

(1995) 05 DEL CK 0076

In the Delhi High Court

Case No : Criminal Revision Appeal No's. 219 and 227 of 1994 and Criminal Miscellaneous Appeal No's. 397, 415, 631 and 872 of 1994

Sangeeta and Another

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 08-05-1995

Acts Referred:

Immoral Traffic (Prevention) Act, 1956 — Section 16, 17, 2

Citation : (1995) CriLJ 3923 : (1995) 58 DLT 589

Hon'ble Judges : Mohd. Shamim, J

Bench : Single Bench

Advocate : S.T. Singh, Mukul Rohatagi, B. Ghosh, Sarla Chandra, T.N. Gaur, Meera Bhatia, Gajendra Kumar and H.J.S. Ahluwalia, for the Appellant;

Judgement

Mohd. Sharnim, J.

(1) These are three Revision Petitions Nos. 219/94; 227/94 and 10/95 preferred by Miss. Sangita, Mrs. Usha Singh, Mrs. Pooja and Rekha. Besides the above, Mrs. Usha also filed Criminal Writ Petition No. 872/94. All the aforesaid petitions are being taken up together as they raise the same pleas and legal issues which can be disposed of by a common judgment and order.

(2) Brief facts which led to the presentation of the present petitions are asunder: that Inspector P.L.Suri, S.H.O. Ps Kamla Market was present at G.B.Road Along with a lady constable and staff in connection with his usual patrolling duty during the night of 12/06/1994. He received a secret information that certain minor girls were indulging in prostitution in premises No. 5216, G.B.Road, Delhi. On receipt of the said information, he organized a raiding party and included therein two members of the public known as Rajesh Chawla r/o 2860/3, and Mrs.Sneh Srivastava r/o 107/1, Railway Colony, Thomson Road, Special Police Officer of Ps Kamla Market. The above said premises were searched which resulted in the recovery of nine girls from the said premises including the present petitioners. All of them were produced before the learned Metropolitan Magistrate who after

conducting an enquiry u/Section 17 of the Immoral Traffic (Prevention) Act, 1956 hereinafter referred to as the Act for the sake of convenience) ordered the detention of the petitioners i.e. Usha Singh, Sangita, Pooja and Rekha for a period of three years in a Protective Home through his judgment and order dated 16/08/1994.

(3) The petitioners on being dis-satisfied with the above said order approached the Court of Session. The appeals were dismissed vide order dated 17/10/1994.

(4) It is in the above circumstances that the petitioners are before this Court.

(5) Learned Counsel for the petitioners have assailed the legality and validity of the judgment and order passed by the Courts below, inter alia, on the following grounds: that the raiding party was not constituted in accordance with the provisions of Section 13 and Section 15(6-A) of the Act inasmuch as it did not include two lady Police Officers. The interrogation was not done in the presence of a lady member of a recognised welfare institution. The constitution of the Tribunal was also not valid and legal inasmuch as it was in flagrant disregard of the mandatory provisions of Section 17(5) of the Act. There is absolutely no evidence on record to show and prove that there was sexual exploitation or abuse of the petitioners for commercial purposes. The case of the petitioners does not fall within the domain of Section 2(g) of the Act. Hence no action could have been taken against the petitioners.

(6) Learned Public Prosecutors have urged to the contrary.

(7) It has been urged for and on behalf of the petitioners that the learned Magistrate who was working as a tribunal for the purposes of limited jurisdiction was not assisted at the relevant time by a panel of five respectable persons as envisaged by Section 17(5) of the Act. It thus as a corollary whereof rendered nugatory the entire proceedings before the learned Magistrate since a duty has been cast on the shoulders of the Magistrate to have the assistance of the panel of five respectable persons while discharging his functions under Sub-section (2) of Section 17. Thus, the learned Magistrate was left with no option but to seek the assistance of the said panel comprised of five persons as provided u/s 17(5) while discharging his functions under the said Section. The learned PPs, on the other hand, have contended that it was not incumbent on the Magistrate to seek the assistance of a panel of five persons as spoken of u/s 17(5) of the Act in as much as the word used therein is "may" which gave an ample option and latitude to the Magistrate and left to his judicious discretion to have the services of those five persons or to ignore the same.

