

(1963) 05 CAL CK 0013

In the Calcutta High Court

Case No : A.F.O.O. No. 24 of 1963 and Matter No. 221 of 1962

Sk. Md. Soleman

APPELLANT

Vs

State of West Bengal and Another

RESPONDENT

Date of Decision : 01-05-1963

Acts Referred:

Calcutta Police Act, 1866 — Section 35, 39
Constitution of India, 1950 — Article 14, 19, 19(1), 19(2), 21
Foreigners Act, 1946 — Section 3

Citation : AIR 1965 Cal 312 : (1965) 1 CALLT 270 : (1965) CriLJ 679

Hon'ble Judges : P.B. Mukharji, J;C.N. Laik, J

Bench : Division Bench

Advocate : Subimal Roy and M. Pal, for the Appellant; B. Das and B.C. Basak, for the Respondent

Final Decision : Dismissed

Judgement

P.B. Mukharji, J.—This is an appeal from the judgment and order of Mr. Justice Binayak Nath Banerjee dismissing the petitioner's application for a writ under Article 226 of the Constitution.

2. The petitioner applied to this Court for a Mandamus as well as Certiorari against the respondents--the Commissioner of Police and the State of West Bengal for refusing to grant or renew the petitioner's licence for the year 1962-63 in respect of an eating house established at 98, Lower Chit-pore Road, Calcutta which the petitioner claimed to have been running for several years. The establishment is said to serve meal of rice and curry twice daily to its customers. It is also alleged that the petitioner is a teetotaler and a religious minded person, a man of good behaviour and that there has never been any instance of drunkenness or disorder in the eating house establishment. It is said that no liquor or spirit or alcohol is served in the eating house. There is a supporting affidavit in favour of the petitioner from his landlord. The petitioner is a monthly tenant in respect of a room of the said premises at Lower Chitpore Road paying a

rent of Rs. 131.35 nP per month.

3. The impugned order of the Commissioner of Police is No. 2884 P. S./PS/131(EH)62, dated 28th June, 1962 and is in the following terms;

"With reference to your application, dated 17-3-1962 for fresh issue of police licence by way of renewal for 1962-63 in respect of a Eating house at 98, Lower Chitpore Road, Calcutta, I regret to inform you that the same has been refused.

You are, therefore, directed to close down the said establishment immediately and report compliance."

4. It is this order which is challenged by the petitioner in this application. The challenge Is made on a number of grounds stated in the petition. In the first place, it is said that the refusal to grant the licence is illegal because the Commissioner of Police passed the order of refusal without giving the petitioner an opportunity of being heard and showing cause against such refusal. In the second place, it is said that the impugned order of the Commissioner is against the statutory provisions and liable to be cancelled. In the third place, it is said that the Commissioner's decision is arbitrary and without any reason. In the fourth place, it is said that the Commissioner did not exercise his discretion reasonably and in accordance with the guiding principle laid down in Section 39 of the Calcutta Police Act. Lastly, the order is challenged on the ground that the Commissioner of Police presumably refused to renew the licence on grounds extraneous to the statute.

5. The determination of the questions raised and the decision on this application depend in the first place on the scope and construction of Section 39 of the Calcutta Police Act. The Calcutta Police Act is an ancient Bengal Act of 1886 whose preamble said it was an Act to amend and consolidate the still older provisions of Act XIII of 1856 (for regulating the Police of the towns of Calcutta, Madras and Bombay) and of the Act XLVIII of 1860 (to amend Act XIII of 1856). This Act is about to score a century on the statute book but has survived and continues with life and vigour with occasional amendments in the stormy statutory history of the last hundred years in this country. Ancient wisdom appears to have strength to stand the batteries of the modern generation. The Calcutta Police Act, in one sense, is a legal museum and deals with a variety of miscellaneous subjects whose wealth and richness can astonish even the most progressive thinker of this age. Among other things it deals with such an array of subjects as apprehension of reputed thieves, penalty, for taking spirits into the barracks or such other sensitive places as vessels of war and jails, for keeping taverns, ale-houses, ganja, chandu or hemp shop, for harbouring deserters from merchant vessels, for stopping music, for owning and keeping gaming houses, for pawn-brokers and moneychangers, licences for conveying and removing gun powder, regulation of traffic, disorder at places of public amusement and also public meeting, penalties for offences for driving not merely cars and carts but also elephants and camels, bathing in public street, affixing posters, indecent

behaviour in public, nuisance in streets, stray animals on the roads and kitting even of stray dogs.

6. Against that varied context what falls for construction in this application is the harmless looking Section 39 of the Calcutta Police Act which reads as follows: "The Commissioner of Police may, at his discretion, from time to time, grant licences to the keepers of such houses or places of public resort and entertainment as aforesaid for which no license as is specified in (The Bengal Excise Act, 1909) is required upon such conditions, to be inserted in every such license, as he, with the sanction of the said (State) Government from time to time shall order, for securing the good behaviour of the keepers of the said houses or places of public resort or entertainment, and the prevention of drunkenness and disorder among the persons frequenting or using the same; and the said licenses may be granted by the said Commissioner, for any time not exceeding one year."

7. The language and the look of that section indicate that this is not a judicial or quasi-judicial act of the Commissioner of Police but an administrative act. The granting of the licenses u/s 39 of the Calcutta Police Act appears to be an administrative act and an executive act by the Commissioner. It follows, therefore, that if any writ lies it can only be a writ for Mandamus and not a writ of Certiorari. The language makes it expressly clear that this power is a discretion of the Commissioner. No doubt, of course, the discretion has to be reasonably exercised and not capriciously and whimsically exercised. The Commissioner of Police cannot say that I refuse to grant a license for a eating house because the man does not reach a certain standard of height or size of the chest or that his complexion is either fair or dark or too fair or too dark. Those will certainly be considerations extraneous to the statute and if an order of granting or refusal of license was passed entirely on such considerations a Mandamus certainly would lie upon him to exercise his discretion properly and reasonably. In the next place, the language of Section 39 of the Calcutta Police Act makes it clear that no statutory mandate is laid upon him to give a hearing to the party before he makes an order for a grant or refusal of a license. In fact it has been held more than once that personal hearing in such cases is not an essential requisite by which to test either the reasonableness of the statute or its constitutional validity. See for instance the observations of the Supreme Court in *Kishan Chand Arora Vs. Commissioner of Police, Calcutta*, , where the Supreme Court observed:

"We are, therefore, of opinion that in the circumstances of this case and in the setting in which Section 39 appears the mere absence of a provision for a hearing or a provision for communicating the reasons for refusal to the person applying, does not make Section 39 unconstitutional as an unreasonable restriction on a fundamental right. The attack, therefore, on the constitutionality of Section 39 must fail."

The other decision of the Supreme Court is in *F.N. Roy Vs. Collector of Customs*,

Calcutta, , where the Supreme Court said in the different context of the Customs Act:

"But there is no rule of natural justice that at every stage a person is entitled to a personal hearing."

8. Proceeding further with the interpretation and the language of Section 39 of the Calcutta Police Act. the significant word for the purposes of this application is "keeper". Keeping an eating house has a significance. The word "keeper" in the context of Section 39 means one who actually and factually keeps the eating house. Mere legal, theoretical and juristic ownership or proprietorship is not the dominant note in the word "keeper" in Section 39 of the Calcutta Police Act. Actual control and actual possession, effective control and effective possession of the eating house appear to be the emphasis or Indication contained in the word "keeper" in Section 39 of the Calcutta Police Act.

9. In the next place, the express purpose of granting the license u/s 39 of the Calcutta Police Act is (1) first to secure the good behaviour of the keepers of the said houses and (2) prevention of drunkenness and disorder among the persons frequenting or using the same. Unless, therefore, the keeper is present actually and physically and is in actual and effective control and possession of the eating house, securing the good behaviour of the keeper would be frustrated. An absentee keeper who is not within the jurisdiction of or amenable to the orders of the Commissioner of Police may be, therefore, not a proper person to receive a license for an eating house. The other purpose, of course, as indicated above is prevention of drunkenness and disorder among those who frequent or use the eating house. If the keeper is a non-resident foreigner or a non-resident person who is not a citizen of India then it might be next to impossible for the Commissioner of Police in Calcutta to secure the good behaviour of such a keeper.

