

(2020) 03 CAL CK 0004

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 21802 (W) Of 2019

Avijit Biswas

APPELLANT

Vs

State Of West Bengal And Others

RESPONDENT

Date of Decision : 04-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 21
Indian Penal Code, 1860 — Section 370
Bengal Excise Act, 1909 — Section 46
Immoral Traffic (Prevention) Act, 1956 — Section 3, 4, 5, 6
Information Technology Act, 2000 — Section 2, 2(a), 2(c), 2(f), 7(1), 18, 18(1), 20
Code Of Criminal Procedure, 1973 — Section 21, 102, 107, 108, 109, 110, 111, 144

Citation : (2020) 03 CAL CK 0004

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : Kallol Basu, Soubhik Mitter, Arushi Rathore, Ranjandini Das, Sayan Mukherjee, Kishore Dutta, Pantu Deb Roy, Subrata Guha Biswas, Pannalal Bandopadhyay

Final Decision : Allowed

Judgement

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Sabyasachi Bhattacharyya, J",

1. The writ petitioner is the Director of a company named and styled as Aaratrika Parks and Projects Private Limited, in which he is allegedly a

shareholder of 42.69 percent. The company runs an amusement park called Aqua Marina Water Park at Kanagarh, Hooghly.",

2. One Prodip Kumar Dan, Inspector-in-Charge, Chinsurah Police Station (respondent no.3) recorded a General Diary Entry No.1440 dated

September 21, 2019 and raided, with other police personnel, the said Water Park.",

Allegedly, the said team searched a tent and eleven rooms of the Park and found couples in compromising position, despite not being spouses. Various",
articles were seized during the raid. On the basis of the aforesaid GD Entry, respondent no.3 lodged a complaint, on the basis of which Chinsurah",
Police Station Case No. 315 of 2019 was registered on September 21, 2019 against the petitioner and 24 (twenty four) others under Section 370 of the",
Indian Penal Code, 1860, Section 46 of the Bengal Excise Act, 1909 and Sections 3 to 6 of the Immoral Traffic (Prevention) Act, 1956 (hereinafter",
referred to as "the IT Act").,

3. The petitioner's contention is that the petitioner earns his livelihood by running the business of the Water Park and the closure and sealing of the,
rooms in the Water Park on September 30, 2019, after the aforesaid raid and seizure, has deprived the petitioner from earning his livelihood and",
affected the fundamental right of the petitioner to life and personal liberty guaranteed under Article 21 of the Constitution of India.,

4. By referring to the First Information Report registered by the Police in the above regard, it is submitted by learned counsel for the petitioner that on",
the basis of the same, a case, bearing M.P. Sarai Case No.01 of 2019 dated September 30, 2019 was registered under Section 18 of the IT Act. In",
such proceeding, the Special Executive Magistrate, Chandannagar Division, Chandannagar Police Commissionerate, passed an order dated September",
30, 2019 for the Water Park to be closed temporarily. The said Park was referred to as a "brothel (question premises)",

5. It is argued that the Special Executive Magistrate who passed the order was not a Magistrate contemplated in Section 2(c) of the IT Act having the,
power to exercise jurisdiction under Section 18 of the IT Act. By placing reliance on the said sections, it is argued that a "Magistrate", within the",
definition of Section 2(c) of the IT Act, means a Magistrate specified in the second column of the Schedule to the said Act. Section 18, on the other",
hand, refers to the powers under Section 18 to be exercised by a Magistrate.",

6. Learned counsel for the petitioner argues that the Schedule to the Act, which specifies the Magistrates competent to exercise the powers under",
Section 18 of the IT Act, stipulate that either the District Magistrate or Sub-Divisional Magistrate has the jurisdiction to exercise such powers.",

7. In the present case, the Commissioner of Police in the concerned

Commissionerate was empowered to exercise certain powers as Executive",
Magistrate and "Magistrate of the District" respectively.,

8. Learned counsel for the petitioner argues that the alleged offences, reflected even from the concerned First Information Report, do not disclose that",

either the Water Park was being run as a brothel or prostitution, as contemplated in the IT Act, was being carried on in the premises thereof.",

9. It is further argued, that under the general powers of the Executive Magistrate, there was no provision under the Code of Criminal Procedure, 1973",
to seal and/or close any premises or any immovable property.,

10. Learned counsel for the petitioner cites in this context the judgment of Nevada Properties Private Limited through its Directors vs. State of,