(8) Since we are concerned with the construction of Section 17 of the Act it would be just and proper to examine the provisions of the said Section before embarking upon a detailed discussion. In view of the above I am inclined to reproduce Section 17 of the Act in extenso. It is in the following words:-

(9) "17.(L) When the special police officer removing a person under Sub-

section(4) of Section 15 or a Police Officer rescuing a person under Sub-section (1) of Section 16, is for any reason unable to produce him before the appropriate Magistrate as required by Sub-section (5) of Section 15, or before the Magistrate issuing the order under Sub-section (2) of Section 16, he shall forth with produce him before the nearest Magistrate of any class, who shall pass such orders as he deems proper for his safe custody until he is produced before the appropriate Magistrate, or, as the case may be, the Magistrate issuing the order: Provided(i) ...(ii) ...(2) When the person is produced before the appropriate Magistrate under Sub-section (5) of Section 15 or the Magistrate under Sub-section (2) of Section 16, he shall, after giving him an opportunity of being heard, cause an inquiry to be made as to the correctness of the information received under Sub-section(1) of Section 16, the age, character and antecedents of the person and the suitability of his parents, guardian or husband for taking charge of him and the nature of the influence which the conditions in his home are likely to have on him if he is sent home, and, for this purpose, he may direct a Probation Officer appointed under the Probation of Offenders Act, 1958,(20 of 1958), to inquire into the above circumstances and into the personality of the person and the prospects of his rehabilitation. (3)...Provided....Provided....(4) Where the Magistrate is satisfied, after making an inquiry as required under Sub-section (2),-(a) that the information received is correct; and(b) that he is in need of care and protection, he may, subject to the provisions of Sub-section (5), make an order that such person be detained for such period, being not less than one year and not more than three years, as may be specified in the order, in a protective home, or in such other custody as he shall, for reasons to be recorded in writing, consider suitable:Provided that such custody Shall not be that of a person or body of persons of a religious persuasion different from that of the person and that those entrusted with the custody of the person including the persons in charge of a protective home, may be required to enter into a bond which may, where necessary and feasible, contain undertakings based on directions relating to the proper care, guardianship, education, training and medical and psychiatric treatment of the person as well as supervision by a person appointed by the Court ,which will be in force for a period not exceeding three years.(5) In discharging his functions under Sub-section (2), a Magistrate may summon a panel of five respectable persons, three of whom shall, wherever practicable, be women to assist him and may, for this purpose, keep a list of experienced social welfare workers, particularly women social welfare workers, in the field of suppression of immoral traffic in persons.(6)..... "

(10) Learned Counsel for the petitioners Mr. Mukul Rohatgi, Senior Advocate, Sodhi Teja Singh and Mr. T. Gaur, on the basis of the provisions of law alluded to above, have argued with great zeal and fervour that no doubt it is true that the legislators in their wisdom have used the word "may" while authorising a Magistrate to summon a panel of five persons in order to assist him in the due discharge of his duties as a Tribunal. However the word "may" has been used in the sense of "shall" making it obligatory on the part of the Magistrate to have

the services of five respectable persons while performing his functions and duties u/s 17 of the Act. According to them there is no escape from the said conclusion keeping in view the context in which the word "may" has been used.

(11) Learned Public Prosecutors, Mr. H.J.S. Ahiuwalia and Ms. Meera Bhatia have urged to the contrary.

(12) Thus the pertinent question whereon hinges the fate of the present cases which comes to the tip of the tongue is as to whether the legislators have used the word "may" in the sense of "shall" and as such a duty was cast on the shoulders of the learned Magistrate to summon a panel of five respectable persons to assist him and to advise him in the due discharge of his functions u/s 17 of the Act.

