CHAPTER- V
ANALYSIS OF LEGAL FRAME WORK
CHAPTER-V
ANALYSIS OF LEGAL FRAME WORK

The Immoral Traffic (Prevention) Act, 1956, (Act No. 104 of 1956)\(^{292}\) an Act that has been promulgated in pursuance of the International Convention signed at New York on the 9\(^{th}\) day of May, 1950, for \(^{293}\) the prevention of immoral traffic. It cannot be denied that “prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community. It must also be noticed that with respect to the suppression of the traffic in women and children several International instruments are in force. They are enumerated below:

1. International Agreement of 18\(^{th}\) May, 1904 for the suppression of the White Slave Traffic, as amended by the Protocol approved by the General Assembly of the United Nations on 3\(^{rd}\) December, 1948;
2. International Convention of 4\(^{th}\) May, 1910 for the suppression of the White Slaves Traffic, as amended by the above mentioned Protocol;

In the 1937 the League of Nations prepared a draft Convention extending the scope of the above mentioned instruments. In 1950 a Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of others was signed at New York by several nations including ours. In this convention the above mentioned

\(^{292}\) For draft of the Bill, see Gazette of India, Extraordinary, Part II, Section 2, dated the 20th December, 1954 and for Report of the Select Committee, see Gazette of India, Extraordinary, Part II, Section 2, dated the 25th August, 1956.

\(^{293}\) Subs. By Act 44 of 1986, Section 2 for the words "the suppression of Immoral Traffic in Women and Girls" (w.e.f. 26th January, 1987).
instruments as also the draft Convention prepared by the League of Nations in 1937 were consolidated and embodied.

The present Act has been passed with the view to implement the International Convention signed at New York on 9th of May, 1950. Therefore, while considering the reasonableness or otherwise of the restrictions imposed on the trade or profession of a prostitute by this Act we have to keep in mind that prostitution is slur on human dignity and a shame to human civilization. Its eradication by gradual and evolutionary process is ultimate aim of all civilized nations.

So long as it is not possible to completely abolish it has got to be tolerated as an evil necessity, but it is only reasonable that restrictions should be imposed to mitigate so far as possible the evil effects of the trade or profession and to protect the interests of the general public.294

Legal Rationality behind the Act

The need for gratification of sexual urge has impelled men and women, of all ages and in all countries of the world to exploit either sex. With the growing danger in society to healthy and decent living with morality, the world public opinion congregated at New York in an International Convention opened for signature at Late Success, New York on the 21st March, 1950. It was signed by Shri Gopala Menon on behalf of India on the 9th May, 1950. A Bill No. 58 of 1954, containing the 'Objects and Reasons' was published in the Gazette of India, Part II, Section 2, dated the 20th December, 1954. The Bill received the assent of the President on the 30th December, 1956 and became an Act, Section 1 whereof came into force from the 31st December, 1956, while the remaining sections came into force from the 1st May, 1958. This in brief is the legislative background of the Act.

Act was called Suppression of Immoral Traffic in Women and Girls Act, 1956 (SITA for short), aimed at suppressing the evils of prostitution in women and girls, and to provide opportunity to fallen women and girls to rehabilitate themselves as decent members of the society.

The SIT Act did not succeed in ample measure to eradicate or suppress the evils of prostitution, and so it was drastically amended in 1978. Besides other stringent measures taken, one progressive measure was the opening of probation under the Probation of Offenders Act. However, it was soon realized that the measures needed to be made more stringent and the provision for release on probation was being abused. So the Parliament again intervened and by Amendment Act 44 of 1986, completely repealed the provisions relating to probation and provided stricter and higher penalty for offences under the Act. It also realized that time had come when male prostitution should also be covered by the Act, and so it changed the name of the Act SIT Act to Immoral Traffic (Prevention) Act, 1956 (ITPA for short). In place of women and girls to which SIT Act was confined, the ITPA uses the expression “person” thus covering both male and female. The definition of prostitution has also been changed and mere gratification of sex without any thing more has been taken out of the purview of prostitution. Only where the exploitation or abuse of persons is for commercial purposes, it is prostitution, and any place used for such abuse or exploitation is a brothel.


1. In 1950, the Government of India ratified the International convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of Others. Under Article 23 of the Convention, traffic in human beings is prohibited and any contravention of the prohibition is an offence punishable by law. Under Article 35 such a
law has to be passed by Parliament as soon as may be after the commencement of the Constitution.

(2) Legislation on the subject of suppression of immoral traffic does exist in a few States but the laws are neither uniform nor do they go far enough. In the remaining States there is no bar on the subject at all.

(3) In the circumstances it is necessary and desirable that a Central Law should be passed which will not only secure uniformity but also would be sufficiently deterrent for the purpose. But a special feature of the Bill as that it provides that no person or authority other than the State Government shall establish or maintain any protective home except under a licence issued by the State Government. This will check the establishment of homes which are really dens for prostitution.

Object of the Amending Act 104 of 1956.

It is the suppression of commercialized vice which is aimed at, not the abolition of prostitutes and prostitution. For instance, Section 4 lays down the punishment for persons living on the earning of prostitution, other than the prostitute herself, and section 4(2) raises certain presumptions, which are expressly made inapplicable to the case of the son or a daughter of a prostitute below the age of 18 years. Section 5 deals with the procuring or inducement, or the taking of women or girls for prostitution, and Section 6 similarly deals with the detention of a woman or girl to the brothel, Section 7 and 8 are of particular significance. Section 7 makes punishable the practice of prostitution to or in the vicinity of certain public places, such as places of public religious worship, educational institutions, hospitals and nursing homes etc. This is an illuminating provision, throwing light upon the intentions of the legislature. This provision, undoubtedly, inhibits the women herself from the practice of her profession in contravention of its terms, and to that extent, renders prostitution a penal offence. Similarly, Section 8 deals with seduction or solicitation for prostitution by words, gestures or willful exposure of person in a public place. Again the intention is clear that it is the practice of prostitution in a particular manner, which offends social decencies, which is sought to be penalized. Section 14 renders offences under the Act cognizable, and Section 15, which is particularly important in the present case, deals with the powers of the Special Police Officer to enter certain premises and make a search
without a warrant. Under Section 15(1), the special police officer must record his reasons for such urgent search, and, under Section 15(2) of the Act, he must be accompanied by two respectful inhabitants of the locality, one of whom at least must be woman\textsuperscript{295}.

The object of the Act is not only to prevent immoral traffic in women and girls, but, it has wider aims. Though total prohibition of prostitution is not intended, it is intended to be discouraged. Moreover, the purpose is to prevent any open acting in such a way as to influence others and tempt them into falling in the vocation. Necessity for controlling and even preventing prostitution must be admitted by everyone\textsuperscript{296}.

The entire scheme behind the Act is not the proof of a single incident of prostitution, or of the activities of a prostitute. The Act closely follows the English laws upon the subject, and it is noteworthy that in Archbold's *Criminal Pleading, Evidence and Practice*\textsuperscript{297} the form of indictment for keeping a bawdy house under the common law runs: "and on other dates between that date and the date of" emphasising the continuity of maintenance of a house of ill fame as the essential ingredient.

After passing of the Act 104 of 1956, two amending Acts have been passed to amend provisions of the main Act, namely:


This Act was passed in the year 1956, long after the advent of the Constitution of India, with the avowed object of suppressing immoral traffic in women and girls. This legislation had become necessary also because Article 23 of the Constitution of India in terms prohibits traffic in human beings and regards it as an offence punishable in law and Article 35 of the Constitution clearly lays down that notwithstanding anything in the Constitution, Parliament shall have, and the Legislature of a State shall not have, power to make laws for prescribing punishment for those acts which are declared to be offence

\textsuperscript{295} In re: Ratnamala, AIR 1962 Mad. 31 at 33: 1962 (1) Cr. L.J. 162 (Mad.)


\textsuperscript{297} Archbold: Criminal Pleading, Evidence And Practice, Sweet & Maxwell; 50 edition (29 Nov 2001)
under Part III, and that the Parliament as soon as may be after the commencement of the Constitution shall make laws for prescribing punishment for those acts. The Statement of Objects and Reasons\textsuperscript{298} also give an idea of the reasons which led to the passing of this enactment.

A perusal of the various sections of the Act would show that apart from suppression of immoral traffic in women and girls, they have for their object prevention of prostitution from becoming a danger to social decencies, by reducing the opportunities for such women of contacting the members of the public and also helping the women who have already taken to tat life to rehabilitate themselves by dissociating them from the previous environments.

Whereas Sections 3, 4 and 5 to 7 of the Act prescribe punishment for keeping a brothel or allowing premises to be used as brothel or living on the earnings of prostitution, etc. Sections 6 and 11 are designed to reduce the opportunities to contact the members of the public and Sections 7 and 8 besides minimizing such opportunities aim of preventing prostitution from becoming source of danger to social decencies. Section 17 and 18 provide for the closure of brothels and eviction of offenders from the premises, if they happen to be within 200 yards of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be noted by the Commissioner of Police or District Magistrate in the manner prescribed. Sections 10, 19 and 21 are calculated to help the women in reforming themselves by removing them from the old environments. Sections 13, 14, 15, 16 and 17 provide for investigation and Section 22 for trial. Of course prostitution by itself has not been made an offence punishable in law. As already noticed, there are however, provisions providing punishment for keeping a brothel or allowing a premises to be used as a brothel or for living on the earnings of prostitution and also for contravening certain provisions including an order under Section 20. Thus it would be seen from the scheme of the Act that though the main purpose for enacting this law by

\textsuperscript{298} The Statement of Objects and Reasons published in the Gazette of India, dated 20-12-1954, Part II, Section 2, Extraordinary, page 759 and also the report of the Select Committee published in the Gazette of India, dated 21-11-1958, Part II, Section 2, Extraordinary page 885/3.
the Parliament was to suppress traffic in women and girls to carry out the purposes of Articles 23 read with 35 of the Constitution and to prohibit exploitation of prostitute. Parliament made provisions for meeting all the evil consequences flowing from them299.

The Act is not aimed at abolition of prostitutes and prostitution as such and makes it per se a criminal offence or punishes a woman because she prostitutes herself; and that the purpose of the enactment is to inhibit or abolish commercialised vice namely the traffic in women and girls for purpose of prostitution as an organized means of living. Various provisions of the Act tend to strengthen such a view300.

The evil of prostitution must be curbed. It is the mandate of the Constitution which prohibits traffic in human beings. Keeping that object in view and in pursuance to International Conventions for the Suppression of Traffic in persons and of the Exploitation of the Prostitution of others signed at New York on May 9, 1950, the Parliament enacted the Suppression of Immoral Traffic in Women and Girls Act, 1956. The Act was amended in 1978 to make good some inadequacies in the implementation of the Act and in the light of the experience gained during the period the Act was being implemented. Despite the amendments of the Act it was felt that enforcement of the Act had not been effective enough to deal with the problems of immoral traffic in all its dimensions. Suggestions had been made to Government by all voluntary organizations working for women, advocacy groups and various individuals urging the enlargement of the scope of the Act, to make penal provisions more stringent and to provide for certain minimum standards for correctional treatment and rehabilitation of the victims. The Act was, therefore, further amended in 1986 making it more wide based301.

What is intended by this legislation is not only to suppress traffic in women and girls but also to curtail the activities of prostitutes if their activities have got a tendency to tempt young persons or cause annoyance to even grown up persons who visit place of worship, hospitals, Nursing Homes and educational institutions and affect their susceptibilities.302

---

The Act was conceived to serve a public social purpose, viz., to suppress immoral traffic in women and girls, to rescue fallen women and girls and to prevent deterioration in public morals. The following features of the Act clearly signifies that

- The Act clearly defines a "prostitutes", and definite indications from which places prostitutes should be removed or in respect whereof their movements should be restricted.

- Though the preamble as well as the title shows that the Act was intended to prevent immoral traffic in women and girls, the other sections of the Act indicate that it was not the only purpose of the Act. Section 2(b) defines "girl" to mean a female who has not completed the age of twenty-one, Section 2 (j), "woman' to mean a female who has completed the age of 21 years, Section 2(e) "prostitute" to mean a female who offers her body for promiscuous sexual intercourse for hire, whether in money or in kind, and Section 2 (i), "prostitution" to mean the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. These provisions aims to protect the minors from the evil cluthes of the society.

- There are provisions in the Act for punishing men who run brothels and who procure girls and women for prostitution, for punishing women and girls who seduce or solicit for the purpose of prostitution in public places, for placing the rescued women and girls in detention in protective homes, for closure of brothels and eviction of offenders from premises, for restricting the movements of prostitutes and even for deporting them to places outside the jurisdiction of the Magistrate.

- Section 7 (1) provides for the punishment of a prostitute, if she carries on prostitution in any premises which are within a distance of two hundred yards of any place of public religious worship, educational institution, hostels, hospitals, nursing home or such other public place of any kind.

notified in that behalf by the Commissioner of Police or the District Magistrate, as the case may be.

- Section 8 prohibits seducing or soliciting for purpose of prostitution in any public place or within sight of, any in such manner as to be seen or heard from any public place, whether from within any building or house or not, and makes such soliciting or seducing an offence under the Act.
- Section 18 provides for the closure of brothels and eviction of offenders from the premises, if such premises are within a distance of two hundred yards from a public place mentioned in Section 7(1) and are used or run as a brothel by any person or used by prostitutes for carrying on their trade.

Whether Act is a Penal Statute.

Penal statutes must be strictly construed. They cannot be enlarged or extended by intendment, implication or by any equitable considerations beyond the fair meaning of the language used. In other words, only those persons, offences or penalties which are clearly included will be considered within the operation of the statute and all questions in doubt will be resolved in favour of the person who has contravened the provisions of law. At the same time it must be remembered that no rule of construction requires that a penal statute should be, unreasonably construed so as to defeat the obvious intention of the Legislature or construed in a manner as would lead to absurd results. On the other hand, it is of utmost importance that the Court should endeavour to ascertain the intention of the Legislature and to give effect thereto. In State Of Kerala & Ors vs Unni & Anr the Apex court relying on Tolaram Relumal v. State of Bombay, and Girdhari Lal Gupta v. D.H. Mehta opined that it is true that all penal statutes are to be strictly construed in the sense that the court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it

---

304 Teja Singh v. The State, AIR 1952 Punj 45 At 46: 1952 CR.L.J.131 (Punj.).
must have been intended to be included and would have been included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment.

The Immoral Traffic (prevention) Act is a penal statute. Penal statutes affect the liberty of the subject, if two possible and reasonable constructions can be put upon a penal provision; the Court must lean towards that provision which exempts the subject from penalty rather than that which imposes a penalty.

Where there is a reasonable ground for doubt as to the correct interpretation of an enactment that interpretation should be adopted which is most in favour of the person to be penalised. In a penal statute it is the duty of the Court to interpret words of ambiguous meaning in a broad and liberal sense so that they will not become traps for honest, unlearned (in the law) and unwary men.

Constitutional Validity of the Act

Under Article 35 (a)(ii), the Parliament alone is competent and empowered to make laws for prescribing punishment for those acts which are declared to be offences under Part III of the Constitution dealing with the fundamental rights. The Immoral Traffic (Prevention) Act, 1956 is an example of exercise of such power by the Parliament. Article 21 of the Constitution which guarantees and protects the right of life and personal liberty, implicitly contains the mandate of protection against the immoral trafficking of women and children. Religion and religious freedom cannot be the basis for justifying or perpetuating the social evils like prostitution. Therefore, the Constitution of India in Article 25 (2) (b) specifically provides that measures of social reform are permissible and would not be void on the ground of interfering with freedom of religion.

The abolition of 'Devadasi' and 'Jogini' system is based on this provision. Article 23 of the Constitution prohibits traffic in human beings and forced labour. As regards the Directive Principles of State Policy, it is significant to refer Article 39 which relates to 'Directive Principles of State Policy' under Part IV of the Constitution. Article 39 particularly contains certain directives. One of the directives under clause (e) of Article 39 is that the State should, in particular, direct its policy towards securing that childhood

and youth are protected against exploitation and against moral and material abandonment. These objectives reflect the great anxiety of the Constitution makers to protect and safeguard the interest and welfare of the children of our country, who often become victims of immoral traffic.

In *Smt. Shama Bai And Anr. vs State Of Uttar Pradesh, Lucknow And Ors*\(^\text{309}\). The petitioner has come to this Court on the allegation that she is a prostitute aged 24 years and is also a singer. She resides in premises No. 54-A, Mohamad Ali Park, Allahabad, of which the respondent No. 5 is the landlord and the respondent No. 4 the chief tenant. Her allegation is that prostitution is her hereditary trade and the only means of her livelihood as also that of her cousin sister and two younger brothers who are her dependants and who wholly live on her earnings made by prostitution. She complains that the Suppression of Immoral Traffic in Women and Girls Act, 1956, (hereinafter referred to as the Act) is ultra vires of the Constitution of India, as it illegally prohibits the petitioner from carrying on her trade and in any case imposes unreasonable and illegal restriction on the same. She alleges that the result of the enforcement of the Act would be that she would be left to starve as she has no other source of livelihood and the chances of her being rehabilitated as a good housewife in society are nil. The Court hesitatingly and partially recognized prostitution as a fundamental right.

In *Pramod Bhagwan Nayak v. State Of Gujarat*\(^\text{310}\) the learned High Court observed There has been a considerable acrimonious debate over the question: Is prostitution a form of exploitation to be abolished or an occupation to be regulated? The question is no longer about morality: Is prostitution a vice and there involved evil or lacking in morals? There are basically two camps, those seeking to eradicate prostitution and those who view the women involved as sex workers. The Court has to steer through the non-legal aspects of the debate, because, what social standards should be reflected in the laws in the matter of prostitution is in the legislative domain.

Prostitution in the modern times is not confined to street-walking and its forms are diversified into various kinds, such as prostitution services, including date clubs,

\(^{309}\) on 26/5/1958 \(\text{http://indiankanoon.org/doc/354368/}\)

\(^{310}\) K.M. Mehta, J. \(\text{http://indiankanoon.org/doc/1735887/ on 22 February, 2006}\)
various kinds of services in adult entertainment, business facilities, meet and mate on
the internet etc. Pornography acts as an arm of prostitution and often women coerced
into pornography are coerced into prostitution. Economic crisis, natural diseases,
political unrest and conflict situations make women and children more vulnerable and
easy prey to sex traffickers and recruits. The term "sex worker" does not dignify the
women involved though it may dignify the pimps, procurers and traffickers who can call
themselves "managers", "supervisors" and "organisers". Prostitution for women is
considered not merely temporal activity, but rather a heavily stigmatized social status
which in most societies remains fixed on them regardless of any improvement in
behaviour.

In a study of street prostitutes in Toronto, approximately 90% of women
contacted indicated that they wished to stop working on the streets at some point of
time, but felt unable or unclear about how to even begin the process. Often women
who themselves view sex service as a temporary and part-time engagement are forced
by legal and social labeling to remain prostitutes and to bear that status in all the walks
of their life. Prostitutes epitomize social illegitimacy and are designated as a fair game
for police scrutiny and social attack. If prostitutes by circumstances regulated by
commercial interests of the middlemen and organizers cannot leave, they remain as
sexual slaves. Women in prostitution usually begin their career due to poverty and are
kept indebted and poor by pimps and other middlemen who control their earnings and
movements making them a legal non-person in a biased society.

Article 23 of the Constitution of India prohibits traffic in human beings, beggar
and other similar form of forced labour. The victim of prostitution is the prostitute herself
who is placed in a slave-like condition and subjected to virtually unlimited authority of
others in the trade for rendering distinctly personal service. Through, contrived and
manipulated indebtedness to which she gets subjected, she is unable to ward off the
shackles of poverty and inch towards a dignified living. Servitude results from
indebtedness and poverty. The victims of the vice of prostitution believe that they have
no viable alternative but to continue in the field of their exploitation for survival. Poverty
and indebtedness make exit from prostitution impossible for such women. This condition

of involuntary servitude of most of the women and girls in prostitution, where their
distinctly personal services are bought and sold as chattel, would justify the Court and
other constitutional authorities in viewing prostitution as a form of modern slavery and
its perpetrators, pimps and traffickers as exploitation of the victim prostitutes in violation
of their right against exploitation guaranteed by Article 23.

Our Constitution values human dignity which inheres in various aspects of what it
means to be a human being. One of these aspects is the fundamental dignity of human
body which is not simply organic. The very nature of commodifying the human body
devalues the respect that the Constitution regards as inherent in the human body by
guaranteeing fundamental right against exploitation under Article 23 and by issuing
directives under Articles 39(e) and 46 that the State should strive towards securing that,
health and strength of men and women are not abused and citizens are not forced to
enter avocations unsuited to their age or strength and to promote with special care the
educational and economic interests of the weaker sections of the people and protect
them from social injustice and all forms of exploitations. The most potent rejoinder
against recognition of the degrading practice of prostitution, which undermines
womanhood itself, comes from Article 51A (e) of the Constitution, which ordains that it
shall be the duty of every citizen of India to renounce practices derogatory to the dignity
of women.

The fact that prostitution is a practice derogatory to the dignity of women is
universally recognized and is clearly reflected from the "Convention for the Suppression
of the Traffic in Persons and of the Exploitation of the Prostitution of Others", to which
India was a signatory having signed it on 9-5-1950 and which was ratified on 9-5-1953.
The Convention was approved by the General Assembly of the United Nations in its
Resolution 317(IV) of 2 December, 1949. The preamble of the Convention records that:

...prostitution and the accompanying evil of the traffic in persons for the purpose
of prostitution are incompatible with the dignity and worth of the human person
and endanger the welfare of the individual, the family and the community...

The parties to the Convention agreed under Article 1 to punish any person who, to
gratify the passions of another, procures, entices or leads away, for purposes of
prostitution, another person, even with the consent of that person, or exploits the
prostitution of "another person", even with the consent of that person.

The "Convention on the Elimination of all Forms of Discrimination Against
Women of 1979" provided in Article 6 that State Parties shall take all appropriate
measures, including legislation, to suppress all forms of traffic in women and
exploitation of prostitution of women. The General Assembly of the United Nations
passed a Resolution on 16-12-1983 (A/RES/38/107) in its meeting No. 100 reaffirming
the objectives of the United Nations Decade for Women : Equality, Development and
Peace, bearing in mind, "the essential role of women in the welfare of the family and the
development of society" and "considering that prostitution and the accompanying evil of
the traffic in persons for the purpose of prostitution are incompatible with the dignity and
worth of the human person and endanger the welfare of the individual, the family and
the community", urged the Members States "to take all appropriate humane measures,
including legislation, to combat prostitution, exploitation of the prostitution of others and
all forms of traffic in persons and to provide special protection to victims of prostitution
through measures including education, social guarantees and employment opportunities
for those victims with a view to their rehabilitation".

To recognize prostitution as a legitimate means of livelihood would be an open
invitation to trafficking in women and girls is one of the most corrosive forms of violation
of human rights. It results in gradual total destruction of a women's personal identity,
and her right to live as a free human being in a civilized society. The victim is subjected
to violence, total humiliation and violation of personal integrity. The victim of such
devastating violence may also end up with life-threatening H.I.V. /A.I.D.S. /S.T.D. or a
lifetime of trauma, drug addiction or personality disintegration. It is a denial of the right
to liberty and security of person, the right to freedom from torture, violence, cruelty or
degrading treatment, the right to a home and a family, the right to health care-everything
that makes for a life with dignity. Trafficking has been rightly referred to as a modern
form of slavery."312 " The restriction on personal liberty by Section 7 is in the interests of
general public and is imposed by law enacted by the Parliament in the background of

312 (See : Consultation Paper on "Trafficking in Women and Girls" by Justice Sujata Manohar for the Expert
Group Meeting on "Trafficking in Women and Girls" 18-22 November, 2002 Glen Cove, New York, USA)
the Convention for Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others signed and ratified by India, and the deprivation of liberty to carry on prostitution in public places is as per the procedure established by law. Therefore, there is no violation of the fundamental right to life and personal liberty of persons guaranteed by Article 21 of the Constitution. It was argued that the right to privacy gets violated every time the law enforcing agencies barge in the precincts of the premises in their occupancy, and therefore, the provisions of Section 15 read with Section 7 of the Act enabling the police to search the premises in which prostitutes may be living violate Article 21 of the Constitution.

The Court finally opined that the purpose of the Act was to inhibit or abolish commercialized "vice". It was not to render prostitution per se a criminal offence or to punish a woman merely because she prostitutes as clearly indicated in the definition of brothel which has been given in the Act. Section 2(a) "brothel" includes any house, room or place which is used for purposes of sexual exploitation or abuse for the gain of another person or the mutual gain of two or more prostitutes. Thus, where a single person practices prostitution for his or her own livelihood without another prostitute or some other person being involved in the maintenance of such premises, his or her residence will not amount to "brothel". This implies that a woman can live with prostitution alone.

Moreover, the amendment in the law in 1986 has amended the definition of "prostitution" (i.e. the act of a female offering her body for promiscuous sexual intercourse for hire whether in money or in kind, or whether offered immediately or otherwise) and replaced it by the following new definition "prostitution" means the sexual exploitation or abuse of persons (male or female) for commercial purposes, and the expression "prostitute" will be construed accordingly. This new definition clearly implies that those who have to be punished under the Act are those who exploit persons through prostitution. Most of the provisions of the Act are intended to punish the brothel keepers, the pimps, those who live on the earnings of prostitution of another person and those who are involved in the trafficking of persons for the purpose of prostitution.

It may be said at once that where the effect of a restrictive legislation is to totally prevent a citizen from carrying on a trade, business or a profession such a restriction is
unreasonable and void\textsuperscript{313} It is also settled law that restrictions imposed in an Act are subject to judicial scrutiny and it will be open to Courts to say whether a particular restriction is reasonable or not\textsuperscript{314}. It is not necessary to multiply cases on this point because it is now settled beyond controversy that the question whether a restriction is reasonable or not is justifiable\textsuperscript{315}.

Indian Penal Code, 1860 and Immoral Trafficking: Correlation

Framers of the Indian Penal Code have not treated prostitution and immoral trafficking as offences probably because those acts can be tackled as socio-economic problems. However, they are abundant number of provisions in Sections 350 to 376 of the Code that have a direct or indirect bearing on immoral trafficking. In this age of criminalization of every field in human sphere, no person indulges in acts like prostitution unless there is a criminal act on part of others either in the form of abatement, kidnapping, abduction, buying and selling of persons including minors for purposes including prostitution and last but not the least rape. Therefore, it becomes necessary to discuss these aspects to render substantial justice to any commentary on the immoral trafficking in India. Section 359 of the Indian Penal Code recognizes two kinds of kidnapping from India and kidnapping from lawful guardianship. Kidnapping literally means child stealing but the Code considers the act of taking away a person of any age unless specifically mentioned, as the offence of kidnapping.

Section 360 details the offence of kidnapping from India of any person irrespective of age. Section 361 in its first part lays down what kidnapping from lawful guardianship strands for. The object of this section is to protect children of tender age from being abducted for improper purposes, and also to protect the rights of parents and guardians having the lawful custody of minors. Abduction is defined as compelling a person by force or inducing such person by deceitful means to go from any place. Kidnapping or maiming a minor for purposes of begging has been made an offence under Section 363-A which was inserted 1959. Section 365 embodies an aggravated

\begin{flushright}
\textsuperscript{314} Chintaman Rao v. State of M.P., AIR 1951 SC 118
\end{flushright}
form of offence of kidnapping as defined in Sections 360 and 361, and of abduction as defined in Section 362. This Section 365 is attracted when the kidnapping or abduction is committed with intent to secretly and wrongfully confine the victim.

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it, to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, will be guilty of an offence under Section 366, were charged to have abducted the poor women for forcing them to prostitution whereas they were carried away by making false promise of providing them jobs. There was sufficient evidence to prove that the accused had taken away the women for the purpose of prostitution and minor discrepancy in evidence of particular witness was considered to carry no weight. It was held that the conviction of the accused was proper. Sections 366-A and 366-B intend to punish the export and import of girls for prostitution. Sections 366-A deals with procuration of minor girls from one part of India to another for prostitution or illicit intercourse. Section 366-B makes it an offence to import into India from any country outside India, girls below the age of 21 years for the purpose of prostitution. Kidnapping or abducting in order to subject person to grievous hurt, slavery or to the unnatural lust of any person, has been made an offence under Section 367. Section 368 imposes a proactive duty on any person who has knowledge of any kidnap or abduction but who wrongfully conceals or confines such person to reveal such offence. Any person assisting the principal offender of such kidnapping or abduction will be liable to be punished in the like manner the principal offender is punished.