10. The purpose, the context of the Calcutta Police Act and the language of Section 39 of the Calcutta Police Act all indicate that the Commissioner of Police was intended to have a kind of personal control over the keeper and a discretionary power to grant a licence for an eating house keeping in view the interest of good behaviour and prevention of disorder which are presumably and pre-eminently police functions.

11. In support of the interpretation that Section 39 of the Calcutta Police Act introduces the doctrine of actual and effective control and possession by using the word "keeper", the decision of the Supreme Court in Kishan Chand Arora Vs. Commissioner of Police, Calcutta, , can be cited on the point where the Supreme Court, after observing that Section 39 of the Calcutta Police Act did not lay down an absolute discretion and that the imposition of the conditions for the licenses was for the two express purposes indicated above, laid down as follows at page 709:

" the Commissioner shall satisfy himself (i) that the person applying for a licence is the keeper of an eating house, meaning thereby that he has a place

where he can carry on the business or trade and that he actually and effectively has control and possession of that place, (ii) that the keeper is a person of good behaviour so that the eating house may not become a resort of criminals and persons of ill-repute, and (iii) that the keeper is in a position to prevent drunkenness and disorder among those who come to the eating house."

The Supreme Court proceeded to lay down that the discretion that is given to the Commissioner of Police is to satisfy himself on these three points and if he is satisfied about them he is to grant the licence. On the other hand, if he is not satisfied on any one of those three points he will exercise his discretion by refusing to grant the licence.

12. Now, in order to apply these three tests we have to examine the facts and the materials which the Commissioner of Police had in this case before he came to the decision.

13. In the first place, he had before him a written complaint which was addressed to the Police and Defence Minister of West Bengal with a copy to him and the Officer-in-charge, Barabazar Police Station. In that complaint three distinct allegations were made, namely, (1) that a Pakistani National named Rajab Ali son of Rabis Ali, village Bamui, Sylhet, having no passport and visa, is residing in the Eating House of Sk. Sulaiman at 88, Lower Chitpore Road, Calcutta; (2) This Rajab Ali had passport and visa (and staying for some time in the Belgachia area, Calcutta), but the same was cancelled for a serious offence done by him and he was ordered to leave India; (3) that this hotel is nothing but a shelter of some informers of Pakistan and this Rajab Ali is an absconder. There was also further material before the Commissioner of Police in the shape of a report from the Deputy Commissioner of Police who made an enquiry. That report proves that Rajab Ali was looking after this eating house and was a Pakistani National. It also transpires that Rajab Ali had a Pakistani passport and "F" category visa which he was supposed to have lost in 1957 but which loss he did not report to any police station or to any authority in West Bengal. It is found as a fact that Rajab Ali had been living in Calcutta since then without any travel document.

14. It is plain and undisputable on the facts that the petitioner is a Pakistani National coming to India only occasionally and staying only for a few days in the year. Paragraph 6 of the affidavit of the Commissioner of Police shows the dates of his entry, exit and duration of stay in India. In 1960 he stayed only for 46 days; in 1961 he came in and went out of India on three occasions staying respectively for 38 days, 15 days and 27 days; in 1962 he stayed only for five days in March and then came to India after the 10th July, 1962 for the purpose of this application.

15. On these facts the respondent, Commissioner of Police, says that he does not consider the petitioner a fit and proper person to hold a licence for eating house in Calcutta not only because he is not an Indian citizen but also because he does

not even ordinarily reside in India on whom he could exercise any effective control. Applying the three tests laid down by the Supreme Court in *Kishan Chand Arora Vs. Commissioner of Police, Calcutta*, as enunciated above, to the above facts of the present petition we are satisfied that the Commissioner was well within proper statutory and reasonable exercise of his discretion to refuse to grant the licence because the petitioner could not be such a keeper as could come within the interpretation that we have put u/s 39 of the Calcutta Police Act. In refusing to grant the licence to the petitioner the Commissioner, therefore, did not take any matter which was extraneous to the statute.

16. Lastly it may be pointed out that Section 35 of the Calcutta Police Act makes it an offence for having or keeping inter alia an eating home, without licence, an offence which is liable on a summary conviction before a Magistrate to a fine not exceeding Rs. 50 for every day. The material words used in Section 35 of the Act are "has or keeps". These words "has or keeps" indicate the same interpretation and construction. It is not so much theoretical, legal or juristic possession of having hut in fact "has or keeps". This is consistent with the policy and the object of the Calcutta Police Act in this respect and supports the Supreme Court doctrine of actual and effective control and possession laid down in *Arora's* case, cited above.

17. It is, therefore, difficult to see in the present context of facts in this application what was wrong in the Police Commissioner refusing licence to a non-resident person who is not a citizen of India and who keeps a person who is said to be an absconder or, at any rate, admittedly a person without travel documents, and who himself is not a citizen of India. If in that context of facts the Police Commissioner considers that it is not possible for him to secure good behaviour and prevent disorder in such a case if he refuses to grant licence to such a person, I think he acts well within the statutory limits both of discretion as well as of the language used in Sections 35 and 39 of the Calcutta Police Act read together. This view can also be supported by a recent Division Bench decision of this Court in *Commr. of Police v. Lakshmi Chand Gupta*, AIR 1962 Gal 556. I have no hesitation in holding that the Commissioner in the above facts and materials in the present case was statutorily justified in refusing the licence to the petitioner

18. Before leaving the Calcutta Police Act on this point I shall refer to another consideration, suggested in the arguments at the Bar. It is whether Sections 35 and 39 of the Calcutta Police Act read together give any impression that only such eating houses where spirit or drug or alcohol or intoxicating drinks and food are consumed are the only kinds of eating houses which require licences but other eating houses where no such food and drinks of intoxicating kind are secured are exempted from having a licence. On a close consideration of the language of these two sections and the policy of Section 39 which especially provides for a case of Commissioner of Police granting licence for places for which no licences are required under the Bengal Excise Act I have come to the

conclusion that the word "refreshment" in Section 35 of the Calcutta Police Act does not have the limitation that refreshment is only spirituous refreshment and not other kinds of refreshments which only "cheer but do not inebriate". In this connection reference may be made to *Binns v. Wardale*, (1946) 1 K. B. 451 where Lord Goddard C. J. at page 455 took the view:

" "Refreshment" is not a term of art. When one talks about a person taking "refreshments" one means taking some article of food generally different from what I may call a full meal--something light--a refresher."

I am of the view that refreshment in Section 35 of the Calcutta Police Act would include ordinary refreshment which has nothing to do with alcohol or liquor or spirit or any drug which intoxicates.

19. Mr. Subimal Roy, learned counsel for the appellant contends that the licence was refused on the ground that the petitioner was not an Indian citizen and he argues with authorities that foreigner or a person who is not a citizen of India is not by that fact alone disqualified to obtain a licence for an eating home in Calcutta. The short answer to the argument of Mr. Roy on this point is that what is essential in the context, interpretation and scope of Section 39 of the Calcutta Police Act is not that whether a person is a foreigner or not a citizen of India but whether he is such a person who is mostly and largely a non-resident so that his behaviour could not be secured within the meaning of Section 39 of the Calcutta Police Act, for then the Commissioner is entitled to refuse him licence on the ground that one of the express purposes of the licence under that section could not be given effect to by giving a licence to such a person and on the ground that he cannot control such a person within the meaning of Section 39 of the Calcutta Police Act.