(13) It is a well established principle of law that the word "may" and the word "shall" are interchangeable terms. It cannot be deduced ipso facto from use of word "may" in a particular statute that it has been used in the sense of directory conferring an ample discretion on the part of the authority to take recourse to particular course of action or not. Much would depend upon the context in which the word "may" has been used and the intention of the legislature which they want to convey through a particular enactment. It is true that ordinarily whenever the words "shall" and "must" are used they issue a mandate and a duty is cast thereby on the shoulders of an authority to carry out the said obligations. On the other hand, if it appears from the context that the legislators have used the word "may" in the sense of "shall" keeping in view the statute as a whole and with regard to its nature and object in that eventuality it would be appropriate for the Courts to construe the word "may" as "shall". It has also been held time and again that in case the word "may" occurs in a statute concerning the rights and interests of the public and if some benefit is proposed to be conferred on the persons affected by the said statute in that eventuality the word "may" would be construed as "shall" and would have a mandatory meaning.

(14) Admittedly the present Act is meant to prevent immoral traffic in the human beings. The said Act was enacted by the Parliament in pursuance of the International Convention signed at New York on the 9th day of May 1950. Furthermore, Art. 23 of our Constitution deals with right against exploitation. It lays down traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. Art. 35 casts a duty on the shoulders of the Parliament to make laws as soon as possible after the commencement of the Constitution. Thus, the present Act is a piece of social legislation. It is meant to ameliorate the lot of the persons of this contrary who are being exploited by others. Hence the present Act is meant for the benefit of those persons who are suffering and being exploited at the hands of others. Consequently according to well established principles of interpretation the word "may" which occurs in Section 17(5) of the Act is to be read as "shall" and as

such, whatever, is contemplated therein cannot be ignored. I am tempted here to refer to the enthralling commentary on the Law of Interpretation of Statutes by Maxwell, 1940 Edn. page 246, in support of my above view:-"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they "may" or "'shall, if they think fit," or, "shall have power," or that "it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have - to say the least - a compulsory force, and so would seem to be modified by judicial exposition. On the other hand, in some cases, the authorised person is invested with a discretion, and then those expressions seem divested of that compulsory force, and probably that is the prima facie meaning..... Again, Section 13 of the Weights and Measures Act,1889(c.21), which provides that an Inspector "may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified," has been held to be obligatory and to impose on the inspector a duty to take the fees in all cases".

(15) Crawford in his famous book " The Construction of Statutes" has got to say the following at page 519 in this regard:-"Ordinarily the words "shall" and "must" are mandatory, and the word "may" is directory, although they are often used inter-changeably in legislation. This use without regard to their literal meaning generally makes it necessary for the Courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the Court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will be construed as directory, or vice versa. In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words "shall" and "must" to be directory, they should be given that meaning. Similarly, under the same circumstances, the word "may" should be given a mandatory meaning, and especially where the statute-concerns the rights and interests of the public, or where third persons have a claim de jure that a power shall be exercised, or whenever something is directed to be done for the sake of justice or the public good, or is necessary to sustain the statute's constitutionality.

(16) Yet the construction of mandatory words as directory and directory words as mandatory should not be lightly adopted. The opposite meaning should be unequivocally evidenced before it is accepted as the true meaning, otherwise, there is considerable danger that the legislative intent will be wholly or partially defeated."

(17) I would also like to cite a few lines from Corpus Jurisdiction Secundum, Vol.

82, Art. 380, page 880..." "May" construed as mandatory. Where, from a consideration of the whole statute, and its nature and object, it appears that the intent of the legislature was to impose a positive duty rather than a discretionary power, the word "may" will be held to be mandatory. A mandatory construction will usually be given to the word "may" where public interests are concerned, and the public or third persons have a claim de jure that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or the public good; but never for the purpose of creating a right. Accordingly, in a proper case the word "may" will be construed as "must" or "shall". Such a construction is warranted only where it is necessary to effectuate a manifest legislative intent, and, if no imperative reason exists for a mandatory construction, the word "may" will be construed as permissive. The word "may" will be construed as "shall", when the statute can thereby be upheld, if construction to the contrary would render it obnoxious to a constitutional inhibition."

