the discretion is arbitrary and looking to the object to be achieved, it cannot be said that the section makes excessive invasion on the rights of a prostitute to move freely and reside wherever she likes. The section prescribes a procedure which the Magistrate has to follow before passing an order. It requires a notice to be issued and giving a hearing to the prostitute concerned. This requirement is satisfied. The restrictions cannot therefore be said to be unreasonable.

14. It has been argued that Section 20 of the Act is out of place in the scheme of the Act and has practically overriding effect over the other provisions and also the general intention of the Legislature. It is not possible to say that it falls outside the scheme of the Act. Both Sections 7 and 18 put down an arbitrary limit of the place of activities to within 200 yards of those public places. There may yet be cases where even though the place of activity of a prostitute is beyond the limits of 200 yards is yet such as to have the same effect both as to extent and the frequency as in the other case. It is to meet such exigencies that Section 20 has been enacted. It cannot be said that the section is out of place.

15. It is, however, argued that when the section enables the Magistrate to direct a prostitute to remove herself from the place where she is living to such place whether within or without the local limits of his jurisdiction, it exceeds the necessities of the case and therefore it is ultra vires. Now, it is true that if the purpose of removal is only to prevent the mischief which we have indicated above removing the prostitute from out of the jurisdiction would certainly appear to be excessive. But then the learned Government Pleader says that the power to direct her to remove herself from the place where she lives to any other place, within the jurisdiction, can be easily separated from the power to remove herself to any other place without the jurisdiction and therefore, it is only that portion which goes beyond the necessities of the case that should be struck down and not the whole. The principles in respect of determining whether a part of the statute can be held to be invalid and a part valid, have been considered in *R. M. D. Chamarbaugwalla v. Union of India*[7], *A*where it is said that it is the intention of the Legislature that is the determining factor. The tests were

> "Whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. Secondly, if the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid; what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest

has become unenforceable; thirdly, even when the provisions which are invalid, if they all form part of a single scheme and is intended to be operative as whole, then also the invalidity of a part, will result in the failure of the whole. Fourthly, likewise when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety. Fifthly, the separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein. Sixthly, if after invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation."

We may also illustrate the applicability of the principle by reference to *State of Bombay v. F. N. Balsara*[8]*,* where Sections 12 and 13 of the Act were held to be partially invalid i.e.

[7] IR 1957 SC 628

[8] 1951-2 SCR 682 : AIR 1951 SC 318

when applied to a few of the items out of several items appearing in the definition of the word "liquor". Considered from this point of view, we have no hesitation in holding that the power to remove such prostitute to a place without the local limits of the jurisdiction of the Magistrate, can be struck down without in any manner impairing the provisions of the section. Even if these words are not there, the provisions can be fully operative and the purpose intended to be achieved can be fully achieved. In this view of the matter, except, the portion indicated above, the rest of the section cannot be held to be invalid on the ground that it unreasonably encroaches upon the fundamental rights guaranteed by Article 19(1) (d) and (e) of the Constitution.

16. It is agrued that the section is invalid because it does not prescribe any limit of time for which a prostitute is to be removed. In this connection, 52 Bom LR 544 : (AIR 1950 Bombay 353) (F8), has been relied upon. In that case Section 2(l)(b) of the Bombay Public Security Measures Act, 1947, was held to be invalid on two grounds; (1) no period for the duration of the externment order was laid down in the statute and (2) no right of hearing was given to the person sought to be externed. On the other hand the same Full Bench in *Emperor v. Abdul Rahaman*[9]*,* in relation to section 46 of the Bombay District Police Act, 1890, said

"It is perfectly true that section 42 (1) does not contemplate an order of any particular duration. But it must be borne in mind that under the General Clauses Act the authority making an order has also power to revoke.......it. It must also be borne in mind that in cases that fall under section 42 (1) it would be very difficult for the authority at the time it makes an order to be in a position to know how long the emergency would last or how long the danger would last".

Since the section in the present case enables the Magistrate to evoke the order in a proper case we are not prepared to accept the contention.
17. The learned Advocate has indeed not argued and has practically conceded that it may not be possible for him to contend that restrictions imposed also are an encroachment upon the rights of his clients under Article 19 (1) (g) to carry on any trade or business in view particularly of Article 23 which enables the legislature to prohibit traffic in human beings and certain other matters. In *Cooverjee v. Excise Commissioner, Ajmer*[10] it was observed in respect of Article 19 (1) (g) as follows :

> "It was not disputed that in order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that 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. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public.". . . .
> "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."

As the argument is not pressed, it is not necessary to labour this point further.

18. In view of what we have stated above, the order made by the Sub-Divisional

[9]52 Bom LR 558 : (AIR 1950 Bom 3/4)
[10] AIR 1954 SC 220

Magistrate directing that the petitioners shall remove themselves from their present places of residence and shall leave the place and go to Osmanabad Via Yadeshi is clearly unsupportable. We may mention that the learned Magistrate was prompted to make the order that he had because it appeared from the depositions before him that the Municipal school was only 80 feet away from the house of the petitioners, that behavior of the petitioner was indecent, that respectable persons of that locality as well as girl students go to school or work by that way and that the petitioners were standing in the lane leading to that school and that the general public of particular locality was very much troubled by their activities. It appears apparently to be a respectable locality. Prima facie, the reasons for the making of the order would bring the petitioners within the category of prostitutes who ought to be removed in the interests of general public from that locality. In view however, of the fact that the order is made under powers given by a portion of the section which is held to be ultra vires, the order cannot be sustained.

We, therefore, set aside that order and send the matter back to the Magistrate for being dealt with in accordance with law.
Order accordingly.