Maharashtra and another, reported at 2019 SCC OnLine SC 1247, wherein the Supreme Court held inter alia that the power of a Police Officer under",

Section 102 of the Code of Criminal Procedure to seize any property, which may be found under circumstances that creates suspicion of the",

commission of any offence, would not include the power to attach, seize and seal an immovable property.",

11. Learned counsel for the petitioner further cites a judgment reported at 2005 SCC OnLine Bom 582 [Suresh Sham Singh vs. A.N. Roy,]wherein a",

division bench of the Bombay High Court held that there cannot be appointment of District Magistrate unless the person is primarily an Executive,

Magistrate. It was further held that it was settled law that when the statute defined the limits of the power that could be conferred upon a specific,

Officer, the conferment of power had to be within the parameters prescribed under the statute. Once it is apparent that the Commissioner of Police",

was not appointed as an Executive Magistrate nor as a District Magistrate, question of exercising the power of the District Magistrate by the",

Commissioner of Police does not arise at all. It was further observed that it is well-settled that when a statute prescribes the powers, it must be",

exercised by that body or Officer and none else, unless the statute by express words or necessary implication permits delegation, in which event, it",

may also be exercised by the delegate if the delegation is made in accordance with the terms of the statute and not otherwise. In this context, the",

judgment reported at AIR 1989 SC 1582 [The Marathwada University vs. Seshrao Balwant Rao Chavan] was relied on by the Supreme Court. It was,

also held that a Notification issued in excess of powers would be illegal and unlawful ab initio and therefore unenforceable and therefore any act,

performed on the strength of such unenforceable delegation of power would be ab initio bad in law.,

12. Learned counsel for the petitioner also relies on several documents annexed to the writ petition to show the fact that not only was the Water Park,

used for amusement of the general public, but the same was also booked for marriage ceremonies, regarding which relevant documents have been",

annexed to the writ petition.,

13. Learned counsel, by relying on annexure P1 at page 26 of the affidavit-in-reply filed by the petitioner, submits that the local residents in the",

neighbourhood have, of their own volition, made a mass petition before Ashit Majumder, a Member of the Legislative Assembly, stating that the",

allegations levelled by the Police against the petitioner and his establishment are wholly frivolous and have been made to harm his goodwill.,

14. In the meantime, the petitioner was arrested and enlarged on bail in connection with the aforesaid complaint.",

15. In reply, the learned Advocate General places reliance on annexure R-7 to the affidavit-in-opposition filed by the respondents. The said annexure",

is a copy of a Notification No. 2126-PL/PB/14M-109/19, dated July 23, 2019, whereby the Governor was pleased to confer the power on the",

Commissioners of Police in the respective Commissionerates of Police within the State of West Bengal, to exercise the powers and discharge the",

functions of the authorities mentioned under column (2) of the table given thereinbelow for the purposes of the Acts, including the Code of Criminal",

Procedure, 1973, mentioned in column (3) of the said Schedule.",

16. The said Notification was also directed to be published in an Extraordinary issue of the Kolkata Gazette. It is submitted that, by virtue of the said",

Notification, the Police Commissioner of the concerned District was empowered, as a Special Executive Magistrate to exercise the powers under",

Section 18 of the IT Act.,

17. By placing reliance on a judgment reported at (1991) 1 SCC 550 [State of Maharashtra and others vs. Mohammed Salim Khan and others,]",

learned Advocate General submits that as per Section 21 of the Code of Criminal Procedure, 1973, the Special Executive Magistrates, though the area",

of operation of such Magistrates may be limited and the terms of appointment may be different, nevertheless, they are Executive Magistrates and",

accordingly entitled to exercise powers conferred by the Code which are the same as other Executive Magistrates. It is not necessary for the State,

Government to separately confer powers on such Magistrates. The said judgment was rendered in the context of the distinction between the,

â??powers conferredâ?? and â??powers conferrableâ?? under the Code on the Executive Magistrates.,

18. It is, thus, argued that since a District Magistrate or Sub-Divisional Magistrate is an Executive Magistrate as per the scheme of the Code of",

Criminal Procedure and the conferment of powers on Special Executive Magistrates has been contemplated in Section 21 of the Code, since the",

Commissioner of Police, acting as the Special Executive Magistrate, Chandannagar Division, Chandannagar Police Commissionerate, could exercise",

the powers of an Executive Magistrate and as such, could be deemed to be empowered to act under Section 18, read with Section 2(c), of the IT Act.",