20. Apart from the short answer, the argument of Mr. Roy for the appellant, even on the merits, does not stand closer scrutiny. In the first place, If it is contended for the appellant that he is trying to enforce a fundamental right under Article 226 of the Constitution to carry on the trade or business of an eating house under Article 19(1)(g) then he is clearly out of Court because Article 19 confers a fundamental right only on the citizens. The opening words of Article 19 are--"All citizens shall have the right..." The petitioner in this case is certainly not a citizen of India--he is a citizen of Pakistan. He is a national of Pakistan, he comes on the Passport of Pakistan. He stays only with special visas in India for specified periods. It is then argued by Mr. Roy that the words in Article 19 are "All citizens" and not with the qualification "Citizens of India". For that purpose he made elaborate submission with copious references to different Articles of the Constitution endeavouring to say that the words "Citizens of India" are used in the Constitution whenever necessary, such as in Part II of the Constitution dealing with the Citizenship e.g. in Article 9, Articles 58 and 66 of the Constitution requiring President and Vice President to be "a citizen of India" or Articles 124 and 217 of the Constitution requiring Judges of the Supreme Court and the High Courts to be "citizens of India".

21. We are unable to accept this contention of Mr. Roy that because Article 19 uses only the words "All citizens" and not "Citizens of India" therefore the fundamental right guaranteed by that Article is open to a person who is not a citizen of India. Article 19 is a fundamental right under the Constitution of India and deals specifically and expressly with the "right to freedom". These are the civic freedoms of speech, expression, assembly, association, movement, resident, acquiring, holding and disposing property, profession, occupation, trade or business. The very idea or context of such a freedom which is a right to freedom under the Constitution excludes the idea that such freedom as a fundamentally guaranteed Constitutional right was at all intended for foreigners or persons not citizens of India. That Constitutional right is open only to Indian citizens and none else. Other persons may have rights in respect of the matters mentioned in Article 19 of the Constitution; but those rights are not constitutionally guaranteed fundamental right and for that purpose If such persons were not citizens of India they have to seek them as ordinary legal rights independently of the Constitution. Secondly, Part III itself of the Constitution dealing with these fundamental rights makes a distinction between the types of fundamental rights open and available only to citizens of India and others open to all persons. Now, a fundamental right to freedom is open only to a citizen of India. But such other fundamental rights as right to equality under Article 14 of the Constitution, or right to life or personal property under Article 21 of the Constitution (which also is one of the fundamental rights under the right to freedom), fundamental right to freedom of religion as under Article 25 or fundamental right to property as under Article 31 are open to a person irrespective of the fact whether he is a citizen of India or not and that is for the obvious reason that all civilised countries recognise and protect certain basic human freedoms.

22. That Article 19 of the Constitution is only for the citizens of India is now concluded by the authority of the Supreme Court in *Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others*, where Bose, J. delivering the judgment of the Supreme Court at page 1297 laid down:

"Article 19 of the Constitution confers certain fundamental rights of freedom on the citizens of IndiaNo corresponding rights are given to foreigners. All that is guaranteed to them is protection to life and liberty in accordance with the laws of the land."

Such was the view also expressed by the Supreme Court in *A.K. Gopalan Vs. The State of Madras*, where Kania C. J. at page 107 of the report (SCR): (at p. 37 of AIR) observed:

"Article 19 gives the right specified therein only to the citizens of India while Article 21 is applicable to all persons. The word citizen is expressly defined in the Constitution to indicate only a certain section of the inhabitants of IndiaIn my opinion therefore Article 19 should be read as a separate complete article."

23. Reference may be made to some other decisions on this point. The former Madhya Bharat High Court in *Noor Mohammad v. State*, (S) AIR 1956 Madh B 211 at p. 214 after applying the above Supreme Court decision in *Hans Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and Others*, , observed:

"The petitioners being Pakistan citizens have thus no fundamental right to reside in this country..

If Article 19 does not apply to foreigners, the question of the Indian Passport Act in its applicability to foreigners being repugnant to Article 19 cannot arise."

24. Mr. Roy for the appellant realised this difficulty in claiming fundamental right for his client, in this case a Pakistan citizen, under Article 19(1)(g) of the Constitution in respect of his alleged right to carry on the trade or business of an eating house. He, therefore, made another point before the Court. He made the bold suggestion that his client, the appellant, was a citizen within the meaning of Article 19 of the Constitution because he was a Commonwealth citizen. His submission is this that Pakistan is a part of the Commonwealth. That being so, a citizen of Pakistan is not a foreigner because no part of the Commonwealth is a foreign state. He develops his point first by reference to the expression "foreign states" in the Constitution of India in such Articles as Articles 9, 18(2), (3) and (4), 19, 102(1)(d) and 191(1)(d) and to such expression as "foreign country" in items 10, 14 and 41 in List I of the Seventh Schedule to the Constitution, namely the Union List and secondly he developed his argument by reference to the Foreigners Act. Section 11 of the Citizenship Act, 1955 provides for Commonwealth citizenship and says that every person who is a citizen of a Commonwealth country specified in the First Schedule shall, by virtue of that citizenship, have the status of Commonwealth citizen in India. Section 12 proceeds to grant a power to confer rights of Indian citizens on citizens of certain countries. It says that the Central Government may, by order notified in the Official Gazette, make provisions on a basis of reciprocity for the conferment of all or any of the rights of a citizen of India on the citizens of any country specified in the First Schedule, but proceeds to state that any such order shall have effect notwithstanding anything inconsistent therewith contained in any law other than the Constitution of India or that Act. Now the First Schedule of the Citizenship Act includes in the list of Commonwealth countries Pakistan. No notification has been issued by the Central Government u/s 12 of the Citizenship Act conferring the rights of the Indian citizens on the citizens of Pakistan. On the strength of Section 11 of the Citizenship Act, 1955 Mr. Roy for the appellant contends that he is a Commonwealth citizen. Therefore he claims to come under Article 19 of the Constitution. Here again Article 19 of the Constitution does not, in our view, include a Commonwealth citizen within the meaning of "all citizens" in that Article of the Constitution. No doubt, when the Constitution came to be framed Citizenship Act was not there nor any provision for a Commonwealth citizen as in Section 11 of the Citizenship Act, 1955. The Citizenship Act cannot override the Constitution. No doubt again Article 11 in Part

II of the Constitution provides that nothing in the foregoing provisions of that Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. "That is only a negative constitutional declaration that Articles 5 to 10 of Part II of the Constitution will not mitigate the power of Parliament to make law in respect of citizenship. But that does not mean that it grants any more power than Parliament has in other parts of the Constitution, and certainly does not mean any power for Parliament to override fundamental rights under Article 19 by throwing such rights open to persons who are not citizens of India, without of course an amendment of the Constitution itself to that effect. A Commonwealth citizen therefore in our view cannot be included within the expression "all citizens" in Article 19 of the Constitution. We shall reinforce that conclusion by a reference to the preamble of the Citizenship Act, 1955 which says--

"An Act to provide for the acquisition and termination of Indian citizenship."

That being the object in the preamble, Pakistan citizen as a Commonwealth citizen cannot claim to come within Article 19 of the Constitution or India through the doors of Citizenship Act, 1955.

25. Mr. Roy's reference to the Foreigners Act also really does not help the appellant on the point. "Foreign State" is defined in Article 367(3) of the Constitution which says--"For the purposes of this Constitution "Foreign State" means any State other than India." But there is a proviso to that article which says that--"Provided that, subject to the provisions of any law made by Parliament, the President may by order declare any State not to be a foreign State for such purposes as may be specified in the order." What has happened in the case of Pakistan is that Pakistan is not a foreign State because of the declaration in the Foreign States Order, 1950 made under Article 367(3) read with Article 392(3) of the Constitution stating that the powers conferred on the President by this article, by Article 324, by Clause (3) of Article 367 and by Article 391, shall, before the commencement of this Constitution, be exercisable by the Governor-General of the Dominion of India. Now the Constitution (Declaration as to Foreign States) Order 1950 provides as follows:--

"In exercise of the powers conferred by Clause (3) of Article 367 and Clause (3) of Article 392 of the Constitution of India, the Governor-General is pleased to make the following Order, namely:

(1) This order may be called the Constitution (Declaration as to Foreign States) Order, 1950.

(2) It shall come into force at once.

(3) Subject to the provisions of any law made by Parliament, every country within the Common-wealth is hereby declared not to be a foreign State for the purposes of the Constitution."