(18) To the same effect are the observations of their Lordships of the Supreme Court as reported in *Shri A.C. Aggarwal, Sub-divisional Magistrate, Delhi and Another Vs. Mst. Ram Kali, etc.*, wherein their Lordships had had an occasion to construe the words appearing "may take cognizance" u/s 190(I)(c) of the Code of Criminal Procedure. Their Lordships opined that the Magistrate is bound to take cognizance of any cognizable offence brought to his notice u/s 190(I)(c) of the Code of Criminal Procedure. The words "may take cognizance" in the context means "must take cognizance". He has no discretion in the matter, otherwise that Section will be violative of Art. 14 of the Constitution.

(19) Their Lordships gave vent to the same view in *State (Delhi Admn.) Vs. I.K. Nangia and Another*. Normally, the word "may" implies what is optional, but for the reasons stated, it should in the context in which it appears, mean "must". There is an element of compulsion. It is a power coupled with a duty." Their Lordships cited with approval the observations of Lord Kaimis in *Julius v. Lord Bishop of Oxford*, 1974 80 A.C. 214....." There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

(20) There is another side of the picture. A close scrutiny of Section 17(4) reveals that when the Magistrate has satisfied himself that the information with regard to a particular person is correct and that such person is in need of care and protection then he will pass an order subject to the provisions of Sub-section (5) that such person be detained for such period being not less than one year and not more than three years as may be specified in the order in a Protective Home. It implies thereby that an order under the said Section can be made only subject to the provisions of Sub-section (5) of Section 17 of the Act. Sub-section (5) of

Section 17 which has already been adverted to above provides that the Magistrate while discharging the functions u/s 17 would be assisted by five respectable persons out of whom whenever it is practicable three would be women to assist him.

(21) In view of the above it can be safely inferred there from that the legislature while using the word "may" wanted to use it in the mandatory sense otherwise they would not have subjected the exercise of powers under Sections 17(2) to 17(5). It is axiomatic that nothing can be made subject to which is discretionary.

(22) Learned Public Prosecutors have contended that after the amendment of Section 17 in the year 1986 the legislature introduced an enquiry by a Probation Officer with regard to the circumstances, character and antecedents of the women and girls and the prospects of their rehabilitation. Thus, the Magistrate was left free to adopt either of the two modes i.e. he could have an enquiry conducted through the Probation Officer u/s 17(2) of the Act, as was the case in the instant case, or could have summoned a panel of five respectable persons as contemplated by Section 17(5) while discharging his functions. The Magistrate took a recourse to the procedure provided u/s 17(2). Thus he need not have followed the mode provided u/s 17(5) of the Act. I feel the learned Public Prosecutors have construed amiss the provisions of Section 17(2) and Section 17(5). A close scrutiny of the said Sub-sections leaves one in no doubt that every function of the learned Magistrate whichever is to be performed by him is subject to the provisions of Sub-section (5) of Section 17. Had it not been so the legislators would not have provided that every function under the said section to be performed by a Magistrate would be subject to the provisions of Sub-section (5). (vide Sub-section (4) of Section 17). To the same effect are the observations of a Division Bench of the Allahabad High Court as reported in 1963 2nd 543, Smt. Ram Devi v. State and Others, Suppression of Immoral Traffic in Women and Girls Act has been used in the sense of "shall" i.e. in the sense of being imperative with the result that in discharging his functions under Sub-section (2) of Section 17 the Magistrate has to summon a panel of five respectable persons.

(23) The panel of five respectable persons is summoned in order to assist the Magistrate discharging all his functions under Sub-section (2) of Section 17 of the Act and not only part of those functions and that the panel is an integral part of the Tribunal."

(24) The next contention raised by the learned Counsel for the petitioners is that no offence was being committed by the petitioners. In any case there is no evidence to the effect that the petitioners were living or carrying on or were being made to carry on prostitution in a brothel at the time of the raid. Hence the impugned order is liable to be set aside.

