

**Smt. Kaushailiya Vs. State**

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**Court :** Allahabad

**Decided On :** Nov-17-1961

**Reported in :** AIR1963All71; 1963CriLJ138

**Judge :** W. Broome, J.

**Acts :** Suppression of Immoral Traffic in Women and Girls Act, 1956 - Sections 3, 4, 6, 8, 13 and 20; [Constitution of India](#) - Articles 13, 13(2), 14 and 19(1); Code of Criminal Procedure (CrPC) - Sections 5(2) and 435

**Appeal No. :** Criminal Revn. Nos. 322, 323, 324, 611, 612 and 613 of 1961

**Appellant :** Smt. Kaushailiya

**Respondent :** State

**Advocate for Def. :** Asstt. Govt. Adv.

**Advocate for Pet/Ap. :** Vijay Kumar Barman, Adv.

**Disposition :** Revision allowed

**Judgement :**

ORDER

**W. Broome, J.**

1. These six criminal revision applications from Kanpur involve identical questions of law and may conveniently be dealt with together. Proceedings have been launched against all the six applicants under Section 20 of the Suppression of Immoral Traffic in Women and Girls Act 1956, on the ground that they are prostitutes and that in the interests of the general public they should be asked to remove themselves from the places where they are at present residing. Objections have been filed at the initial stage of the proceedings in the Court of the City Magistrate of Kanpur, before whom the cases are pending, claiming that the proceedings are not legally maintainable and should be dropped; but the learned Magistrate has repelled this argument and the applicants have accordingly been obliged to approach this Court.

2. The contention of the applicants is twofold : firstly that the Magistrate is not entitled to take action against them under Section 20 Suppression of Immoral Traffic in Women and Girls Act on the basis of reports submitted by a Sub-Inspector of Police who has not been appointed under Section 13 of the Act as a 'special police officer', with power to deal with offences under the Act; and secondly that Section 20 of the Act is unconstitutional since it infringes Article 14 and Clauses (d), (e) and (g) of Article 19 of the Constitution.

3. As regards the first point, reliance is placed on the decision in *Delhi Administration v. Ram Singh*, 1961 All LJ 805 : (AIR 1962 SC 63), in which the Supreme Court approved the view taken by a Delhi Magistrate that he could not take cognizance of an offence under Section 8 of the Suppression of Immoral Traffic in Women and Girls Act on the basis of a charge-sheet submitted by a Sub-Inspector who had not been appointed as a special police officer under Section 13. My attention has also been drawn to the ruling of the Madras High Court in *Re Kupppammal*, AIR 1959 Mad 389, where it was held that a Magistrate could not take cognisance of offences under Sections 3, 4 and 6 of the Act because the investigation in that case had been conducted by an Inspector of Police who had not been appointed under Section 13 as a special police officer 'for dealing with offences under this Act'. It seems to me, however, that reports under Section 20 of the Act stand on quite a different footing from charge-sheets under Sections 3, 4, 6 or 8. A. report under Section 20 does not relate to any offence, but is merely an

information to the Magistrate that a certain woman or girl residing in or frequenting some place within the local limits of his jurisdiction is a prostitute, whom it is desirable to remove in the interests of the general public.

Special police officers are appointed under Section 13 of the Act for the purpose of 'dealing with offences'; and that is why it has been held that they alone can submit charge-sheets regarding offences alleged to have been committed under various sections of the Act. But making a report under Section 20 cannot be constrained as 'dealing with offences under the Act'; and there would appear to be no reason why an ordinary sub-inspector, who has not been appointed as a special police officer under Section 13, should not be competent to make such a report. Indeed the wording of Section 20 is wide enough to permit a Magistrate to act on the basis of information received from a person who is not a police officer at all. There is thus no force in the applicants' first contention.

4. The next point that arises for consideration is whether Section 20 of the Act violates the fundamental right guaranteed by Article 19(1)(g) of the Constitution. The argument advanced in this connection is that prostitution is a profession, occupation or trade which the applicants have the right to practice or carry on and that Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, under which Magistrates have been given the power to require a prostitute to remove herself from the place where she is residing and not to re-enter that place without permission, is calculated to impose a restriction amounting to total prohibition and cannot in any case be regarded as a reasonable restriction such as would be valid under Clause (6) of Article 19.

This view receives support from the remarks made by a learned single Judge of this Court in *Shama Bai v. State of U. P.*, AIR 1959 All 57; but those remarks are admittedly obiter and cannot be treated as authoritative. The crucial point that must not be lost sight of when considering this problem is that prostitution (like gambling, toutage and other inherently immoral occupations) cannot be put on a par with normal, respectable professions and trades which have no taint of immorality about them. As pointed out by a Division Bench of this Court in the case of *In the matter of Phool Din*, AIR 1952 All 491 :

'It has been argued also that restrictions contemplated by Clause (6) of Article 19 cannot mean total prohibition. As already stated, the restrictions contemplated by this clause do not mean the restrictions upon the practice of any particular profession, but the restriction upon the very right to engage oneself in 'any profession'. It is therefore permissible under Clause (6) to prohibit a profession altogether if it is necessary to do so in public interest. The profession must not be opposed to public interest. We cannot interpret the words 'any profession' in Article 19(1)(g), as any profession which a citizen may choose to adopt regardless of its effect upon public interest.'