26. Mr. Roy on the strength of this Constitutional Order submits that by virtue of Clause (2) of this Order Pakistan is not a foreign state for the purposes of the Constitution and, therefore, a citizen of Pakistan is not a foreigner. Accepting Mr. Roy's contention that a citizen of Pakistan is not a foreigner, that does not mean that he becomes a citizen of India by virtue of this Constitutional Order. He does not. The reason is clear. The citizen of a Commonwealth has certain privileges and rights. The citizen of a Commonwealth has a status in between a foreigner and a citizen of India. He has more rights than a foreigner but less rights than a citizen of India. A Commonwealth citizen does not by virtue of that alone become a citizen of all the different individual states composing the Commonwealth. The Foreigners Act, 1946 itself clearly defines a foreigner by Section 2(a) as meaning a person who is not a citizen of India. Section 3(a) of the Foreigners Act, 1946 provides power to exempt the citizens of Commonwealth countries and other persons from application of the Foreigners Act in certain cases. It expressly lays down that the Central Government may, by order declare that all or any of the provisions of this Act or of any order made thereunder shall not apply or shall apply only in such circumstances or with such exceptions or modifications or subject to such conditions as may be specified in the order in respect of (a) the citizen of any such Commonwealth country as may be so specified, or (b) any other individual foreigner or class or description of foreigner.

27. There was Foreigners Exemption Order, 1957 issued in exercise of the powers conferred by Section 3(a) of the Foreigners Act, 1946. While this Foreigners Exemption Order 1957 specifies (i) United Kingdom, (ii) Canada, (iii) Commonwealth of Australia, (iv) New Zealand, (v) Ceylon, (vi) Federation of Rhodesia and Navesaland and (vii) Republic of Ireland, it does not include Pakistan so that a citizen of Pakistan is not within the Foreigners Exemption Order, 1957.

28. For these reasons I am of the opinion that the petitioner even as a Commonwealth citizen and even on the basis that he is not a foreigner and even on the basis that Pakistan is not a foreign state as noted above cannot be regarded as a citizen of India who alone is capable of asserting a right under Article 19 of the Constitution on my interpretation of it. I shall conclude this branch of the decision by a reference to one or two authorities. One is the Division Bench decision of Madhya Bharat in Naziranbai v. State, AIR 1957 Madh B 1 where at page 3 it is laid down that no doubt u/s 11 of the Citizenship Act a citizen of Pakistan has a status of Commonwealth citizen. But as a Commonwealth citizen he can have only those rights which the Central Government may, u/s 12 of the Citizenship Act by order notified in the Gazette, confer on the citizens of Pakistan, and as there was no order u/s 12 of the Act conferring any of the fundamental rights guaranteed to the citizens of India under Article 19 such a person cannot claim the rights under Article 19. The other is a recent Division Bench decision of the Patna High Court in State Vs. Abdul Rashid, which discussed the effect of the Constitution (Declaration as to Foreign States) Order, 1950 and came to the conclusion that this Order did not

mean that the citizens of a Commonwealth country were Indian citizens even for the purpose of those Articles of the Constitution which contain the words "foreign state". We shall only add a rider, how ever, to the proposition that the words "foreign state occur in Article 19(1) of the Constitution but that is only when considering the reasonableness of any restriction on the otherwise available fundamental right under Article 19 of the Constitution in connection with friendly relations with foreign states.

29. We, therefore, hold that the petitioner cannot claim a fundamental right and, therefore, cannot enforce the same under Article 226 of the Constitution.

30. The last attempt on this branch of the case is made by Mr. Roy for the appellant by saying that even if the petitioner cannot claim a fundamental right, he is entitled to come under Article 226 of the Constitution to ask for a writ from this Court for "any other purpose".

31. He relies on the observation made by the Supreme Court in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, saying that--

"Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental right can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right."

32. Now Article 226 of the Constitution is expressly clear about the two-fold purposes for which writs or orders can be issued thereunder and that is (i) for the enforcement of any of the rights conferred by Part III of the Constitution, and (ii) for any other purpose. One way of looking at this Article is that the word "and" is not disjunctive but conjunctive. In other words, it is only where the question of enforcement of fundamental rights is involved that a writ or order under Article 226 of the Constitution can be issued and if that is so the words "any other purpose" would mean an ancillary or incidental relief or purpose connected with the enforcement of fundamental rights. In that view of the interpretation taking the word "and" as conjunctive it would mean that there could not be independently any writ or order under Article 226 for any other purpose which is not mainly connected or associated with enforcement of a fundamental right. That will support the language of Article 226 saying "Notwithstanding anything in Article 32", at the beginning of this article as governing the whole of the article which follows. For the effect of the words "notwithstanding anything in Article 32" is that this power of the High Court under Article 226 is not affected by the existence of the power in the Supreme Court under Article 32 of the Constitution in respect of fundamental rights. If the expression "and for any other purpose" was intended to mean "or for any other

purpose" then the qualifying words "notwithstanding anything in Article 32 should have been placed immediately after the words "Part III" and before the words "and for any other purpose" in Article 226, for the simple reason that "any other purpose" is not at all within Article 32. This is further ensured by sub-article (2) of Article 226 which expressly says that - "The power conferred on a High Court by Clause (1) shall not be in derogation of the power conferred on the Supreme Court by Clause (2) of Article 32. These arguments as such were not, from this particular point of view, discussed and decided in any of the reported decisions. But the trend of decisions where the point was incidentally discussed appears to be against this view. The authorities seem to indicate that the expression "and for any other purpose" in Article 226 of the Constitution should be taken disjunctively and the word "and" should be read as "or" and the words "any other purpose" should be read as distinct and separate not connected with the enforcement of fundamental rights and not even as ejusdem generis.

33. On the meaning of the word "other" in "any other purpose" in Article 226 of the Constitution, I shall now examine some decisions. In the Full Bench decision of the Bombay High Court in *Jeshingbhai v. Emperor*, Chagla C. J., in AIR 1950 Bom 365 (FB) made the following observations:

"Further, its jurisdiction is not merely confined to the writs which it issued in the past, but power has been conferred upon it to issue directions, orders or writ for the enforcement of any of the rights conferred by Part III which deals with fundamental rights. It is not possible to read "directions, orders or writs as being ejusdem generis with what follows, because these "directions, orders or writs" refer to a larger category in which category is included writs in the nature of habeas corpus, mandamus, quo warranto and certiorari. The article further confers upon this Court the power to issue not only writs in the nature of various categories specified in that article, but those writs themselves, and further the article goes on to state that these writs or orders can be issued not only for the enforcement of fundamental rights but for any other purpose. It is clear to my mind that "any other purpose" was embodied in this article in order to remove any doubt that the High Court's Jurisdiction to issue these writs was confined merely to the enforcement of fundamental rights because the High Court could issue a writ otherwise than for the enforcement of fundamental rights and that power of the High Court is saved and safeguarded by providing in Article 226 that the writs can be issued not only for the purposes of enforcement of fundamental rights but also for any other purpose. * * * * Therefore, whereas the jurisdiction of the Supreme Court is restricted to the issuing of writs and orders only for the purpose of enforcement of fundamental rights, the jurisdiction of the High Court is much wider and, as I said before, these orders and writs can be issued for other purposes which purposes were availed of by the High Court prior to the enactment of the Constitution"

34. In the above observation the words used are "not only" and "but also", words which are not in Article 226 of the Constitution which reads "and for any

other purpose". Then again, the above observations appear to include that any other purpose would only include such purpose as was in respect of powers which these High Courts had previous to the Constitution, although the actual language of Article 226 does not limit "any other purpose" by such a qualification as could have been provided for by saying that this was not in derogation of any such power which such High Courts enjoyed, following the pattern of sub-article (2) of Article 226 of the Constitution.

