
(1972) 04 GUJ CK 0005
In the Gujarat High Court

Koli Dana Nathu

APPELLANT

Vs

G. Ghosh

RESPONDENT

Date of Decision : 20-04-1972

Acts Referred:

Bombay Police Act, 1951 — Section 57(1), 57(1)
Bombay Prohibition Act, 1949 — Section 66, 67(b), 85
City of Bombay Police Act, 1902 — Section 27(1)
Suppression of Immoral Traffic in Womemand Girls Act, 1956 — Section 20(1)

Citation : (1973) 14 GLR 209

Hon'ble Judges : S.H. Sheth, J;J.B. Mehta, J

Bench : Division Bench

Judgement

J.B. Mehta, J.—The petitioner challenges the externment order, dated January 10,1972, u/s 57(1) of the Bombay Police Act, 1951, hereinafter referred to as "the Act," for a period of two years from four contiguous districts. A show cause notice was issued to the petitioner on March 30, 1971, informing him that he had been thrice convicted for offences under the Bombay Prohibition Act, 1949, and he was still continuing his activities for similar offences not only in Rajkot District but also in the limits of the three contiguous Districts of Surendranagar, Bhavnagar and Amreli, and, therefore, it was proposed to extern him from all these four Districts. The three convictions which were mentioned were under the various sections of the Prohibition Act in 1967 and 1968. Particulars were given about his activities of similar offences by mentioning that: (1) on February 27, 1969 in Jasdan village in Vajsur locality in the evening at 5-45 P. M., he was caught with country liquor made locally and implements for manufacturing the same, and (2) on September 4, 1970 at 4-0 A. M. he was found in a drunken state in the said Vajsur locality and at that time some intoxicant was also found with him. After the petitioner's explanation in this connection, the petitioner was externed by the impugned order at Annexure 4 where it was mentioned that the petitioner was thrice convicted on June 8, 1967, June 17,1968 and September 13,1968 u/s 67(b) of the Bombay Prohibition Act for which he was sentenced for the first offence to three months Rigorous imprisonment and a fine of Rs. 500/-,

for the second offence 15 days" R.I. and a fine of Rs. 50/- and in the third case with a fine of Rs. 50/- only. These offences having taken place within the period of three years and as materials were placed before the authorities to the effect that the petitioner was again involved in a case when he was caught on February 29, 1969 in Vajsur locality of Jasdan at 5-45 P. M. in a drunken condition and also as he was caught on September 4, 1970 at 4-00 A. M. in drunken state, after considering the explanation and the evidence, the authority was satisfied that the petitioner had three convictions mentioned above, and that he was likely to engage himself again in the commission of similar offences. The authority, therefore, ordered his externment not only from Rajkot District but also from the aforesaid three Districts as he was likely to operate and indulge in his activities from the contiguous districts through his associates and agents. The petitioner has challenged the externment order in this petition on the ground that such an order was ultra vires order as the authority had passed this order merely on the basis of three convictions u/s 66(b) without considering whether there was any substantial danger to the society because of the presence of such a person in a particular locality. There was no allegation or proof of danger to the society and, therefore, the power was exercised in violation of the constitutional guarantee under Article 19(1)(d) and (e), because the restraint sought to be imposed on the petitioner's freedom was not in the interest of general public. There was, therefore, complete non-application of mind by the authority. The concerned authority, Sub-Divisional Magistrate Mr. Ghosh had filed first affidavit on March 18, 1972, where he in terms admitted that in the notice there was no allegation as regards the breach of peace or of other activities which might be harmful or injurious to the people or the society and that was not a necessary ingredient of Section 57 of the Act. He emphatically denied that there must be substantial danger to the society because of the presence of such persons before an externment order could be passed u/s 57(c). In the subsequent affidavit of April 10, 1972, the said Mr. Ghosh has pointed out the details of the three previous convictions and has taken up a plea that the petitioner was found not only drinking liquor but that he was manufacturing and dealing in illicit liquor and so he was of the view that it was necessary to extern him from the contiguous districts. He also admitted that not only in the first case he was convicted but in the second case also he was convicted. The petitioner was acquitted only in the second case in appeal. In the first case he was convicted u/s 66(1)(b) All these convictions were considered by him properly for being satisfied that the petitioner was engaged in the commission of offences similar to the three for which he was convicted. He, therefore supported the order on this basis.