Whoever imports, exports, removes, buys, sells or disposes of any person as a slave, or accepts, receives of detains any person against his/her will as a slave is punishable under Sections 370 and 371. Section 372 of Indian Penal Code deals with the offence of selling, letting, hiring or otherwise disposing of a minor for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purposes.

This section applies to both, males or females under the age of 18 years, irrespective of their marital status or background. It is worthwhile to note that under Section 2(i) of the Immoral Traffic (Prevention) Act, 1986, prostitution means the sexual
exploitation or abuse of persons for commercial purpose and the same shall be considered accordingly. However, it appears that the above definition does not control the meaning of the term in Indian Penal Code. It is because, when the Acts are not in pari materia and the words in earlier Act would be totally irrelevant. It is also important to note in this context that Section 5 of the Act of 1956 also makes the procuring, inducing or taking person for the sake for prostitution an offence. A closer look at Section 372, Indian Penal Code and Section 5 of the Act of 1956 makes it clear that they create distinct offences therefore, they do not overlap and conviction under both the sections would be legal. Section 373 of the Code, makes buying, hiring or otherwise obtaining possession of any person under the age of 18 years for the purpose of employing or using them for the purpose of prostitution or illicit intercourse an offence.

The offence of rape under Section 375, Indian Penal Code is another relevant provision having a bearing on the immoral trafficking. Rape is sexual intercourse with a woman:

I. Against her will;
II. without her consent;
III. with her consent if it is obtained by putting her or her dear ones in fear of death or hurt;
IV. with her consent, it the same is caused by deception of marriage;
V. with her consent if the same is given due to intoxication or, unsoundness of mind or some drug; and
VI. with or without consent, when she is under 16 years of age.

Provisions of the Criminal Procedure Code would be applicable in regard to the matters for which there is no specific provision in the Act.

The scheme and purpose of the Act clearly disclose that the special police officer, who has been invested with police powers may arrest an offender, carry out searches of premises used for the purpose of prostitution and file a charge-sheet Court against a person suspected of having committed an offence under the Act. At the same time, the other modes of initiating prosecution as for example upon a complaint by a private party or upon his own knowledge or suspicion by a Magistrate are not outside the Act. The Act is silent upon these matters, and it must, therefore, be held that the
provisions of the Cr.P.C. would be applicable in regard to matters for which there is no specific provision in the Act. The above conclusion finds support by reference to subsection (2) of Section 5 (new Section 4) of the Code which states that all offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring, trying or otherwise dealing with such offences. Therefore, in so far as the Act makes provision for the offences being dealt with in a particular manner and by a particular officer or class of officers, the provisions of the Act shall override the provisions of the general law. But in matters with respect to which the Act is silent the provisions of the general law will come into operation. The Counsel contended that the maxim 'expressio unius est exclusion alterius' applied to the case and that the special police officer having been invested with the power of dealing with offences under the Act, it should be held that the Legislature had impliedly prohibited cognisance of cases in any other manner than that provided by the Act. The maxim is based upon the probable intention of the Legislature. Hence, where that intention is clear the principle of the maxim is not applicable. In Crawford's Construction of Statutes at page 333 the learned author observes:

"The principle is to be used only as a means of ascertaining the Legislative intent where it is doubtful and not as a means of defeating the apparent intent of the Legislature. Where the statutory language is plain and the meaning clear there can be no implied exclusion." 316

None of the sections of the Act have the effect of stopping the profession or trade of a prostitute altogether. Under the provisions of the Penal Code Prostitution is not an offence. Section 372 of the Penal Code only prohibits sale, letting to hire, or otherwise disposing of any person under the age of 18 years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose. After having read the Act carefully it is not quite correct to say that the Act prohibits the carrying on of the profession or trade of a prostitute though it cannot also be denied that


198
it has imposed restrictions on the same. This Act has got twenty-five sections in all. Of these some are penal. None of the sections, have the effect of stopping the profession or trade of a prostitute altogether. The only question, therefore, is whether the restrictions which are imposed upon the trade or profession of a prostitute by means of the provisions of the Act are reasonable restrictions. "In order to determine the reasonableness of the restrictions regard must be had to the nature of the business and the conditions prevailing in the trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down."

There is no provision of the Act, under which bond for good conduct may be taken. In the instant case, AGA strongly contends that some bond may be taken from the girl or from her mother for her good conduct, and that she may not be allowed to lead an immoral life. However, the AGA has not been able to point out any legal provision under which, such a bond may be taken in the peculiar facts of this case, in which as already seen the pre-conditions for taking action under Section 15, 16 and 17 were absent, as admittedly Pushpa was not recovered from a brothel, but was apprehended when she was freely moving around on a rickshaw. Furthermore, as the mother of Pushpa resides in Drugs in M.P., it is not clear how feasible it would be for High Court to monitor the observance of any bond even if it is executed by Pushpa or her mother. High Court can only express a hope that she may not be exploited or enticed away for any immoral activity and that the concerned City Magistrate at Durg or other appropriate authorities at her place of residence will ensure that she is prevented from taking part in any immoral activities. If Court observed that when such a girl is produced in the Court of appropriate Magistrates, they will see in future that the mandate of law is followed and conduct the enquiry, if the pre-conditions exist for giving them jurisdiction to detain a person, and to make the concerned enquires under Sections 15, 16 and 17-A of the ITP Act in a time bound manner according to the time schedule prescribed under the ITP Act, and not allow the enquiry to linger on unnecessarily for an inordinately long period of time, as has been done in this case.

Jurisdiction of the Act.

Section 1 of the Act came into force at once viz., 31st December 1956, while the remaining sections of the Act came into force on the first day of May, 1958, vide Central Government notification No.G.S.R. 269. dated the 16th April, 1958. The Immoral Traffic (Prevention) Act, 1956 has been extended to the whole of India. It was extended to the Union territory of Dadra and Nagar Haveli by the Dadra and Nagar Haveli (Laws) Regulation No.6 of 1963, Section 2 and First Schedule and to the Union Territory of Goa, Damn and Diu by the Goa, Daman and Diu (Laws) No.2 Regulation No.11 of 1963, Section 2 and Schedule. It was extended to the Union territory of Pondicherry by the Pondicherry (Extension of Laws) Act 26 of 1968. Section 3 (28) of the General Clauses Act, 1897, provides that as respects the period after the commencement of the Constitution, "India" shall mean all the territories for the time being comprised in the territory of India. Under Article 1 (3) of the Constitution the territories of India comprise (a) the territories of the State, (b) the Union territories specified in the First Schedule, and (c) such other territories as may be acquired.

The States in India, 28 in number are: Andhra Pradesh, Assam, Bihar, Gujarat, Kerala, Madhya Pradesh, Tamil Nadu, Maharashtra, Karnataka, Orissa Punjab, Rajasthan, Uttar Pradesh, West Bengal, Jammu and Kashmir, Nagaland, Haryana, Himachal Pradesh, Manipur, Tripura, Meghalaya, Sikkim, Mizoram, Arunachal Pradesh, Goa, Chhattisgarh, Uttaranchal and Jharkhand.

The Union territories, seven in number are Delhi, the Andaman and Nicobar Islands, Lakshadweep, Dadra and Nagar Haveli, Daman and Diu, Pondicherry, Chandigarh.

Judicial Delineation of some Important Terms

Over the years Judicial efforts have been made to define and interpret different terms that plays significant role in actualizing the objectives of the legislature. In the present segment attempts have been made to critically examine those judicial delineation.

Brothel: A 'brothel' means a place promiscuously resorted to by persons of both sexes for the purpose of prostitution. A prostitute receiving men only into her own room
cannot be convicted of keeping a brothel.\textsuperscript{319} A brothel includes a house, room, conveyance or place or a portion thereof which is used for the purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes. To constitute a brothel there must be a person who lets on hire a person for prostitution or there must be two or more prostitutes carrying on prostitution there for their mutual gain.

Brothel, same as bawdy house. It legally applies to a place resorted to persons of both sexes for the purpose of prostitution. This also means any house, room or place which the occupier or the person in charge thereof habitually allows to be used by any other person for the purpose of prostitution. To constitute brothel, the place must have been used for purposes of prostitution. A solitary instance of prostitution committed within any house or room or place would not satisfy the ingredient of brothel\textsuperscript{320}.

Brothel is a place which should be used for purposes of prostitution for the gain of another person or for mutual gain of two or more prostitutes. "For purposes of prostitution" would undoubtedly mean more than one instance of prostitution and solitary instance of prostitution in a place does not make the place a 'brothel'\textsuperscript{321}.

So far as the offence about the premises being used for the purposes of a brothel by accused 1 to 3 is concerned, if left aside the evidence of PW 4, for a minute, there is only the evidence that on 14-7-1963, a woman living in the premises in question namely, accused, had committed an act of prostitution with a stranger for money with the assistance of her servant accused 1. For the interference that accused 3 was living on the earnings of his wife by hiring her body for promiscuous intercourse, the prosecution has to rely on the evidence of PW 4. PW 4's evidence on this point cannot be considered very satisfactory. His version is that in spite of his being aware of the reprehensible conduct of accused 3 in making his wife to prostitute herself against her will, he and his relations persisted in their visits to the house of accused 2 and 3 that at times the objectionable activities of accused 2 and 3 and were conducted almost under their nose. This version appears to be too artificial and unnatural to be accepted. Reference was made in the course of his evidence to certain prior complaints by his

\textsuperscript{319} \textit{Singleton v. Ellison}, (1895) 1 DB 607.

\textsuperscript{320} \textit{In re: Unnikumar}, (1975) 1 MLJ 22 (Mad.)

\textsuperscript{321} \textit{Susheela v. State}, 1982 Cr.L.J. 702 (Mad.).
father to the police regarding the prostitution of accused 2 with the connivance of her husband for making a living thereby.

But no copies of these complaints have been produced. It is possible that PW 4 suspected that something was wrong with his sister and her husband but the circumstances under which he claims to have seen them, appear to be too fanciful to be believed. If PW 4's evidence cannot be accepted, there are no other proper grounds for holding that the premises in question were used by the three accused persons for running a brothel. The definition of "brothel" implies that the premises must have been used for the purpose of prostitution for the gain of another person or for the mutual gain of two or more persons. There is also evidence here of two prostitutes having worked for their mutual gain in these premises. Unless there is satisfactory evidence that accused 2's prostitution was for the gain of accused 3, her husband, there cannot be a finding that the premises in question was used as brothel.

As one English decision tersely puts it, the terms "keeping a brothel" will not apply where one woman receives a number of men. The definition of a "brothel" in the Indian Act does not make any departure from this test. Therefore, accused 2 cannot be convicted of the offence under Section 3 (1) of the Act.; Her conviction is also set aside.

It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it.

The mere fact that the accused is the owner of an undivided half of the house in which his daughter was leading the life of a prostitute does not amount to abatement of the offence under Section 6(1) of the Calcutta Suppression of Immoral Traffic Act, 1923. When the accused collected his rent daily from his women-tenants whom he knew to be prostitutes, it is doubtful if Section 6 of the Calcutta Suppression of Immoral Traffic

322 State v. Foxon, 1956-1 QB 67
325 Padmamoni Dassi v. Emperor, AIR 1932 Cal. 457 at 459
Act, 1923 would apply. But if the accused goes at night and sits at the gate, the only possible conclusion is that the accused was doing something more than collecting the rent and that he was actively associating himself with the business of the brothel. 326

In the instant case it is proved by the evidence that the bogus punter Lalji approached the applicant himself for the services of a woman for the purpose of prostitution, and that it was the applicant himself who offered two girls to Lalji one of whom was Indumati, the wife of the applicant. In view of this evidence, it must be held that the applicant himself was keeping or managing the brothel. His conviction under Section 3(1) would be quite proper provided there has been a charge under Section 3(1) of the Act. But it is contended that charge does not relate to keeping or managing or acting or assisting in the keeping or managing his house as a brothel; and that the charge merely relates to using a house as brothel, and that the charge does not fall under Section 3(1) of the Act. The charge is clearly under Section 3(2) of the Act. 327

To constitute a brothel the place must have been used for purposes of prostitution. A solitary instance of prostitution committed within any house or room or place would not satisfy the ingredients of a brothel. 328 This means that both women and men have to go to the place to constitute it a brothel. 329 A house can be called a brothel if women were kept in that house by another women or by a man for the purposes of prostitution. Where a woman who along with her husband, is living with her husband's sister and practices prostitution, the sister of the prostitute's husband cannot be called a brothel keeper. 330 It may be true that a place used once for the purpose of prostitution may not be a brothel, but it is a question of fact as to what conclusion should be drawn about the use of a place about which information had been received that it was being used as a brothel to which a person goes and freely asks for girls, where the person is shown girls to select from and where he does engage a girl for the purpose of prostitution. The conclusion to be derived from these circumstances about the place and the person keeping it can be nothing else than that the place was being used as a brothel.

326 Kambho Bera v. Emperor, AIR 1928 Cal. 381 at 382.
328 In re: John, AIR 1966 Mad. 167 : 1966Cr.L.J. 551 (Mad).
330 ibid
brothel and the person in charge was so keeping it. It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution.

A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel, and that the person alleged was so keeping it. If the husband lives with his wife and allows his wife to be a prostitute there is no reason for not believing that the husband was doing so for the purpose of living on the earnings of prostitution of his wife. There is therefore, no reason not to apply the presumption mentioned in Section 4(2) of the Act. When such a presumption is drawn until the contrary is proved, it can be presumed that the husband is knowingly living on the earnings of prostitution of his wife. When such a presumption is drawn, that would be sufficient to constitute the house of the husband a "brothel". The last part of the definition is certainly significant. It implies that where is a single woman practices prostitution for her own livelihood, without another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to a "brothel".

The purpose of the enactment was to inhibit or abolish commercialized vice, namely, the traffic in women and girls, for purposes of prostitution, as an organised means of living. The idea was not to render prostitution per se a criminal offence, or to punish a woman merely because she prostitutes herself. In, K.E.Adam v. State, Ramaswami, J. has reviewed the available literature upon this subject, in an extensive manner. After making a historical survey, the learned Judge proceeded to observe that legislation, by itself, was almost powerless to eradicate this, evil, and added: "nor have all the social and administrative resources of modern civilization availed to exercise an effective control." A carefully scrutiny of the Central Act 104 of 1956 clearly reveals that the Act was aimed at the suppression of commercialized vice, and not at the penalisation of the individual prostitute, or of prostitution in itself.

This is of some importance in considering the case against the appellant Ratnamala (accused 3). Section 3 (1) of Central Act, 104 of 1956 runs as follows.—"any

---

333 C.A. No. 536 of 1956
person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable. "The Public Prosecutor has rightly emphasized that this wording is different from the text of the corresponding Section 5(1) in Madras Act V of 1930, which was to the effect that". Any person who keeps or manages or acts or assists in the management of a brothel shall be punished. "The Central Act deliberately includes the words "or acts or assists in the keeping or management of." Thus implying at least a fine shade of distinction between 'keeping' and 'management'. "Brothel" is defined under Section 2 (a) as including "any house, room or place or any portion of any house, room or place which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes."

The last part of the definition is certainly significant. It implies that where a single woman practices prostitution, for her own livelihood another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to a "brothel" There cannot be any clearer indication of the purposes of the Act, which is to strike down commercialized vice, not to make the unfortunate prostitute, herself often a victim of economic pressures and social maladjustment, a criminal under the law.  

When the prosecution proved only the presence of only one girl in the premises and a single instance of prostitution, the premises cannot be held "used for brothel" in the absence of any proof from the surrounding circumstance. There must be at least two women using the premises for purposes of prostitution to constitute the premises as brothel. Brothel is defined under Section 2(a) of the Act so as to include any house, room or place or any portion of any house, room or place which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more persons. 'Prostitute' is defined in Section 2 (a) of the Act and it means a woman who offers her body for promiscuous sexual intercourse for hire whether in money or in kind. Any person, who keeps or maintains or acts or assists in the keeping and management of a

---


335 In re: Dhanalakshmi, 1974 Cr. L.J. 61 at 65 : (Mad).

brothel, is liable to be punished under Section 3 of the Act. A perusal of the definition of the word "brothel" would clearly indicate that the place must be used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes. The phrase 'for purposes or prostitution' postulates plurality of instances of prostitution. A single instance would not suffice for the purpose of prostitution, for the definition mentions the word 'purposes'. Even accepting the testimony of P.Ws 1 and 3, Court was unable to see whether the significant ingredient 'purpose of prostitution' has been proved in this case. A brothel is a place resorted to by persons of both sexes for purposes of prostitution, the ratio decidendi being that the prostitute or prostitutes must be strangers to the occupancy. Brothel to mean any house, room, conveyance or place which issued for purpose of sexual exploitation or abuse, for the gain of another person or for the mutual gain of two or more prostitutes.

The essential ingredient, therefore, is a place being used for the purpose of sexual exploitation or abuse. The phrase 'for the purpose of' indicates that the place being used for the purpose of the prostitution may be a brothel provided a person used the place and ask for girls, where the person is shown girls to select from and where one does engage or offer her body for promiscuous sexual intercourse for hire. In order to establish prostitution, evidence of more than one customer is not always necessary. All that is essential to prove is that a girl/lady should be a person offering her body for promiscuous sexual intercourse for hire. Sexual intercourse is not an essential ingredient. The inference of prostitution would be drawn from diverse circumstances established in a case. Sexuality has got to be established but that does not require the evidence of more than one customer and no evidence of actual intercourse should be adduced or proved. It is not necessary that there should be repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances may be sufficient to establish that the place is being used as a brothel and the person alleged was so keeping it. The prosecution has to prove only

---

337 State of Rajasthan v. Wahida, 1981 Raj Cr. C. 42 at 43 (Raj.)
338 In re: Dhanalakshmi, 1974 Cr. L.J. 61 at 66: (Mad).
that in premises a female indulges in the act of offering her body for promiscuous sexual intercourse for hire. On proof thereof, it becomes a brothel.340

In order to prove that a particular premises is a brothel, prosecution has to prove that it is used for purposes of prostitution for gain of another person or for mutual gain of two or more prostitutes, in other words, prosecution has to prove that in the premises a female indulges in the act of offering her body, for promiscuous sexual intercourse for hire whether in money or in kind. The onus entirely remains on the prosecution and the legislature has not deemed it fit or necessary to shift any part of the onus on the accused in any circumstances. The only evidence brought in this case is from pimps and prostitutes—pimps procure the visitors for gain and prostitutes offer their body for money. Either of them is, therefore, an accomplice and judicial decisions have settled the value of accomplice evidence. Although it is not entirely illegal to convict an accused on accomplice evidence only the rule of prudence is to look for corroboration. This rule of prudence is now virtually the law enunciated by judicial decisions.

It is also well settled that evidence of accomplice is tainted evidence and one tainted evidence cannot corroborate another. There was an attempt to draw the analogy of the victim girl in a rape case but this is not applicable in such cases, for the female is not a 'victim' but a willing partner in the sexual act. Learned Judges were not unmindful of the difficulty for the prosecution to adduce corroborating evidence; even the 'test purchaser' of a female body would be an accomplice and therefore, his evidence is tainted evidence.

The law as it stands provides neither for presumptions nor shifting the onus on the accused and puts an uphill task on the prosecution but that is entirely a matter of policy for the legislature. Court did not think that such provision is beyond the genius of the law makers and the draftsmen. This is undoubtedly a measure for eradicating a social evil by way of suppression of immoral traffic in women and girls in pursuance of International Convention signed at New York in May 1950, as the preamble discloses, but such legislation should be thorough going or else it loses its efficacy.341 Sec. 3 of the Act has absolutely no application because even according to the prosecution, Room

No. 108 of the Government Guest House was used only once for Crl.R.P. 653 of 2009 sexual exploitation and if so, such a place cannot be called a brothel. It is only if a person keeps a brothel or allows the premises under his control to be used as a brothel that he commits an offence under Sec. 3 of the Act. Sec. 2 (a) defines a "brothel" as follows: "Brothel" includes any house, room, conveyance or place or any portion of any house, room, conveyance or place, which is used for purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. In the light of the interpretation placed by the Apex Court, the room in the Government Guest House will not answer the definition of "brothel" if it was used for sexual exploitation only once.

**Child:** Clause (aa) of Section 3 of the Act defines "child" means a person who has not completed the age of sixteen years. Whereas Section 2 (e) of the Children Act, 1960, defines the child as "child" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. Any person who is unable to maintain himself or herself of whatever age would be a child for purposes of maintenance under the Cr.P.C because he or she is the immediate issue of his or her father. If the word is to be restricted to a person who has not yet attained the age of majority, a crippled or imbecile off-spring of well-to-do parents would be left without any legal remedy against his well-to-do parents and would be left to starve till he or she is able to attain relief through the trade process of a civil suit.

There is, hence, no reason to limit the meaning of the word 'child' to a person who has not yet attained the age of majority. The key-phrase is inability to maintain itself, and not the age of the child. It is, no doubt, true that normally a claim for maintenance will arise in cases of tender years because a strong and healthy person of grown-up years is presumed to be able to maintain himself even though he may have a father who is possessed of sufficient means. But that does not furnish any ground for limiting the meaning of the word 'Child' to a person of tender years or of a particular age. A fully grown person who is suffering from a crippling disease or some physical or mental affliction is therefore, unable to maintain himself, nor has he any dependent

---

342 Krishnamurthy v. Public Prosecutor 1967 Cri.L.J. 544 S.C.
343 Section 125, Cr.P.C, 1973

208
means of his own is as much a child entitled to speedy and immediate relief from his
parent as a person of tender years or one who has not yet attained majority. 'Child',
therefore, in this context means an immediate issue or off-spring of a parent and that
age is not at all a relevant consideration.344

The term means a person under the age of 14 years and when used in reference
to a child sent to a certified school applies to that child during the whole period of
detention, notwithstanding that the child attains the age of 14 years before the
expiration of that period. With reference to non-power, Factories Act and Shops and
Commercial Establishments Act the term 'child' means a person who has not completed
14 years. There are three strong reasons for construing the 'child' in Section 4 of the
Fatal Accidents Act, 1855, as inclusive of an illegitimate child, viz.:

There is no justification whatever for introducing the word 'legitimate' to prefix
the word child used in Section 1-A of the Act; When the expression 'child' as defined to
include a step-son or a step-daughter, who cannot be born of the loins of the deceased,
there is no reason to interpret the word 'child' so as to exclude an illegitimate child who
is born of the loins of the deceased; If a parent is under an obligation to maintain
his illegitimate child, there is no reason why the illegitimate child, should not be
entitled to compensation from the person responsible for the death of the
parent.345 When the word “child” is used in correlation with father or parents it means
the offspring, male or female, of human parents.346 Where the word “child” is used with
reference to parentage, it means a descendant of the first degree, a son or a daughter
and has no reference to age. In certain contexts it may include descendants of more
remote degree and be equivalent to “issue”. But at any rate where the word “child” is
used in conjunction with parentage it is not concerned with age. No one would suggest
that a gift “to all the children of A” should be confined to minor children.347

The aforesaid discussion clearly indicates that there exists no uniformity with
respect to the definition of the child. In most cases it has been used contextually. In fact

347 Shaitkh Ahmed Shaitkh Mahomed v. Bai Fatma, AIR 1943 Bom. 48 at 49.
matter was referred to the Law Commission of India to streamline this disparity. But, for the present the state is in no mood to uniform the definition of the child.  

Table-4: Showing Minimum Prescribed Legal Age Defined Under Different National Legislations

<table>
<thead>
<tr>
<th>Minimum Legal Age Defined by National Legislation</th>
<th>Boys</th>
<th>Girls</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Particulars</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>End of compulsory education*</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Marriage*</td>
<td>21</td>
<td>18</td>
</tr>
<tr>
<td>Sexual consent**</td>
<td>Not defined</td>
<td>16</td>
</tr>
<tr>
<td>(Section 375 of the Indian Penal Code)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Voluntary enlistment in Armed Forces</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>(A person is allowed to take part in active combat only at the age of 18)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conscription into the armed forces</td>
<td>There is no conscription in India</td>
<td>There is no conscription in India</td>
</tr>
<tr>
<td>Participation in hostilities</td>
<td>Not applicable</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Admission to employment or work, including hazardous work, part-time and full-time work*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Child Labour (Prohibition and Regulation) Act, 1986</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>2. Mines Act, 1952</td>
<td>18</td>
<td>18</td>
</tr>
<tr>
<td>3. Merchant Shipping Act, 1958</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>5. Apprentices Act, 1961</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>6. Bidi and Cigar Workers Act, 1966</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>7. Plantation Labour Act, 1951</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>8. Factories Act, 1948</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Criminal responsibility*</td>
<td>12</td>
<td></td>
</tr>
<tr>
<td>(Section 83 of the Indian Penal Code, according to which, nothing is an offence which is done by a child above seven years of age and under 12 years, who has not attained sufficient maturity of understanding to judge the nature and consequences of his conduct on that occasion. It may be noted that children below the age of</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---

348 New Delhi, Apr 28 There is no proposal to make definition of the 'child' uniform in all legislations, Rajya Sabha was told today. "The definition of 'child' varies from legislation to legislation according to its nature and scope. A child is defined as a person below the age of 18 years in the UN Convention on the Rights of the Child," Women and Child Development Minister Renuka Chowdhary said. "The Juvenile Justice Act, 2000 has the same definition of the 'child' as the UN Convention on the Rights of the Child. At present there is no proposal to make definition of the child uniform in all other legislations," she said. http://www.indopia.in/India-usa-uk-news/latest-news/176460/National/1/20/1

210
<table>
<thead>
<tr>
<th>Activity</th>
<th>Age Limit</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deprivation of liberty, including by arrest, detention and imprisonment</td>
<td></td>
<td>There is no age limit for deprivation of liberty because as per Article 21 of the Constitution of India, all citizens have protection to life and personal liberty.</td>
</tr>
<tr>
<td>Capital punishment and life imprisonment*</td>
<td>18</td>
<td>Giving testimony in court, in civil and Section 118 of the Indian Evidence Act states that all persons shall be criminal cases*competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by virtue of tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. Therefore all persons irrespective of their age are competent to testify in court provided the adult or child understands the question.</td>
</tr>
<tr>
<td>Lodging complaints and seeking redress before a court or other relevant authority without parental consent*</td>
<td></td>
<td>There is no minimum age prescribed for lodging complaints and seeking grievance before a court or other relevant authority without parental responsibility.</td>
</tr>
<tr>
<td>Participating in administrative and judicial proceedings affecting the child*</td>
<td>As mentioned above</td>
<td>As mentioned above</td>
</tr>
<tr>
<td>Giving consent to change identity, including change of name, or modification of family relations, adoption, and guardianship, there is no adoption, guardianship*</td>
<td>18</td>
<td>Giving testimony in court, in civil and Section 118 of the Indian Evidence Act states that all persons shall be criminal cases*competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by virtue of tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. Therefore all persons irrespective of their age are competent to testify in court provided the adult or child understands the question.</td>
</tr>
<tr>
<td>Having access to information concerning the biological family</td>
<td>Not defined.</td>
<td>Not defined.</td>
</tr>
<tr>
<td>Legal capacity to inherit</td>
<td></td>
<td>According to Section 20 of the Hindu Succession Act, even a child in the womb has the right to inherit property and it shall be deemed to from the date of death of one who died intestate. However, as per Section 4 of the Hindu Minority and Guardianship act, 1956, the guardian will have the powers to take care of the property of such a minor.</td>
</tr>
<tr>
<td>To conduct property transactions</td>
<td>21</td>
<td>Section 11 of the Indian Contract Act, 1972, states that a person is competent to contract only if he/she is a major and is of sound mind.</td>
</tr>
<tr>
<td>To create or join association</td>
<td>Not defined</td>
<td>Not defined</td>
</tr>
<tr>
<td>Consumption of alcohol and other Controlled substances**</td>
<td>21</td>
<td>21</td>
</tr>
</tbody>
</table>

7. **Notes:**

- *Deprivation of liberty, including by arrest, detention and imprisonment*
- *Capital punishment and life imprisonment* (including change of name, modification or modification of family relations, adoption, and guardianship, there is no adoption, guardianship* (21)
- *Lodging complaints and seeking redress before a court or other relevant authority without parental consent* (21)
- *Participating in administrative and judicial proceedings affecting the child*
- *Giving consent to change identity, including change of name, or modification of family relations, adoption, and guardianship, there is no adoption, guardianship*
- *Having access to information concerning the biological family*
- *Legal capacity to inherit* (According to Section 20 of the Hindu Succession Act, even a child in the womb has the right to inherit property and it shall be deemed to from the date of death of one who died intestate. However, as per Section 4 of the Hindu Minority and Guardianship act, 1956, the guardian will have the powers to take care of the property of such a minor.)
- *To conduct property transactions* (Section 11 of the Indian Contract Act, 1972, states that a person is competent to contract only if he/she is a major and is of sound mind.)
- *To create or join association* (Not defined)
- *Consumption of alcohol and other Controlled substances** (21)
Section 2 (c) (old) defines the word 'Magistrate' to mean a District Magistrate, a Sub-Divisional Magistrate, a Presidency Magistrate, or a Magistrate of the first class specifically empowered by the State Government, to exercise jurisdiction under the Act. It would only mean that wherever the words "the Magistrate" occur such as in Sections 16, 18, 19, 20 it must have the meaning as given in Section 2 (c). It is not and could not have been intended that it should control in any manner the jurisdiction of the Court which could take cognizance of the offence. The only section on which Counsel for the respondent relies in Section 22. It provides that no Court inferior to that of a Magistrate as defined in clause (c) of Section 2 shall try any offence under Sections 3, 4, 5, 6, 7 and 8. It is clear that this is not a section which in terms excludes the jurisdiction of any Court to take cognizance of an offence under the Act, shall be a Court of either equal or superior jurisdiction to that of the Magistrate named. The other provisions of the Act show that it could not be otherwise.