35. A Division Bench of the Nagpur High Court in *G.D. Karkare v. T.L. Shevde*, AIR 1952 Nag 330 observed at page 334:

"The words "for any other purpose" must receive their plain and natural meaning, namely, for any other object which the Court considers appropriate and calls for the exercise of the powers conferred upon it." And also further observed at the same page:

"The power under Article 226 is given not only for the enforcement of the fundamental rights conferred by Part III of the Constitution but also for any other purpose."

and in fact rejected the application of the doctrine of *ejusdem generis* to the Constitution. The same view was taken by the Judicial Commissioner in *Kishan Chand v. Competent Authority Bairagarh*, AIR 1956 Bhopal 27 and which appears to go so far as to say at page 31:

"There can also be many instances where the High Courts can interfere under Article 226 even if no legal right had accrued to the petitioner."

which seems to be a proposition to which this Court cannot assent. The Supreme Court has made it clear that a legal right is the very foundation of an application under Article 226. In *The State of Orissa Vs. Madan Gopal Rungta*, the Supreme Court had occasion to discuss this question and Kania C. J. delivering the judgment of the Supreme Court at page 13 observed as follows:

"The language of the Article shows that the issuing of writs or directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Rights) has been infringed. It can also issue writs or give similar directions for any other purpose. The concluding words of Article 226 have to be read in the context of what precedes the same. Therefore the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article."

That view is confirmed now by the more recent decision of the Supreme Court in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, which has already been quoted above.

35a. On these authorities and on the reasons stated above this Court is of the opinion that if there is a legal right then a person aggrieved in such legal right can move this Court under Article 226 of the Constitution for appropriate order or

writ While, therefore, the petitioner as a citizen of Pakistan has no locus standi to claim a fundamental right under Article 19 he can in our opinion still have a locus standi to claim a legal right, if he has any, and attempt to enforce it by a writ or order or direction under Article 226 of the Constitution. For that purpose the fact that he is either a foreigner or a Commonwealth citizen or a citizen of Pakistan would not matter. But the overriding consideration must be that he must have a legal right. It is here that the appellant really is met with serious difficulty. What is the legal right of the petitioner which can found and support an application for a writ or order under Article 226 of the Constitution ?

36. Mr. Roy for the appellant contends that his legal right is based on Section 39 of the Calcutta Police Act. But, the Calcutta Police Act expressly, as discussed already, gives the Commissioner of Police discretion from time to time to grant licence to the keepers of eating houses. That discretion is certainly not absolute in the sense that Sinha, J., thought in *Purushottam Singh v. Commr. of Police, Calcutta*, in Matter No. 106 of 1952 (Cal), where judgment was delivered on 16-4-1953. That discretion has got the qualification indicated by the Supreme Court in *Arora's case* which has already been discussed. No petitioner can claim a right as of course to get a licence u/s 39 of the Calcutta Police Act. The express word used "is" "may" in Section 39 and the other express word used there is "discretion". Mr. Roy submits that Section 39 of the Calcutta Police Act does not exclude a foreigner or a person who is not a citizen of India from applying for a licence thereunder. No doubt expressly it does not do so. But the point is not whether he is a foreigner or a person who is not a citizen of India, Even a citizen of India u/s 39 of the Calcutta Police Act has no right as of course to get a licence. All the conditions may be satisfied but there may be more applicants for licences for eating houses than are good for the City, and it may not be possible to grant a licence to every applicant for licence who is otherwise a fit person there is no legal right as of course to get such a licence. It was said by the Supreme Court in *Veerappa Pillai v. Raman and Raman Ltd.*, AIR 1952 SG 198 at p. 196 discussing the Motor Vehicles Act:

"No one is entitled to a permit as of right even if he satisfies all the prescribed conditions. The grant of a permit is entirely within the discretion of the transport authorities and naturally depends on several circumstances which have to be taken into account."

37. What then is the position of the petitioner on this question of legal right to make this application ? He certainly has no legal right as a citizen of India because he is not one. He is not entitled to a licence as of right u/s 39 of the Calcutta Police Act. Has he any other right ?

38. The ordinary legal rights of a foreigner in a foreign country or of a person who is not a citizen of that country are vexed questions of law. A foreigner or a Commonwealth citizen or a person not a citizen of India can only come to India on a passport. The passport is the origin of his entry and presence in India. The material language of the passport is contained in the following words, generally

used by Head of the issuing state:

"These are to request and required in the Name of. . . all those whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford him or her every assistance and protection of which he or she may stand in need."

39. These words of the passport do not make the visitor a citizen of the country which he visits. The actual terms of the request are to allow him to pass freely without let or hindrance and secondly to afford him every assistance and protection to which he may stand in need. This passport does not by itself and by its terms allow a foreigner or a person who is not a citizen of India to carry on trade or business in India. In a recent decision of the House of Lords in *Joyce v. Director of Public Prosecutions*, 1946 AC 347, Lord Jowitt L. C., observed at page 369 on the nature of the passport as follows:

"It is thus described by Lord Alverstone, C. J. in *R. v. Brailsford*, (1905) 2 K. B. 730:

"It is a document "issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries." By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the sovereign duty of protection, though it will make his path easier".

40. The learned Lord Chancellor proceeds to make the following pertinent observation on the rights of a foreigner or an alien at page 370 of that report in these terms:

"It is not necessary to trace the gradual process by which the civic rights and duties of a resident alien became assimilated to those of the natural born subject; they have in fact been assimilated, but to this day there will be found some difference. It is sufficient to say that at the time when the common law established between the sovereign lord and resident alien the reciprocal duties of protection and allegiance it was to the personal power of the sovereign rather than to the law of England that the alien looked. It is not, therefore, an answer to the sovereign's claim to fidelity from an alien without the realm who holds a British passport that there cannot be extended to him the protection of the law. What is this protection upon which he claim to fidelity is founded ?"

Then quoting *Oppenheim International Law* the learned Lord Chancellor goes on to say at p. 371:

"It is true that the measure in which the State will exercise its right lies in its discretion. But with the issue of the passport the first step is taken. Armed with

that document the holder may demand from the State's representatives abroad and from the officials of foreign Governments that he be treated as a British subject, and even in the territory of a hostile state may claim the intervention of the protecting power."

41. The leading case on the point is *Johnstone v. Pedlar*, (1921) 2 AC 262, a decision of the House of Lords. Again Lord Reading, C. J., in *Porter v. Freudenberg*, (1915) 1 KB 857 at p. 869, says that alien friends seem to have the same civil rights as British subjects and practically all personal rights of a British citizen. Lord Reading at page 869 actually used these words:

"In ascertaining the rights of aliens the first point for consideration is whether they are alien friends or alien enemies. Alien friends have long since been and are at the present day, treated in reference to civil rights as if they were British subjects, and are entitled to the enjoyment of all personal rights of a citizen, including the right to sue in the King's Courts. Alien enemies have no civil rights or privileges unless they are here under the protection and by permission of the Crown."

42. But Mr. Roy's reference to these English decisions on the rights of the foreigners cannot help the appellant in this case unless he can in the specific case establish a legal right. It is not a case which he seems to assume wrongly that because he is a foreigner and because he is not a citizen of India that is why he has not been given a licence. No doubt an alien or a Commonwealth citizen or a foreigner is entitled to certain civic rights and protection. It is not necessary for the purpose of this application for this Court to see, what those different rights and protections are. The short question before us in this application is whether the petitioner in this case has a legal right to seek for a writ or order under Article 226 of the Constitution to get a licence for an eating house. The whole question whether he is a foreigner or a Commonwealth citizen or a person not a citizen of India is really from this point of view immaterial.

43. Looking at the problem from the three possible points of view it does not appear that the petitioner in this case can get the relief. Not being a citizen of India he has no fundamental right. Even though he is a person who may be qualified for a licence he can base no legal right u/s 39 of the Calcutta Police Act except of course in a case which we have already indicated where the Commissioner of Police abuses his discretion or does not follow the conditions of the Statute. In the next place, the petitioner cannot as a person not a citizen of India have any more right than what a Commonwealth citizen or a foreigner has on a passport. But that will not give him a legal right to call upon the Commissioner of Police for a licence as of right for eating house.