2. Mr. Nanavati raised a preliminary objection that the question of vires of this provision was already settled by the earlier decisions of the Supreme Court, and in any event, as petitioner has not exhausted the alternative remedy of an appeal before the State Government, this petition ought not to be entertained. Mr. Mehta challenges the order of this executive authority imposing so serious a restraint on the cherished right of freedom of movement and freedom of choice

of his residence on the ground that the authority did not bear in mind the guideline for the exercise of this wide power imposing so serious a restraint on the citizen's freedom that it could only be exercised on consideration of necessity of invoking this power in the interest of general public. When the order of the executive authority is attacked as an ultra vires order, the order would be a nullity and even if an appeal was filed, the order confirmed in appeal would also be a nullity and in such a case where challenge is on the ground that the order is ultra vires order, the question of exhausting alternative remedy of appeal could hardly arise as the petitioner can straight away seek remedy of judicial review. Besides, Mr. Mehta's contention is not to go behind the earlier settled legal position but he only wants us to examine this case from the aspect that the authority concerned had abused his powers by not acting as per the guidelines laid down in the settled law. When such a high authority is invested with the power to impose such a restraint on the cherished right of liberty of a citizen on his subjective satisfaction, the citizen could always challenge the order as ultra vires order if the authority has not kept in his mind the guide-lines laid down for the exercise of this power.

3. After the classic decision in *A.K. Kraipak and Others Vs. Union of India (UOI) and Others*, , the legal position is well settled. With the increase of the power of the administrative bodies it has become necessary to provide guide-lines for the just exercise of power. To prevent abuse of power and to see that it does not become a new despotism, the courts are gradually evolving the principles to be observed while exercising such powers. In matters like this, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. Further proceeding at page 156 their Lordships approved Lord Parker C. J's observations re *H. K. (An Infant)* 1967 2.Q B. 617 at page 630 that good administration and an honest or bona fide decision must require not nearly impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly, and to the limited extent that the circumstances of any particular case allow and within the legislative frame-work under which the administrator is working, and only to that limited extent the minimum principles of natural justice apply in so far as they are necessary for a just decision on the facts of the case. Their Lordships in terms adopted the approach laid down by Blain J. in that case that whatever be the nature of jurisdiction given to a statutory authority, whether it be administrative, executive or quasi-judicial, the jurisdiction has to be exercised fairly by applying the mind dispassionately to a fair analysis of the particular problem and the information available to him in analyzing it. If in any hypothetical case, and in any real case, the court was satisfied that an Immigration Officer was not so doing, then mandamus would lie. In view of the very wide impact of power on the cherished liberty of the citizen, the authority was bound to follow strictly the safeguards created for the exercise of this wide power and, therefore it would be a material question as to what are the guide lines or the perspective within the framework of this very legislation for the exercise of such powers with this wide impact. In *Rohtas Industries Vs. S.D.*

Agarwal and Others, their Lordships first pointed out that u/s 237(b) of the Companies Act which took colour from the entire scheme of other Sections 235 and 236, the power was one of serious inroad on the powers of the company to carry on its trade and business and also on the fundamental rights of the shareholders guaranteed under Article 19(1)(g) and its validity could be upheld only on the ground that there was a reasonable restriction in the interest of the general public. Once the vires was upheld of such wide power on the ground of reasonable restraint, and not being arbitrary power conferred on the Central Government, it had to be exercised in accordance with the restrictions imposed by law. Even though the condition precedent for the exercise of the power of the Central Government was the requisite opinion, the existence of circumstances, required for forming the opinion, was held to be open to judicial review, although the opinion formed by the Government was not amenable to review by courts. At page 718 their Lordships pointed out that every statute had to be expounded according to its mandate or expressed intention and that there was always a perspective within which the statute was intended to operate. When a public regulation was enacted which had this mandate of Article 19, there was no such thing as absolute untrammelled discretion and the Government could not be the sole judge as to the content of the power or as to the way in which it was to be exercised. Discretion necessarily implied good faith in discharging public duty and, therefore, if there was a clear departure from the lines of statutory perspective or its objects, it was as objectionable as fraud or corruption. Their Lordships agreed with the decision of the House of Lords in *Padfield v. Minister of Agriculture, Fisheries and Food* 1968 1 A.E.R. 604, where it was held that where a statute conferring a discretion on a Minister to exercise or not to exercise a power did not expressly limit or define the extent of his discretion and did not require him to give reasons for declining to exercise the power, his discretion might nevertheless be limited to the extent that it must not be so used, whether by reasons of misconstruction of the statute or other reason, as to frustrate the object of the statute which conferred it. Although the Minister had full or unfettered discretion he was bound to exercise it lawfully i.e. not to misdirect himself in law, nor to take into account irrelevant matters, nor to omit relevant matters from consideration. In *Rampur Distillery and Chemical Co. Ltd. and Another Vs. Company Law Board and Another*, His Lordship Shah J. agreed with the view of Lord Reid in *Ridge v. Baldwin* 1964 A.C. 40 and held that when an enactment required an official to have reasonable grounds for the decision, the law was not so defective that the aggrieved person could not bring up the decision for review, however, seriously he might be affected, and however obvious it might be that the official acted in breach of his statutory obligation. *Padfield's* case was in terms followed. Their Lordships were unable to agree that because the exercise of the power depended upon satisfaction, its exercise could not be subjected to judicial review, the Government being the final arbiter of the conditions on the existence of which the power might be exercised. Looking to the wide impact of the power which was conferred, their Lordships held that the recital about satisfaction as to the existence of certain objective facts which were