Under the scheme of the Act, large powers are given by Sections 16, 18, 19 and 20 to the Magistrates for the purposes of the Act. Section 16 gives power to the Magistrate to direct the special police officer to enter a brothel and to remove therefrom the girl mentioned in that section and produce her before him. Section 19 enables a woman or a girl who is carrying on prostitution to make an application to a Magistrate for an order that she may be kept in a protective home. Section 20 gives powers to a Magistrate to direct the removal of a woman or a girl from the place where she is suspected of carrying on prostitution. Section 2 sub-section (c) defines the word 'Magistrate'. It would only mean that wherever the words "the Magistrate" occur such as in Sections 16, 18, 19, 20 it must have the meaning as given in Section 2(c). It is not and could not have been intended that it should control in any manner the jurisdiction of the Court which could take cognizance of the offence.

A schedule has been added to the text of the Act, in which it has been specified as, who are those Magistrates who can exercise powers under the various provisions of the Act. The table in the Schedule is self-contained. The Schedule when read with

Section 22, gives a clear picture at a glance as to which Magistrate can try which offence, e.g., offences under Sections 5 to 8 can be tried by a Metropolitan Magistrate or a Judicial Magistrate first class while under Section 18 only District Magistrate or Sub-Divisional Magistrate can exercise their powers.

**Table-5: Showing the Competency of the Magistrate to Exercise their power under the Act**

<table>
<thead>
<tr>
<th>Section</th>
<th>Magistrate Competent to Exercise the Powers</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 (1)</td>
<td>District Magistrate.</td>
</tr>
<tr>
<td>11(4)</td>
<td>Metropolitan Magistrate or Judicial Magistrate of the first class.</td>
</tr>
<tr>
<td>15(5)</td>
<td>Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or Sub-Divisional Magistrate.</td>
</tr>
<tr>
<td>16</td>
<td>Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or Sub-Divisional Magistrate.</td>
</tr>
<tr>
<td>18</td>
<td>District Magistrate or Sub-Divisional Magistrate</td>
</tr>
<tr>
<td>19</td>
<td>Metropolitan Magistrate, Judicial Magistrate of the first class, District Magistrate or Sub-Divisional Magistrate.</td>
</tr>
<tr>
<td>20</td>
<td>District Magistrate, Sub-Divisional Magistrate or any Executive Magistrate specially empowered by the State Government</td>
</tr>
<tr>
<td>22-B</td>
<td>Metropolitan Magistrate or Judicial Magistrate of the first class</td>
</tr>
</tbody>
</table>

The Code of Criminal Procedure, 1973 provides specific types of Court of Magistrates. Sections 11 to 23 of the Code lay down the provisions as to various classes of Magistrates and their jurisdiction.  

---

**350**  
*11. Courts of Judicial Magistrates.— (1) In every district (not being a metropolitan area), there shall be established as many Courts of Judicial Magistrates of the first class and of the second class, and at such places, as the State Government may, after consultation with the High Court, by notification specify: Provided that the State Government may, after consultation with the High Court, establish, for any local area, one or more Special Courts of Judicial Magistrates of the first class or of the second class to try any particular case or particular class of cases, and where any such Special Court is established, no other Court of Magistrate in the local area shall have jurisdiction to try any case or class of cases for the trial of which such Special Court of Judicial Magistrate has been established. (2) The presiding officers of such Courts shall be appointed by the High Court.*
The High Court may, whenever it appears to it to be expedient or necessary, confer the powers of a Judicial Magistrate of the first class or of the second class on any member of the Judicial Service of the State, functioning as a Judge in a Civil Court.

12. Chief Judicial Magistrate and Additional Chief Judicial Magistrate, etc.— (1) In every district (not being metropolitan area), the High Court shall appoint a Judicial Magistrate of the first class to be the Chief Judicial Magistrate.

(2) The High Court may appoint any Judicial Magistrate of the first class to be an Additional Chief Judicial Magistrate and such Magistrate shall have all or any of the powers of a Chief Judicial Magistrate under this code or under any other law for the time being in force as the High Court may direct.

(3) (a) The High Court may designate any Judicial Magistrate of the first class in any sub-division as the Sub-divisional Judicial Magistrate and relieve him of the responsibilities specified in this section as occasion requires.

(b) Subject to the general control of the Chief Judicial Magistrate, every Sub-divisional Judicial Magistrate shall also have and exercise, such powers of supervision and control over the work of the Judicial Magistrate (other than Additional Chief Judicial Magistrates) in the sub-divisions as the High Court may, by general or special order, specify in this behalf.

13. Special Judicial Magistrates.— (1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers, conferred or conferrable by or under this Code on a Judicial Magistrate of the first class or of the second class, in respect to particular cases or to particular classes of cases, in any local area, but not being a metropolitan area:

Provided that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.

(2) Such Magistrates shall be called Special Judicial Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court, may, by general or special order direct.

(3) The High Court may empower a Special Judicial Magistrate to exercise the powers of a Metropolitan Magistrate in relation to any metropolitan area outside his local jurisdiction.

14. Local Jurisdiction of Judicial Magistrates. — (1) Subject to the control of the High Court, the Chief Judicial Magistrate may, from time to time, define the local limits to the areas within which the Magistrates appointed under Section 11 or under Section 13 may exercise all or any of the powers with which they may respectively be invested under this Code:

Provided that the Court of a Special Judicial Magistrate may hold its sitting at any place within the local area for which it is established.

(2) Except as otherwise provided by such definition, the jurisdiction and powers of every such Magistrate shall extend throughout the district.

(3) Where the local jurisdiction of a Magistrate, appointed under Section 11 or Section 13 or Section 18, extend to an area beyond the district, or the metropolitan area, as the case may be, in which he ordinarily holds Court, any reference in this Code to the Court of Session, Chief Judicial Magistrate or the Chief Metropolitan Magistrate shall, in relation to such Magistrate, throughout the area within his local jurisdiction...
be construed, unless the context otherwise requires, as a reference to the Court of Session, Chief Judicial Magistrate, or Chief Metropolitan Magistrate, as the case my be, exercising jurisdiction in relation to the said district or metropolitan area.

15. Subordination of Judicial Magistrates.— (1) Every Chief Judicial Magistrate shall be subordinate to the Sessions Judge; and every other Judicial Magistrate shall subject to the general control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate.

(2) The Chief Judicial Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Judicial Magistrates subordinate to him.

16. Courts of Metropolitan Magistrates.— (1) In every metropolitan area, there shall be established as many Courts of Metropolitan Magistrates, and at such places, as the State Government may, after consultation with the High Court, by notification, specify.

(2) The presiding officers of such Courts shall be appointed by the High Court.

(3) The jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area.

17. Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate.— (1) The High Court shall, in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area.

(2) The High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate, and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force as the High Court may direct.

18. Special Metropolitan Magistrates.—(1) The High Court may, if requested by the Central or State Government so to do, confer upon any person who holds or has held any post under the Government, all or any of the powers conferred or conferrable by or under this Code on a Metropolitan Magistrate, in respect to particular cases or to particular classes of cases in any metropolitan area within its local jurisdiction:

Provided that no such power shall be conferred on a person unless he possesses such qualification or experience in relation to legal affairs as the High Court may, by rules, specify.

(2) Such Magistrates shall be called Special Metropolitan Magistrates and shall be appointed for such term, not exceeding one year at a time, as the High Court may, by general or special order, direct.

(3) The High Court or the State Government, as the case may be, may empower any Special Metropolitan Magistrate to exercise, in any local area outside the metropolitan area, the powers of a Judicial Magistrate of the first class.

19. Subordination of Metropolitan Magistrates.—(1) The Chief Metropolitan Magistrate and, every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.
Prostitution: In United States almost all states have laws making it illegal to engage in, promote, or profit from prostitution. The term "prostitution" generally means the
commission by a person of any natural or unnatural sexual act, deviate sexual intercourse, or sexual contact for monetary consideration or other thing of value. An escort service is any business, agency or person who, for a fee, commission, hire, reward or profit, furnishes or offers to furnish names of persons, or who introduces, furnishes or arranges for persons, who may accompany other persons to or about social affairs, entertainments or places of amusement, or who may consort with others about any place of public resort or within any private quarters. Escort services are generally legal, but if they are a cover for prostitution, they are not. Besides engaging in, offering, or soliciting acts of prostitution, laws, which vary by state, also make it a crime to do the following:

- Cause or aid a person to commit or engage in prostitution.
- Procure or solicit patrons for prostitution.
- Provide persons or premises for prostitution purposes.
- Receive or accept money or other thing of value pursuant to a prior agreement with any person whereby he or she participates or is to participate in the proceeds of any prostitution activity.
- Operate or assist in the operation of a house of prostitution or a prostitution enterprise.

The following is an example of a New Mexico statute defining prostitution:

"Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire. As used in this section "sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission. Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor."351

Currently in the UK, prostitution is not illegal however the laws serve to make providing sex in exchange for money difficult and dangerous. Soliciting (advertising sexual services), streetwalking and brothels (where more than one woman sells sex in an apartment) are illegal. Kerb crawling is illegal in most of the UK but different laws apply

351 http://definitions.uslegal.com/p/prostitution/
in Scotland. These laws are currently under review and a draft bill is in the process of consultation. In all of the UK, paying for sex with a woman is not illegal. These laws firmly place the criminality of prostitution on the women. Why does the law criminalise the supply of sexual services but not the demand? With other illegal activities such as drugs, both the supply and the demand are criminalised.

These laws firmly fail women who have been trafficked into the UK or any woman who has been coerced or forced to some extent into prostitution. If they are caught in a brothel they have committed an offence under the law and may be given a jail sentence, or more normally a trafficked woman is deported back to her country of origin where she is often met by traffickers. She may be trafficked to a new destination so that the nightmare continues.

Under Indian Law normally, the word "prostitution" means an act of promiscuous sexual intercourse for hire or offer or agreement to perform an act of sexual intercourse or any unlawful sexual act for hire as was the connotation of the Act. It has been brought within its frame, by amendment, the act of a female and exploitation of her person by an act or process of exploitation for commercial purpose making use of or working up for exploitation of the person of the women taking unjust and unlawful advantage of trapped women for one's benefit of sexual intercourse352 the definition given under Section 2(f) was:

"Prostitution" means the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind."

It is clear from this definition, that, in order to constitute prostitution, the act of the female must be an act of offering her body for promiscuous sexual intercourse and that his must be for some consideration or hire, whether in money or in kind. In other words, it is not enough to constitute prostitution within the meaning of the Act to offer the feminine body for promiscuous sexual intercourse, but it must be further established that such offering was for hire which might be either in money or in kind. It must also be recognized that in most cases these two ingredients of prostitution can only established by some circumstantial evidence, because direct evidence is usually impossible to

---

intercourse with men and that must be taken to be the meaning. The word “prostitution” is not confined to acts of natural sexual intercourse but includes any act of lewdness. Prostitution is proved if it is shown that the woman offers her body for purposes amounting to common lewdness in return for the payment of money.\textsuperscript{353} obtain in offences of this nature\textsuperscript{354} The ordinary and commonly understood meaning of the term ‘prostitution’ is the offering of the person for promiscuous sexual gratification.

“Prostitution” is the practice of a female offering her body to a discriminate intercourse with men, usually for hire. Prostitution involves indiscriminate employment of a woman's body for hire. Obviously, it excludes intercourse which a person may have with a permanently kept concubine or with a woman without paying any consideration either in cash or in kind. For convicting a person for carrying on prostitution, there must be indiscriminate sexuality requiring more than one customer of the prostitute but in a given case where there are circumstances which would legitimately lead to the inference that the person concerned has been indulging in sexual intercourse for money indiscriminately, a conviction can well as be sustained on such evidence\textsuperscript{355}. Clause (e0 of Section 2 which defined “prostitute” has since been deleted by Amendment Act 46 of 1978, with effect from 2-10-1979, but the definition of “prostitution” in clause (f) of Section 2, as it now stands after 1986 amendment specifically covers the term “prostitute” also. Act of sexual intercourse are acts of prostitution in one strict sense of the term. The ordinary and commonly understood meaning of the word ‘prostitution’ is the offering of the person for promiscuous intercourse with me and that must be taken to be its meaning. The fact that a woman was the kept of one person for four years and during that time she also had paramour is not sufficient to constitute the woman prostitute. The ideal underlying prostitution is that a woman should surrender her body for monetary consideration to someone who is not in law entitled to have sexual intercourse with her. The position of a mistress in not necessarily that of a prostitute.

\textsuperscript{353} Emperor v. Lalya Bapu Jadhav, AIR 1929 Bom. 266.
\textsuperscript{354} State of Bihar v. Jagrup Singh, AIR 1963 Patna 381 at 382.
\textsuperscript{355} In re : Devkumar, 1972 Ma. L.J. (Cr.) 150.
The relationship is of a more permanent nature than casual relationship implied in prostitution. Having a stray paramour would not constitute a woman a prostitute\textsuperscript{356}. A woman who is a prostitute by profession and whose trade is to let out her body to all or to visitors of a specified class is a public prostitute but where she is the employee of one man or has been living with different lovers at different occasions but with one at a time, she is not a public prostitute\textsuperscript{357}. A prostitute would answer the description of a public prostitute unless she be kept by some persons exclusively in which case she can be said to be kept by that person and to be not available for the purposes of prostitution. The expression "prostitute" itself means a woman who offers her body to indiscriminate sexual intercourse especially for hire. Such a person would answer the description of a public prostitute.\textsuperscript{358} Where one of the accused persons was found having sexual intercourse in a room in the circuit house with a woman and Rs.1,000/- was given to her for the purpose of the sexual intercourse, so as to bring it within the clause "sexual exploitation for commercial purposes" and though the witnesses had spoken in detail, the contents of the confessional statement of the woman could not be looked into excepting to the limited extent that the sum of Rs.1,000/- was seized from the house of the woman, it was held that there was no admissible evidence to show that the sum of Rs.1000/- was paid by any one of the accused to her for the purpose of sexual exploitation. Thus, evidence was lacking to show that there was prostitution\textsuperscript{359}.

In order to constitute an act of prostitution the following ingredients have/had to be present. Prior to Amendment Act 44 of 1986

(i) a female must offer her body to an indiscriminate intercourse with men, usually for hire. It must be promiscuous intercourse for hire.

(ii) There must be 'sexual intercourse';

(iii) It must be for hire. The consideration may be in cash or kind.

After Amendment Act 44 of 1986:

\textsuperscript{356} Emperor v. Lalya Bapu Jadhav, AIR 1929 Bom. 266.

\textsuperscript{357} Moti Jan v. Municipal Committee, Delhi, AIR 1926 Lahore 461 at 463

\textsuperscript{358} Razia v. State, AIR 1957 All. 340 at 341

\textsuperscript{359} Kalyansundaram v. State, 1994 Cr.L.J. 2487 at 2487 at 2489 (Mad.)

220
a) there must be sexual exploitation or abuse of any person;
b) it must be for commercial purposes.\(^{360}\)

The activity carried on in a given premises will amount to "prostitution" within the meaning of Sec. 2 (f) of the Act only if sexual abuse or exploitation of a person is done for a commercial purpose. For the activity to become one with a commercial purpose, it should partake the character of a business or one carried on for profit.\(^{361}\)

**Abuse:**

The word "abuse" has a very wide meaning everything which is contrary to good order established by usage amounts to abuse. Physical or mental maltreatment also is an abuse. An injury to genital organs in an attempt of sexual intercourse also amounts to sexual abuse\(^{362}\).

Abuse refers to the use or treatment of something (a person, item, substance, concept, idea or vocabulary) that is harmful. It can be classed by the target of abuse or the type of abuse.

- **Psychological abuse:** coercion, humiliation, intimidation, relational aggression, parental alienation or covert incest: Where one person uses emotional or psychological coercion to compel another to do something they do not want, or is not in their best interests; or when one person manipulates another's emotional or psychological state for their own ends (see battered person syndrome), or commits psychological aggression using ostensibly non-violent methods to inflict mental or emotional violence or pain on another.

- **Physical abuse:** Where one person unlawfully inflicts physical violence or pain on another.

- **Sexual abuse:** The improper use of another person for sexual purposes, generally without their consent or under physical or psychological pressure (also,

---

\(^{360}\) http://www.indiankanoon.org/doc/607345/

\(^{361}\) Radhakrishnan v. State of Kerala • 2008 (2) KLT 521

\(^{362}\) Gaurav Jain v. Union of India, 1997 SC 3021 at 3033: (1997) 8 SCC 114

Kamaljeet Singh (In Judicial Custody) v. State on 29/1/2008

http://www.indiankanoon.org/doc/607345/ visited on 24.7.2009 (Text down loaded for use in research)
child sexual abuse, whether abused by parents, those \textit{in loco parentis} or strangers).

- \textit{Spiritual abuse}: abusive or aberrational practices identified in the behavior and teachings of some churches, spiritual and religious organizations and groups. These types of groups or organizations could be more accurately defined as a cult.

- \textit{Verbal abuse}: When a person uses profanity, demeaning talk, or threatening statements.

- \textit{Human rights abuse}.

- \textit{Legal abuse}.

- \textit{Drug abuse}:\footnote{http://en.wikipedia.org/wiki/Abuse visited on 24.7.2009\hspace{1cm}http://en.wikipedia.org/wiki/Abuse visited on 24.7.2009 \hspace{1cm} Retrieved for Research only}

- \textit{Socio-Economic Abuse}

\textbf{Promiscuous:} After the amendment to the Act in 1986, prostitution is not confined to offering of the body to a promiscuous sexual intercourse. In Shorter Oxford English dictionary the term, "promiscuous" has been explained as:

(a) Consisting of members or elements of different kinds massed together without order, or mixed or disorderly composition or character, also of various kinds mixed together;

(b) That is without discrimination or method; confusedly mingled, indiscriminate;

(c) of an agent or agency; Making no distinctions; indiscriminating

The word "promiscuous" means "indiscriminate". It excludes intercourse which a person may have with a permanently kept concubine. The Important of that word is that the woman or girl offering her body offers it for hire to any one who desires it for sexual intercourse\footnote{State of Kerala v. Pathumma, 1969 Cr.L.J. 697 at 696 (Ker).}
Prostitution involves a more or less plural and indiscriminate sexuality. Ramaswami, J. in *K.E. Adam. v. State*,365 has cited with approval an observation by Beaumont C.J. in an unreported case, to the effect that:

"prostitution involves a more or less indiscriminate employment of the woman's body for hire... I do not say that it is a universal definition, and I do not suggest that a prostitute is bound to be entirely indiscriminate and to accept the first customer who offers her price like cabman on the rank. But I certainly think that prostitution involves more than intercourse with the man."

The point here is that, as the definition is framed, this plural and indiscriminate sexuality will be a matter of interference from the facts; it is certainly no necessary that the evidence of more than one customer of the prostitute should be adduced366

It is true that the Magistrate did not make any definite finding that the woman indulged in prostitution in the flat No.59, Rafi Ahmed Kidwai Road. Even if there is such a finding by implication, there is hardly any evidence to show that she indulged in prostitution in that flat. Prostitution is defined in the Act as an act of female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind and nothing short of that would be prostitution. The Magistrate has found on the evidence that various people used to visit the flat and were entertained with drinks. He also found that they created disturbance causing annoyance to other tenants of the house, and several witnesses spoke about great noise coming from inside the room in her occupation. This does not prove that she indulged in prostitution in the room, i.e., she offered her body for promiscuous sexual intercourse for money. The prosecution examined PW. 5 an Assistant Commissioner of Police but he stated that he had no information as to the fact that the woman was using the room in the said premises as a brothel. This is a finding based upon no evidence and a wrong interpretation of the provision relating to prostitution367.

365 C.A. No. 536 of 1959
When sexual intercourse is a promiscuous intercourse? In the instant case neither, accused 1 nor accused 2 stated in the course of their explanation under Section 342 (new Section 313 of the Code of Criminal Procedure that they were acquainted with one another, or that they were old acquaintances, or that even if they had not become acquainted with one another, or their acquaintance was not of a long duration, the sexual intercourse between them was attributable to any fondness or infatuation which the one had for the other. It seems extremely improbable that Suseela, young as she was, should have developed any infatuation or attraction for Nabi who was twice as old as she was and, there is no evidence that Nabi, in spite of his advanced years, was such a handsome person as to be able to seduce Suseela and to persuade her to have sexual intercourse with him. This fact taken along with the evidence given by the witnesses that there was an eight anna coin somewhere on the carpet on which Suseela slept with Nabi, makes it abundantly clear that Suseela gave her body to Nabi for gain.

That the sexual intercourse was a promiscuous intercourse and not the sexual intercourse between two lovers or between persons between whom there was a relationship of concubine, is what can be gathered from the evidence of Keshav PW 1. The evidence of Keshav PW 1 and the evidence of Sivaraj PW 5, a neighbour of Suseela, that Suseela along with the other women accused was in the habit of displaying her person fancifully attired and was indulging in act of solicitation when persons were walking on the road, clearly excludes the possibility of the sexual intercourse between Suseela and Nabi being anything other than promiscuous. What be can inferred from that is that Suseela was exercising the profession of a prostitute and that she was inviting persons traveling along the road to walk into her room so that she may offer for hire her body for such intercourse. What her conduct further demonstrates is that she was willing to so offer her body to any one who was willing to pay her the hire. The discussion so far made therefore, transports to the conclusion that Suseela did offer her body to Nabi for promiscuous sexual intercourse for a hire, and that, precisely is prostitution as defined by Section 2 (f) of the Act. That she carried on that act of prostitution with Nabi is what is proved by the fact that Nabi when invited by Suseela walked into her room, paid her a sum of eight annas and slept with her.
The District Magistrate was, in error in thinking that the absence of spermatozoa on the lungi and petticoat has falsified the prosecution case that Nabi slept with Suseela. It is indisputable that in the case of some persons the emission may not contain spermatozoa and that, from the evidence produced by the prosecution, it is impossible to resist the conclusion that the wetness in the lungi and the petticoat was caused only by the emissions during copulation\textsuperscript{368}.

\textbf{Keeping and Managing}

The entire scheme of the Act is not such as to render the prostitute herself criminally liable, for the mere act of prostitution. It is not correct to suggest that the word “keeping" occurring in Section 3(1) of the Act implies that even the prostitute, by her prostitution, may be assisting in the “keeping" of the brothel, it not in its management or maintenance. There is no doubt that this was not the intention of the Legislature. Had that been so, nothing would have been easier than to make the prostitute strictly liable for any act of prostitution carried in the premises which could be inferred to be a brothel. On the contrary it is significant that "keeping" though distinct from "management" has to be construed \textit{ejusdem generis} with that latter word, and, in the "Law Lexicon"\textsuperscript{369} the verb "to keep" is said to include the sence of “to conduct or manage, to have the control and management of”. There is absolutely nothing in the evidence which would justify the inference that accused 3; Ratanamala was liable for this offence. The entire record merely establishes that she, a young girl of about 19, was either the victim of circumstances, or of her own predisposition, to the extent of willfully prostituting herself upon the occasion for hire, with the decoy witness, PW 1. There is absolutely nothing else against her. Held that she was clearly entitled to acquittal\textsuperscript{370}.

Section 3 of the Immoral Traffic (Prevention) Act penalizes the keeper of manager or the person who acts as or assists in the keeping or management of a brothel. It is clear that it is intended to hit at persons who establish and maintain house of prostitution, or assist in their keeping or managing\textsuperscript{371}. In explaining the connotation of

\begin{footnotesize}
\begin{enumerate}
\item State of Mysore v. Susheela, AIR 1966 Mysore 194 at p.197.
\item Ramanatha Iyer, 1940
\item In re: Ratanamala, AIR 1962 Mad. 31 at 34 : 1962 (1) Cr. L.J. 162 (Mad.).
\item State v. Gaya, AIR 1960 Bom. 289 : 1960 Cr. L.J. 893 (Bom.)
\end{enumerate}
\end{footnotesize}
Keeping the Apex court held that "It may be true that a place used once for the purpose of prostitution may not be a brothel, but it is a question of fact as to what conclusion shall be drawn about the use of a place about which information had been received that it was being used as a brothel to which a person goes and freely asks for girls, where the person is shown girls to select from them and where he does engage a girl for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as brothel and that the person in charge was so keeping it" 372.

Mere collection of rent from inmates cannot be held as acted or assisted in keeping of brothel. Magistrate relied on the evidence of pimps and prostitutes, including those arrested in the same raid and failed to consider the value of uncorroborated evidence of accomplices and also the defence evidence that the petitioner was biri shop owner in the mosque. The finding that he is a manager is not based upon legal evidence. Then again, Section 3(1) of the Act provides that any person who keeps or manages or acts or assists in the keeping or management of a brothel shall be punishable. The evidence adduced is that the petitioner realized rents from the inmates. Is collecting rent tantamount to keeping or managing or acting or assisting in the keeping or management of a brothel? Acting or assisting in keeping or management of the brothel involves something more than mere collection of rent, but there is no evidence as to that. There is no evidence that the petitioner ever was present in the house while visitors were received or in any way acted or assisted in running the brothel. By a parity of reasoning, could it be said that people who supplied water or electricity to the premises acted or assisted in the running of a brothel? The mere fact that he collected rent from inmates is not sufficient; prosecution has to prove that he acted or assisted in the keeping or management of brothel, some kind of participation beyond mere collection of rent. That prosecution has failed to prove and a conviction under Section 3 (1), therefore, cannot be supported. Petitioner is convicted under section 3 (2) (a) and (b) There is no evidence that he was the person in charge and allowed the premises to be used as a brothel, or let out the premises or that he is actually a party to the lease of the premises as a brothel. The only evidence is that he

collected rent and therefore by identical line of reasoning this conviction under Section 3(2) (a) or (b) cannot be supported.\textsuperscript{373}

Section 3 of the Act provides the punishment for keeping/managing or assisting in keeping or managing of a brothel. Section 2 (a) of the Act defines that brothel includes any house, room or place or any portion of any house, room or place, which is used for the purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes. It is obvious that for proving an offence under Section 3 of the Act some specific instances of prostitution must be proved and then it must further be proved that the accused was managing/keeping the place with the knowledge that same is being used for the purposes of sexual exploitation or abuse for the gain of another person or for the mutual gain of two or more prostitutes.