(25) A perusal of the relevant provisions of the Act goes a long way to show that the purpose and the object of the Act is not to abolish the prostitute or the

prostitution. There is no provision under the Act which makes the prostitution parse a criminal offence or punishes a person(r)because he is indulging in prostitution. What is punishable under the Act is sexual exploitation or abuse of persons for commercial purposes and to earn the bread thereby except where a person is carrying on prostitution in the vicinity of a public place (vide Section 7) or when a person is found soliciting or seducing another person (vide Section 8).

(26) It is thus crystal clear from above that the prostitution by itself is not an offence except when it is committed in the vicinity of a public place or somebody seduces or slits a person for the purpose of prostitution. Learned Counsel for the provisions thus contend that in the instant case no evidence has been placed on record that the petitioners were indulging in prostitution as defined u/s 2(f) of the Act. There is no evidence to show and prove that the petitioners were seducing any person for the purposes of prostitution. There is no evidence again on record that the petitioners were running a brothel. The learned Magistrate it appears was swayed while passing the impugned order by the fact that the provisions belonged to a particular caste. To my mind, no order could have been passed against the petitioners for the removal from their rooms simply because they belonged to Body a caste whose profession is stated to be dancing and singing.

(27) The second factor which weighed with the learned Magistrate was that on being medically examined they were found to have had sexual intercourse very recently, such as within a week before their medical examination. To my mind asI have already observed above, sexual intercourse by itself is not an offence. Thus, the learned Magistrate was wrong in coming to his conclusion that the petitioners were indulging in prostitution as defined under the Act.

(28) Section 16 of the Act deals with the rescue of person. It provides " Where a Magistrate has reason to believe from information received from the police or from any other person authorised by the State Government in this behalf or otherwise, that any person is living, or is carrying on or is being made to carry on, prostitution in a brothel, he may direct a Police Officer not below the rank of a Sub Inspector to enter such brothel, and to remove there from such person and produce him before him." It is manifest from above that a person can be removed from his hearth and home only in those discerning few cases when he is living or carrying on or is being made to carry on prostitution in a brothel. The respondents for the best reasons known to them have not placed anything on record to make the case of the petitioners fall within the domain of Section 16 of the Act.

(29) The above view was also given vent to by a Division Bench of the Allahabad High Court as reported in Smt. Jiam Devi's case (supra) ..." From this it would follow that Section 16 can only apply if some person is gaining by any acts of prostitution committed by a girl or when one or more prostitutes carry on the profession for mutual gain. There is thus nothing in the Act which punishes or makes liable for action a woman, who carries on prostitution for her own gain,

unaided by others or who carries it on for the mere pleasure or fun of it."

(30) The other contention put forward by the learned Counsel for the provisions is that even the raiding party was not constituted in accordance with the mandate of Section 13 of the Act. Hence the entire proceedings in the instant case were an exercise in futility as the non compliance of the said provisions rendered them to be nugatory. Since the point raised by the learned Counsel for the provisions requires a close examination of the relevant provision of law, alluded to above, the same can be adverted to with profit. Section 13 of the Act lays down"(1) There shall be for each area to be specified by the State Government in this behalf a Special Police Officer appointed by or on behalf of that Government for dealing with offences under this Act in that area.(2) The Special Police Officer shall not be below the rank of an Inspector of Police. (2A).....(3) ofPolice.(2A).....(3) For the efficient discharge of his functions in relation to offences under this Act-(a) the Special Police Officer of an area shall be assisted by such number of subordinate Police Officers (including women Police Officers wherever practicable) as the State Government may think fit;(b)(4).....".

(31) Section 15(6A) envisages "The Special Police Officer or the trafficking Police Officer, as the case may be, making a search under this section shall be accompanied by at least two women Police Officers, and where any woman or girl removed under Sub-section (4) is required to be interrogated, it shall be done by a woman Police Officer and if no woman Police Officer is available, the interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation."

(32) Learned Counsel for the petitioners on the basis of the above provisions of law have found fault with the constitution of the raiding party and have argued that a duty has been cast on the shoulders of the Special Police Officer to include in the raiding party at least two women Police Officers. Admittedly, the learned Counsel contend there were no two women Police Officers in the raiding party. The raiding party consisted of a woman constable and a lady member of the public. Thus the constitution of the raiding party fell far short of the requirements of the provisions of law, alluded to above.