guide-lines for the exercise of the power could be displaced by showing that the conditions did not exist, or that no reasonable body of persons properly versed in law could have reached the said satisfaction, although sufficiency of the grounds on which satisfaction was reached could not be canvassed before the court. If in reaching such a satisfaction the authority misapprehended the nature of the conditions or proceeded upon irrelevant material or ignored relevant materials, the jurisdiction of the court to examine the satisfaction was not excluded. We may of course state as was held in *Chandra Bhavan Boarding and Lodging, Bangalore Vs. The State of Mysore and Another*, that it is not the law that the guidance for the exercise of a power should be gatherable from one of the provisions in the Act. It can be gathered from the circumstances that led to the enactment of the law in question i.e., the mischief that was intended to be remedied, the preamble to the Act or even from the scheme of the Act. When the power is conferred on such a high authority which can result in such a serious impact by way of inroad on the cherished right of liberty of subject, even though the high authority is proceeding to exercise that power to further the purposes of the Act, if by misconception of law as to the nature of these guide-lines, it misdirects itself in law, or if it goes beyond the mandated area, the ultra vires orders can be corrected in judicial review.

4. In view of this settled legal position we will have to find out what are the guide-lines which have been settled as per the settled law when the vires of the provisions of the Sections 56 and 57 had been upheld. In *Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another*, and in the companion matter in *Bhagubhai Dullabhabhai Bhandari Vs. The District Magistrate, Thana and Others*, , the vires of Sections 56 and 57 and the connected provisions was in terms upheld, following the earlier decision u/s 27(1) of the City of Bombay Police Act in *Gurbachan Singh Vs. The State of Bombay and Another*, . These decisions are approved again in *State of Gujarat v. Mehbubkhan* AIR 1968 S.C. 1468 . In *Gurbachan Singh's* case, their Lordships had pointed out that the law was certainly an extraordinary one and had been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property were willing to depose publicly against certain bad characters whose presence in certain areas constituted a menace to the safety of the public residing therein. The minority view was of His Lordship Jagannadhadas J., who struck down these sections holding that a wide power was conferred u/s 57(a), which was not confined to offences which were serious in their nature or with reference to attendant circumstances and that the previous commission of any offence of the category specified, without any reference to the time, environment and other factors had no rational relation to the criterion of reasonableness in the interest of public. The same was the objection to Section 56. The majority view, however, proceeded on the settled principle that abuse of power should not be assumed and the high authorities created under the Act to impose such wide restraint on the liberty of the subject could always be trusted that they would honestly and impartially use this wide power justly and fairly. In case of abuse of

the power the authority could be corrected by judicial review or by the provision of appeal and the appeal right was not, therefore, illusory. In the majority view it was in terms pointed out in *Hari Khemu Gawali Vs. The Deputy Commissioner of Police, Bombay and Another*, in Hart's case that these provisions were not punitive in nature, but were only preventive. A person proceeded against was not prosecuted but was only put out of the harm's way. Externment of an individual like preventive detention is largely precautionary and based on suspicion. The Court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based. The legislature has entrusted the police officer, or the Magistrates of the higher ranks to examine the facts and circumstances of each case brought before them by the Criminal Investigation Department and there were provided various safeguards against the tyrannical or wholly unfounded order being passed by the ranks of the police or the magistracy, so that the materials could be properly examined with a view to being satisfied that circumstances existed justifying a preventive order of such a wide nature and the duty could be discharged with due care and caution. Their Lordships pointed out that Section 57 was an instance of the State taking preventive measures in the interest of the public and for safeguarding individual's right. The section was plainly meant to prevent a person who had been proved to be a criminal from acting in a way which might be a repetition of his criminal propensities. In doing so the State might 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 might be conserved. The law was based on the principle that it was desirable in the larger interest 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 might 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. The individual's right to reside in and move freely in any part of the territory of India had to yield to larger interest of the community. That the Act was, therefore, based on sound principles could not be gainsaid. The only question was whether reasonable restraint was placed under Article 19(5) on individual's liberty which was commensurate with the requirements of the interest of the general public, which included public order, decency or morality and all other public interests which might be compendiously described as social welfare. Their Lordships pointed out that Chapter 5 of the Act was headed as "Special measures for maintenance of public order and safety of State" and the sub-head II therein provided for "Dispersal of gangs and removal of persons convicted of certain offences". The substantial provisions under this head II are Sections 55, 56 and 57. Their Lordships pointed out that a gang of criminal or potential criminals may operate or might intend to operate within certain local limits, the idea behind the provisions of Section 57 was to see that if a person with previous conviction who might have banded together with other such persons should be disbanded and hounded out of the limits of his ordinary activities, his associates also were to be similarly dealt with so that the gang was