In the present case, the police did not send any decoy customer to the Kotha to strike a deal with the appellant for providing girl for prostitution. Even the girl Allivelu PW 3 does not say that appellant ever provided girls for prostitution or allowed any body else to use Kotha for prostitution. In examination-in-chief PW 3 Allivelu has completely exonerated the appellant by stating clearly "I do now know the other accused present in Court". Her entire statement is against the other accused Nagina. But in cross-examination she states that the appellant was the owner of the Kotha and she used to take money from the girls. The factum of ownership of Kotha has been admitted by the appellant herself in her statement under Section 313, Cr. P.C but there is no evidence whatsoever that she took money from prostitutes. PW 3 herself did not say that she ever paid any amount to the appellant. Her statement was that the appellant was the owner of the Kotha and she used to be called Badi Didi and she used to take money from the other girls. PW 3 Allivelu herself denied that the appellant used to help Nagina in prostitution and used to take earnings of the prostitution. So the mere fact that the appellant is the owner of the building/Kotha, in absence of any definite evidence to prove any specific instances of prostitution or that the said Kotha was used for

prostitution with the connivance of the appellant, would not be sufficient to make out offence under Section 3 of the Act.  

State v. Gaya\(^{375}\) was a trap case, with the use of a decoy witness, upon lines very similar to the present prosecution, if not almost identical. The conviction was under Section 3(1) of the Central Act 104 of 1956, and the Judge made the following observations, which are highly pertinent:

> "The Act was passed in pursuance of the international Convention signed at New York for the suppression of immoral traffic in women and girls. It was never intended that the woman or girls used for such traffic should be liable to punishment ... To my mind, nothing can be more reprehensible than the conduct of this investigation. Under the very auspicious of the officers charged with the duty of suppressing immoral traffic in women and girls Sk. Kasom had sexual intercourse with Saru. Rather than suppress such traffic, the investigation encouraged it. If investigations under this Act are to proceed in this manner, in conceivable cases it will be difficult to determine whether a person was committing an offence under the Act or carrying on an investigation. Such investigations also will not have any salubrious effect upon the public mind and will not achieve the object for which the Act was passed."  

So far as the offence about the premises being used for the purposes of a brothel by accused 1 to 3 is concerned, if left aside the evidence of PW 4, for a minute, there is only the evidence that on 14-7-1963, a woman living in the premises in question namely, accused, had committed an act of prostitution with a stranger for money with the assistance of her servant accused 1. For the interference that accused 3 was living on the earnings of his wife by hiring her body for promiscuous intercourse, the prosecution has to rely on the evidence of PW 4. PW 4's evidence on this point cannot be considered very satisfactory. His version is that in spite of his being aware of the reprehensible conduct of accused 3 in making his wife to prostitute herself against her

\(^{374}\) Mumtaj alias Behri v. State (NCT of Delhi), 2003 Cr.L.J. 533 at 536 (Delhi).

\(^{375}\) AIR 1960 Bom 289

\(^{376}\) In re: Ratnamala, AIR 1962 Mad. 31 at 34: 1962 (1) Cr. L.J. 162.
will, he and his relations persisted in their visits to the house of accused 2 and 3 that at times the objectionable activities of accused 2 and 3 and were conducted almost under their nose.

This version appears to be too artificial and unnatural to be accepted. Reference was made in the course of his evidence to certain prior complaints by his father to the police regarding the prostitution of accused 2 with the connivance of her husband for making a living thereby. But no copies of these complaints have been produced. It is possible that PW 4 suspected that something was wrong with his sister and her husband but the circumstances under which he claims to have seen them, appear to be too fanciful to be believed. If PW 4's evidence cannot be accepted, there are no other proper grounds for holding that the premises in question were used by the three accused persons for running a brothel.

The definition of "brothel" implies that the premises must have been used for the purpose of prostitution for the gain of another person or for the mutual gain of two or more persons. There is also evidence here of two prostitutes having worked for their mutual gain in these premises. Unless there is satisfactory evidence that accused 2's prostitution was for the gain of accused 3, her husband, there cannot be a finding that the premises in question was used as brothel. As one English decision tersely puts it, the terms "keeping a brothel" will not apply where one woman receives a number of men:377

It is not necessary that there should be evidence of repeated visits by persons to the place for the purpose of prostitution. A single instance coupled with the surrounding circumstances is sufficient to establish both that the place was being used as a brothel and that the person alleged was so keeping it.378

The mere fact that the accused is the owner of an undivided half of the house in which his daughter was leading the life of a prostitute does not amount to abatement of the offence under Section 6(1) of the Calcutta Suppression of Immoral Traffic Act, 1923379

377 State v. Foxon, 1956-1 QB 67.
When the accused collected his rent daily from his women-tenants whom he knew to be prostitutes, it is doubtful if Section 6 of the Calcutta Suppression of Immoral Traffic Act, 1923 would apply. But if the accused goes at night and sits at the gate, the only possible conclusion is that the accused was doing something more than collecting the rent and that he was actively associating himself with the business of the brothel.380

In the instant case it is proved by the evidence that the bogus punter Lalji approached the applicant himself for the services of a woman for the purpose of prostitution, and that it was the applicant himself who offered two girls to Lalji one of whom was Indumati, the wife of the applicant. In view of this evidence, it must be held that the applicant himself was keeping or managing the brothel. His conviction under Section 3(1) would be quite proper provided there has been a charge under Section 3(1) of the Act. But it is contended that charge does not relate to keeping or managing or acting or assisting in the keeping or managing his house as a brothel; and that the charge merely relates to using a house as brothel, and that the charge does not fall under Section 3(1) of the Act. The charge is clearly under Section 3(2) of the Act.381

In K.E.Adam v. State, Ramaswami, J. after carefully scrutinizing of the Central Act 104 of 1956 clearly reveals that the Act was aimed at the suppression of commercialized vice, and not at the penalisation of the individual prostitute, or of prostitution in itself. This is of some importance in considering the case against the appellant Ratnamala (accused 3).Section 3 (1) of Central Act, 104 of 1956 runs as follows.— "any person who keeps or manages, or acts or assists in the keeping or management of, a brothel shall be punishable........" The Public Prosecutor has rightly emphasized that this wording is different from the text of the corresponding Section 5(1) in Madras Act V of 1930, which was to the effect that "Any person who keeps or manages or acts or assists in the management of a brothel shall be punished ............" The Central Act deliberately includes the words" or acts or assists in the keeping or management of" Thus implying at least a fine shade of distinction between 'keeping' and 'management'. "Brothel" is defined under Section 2 (a) as including" any

380 Kambho Bera v. Emperor, AIR 1928 Cal. 381 at 382.
house, room or place or any portion of any house, room or place which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes. "The last part of the definition is certainly significant. I imply that where a single woman practices prostitution, for her own livelihood another prostitute, or some other person being involved in the maintenance of such premises, her residence will not amount to a "brothel". There cannot be any clearer indication of the purposes of the Act, which is to strike down commercialized vice, not to make the unfortunate prostitute, herself often a victim of economic pressures and social maladjustment, a criminal under the law.\textsuperscript{382}

**Seducing:** The term "seduced to" can properly be applied only to that which leads to-the first act of illicit intercourse, or whether it can be properly applied to that, which precedes each subsequent act of illicit intercourse. The Oxford Dictionary defines "seduction" in this connexion as "to induce a woman to surrender her chastity," which suggests at the outset that the term "seduction" can only apply properly to the first act of illicit intercourse, for once that act has been completed; the girl has surrendered her chastity. We would therefore hold that the term seduction.\textsuperscript{383}

There is a conflict of view on the interpretation of the word "seduced" in the section. The Dictionary meaning of the word 'seduce" is to lead astray, to entice, to corrupt or to induce a woman to perform an act of unchastity with oneself. The word can be used in two senses, one wider and the other narrower. In the narrower sense, it may connote the first lapse from the path of virtue. In the wider sense, it includes every device or persuasion, every word or act Which induced a girl to submit to illicit intercourse? Indeed, every illicit intercourse must be preceded by some overture on the part of the male.

After the surrender of chastity for the first time, a girl may lead a life of rectitude. Can it be said that further acts of device or inducement to draw her from the path of rectitude are not acts of seduction? If such a narrow meaning is given, the salutary

\textsuperscript{382} In re: Ratnamala, AIR 1962 Mad. 31 at 33 : 1961 MLJ (Cr.) 686 : 1961 All Cr. R. 155 : 1962 (1) Cr. L.J. 162 (Mad.)

\textsuperscript{383} Baijnath vs Emperor. All on 16/3/1932
provisions of Section 361 should be confined only to the first lapse on the part of an innocent girl from the conditions of purity and leave her to the mercy of unscrupulous persons. Therefore, though the words 'Seduction' and "illicit intercourse" are distinct, more emphasis should be laid on the words "illicit intercourse" rather than on the word 'seduction'.

Any act on the part of a person to lead a woman astray from the path of rectitude is seduction and if it is followed by intercourse, it will be seduction for illicit intercourse. The Court of Criminal Appeal in ‘Rex v. Frederick Moon’, defined the word "seduction" found in Section 17 of the Children Act, 1908. Under that section, it is provided that if any person having the custody, charge or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he should be guilty of misdemeanor. Seduction under that section is a substantial offence and seduction for illicit intercourse is an aggravated from of it.

Lawrence J. held having regard to the scope of the section and the purpose behind it, that seduction in that Act has its ordinary sense of inducing a girl to part with her virtue for the first time. The learned Judge himself realized that the word has two meanings and that, in the wider sense, it also means inducing a girl to have carnal connection at any time or/on any occasion. I do not think that the meaning attributed to the word, having regard to the scope of that Act, can be applied to a case under S. 361, I.P.C.

Boys and Young JJ. in—'Baijnath v. Emperor', AIR 1932 All 409 (D) confirmed the scope of that word to its narrower meaning. The reason for their conclusion is found in the following observation:

"The important question is whether the term "seduced to" can properly be applied only to that which leads to the first act of illicit intercourse, or whether it can be properly applied to that which precedes each subsequent acts of illicit intercourse. The Oxford Dictionary defines "seduction" is this connection as "to induce a woman to surrender her chastity' which suggests at the outset that the term "seduction" can only apply properly to the first act of illicit intercourse, for

---

384 In Re: Khalandar Saheb v. Unknown on 29 October, 1954
385 (1910) 1 KB 818
once that act has been completed, the girl has surrendered her chastity. We would, therefore, hold that the term “seduction” can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile or unless possibly there is an intention on the accused’s part that the girl should be seduced by some different man.” Divatia J. in Lakshman Bala v. Emperor.\(^{386}\) rejects this narrow interpretation.

After pointing out the conflict of decisions, the learned Judge observed

“In my opinion, the term “seduce” is used in this section in the general sense of enticing or tempting, not in the limited sense of committing the first act of illicit intercourse. The substantial offence in the section is the act of kidnapping or abduction and the intention or knowledge that the girl may be Forced or seduced to illicit intercourse raises it to an aggravated form of the main offence of kidnapping or abduction and punishable with greater severity. I do not think that the Legislature had in mind while enacting this section that it was only when a girl was kidnapped with the intention or knowledge that she should surrender her chastity for the first time, that kidnapping would become a more serious offence, while an act of kidnapping a girl even though avowedly for the purpose of having illicit intercourse with her would only amount to the simple offence of kidnapping, if there was previous intimacy with the girl. I think the material words in the section are ‘illicit intercourse’ rather than “forced or seduced”. It is the illicit nature of the intercourse for which the kidnapping or abduction takes place that constitutes the aggravation of the offence and not the priority in point of time of such intercourse”.

The same High Court in Emperor v. Ayubkhan Mirsultan,\(^{387}\) expressed a similar view. The learned Judge stated

“The girl’s consent might always be revoked, and if it were revoked, force or a further seduction would be essential before an act of illicit intercourse could take place, and even if it were not revoked, it is difficult to see how the act of

\(^{386}\) AIR 1935 Bom 189 (E) at p. 190:

\(^{387}\) AIR 1944 Bom 159 (F)
illicit intercourse could take place without at least some overture, however slight, being made by the male person, which overture, however, slight could properly be called a seduction to illicit intercourse".388

"The expression "seduced to illicit intercourse" in Section 368 is not intended to be restricted to inducing a girl to surrender her chastity for the first time. It is used to indicate a distinction between 'seduction' in the popular, usual or ordinary sense. "Seduced to illicit intercourse" means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse"389

Soliciting:

The Act itself has not defined the word "solicits"; Section 8(a) which is a different offence, refers to the temptation of a person, or to attracting a person for the purpose of prostitution. Presumably, the word 'solicits' conveys something more, and has the essential import of an oral entreaty or persuasion, used to achieve the object of prostitution. In "Words and Phrases", Permanent Edition, Volume 39 at page 614, I find a comprehensive commentary on the expression "solicits". The most satisfactory definition that I can discover seems to be this: "to importune, entreat, implore, ask, attempt, try to obtain". ....Merely to indulge in some flirtation with a stranger, or to behave in such a way as to attract the attention of persons of the opposite sex, may, as I stressed earlier, be regrettable or immodest, but per se, it does not amount to any offence under Section 8(b) of the Act.390 In the construction of the words; "Whoever solicits any person for the purpose of prostitution," one may with advantage consult the dictionary for the meaning of the word "solicit" as the word is not defined in the Act. In the Oxford Dictionary391, the word "Solicit" is defined under sub-heading 3, to mean "to urge or importune" and under sub-heading 4, the meaning of the word is stated to be "to make immoral attempts upon". In Webster’s Dictionary, 1961 Edition, the word "Solicit' is defined to mean "to entreat or importune" under sub-heading 3, and "to accost (a man) for immoral purposes" under sub-heading 6©. The word 'prostitution' is defined in

388 at p. 159:
389 Dolgobinda Rath vs The State on 29/1/1958
390 In re v. Kamala AIR 1966 Madrass 312
Section 2(f) of the Act to mean "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind. ". If word 'solicit' as stated in the two standard dictionaries, means to urge or importune or to accost a man for unmoral purposes, then clause (b) of Section 8, which provide a penalty for one who solicits a person for Prostitution must be held to cover every case in which a person urges or accosts another for the purposes of prostitution, and whether the urging or accosting is by the prostitute herself or by any other person can make no difference to the criminality of the act. 392 ...... " therefore, "Soliciting for the purposes of prostitution" would imply that the female must herself solicit another person in order that he may avail himself of her body for promiscuous sexual intercourse. It has been overlooked that persons other than the prostitute could urge or accost others for purposes of prostitution and indeed it is not unoften that the soliciting is indulged in more by the mobile middleman than by the prostitute herself. 393

Public Places:

A public place is generally an indoor or outdoor area, whether privately or publicly owned, to which the public have access by right or by invitation, expressed or implied, whether by payment of money or not, but not a place when used exclusively by one or more individuals for a private gathering or other personal purpose. The following is an example of a state law defining public places for smoking laws: "Public place" means any enclosed indoor area used by the general public or serving as a place of work containing two hundred fifty or more square feet of floor space, including, but not limited to, all restaurants with a seating capacity greater than fifty, all retail stores, lobbies and malls, offices, including waiting rooms, and other commercial establishments; public conveyances with departures, travel, and destination entirely within this state; educational facilities; hospitals, clinics, nursing homes, and other health care and medical facilities; and auditoriums, elevators, theaters, libraries, art museums, concert halls, indoor arenas, and meeting rooms. "Public place" does not include a retail store at which fifty percent or more of the sales result from the sale of tobacco or tobacco products, the portion of a retail store where tobacco or tobacco

---

392 State vs Premchand Kubchand on 22 July, 1963
393 Ibid para 7

235
products are sold, a private, enclosed office occupied exclusively by smokers even though the office may be visited by nonsmokers, a room used primarily as the residence of students or other persons at an educational facility, a sleeping room in a motel or hotel, or each resident's room in a health care facility. The person in custody or control of the facility shall provide a sufficient number of rooms in which smoking is not permitted to accommodate all persons who desire such rooms.

Living on the Earnings of Prostitution: Unlike most of the other countries in our country there is a practice under which members of a family usually live together, e.g., father and mother, and their children live together. It is quite conceivable, in fact it must be so, that there would be hundreds of prostitutes whose parents or other family members live with them, though they may not be economically dependent upon them and may not in any manner be encouraging, aiding, abetting or helping them in the carrying on of their profession or trade.

In the absence of there being any evidence that they are either living on the income of the prostitutes with whom they are living or are encouraging, aiding, abetting or helping them towards prostitution, it would be extremely risky and not free from danger to draw any presumption as contemplated by the above sub-section. A close scrutiny of the ingredients of the respective Sections 3 and 4 would clearly indicate that the ingredients of the offence under Section 3 are fundamentally different from the ingredients of the offence under Section 4. Although Section 4(1) is a lesser offence in

394 http://definitions.uslegal.com/p/public-place/
395 Section 4 of the Act suggests (1) Any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both [and where such earnings relate to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years]. [(2) Where any person over the age of eighteen years is proved (a) to be living with, or to habitually in the company or, a prostitute; or (b) to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that such person is aiding, abetting or compelling her prostitution; or (c) to be acting as a tout or pimp on behalf of a prostitute, it shall be presumed, until the contrary is proved, that such person is knowingly living on the earnings of prostitution of another person within the meaning of sub-section (1).]
point of the punishment there ought to be a separate charge of which the accused must have sufficient notice to meet. In the absence of the charge under Section 4 (1) of the Act and on the strength of a mere presumption embodied in Section 4(2) it may not be legally correct to convict the accused appellant for an offence under Section 4(1) of the Act.

In order to bring home the guilt against the accused for an offence under Section 4(1) of the Act, it is necessary to analyse Section 4 (1) of the Act. Sub-section (1) of Section 4 of the Act may be analysed as under:

If any person over the age of eighteen years knowingly lives, wholly or in part, on the earnings of prostitution of a woman or girl, he shall be punishable with—

(a) imprisonment for a term which may extend to two years, or
(b) fine which may extend to one thousand rupees, or
(c) both, and
(d) where the earnings related to the prostitution of a child or a minor, shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.

The provisions of Section 4 are justifiable on the ground that to allow a person over the age of eighteen years to live on the earnings of a prostitute is not only to encourage parasitism but also to offer inducement to the prostitute to carry on her profession or trade which she may not be inclined to carry on otherwise. Similarly the presumption against touts and pimps or persons who exercise control, direction or influence over a prostitute or aid, abet or compel her to carry on the trade or profession of a prostitute is a reasonable presumption and is in the interests of the public at large.

In the instant case, on the evidence it is clear that the wife of the applicant was a prostitute, and that the applicant, her husband, was living with her. The presumption mentioned in Section 4(2) of the Act may therefore, be drawn. But, it is contended that the presumption should be drawn only in the case of strangers living with or habitually in the company of a prostitute, and that such a presumption should not be drawn in the case of the husband of the prostitute, who is living with her. There is no reason to.

397 In re: Dhanalakshmi, 1974 Cr. L.J. 61 at 66 (Mad.)
restrict the scope of the presumption provided in Section 4(2) of the Act. If a stranger lives with a prostitute, a rebuttable presumption may be drawn, that such person is knowingly living on the earnings of a prostitute. If the husband lives with his wife, and allows his wife to be a prostitute, there is no reason for not believing that the husband was doing so for the purpose of living on the earnings of prostitution of his wife. If the husband allows his own wife to be a prostitute, the presumption would be stronger that he was doing so for the purpose of living on her earnings of prostitution. There is, therefore, no reason not to apply the presumption mentioned in Section 4(2) of the Act to the case of a husband living with his prostitute wife. In this case, therefore, such a presumption can be drawn, and when such a presumption is drawn, until the contrary is proved, it can be presumed that the applicant was knowingly living on the earnings of the prostitution of his wife. When such a presumption is drawn, that would be sufficient to constitute the house of the applicant a brothel, because 'brothel' includes any house, room, or place which is used for purposes of prostitution for the gain of another person. That the house in question was a brothel is therefore, proved by the evidence on record and the presumption to be drawn from Section 4(2) of the Act.

In another case, so far as accused 1 is concerned, there is ample evidence to show that, though he is the servant of accused 2, he actively abetted the act of prostitution by accused 2. Under Section 4(1) of the Act "Any person over the age of 18 years, who knowingly lives wholly or in part, on the earnings of the prostitution of a woman or girl shall be punishable." Under Section 4(2) if a person is proved to have exercised influence over the movements of a prostitute in such a manner as to show that such person is aiding, abetting or compelling her prostitution, he shall be presumed to be living on the earnings of prostitution. Here, accused 1 on the arrival of PW 1 negotiated the terms of the prostitution of accused 2. He receives money from PW 1 and gave it to accused 2. Though, he has been charged only under Section (1) of the Act, he can be convicted on the proved facts under Section 4(1) in this case which is a lesser offence. Two unreported judgments of Madras High Court in C.A. No. 663 of 1960 (Mad) and 667 of 1962 (Mad.) have laid down a similar view that even if the charge be under Section 3(1) of the Act, a conviction can be had on the same facts for

an offence under Section 4 (1) of the Act. Therefore, accused 1 is found guilty under Section 4 (1) of the Act.

**Procuring, inducing or taking [person], for the sake of prostitution.**

Any person who, under Section 5 (1) (d) it is necessary that the accused should have caused or induced the woman to carry on prostitution. In the absence of evidence that the accused was in any way connected with the woman prior to the incident, he cannot be held guilty. The carry on prostitution, is suggestive of more than a solitary instance of prostitution, which means that there must be indiscriminate sexuality, requiring of more than one customer of the prostitute before she can be held guilty. Where in the light of the evidence in the case that the accused would not have any hand in the conduct with the woman now or at any time previous to the incident, in the absence of any such evidence, the prosecution cannot invoke the provision of Section 5 (1) to implicate the accused to a charge under that section.

**Procure:** In the *Chambers Twentieth Century Dictionary*, the following meanings are given: “To obtain for one’s self or for another; to bring about; to attract; to urge earnestly; to pander; pimp.” In the *Concise Oxford Dictionary of Current English*, the meanings given for the word ‘procure’ are: “obtain by care or effort; acquire; bring about”. In the *Random House Dictionary of the English Language*, the meanings given are:

1. to obtain or get by care, effort, of the use or special means: to procure evidence.
2. to bring about, especially by unscrupulous and indirect means: to procure secret documents.
3. to obtain (women or girls) for the purpose of prostitution.
4. to act as a procurer or pimp.”

In the *Oxford (Pocket) Dictionary*, meaning of the word ‘procure’ is, “to succeed in getting (for another or with double object, or for oneself; please procure me a copy;
will procure it for you; must try to procure one), to bring about or cause by other's agency; be a procurer or procuress". In the same Dictionary, the word "procuration" is said to mean, "acting as another's agent, authority to do this. In the Webster's Seventh New Collegiate Dictionary\(^{405}\), the meanings given for the word 'procure' are "to take care of; to get possession of; obtain, to get and make available for promiscuous sexual intercourse; to bring about; achiever; to procure women."

In the Readers' Digest Great Encyclopedic Dictionary\(^{406}\), 'procure' means "obtain by care or effort; acquire; act as procurer or procuress", and 'procurers' means "men or women who procure women for gratification of another's lust".

In the New English Dictionary\(^{407}\), the word 'procure' means "to obtain (woman) for gratification of lust".

The various meaning extracted above would indicate that the word 'procure' means not only procuring for others but procuring for oneself. In enacting Section 5 (1) (a), the Legislature meant only persons who procure girls or women for the purpose of others, then the Legislature would have made its intention clearer by using proper words for it, for it is well-known that the Legislature would not and do not shy at repetitions. From the meaning given above, the word 'procurer' takes in not only persons who procure women for others but persons who procure women for themselves\(^{408}\).

**Can Transfer of Property be the Consideration of Prostitution**

A public policy which defeats statutory provision or does not correct the breach of a statutory mandate is always dangerous to use and apply. But if one the very same ground of public policy it is necessary to relieve a party, then the insistence on the procedural rule of denying a person in pari delicto or in particeps criminis the right of relief will be not furtherance of public policy, but its defeat. To deny a person who in this case is not even a party to the immoral contract, the right of relief in the instant appeal, is to perpetuate for ever the prostitution and a brothel in the same premises. The Court

---

405. Webster's Seventh New Collegiate Dictionary
406. Readers' Digest Great Encyclopedic Dictionary
in such an event as this is faced with a choice of evils and should be guided to chose the lesser evil. Both are good grounds of public policy, ordinarily public policy demands that High Court should not allow itself and its procedure to be used to aid the grant of relief to a claimant whom it finds to be a person in pari delicto or in particeps criminis. Within the meaning of Section 23 of the Contract Act that every court of law in this country will regard prostitution and brothel keeping as immoral, and shall not wait to discuss whether prostitution or brothels can be justified by the new fanged ethics of the modern society or by any Shavian enthusiast for 'Mrs. Warren's Profession'. Having made these two assumptions the question is, which consideration should be allowed to prevail.

To follow the former public policy ground is to perpetuate prostitution and brothel keeping. A decision to deny relief will be to hold that his property is for ever irrecoverable, and that the moral evil of prostitution or keeping a brothel is for ever irremediable. It is the duty of the Court in case of conflict of different grounds of public policy such as this to chose the lesser evil and discourage the greater evil. The lesser evil is the disregard of the purely procedural convention which is not sanctioned by Statue or any substantive law but is evolved by judicial conscience of not helping an impure party. The greater evil in this case will be perpetuation of the brothel and the prostitution. Therefore accord relief to the claimant in such a case and depart from the procedural convention of Courts tragically misconceived very often as an inflexible rule of law and obey the still higher rule of public policy of not permitting not only a void and illegal act forbidden and prohibited by Statute but also an immoral act under Section 6 (h) (2) of the Transfer of Property Act read with Section 23 of the Indian Contract Act. Consequently the very dictates of public policy which led the Courts to invent their self-imposed bar against an immoral party demand that the bar should be lifted so that greater interest of a larger public policy is served.

The doctrine that the Court does not grant relief to a person who is in pari delicto or in particeps criminis has been extended beyond its rational and legitimate limits. Delict or crime is ordinarily personal and not titular. But this procedural handicap which the Courts have evolved has been applied indiscriminately to innocent persons other than those in pari delicto or in particeps criminis. To extend that doctrine to such
persons as innocent trustees and executors under a Will to whom High Court has
granted probate is an unintelligible and unjustified extension of that principle whatever is
merits may be as between actual guilty parties. The Courts refused relief originally as
personal disqualification for the guilty claimant. No principle or reason which justifies the
Courts to visit this personal disqualification on an innocent party who did not participate
in the immorality. Application of the doctrine of *pari delicto* or in *particeps criminis* to the
case of innocent executors and trustees under a Will of which Calcutta High Court has
granted probate and whom the Court by its solemn orders asked to administer the
estate under the Will and to hold that they should not be permitted to bring to the notice
of this very same Court a transfer prohibited by the Statute of this country and that
relating to a party of the estate which High Court has made them responsible for
administering according to law is wholly indefensible and unjust. No hesitation in holding
that the plaintiff executors and trustees here are not in *pari delicto* or in *particeps
criminis*, either literally or metaphorically or legally and they are not so either by any
proprietary devolution because Section 6(h) (2) of the Transfer of Property Act says no
transfer of property at all can take place for immoral purpose. It has been found by the
trial Judge that the plaintiffs did not accept the defendant as a tenant after the death of
Ranubala which was the second issue before the trial Court and on which issue, Court
the upheld Judge’s finding of fact. In such a case therefore, it is all the more impossible
in fact of law to treat the trustees and executors as in *pari delicto* or in *particeps
criminis*409 *it ak Kamu v. Ranchod Zipru, AIR 1947; Bom 98 (S), AIR 1947; Bom 98 (S),
was a case of a transfer in consideration of future illicit cohabitation. It was held to be an
immoral consideration and therefore, void. A gift does not require consideration and part
cohabitation may be its motive but it was pointed out there that it would not be its object
and consideration. It was held, therefore, that a gift made out of gratitude for, or with the
idea of compensating past cohabitation is not *per se* void under 6(h) (2) of the Transfer
of Property Act read with Section 23 of the Indian Contract Act. But the more important
consideration discussed in that judgment by Lokur, J. is where His Lordship lays down

at page 203 that the equitable doctrine in (1874) 16 Eq. 275 (A), does not apply to transactions which are forbidden by law and are void. Thus, the doctrine according to the Judge could not be extended to transfer for an unlawful object or consideration. Lokur, J. says at page 203 of the Report

"But in India a transfer for an unlawful object or consideration within the meaning of Section 23, Contract Act, is expressly prohibited by Section 6 (h), T.P.Act. If the doctrine is extended to such transfers, the prohibition would be meaningless. This distinction has been emphasized by Lord Selborne on page 284 where he says: "..........I think if consistent with all sound principle, and with all authority, to recognize the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the defendant's trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law.