19. As such, it is argued by the Learned Advocate General that the Police acted well within its jurisdiction to seal and close the rooms of the Water",

Park under the IT Act, 1956.",

20. The primary question which has been raised in the writ petition is, whether the Commissioner of Police, Chandannagar Police Commissionerate,",

having been designated as a Special Executive Magistrate under the Notification dated July 23, 2019, could exercise the powers under Section 18 of",

the IT Act.,

21. For the said purpose, the said section is quoted hereinbelow:",

â??Section 18:

18. Closure of brothel and eviction of offenders from the premises.â??(1) A magistrate may, on receipt of information from the police or otherwise,",

that any house, room, place or any portion thereof within a distance of two hundred metres 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, issue notice on the owner, lessor or",

landlord of such house, room, place or portion or the agent of the owner, lessor or landlord or on 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 ordersâ?"",

(a) directing eviction of the occupier within seven days of the passing of the order from the house, room, place or portion;",

(b) directing that before letting it out during the period of one year , or in a case where a child or minor has been found in such house, room, place or",

portion during a search under Section 15, during the period of three years, 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:",

Provided that, if the magistrate finds that the owner, lessor or landlord as well as the agent of the owner, lessor or landlord, was innocent of the",

improper user of the house, room, place or portion, he may cause the same to be restored to the owner, lessor or landlord, or the agent of the owner,"

lessor or landlord, with a direction that the house, room, place or portion shall not be leased out, or otherwise given possession of, to or for the benefit",

of the person who was allowing the improper user therein.,

(2) A court convicting a person of any offence under Section 3 or Section 7 may pass order under sub-section (1), without further notice to such",

person to show cause as required in that sub-section.,

(3) Orders passed by the magistrate or court under sub-section (1) or sub-section (2) shall not be subject to appeal and shall not be stayed or set aside,

by the order of any court, civil or criminal, and the said orders shall cease to have validity after the expiry of one year, or three years, as the case may",

be:,,

Provided that where a conviction under Section 3 or Section 7 is set aside in appeal on the ground that such house, room, place or any portion thereof",

is not being run or used as a brothel or is not being used by prostitutes for carrying on their trade, any order passed by the trial Court under sub-section",

(1) shall also be set aside.,

(4) Notwithstanding anything contained in any other law for the time being in force, when a magistrate passes an order under sub-section (1), or a",

court passes an order under sub-section (2), any lease or agreement under which the house, room, place or portion is occupied at the time shall",

become void and inoperative.,

(5) When an owner, lessor or landlord, or the agent of such owner, lessor or landlord fails to comply with a direction given under clause (b) of sub-",

section (1) he shall be punishable with fine which may extend to five hundred rupees or when he fails to comply with a direction under the proviso to,

that sub-section, he shall be deemed to have committed an offence under clause (b) of sub-section (2) of Section 3 or clause (c) of sub-section (2) of",

Section 7, as the case may be, and punished accordingly.â??",

22. That apart, the following definitions as provided in Section 2 of the IT Act are also relevant in the context:",

â??2.(a) â??brothelâ? includes any house, room, conveyance, or place or any portion of any house, room, conveyance, or place, which is used for",

purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes;,,

.... ,

2.(c) â??magistrateâ? means a magistrate specified in the second column of the Schedule as being competent to exercise the powers conferred by,

the section in which the expression occurs and which is specified in the first column of the Schedule;,,

.... ,

2.(f) â??prostitutionâ? means the sexual exploitation or abuse of persons for commercial purposes and the expression â??prostituteâ? shall be,

construed accordingly;â??,

Section, Magistrate competent to exercise the powers

7(1), District Magistrate

11(4), Metropolitan Magistrate or Judicial Magistrate of the first class

15(5), "Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or

Sub-Divisional Magistrate

16, "Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or

sub-Divisional Magistrate

18, District Magistrate or Sub-Divisional Magistrate.

19, "Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or

Sub-Divisional Magistrate

20, "Metropolitan Magistrate, Sub-Divisional Magistrate or any Executive Magistrate

specially empowered by the State Government.