44. Throughout the proceedings in this Court a short question cropped up very frequently that all this noise about a licence was uncalled for in the facts of this case. The licence for which the writ was sought was a licence of 1962-63. The period expired with the end of March, 1963. It is, therefore, said that this Court

would in any event never issue a writ in vain and when the period has expired there is nothing for this Court to do but to dismiss the application. Not only was the petitioner's application for licence for eating house for 1962-63 refused by the impugned order quoted elsewhere in this judgment, but also it now transpires that after the expiry of that period another application was made by the petitioner for licence for the eating house for 1963-64 and that was also not entertained. The petitioner's counsel produces the letter No. 1886 P. S., dated 30-2-1963 to show that the application for renewal of his licence for 1963-64 was not entertained,--"since his application for renewal of licence for 1962-63 was refused." By consent it is directed to be filed with the records of this case. Naturally on this fact Mr. B. Das, learned Jr. Standing Counsel for this State relied on the decision of the Supreme Court in K.N. Guruswamy Vs. The State of Mysore and Others, , where Bose, J., at p. 999 (of SCA): (at p. 596 of AIR), made the following observation:

"We would, therefore, in the ordinary course have given the appellant the writ he seeks. But owing to the time which this matter has taken to reach us (a consequence for which the appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. We were told that the excise year for this contract (1953-54) expires early in June. A writ would, therefore, be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the appellant content with an enunciation of the law."

45. Mr. Das, therefore, submits that this Court should not issue meaningless writs and as the Supreme Court did not even issue a writ where there were a few days to go in that case we should never think of doing so where the time has already expired in the present case. There is a good deal of force in this submission. But then Mr. Roy for the appellant is not to be vanquished so easily and he turns round and says that he would also rely on the observation of the Supreme Court and ask that even if the Supreme Court refused to grant a writ it must give him at least the "enunciation of the law so that in future this petitioner may on that basis claim such rights as he may possess.

46. K.N. Guruswamy Vs. The State of Mysore and Others, , came up again for consideration before the Supreme Court in Shrinivasa Reddy and Others Vs. State of Mysore and Others, , and Wanchoo, J., at pages 353-54 made the following observation:

"Our attention in this connection was drawn to K.N. Guruswamy Vs. The State of Mysore and Others, . In that case this Court after declaring the law in favour of the petitioner did not issue a writ as there was hardly a fortnight left for the excise contract which was involved in that case to expire and the issue of a writ would have been meaningless and ineffective. That case, however, is distinguishable because the contract there would have come to an end within a few days. In the present case there is no reason to assume that the six weeks period which is the minimum period prescribed u/s 57 (2) is the only period that

will be required for implementation of the scheme u/s 68F(1)."

47. In that case, however, the Supreme Court took the view that the time would continue. But here the appellant's difficulty is that the time has irretrievably expired. Not even all the high constitutional writs can call back the time past. It certainly is apparent that it would be useless to issue any writ in terms of any of the prayers of the petition as it is today and having regard to the events that have taken place.

48. It is not necessary in this connection to finally answer a cognates point raised in this appeal namely whether any Constitutional writ or order under Article 220 should over be used for purposes as such to secure a short temporary licence such as this. It is argued by Mr. Das that Section 39 of the Calcutta Police Act speaks of licence which may be granted by the Police Commissioner for anytime not exceeding one year. In other words, such licences are short and temporary and cannot exceed one year. Ho cogently argues that in case of fundamental rights the temporary character of a licence may not be decisive, of this question. But in a case where an applicant asserts his right to a licence of this nature not as a fundamental right granted by the Constitution, but only as some kind of a legal right, then such a legal right might be governed by the law on which it is claimed. That claim in this case is made entirely on the basis of the language of Section 39 of the Calcutta Police Act. Where the statute, itself says that the licence can only be for a short duration not exceeding one year then, Mr. Das contends, that writs like Mandamus should not be used to enforce such trivial or temporary rights. But the question perhaps may not be so simple as Mr. Das puts it. Not all temporary rights are trivial. No doubt writs should not be used to enforce trivial right. For that purpose other legal proceedings may be used and discretion to grant Constitutional writs under Article 226 may not be the proper procedure to employ. But then although these licences are only annual at best or even for a shorter period, they in fact continue although always on fresh applications and fresh licenses; call them renewal or call them fresh licences it does not matter. In this case the question strictly speaking does not arise for a decision having regard to the fact that the actual licence for 1962-63 for which the application for mandamus was made had already expired and a fresh application for 1963-64 had been made which is not the subject matter of this application and which also has not been entertained by the Commissioner of Police. It is not possible, therefore, for this Court to grant licence for the expired period of 1962-63 for that would really be meaningless and worthless.

49. For these reasons we dismiss this appeal. There will be no order as to costs.

Laik, J.

50. In the judgment just now delivered, by learned brother has stated the facts hilly and exposed the undisclosed policy arising out of the crevices of the Calcutta Police Act, 1866, the validity of which was tested on first principles. In this circumstance, there is no point in tracing the descent again, of the provisions

of this century-old legislation, right through to the present day. I will henceforward call the said Act of 1866 as "the Police Act." My learned brother has dealt with in details the freedom of a person to carry on his trade and business in view of the fundamental rights under the Constitution and has discussed several decisions cited by each side to be in its favour. Some of these decisions again, are relied on by both sides.

51. To appreciate the challenge of the impugned order on the ground of violation of fundamental rights, the purpose and the scheme of the Constitution in the present context is to be remembered. The scheme of our Constitution, hammered out by the sovereign peoples of India, stated to be free democratic equals; with no class, no caste, no race, no creed, no distinction and no reservation; is supposed to forge the pattern of a new life grounded on the same basis. Though its main purpose is to protect the freedom of each individual citizen to carry on his trade or business throughout the territory of India in current times, the policy of the democratic State is bound to be flexible. The needs of the country, the invasion of the Indian territory by a Foreign State and subsequent agreements between two Border States, the position of other contiguous Foreign States, the need to protect national industries and such and all other relevant considerations have no doubt to be examined by the Government from time to time and provisions have to be made and rules to be suitably adjusted. I may, therefore, at the outset dismiss, as idle, the suggestion, that there may be an unfettered and unrestricted freedom of running a business in this country even by a foreigner or that the policy of the Government must be fixed and not changed, according to the requirements of the country. In the never ending race, the law must keep pace with the realities of the social and political evaluation of the country, as reflected in the Constitution. The State, in my judgment, is to give effect to these avowed purposes of our Constitution to promote the welfare of the people in preference to the foreigners, from the point of view of unity of possession, unity of interest, unity of title and unity of time. All the citizens of India, however, will enjoy the same fundamental rights and the same legal remedies to enforce them.

52. As the appellant's application for grant of a license in respect of a eating house under the provisions of the Police Act, is refused by the Commissioner of Police and as in this appeal, there is also a challenge on the ground of violation of the legal rights of the appellant, conferred by the Police Act, it is necessary to ascertain its true nature and character, i.e., its subject matter, the area in which it is intended to operate, its purport and intent, which has been done by my learned brother. In order to do so, it is legitimate to take into consideration all the factors such as, the history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief intended to be suppressed, the remedy proposed by the legislature and the true reason for the remedy.

53. When the Police Act was passed in 1866, the eating houses were connected

mainly with intoxicating liquors. When the liquors are taken in excess, the injuries are confined to the party offending. The injury, it is true, first falls upon him in his death, which the habit undermines; in his morals, which it weakens; and in the self-abasement, which it creates. But, it is said, as it also leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized country, there are few sources of crime and misery to society, equal to such houses, where intoxicating liquors, drunk at the time, are sold and served indiscriminately to all the persons frequenting such houses. The business of such eating houses is naturally attended with danger to the community. I may preface by saying that it may be entirely prohibited or be permitted under such conditions, as will limit to the utmost, its evils, The manner and extent of regulation should, therefore, rest in the discretion of the governing authority. The purposes are intertwined and the policy underlying the Police Act is healthy and unexceptionable.

54. 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 condition at the time of the enactment, and of the time when the application was considered by the Commissioner of Police, should all be considered, in my view, to give the judicial verdict. In evaluating such elusive factors and forming our own conception in all the circumstances of a given case, it is inevitable that we should hold the scale of values with social philosophy. In the sense of self-restraint and the sobering reflection our Constitution is meant not only for a class of people of their way of thinking but meant for all.