In a similar strain, the Supreme Court has held in *Cooverjee B. Bharucha v. Excise Commr. and Chief Commr. Ajmer*, 1954 SCR 873 : (AIR 1954 SC 220) :

'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 most 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 innoxious 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 conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community.'

It is clear therefore that in the case of an inherently immoral activity like prostitution, it is open to the State to impose a total ban; and no one can claim any fundamental right to carry on such an activity as though it were an ordinary profession or trade. That being so, I cannot accept the contention that Section 20 of the Suppression of Immoral Traffic in Women and Girls Act is invalid for violation of Article 19(1)(g).

5. The 'applicants are on surer ground, however, when they rely on Clauses (d) and (e) of Article 19(1). It is important to note that Section 20 of the Act is not

aimed directly at the carrying on of prostitution, but instead seeks to control the movements and residence of prostitutes. Under this section a Magistrate is not required to order a prostitute to give up her trade, but can direct her to remove herself from some place within the local limits of his jurisdiction that she is residing in or frequenting '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 may further prohibit her from re-entering the place from which she has been removed. This is a clear infringement of the fundamental rights guaranteed to citizens of this country by Article 19 of the Constitution, to move freely throughout the territory of India and to reside in any part of that territory.

6. Learned counsel for the State argues that the restrictions imposed by the impugned section are reasonable restrictions on the movements and residence of prostitutes that have been introduced in the interests of the general public and are therefore constitutionally valid by virtue of Clause (5) of Article 19. I do not think however that the provisions of Section 20 can be said to pass the usual tests of reasonableness. In the first place the action envisaged against prostitutes by this section is so harsh and drastic that it is out of all proportion to the benefit likely to accrue to the general public. As laid down by the Supreme Court in *Chintamanrao v. The State of Madhya Pradesh*, (AIR 1951 SC 118) :

'The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation, that is the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness.'

Again, more recently, in *Narendra Kumar v. Union of India*, AIR 1960 SC 430, the Supreme Court has held :

'In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to

the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public.'

Viewed from this angle, Section 20 of the Suppression of Immoral Traffic in Women and Girls Act is clearly unreasonable. A woman proceeded against under this section is not given the option of ceasing to carry on prostitution, if she wishes to be allowed to continue to reside within the Magistrate's jurisdiction. If he finds that she has been working as a prostitute in the past, he can expel her from the area controlled by him without further ado. Moreover she cannot only be removed from one mohalla to another or from one town to another in the same district, but may be expelled from the whole district. And no time limit is prescribed for the period of exile -- she can be kept out as long as the Magistrate chooses. Presumably the object of Section 20 is merely to prevent prostitution being carried on in certain localities where for one reason or another it is desirable in the interests of the general public that it should be banned; but the remedy provided by the section is unnecessarily drastic and wide in its scope. The encroachment made by Section 20 on the fundamental rights of residence and free movement of the individual far outweighs the benefit likely to accrue to the public at large and cannot therefore be deemed to be reasonable.

7. The decision in the case of *Hari Khemu Gawali v. Deputy, Commr. of Police, Bombay*, AIR 1956 SC 559 at first sight appears to run counter to this conclusion. That too was a case of externment by executive order, under Section 57 of the Bombay Police Act; and the Supreme Court held that there was nothing unreasonable in the provisions of the aforesaid section, since

'the State may have to curb an individual's activities and put fetters on his complete freedom of movement and residence in order that the greatest good of the greatest number may be conserved. The law is based on the principle that it is desirable in the larger interests of society that the freedom of movement and residence of a comparatively fewer number of people should be restrained so that the majority of the community may move and live in peace and harmony and carry on their peaceful avocations untrammelled by any fear or threat of violence to their

person or property.'

But a closer scrutiny shows that case to be clearly distinguishable on several grounds from the present one.

To begin with, the threat to public peace and safety by goondas who are likely to resort to violence obviously calls for stronger and more drastic measures than the mere contamination of public morals by prostitutes. Moreover, under Section 57 of the Bombay Police Act, only those persons can be externed who have certain convictions to their credit and are likely to commit further offences of a similar nature; whereas under Section 20 of the Suppression of Immoral Traffic in Women and Girls Act, even prostitutes who have committed no offence whatsoever and who are scrupulously observing the letter of the law can be asked to remove themselves from the places resided in or frequented by them. And further-more, under the Bombay Police Act the person proceeded against has a right of appeal to the State Government and can even in certain circumstances challenge the order of externment in a court of law.