22-B, "Metropolitan Magistrate, or Judicial Magistrate of the first class.

powers, conferred upon such Magistrates, to exercise similar powers conferred upon the Executive Magistrates, the said logic does not help the",

respondents. This is for the simple reason that, to exercise the powers conferred under Section 18(1) of the IT Act, the authority concerned has to be",

a "Magistrate", as contemplated in Section 2(c) of the said Act, which, in turn, refers to the Schedule appended to the Act, which categorically",

limits the powers to be exercised under Section 18 of the IT Act exclusively to District Magistrates or Sub-Divisional Magistrates. This is in direct,

contrast with powers having been conferred in the Schedule to Executive Magistrates to act under Section 20 of the IT Act, which was specifically",

excluded with regard to Section 18.,

36. Even though, as per the argument of the respondents, Special Executive Magistrates may have powers co-extensive with Executive Magistrates,"

every Executive Magistrate is not a District Magistrate or a Sub-Divisional Magistrate, although the converse may be true.",

37. As such, even the Notification dated July 23, 2019 or the order dated September 18, 2019 did not confer upon the Commissioner of Police of the",

Chandannagar Commissionerate the authority to act as a District Magistrate or Sub-Divisional Magistrate authorized to exercise power under Section,

18 of the IT Act.,

38. As such, there was no question of the Commissioner of Police, or his delegated Officers, to exercise the powers under Section 18 of the IT Act.",

39. There was no power conferred on the Special Executive Magistrate to direct the closure or sealing of any hotel, room or place under the general",

powers conferred by the Code of Criminal Procedure.,

40. As rightly pointed out by learned counsel for the writ petitioner, Section 102

of the Code of Criminal Procedure does not empower a Police Officer",

to close or seal any property in the garb of seizure of articles, as held in Nevada Properties (supra).",

41. That apart, all the allegations levelled against the writ petitioner being primarily under the IT Act and not a single allegation being levelled under the",

Sarais Act, the invocation of such power and institution of the criminal proceeding under the Sarais Act, giving rise to M.P. Sarai Case No. 01 of",

2019, in which Special Executive Magistrate passed the order of closure of the Water Park-in-question, was de hors the law and without jurisdiction.",

42. Even if the prima facie merits of the complaint against the petitioner regarding the Water Park are considered on the basis of the First Information,

Report registered by the Police in that regard and the connected complaints, it has not been prima facie established that the Water Park was being",

used as a "brothel" as contemplated in Section 2(a) of the IT Act or for "prostitution", as defined in Section 2(f) of the IT Act. No material",

or ingredient, even on a prima facie footing, is found in the report and complaints to show that sexual exploitation or abuse of persons for commercial",

purposes was going on at the premises-in-question, which could fit the definition of "prostitution" under the IT Act. Moreover, it was not",

established even prima facie from the complaint lodged against the petitioner that the Water Park was being used for the purposes of sexual,

exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes, to define the place as a "brothel".",

43. In such view of the matter, the closure and sealing of the Water Park was not justified under any circumstances, within the contemplation of",

Section 18(1) of the IT Act.,

44. As such, on the grounds discussed above, the institution of M.P. Sarai Case No.01 of 2019 as well as all orders passed therein, including the order",

of closure and sealing of the Water Park, were de hors the law and as such, void ab initio. The Commissioner of Police himself did not have the power",

to take up such a criminal proceeding under Section 18 (1) of the IT Act, let alone the power to delegate it. Moreover, since the case was registered",

under provisions of the IT Act, an "M.P. Sarai Case", obviously under the Sarais Act, could not be initiated just to conveniently permit the",

Commissioner to exercise jurisdiction, as empowered by the Notification, under

the Sarais Act.",

45. Hence, W.P. No.21802(W) of 2019 is allowed on contest, thereby quashing M.P. Sarai Case No.01 of 2019, pending before the Special Executive",

Magistrate, Chandannagar Division, Chandannagar Police Commissionerate and holding that all the orders passed therein were null and void.",

Consequently, the respondent nos. 2 and 3 are directed to ensure that the premises of the Aqua Marina Water Park and all rooms and portions",

thereof be immediately reopened for being used by the petitioner commercially by removing the seal/closure thereof, latest within 48 hours of passing",

of this order.,

46. It is left open to the petitioner to seek compensation before an appropriate authority for such illegal closure of the said Water Park, from the date",

of its closure till reopening.,

47. However, it is made clear that since the initiation of the said criminal case and the consequent closure of the premises-in-question are under",

challenge in the present writ petition, the observations made above are confined to the said proceeding and closure, and this court does not comment",

upon the merits of the First Information Report lodged against the petitioner and the police will be free to continue their investigation in that regard.,

48. There will be no order as to costs.,

49. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.",