**Special Police Officer:**

Sub-section (1) of Section 13 of the Act provides that for each area there shall be a special police officer appointed by the State Government for dealing with offence under the Act in that area. Sub-Section (2) of Section 13 provides that the special police officer appointed by the State Government shall not be below the rank of an Inspector of Police. The word "the" has not been used before the words "Special Police Officer" in sub-section 13 of the Act before the words "Special Police Officer of a area". In Section 14 of the Act also the word "the" has been used before the words "Special Police Officer". Sub-section (3) of Section 13 of the Act provides that the State Government may associate with the Special Police Officer a non-official advisory body consisting of not more than five leading social welfare workers of the area to advise him on question of general importance regarding the working of the Act. If the intention of the Legislature had been that the word "a" in sub-section (1) of Section 13 of the Act may be interpreted in plural it would not have used the word "the" before the words "Special Police Officer" in sub-section (3) and (4) of the Act. The fact that the Act empowered the State Government to associate with the special police officer a non-official advisory body to advise him on questions of general importance regarding the working of the Act also shows that the Legislature contemplated that the interpretation of the word "a" in sub-
section (1) of Section 13 of the Act to be in the singular and not in the plural. The scheme of the Act points out to the appointment of only one Special Police Officer for each area for dealing with offences under the Act.  

**Appointment of Special Police Officer**

A special police officer may be appointed by name or he can be appointed by virtue of office held by him. The appointment of the "Deputy Superintendent of Police (City)" was valid and the person holding charge as Deputy Superintendent of Police (City) would be empowered to deal with offences under the Act. He need not be appointed by name. A Special Police Officer shall be appointed by or on behalf of the State Government for each area specified by such Government. Such Special Police Officer shall deal with offences under this Act and shall not be below the rank of an Inspector of Police. He shall be assisted by subordinate police officers for the efficient discharge of his duties. It is not required that the appointment of a Special Police Officer must be made by name. The notification issued by the Government of Bombay in exercise of the powers conferred by Section 13 of the Act appointing a Deputy or Assistant Superintendent of Police as Special Police Officer for the purposes of the Act for every sub-division of a district is a perfectly valid notification and a Deputy or Assistant Superintendent of Police in charge of a sub-division of a district would be a police officer or the purposes of Section 15 of the Act in regard to the area of the subdivision of the district of which the he is in charge.

**Police Duties:** There must be a definite purpose behind the provision of appointing a police officer-in-charge of the police duties within a specified area for the purpose of this Act. If the ordinary police can also perform the police duties for the purposes of the Act, there can be no special reason for making the provision for appointment of a special police officer. The expression "police duties" will include all the functions of the police in connection with the purpose of the Act and to the special context of the Act they will include detection, prevention and investigation of offences, and the other duties which have been specially imposed on them under the Act.

---

Further, there is no reason to exclude functions connected with investigation of offences, under the Act from the scope of the expression "functions in relation to offences" contemplated by sub-section (3) of Sections 13. It is true that in relation to the investigation of offences under the Act there is no express provision in the Immoral Traffic (Prevention) Act to the effect that the regular police force shall have no power of investigation. But when Section 13 provides that for each area the State Government shall appoint a Special Police Officer to deal with offences under the Act for that area that the Special Police Officer shall not be below the rank of an Assistant Commissioner of Police in the Presidency towns and a Deputy Superintendent of Police elsewhere, it follows by necessary implication that it is intended to exclude the general police force from taking cognizance and investigating offences under the Act.413

If the power of the special police officer to deal with the offences under the Act, and therefore, to investigate into the offences, be not held exclusive there can be then two investigations carried on by two different agencies, one by the special police officer and the other by the ordinary police. It is easy to imagine the difficulties which such duplication of proceedings can lead to. There is nothing in the Act to co-ordinate the activities of the regular police with respect to cognizable offences under the Act and those of the special police officer. The special police officer is a police officer and is always of the rank higher than a Sub-Inspector and therefore, in view of Section 551 (New Section 36) of the Code, can exercise the same powers throughout the local area to which he is appointed as may be exercised by the officer in charge of a police station within the limits of his station. Therefore, held that the special police officer is competent to investigate and that he and his assistant police officers are the only persons competent to investigate offences under the Act and that police officers not specially appointed as special police officers cannot investigate the offences under the Act even though they are cognizable offences.414

Implication of Power:

Under sub-section (1) of Section 5 (New Section 4) of the Criminal Procedure Code "all offences under the Indian Penal Code shall be investigated, inquired into, tried

413 Superintendent and Remembrancer of Legal Affairs v. Kshitish Chandra Roy, AIR 1962 Cal. 189 at 190
and, otherwise dealt with according to the provisions hereinafter contained." It is submitted that the powers of investigation are impliedly excluded from the scope of the functions assigned to a special police under the Act. As the Act is designed to suppress immoral traffic in women and girls, a task which is at once difficult and delicate, it has been thought fit by the Legislature in its wisdom to create the authority of a special police officer who is to be assisted by a non-official body to deal with certain situations contemplated under Section 14, 15 and 16 of the Act. For the efficient discharge of his functions under these sections, he is to be assisted by a hierarchy of police officers as also by the advice of a non-official body consisting of leading social workers. It would be contrary to the intentions of the Legislature if the special police officer, in addition to the special functions assigned to him under the Act is required also to act as the normal agency for investigation. It is argued that the station house officer of a police station remains and is intended to remain the principal investigating agency within his area. If his authority was to be abrogated, it could have been done only by saying so specifically. The powers of an ordinary police officer cannot be said to have been taken away even by implication415.

Power of the Police Officer In the case, of Delhi Administration v. Ram Singh416, the accused was sought to be prosecuted under Section 8 of the Act. The investigation was made by a Sub-Inspector of Police. After the investigation was completed he filed a charge-sheet before the Magistrate. On objection being taken to the investigation, the Magistrate quashed the charge-sheet holding that the Special Officer, was alone competent to investigate the case and that the Sub-Inspector could not have investigated it: It was held by K. Subba Rao and Raghubir Dayal, JJ. That:

"The special Police Officer is competent to investigate and that he and his assistant police officers are the only persons competent to investigate offences under the Act and that police officers not specially appointed as special police officers cannot investigate the offences under the Act, even though they are cognizable offences."

415 State v. Mehro, AIR 1962 Punj. 91 at 92 : 1962 (1) Cr.L.J. 561 (Punj.).
416 Criminal Appeal No. 220 of 1980: AIR 1962 SC 63

246
Mr. Justice Mudholkar differed from the majority view. The appeal, therefore, came to be dismissed. In the instant case the respondent is alleged to be a pimp and said to have committed offences under Section 8 of the Act. Investigation into the offences was made by the officer in charge of the Kamla Market Police Station and a charge-sheet was presented by him before a First Class Magistrate in Delhi. Similar charge-sheets were put up against certain other persons. An objection was taken before the Magistrate in all these cases that the charge-sheets were bad because the investigation into the various offences was not made by the special police officer referred to in the Act. This objection was upheld by the Magistrate and the charge sheets were rejected. An application for revision was preferred by the Delhi Administration before the High Court of Punjab. But that application was also rejected. Thereupon the Administration sought a certificate from the High Court under Article 134 (1) (c) of the Constitution which the High Court granted. That is how the appeal came to be preferred before Supreme Court.

The High Court, following the decision in Kupammal, held that an offence under the Act must be investigated only by one of the officers mentioned in Section 13 and that a charge-sheet based upon the investigation made by any other police officer is bad and must be quashed. The view taken by the Madras High Court and accepted by the Punjab High Court is untenable. The Act creates certain new offences, prescribes the placing of certain restriction upon persons found guilty of those offences, provides for the appointment of special police officer and for the constitution of an Advisory Board, confers certain special powers upon the special police officer, empowers Magistrates to order the closure of brothels and eviction of the offenders from the premises occupied by them as well as for the removal of prostitutes from any place and also makes a provision for the establishment of protective homes as well as empowers Magistrate to order detention of women and girls in such protective homes in certain circumstances. In addition it provided for the making of rules. According to Hon'ble Raghubar Dayal, since the Act creates new offences and prescribes the procedure for dealing with them it is a complete code in itself. Therefore, according to

---

417 State v. Mainabai, AIR 1962 Bom. 202 at 203 : 64 Bom. L.R. 127 ; 1962 (2) Cr. L.J. 323 (Bom.)
418 In re : ILR (1959) Mad 345 : (AIR 1959 Mad 389

247
him to that extent the provisions of the Act must prevail over those of the Code of Criminal Procedure, 1898. Further according to him, since the Act provides for the appointment of a special police officer for dealing with offences under this Act in the area within his jurisdiction, it is he and he alone who can investigate into an offence under the Act committed within that area. It would be convenient to refer to the provisions of Section 5 (Now Section 4) of the Code of Criminal Procedure which runs thus:

“(1) All offences under the Indian Penal Code shall be investigated, inquired, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.”

Sub-section (2) would prima facie apply to cases arising under the Suppression of Immoral Traffic in Women and Girls Act except to the extent that its provisions are abrogated or superseded by the aforesaid Act. While sub-section (1) provides that only an offence under the Penal Code must be investigated in accordance with the provisions of the Code of Criminal Procedure, sub-section (2) provides that offences under any other law shall be investigated, inquired into tried and otherwise dealt with according to the provisions of the Code subject to any enactment for the time being in force “regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences”. What has to be ascertained, therefore, is whether in the Act in question there are any provisions which regulate the manner of carrying out an investigation of offences thereunder because here their Lordships are concerned only with the limited question of the power of a station house officer to investigate into an offence under the Act. A bare perusal of the Act would show that there is no provisions therein which confers upon the special police officer appointed thereunder the power to investigate into an offence made punishable by the Act Such power is, however, sought to be deduced from the provisions of sub-section (1) of Section 13 which reads thus:
"There shall be for each area to be specified by the State Government in this behalf a specified police officer appointed by or on behalf of that Government 'for dealing with offences under this Act' in that area."

It is said that the words underlined ('here into') are wide enough to include the power to investigate into offences. These are general words and are undoubtedly of wide import. But they must be construed in the light of the other provisions of the Act. The Act confers certain specific powers and imposes certain specified duties on a special officer. It is to these matters that the words "dealing with offences" must be confined. If it were the intention of the legislature to confer upon a special police officer the sole power to investigate into an offence under the Act it would have enacted a provision similar to Section 5-A in the Prevention of Corruption Act, 1947 (II of 1947). This Act was before the Parliament when it enacted the Act in question and it would be reasonable to presume that if Parliament intended to confer similar power upon a special police officer appointed under this Act it would have used the same language for expressing its will as it did in Section 5-A of the Prevention of Corruption Act.

Section 5-A of the Prevention of Corruption Act, 1947 (Act II of 1947) provides that notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank of officers mentioned in clauses (a), (b) and (c) shall investigate any of the offences mentioned in that section. The provision was made in a prohibitive form because the police officers below the ranks mentioned were not to exercise their power of investigation unless a Magistrate specially ordered them to investigate. The provision was not with respect of conferring any special powers on any particular officer. It was just to restrict the powers of certain officers with respect to investigating. In case of Delhi Administration v. Ram Singh, a sub-inspector of police under the Delhi Administration not appointed, and incapable too of being appointed a special police officer, under Section 13, sub-section (1) and (2), below the rank of a Deputy Superintendent of Police as he was, investigated an offence under Section 8 ("seducing or soliciting for purpose of prostitution"), and submitted the charge-sheet as well. That was struck down by the majority decision, and it was held—

---

420 AIR 1962 SC 63 : (1992) 3 Cri. L.J. 106
A. The special police officer is competent to investigate.
B. He and his assistant police officers are the only persons competent to investigate the offences under the Act (104 of 1956).
C. Police officers not specifically appointed as special police officers cannot investigate the offences under the Act even though they are cognizable offences.

It, therefore, follows that the subordinate police officers, whom the learned Magistrate does not apparently think much of, are even competent to investigate the offences: Proposition B above. Indeed to assist the special police officer by conducting the search or by examining witnesses is to participate in investigation, which is only part of the functions; the special police officer has to discharge in relation to the offences under the Act. Part, because by the conjoint operation of Section 2, clause (i) and Section 13, Sub-section (1) the special police officer, in charge of police duties within a specified area for the purposes of the Act, shall be dealing with offences under the Act in that area. Both these expressions—"police duties" and "dealing with offences"—are of the widest amplitude and necessarily connote all that the police have to do in connection with offences under the Act, including detection, prevention and investigation⁴²¹.

Police report submitted by a police officer who is not a Special Police Officer appointed by or on behalf of the State Government as provided under Section 13(1) of the Act for dealing with offences under the Act, the Magistrate taking cognizance of such a police report has no option except to drop the proceedings when an objections to his jurisdiction is raised.

The law as laid down by the Supreme Court has to be followed, though in suitable circumstances where facts are different it may be distinguished or held not applicable. Courts of law shall not be justified to disregard the decision of the highest Court of the country on insufficient grounds. What has been laid down in Delhi Administration v. Ram Singh, ⁴²² is that an offence under the Act can be investigated by Special Police Officer only in accordance with the Special Law, and not by any police officer under the provisions of the Code of Criminal Procedure, and that the Magistrate

⁴²² AIR 1962 SC 63.
can decline to take cognizance of a report submitted under Section 173(1) Criminal Procedure Code, by a police officer other than a Special Police Officer. There can thus be no controversy that the trial Magistrate could have refused to take cognizance of the present police report.

Section 190 (1), Criminal Procedure Code lays down the modes in which a Magistrate can take cognizance of an offence. The Magistrate can take cognizance of the offence upon receiving a complaint of facts which constitute such offence; upon a report in writing of such facts made by any police officer; upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence has been committed. See clause (a) to (c) of Section 190 (1) Criminal Procedure code. The word 'complaint' has been defined in clause (h) of Section 4(1), [Now clause (d) of Section 2] Criminal Procedure Code it does not include the report of a police officer. In other words, a complaint contemplated by the Code of Criminal Procedure cannot include a report under Section 173(1), Criminal Procedure Code by a police officer. The present was a report by a police officer though not by a Special Police Officer. Cognizance thereof could not be taken by the Magistrate under clause (a) of Section 190(1), Criminal Procedure Code, nor could be cognizance be taken under the first part of clause (c) of the sub-section. This part clearly, excludes information received from a police officer. The Magistrate apparently had noted on his own knowledge or suspicion. He had throughout acted on clause (c) of Section 190(1) was thus inapplicable and could not be availed of to exercise jurisdiction in the present case. In other words, therefore, the Magistrate could have taken cognizance, if permissible under the law under clause (b) of Section 190(1), Criminal Procedure Code only. If this clause did not confer any jurisdiction on him, he could not proceed with the trial, though he could not proceed with the trial, though he could later take cognizance of the offence on the report of a Special Police Officer.

It is now a settled law beyond controversy that a police officer other than a Special Police Officer cannot investigate an offence under the Act and ordinary police officer cannot, therefore, submit a report under Section 173(1), Criminal Procedure Code. When a police officer cannot submit such a report, Magistrate could not take cognizance of that report in order to proceed with the trial. The proceeding based on the
Investigation inquiry and trial of offences are definite stages in the process of bringing a delinquent to book. Each state is distinct from the other and the legislature has made it quite clear in Section 5 (Now Section 4) of the Code of Criminal Procedure itself that they are important enough to be mentioned specifically. To make the point clearer it would be useful to compare the provisions of sub-section (1) of Section 13 of the Act with those of sub-sections (1) and (2) of Section 5 (now Section 4) of the Code of Criminal Procedure. While in the former, Parliament has merely used the words "dealing with offences under the Act" in the latter the words used are "investigating, inquiring into, trying or otherwise dealing with such offences". No doubt the expression "dealing with offences" would according to its ordinary connotation, include the stages of investigation, inquiry and trial. But the legislature has specifically referred to the aforesaid three stages because of their importance and apparently for obviating any doubt as to its intention. When Parliament had before it the Code of Criminal Procedure and in particular the provisions of Section 5 (new section 4) and Section 156 thereof it would have used in sub-section (1) of Section 13 of the Act language similar to that used to it in sub-section (2) of Section 5, (Now Section 4), Cr.P.C. if it were its intention to include in sub-section (1) of Section 13 matters like investigation, inquiry and trial or any of them. It would, therefore, be legitimate to infer that when Parliament spoke in Section 13(1) of a special police officer being empowered to deal with offences under the Act it did not intend to confer upon him the power to investigate into an offence under the Act. It was pointed out that special police officer shall not be below the rank of an Assistant Commissioner of Police in the towns of Madras and Calcutta and a Superintendent of Police in the Presidency Town of Bombay and a Deputy Superintendent of Police elsewhere and, therefore, such police officer would have the power to investigate into an offence. That, however, would be not by force of the

423 Tara v. State, AIR 1965 All 372 at 373-74.
provisions of sub-section (1) of Section 13 of the Act but by that of the provisions of Section 551 (now Section 36) of the Code of Criminal Procedure, which runs thus:

"Police officers superior in rank to an officer in charge of a police-station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station."

To make it clear that it is not the view that a special police officer appointed under the Act cannot have the power to investigate into an offence under the Act but what was held is that he does not derive such power from sub-section (1) of Section 13 of the Act. It is only under Section 551 (Now Section 36) of the Code of Criminal Procedure that he may be able to exercise the power to investigate into an offence under the Act.\(^\text{424}\)

Under Section 15 of the Act, a Special Police Officer is authorized to enter and search a premises without a warrant. If he has reasonable grounds for believing that an offence punishable under the Act is or is being committed in respect of a woman or girl living in any premises and that search of the premises with warrant cannot be made without undue delay. "Special Police Officer" is defined in Section 2(i) of the Act as follows:

"Special Police Officer" means a police officer appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purpose of the Act."

The Government of Bombay issued a notification in exercise of the powers conferred by Section 13 of the Act appointing the Deputy or Assistant Superintendent of Police in charge of sub-division of District or any police officer not below the rank of the Dy. S.P. temporarily holding the additional charge of the Deputy or A.S.P. of a sub-division of a District, for the Sub-Division of a District constituted for the purpose of the Code of Criminal Procedure, 1898. It is, therefore, clear from this Notification that for every Division of District constituted for the purpose of the Code of Criminal Procedure, the Deputy or Assistant Superintendent of Police in charge of that Division is appointed as a Special Officer. Counsel for the applicant contends that the special appointment must be by name and he relies on Emperor v. Udho Chandulal.\(^\text{425}\) That was a case.


\(^{425}\) AIR 1943 Sind 107.
under Section 6(ii) of the Bombay Prevention of Gambling Act, which provided that entry by police officers in gaming houses can be made amongst other persons by Taluka Magistrate specially empowered by the State Government or by an Assistant or Deputy Superintendent of Police specially empowered by the State Government. Having regard to these expressions it has been held in the Sind case that when Deputy Superintendent of Police is especially empowered by Government under Section 6(ii) of the Gambling Act, he should be specially empowered by name and not merely by virtue of his office, because the words 'or by an assistant or Deputy Superintendent of Police specially empowered by the Government in this behalf' clearly implied the exercise by Government of a certain selection or discrimination as regards an individual on whom this special power is to be conferred.

The scheme of Section 6 (ii) of the Gambling Act is that although there may be several Assistant and Deputy Superintendents, for the purpose of search under Section 6(ii), it is only that Assistant, Superintendent or Deputy Superintendent of Police specially empowered by Government, who can issue a warrant for the search. The words 'specially empowered' are not found in the definition of 'special police officer' in Section 2(i) or in Section 15 of the Act. In view of the definition of expression 'special police officer' in Section 2(i) of the Act, what is required is that the State Government should appoint a particular police officer to be in charge of police duties within a specified area for the purpose of this Act. But in the Gambling Act for the purpose of issuing a warrant, when an Assistant or Deputy Superintendent of Police is specially empowered by Government under Section 6(ii) of that Act, he should be specially empowered by name as there may be many such police officers. In the instant case, the Government has appointed one police officer for the sub-division of a district as constituted for the purpose of the Code of Criminal Procedure. In the area of that sub-division it is the Deputy or Assistant Superintendent of Police in charge of the sub-division who is appointed as a police officer. Ordinarily, there would be only one police officer in charge of the sub-division of that District. There is therefore, no question of selection between police officers in charge of the sub-division of a District. Therefore, the Notification issued by the Government appointing special police officers for the purpose of the Act for every sub-division of a District is a perfectly valid notification and
a Deputy or Assistant Superintendent of Police in charge of the sub-division of a District would be a police officer for the purpose of Section 15 of the Act in regard to the area of the sub-division of the district of which he is in charge.\textsuperscript{426}

**Dealing with Offences:**

The expression "dealing with offences" is of wide import. According to Section 13 of the Act, there shall be, for each area to be specified by the State Government for dealing with offences under the Act in that area. The expression 'dealing with offences' is of wide import and will include any act which the police has to do in connection with the offences under the Act. In this connection, Court has been referred to the provisions of Section 5 (New Section 4) of the Criminal Procedure Code, which reads:

"(1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating inquiring into, trying or otherwise dealing with such offences."

It is submitted that the expression 'dealt with' must mean something which is not included in investigation, inquiry or trial. This does not necessarily flow from the provisions of this section. The word 'otherwise' points to the fact that the expression 'dealt with' is all comprehensive, and that investigation, inquiry and trial were some aspects of 'dealing with' the offences. Further, according to sub-section (3) of Section 13, the special police officer is to be assisted, for the efficient discharge of his functions in relation to offences under this Act, by a number of subordinate police officers and will be advised by a non-official advisory body. The expression 'functions in relation to offences' do include his functions connected with the investigation of the offences. There is no reason to exclude such functions from the functions contemplated by sub-section (3). The suggestion that the special police officer would be very heavily worked in case he had to perform all the ordinary duties of the police connected with the

investigation of offences in addition to the duties conferred on him under the Act does not go far in putting a different interpretation on the powers of the special police officer. He is to be assisted by his subordinate police officers. They can investigate both under the implication of the provisions of Section 13 as they are to assist the special police officer, and also on deputations by the special police officer, in view of Section 157 of the Code.

In re: Kuppammar, Mr. Justice Somasundaram was presented with a similar argument which has been addressed and it was held that the phrase 'dealing with offences' is a wider than 'investigation' and an investigation therefore, is included in the expression 'dealing with offences', and the offence must, therefore, be investigated only by one of the officers mentioned in the section and in this case it must be investigated by the special officer, namely, the Deputy Superintendent of Police, authorised for that area to investigate. Exception has been taken by Mr. Dhebar to the observation of Mr. Justice Somasundaram who stated at page 300 thus:

"But when the section says that a particular police officer alone shall deal with offences under this Act, it seems to be that it means that such particular officer alone shall investigate into the offence."

It has been pointed out that the word "alone" is not used in the Act anywhere. That may be so, but it appears to be reasonable inference because it is stated in the Act that the special police officer is to deal with the offences under this Act.

Entire hierarchy of police officers who are to assist the special officer would be purposeless if they are to deal only with the rescue and search operations envisaged in the Act. A wider meaning of the term "dealing with" would be in harmony with legislative intention and purpose. The Act does not just create 'an' authority in the person of a police officer but such an officer is the authority for the purposes of the Act.

Act is a special law which prescribes a special procedure with respect to the arrest, investigation and trial of the offence mentioned in the Act. Section 2 (i) defines a

---

428 AIR1959 Mad 389,
430 ibid
'special police officer' as meaning a police officer, appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purpose of the Act. Section 13 enacts that 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.

It is further provided that in areas outside the Presidency towns of Madras, Calcutta and Bombay an officer of the rank of a Deputy Superintendent of Police shall be appointed as a special police officer for dealing with offences under the Act. Section 14 makes all the offences punishable under the Act to be cognizable offences. Section 15 makes provision for the search by special police officers of premises which may be suspected of being used for the purpose of prostitution. So much about the powers and functions of a 'special police officer' appointed under the Act. Under the Act the special officer alone is charged with the performance of police duties. He is to all intents and purposes a police officer whose powers are analogous to those of the police officer in charge of a police station in regard to the investigation of cognizable offences as contemplated by the Code.

It was urged that the Act has invested a special police officer with powers for dealing with offences and that this shows that no other person or authority is competent to initiate a prosecution for an offence made punishable thereunder. Court was unable to accede to this argument. The expression 'dealing with offences' in Section 13(1) refers to the police powers, conferred on a special police officer. It does not and cannot enlarge his powers. It simply means that special police officer has been charged with the performance of police duties, within a specified area for carrying out the purpose of the Act. The Act provides a special machinery for the performance of police duties by an officer specially appointed for that purpose. To this extent, the Act makes a departure from the provisions of the Cr.P.C. Consequently, it follows that the duties, which are normally required to be performed by the officer in charge of a police station, shall be performed only by the special police officer, appointed under the Act.431

In the instant case, contention of the Public Prosecutor is that the appointment of a special police officer to deal with offences does not necessarily mean an investigation by the special police officer. In fact, he tried to contrast the expression used in the section with the expression used in Section 5(a) of the Act II of 1947 where it is clearly stated that the investigation shall not be taken up by any officer below the rank of a Deputy Superintendent of Police. It is true that in the Act to prevent corruption the expression "investigation" has been used and a similar expression in not used in Section 13 of the present Act. But Court was unable to understand the expression "deal with offence" as meaning other than an investigation into the offence and filing a charge-sheet. The Public Prosecutor lays stress on clause (3) of Section 13 and contends that "dealing with offences" means what is contained in Section 3(b), i.e., associating a non-official body with the special police officer which is not normally allowed or permitted under the ordinary investigation and it is for that purpose alone that Section 13 has been introduced, and that Section 13 read with Sections 14 and 15 does not prohibit an investigation by an ordinary police officer. This contention was declined.

Section 13 no doubt enables a special police officer to associate a non-official body for the purpose of dealing with offences under this Act. But when the section says that a particular police officer alone shall deal with offences under this Act, it seems that it means that such particular officer alone shall investigate into the offence. There can be no "dealing with offences" without an investigation into the matter. "Dealing with offences" is wider than "Investigation" and an investigation therefore, is included in the expression, "dealing with offences", and the offence must, therefore, be investigated only by one of the officers mentioned in the section and in this case it must be investigated by the special officer, namely Superintendent of Police, authorized for that area to investigate. If this interpretation is to be given then the question is what happens to the offence which has been taken cognizance of by the Magistrate432.

Cognizance of the Offence 433

432 In re : Kuppammal, AIR 1959 Mad. 389/390-91 : 1959 Cr. L.J. 1085 : 1958 (2) MLJ 606 (Mad.).
433 Section 14. Offences to be cognizable.— Notwithstanding anything contained in the [Code of Criminal Procedure, 1973 (2 of 1974)] any offence punishable under this Act shall be deemed to be a cognizable offence within the meaning of that Code: Provided that, notwithstanding anything contained in that Code, —
Section 2(c) of the Code of Criminal Procedure, 1973 defines a 'cognizable offence', as an offence for which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant. Sections 41 to 60 of the code deal with the arrest of persons.