8. Another ground for holding the restrictions imposed by Section 20 of the Suppression of Immoral Traffic in Women and Girls Act to be unreasonable is that no principles have been prescribed for the guidance of the Magistrate concerned, the circumstances in which action should be taken under this section being left entirely to his subjective determination. As observed by the Madras High Court in *Balakrishnan v. State of Madras*, AIR 1952 Mad 565 :

'The legislature can confer on a person or body of persons large powers for the purpose of administering the Act. But it must prescribe the principles on which these powers are to be exercised. If there are no rules for guiding and controlling the exercise of discretion by the person or body of persons, then the power must be held to be arbitrary and unreasonable.'

A similar view has been expressed by the Supreme Court in *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 in which certain provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, have been held to be invalid on the ground that they

'confer uncanalised and uncontrolled power to the Executive',

as

'Parliament has established no criteria, no standards and has not prescribed any principle on which a particular disease or condition is to be specified in the Schedule'.

In the present case the Act gives no inkling of what criteria or principles are to be followed by a Magistrate under Section 20, while making up his mind whether action should be taken against a particular prostitute

'in the interests of the general public'.

Uncontrolled power has thus been delegated to the Executive; and the restrictions imposed in this manner on the fundamental rights of residence and free movement must be held to be unreasonable.

9. This delegation of unguided and unfettered power to a subordinate Magistrate also amounts to an infringement of the right to equality before the law guaranteed by Article 14; As already pointed out, there is nothing in the Act to guide the Magistrate in the exercise of his discretion when deciding the cases of individual prostitutes. At his own sweet will he can expel one prostitute from a certain locality 'in the interests of the general public', while at the same time allowing another prostitute to carry on her trade in that same area. And his decision, based on pure subjective satisfaction, is not subject to any control or scrutiny by any higher authority, whether executive or judicial.

10. Learned counsel for the State concedes that if Section 20 is to be construed as conferring powers on the Executive, it must be held to be unconstitutional. He has tried to argue however that the section confers powers not on the Executive but on the Judiciary (i.e. on a Magistrate acting in his judicial capacity) and further that any decision made by a Magistrate under this section will be revisable by the High Court under Section 5 (2) Cri. P. C. His contention is that a Magistrate acting under Section 20 exercises a judicial discretion and his decisions cannot be treated as making unreasonable inroads on any fundamental rights, particularly

when they are subject to the scrutiny of the High Court in revision. It seems to me however that the procedure prescribed by Section 20 cannot by any stretch of imagination be equated with a true judicial trial by a court of law : at best it provides for a quasi-judicial inquiry. The Magistrate is no doubt enjoined to issue notice to the person proceeded against and to allow her an opportunity to produce evidence; but she has not been given the right to cross-examine the prosecution witnesses on whose testimony the proceedings have been initiated, nor is any obligation cast on the Magistrate to record the reasons for his decision.

The section appears to envisage mere subjective satisfaction on the part of the Magistrate, without laying down any principles or providing any safeguards to ensure that he acts fairly and reasonably in arriving at his conclusions. Nor does it appear to be correct that his decision would be revisable by the High Court. Section 5 (2) Cri. P. C. cannot be invoked, in this connection, as it applies only to offences, while Section 20 of the Suppression of Immoral Traffic in Women and Girls Act does not deal with offences at all (apart from the last clause, which provides a punishment for disobedience of an order passed under the preceding clauses). And a Magistrate acting under Section 20 is a special kind of tribunal, employing a special procedure, and cannot be treated as an 'inferior Criminal Court' for the purposes of Section 435 Cri. P. C. Learned counsel for the State relies on a recent decision of this Court *Shakila v. State*, 1961 All LJ 470 : (AIR 1961 All 633) --as authority for the proposition that the Criminal Procedure Code will apply to all proceedings under the Suppression of Immoral Traffic in Women and Girls Act, unless specifically excluded; but a perusal of the ruling in question shows that the learned Judges were discussing the procedure relating to offences only, and their remarks can have no relevance for proceedings under Section 20, which are not in respect of any offence. Similar is the position in the other case cited by learned counsel for the State -- *Smt. Prem v. District Magistrate, Meerut*, AIR 1959 All 206.

11. My conclusion therefore is that Section 20 of the Suppression of Immoral Traffic in Women and Girls Act must be struck down under Article 13(2) of the Constitution for taking away or abridging the fundamental rights conferred by Clauses (d) and (e) of Article 19(1), as well as for infringement of Article 14.

These six revision applications are accordingly allowed and the proceedings pending against the applicants in the court of the City Magistrate of Kanpur are quashed.

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