broken up and the different persons constituting it might be removed to different parts of the State so as to reduce their criminal activities to the minimum. Their Lordships pointed out that unless a person made himself so obnoxious as to render his presence in every part of the Bombay State a menace to public interest including public peace and safety, every authority would not think of acting in the same way in respect of the same person. When it was pointed out to their Lordships that the safeguards were of no avail as the proposed extremes was entitled to have only the general nature of material allegations, their Lordships observed that in the very nature of things it could not have been otherwise. The grounds available to an extremes had necessarily to be very limited in their scope, because if evidence were available which could be adduced in public, such a person could be dealt with under the preventive sections of the Code of Criminal Procedure for example Section 107 or Section 110. But the special provisions of the Act proceeded on the basis that the persons dealt with under any of the Sections 55, 56 or 57 were of such a character as not to permit the ordinary laws of the land being put in motion in the ordinary way, namely of examining witnesses in open court who should be cross-examined by the party against whom they were deposing. The provisions were plainly intended to be used in special cases requiring special treatment, that is cases which could not be dealt with under the preventive sections of the Code of Criminal Procedure. In that view of the matter, the safeguards provided made the restrictions reasonable and brought them within the permissible limits laid down by the Constitution in Article 19(5). Their Lordships particularly added that after Gurbachan night's case the constitutionality of section could not be challenged because, if anything, Section 57 provided a surer ground for proceeding against a potential criminal in so far as it insisted upon a previous conviction at least. While discussing the essential requirements of Section 57 their Lordships pointed out that two essential conditions must be fulfilled viz., (1) that there should have been a previous conviction under Chapter 11, 16 or 17, I. P. C. or two previous convictions under the Acts mentioned in Clause (b) or three previous convictions within a period of three years under the Acts mentioned in Clause (c), and (2) that the authority named should have reason to believe that a person coming within the purview of any of the Clauses (a), (b) and (c) was likely again to engage himself in the commission of an offence similar to that for which he had been previously convicted, that is to say, for an offence falling under any of the three chapters mentioned in Clause (a), or if he had been twice convicted under the Beggers Act or the Prevention of Prostitution Act, or thrice convicted under the Prevention of Gambling Act or the Prohibition Act. Their Lordships held that the wisdom of the legislature in clubbing the offences against public finance and against person and property in Clause (a) could not be questioned, if the provisions impose reasonable restriction on the right to freedom. The previous convictions under the three clauses have been placed under three different categories and when the authority had to proceed on the surer ground of previous convictions, the authority had some solid ground for suspecting that the person concerned might repeat his criminal activity. It might be added that in

The State of Maharashtra Vs. Vishnu Ramchandra, , at page 312 Their Lordships again pointed out that Section 57 did not create a new offence or made punishable that which was not an offence. It was designed to protect the public from the activities of undesirable persons who had been convicted of offences of a particular kind. The section only enabled the authorities to take note of their convictions and to put them outside the area of their activities so that the public might be protected against a repetition of such activities. Their Lordships further added at page 311 that an externment order in order to satisfy the requirements of Section 57 must be made bona fide taking into account a conviction which was sufficiently proximate in time. Therefore, while the vires is upheld, it is in terms laid down that the relevant scheme as so interpreted conferred a guided discretion on such a high authority and, therefore, the restriction was a permissible restriction saved by Article 19(5) of the Constitution as imposed in public interest. Therefore, the guide-lines as laid down by Their Lordships are to be found in the fact that a judicial discretion is vested in this high authority who is to be satisfied not only of the two necessary conditions precedent that the person is likely to commit similar offences for which there are the necessary convictions as specified in the section, but that the public interest required the authority to impose this wide restraint by passing such an externment order. Their Lordship had in terms pointed out that the heading of Chapter V, which contained a scheme of "dispersal of gangs and removal of persons convicted of certain offences", was by way of special measures for maintenance of public order and safety of the State, and they were plainly intended to be resorted to in special cases requiring special treatment, which could not be dealt with under the preventive sections of the Code of Criminal Procedure. It was only when a person became so obnoxious as to render his presence in the locality concerned a menace to public interest, including public peace and safety or public health and public moral, that this wide power could be exercised by way of restraint on his liberty which would be reasonably imposed in general public interest. Therefore, the guidelines are to be found not only in the two conditions precedent, but because of this constitutional guarantee that the restriction is in general public interest, and so the power is only to be resorted to by way of special measure when the individual case required special treatment because it could not be dealt with under the preventive sections of the Code of Criminal Procedure. In case of such persons who have been a menace their individual liberty must yield on considerations of public tranquility, public peace and safety or on such considerations of public health and general public interest. In those cases only where the person concerned is a menace that he is required to be removed by resorting to this extra-ordinary process. The person would suffer serious detriment by being removed from his home, environment and from place where he earned his livelihood by being uprooted. Even his entire family in case of a single bread-earner would be seriously affected. But these restraints looked at from these guide-lines were found to be reasonable.