Cognizance of offences by Magistrate.—Section 190 of the Code of Criminal Procedure, 1973 lays down the provisions as under:

190. Cognizance of offences by Magistrates.—(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the Second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—
(a) upon receiving a complaint of facts which constitute such offence;
(b) upon a police report of such facts;
(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

The proviso (ii) to section 14 of the act provides for delegation, by the special police officer, of his power to arrest without warrant, to any officer subordinate to him, by an order in writing; whereas Section 13 provides for nothing of the kind. That is no doubt

(i) arrest without warrant may be made only by special police officer or under his direction or guidance, or subject to his prior approval; (ii) when the special police officer requires any officer subordinate to him to arrest without warrant otherwise than in his presence any person for an offence under this Act, he shall give that subordinate officer an order in writing, specifying the person to be arrested and the offence for which the arrest is being made; and the latter officer before arresting the person shall inform him of the substance of the order and, on being required by such person, show him the order; (iii) any police officer not below the rank of 433[ sub-inspector] specially authorised by the special police officer may, if he has reason to believe that on account of delay involved in obtaining the order of the special police officer, any valuable evidence relating to any offence under this Act is likely to be destroyed or concealed, or the person who has committed or is suspected to have committed the offence is likely to escape, or if the name and address of such a person is unknown or there is reason to suspect that a false name or address has been given, arrest the person concerned without such order, but in such a case he shall report, as soon as may be, to the special police officer the arrest and the circumstances in which the arrest was made.

259
true. But Section 13, sub-section (3), read with the State Government’s direction thereunder, does provide for the special police officer being assisted by his subordinate police officers, who have in fact assisted him by conducting the search, making the search, making the search-list and recording the statements of witnesses. So no illegality can lurk here, no matter that Section 13, unlike Section 14, does not provide for delegation\(^\text{434}\).

What is said in the second proviso to Section 14 of ITP Act, 1956 is that for the purpose of arresting any person, an order in writing specifying the person to be arrested has to be given to the subordinate officer by the Special Police Officer. Such an order in writing can be given by the Special Police Officer specifying the person to be arrested only after seeing that a particular person has committed an offence. There is also provision in the proviso which says that in the order in writing given by the Special Police Officer the offence for which the arrest is being made also has to be mentioned. That also would indicate that the Special Police Officer can give an order in writing to a subordinate officer for arresting a person only after he is being convinced that there are reasons to believe that a particular person has committed an offence. Here the sanction given by the Assistant Commissioner or Police who is the Special Officer cannot at all be said to be a sanction given for effective arrest by a subordinate officer as is said in the second proviso to Section 14 since the sanction order was made even before the raiding of the house of the first accused. For that reason, it cannot be said that there was sufficient authorization given by the Special Police Officer to the Sub-Inspector of Police for effecting arrest as mentioned in Section 14 of the Act\(^\text{435}\). Under Section 14 of the Act an offence punishable under the Act shall be deemed to be a cognizable offence. Under proviso (i) arrest without warrant may be made only by the Special Police Officer or under his direction or guidance or subject to his prior approval. Under Proviso (ii) when the Special police Officer requires any Officer subordinate to him to arrest without warrant otherwise than in his presence, he shall give the Subordinate


\(^{435}\) Sinu Saindheen v. Sub-Inspector of Police, 2002 Cri.L.J. 3205 at 3206-3207 (Ker.)
Officer an order in writing specifying the person to be arrested. Therefore, Section 14 enables a Special Officer to authorise any other officer to arrest a person\textsuperscript{436}.

*Power to arrest without warrant is not given to regular police:* There are certain provisions which are such that the regular police cannot comply with them and thus they point to the conclusion that it is the special police officer alone who is to take any action which the police has to take in connection with the offences under the Act. Section 14 makes offences under the Act cognizable, which according to the Code of Criminal Procedure means that persons accused of those offences can be arrested without a warrant and Section 157 of the Code specifically mentions that the investigating officer, if necessary, is to take measures for the discovery and the arrest of the offender, and yet, the power to arrest without a warrant is not given to the regular police, but under the proviso to this section, is to be exercised by the special police officer or under his direction or guidance or subject to his prior approval\textsuperscript{437}

Section 14 makes an offence under the Act to be cognizable within the meaning of the Criminal Procedure Code. But an arrest without warrant is to be made only by the special police officer or under his discretion or guidance, or subject to his prior approval\textsuperscript{438} When once under Section 14, offences under this Act are made cognizable, it means that any police officer can investigate into this offence, subject to the limitations contained in the proviso and also under Section 15 of the Act, the limitation being that the arrest shall not be made except by the special police officer and also that the search shall not be except by the special officer.

*Cognizance by the Magistrate:*

In the instant case, Additional Government, Pleader relies on Section 156 (2) and Section 529 (new Section 460) of the Criminal Procedure Code and contends that even assuming that the investigation was illegal or irregular that cannot affect the jurisdiction of the Court. He relies on *Rustom Ardeshir Banaji v. Emperor*,\textsuperscript{439} which supports his contention. It may be that if a person is illegally arrested he may by appropriate

\begin{itemize}
\item \textsuperscript{436} *Muhammed Ali v. S.I. of Police, 2005 (35) AIC 505 at 507 (Ker).*
\item \textsuperscript{437} *Delhi Administration v. Ram Singh, AIR 1962 SC 63 at 66.*
\item \textsuperscript{438} *State v. Mehra, AIR 1962 Punj 91 at 92.*
\item \textsuperscript{439} *AIR 1948 Bom 163 : 49 Bom L.R. 821,*
\end{itemize}
proceeding get himself released. It may be that if the action of the Police Officer is illegal or improper he may not be able to protect himself in a proceeding against him. And though the Court may strongly disapprove the illegality in the investigation "the question" as Lord Tenterden, C.J. posed is:

"...Whether if a person charged with a crime is found in this country, it is the duty of the Court to take care that such a party shall be amenable to justice or whether we are to consider the circumstances under which he was brought here."

He answered it saying: "I thought and I still continue to think, that we cannot enquire into them." These observations were quoted with approval by Lord Macmillan in Parbhu v. Emperor, the following observation of Lord Chief Justice Cockburn in the charge to the Jury in Queen v. Nelson and Brand,

"...We leave you (the party wrongfully brought before the Court) to settle with the party who may have done an illegal act in bringing you into this position; settle that with him."

It is next contended that even if the report of the Police Officer be bad qua report, it can still be regarded as a complaint and the Magistrate can proceed with the case. This view has been taken in several cases. The above view is accepted in the pronouncements of the Supreme Court in arising assign under the Prevention of Corruption Act. In H.N. Rishbud v. State of Delhi, the following observations are pertinent.

"A defect to illegality in investigation, however serious, has no direct bearing on the competence of the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190, Cr.P.C. as the material on which cognizance is taken. But it cannot be

440 AIR 1944 PC 73 : 46 Bom L.R. 838
441 46 Bom L.R. quoted at page 839
443 AIR 1955 SC 196

262
maintained that a valid and legal police report is the foundation of the jurisdiction of the Court, to take cognizance. Section 190, Cr.PC is one out of a group of sections under the heading "Conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, i.e., sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But Section 190 does not. While no doubt, in one sense, clauses (a), (b) and (c) of Section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore, a nullity. Such an invalid report may still fall either under clause (a) or (b) of Section 190(1) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation, Section 537, Cr.PC is attracted". "If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality......in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial is well settled. Hence, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigating does not vitiate the result, unless miscarriage of justice has been caused thereby,"

There is nothing in this Act which makes Section 156(2) and Sections 529 and 537 (new Sections 460 and 465) of the Code inapplicable. This being so, held that illegal or improper investigation and arrest dies not in any manner affect the jurisdiction of the Magistrate to take cognizance of the offence. This aspect of the case was not presented before their Lordships in Cr. A. No. 220 of 1960, D/ 3-5-1961; (AIR 1962 SC 63). Court therefore, considered whether any prejudice was caused to the accused by reason of the illegality of the investigation and the arrest. In the present case the answer
is clearly no. The accused admits the facts alleged against her and these facts clearly make out an offence with which she is charged

Offences under the Act have been made cognizable by Section 14 thereof. Therefore, prima facie Section 156 (1) of the Code of Criminal Procedure would apply and an officer-in-charge of a police station would have the power to investigate into such an offence. No doubt by virtue of the provisions of sub-section (2) of Section 5 (now Section 4) of the Code of Criminal Procedure, the provisions of Section 156, Cr.P.C. would be subject to those provisions of the Act which bear on the question of investigation into offences. Had Parliament desired that the provisions of Section 156 of the Code of Criminal Procedure should not apply to offence under the Act it would, in view of the provisions of sub-section (2) of Section 5 (now Section 4) of the Code of Criminal Procedure, have been careful enough to make express provisions in the Act regulating the manner of investigation of offences thereunder and specifying the officer entitled to make the investigation so as to exclude a police officer entitled under the Code of Criminal Procedure to investigate into offences.

The facts briefly stated are that at about 9 p.m. on the 18th March 1959, Sri B.N. Rai, a Magistrate of the 1st Class, Kanpur, found the applicant soliciting persons by words, gestures and willful exposure of her person, for the purpose of prostitution. He placed her under arrest and filed a complaint for her prosecution under Section 8 of the Act. An objection was made by the applicant in Court against her prosecution challenging the validity of the complaint on the ground that she could only have been prosecuted on a charge-sheet submitted by a Special Police Officer, appointed under the Act and not on a complaint filed by the Magistrate. Her objection was overruled by the trial Court and the Additional Sessions Judge upheld that order in revision. She then filed a revision to High Court out of which instant reference has arisen. The Counsel appearing for the applicant has raised two contentions before Court; firstly, that a 'special police officer' appointed under the Suppression of Immoral Traffic in Women and Girls Act, can alone initiate prosecution in respect of offences mentioned

thereunder, and secondly, that the Act being a self contained enactment it was not permissible to enlarge the powers of a Magistrate by reference to the provisions of the Cr.P.C.

Coming now to the powers which may be exercised by magistrate with respect to offences falling under the Act. It is provided in Section 2(c) that a Magistrate specially empowered by the State Government shall exercise jurisdiction under the Act and that such Magistrate shall be a District Magistrate, a Sub-divisional Magistrate, a Presidency Magistrate or a Magistrate of the 1st Class. Under Section 12(4), a Magistrate on receiving information from the police or otherwise, that any person within the local limits of his jurisdiction habitually commits, or attempts to commit, etc., any offence under this Act, may require such person to show cause why she should not be ordered to execute a bond for her good behaviour, etc. Section 16 indicates that where a Magistrate has reason to believe, from information received from the police or otherwise, that a girl apparently under the age of 21 years, is living, or is carrying on, or is being made to carry on prostitution in a brothel, he may direct the special police officer to remove the said girl from the brothel and produce her before him. Sub-section (2) of Section 16 further provides that the special police officer, after removing the girl from the brothel, shall produce her before the Magistrate issuing the order.

Section 18 gives power to a Magistrate to order eviction of the occupier of the premises, in respect of which he receives information from the police or otherwise that they are being used by prostitutes for carrying on their trade, etc. Similarly, Section 20 empowers a Magistrate to issue notice to a woman or girl requiring her to appear before him and show cause why she should not be required to remove herself from any place situate within the local limits of his jurisdiction, if he receives information that the said woman or girl resides in or frequents any place within the local limits of his jurisdiction. Thus the Legislature has defined and clearly distinguished between the respective powers and functions of a special police officer and a Magistrate specially empowered in that behalf. There does not appear to be any ambiguity as to the intention of the Legislature in this matter.

In the present case the Legislature has clearly limited the power of the special police officer to those functions which are ordinarily performed by the police officer in
charge of a police station. Hence, it follows that the other modes of initiating prosecution by was of complaint or otherwise have not been excluded. Consequently, it cannot be held that it was intended to exclude other methods of bringing offences to the notice of the Court. It would thus appear that the cognizance of an offence on the basis of a complaint filed by a Magistrate is not prohibited by the Act. Indeed, a reading of Sections 16, 18 and 20 of the Act would go to show that a Magistrate may take cognizance on information received from the police or otherwise in respect of offence mentioned therein. Thus, it is not a condition precedent for the initiation of prosecution against an offender that the information should be laid before a Magistrate by the special police officer. The Magistrate is empowered under the Act to take cognizance of an offence on information received from any source or upon his own knowledge of the facts constituting the offence. The Act has not placed any fetter on the powers of a Magistrate to take cognizance of an offence from any source whatsoever. There is, therefore, no warrant for the proposition that cognizance of an offence under the Act cannot be taken except upon a report submitted by a special police officer. Held that Section 13 does not create any bar to the filing of a complaint by a Magistrate of the 1st Class against a person suspected of having committed an offence under the Act.

Legality of Search

The Supreme Court have always sounded a note of warning that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-section (1) and (2) of Section 15 of the Act. The legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females.

Section 15 of the Act446 applies to apprehension of persons living in any premises after search of those premises without warrant. It does not permit

---

446 1) Notwithstanding anything contained in any other law for the time being in force, whenever the special police officer [ or the trafficking police officer, as the case may be,] has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a [ person] living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.
apprehending a person whilst she is traveling on a rickshaw. It also requires a special police officer or trafficking police officers who are appointed by the State or Central Governments respectively under Section 13 of the act, to take a person into custody. In the instant case, Government Pleader has submitted that the fact that there are several other provisions in the Act, for instances, the provisions under Sections 14

(2) Before making a search under sub-section (1), the special police officer [or the trafficking police officer, as the case may be] shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situated, to attend and witness the search, and may issue an order in writing to them or any of them so to do:

[Provided that the requirement as to the respectable inhabitants being from the locality in which place to be searched is situate shall not apply to a woman required to attend and witness the search].

(3) Any person who, without reasonable cause, refuses or neglects, to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).

(4) The special police officer or the trafficking police officer, as the case may be, entering any premises under sub-section(1) shall be entitled to remove therefrom all the persons found therein.

(5) The special police officer [or the trafficking police officer, as the case may be] after removing [the person] under Sub-section (4) shall forthwith produce [him] before the appropriate Magistrate.

(5-A) Any person who is produced before a Magistrate under sub-section (5), shall be examined by a registered medical practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases. Explanation.—In this sub-section, “registered medical practitioner” has the same meaning as in the Indian Medical Council Act, 1956 (102 of 1956).

(6) The special police officer [or the trafficking police officer, as the case may be] and other persons taking part in, or attending, and witnessing a search shall not be liable to any civil or criminal proceedings against them in respect of anything lawfully done in connection with, or for the purpose of the search.

(6A) 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 women 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.

Explanation. — For the purposes of this sub-section and section 17A, “recognised welfare institution or organisation” means such institution or organisation as may be recognised in this behalf by the State Government.

(7) The provisions of the Code of Criminal Procedure, 1973, (2 of 1974) shall so far as may be apply to any search made under this section as they apply to any search under the authority of a warrant issued under section 84 of the said Code.

and 15, which lay down that no arrest without warrant can be made by officer other than the special police officer or under his direction or guidance or subject to his prior approval, and any police officer, not below the rank of Inspector, even when delay would result and the delay in obtaining the order of the special officer would result in valuable evidence relating to the offence being destroyed or concealed and the person concerned may escape, can attest such person only subject to certain conditions, viz., that immediately after the arrest, report should be sent to the special police officer about the arrest or circumstances in which the arrest was made, goes to show that wherever the legislature so contemplated, the Act confined the powers of investigation to the special police officer appointed under Section 13 and the Act made special provision in respect thereof. Section 15 lays down that a search without warrant can be made in certain instances by the special police officer after recording the grounds of his belief and hence no other police officer assisting him could search without a warrant. It is because of the legislature that such a power should not be exercised by any assisting police officer that it has made it incumbent upon the special police officer, to record the grounds for believing that the offence punishable under the Act has been or was being committed in respect of a woman or girls living in any premises and that search of the premises with warrant cannot be made without undue delay. It is, therefore, submitted by the Government Pleader that if the legislature had intended that the filing of the charge-sheet or making of the report was to be done only by the special police officer, the legislature would have expressly said so.\textsuperscript{448}

In \textit{Raj Bahadur v. Legal Remembrancer to the Government of West Bengal},\textsuperscript{449} the question of the constitution validity of Section 13 of the Bengal Suppression of Immoral Traffic Act, 1933, which was analogous to Section 15 of the present Act was considered by the Calcutta High Court. The Court observed as under:

"Section 13 of the Bengal Suppression of Immoral Traffic Act is concerned with the removal of a minor girl from a brothel or from premises which are used as brothel and does not in terms authorise the arrest of any such girl. The word


\textsuperscript{449} AIR 1953 Cal. 522 at 523 : 54 Cr. L.J. 1167
arrest in Article 22 of the Constitution has a much restricted meaning and does not include the removal of a minor girl under Section 13 of the Act. The scheme of the Bengal Act is to provide for the salvage of such children as are being exploited or likely to be exploited for immoral purposes. While the Constitution prohibits discrimination it provides for protection of women and children who may be said to suffer from a certain amount of disability either by reason of their sex or age. Nothing exists in the Act which can be said to infringe either Article 21 or Article 23 of the Constitution and the removal and subsequent detention of the girl under the provisions of the Act were and are legal."

The Calcutta High Court based its decision on the judgment of the Supreme Court in State of Punjab v. Ajaib Singh, a case under the Abducted Persons (Recovery and Restoration) Act 65 of 1949. In that case there Lordships held that the physical restraint put upon an abducted person in the course of recovering and taking that person into custody under Section 4 of the impugned Act could not be regarded as 'arrest' and 'detention' within the meaning of Articles 22(1) and 22(2) of the Constitution.

During the search the issue of Respectable witnesses of the Locality plays very important role. Because, the credibility and consistency of the witnesses can prevent abuse of power. The expression "inhabitants of the locality" suggests that the persons should be from that locality. Person accidentally found near the place to be searched are not contemplated.

In the instant case, the contention that the Panchas do not belong to the same locality as the house searched which is in Bukar Fallia in Junagadh while the Panchas come from other parts of the same town, has no substance. 'Locality' does not necessarily mean the street in which the house is situated. Whether the Panchas belong to the same locality or not has to be decided on the facts of each case. Of course, if the Panchas belong to a different town they cannot be said to belong to the same locality; but it is not necessary that they should be residents of the same street or

450 AIR 1953 SC 10 at 14: 1953 Cr.L.J. 180: 1953 SCR 791,
the same Falia. As the Panchas belong to different parts of the same town, it cannot be said that they do not belong to the same locality452

In another case, the Sub-Inspector out of abundant caution asked to rickshaw wallahs to be present as they were the persons most easily available. The Sub-Inspector in spite of his efforts could not get any person from the locality to be present at the projected search and most of the occupants of the servants quarters of the DIG of Police were police constables or members of the armed guard. The Sub-Inspector naturally thought that the search witnesses should be persons other than constables or member of the armed guard. Held, in respect of the search of the room occupied by the accused and the recovery of the blood stained shirt and blood strained pants it was necessary to have at least two search witnesses as required by Section 103, Cr.P.C., 1898 (now section 100 of 1973 Code). Assuming that the two rickshaw wallahs who actually witnessed the search as found by the Courts below were not respectable inhabitants of the locality, that circumstances would not invalidate the search. It would only affect the weight of the evidence in support of the search and the recovery. Hence at the highest the irregularity in the search and the recovery in so far the terms of Section 103 (now Section 100) had not been fully complied with would not affect the legality of the proceedings. It only affected the weight of evidence which is a matter for Courts of fact and the Supreme Court would not ordinarily go behind the findings of fact concurrently arrived at by the Courts below453

Question of Respectability:

Respectability does not connote any particular status or wealth or anything of that kind. Any person is entitled to claim respectability provided he is not disreputable in any way, that is, if he is not a thief or a criminal of some kind or a person perhaps of grossly immoral habits454.

Woman Witness:

The Amendment Act 46 of 1978 has provided that the requirement as to the respectable inhabitants being from the locality of search shall not apply to a woman

454 Emperor v. Masuria, AIR 1936 All 107.
required to attend and witness the search. The reason is obvious, because women by and large are shy to appear in the Court and much less a woman of the same locality against a person of her very sex. To meet this difficulty the condition of local witness has been waived in the case of females. But it has the other side too. The police can join their stock-witnesses or stooges amongst women to join the search. In such situation the search may become farce. Therefore, when the witness is joined from a different locality, the Court should look upon the search with a suspicious eye. In a recent case where the requirement that at least one of the witnesses should be a female from the locality was not complied with, it was held that non-compliance with the essential requirement of law will vitiate the entire proceedings455.

In the instant case, prosecution examined, in support of their case, Puran Chand PW 1, Panna Lal PW 2, Mukhatiar Singh PW 3, Tara Singh PW 4, Dewan Chand PW 5, Chuni Lal PW 6 besides Shri Sohan Lal, Deputy Superintendent of Police, CID who had investigated this case. Dewan Chand and Chuni Lal PWs are formal witnesses. The late of the case hinges mainly on the statements of Puran Chand, Panna Lal, Mukhtiar Singh and Tara Singh. The petitioner's Counsel drew attention to the statement of Puran Chand who in cross-examination admitted that he was married 10 or 12 years ago and occasionally indulged in prostitution. In this year also he committed sexual intercourse with Mst. Kesro and Mst. Sheela. He also stated that he was PW in the case against Mst. Kesro and also against Mst. Sheela. He also admitted that about two year's ago he was convicted in an Opium case. Similarly, while dealing with the evidence of Panna Lal, Counsel submitted that this witness does not belong of the locality and had been appearing in police cases. This witness submitted that he appeared as a PW in the case of Asha Rani under Immoral Traffic Act about 6 months back. This witness appears to a petty shop-keeper and lives at about 1 or 1-1/4 mile from the place of occurrence. Mukhtiar Singh PW 3 has himself admitted in cross-examination that he had enjoyed Mst. Rattan Kaur after paying her Rs. 10/- through Harnam Singh. He then suggested to Puran Chand that if he liked he could negotiate for marriage with Mst. Rattan Kaur, and it was he who took Puran Chand to the house of

455 Laxmi Maruthi v. State, 1980 Cr.L.J. 28 at 29 (Bom.).
Harnam Singh. This witness, according to him, actually saw Puran Chand and Mst. Rattan Kaur going to the room for the purpose of sexual intercourse. He has admitted that his house is situated at about half a mile or so from the said Bunga. The last witness is Tara Singh who admitted in cross-examination that he occasionally joins the police raids and investigation for the last 2 years or so. From the evidence of these witnesses it appears that they are men of no character and are always ready at the back and call of the police.

Moreover the petitioner's Counsel drew attention to Section 15 of the said Act which lays down that before making a search under sub-section (1) the special police officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search. In this case no woman, as required under this section, was made to join the raid. Nor is there any evidence that any of these witnesses resides in the neighbourhood of the said locality, which according to the Counsel was imperative. The evidence which consists of the above-mentioned persons does not inspire confidence. The petitioner who is an old man of 70 is a Mahant of Bunga. It is, therefore, not expected that in that old age he would indulge in such a traffic. In any case the evidence produced in this case does not inspire confidence. Some of the witnesses on their own showing are under the thumb of police while the others have admitted their immorality.

Section 15(2) envisages that before making search under sub-section (1), the Special Police officer or the trafficking police officer shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place is to be searched is situate, to attend and witness the search. Section 15 (6-A) of the Act says that Special Police Officer or the Trafficking Police Officer as case may be, making a search under this section shall be accompanied by at least two woman police officers. It is pointed out that there were two women police officers in the police party which raided the house. Coming to sub-section (2) of Section 15, the submission made by the Counsel appearing for the petitioners is that at the time of conducting the search, there was no respectable woman inhabitant of the locality were the house in

which the search was conducted is situated. It is not in dispute that there was no woman inhabitant of the locality present at the time of search to attend and witness the search. It is maintained by the Counsel for the petitioners that the requirement under sub-section (2) of Section 14 is mandatory.457

Special Police Officer is required to include at least one woman among the search witnesses. Section 15 provides for searches without warrant, by the special police officer. The section does not specifically state that the special police officer alone will search without warrant, but it is clear from the provisions of this section that officers of the regular police force will not search without warrant and thus will not exercise the power given under Section 165 of the Code. All the provisions of Section 15 correspond to those of Section 165 of the Code of Criminal Procedure. Further, in view of sub-section (2) of Section 15, the special police officer is required to include at least one woman among the search witnesses. There is no such restriction Section 103 (now Section 100) of the Code. If a regular police officer is to conduct search in pursuance of the powers conferred under Section 165 of the Code, he is not bound to include a woman among the search witnesses. Further, sub-sections (4) and (5) of Section 15 authorise a special police officer to remove any girl found in the premises searched, if she be under twenty-one years of age and is carrying on prostitution. Such a girl is to be produced before the appropriate Magistrate. The ordinary regular police officer conducting search under Section 165 of the Code, will not be able to do any thing with respect to such a girl found in the premises searched by him. These provisions clearly indicate that the regular police officers are not to exercise any powers in connection with the offences and the other purposes of this Act. The entire police duties in connection with the purposes of the Act within a certain area have been put in the charge of a special police officer. There must be a definite purpose behind the provision of appointing a police officer in charge of the police duties within a specified area for the purpose of this Act. If the ordinary police can also perform the police duties for the purposes of the Act, there can be no special reason for making the provision for the appointment of a special police officer. The expression ‘police duties’ will include all the

457 Sinu Sainudheen v. Sub-Inspector of Police, Thrakkakara, 2002 Cri.L.J. 3205 at 3207 (Ker.)
functions of the police in connection with the purpose of the Act and in the special
context of the Act they will include the detection, prevention and investigation of
offences and the other duties which have been specifically imposed on them under the
Act. 458

Search: Effect of Non Compliance with provisions of Section 15(2)

The recording of reasons under Section 165, Cr.P.C. did not confer on the officer
jurisdiction to make search though it is a necessary condition for doing so. Jurisdiction
or power to make a search was conferred by the statute and derived from the recording
of reasons. The trial of the accused was for contravention of certain provisions of the
Act and the search was made in respect of those offences. The trial having taken place
the question of the applicability of Section 537 of the Cr.P.C. (now Section 465 of 1973
Code) will at once arise. The non-observance of the provisions of Section 15(2) is not
an illegality but is a mere irregularity. The sentence cannot be set aside unless it can be
shown that such irregularity has caused failure of justice.

It would be legitimate to say that a search which is to be conducted under the Act
must comply with the provisions contained in Section 15, but it cannot be held that if a
search is not carried out strictly in accordance with the provisions of that section the trial
is rendered illegal. There is hardly any parallel between an officer conducting a search
who has no authority under the law and a search having been made which does not
strictly conform to the provisions of Section 15 of the Act. The principles which have
settled with regard to the effect of an irregular search in exercise of the powers under
Section 165 of the Code of Criminal Procedure would be fully applicable even to its
provisions. It is significant that there is no provision in the Act according to which any
search carried out in contravention of Section 15 would render the trail illegal. In the
absence of such a provision the law must be applied which has been laid down with
regard to searches made under the provisions of the Criminal Procedure Code. 459

Where search, investigation, arrest and prosecution were conducted by sub-inspector
who was not appointed as special police officer under the Act, held that such procedure


274
was illegal and trial was vitiated\(^{460}\). The Sub-Inspector of Police is not an officer competent to conduct search under Section 15 of the Act because the section specifically provides that the Special Police Officer or the Trafficking Police Officer is to conduct search. Illegality in conducting search and arrest can be ground for quashing the proceedings, if it is found that search and arrest were done by the officer not in accordance with the provisions of law and the possibility of the case ending in a conviction is not there. If the proceedings are allowed to go on even after it is found that the search and arrest were not conducted on observing the mandatory provision of law that will be an abuse of process of Court. Under Section 482 of the Criminal Procedure code, the Court will be justified in quashing the proceedings to prevent the abuse of process of Court or otherwise to secure the ends of justice.

In the instant case, the Supreme Court has sounded a note of warning that the investigating agencies cannot and ought not to show complete disregard of such provisions as are contained in sub-section (1) and (2) of Section 15 of the Act. The legislature in its wisdom provided special safeguards owing to the nature of the premises which have to be searched involving inroads on the privacy of citizens and handling of delicate situations in respect of females. But the entire proceedings and the trial do not become illegal and vitiated owing to the non-observance of or non-compliance with the directions contained in the aforesaid provisions. The Court, however, has to be very careful and circumspect in weighing the evidence where there has been such a failure on the part of the investigating agency but unless and until women prejudice is shown to have been caused to the accused person or persons the conviction and the sentence cannot be set aside. It may not be out of place to reiterate when it was said in *H.N. Rishbud v. State of Delhi*, \(^{461}\), that a defect or an illegality in the investigation, however, serious, has no direct bearing on the competency or the procedure relating to cognizance or trial of an offence and that whenever such a situation arises, Section 537 of the Code of Criminal Procedure (now Section 465 of

\(^{460}\) *Mumtaj v. State (Government of NCT of Delhi)*, 2003 Cr.L.J. 533 (Delhi).