(33) The contention of the learned Counsel I feel does not hold much water. A close scrutiny of Section 13(3)(a) reveals that it provides that women Police Officers be included in the raiding party as and when it is practicable. Thus, it has been, I feel, left to the discretion of the Special Police Officer which leads the raiding party to include women Police Officers as and when they are available. The Police Officer, I feel, in view of the above was not bound to include women Police Officers if the same were not available.

(34) A careful perusal of Sub-section (6A) of Section 15 of the Act reveals that the Special Police Officer would be accompanied by at least two women Police Officers. However, again it has been left to the discretion of the Special Police

Officer to include two woman Police Officers at the time of the search and at the time of the interrogation. This intention of the legislature is crystal from the subsequent last lines of Sub-section (6A) inasmuch as it provides that if no woman Police Officer is available in that eventuality interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation.

(35) There is another aspect of the matter. Admittedly the raiding party in the instant case consisted of Inspector P.L.Suri who was a Special Police Officer, SIU day Singh and a lady constable Ms.Julia, Smt. Sneh Srivastava, a Special Police Officer of Ps Kamla Market, and Shri Rajesh Chawla, residents of 107/1 & 2860/3, Thomson Road, New Delhi. Thus the raiding party had two women Police Officers. Hence even if the contention of the learned Counsel is taken to be correct even then they cannot find fault with the constitution of the raiding party.

(36) The next limb of the argument in support of the above contention is that the constitution of the raiding party was not in accordance with law inasmuch as all the members of the raiding party were not above the rank of the Head Constable i.e. not below the rank of Assistant Sub Inspector of Police as required vide Notification No. F.5/67/88-Home (P)/Estt. dated 14/12/1988. The learned Counsel in this connection has led me through the above said Notification. It is in the following words:-

"IN exercise of the powers conferred by Sub-section (1) of Section 13 of the Immoral Traffic (Prevention) Act,1956, read with Government of India, Ministry of Home Affairs, Notification No. 37/1/57-P-11 dated 26/04/1958, the Administrator of the Union Territory of Delhi is pleased to appoint all Assistant Commissioners of Police, working as Sub-Divisional Police Officers, all Station House Officers, and all the Assistant Commissioners of Police of the Crime Branch, Palam Airport and Railways, as Special Police Officers within the said territory for purposes of the said Act. He is further pleased to direct under Sub-section (3)(a) of the said Section 13 that the Subordinate Police Officers (not below the rank of Assistant Sub-Inspector of Police) shall assist their respective officers so appointed as Special Police Officers."

(37) The learned Counsel on the basis of the above Notification has contended that it is mandatory in view of the above Notification that all the members of the raiding party should not be less than the Assistant Sub-Inspectors of Police in rank. Admittedly, according to the learned Counsel there was one lady police constable in the raiding party. Thus all the members of the raiding party were not above the rank of Head Constables. Thus the said raiding party can by no stretch of imagination be called to be legal and validly constituted raiding party.

(38) The contention of the learned Counsel I feel is without any substance. A careful perusal of the said Notification shows that there is no mandate that all the members of the raiding party should not be below the rank of Assistant Sub Inspectors of Police. What is required by the said Notification is that a Special

Police Officer would be assisted by an officer not below the rank of Assistant Sub Inspector of Police. The raiding party consisted of an Inspector of Police known as Inspector P.L.Suri and a Sub Inspector of Police known as Si Uday Singh and a lady constable. Thus the Inspector of Police who was a Special Police Officer was being assisted by a Sub Inspector of Police. Thus the constitution of the raiding party cannot be found fault with on the said score.

(39) In the circumstances stated above the petitioners are entitled to succeed. The petitions are allowed. The impugned order dated 16/08/1994 passed by the learned Magistrate and the order dated 17/10/1994 passed by the learned Additional Sessions Judge are hereby set aside. The petitioners be set at liberty incase they are not required to be detained in connection with any other case.