5. Therefore, while interpreting these guide lines-we will have to keep in mind

the interpretation of Article 19(5) and the words "in the interest of general public". The Constitutional Bench of seven Judges in *Madhu Limaye Vs. Sub-Divisional Magistrate, Monghyr and Others*, , interpreted the expression "in the interest of public order" and "in the interest of general public" in the saving clauses in Article 19. At page 755 Their Lordships pointed out that even though in " *The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia*, , his Lordship Subba Rao J. had interpreted the expression "public order" as synonymous with public peace, safety and tranquility or as absence of disorders involving breaches of purely local significance so as to bring in such offences within the scope of permissible restrictions under Clause (2) of Article 19, in the second *Dr. Ram Manohar Lohia Vs. State of Bihar and Others*, , (*Dr. Ram Manohar Lohia's v. State of Bihar*), the concept of three circles had been introduced. All cases of disturbances of public tranquility fell in the largest circle but some of them were outside "public order" for the purpose of the phrase "maintenance of public order". Similarly, every breach of public order was not necessarily a case of an act likely to endanger the security of the State. It was observed that the State was at the centre and society surrounded it. Disturbances of society went in a broad spectrum from mere disturbance of the serenity of life to jeopardy of the State. The acts became graver as the journey was from the periphery of the largest circle towards the centre. The journey was first through public tranquility, then through public order and lastly to the security of the State. Their Lordships it terms pointed out that while interpreting the phrase "maintenance of public order" in the context of preventive detention, the expression was confined to what was included in the second circle and it left out that which was in the largest circle. But that consideration need not always apply because small local disturbances of the even tempo of life might in a sense be said to affect "public order" in a different sense, namely in the sense of a state of law- obligingness vis-a-vis the safety of others. Therefore, the expression "in the interest of public "order" in the Constitution was capable of taking within itself not only those acts which disturb the security of the State or acts within order publica as described, but also certain acts which disturb public tranquility or were breaches of peace. In the context of preventive sections of the Criminal Procedure Code under Sections 107, 110 and 144, Their Lordships pointed out that it was not necessary to give the expression a narrow meaning because the expression "in the interest of public order" was very wide. Whatever may have been said of "maintenance of public order" in the context of special laws entailing detention of persons without a trial on the pure subjective determination of the executive could not be said in other circumstances. In the former case the court confined the meaning to graver episodes not involving cases of law and order which were not disturbances of public tranquility but of order publica. There it was argued that there could not be two kinds of detention, one by Magistrate under the Code of Criminal Procedure and another under the laws made for preventive detention under Article 22 of the Constitution. It was held that the area of the two was entirely different and there was therefore, good classification. So far as the preventive provisions of the Act were concerned, their

Lordships observed at page 757 that when all the acts in Section 144 were referred to, the key-note of the power was to free society from menace of serious disturbances of a grave character. The section was directed against those who attempted to prevent the exercise of legal rights by others or imperil the public safety and health. If that was so, the matter must fall within the restrictions which the Constitution itself visualized as permissible "in the interest of public order", or in the interest of the general public." Even in the case of annoyance mentioned in Section 144, their Lordships pointed out that in view of these guide-lines given by the Constitution the annoyance contemplated in the relevant provisions must assume sufficiently grave proportions to bring the matter within interests of public order. At page 763, their Lordships ultimately held that the gist of the entire Chapter was the prevention of crimes and disturbance of public tranquility and breaches of the peace. The action being preventive was not based on overt act but on the potential danger to be averted. These provisions were thus essentially conceived in the "interest of public order" in the sense defined, and were also "in the interest of general public." If the prevention of crimes and breaches of peace and disturbance of public tranquility were directed to the maintenance of even tempo of community life, there could be no doubt that they were in the interest of public order" which was an elastic expression which took within its embrace various meanings according to the context of the law and the existence of special circumstances. It was therefore given this narrower meaning although it was wider than mere law and order, and in that context the Chapter was held to be constitutional as imposing reasonable restriction in the interest of public order or in the interest of general public. In the present context, these special provisions are in terms held to be applicable where the preventive provisions of the Code of Criminal Procedure would not serve the purpose and, therefore, at least that guide-line was necessarily intended, even though it would not be necessary for us to conclude the much larger question whether that guide-line should be as narrow as in the cases providing preventive detention, where the law has also to satisfy the requirements of Article 22 of the Constitution. As Their Lordships in terms pointed out in the context of the state of law-abidingness visa-vis the safety of others, this expression would have this narrower meaning as in the case of a preventive action contemplated under the Code so as to cover even small local disturbances of the even tempo of life which disturb public tranquility, public safety or public peace. The expression "general interest of the public" would cover even those cases where danger was by a person becoming annoyance by being danger to human life and safety and when such annoyance had to be abated by deporting him. In Section 55 even a case of public health is mentioned specifically in Clause (c), for when an outbreak of epidemic was likely to result from the continued residence of such person, he could be external. Besides, even Section 57(b) and (c) as now amended after 1959 covers cases not only under the Bombay Beggars Act and Prevention of Prostitution Act, but under the Suppression of Immoral Traffic Act and under the Gambling Act. Therefore, it covers a person who commits the acts of violence or danger to human life or