\(^{461}\) AIR 1955 SC 196
1973 Code) is attracted and unless the irregularity or the illegality in the investigation or trial can be shown to have brought about a miscarriage of justice462.

Non-compliance of requirements of Section 15 does not necessarily vitiate the entire proceedings and trial and the matter depends upon the facts brought to light in the course of trial and evidence463. The Act, is a special piece of legislation enacted with a special purpose and as it has to deal with women and girls. Certain provisions of the Act are required to be strictly complied with. Section 15 is one of those provisions, it begins with the wording : ‘Notwithstanding anything contained in any other law for the time being in force,’ making it clear that even if in some other general provisions of law, there is a section which enables the police officers to proceed with the search effect seizure, this cannot be resorted to when acting under this Act without strictly observing the procedure laid down in Section 15. All the directions contained in the said provisions appear to be mandatory.

While the recording of reasons for proceeding without obtaining the search warrant may not be done, which is a matter of discretion, so far as the requisition of the services of the respectable inhabitants is concerned, the direction is mandatory and the Legislature by insisting on the presence of one woman mediator at the time of search has undoubtedly chosen to safeguard the interests of the persons with whom the Act is intended to deal.464 Where the law requires that reasons should be recorded in writing, a search made without such record is illegal. Again, the prosecution must always adduce the evidence of such record during the trial, and not merely leave it to the officer to state that the reasons were recorded.465

The words used in sub-section (1) of Section 15 of the Act viz. that "such officer may, after recording the grounds of his belief", clearly show that it is he who has to set out the reasons or the grounds which made him think or believe that the search of the premises with warrant cannot be made without undue delay, and that in itself would

---

463 Shyam Kumari v. State of U.P., 1984 (2) Crimes 140 (All.).
show that the grounds are intended to be judged to the satisfaction of the Court in case such question arises to be considered. It may be that what satisfied him may not appear to be so satisfactory in the eyes of another person, but at any rate that does not exonerate him from setting out the grounds which led him to a particular belief and not having done so only justifies one to say that he had failed to carry out the peremptory provisions which led him to carry out the search of the premises without obtaining a warrant in that connection.\textsuperscript{466}

It is not necessary that the Special Police Officer must depose that he had recorded the grounds for his belief when acting under Section 15 of the Act. When an official act is done, under Section 114 of the Evidence Act, it is presumed to have been properly done. In the absence of any admission by the Special Police Officer and in the absence of any other evidence it cannot be held that it has been proved that the Special Police Officer did not record the grounds of his belief when acting under Section 15 of the Act.\textsuperscript{467}

Removal of prostitute from any place.\textsuperscript{468}

\textsuperscript{466} State of Gujarat v. Bai Radha, 1968 (9) G.L.R. 278 (Guj.)
\textsuperscript{468} (1) A Magistrate on receiving information that any [person] residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, may record the substance of the information received and issue a notice to such [person] requiring [him] to appear before the magistrate and show cause why [he] should not be required to remove [himself] from the place and be prohibited from re-entering it.
(2) Every notice issued under sub-section (1) shall be accompanied by a copy of the record aforesaid, and the copy shall be served along with the notice on the [person] against whom the notice is issued.
(3) The magistrate shall after the service of the notice referred to in sub-section (2), proceed to inquire into the truth of the information received, and after giving the [person] an opportunity of adducing evidence, take such further evidence as he thinks fit, and if upon such inquiry it appears to him that such [person] is a prostitute and that it is necessary in the interests of the general public that such [person] should be required to remove [himself] there from and be prohibited from re-entering the same, the magistrate shall, by order in writing communicated to the [person] in the manner specified therein, require [him] after a date (to be specified in the order) which shall not be less than seven days from the date of the order, to remove [himself] from the place to such place whether within or without the local limits of his jurisdiction, by such route or routes and within such time as may be specified in the order and also prohibit [him] from re-entering the place without the permission in writing of the magistrate having jurisdiction over such place.
(4) Whoever —
The question is whether Section 20 of the Act offends Article 14 of the constitution. It is stated that the power conferred on the Magistrate under Section 20 of the Act is an uncanalised and uncontrolled one that he acts there under in his executive capacity, that the said section enables him to deiscriminate between prostitute and prostitute in the matter of restricting their movements and deporting them to places outside his jurisdiction, and that it also enables him on flimsy and untested evidence to interfere with the lives of respectable women by holding them to be prostitute and, therefore, it violates Article 14 of the Constitution. So stated, the argument appears to be plausible, but a closer scrutiny of the section and the connected sections not only reveals clear-cut policy but also the existence of effective checks against arbitrariness.

It has been well settled that Article 14 does not prohibit reasonable classification for the purpose of legislation and that a law would not be held to infringe Article 14 of the Constitution if the classification is founded on an intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the said law. The differences between a woman who is a prostitute and one who is not certainly justify their being placed in different classes. So too, there are obvious differences between a prostitute who is a public nuisance and one who is not. A prostitute who carries on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not be so dangerous to public health or morals as a prostitute who lives in a busy locality or in an over-crowded town or in a place within the easy reach of public institution like religious and educational institutions. Though both sell their bodies the latter is far more dangerous to the public, particularly to the younger generation during the emotional state of their life. Their freedom of uncontrolled

(a) fails to comply with an order issued under this section, within the period specified therein, or whilst an order prohibiting [him] from re-entering a place without permission is in force, re-enters the place without such permission, or
(b) knowing that any [person] has, under this section, been required to remove [himself] from the place and has not obtained the requisite permission to re-enter it, harbours or conceals such [person] in the place, shall be punishable with fine which may extend to two hundred rupees and in the case of continuing offence with an additional fine which may extend to twenty rupees for every day after the first during which [he] has persisted in the offence.
movement in a crowded locality or in the vicinity of public institutions and only helps to
demoralize the public morals but, what is worse to spread diseases not only affecting
the present generation, but also the future one. Such trade in public may also lead to
scandals and unseemly broils. There are, therefore, pronounced and real differences
between a woman who is a prostitute and one who is not, and between a prostitute,
who does not demand in public interests any restrictions on her movements and a
prostitute whose actions in public places call for the imposition of restrictions on her
movements and even deportation. The object of the Act, as has already been noticed, is
not only to suppress immoral traffic in women and girls, but also to improve public
morals by removing prostitute from busy public places in the vicinity of religious and
educational institutions. The differences between these two classes of prostitutes have
a rational relation to the object sought to be achieved by the Act. Section 20 in order to
prevent moral decadence in a busy locality, seeks to restrict the movements of the
second category of prostitutes and to deport such of them as the peculiar methods of
their operation in an area may demand.

In the instant case, the petitioner took a house on rent from the respondent tin
Guntur Municipal area. She is said to have taken to a life of prostitute there and to have
been since running a brothel in that house. This became a source of nuisance to the
respondent and a menace to the healthy, moral atmosphere of the general public of the
locality. On a petition filed by the respondent, the Additional Munsif-Magistrate, Guntur
started proceedings under Section 20 of the Suppression of Immoral Traffic in Women
and Girls Act, 1956. After due enquiry into the truth of the information received and after
giving the petitioner herein an opportunity of adducing evidence he reached the
conclusion that the petitioner is a prostitute and that it was necessary in the interests of
the general public and that she should be directed to remove herself from the Guntur
area. He accordingly passed an order, directing her to remove herself from the disputed
portion of the house in Door No. 9-3-1933 Vinapamulavari Street, Railpet, Guntur and
from the local limits of Guntur Municipality within 7 days from the date of the order and
not to re-enter the premises or come again within the Guntur Municipal limits without the
written permission of the Court. Aggrieved by this order, the petitioner moved in vain the
Sessions Court to make a reference to the High Court. She has now come in revision to
The petition came up before Mohammed Mirza, J. who, having regard to the conflict of views between the Allahabad and Punjab High Courts, has referred the matter to this Bench. The contentions raised by the Counsel for the petitioner, Sri Rama Mohana Rao, are two fold, firstly, that there is no evidence on which the revision petitioner can be held to be a prostitute; secondly that even assuming that she was prostitute, Section 20 of the Act cannot be lawfully invoked, as it is hit by Article 19(1), sub-clauses (d), (e) and (g) of the Constitution. He further contended that at any rate, the order of the lower Court is bad, because it does not bear any reference to either the place where the petitioner should reside, or to duration time for which the order shall remain in force.

The constitutionality of Section 20 seems to have been judicially noticed by some of the High Courts in India. The Counsel for the parties has referred to these decisions. The Counsel for the petitioner placed his reliance mainly on certain observations which are obiter dicta in Shama Bai v. State of U.P. He has of course referred also to Smt. Begum d/o Hudsain Saheb v. State, and Smt. Kaushialiya v. State.

Shama Bai v. State of U.P., is a case decided by a single judge who spoke of the evils of prostitution in the following manner:

“It cannot be denied that prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community............”

Therefore, while considering the reasonableness of the restrictions imposed on the trade or profession of a prostitute by this Act it has to be kept in mind that prostitution is a slur on human dignity and a shame to human civilization.

“its eradication by gradual and evolutionary process is ultimate aim of all civilized nations. So long as it is not possible to completely abolish it, it has to be tolerated as an evil necessity, but it is only reasonable that restrictions should be imposed to mitigate so

469 AIR 1959 All 57
470 AIR 1963 Bom 17
471 AIR 1963 All 71
472 AIR 1950 All 57
far as possible the evil effects of the trade or profession and to protect the interests of the general public.

As already observed, the Counsel relies on the following observations of the learned judge, which are *obiter dicta* in nature. The learned Judge, observed thus:

"It is true that in Section 20 of the Act it is provided that a Magistrate may pass an order removing a prostitute from a place within his jurisdiction only if he considers that it is necessary to do so in the interests of the general public. Prima facie, again, it appears that the expression 'necessary in the interests of the general public' is 'too vague, uncertain and elusive a criterion to form a rational basis for the discrimination made.'

Having expressed himself thus the learned Judge observed that he was not giving any final opinion on this point, because he did not hear the other side and that it was only proper that before a provision of a Central Act is held unconstitutional notices must go not only to the respondents but also to the Attorney General of India. In such circumstances reliance on the observations which the Counsel for the petitioner considers are favourable to him is of no avail.

Then there is the case of *Kaushaliya v. State*[^473]. Therein it was argued that Section 20 takes away or abridges the fundamental rights conferred by sub-clauses (d) and (e) as well as infringes Article 14. The learned judge did not accept the contention that the provision violates Article 19(1) (g) of the Constitution, on the ground that no one can claim any fundamental right to carry on such an activity as though it was an ordinary profession or trade. But he observed at the same time that the encroachment made by Section 20 on the free movement of an individual far outweighs the benefits that may likely to occur to the public at large and therefore, cannot be deemed to be reasonable, that no principles have been prescribed for the guidance of the Magistrate and that the circumstances under which action can be taken is left entirely to the subjective satisfaction of the Magistrate. He was further of the view that uncontrolled power has been delegated to the Executive and that unfettered and unguided power to a subordinate Magistrate also; amounts to an infringement of the right to equality before the law guaranteed by Article 14 as there is nothing in the Act to guide the Magistrate in

[^473]: AIR 1963 All 71
the exercise of his discretion when deciding the cases of individual prostitute. Court did not agree to this view. The discretion exercised by a Magistrate in a State where there is separation of judiciary from the executive cannot be deemed to be the exercise of discretion by an executive authority. When there is a definite procedure prescribed, the rules of natural justice far from being ignored or in any wise violated have to be followed strictly, the person concerned is put on notice of the circumstances against her and has ample opportunity to meet the case and the procedure for the conduct of the proceedings in judicial manner has been clearly laid down in Section 20, not think that exception can be taken to this process, as being unconstitutional or violative of any principle of natural justice. It is not necessary nor is it possible or even expedient to lay down a satisfactory standard or hard not fast rules that may govern all the circumstances which are difficult to be visualized. It is difficult to say that the power is uncontrolled either. It is controlled and limited by the dictates of the interest of the general public. The term “interests of the general public” though said to be elastic, has got its own natural limitations and those limitations cannot be transgressed by the Magistrate. The power thus limited is in no sense untrammeled. Further the order passed is subject to the revisionary jurisdiction of the High Court. Therefore, court did not agree with the view expressed by the learned judge who decided the above case.

In this connection court referred to the decision of a Division Bench of the Allahabad High Court in *Sona Bai v. Municipality of Agra*,474 There the Municipal Board of Agra was enforcing a bye-law which it made in 1948 and under which the Municipal Board could direct that a public prostitutes may not reside within a specified areas of the city of Agra. Under that bye-law, the mohallas where the public prostitutes were not to reside were specified and then it was provided that no person shall let or otherwise dispose of any house or building to public prostitute or for a brothel within the area or in the streets so specified. The bye-law further provided for a penalty of Rs.50 for its breach. The executive officer issued a notice to the prostitute to remove themselves from the locality which fell within the purview of the bye-law. It was contended in the High Court that the bye-law was *ultra vires* on the ground that it imposed an unreasonable restriction on the fundamental right which is guaranteed under Article

474 AIR 1956 All 736.
19(1) (g) and also that the bye-law does not provide for any opportunity being given to the aggrieved person to lead evidence before the Magistrate. The learned Judges did not however, go into the larger question whether a prostitute should be prohibited from carrying on her trade. However, so far as the question before them was concerned being a limited one, they observed that they have no hesitation in holding that the restriction on carrying on trade of public prostitution within a specified area of the Municipality is eminently a reasonable one.

This decision was followed by the Punjab High Court in Municipal Committee, Malerkatla v. Mohd. Mushtaq,\(^{475}\) there it was observed that a restriction carrying on trade of public prostitution within a specified area of the Municipality is eminently a reasonable one, being in the interests of the health and morals of the persons living in that locality, that a Municipal Board has power to impose such restriction, that such restriction is within the ambit of Article 19 of the Constitution and that it is of a restrictive nature and does not amount to an unreasonable exercise of the powers of the legislature.

Kamala China v. State,\(^{476}\) is again a case where it was held that Section 20 of the Act is hit neither by Article 14 nor Article 19 of the Constitution. The learned Judge there observed that the Magistrates have not been given any unrestricted powers under Section 20, for in each case it is the duty of the Magistrate to examine the evidence and to come to the conclusion that the removal or externment of a particular prostitute from a particular locality was in the interests of general public. The expression "necessary in the interest of the general public" could not, therefore, be held "vague, uncertain and elusive." While holding so, he referred to the observations made by Sahai, J., in Shama Bai v. State of U.P.,\(^{477}\) and differed from his conclusions. He further observed that the classification enjoined as per Section 20 is neither arbitrary nor unreasonable, for that has to be determined on two-fold considerations, firstly, that the woman or the girl has been found to be a prostitute and secondly, that it was in the interest of the general public to direct her removal from the locality in question. In support of this view, the

\(^{475}\) AIR 1960 Punj 18.
\(^{476}\) AIR 1963 Pun 36
\(^{477}\) AIR 1959 All 57,
learned Judge relied on the case *Gurbachan Singh v. State of Bombay*[^478], which was a case under Section 27(1) of the City of Bombay Police Act, wherein the Supreme Court repelled the plea that provision is hit by article 14 of the Constitution of India. The provisions of Section 20 of the Act are almost in similar terms, with an additional safeguard viz. that it is a judicial decision of the Magistrate and not the excessive decision of a Commissioner of Police, and has to be given on evidence. Court agreed with the view expressed by the learned Judge of the Punjab High court. Section 20 is not hit by any constitutional inhibition under Article 19. the Bombay High Court too in *Bapurao Dhondiba Jagtap v. The State*,[^479] has taken somewhat a similar view. There the question arose under Section 37 (8) of the Bombay Police Act. The constitutionality of the provision was questioned on the ground that the restrictions imposed under that section are executive that as per the terms of the section any assembly or any procession can be prohibited and that there is no indication given by the Legislature as to the type of the assembly or of the procession which should be prohibited under that sub-section. It was observed thus:

"It was impossible for the Legislature to indicate the exact nature of the assembly or the procession which should come within the ambit of Section 37(3). Again, the only test which the Legislature could lay down and which the Legislature has laid down is that only that assembly or that procession should be prohibited where the prohibition was necessary for the preservation of the public order. It is difficult to see how, apart from laying down this test, the Legislature could have given only more details in indicating the nature of the assembly or the procession."[^480]

The learned Judges finally came to the conclusion that sub-section (3) was a reasonable restriction imposed by the Legislature in the interests of public order, upon the freedom guaranteed under Article 19(1) (b) and (d) and that provision of law cannot be said to contravene the provisions of the Constitution so as to render it void. This case of course does not relate to the Act with which herewith concerned. But, however,

[^478]: AIR 1952 SC 221
[^479]: AIR 1956 Bom 300 at p. 303
[^480]: Ibid at page 303
it shows the considered opinion of that High Court with regard to the constitutionality of law under which discretion was allowed to an authority having regard to the nature and circumstances of the subject matter involved.

*Smt. Begum d/o Hudsain Saheb v. State*,\(^{481}\) is a case directly on the point. There it was held that Section 20 of the Act does not offend Article 14 of the Constitution, that the discretion given to the Magistrate under the section is not unguided and undefined, that the words "in the interest of general public" appearing in sub-section (3) of the section are intended to have application in the circumstances similar to those created by Sections 7, 8 and 18 of the Act and it is only when it is found that a prostitute is carrying on her trade in such a place and in such a manner as to affect the morals of young and unwary who have frequently to use the locality where she carries on her activities or hurts the susceptibilities of a large number of even grown-up persons having occasion to be in the locality that it can be said that is necessary "in the interests of the general public" that such woman or girl should be required to remove herself therefrom; that in view of the limited meaning of the words "in the interests of general public" it cannot be said that the discretion is arbitrary and looking to the object to be achieved the section does not make excessive invasion on the rights of a prostitute to move freely and reside wherever she likes\(^{482}\).

The territorial jurisdiction of the Magistrate differs from place to place. The very next village adjoining the place from where the prostitute is removed may be a place out of the jurisdiction of the Magistrate. It cannot, therefore, be said that removal of a person from that village to another village would go beyond the purposes of the Act. In fact it may be deemed to sub-serve the interests and the purposes of the Act, itself. That is the reason why both the expressions "within the jurisdiction" and "without the jurisdiction" have been used. This expression does neither go beyond the purpose of the Act nor the necessities of the case that may come before the Court in this behalf.

Thus, on a consideration of the argument of the Counsel and the above authorities, it seems plain that wide though the powers conferred upon the Magistrate may appear

\(^{481}\) AIR 1963 Bom 17

\(^{482}\) Seetharamamma v. Sambasiva Rao, AIR 1964 AP 400 at 402, 405-406.
to be under Section 20 of the Act, it would be wrong to regard that power as untrammeled or unlimited. Bounded as it is by the limitations and dictates of interest of the general public, such power is necessary to advance the purpose of the Act. The objects and the scheme of the Act require it. The power so conferred has to be exercised by a judicial authority. Though no provision for appeal has been provided, it cannot on that account be an arbitrary exercise of the power, as the discretion has to be exercised judicially and this exercise is always subject to revisionary jurisdiction of the High Court. In these circumstances Section 20 cannot be deemed to be an invalid piece of legislation. In this view of the matter, the order of the Magistrate cannot be deemed to be unconstitutional, either because Section 20 violates the fundamental rights recognized by Article 19 or on the ground that it is vague and places unreasonable restriction on these fundamental rights.\[483\]

The question that arises is whether Section 20 of the Act imposes an unreasonable restriction on girls and women, leading a life of prostitution. To state it differently, does Section 20 of the Act impose reasonable restrictions on the exercise of the fundamental right of the prostitutes under Article 19(1) (d) and (e) of the Constitution in the interest of the general public. Under Article 19(1) (d) the prostitute has a fundamental right to move freely throughout the territory of India; and under sub-clause (e) thereof to reside and settle in any part of territory of India. Under Section 20 of the Act the Magistrate can compel her to remove herself from the place where she is residing or which she is frequenting to places within or without the local limits of his jurisdiction by such route or routes and within such time as may be specified in the order and prohibit her from re-entering the place without his permission in writing. This is certainly a restriction on a citizen's fundamental right under Article 19(1) (d) and (e) of the Constitution. Whether a restriction is reasonable in the interests of the general public cannot be answered on a priori reasoning; it depends upon the peculiar circumstances of each case. Mahajan, J., as he then was, speaking for the Court in Chintaman Rao v. State of Madhya Pradesh,\[484\] succinctly defined the expression "reasonable restrictions" thus:


\[484\] 1950 SCR 756 at p. 763 : AIR 1951 SC 118 at p. 119
"The phrase 'reasonable restriction' connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word 'reasonable' implies intelligent care and deliberation that, is the choice of a course which reason dictates."

A fairly exhaustive test to ascertain the reasonableness or a provision is given by Pantanjali Sastri, C.J. in *State of Madras v. V.G.Row*, 485 There in the learned Chief Justice observed thus:

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

This passage summarized the law on the subject fully and precisely. The reasonableness of a restriction depends upon the values of life in a society, the circumstances obtaining a particular point of time when the restriction is imposed and degree and the urgency of the evil sought to be controlled and similar others. If in a particular locality the vice of prostitution is endemic degrading those who live by prostitution and demoralizing others who come into contact with them, the Legislature may have to impose severe restrictions on the right of the prostitute to move about and to live in a house of her choice. If the evil is rampant, it may also be necessary to provide for deporting the worst of them from the area of their operation. The magnitude of the evil and the urgency of the reform may require such drastic remedies. It cannot be gain said that the vice of prostitution is *rampant* in various parts of the country. There cannot be two views on the question of its control and regulation. One of the objects of the Act is to control the growing evil of prostitution is public places. Under Section 20 of the Act the freedom of movement and residence are regulated, but, an effective and

safe judicial machinery is provided to carry out the objects of the Act. The said restrictions placed upon them are certainly in the interests of the general public and, as the imposition of the restrictions is done through a judicial process on the basis of a clearly disclosed policy, the said restrictions are clearly reasonable. It is said that the restrictions on prostitutes, though they may be necessary, are excessive and beyond the requirements the eradication of the evil demands. The movements of prostitutes, the argument proceeds, may be controlled but that part of the section which enables the Magistrate to deport them outside his jurisdiction is far in excess of the requirement. It is suggested that by consecutive orders made by various Magistrates, the point may be reached when a prostitute may be deported out of India. The second argument borders on fantasy. The first argument also has no force. If the presence of a prostitute in a locality within the jurisdiction of a Magistrate has a demoralizing influence on the public of that locality having regard to the density of population, the existence of schools, colleges and other public institutions in that locality and other similar causes an order of deportation may be necessary to curb the evil and to improve the public morals.486

In the instant case, Advocate for the petitioner argued that the petition filed by the landlord disclose offence under Sections 3 and 7, i.e., keeping a brothel and allowing a premises to be used as a brothel and also prostitution in and/or in the vicinity of public places. The learned Magistrate should therefore, have taken cognizance of the offence under Section 190(1) (b) of the Code of Criminal Procedure. It was urged that the words "may take cognizance" in the context means "must take cognizance" and the Magistrate had no discretion in the matter, otherwise that section would be violative of Article 14 of the Constitution. In support of this the Advocate for the petitioner has referred to a decision of the Supreme Court in the case of A.C. Agarwal v. Mst. Ram Kali, 487. The learned Magistrate started this proceeding under Section 20 of the Act on the complaint of the landlord of the premises in which he alleged that the petitioner was using the premises as a brothel and carried on prostitution in the room. He also alleged that within 200 yards of the premises there were educational institutions and Boarding House, Hostel and Messes used by students besides places of worship. The allegations prima

487 AIR 1968 SC 1
facie make out a case for prostitution under Sections 3 and 7 of the Act. But the learned Magistrate instead of taking cognizance of the offence started a proceeding under Section 20 for throwing her out of the premises. The decision of the Supreme Court however, is in respect of proceeding under Section 18 of the Act. Sub-section (2) of Section 18 of the Act provides as follows:

"A Court convicting a person of any offence under Section 3 or Section 7 may pass order under sub-section (1), without further notice to such person to show cause as required in that sub-section."

There is no corresponding provision in Section 20 under which the present proceeding has started. Sub-section (2) of Section 18 virtually made a proceeding under Section 18 consequential to a conviction under Sections 3 and 7 but his cannot be so with respect to a proceeding under Section 20. The Legislature apparently did not provide for a proceeding under Section 20 consequential upon conviction under Sections 3 and 7. The learned Judges permitted out that any other interpretation in respect of Section18 would make the provision discriminating but this cannot be said of the provision of Section 20. This argument, therefore, does not hold water

Court considered whether Section 20 imposing as it does restrictions on the exercise of the right vouchsafed by the Constitution satisfies the test of reasonableness to be within the pale of permissible legislation. That section obviously enough is designed to protect the public from the harmful effects of prostitution. In fact it is calculated to serve two fold purposes in that it also allows ample scope for the prostitute reform herself by removing herself from the uncongenial atmosphere. Wide though the power vested in the Magistrate under this section may seem to be, its exercise is regulated by the limitations imposed by the object o0f the provision, viz., interests of the general public. In the matters of such nature it is rather difficult for the Parliament or Legislature to visualize all the circumstances and make express provision for each case in the enactment. A good deal of course has to be of necessity left to the discretion of the Magistrate to carry out the purpose of the Act as best as it could be. That is the reason why discretion of such amplitude has been allowed to the Magistrate and this discretion, it may be remembered is not vested in any administrative or executive authority but in a judicial body. It is said that a check on arbitrary exercise of discretion
could be provided for by specifying in the Act the maximum period for which and the
distance to which the woman should remove herself. Of course Section 20 does not
make any provision limiting the duration of time.

But that is because it is rather difficult for even the Magistrate to decide at the
time of making the order how long it will take for the woman to be rid of such tendencies
as are likely to pollute the atmosphere. The provision in such circumstances does not
become a bad piece of legislation. It is significant that the Magistrate has to revoke the
order as and when he feels that her presence is no longer a threat to public interests.
That is sufficient guarantee for the fact that the restrictions on her right will not extend to
an unreasonable period (i.e.) to a period beyond what is necessary in the interests of
the public. The same may be said as to the place where she should depart. The section
as enacted does not give any scope for arbitrariness in making or revoking the order.
Before any order prejudicial to a woman is made, a detailed procedure has to be
followed. The procedure prescribed affords full opportunity to the woman to make her
representation and to effectively meet the case against her. The Magistrate has to be
satisfied that the woman is a prostitute and her removal from the place is necessary in
the public interest. The satisfaction required is objective and should rest on evidence
that bears scrutiny. The inquiry under that section is judicial and is entrusted to a judicial
body. Under these circumstances, it is difficult to hold that Section 20 in any manner
abridges the rights conferred under Article 19(1) (d), (e) and (g) as controlled by clause
(5) of the same Article488.

**Question of 'Interests of the General Public'**

As observed by Bombay High Court in *Jeshingbhai Ishwarlal v. Emperor*,489 the
expression “interests of the general public” is of wide connotation and has got several
implications. Though it is an expression of large import and may leave the Magistrate
without much rational guidance by themselves, as used it is not possible to regard the
words “interest of the general public” to be in any manner vague. If one has regard to
the whole purpose of the Act, not only as given in the preamble, it would clearly appear
that the words are intended to have application in the circumstances similar to those

489 AIR 1950 Bom. 363 (F.B.)
created by Sections 7, 8 and 18. In other words, if it is found that a prostitute is carrying on her trade in such a place and in such a manner as to affect the morals of young and unwary who have frequently to use the locality where she carries on her activities or hurts the susceptibilities of large number of even grown up persons having occasion to be in the locality then it can be said that "it is necessary in the interest of the general public that such woman or girl should be required to remove herself therefrom....." Viewed from this point of view it cannot be said that the discretion is unguided and undefined. Only such prostitute whose activities are such as to fall within the limits stated above that can be removed by this order. Public interest may be the object which the Legislature had in view or it may be the occasion for making the enactment but it seems that there is no reasonable classification in Section 20 but only an arbitrary selection is provided for.