55. I have said all these, because the Court in such a case, not only may, but should, take into consideration the matters of common knowledge and the history of the times as laid down by the Supreme Court in the case of *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, .

56. To consider the vitality of the argument of Mr. Subimal Roy, appearing on behalf of the appellant and that of Mr. B. Das for the State Government, and to consider the relevant provisions of the Police Act, in the background of the Bombay Police Act, 1951, The Citizenship Act, 1955, The Foreigners Act, 1946, The Extradition Act, 1870, the Preventive Detention Act, 1950, The Passport Act, 1920 and the rules framed thereunder, and the relevant Articles of Constitution of India and to appreciate the decisions, certain principles and/or observations made by the Supreme Court should be re-stated.

57. In spite of the learned Advocate to the appellant's able arguments, I am of opinion, and I agree, with my learned brother, that the appeal is without any merit. His arguments may be conveniently dealt with under the following four broad heads: viz.:

(A) Status of the appellant,

(B) Infringement of the right of the appellant,

(C) Relief of the appellant, and (D) Permissibility of the relief in the given case.

58. (A)--As to the status of the appellant: Prime reliance has been placed by Mr. Roy that Pakistan is not a foreign state and, therefore, it cannot be regarded as a foreign power. Therefore, the appellant though a Pakistani national, is not a foreigner. Taken in the context of the statute, I cannot agree with the said submission. The Supreme Court in the case of Jagan Nath Sathu Vs. The Union of India (UOI), , after discussing "foreign state", "foreign power" and "foreign affairs" and also referring to the Declaration Order (Foreign States) of the year 1950, came to the conclusion that Pakistan must be regarded as a foreign power, though not a foreign state in view of the said Order. In another decision, namely, In Re: The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of The Constitution of India, , the Supreme Court treated Pakistan as a "foreign State". In the case of State of Andhra Pradesh Vs. Abdul Khader, , the Supreme Court proceeded on the assumption that if a person be a Pakistani national, he would be a "foreigner". An application by a person for appointment of a guardian of his minor child who migrated to Pakistan, was dismissed by the Supreme Court under Article 32 of the Constitution, on the ground that the same was not a fundamental right (vide the decision of Sahibzada Saiyed Muhammed Amirabbas Abbasi and Others Vs. The State of Madhya Bharat and Others, . The Supreme Court also held that a foreign company possesses no right of citizenship of a country and has no right under Article 19 of the Constitution. Shewpujanrai Indrasanrai Ltd. Vs. The Collector of Customs and Others, . It was also held by the Supreme Court that a non-citizen, running a newspaper, was not entitled to the fundamental right of freedom of speech M.S.M. Sharma Vs. Sri Krishna Sinha and Others, . Again, the Supreme Court lays down that Articles 15, 19(1)(f), 29(1)(2), 30(1) and 31 of the Constitution refer to citizens of India only. (Vide The State of Bombay Vs. Bombay Education Society and Others, , Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co. Ltd. and Others, and The State of West Bengal Vs. Subodh Gopal Bose and Others, . Chief Justice Kania in the case of A.K. Gopalan Vs. The State of Madras, , held as quoted by my learned brother that Article 19 applied to citizens of India, but Article 21 referred to a non-citizen also. Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others, , referred to by my learned brother, decides that although Article 19 does not apply to foreigners, all that is guaranteed to them, is protection to life and liberty under Article 11 of the Constitution. The Supreme Court decision in the case of D.P. Joshi Vs. The State of Madhya Bharat and Another, , lays down that citizenship has a reference to the political status of a person but not to his civil right, to which the expression "domicile" refers. I am, therefore, led to conclude that the appellant is not only a non-citizen but a foreigner.

59. The case of The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, , referred to by my learned brother, was relied on for

the proposition that a foreigner is| entitled to apply under Article 226 of the Constitution; but I do not find in the said report that any such principle is laid down there. Rather, in view of the principle laid down by Mukherjea, J., in the Supreme Court in the case of Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others, , that equal protection of law does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position but the varying needs of the different classes of persons often require separate treatment. The argument that the theory of equal protection of law should also be extended in the case of foreigners, cannot be accepted.

60. I can see the force of the Counsel's argument about the status of the appellant, as a Commonwealth citizen. At first sight this seemed to make it necessary for me to explore further the difficulties, which my learned brother has just indicated; but it must be agreed that there is not much room for justice in the said submission. "Citizen" in the said context, is only an echo of the phrase. Superficially at any rate, it is a rule of public policy, which has its origin in history and its Justification in convenience.

61. I accordingly, without any hesitation, hold that by virtue of his status, the appellant is not entitled to move the application under Article 226 of the Constitution and to get the reliefs as prayed for.

62. (B)--As to the infringement of the right of the appellant--fundamental, inherent, legal or otherwise: (a) Fundamental: Let me say first; that I reject the argument, faintly suggested, by Mr. Subimal Roy, that his client, even if he be held as a foreigner, had fundamental right to run the business, namely, the eating house. He did not rightly pursue it further, as it is not only a lop-sided way of looking at things but a step too long to have a firm footing in the steps of argument.

63. The grievance of the appellant, by the refusal of the licence by the Commissioner of Police, is, that he was running the trade or business for the purpose of eking his livelihood which he would be deprived of. This no doubt comes within the category of fundamental right under Article 19 of the Constitution. Comparing the provisions of Article 19 with that of Article 14, we find that Article 19 confers the right, whereas Article 14 does not. It is rather an obligation,

64. It is true that both the majority and the minority judgments in Kishan Chand Arora Vs. Commissioner of Police, Calcutta, , (referred to by my learned brother) which was the case of an Indian citizen, the Supreme Court held, that the order when made, one way or the other (grant or refusal of the licence) affects the fundamental rights of carrying on trade and preventing a person from doing his business in the case of refusal. It is again true that the Fundamental right must be construed broadly and liberally as laid down by the Supreme Court in the case of Dwarkadas Shrinivas of Bombay Vs. The Sholapur Spinning and Weaving Co.

Ltd. and Others, , but that in my opinion should be done in favour of those, on whom the rights have been conferred, namely, the citizens of India. In my judgment a non-citizen cannot invoke the said principle to his aid. In the case of Hamdard Dawakhana and Another, Kalipada Deb and Another, Lakshman Shripati Itpure @ Lakshman Shripati Impore and A.B. Choudhri and Another Vs. The Union of India (UOI) and Others, , it is laid down by the Supreme Court that the fundamental right is a right of the citizens only and for the welfare of all the citizens of India. We are not concerned here with the post-Constitution law. I may mention that the question whether such a law infringes a fundamental right, guaranteed to all persons, irrespective of whether they are citizens or not, was not finally answered by the Supreme Court in the case of Deep Chand Vs. The State of Uttar Pradesh and Others, . Article 19(1) of the Constitution guarantees to Indian citizens only, the right to carry on trade. (Vide the Supreme Court decision of Rashid Ahmed Vs. The Municipal Board, Kairana, . Articles 14, 15, 16 and 32 of the Constitution are held applicable to citizens of India only; and Article 16(1) guarantees equality of opportunity for all citizens. Vide the decision of the Supreme Court in Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and Others, . The appellant, being a non-citizen, has, therefore no fundamental right under Article 19 of the Constitution.

65. (b) Inherent: There is no inherent right of any citizen of India, far less of the appellant, being a non-citizen, to run an eating house, with or without liquors. The Police Act provides inter alia, that the applicant must be of good behaviour and must be in a position to prevent drunkenness and disorder among persons frequenting or visiting the eating houses. As I have already said it is a business attended with some danger to the community, and it may be entirely prohibited or may be permitted under such conditions as will limit to the utmost its evils; in other words, the manner and extent of regulation of issue or non-issue of licences of such eating houses, should naturally rest on the Commissioner of Police. By this, I am guarding myself against laying down the proposition, that the said discretion may be arbitrary. Elimination and exclusion from such type of trade or business is inherent in its nature; and, in my view, it would hardly be proper to apply to such a trade or business, the general principles applicable to trades or businesses, which all could carry without any limitation. That is the principle laid down by the Supreme Court in the case of Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, . The principles with regard to issue of permits under the Motor Vehicles Act quoted by my learned brother, as laid down by the Supreme Court in the case of Veerappa Pillai Vs. Raman and Raman Ltd. and Others, , ought to apply in the instant case. On the principles, again of the Supreme Court decision, in the case of Fedco (P) Ltd. and Another Vs. S.N. Bilgrami and Others, , there can be no question of any right being infringed, if there is a cancellation of a licence under a valid law.