property, or is an enemy low" public finance or when his offending activities constitute him a menace to the society, e.g. the acts of a person like a common prostitute or of a person carrying on immoral traffic in women and girls or of a gambler or of a drunkard. Even if specific acts of violence are not shown, the offending activities of such a person at some stage might constitute a menace to the society by endangering public health or public moral. Therefore, the wider public interest must require these reasonable restrictions and the provision can be invoked against such a person who has become a menace to the society. Therefore, it is obvious that the guide-lines necessarily bring out the consideration of the public order or public interest in this narrower sense of the person becoming a public menace to the health, safety or morals of the community. Unless the even tempo of life of the locality is seriously disturbed in this sense by such activities, this wider power of committing such serious inroads on individual liberty does not arise at all, especially when this measure has to be taken only when preventive action under the Code which would meet all normal cases would not serve the purpose.

6. In order to illustrate these guide-lines we may usefully refer to the decision in *Arun Ghosh Vs. State of West Bengal*, . At page 1229 their Lordships pointed out after referring to the second Lohia's case that the; difference between maintenance of law and order and its disturbance and the maintenance of public order and its disturbance consisted in the fact that the public order was the even tempo of the life of the community, taking the country as a whole or even in specified locality. Disturbance of public order was to be distinguished from acts directed against individual which did not disturb the society to the extent of causing disturbance of public tranquility. It was the degree of disturbance and its effect upon the life of the community in the locality which determined whether the disturbance amounted to only a breach of law and order or it disturbed the even tempo of the life of the society. If a man stabbed another, people might be shocked and disturbed but the life of the community kept moving at an even tempo, however much one might dislike the act. In another case of a town where there was communal tension if a? man stabbed a member of other community, this was an act of a very different sort. Its implications were deeper and it affected the even tempo of life and public order was jeopardized because the repercussions of the act embraced large sections of the community and incited them to make further breaches of the law and order to subvert the public order. In a case of an assault on girls, a guest at a hotel might make advances to half a dozen chamber maids. He might annoy them and also the management but he would not cause disturbance of public order. He might even have a fracas with the friends of one of the girls but even then it would be a case of breach of law and order only. If, however, a man molested women in lonely places, as a result of his activities girls going to colleges and schools would be in constant danger and fear. Women going for their ordinary business would be afraid of being waylaid and assaulted. The activity of that man in its essential quality was not different from the act of other man but in its potentiality and in its effect upon

the public tranquility there was a vast difference. The act of the man who molested the girls in lonely places caused the disturbance in the even tempo of living which is the first requirement of public order. He disturbed the society and the community. His act made all the women apprehensive of their honour and he could be said to be causing disturbance of public order and not merely committing individual actions which might be taken note of by the criminal prosecution agencies. It meant therefore that the question whether a man had only committed a breach of law or order or had acted in a manner likely to cause a disturbance of public order was a question of the degree and extent of the reach of the act upon the society. The French distinguished the law and order and public order by designating the latter as *ordre public*. Their Lordships referred to the earlier decision of his Pushkar Mukherjee and Others Vs. The State of West Bengal, , where a line was demarcated between serious and aggravated forms of disorder which directly affected the community or injured the public interest and relatively minor breaches of peace of a purely local significance which primarily injured specific individuals, and only in a secondary sense public interest. Therefore a large number of acts directed against individual might total up into breach of public order. Therefore in every case this question of degree of the harm and its effect upon the community is the basis. If it leads to a serious disturbance of the current of the life of the community, the situation created by the offending act amounts to disturbance of the public order. The question has to be faced on facts of every case. Another apt illustration can be found in The State of Uttar Pradesh Vs. Kaushaliya and Others, . There the question arose of the vires of Section 20(1) of the Suppression of Immoral Traffic in Women and Girls Act, (1956) where the power was given to the Magistrate to require in public interest a prostitute to remove herself. At page 420 Their Lordships pointed out that it was the fundamental right of personal liberty. No right could be more important to a person than the right to select his or her home and to move about in the manner he or she liked. Even a depraved woman cannot be deprived of such a right except for good reasons. Therefore, a prostitute even has a fundamental right under Article 19(1) (d) and (e) of movement and of choice of her residence and restriction of these rights can be justified only in the interest of general public. In the context of Article 14 their Lordships first pointed out that a prostitute can be separately classified for the purpose of these restrictions. A prostitute who carried on her trade on the any or in the unfrequented part of the town or in a town with a sparse population might not be so dangerous to public health or morals as a prostitute who lived in a busy locality or in an over-crowded town or in a place within the easy reach of public institutions like religious and educational institutions. Though both sell their bodies the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in a vicinity of public institutions not only helped to demoralise the public morals but what was worse, to spread diseases not only affecting the present generation, but also the future one. Such trade in public might also lead to scandals and unseemly broils. There were,