**Source of "information".**

The question is whether the information received enabling a Magistrate under Section 20 of the Act to make the enquiry provided thereunder should be only from a special police officer designated under Section 13 of the Act. Section 13 of the Act says that 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. The post of special police officer is created under the Act for dealing with offences under the Act, whereas Section 20 does not deal with offences that apart, the expression used in Section 20, namely, "on receiving information" is not expressly or by necessary implication limited to information received from a special police officer. If the Legislature intended to confine the expression "information" only to that given by a special police officer, it would have specifically stated so in the section. The omission is a clear indication that a particular source of information is not material for the application of the particular source of information is not material for the application of the section. There is an essential distinction between an investigation and arrest in the matter of offences and information to the Magistrate: the former, when dealing with women, has potentialities for grave mischief and,

---

491 Shama Bai v. State, AIR 1959 All. 57 at 64.
therefore, entrusted only to specific officers, while mere giving of information would not have such consequences, particularly when, the information received by the Magistrate would only start the machinery of a judicial enquiry. Held: giving the natural meaning to the expression “on receiving information”, that “information” may be from any source.

Sub-section (1) of Section 20 requires the Magistrate to record the substance of the information received by him and sub-section (2) requires him that the notice issued under sub-section (1) shall be accompanied by a copy of the substance of the information so recorded. Now, a Magistrate may receive an information either orally or in writing. In case an oral information has been received by him and he decides to take action on the basis of that information it is but necessary that the substance of that information should be recorded by him before issuing the notice so that a copy of the same may be sent to the person concerned who may be in a position to know the allegations made and to meet them properly. However, the Magistrate may receive an information in writing and on the basis of that information decide to issue a notice. The contention of the petitioner is that even in such a case it is the duty of the Magistrate to record the substance of the information received. Sub-section (1) of Section 20 of the Act uses the word “may” for recording the substance of the information received. It shows that a discretion has been given to the Magistrate to take action on the basis of the information received. He may not decide to issue a notice and thus there is no necessity of recording the substance of the information.

However, if he decides to issue a notice he will be required to send a copy of the same, i.e., information along with the notice under sub-section (2). In those cases where the information received by the Magistrate is in writing and he decides to take action on the basis of that information. It is not necessary for him to record the substance of that information since he may decide to send a copy of the whole of the information received by him in writing along with the notice under sub-section (2). The Magistrate gets the jurisdiction to issue a notice under this section on the basis of the information received by him in writing, or, if received orally, the substance of it has been recorded. As already stated, the purpose of recording the substance of the information is to send a copy of

---

the same along with the notice so that the person concerned may know the allegations made and may be in a position to defend. No reason that where the Magistrate has received the information in writing and decides to send a notice on the basis of the same it is necessary for him to record the substance of the same before he can have the jurisdiction to issue the notice. Sending of a copy of the information received in writing along with the notice as required under sub-section (2) of Section 20 will meet the requirements of law and the person concerned cannot say that any prejudice has been caused to him. The contention of the Counsel for the petitioner that recording of the substance of the information under all circumstances is necessary to show that the Magistrate has applied his mind to the facts of the case is without any force. When the Magistrate decides to issue a notice after receiving an information in writing and without recording the substance of that information, it is to be assumed that he has gone through the report and after applying his mind has decided to issue the notice.

In the instant case it is not the case of the petitioner that she did not receive any copy of the information received by the Magistrate on the basis of which the notice has been issued to her. Under the circumstances no prejudice in any manner whatsoever, can be said to have been caused to her. No doubt very wide powers have been given to a Magistrate to remove any woman or girl who is a prostitute from any place within the limits of his jurisdiction if he considers that it is necessary to do so in the interests of the general public and also to prohibit her from re-entering it again. This section has been attacked on three grounds. The first ground is that it infringes Article 14 of the Constitution of India inasmuch as it has conferred unrestricted powers on a Magistrate and there is no reasonable basis of classification. The second ground is that it is not reasonable restriction as contemplated by Article 19(6) of the Constitution of India. The third ground is that the section infringes Article 19(1) (d) and Article 19(1) (e) of the Constitution of India. High Court took the first objection first. It would be noticed that there is nothing in Section 20 of the Act to guide a Magistrate in deciding which prostitute to remove outside his jurisdiction and which not to remove. In other words, there is no rational classification and it is left to the sweet will of the Magistrate to remove one prostitute and not to remove another though her case may be quite similar.

to the case of the one who is being removed. There is no indication whatsoever in any provision of the Act or the preamble which will guide the Magistrate in determining as to in which cases "it is necessary in the interest of the general public that such woman or girl should be required to remove herself therefrom and be prohibited from re-entering the same."

It appears that the present case would fall in the rule laid down by their Lordships of the Supreme Court in the case of *State of West Bengal v. Anwar Ali,* In that case Section 5 of the West Bengal Special Courts Act was impugned. Section 5 of that Act reads as follows:

"5 (1) A special Court shall try such offences or classes of offences or cases or classes of cases as the State Government may by general or special order in writing, direct. (2) No direction shall be made under sub-section (2) for the trial of an offence for which an accused person was being tried at the commencement of this Act before any Court, but, save as aforesaid; such direction may be made in respect of an offence, whether such offence was committed before or after the commencement of this Act."

The majority view (per Fazl Ali, Mahajan, Mukherjea, Chandra Sekhara Aiyar and Bose, JJ.), was that the provisions of Section 5(1) were *ultra vires* the Constitution by reason of their being in conflict with Article 14 of the Constitution. The minority judgment was by Sastri, C.J., who held that provision to be *intra vires.* Das, J., held the provisions of Section 5(1) ultra vires only so far as it allowed the State Government to direct any case to be tried by the Special Court, the rest of it he held to be valid. In this case Mukherjea, J., observed as follows:

"In the case before us, the language of Section 5 (1) is perfectly clear and free from any ambiguity. It vests an unrestricted discretion in the State government to direct any case or classes of cases to be tried by the Special Court in accordance with the procedure laid down in the Act. It is not stated that it is only when speedier trial is necessary that the discretion should be exercised.

"in the second place, assuming that the preamble throws any light upon the interpretation of the section, I am definitely of opinion that the necessity of a speedier trial is too vague, uncertain and elusive a criterion to form a rational
basis for the discrimination made. The necessity for speedier trial may be the
object which the legislature had in view or it may be the occasion for making the
enactment. In a sense quick disposal is a thing which is desirable in all legal
proceedings. The word used here is 'speedier' which is a comparative term is
and as there may be degrees of speediness, the word undoubtedly introduced an
uncertain and variable element. But the question is; how is this necessity of
speedier trial to be determined? Not by reference to the nature of the offences or
the circumstances under which or the area in which they are committed, nor even
by reference to any peculiarities or antecedents of the offenders themselves, but
the selection is left to the absolute and unfettered discretion of the executive
Government with nothing in the law to guide or control its selection. This is not a
reasonable classification at all but an arbitrary selection."

"A line is drawn artificially between two classes of cases. One side of the
line are grouped those cases which the State Government chooses to assign to
the Special Court; on the other side stand the rest which the State Government
does not think fit and proper to touch. It has been observed in many cases by the
Supreme Court of America that the fact that some sort of classification has been
attempted at will not relieve a state from the reach of the equality clauses."

"It must appear that not only that a classification has been made but also
that it is based upon some reasonable ground some difference which bears a just
and proper relation to the attempted classification. The question in each case
would be : whether the characteristics of the class are such as to provide a
rational justification for the differences introduced ? Judges by this test, the
answer in the present case should be in the negative; for the difference in the
treatment rests here solely on arbitrary selection by the State Government."

Specification of place and route of removal

One Narsing Narayan Singh, landlord of premises No 59, Rafi Ahmed Kidwai
Road, Calcutta, filed a petition against the present petitioner under Section 20 of the

495 Gulf Coloradeo etc. Co. v. Ellis, (1897) 165 US 150 (G)*.
Suppression of Immoral Traffic in Women and Girls Act, 1956 on the allegation that the petitioner was living a reckless life in one of the suites of that premises and that she used to earn her livelihood by selling her chastity and in the interest of the general public, she should be required to remove herself from the said premises and also for directing her not to re-enter therein. The learned Magistrate served a notice to show cause upon the petitioner. The petitioner appeared and show cause denying all the allegations. The learned Magistrate, however, found on a consideration of the materials on record that she was earning her livelihood by prostitution and that in the interest of the general public she should not be allowed to carry on prostitution in that locality and particularly in that house.

The learned Magistrate's order however, is illegal and without jurisdiction for other reasons too. The learned Magistrate directed the petitioner to remove her self from the premises No. 59, Rafi Ahmed Kidwai Road and also from the area of the Part Street Police Station. She was further prohibited from re-entering in the said house and in the area covered by the Park Street Police Station. The Act is a social legislation and not for throwing a woman out on the street. She was directed to remove from the place which was her abode on a finding that she was indulging in prostitution in the suite but presumably the legislature did not want to make her destitute without a shelter to be kicked from place to place by different Magistrates. The Social legislation was passed with an idea of rehabilitation also. The order passed by the learned Magistrate overlooks this aspect of the matter altogether. Will prostitution be stopped by throwing her out on the street? The provisions of the law also did not contemplate that; Sub-section (3) empowers the Magistrate to direct the girls to remove herself from the place to such place whether within or without the local limits of his jurisdiction. The provision, therefore, contemplates not only for removal from one place but the Magistrate is to direct such place whether she has to remove herself. No Magistrate can fix up a place unless the State Government provides for it and apparently the object of the legislation was to provide for such place where the Magistrate shall direct her to remove. "Such other place" contemplates starting of protective home and "protective home" is defined in clause (g) of Section 2 as an institution by whatever name called, in which women and girls may be kept in pursuance of this Act and includes (i) a shelter where female
under trials may be kept in pursuance of this Act and (ii) a corrective institution in which women and girls rescued and detained under this Act may be imparted such training and instruction and subjected to such disciplinary and moral influences as are likely to conduce to their reformation and the prevention of offences under this Act.

Protective Homes

Section 21 of the Act provides provision for Protective Homes. Unfortunately, the conditions of these homes are not very satisfactory. In the case of Dr. Upendra Baxi and Ors. v State of U.P. and Ors.497 the Supreme Court of India expressed its utter dissatisfaction with respect to the condition of Protective Homes.

This is a public interest litigation filed by Dr. Upendra Baxi and Mrs. Lotika Sarkar seeking court's directions to the State Government to protect the basic human rights of the inmates of the protective home at Agra which was established under the provisions of the Suppression of Immoral Traffic in Women and Girls Act 1956. The Supreme Court gave certain directions to the Uttar Pradesh state Government and the Administrators of the previously mentioned Protective home, to provide better living conditions to the inmates. They were directed to ensure that they do not continue living in inhuman and degrading conditions and that the right to live with dignity guaranteed under Article 21 of the Constitution of India is made real and meaningful for them. However, Mrs. Shrivastava, the Superintendent of the home, filed an affidavit before the Court stating the action taken by the State Government in compliance with the directions of the Supreme Court. In the affidavit, Mrs Shrivastava had stated that the present petition had been filed by Dr. Baxi and Mrs. Lotika Sarkar as a last resort to compel the Government to leave the present accommodation of the home and that their sole objective was to secure the building of the Home.

Firstly, the Court unhesitatingly condemned the insinuation made by Mrs Shrivastava that Dr. Baxi and Mrs. Sarkar wanted to secure the building of the Home for themselves. It then proceeded to consider how far the directions made by it had been complied with. The Supreme Court had directed in an earlier order that all the inmates of the Home should be medically examined.\[497\] Supreme Court of India(1983) 2 SCC 308
the Department of Psychiatry, S N Medical College Agra, who examined the 50 inmates of the Home, found that 33 of the inmates were suffering from mild to moderate degrees of mental retardation. However, they had not been medically examined at the time of being admitted in the home.

The Supreme Court sought an explanation from the Superintendent of the Home as to whether any psychiatric treatment was provided to them and whether any steps had been taken towards their rehabilitation. Further, the Supreme Court directed the State government and also the Superintendent of the Home, to segregate the mentally retarded inmates from the normal inmates and to decide which categories of mentally retarded inmates should be transferred to a suitable Institution.

(1) The approach road to the new building that be made into a pucca or semipucca road so that it does not get blocked or waterlogged by rain. This shall be done within 3 months from today.

(2) the big hall as also the three rooms used as class-rooms and the kitchen shall be provided with cross ventilation by putting up sufficient number of windows so as to ensure passage of air in and out the rooms. The District Judge or the Additional District Judge nominated by him shall determine how many windows are necessary to be constructed for this purpose.

(3) Exhaust fans shall be provided in the big hall three classrooms, kitchen and offices.

(4) The State Government shall provide police protection through-out day and night for the inmates of the Protective Home in the new building.

(5) The State Government shall either provide accommodation to the staff of the Protective Home in or near the new building or provide conveyance to the members of the staff for coming to the Protective Home and going back to their respective homes unless public transport is available in the immediate vicinity of the Protective Home.

(6) We are informed that mosquito nets have been provided by the State Government to each and every inmate as also to the members of the staff staying in the Protective Home but if that has not yet been done, the State Government shall immediately take steps to provide mosquito nets to each and every inmate and member of the staff staying in the Protective Home.
(7) The State Government shall provide a conveyance for taking the inmates to the Court and bringing them back to the Protective Home and similarly, conveyance shall also be provided to the District Judge or Additional District Judge inspecting the Protective Home.

(8) The District Manager (Telephones), Agra shall immediately shift the telephone to the new building and whatever steps are necessary for this purpose shall be taken by the State Government without any delay.

(9) The State Government shall immediately provide cooking gas in the kitchen so that it is not necessary to use wood for cooking which may emit a lot of smoke and lead to discomfort and suffocation on account of lack of ventilation.

(10) The State Government shall immediately proceed to carry out rewiring as also to install the electric meter in a safe place where there is no dampen. Sub-section We find from the latest Inspection Report of the Additional District Judge dated 30th June 1986 that the electric meter has been shifted to the chamber of the Superintendent. We hope and trust that the new place to which it is shifted is not damp so as to imperil the safety of the inmates. That is a matter which would have to be looked into by the District Judge or the Additional District Judge when he goes for inspection. But we also think it necessary to direct that since the electric line is of 440 voltage and not 220 voltage and would, therefore, be dangerous for the inmates, the State Government shall without any undue delay proceed to take the necessary steps to install a generator so that the safety of the inmates is not jeopardized.

These specific directions for enquiring into the welfare of the women in the Protective Homes are being made because this Court finds that as in the present case, while action is hardly ever taken against the keepers of brothels and the pimps and other exploiters of the women, the women languish in Protective Homes for long periods of time in oppressive conditions thirsting for freedom. It is hardly unlikely that a trafficked woman may end up in a Protective Home by the collusion of the keepers of brothels, and pimps with some corrupt authorities, as that would throw her at their mercy and she would willingly succumb to their dictates, in a bid to secure her freedom, as there are no provisions for legal aid, and occasionally she has been abandoned by her family or they are too weak economically to give her any worthwhile support. The fact that the Mathura
home was so over-full that Pushpa had to be sent back to the Agra home, and the inordinate over 9 ½ months delay, even in which period the case of Pushpa was not dealt with by the Magistrate only underscores the suffering that such an exploited and trafficked woman, who is usually at the

The Court also directed that the expenses for the same should be borne by the State Government. The Supreme Court observed that soon after its first order, 16 inmates, who were reported to have been in a mentally deranged condition, had been discharged by the Superintendent of the Home after obtaining orders permitting the same, from the Additional District Magistrate. The manner in which these inmates were discharged caused the Court to observe that they might have been discharged merely to avoid an enquiry by the Court. The Court also expressed its disapproval over the fact that the inmates had been discharged without providing them with railway tickets as contemplated under section 37(4) of the Suppression of Immoral Traffic in Women and Girls Act 1956 and that the authorities did not bother to enquire as to where they were going or whether they had any money or how they proposed to look after themselves. The Court also sought an explanation from the Additional District Magistrate as to how the above-mentioned inmates, who had been found to be mentally retarded to some extent, were allowed to be discharged. The court sought explanation on these issues from the State Government and the Superintendent of the Home, and thereafter the case was posted for hearing on another date. While considering the matter under Section 21498 the court observed Lastly, we are pained to point out that though we gave directions from time to time for formulating an effective programme of rehabilitation of

498

(1) The State Government may in its discretion establish 498 [as many protective homes and corrective institutions under this Act as it thinks fit and such homes and institutions], when established, shall be maintained in such manner as may be prescribed.

(2) No person or authority other than the State Government shall after the commencement of this Act, establish or maintain any 498 [protective home or corrective institution] except under and in accordance with the conditions of, a license issued under this section by the State Government.

(3) The State Government may, on application made to it in this behalf by a person or authority, issue to such person or authority a license in the prescribed form for establishing and maintaining or, as the case may be, for maintaining a 498 [protective home or corrective institution] and a license so issued may contain such conditions as the State Government may think fit to impose in accordance with the rules made under this Act:
Provided that any such condition may require that the management of the 498 [protective home or corrective institution] shall, wherever practicable, be entrusted to women:

Provided further that a person or authority maintaining any protective home at the commencement of this Act shall be allowed a period of six months from such commencement to make an application for such license:

[Provided also that a person or authority maintaining any corrective institution at the commencement of the Suppression of Immoral Traffic in Women and Girls (Amendment) Act, 1978 (46 of 1978), shall be allowed a period of six months from such commencement to make an application for such license].

(4) Before issuing a license the State Government may require such officer or authority as it may appoint for this purpose, to make a full and complete investigation in respect of the application received in this behalf and report to it the result of such investigation and in making any such investigation the officer or authority shall follow such procedure as may be prescribed.

(5) A license, unless sooner revoked, shall remain in force for such period as may be specified in the license and may, on application made in this behalf at least thirty days before the date of its expiration, be renewed for a like period.

(6) No license issued or renewed under this Act shall be transferable.

(7) Where any person or authority to whom a license has been granted under this Act or any agent or servant of such person or authority commits a breach of any of the conditions thereof or any of the provisions of this Act or of any of the rules made under this Act, or where the State Government is not satisfied with the condition, management or superintendence of any 498 [protective home or corrective institution], the State Government may, without prejudice to any other penalty which may have been incurred under this Act, for reasons to be recorded, revoke the license by order in writing:

Provided that no such order shall be made until an opportunity is given to the holder of the license to show cause why the license shall not be revoked.

(8) Where a license in respect of a 498 [protective home or corrective institution] has been revoked under the foregoing sub-section such protective home shall cease to function from the date of such revocation.

(9) Subject to any rules that may be made in this behalf, the State Government may also vary or amend any license issued or renewed under this Act.

[(9-A) The State Government or an authority authorised by it in this behalf may, subject to any rules that may be made in this behalf, transfer an inmate of a protective home to another protective home or to a corrective institution or an inmate of a corrective institution to another corrective institution or to a protective home, where such transfer is considered desirable having regard to the conduct of the person to be transferred, the kind of training to be imparted and other circumstances of the case: Provided that —

(a) no 498 [person] who is transferred under this sub-section shall be required to stay in the home or institution to which 498 [he] is transferred for a period longer than 498 [he] was required to stay in the home or institution from which 498 [he] was transferred;

(b) reasons shall be recorded for every order of transfer under this sub-section].

(10) Whoever establishes or maintains a 498 [protective home or corrective institution] except in accordance with the provisions of this section, shall be punishable in the case of a first offence with fine which may
the inmates in the Protective Home and the State Government also on several occasions promised that they would come forward with a rehabilitation programme, nothing seems to have been done by the State Government so far except engaging a sewing teacher. We have pointed out on more than one occasion that it is absolutely essential that the inmates in the Protective Home should be provided a proper rehabilitation programme so that when they come out of the Protective Home, they are in a position to look after themselves and they do not slide into prostitution on account of economic want. The inmates must be given vocational training and guidance by way of rehabilitation. We would, therefore, once again direct the State Government to produce at the next hearing of the writ petition a detailed rehabilitation programme which they have either set up or they propose to set up within a specified time limit. We would also like the Superintendent of the Protective Home to consider whether it would be possible to arrange for their wedding to proper persons in case they want to get married. The Superintendent of the Protective Home can follow the example of the Nari Niketan in Delhi where a Committee was set up by this Court for the purpose of investigating into the antecedents of the would-be bridegrooms in order to ensure that they were genuine persons wishing to marry the inmates and not bogus or sham bridegrooms who were going through the ceremony of marriage merely for the purpose of selling the inmates or pushing them into prostitution. The District Judge will constitute an appropriate Committee for this purpose consisting of himself and at-least two social activists. The State Government will also initiate proper follow up action in this behalf with a view to ensuring that the inmates are not taken back to the brothels or and they do not once again slide into prostitution.

extend to one thousand rupees and in the case of second or subsequent offence with imprisonment for a term which may extend to one year or with fine which may extend to two thousand rupees, or with both.

[21A. Production of records. — Every person or authority who is licensed under sub-section (3) of section 21 to establish or maintain, or as the case may be, for maintaining, a protective home or corrective institution shall, whenever required by a court, produce the records and other documents maintained by such home or institution before such court].
The matter came up for hearing several times after that and various directions were given regarding the wellbeing of the inmates of the Protective Home. In the final order, the Supreme Court held that it was happy to note that the State Government had responded to the various directions and had taken steps with a view to improving the living conditions of the inmates of the Home.

The Allahabad High Court also advised that a social legislation cannot have the object of throwing a woman on the street nor does the legislation contemplate that one Magistrate will throw her out from his jurisdiction to another Magistrate’s jurisdiction to be similarly kicked out. A social legislation has double objective both penal and ameliorative and the legislatures not only wanted prostitution to stop but to provide for rehabilitation of prostitutes. The State government has to provide for protection before enforcing the penal provisions and no tinkering with the problem will serve the purpose. Elaborate Rules have been framed for running “protective homes” by the State Government but the Magistrate’s order does not disclose the running of any such Home. If the penal provision has to be invoked, the ameliorative measure enjoined by the same provision has to be undertaken or else the order becomes bad in law.499

Summing up

“The Immoral Trafficking Prevention Act, 1956 (“ITPA”), the main statute dealing with sex work in India, does not criminalise prostitution or prostitutes per se, but mostly punishes acts by third parties facilitating prostitution like brothel keeping, living off earnings and procuring, even where sex work is not coerced”. But then, often we get to see the images of the sex workers and clients being herded in to police vehicles and kept behind bars. Why? That could be because they would still be tried under common law, as opposed to criminal law, for offences like disturbing public order, peace etc? The rationale behind the said Act itself was that the Government of India in the year 1950 ratified an international convention for suppression of traffic in persons and of the exploitation of the prostitution by others.

Article 1 of the Convention says:

499 Pushpa vs State Of U.P. And Ors. on 16 July, 2004 Allahabad High Court
http://www.indiankanoon.org/doc/1208405/
The Parties to the present Convention agree to punish any person who, to gratify the passions of another:

(1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;

(2) Exploits the prostitution of another person, even with the consent of that person.

Article 2 stipulates:

The Parties to the present Convention further agree to punish any person who:

(1) Keeps or manages, or knowingly finances or takes part in the financing of a brothel;

(2) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.

Article 14 of Constitution of India provides for equality in general and Article 15(3) provides for special protective discrimination in favour of women and children. Article 16(1) covers equality of opportunity in matters of public employment and Article 23 prohibits traffic in human beings and forced labour and makes it punishable under Suppression of Immoral Traffic in Woman and Girls Act 1956 (which was renamed in 1986 as The Immoral Traffic (Prevention) Act. The name of the Act was changed to "Immoral Traffic (Prevention) Act" in view of widening the scope of the Act to cover all persons, whether male or female, who are exploited sexually for commercial purposes).

Article 39 provides that the state should direct its policy towards securing, among other things, a right to adequate means of livelihood for men and women equally and equal pay for equal work for their age or strength. Article 46 directs that state shall promote the educational and economic interests of the women and weaker sections of the people and that it shall protect them from social injustice and all forms of exploitation.

According to the Immoral Traffic (Prevention) Act, 1956, prostitution means the sexual exploitation or abuse of persons for commercial purposes, and the expression "prostitute" shall be construed accordingly. This is a vast improvement on the earlier provision by which prostitution meant the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind and whether
offered immediately or otherwise and the expression prostitute will be construed accordingly.

The objectives of the Act are:

- punish immoral trafficking
- punish traffickers
- punish persons living on earnings of the woman
- welfare measures directed towards rehabilitation of sex workers

By implication, the emphasis is not on the sex worker but on the pimps/brothel owners etc. The various provisions for punishment under the Act for an offence are as under:

Punishment for keeping a brothel or allowing premises to be used as a brothel (Section 3):

- Not less then one year rigorous, not more than three years, and also with fine up to two thousand rupees. (on first conviction)
- Not less then two years rigorous but not more than five years, also with fine up to two thousand rupees. (subsequent occasions)

Punishment for living on the earnings of Prostitution (Section 4):

- Up to two year and fine of one thousand rupees
- If this earning is out of child or minor shall be punishable with imprisonment for a term of not less than seven years and not more than ten years.

Procuring, inducing or taking person for the sake of prostitution (Section 5):

- Punishment not less then 3 years, not more than seven years.
- If the offence under the sub-section is committed against the will of the person imprisonment for a term of seven years shall extent to fourteen years:
  - If it is child not less than 7 years, but may extended to life;
  - If it is minor, not less than 7 years, and not more than 14 years.

Detaining a person in premises where prostitution is carried on (Section 6):

- Not less than 7 years but may be for life. (with or without consent)

Prostitution in or in the vicinity of public places (Section 7):

- With the imprisonment for a term which may extend to three months.
- Where the offence is committed is in respect of a child or minor the person committing the offence shall be not less than seven years but which may be
for life or for a term which may extend to ten years and shall also be liable to fine

Seduction of a person in custody (Section 9):

- Any person who having the custody, charge or care of, or a position of authority over any person causes aid or abets the seduction for prostitution of that person shall be punishable upon conviction for a term which shall be not less than seven years but which may be for life or a term which may extend to 10 years and shall also be liable to fine

Thinking aloud, one cannot but come to the conclusion that no one has the social or political courage to legalise prostitution and regulate it. And it is a dichotomy that we also do not want to completely discourage it by having a legal provision to punish either the prostitute herself or himself or the client or both. In fact, when the Health Ministry and the National AIDS Control Organization (NACO) officials argue that if clients were punished, it would encourage underground sex work and that would act as a major stumbling block in checking the spread of AIDS, it is a tacit acknowledgement that the existence of the institution of prostitution is a reality that no one can deny. And when they talk about possible “underground sex work”, are they acknowledging that the present situation is better? Then, can we call it “unofficially legal prostitution”? Hmm, is it something like lifting prohibition law to combat the menace of bootlegging and illicit liquor? If it is, why don’t we then legalise and regulate prostitution?

Interestingly, then, is prostitution legal under Immoral Traffic (Prevention) Act, 1956, if:

- a prostitute works for self and not for a pimp or a brothel; and
- uses her/his own premises for entertaining clients

Such an arrangement would also not violate the provision under Section 7 of the Act regarding prostitution in or in the vicinity of public places. We cannot, however, expect a small-time sex worker to have her own premises and will the owner of the rented premises be liable to punishment, under Section 3 of the Act, in such a situation? This would probably depend on whether a lone sex worker working for self is considered as a brothel under law.
The judicial trend analysis on the subject presents a mixed view points. On one side, the Indian judiciary is very much concerned about the dignity of women and because of that it has always denounced this vintage occupation. In addition, it has demonstrated no leniency towards the intermediaries of immoral trafficking. One of the outstanding contribution of the Indian Judiciary is that it has shown maximum sensitivity towards the Victims of the crime, their children and their rehabilitation. Further, it has come very hard on the State for not doing enough for the victims of the crime. Demonstrating its anguish and frustration it went on commenting to legalise the prostitution. Finally, it can be said that the approach of the Indian Judiciary towards Immoral trafficking has been very positive and progressive.