The appellant has, therefore, no inherent right I either.

66. (c) Legal Right: My learned brother has dealt with the matter most convincingly. I add only a few comments. On the principles laid down by the Supreme Court in the case of *The State of Madhya Pradesh Vs. G.C. Mandawar*, , there is no right conferred on the appellant, either to be protected or enforced, far less, a legal right to compel the performance of the duty cast on the Commissioner of Police.

67. The remainder of the argument of Mr. Roy on this branch was, that the appellant even if he was not aggrieved, had a right to see that the Police Act and the Rules were followed by the respondent. I find nothing in this submission and I do not think that Mr. Roy should quarrel with that view to-day. The two decisions of the Supreme Court in the case of *Hans Muller of Nuremburg Vs. Superintendent, Presidency Jail, Calcutta and Others*, , and the case of *Nain Sukh Das and Another Vs. The State of Uttar Pradesh and Others*, , lay down the principle that the writ does not lie, if the petitioner is not aggrieved.

68. It would not do to say, that there is "some legal right". The Supreme Court decision of *Satish Chandra Anand Vs. The Union of India (UOI)*, , lays down as to why the same should not be accepted. Mr. Roy also could not satisfy what is the "existing legal right" of a foreigner, in the instant case, as discussed by the Supreme Court in the case of *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, . In my view, the right of the appellant is like a mere chance or prospect of having an interest in an undertaking, on the principles laid down by the Supreme Court in the case of *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, , which is a totally different concept. The right of the appellant cannot thus be measured by the yardstick of the principles of the legal rights laid down by the Supreme Court. It might utmost be like a hyphen which joins fundamental right and the legal right or a buckle which joins both. My conclusion, therefore, is that the appellant has got no legal right, even by the process of strained construction.

69. (d) Other rights or for any other purpose: This case does not satisfy the test "for any other purpose" as laid down by the Supreme Court in the case of *Romesh Thappar Vs. The State of Madras*, . "Any other purpose" does not mean that there would be no existence of right, which is the foundation of exercise of jurisdiction under Article 226 of the Constitution (vide the decision of *The State of Orissa Vs. Madan Gopal Rungta*, , referred to by my learned brother. The allegations of breach or violation of right must, first be well-established and only thereafter the aggrieved person would be entitled to proceed further and not otherwise. (See the principle laid down by the Supreme Court in the case of *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, . The case of *Bokaro and Ramgur Ltd. Vs. The State of Bihar and Another*, , re-affirms the principle that the petitioner must first establish that he has title or right. It is only after this, the question whether his right is infringed would arise. Mr. Roy's submission falls on this score also.

70. (C) As to the relief of the appellant; The prayer for mandamus is clearly

misconceived. No mandamus can issue in this case to compel the discretionary power vested in the Commissioner of Police when not exercised arbitrarily. The prayer for certiorari is equally misconceived., as the act of the Commissioner of Police is neither judicial nor quasi-judicial. Mr. Roy asks us, being a Court of appeal to re-examine the facts ourselves afresh and then direct the issue of mandamus after such re-examination. That is exactly which we were not asked to do by the Supreme Court in the case of *The Vice-chancellor, Utkal University and Others Vs. S.K. Ghosh and Others*, . The Supreme Court reminded us before in the case of *Veerappa Pillai Vs. Raman and Raman Ltd. and Others*, , that our Jurisdiction was not so wide and large.

71. (D) As to whether the relief is permissible on an expired licence: In this case the period of the licence has admittedly expired. The Supreme Court in the case of *K.N. Guruswamy Vs. The State of Mysore and Others*, , discussed by my learned brother, declares that a writ should not be issued which would be Ineffective or meaningless on the ground, that the time would expire, (in the facts of the said case, within a fortnight). The said decision was, however, distinguished by the Supreme Court in the case of *Shrinivasa Reddy and Others Vs. State of Mysore and Others*, , a material portion of which is quoted by my learned brother. On the very same day, the same learned Judge Wanchoo, J., in another case, viz., *Y. Mahaboob Sheriff and sons, Y. Mahaboob Sheriff and Others and S. Shamsoddin and Others Vs. Mysore State Transport Authority, Bangalore and Others*, , issued a writ after quashing the order, though the permits had expired, on the ground that renewal in those cases was certain. Lastly Das Gupta, J. speaking for the Supreme Court in the case of *Glass Chatons Importers and Users" Association Vs. Union of India (UOI)*, , laid down, that as the period of the licence as in the petition had already expired and from what had already happened, there was no question of any future action and no relief could be granted on the application. Because of these pronouncements by the Supreme Court after *K.N. Guruswamy Vs. The State of Mysore and Others*, , it may be usefully remarked that this anomaly, the State and the foreign national recognise in this case, with suitable regret. As the appeal fails on other grounds I need not pursue it further.

72. I have looked behind the name, form and appearance to discover the true character and nature of the Police Act and I am satisfied that the legislature understood and correctly appreciated the needs of its own people and it appreciates the same, even now, by keeping the Act, very much kicking and alive. I am also satisfied that the provisions of the Police Act are directed to the problems, made manifest by experience. The discriminations made by me between citizens and foreigners, are, in my judgment, based on adequate ground.

73. In the interest of the general public, security of the State, public order, decency or morality and for all other public interests and reasons, compendiously described as social welfare, there has to be a balance between individual rights guaranteed under the Constitution and the exigency of the State, which is the

custodian of the interests of the general public. It can be postulated that, public order implies the orderly state of Society or Community in which citizens can peacefully pursue their normal activities of life. Public order is synonymous or equated with public peace, safety and tranquillity. It cannot be denied that for preventing a breach of the public peace or the invasion of private rights, the State has sometimes to impose certain restrictions on the individual rights which the Police Act has sought to do. It, therefore, becomes the duty of the State not only to punish the offender against the penal laws of the State but also to take preventive action in the way of not issuing a fresh licence, etc. "Prevention is better than cure" applies, not only to individuals but also to the activities of the State in relation to the citizens of the State and can be well illustrated in the present case. The provisions of the Police Act are justified in the larger interests of the society, so that the majority of the community may live in peace and harmony and carry on their peaceful avocations untrammelled by any fear of disorder or threat of violence. The individual right has, therefore, to yield to larger interests of the community, otherwise the Police Act would be a mere lope of sand.

74. I find that the sufficiency of the grounds, upon which the satisfaction of the Commissioner of Police purports to be based, has a rational probative value and the grounds are not extraneous to the scope or purpose of the Police Act, as sought to be argued by Mr. Subimal Roy. Enough guide, is afforded by the preamble and the operative provisions of the Act which have been discussed by my learned brother, for exercise of discretionary power vested in the Commissioner of Police. In my view, it is not open to attack as a denial of the appellant's rights, fundamental, inherent, legal or otherwise. The refusal of the licence was made on the grounds which, in my view, are germane and relevant to the policy and purpose of the Act, the principle of which is so well-illustrated in the case of P.J. Irani Vs. The State of Madras, .

75. In my opinion, so long as the legislature indicates the policy and purpose of the enactment with certainty, the mere fact that a discretion is left to the Commissioner of Police for administering the law affords no basis, either for the contention that it amounts to an abdication of the legislative function or that the discretion vested, is uncanalised and unguided, so as to amount to a carte blanche to discriminate.

76. Accordingly as the appeal is grounded on misdirections of law, all that I can do to-day, is to dismiss this appeal and enter judgment for the respondent with no order as to costs, in agreement with my learned brother.