therefore, pronounced and real differences between a woman who was a prostitute and one who was not and between a prostitute who did not demand in public interests any restrictions on her movements and a prostitute, whose actions in public places called for the imposition of restrictions on her movements and even deportation. The object of the Act was not only to suppress immoral traffic in women and girls but also to improve public morals by removing prostitutes from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes had a rational nexus to the object sought to be achieved by the Act. Section 20 in order to prevent moral decadence, in a busy locality sought to restrict the movements of the second category of prostitutes and to deport such of them as the peculiar methods of their operation in an area might demand. Further proceeding at page 422 their Lordships pointed out that whenever reasonable restriction was imposed on the cherished right of liberty, it would imply intelligent care and deliberation, that is the choice of a course which reason dictated. Their Lordship applied the test laid down by his Lordship Patanjali Sastri C. J. in *State of Madras Vs. V.G. Row*, in the following classic words:

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

Their Lordships pointed out that the reasonableness of a restriction depended upon the values of life in a society, the circumstances obtaining at a particular point of time when restriction was imposed, the degree and the urgency of the evil sought to be controlled and similar others. If in a particular locality the vice of prostitution was endemic, degrading those who lived by prostitution and demoralising others who came into contact with them, the Legislature might have to impose severe restrictions on the right of the prostitute to move about and to live in a house of her choice. If the evil was rampant it might also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform might require such drastic remedies. u/s 20 of the Act, the freedom of movement and residence were regulated, but an effective and safe judicial machinery was provided to carry out the objects of the Act. The said restrictions placed upon them were certainly in interests of general public and as the imposition of the restrictions was done through a judicial process on the basis of a clearly disclosed policy, the said restrictions were clearly reasonable. When an argument was advanced that in that way a prostitute can be driven out by similar orders of a Magistrate from the entire territory of India, the contention was held to have no force. Their Lordships pointed out that if the presence of a prostitute in a locality within the jurisdiction of a Magistrate had a demoralising influence on the

public of that locality, having regard to the density of population, the existence of schools, colleges and other public institutions in that locality and other similar causes, an order of deportation might be necessary to curb the evil and to improve the public morals. Once it was held that the activities of a prostitute in a particular area, having regard to the conditions obtaining therein, were so subversive of public morals and so destructive of public health that it was necessary in public interest to deport her from that place, there was no reason why the restrictions should be held to be unreasonable. Whether deportation out of the jurisdiction of the Magistrate was necessary or not depended upon the facts of each case and the degree of the demoralising influence a particular prostitute was exercising in a particular locality. If in a particular case, a Magistrate went out of the way and made an order which was clearly disproportionate to the evil influence exercised by a particular prostitute, she had a remedy by way of revision to an appropriate Court. This decision would show how the executive authority which is entrusted with such wide power of so serious inroads on the cherished right of liberty must exercise this power by balancing the requirement of curbing individual liberty, and pass the order when it is outweighed by the requirement of the general public interest. The authority cannot abdicate its functions merely on the ground that the vires of the section had been upheld. The majority view in Hari's case had proceeded on the footing that when such a serious or wide power was conferred on such high authority, the authority should proceed to exercise its judicial discretion by weighing facts and circumstances of each particular case for seeing whether this special intervention would be necessary because the case required the special treatment, where ordinary methods of prevention under the ordinary law of the land under the provisions of the Criminal Procedure Code would not serve any useful purpose. In such a case he would necessarily have to come to the conclusion that the even tempo of the locality had been sufficiently disturbed by the danger created by unlawful activities of the person concerned so that he had become a menace to the public order in that locality or to the public health, public morals and public safety. Therefore whichever way the matter is looked upon, the authority could exercise this power only after considering offensive activities of the person concerned, whether they had reached that degree of harm that the individual required to be put out of the harm's way by extraordinary action. Without weighing the proportion of the harm which the individual's activities have inflicted on the society and without considering whether the individual has become a menace to the society, without considering to what extent the individual has disturbed the even tempo of the locality, such an order could never be passed for putting the man out of the harm's way so that the society would remain in public tranquility and safety. In short, the authority has in each individual case to exercise his judicial discretion to see that the restrictions which he imposes are commensurate with the requirement of general interest, because otherwise his order would be out of all proportion to the evil sought to be remedied by him and such power sought to be exercised by him would be wholly unconstitutional. That is why in Balu Shivling Dombé Vs.

The Divisional Magistrate, Pandharpur and Another, , a Division Bench of the Bombay High Court consisting of Tarkunde J. and Palekar J. (as then was) in the context of Section 56 read the words in the light of this constitutional guarantee. The expression used in Section 56 was "alarm, danger or harm" to person or property. The Division Bench, however, held that the expression must be so interpreted as to ensure that the provisions of that section were in conformity with the fundamental rights guaranteed by Article 19(1)(d) and (e) of the Constitution. Their Lordships, therefore, in terms held that the words have reference to the alarm, danger or harm to person or property of the public at large and not of one or two individuals among the public. Therefore, the entire scheme of Section 55, 56 and 57 shows that these guide-lines have to be read in the entire scheme because otherwise the restrictions would not be commensurate with the requirements of general public interest and that is the very basis on which these restrictions have been held to be constitutional.

7. Mr. Nanavati, however, vehemently argued that once the question of vires has been concluded by the high authorities, it is not open to this Court to add other conditions precedent. When Their Lordships in terms held that only two conditions precedent were required u/s 57 as to the previous conviction and as to the belief of the authority that the person was likely to commit similar offences to those for which he was convicted, Their Lordships in terms held that this scheme of the sections imposed restrictions which were permissible under Article 19(1)(f) in the interest of general public. Therefore, that guide-line has to be followed by every executive authority while he imposes such serious restrictions on the cherished right of liberty. The nature of the act alone could never furnish the guide-line because, as earlier pointed out, the same act when judged in the context of solitary individual would have different effect as distinguished from one when it has affected or has disturbed the even tempo of life of community. Therefore, the nature of the offences would not be the sole criterion and the authority would have to go into the other pertinent question, whether the offending activities of the individual concerned had reached that degree of harm to the society that the interest of the society or even of that particular locality required that this individual who had become a public menace should be extended from the locality. If the order is not in accordance with this perspective, the order is clearly unconstitutional and ultra vires order and could be surely quashed on that very ground, even if the vires of the section is upheld.

8. In the present case the authority had relied in the show cause notice on the character of the three convictions as falling under Sections 66 and 85 of the Prohibition Act. As for the further continuance of the similar activities, the authorities had given particulars that the person was fought on February 27, 1969, with country liquor and with implements for that purpose, and again on September 4, 1970, he was caught in drunken state carrying intoxicant with him. In the ultimate order at Annex. A, however, the authority has confined his consideration to the nature of these convictions only as offences u/s 66(1)(b) of the Prohibition Act. Even for the similar offences which the petitioner was likely

to commit, the authority has in terms mentioned that on both the occasions on February 27, 1969, and on September 4, 1970, he was found in a drunken condition. The other ingredients mentioned in the show cause notice were dropped and there is no reference even to Section 85. Even the petitioner understood, that merely for drinking he was sought to be externed and he had, therefore, come out with the plea that he had reformed himself by giving up drinking. Even the authority makes no secret in the first reply that he had taken action on this ground of the petitioner being likely to commit offences similar to the aforesaid provision in Section 66(1)(b) and that plea was founded on the fact that on two subsequent occasions the petitioner was found in a drunken state. That is why the authority has in terms stated that it was true that in the notice there was no allegation as to the breach of peace or other activity harmful or injurious to the people or the society but in his view that was not the necessary ingredient. Therefore, the authority clearly admits that he has not applied his mind to the proper perspective or guide-lines which we have enunciated where he had to consider the extent of the harmful activity of the petitioner and whether it had reached such a degree or extent that in the interest of general public the petitioner was required to be removed from this locality by putting him out of the harm's way so that the community in the locality could remain in peace and tranquility and safety. Therefore, the order on the authority's own admission is clearly an ultra vires order as the restrictions imposed on the cherished right of liberty are not commensurate with the requirements of the public interest. Mr. Nanavati, however, vehemently relied on the second affidavit of Mr. Ghosh where he refers to the fact that the convictions were also u/s 65 and 85(1) and (2) because the petitioner was found drunk and on public road and was found in possession of implements for manufacturing illicit liquor and of illicit wash. The authority now takes up the stand that the petitioner was not merely found drinking liquor but he was also dealing in or manufacturing liquor and he was, therefore, of the view that it was necessary to extern him from the contiguous districts. This is clearly an afterthought as the authority never relied upon these activities in the ultimate order which we have already discussed. Besides, in any event, the authority ever posed the right question at all as to the degree and extent of the harmful activity of the petitioner so as to constitute himself a menace to the locality and unless he posed the right problem and analysed that problem dispassionately, he could never be said to have done his duty fairly and justly as required by the statute. He was bound to consider whether this particular activity which he now relies upon of manufacturing liquor had reached to such an extent as would require the authority to take this extreme action so that the community can be saved from harm being done by this individual who had become a public menace.

9. Therefore, even on that ground it is not open to Mr. Nanavati to support this order.

10. In the result this petition must be allowed by quashing the impugned Order which is a wholly ultra vires order. Rule is accordingly made absolute. There shall

be no order as to costs in the circumstances of the case.