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May 8

HARI KHEMU GAWALI
v.
THE DEPUTY COMMISSIONER OF POLICE, BOMBAY AND ANOTHER.

[S. R. DAS C.J., JAGANNADHADAS, VENKATARAMA AYYAR, B. P. SINHA and JAFER IMAM JJ.]

Bombay Police Act, 1951 (Bombay Act XXII of 1951), s. 57—Constitutional validity—Restrictions on individual right to reside in and move freely in any part of India—Reasonableness—Order of externment—Grounds of the order—Validity—Sufficiency of evidence on which the order is made—Whether can be examined by the Court—Constitution of India, Art. 19(1)(d), (e) and (5).

Section 57 of the Bombay Police Act, 1951 provides that if a person has been convicted of certain offences detailed therein, "the Commissioner, the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself".

Under the provisions of the said section an order of externment was passed against the petitioner who challenged the order on the grounds that s. 57 contravened clauses (d) and (e) of Article 19(1) of the Constitution, that the provisions of the said section imposed unreasonable restrictions on the petitioner's fundamental rights of free movement and residence and that the order passed against him was illegal inasmuch as it was based on vague allegations and inadmissible material.

Held, per S. R. DAS C.J., VENKATARAMA AYYAR, B. P. SINHA and JAFER IMAM JJ. (JAGANNADHADAS J. *dissenting*)

(1) Section 57 of the Bombay Police Act, 1951 is not unconstitutional, because, it is an instance of the State taking preventive measures in the interests of the public and for safeguarding individual rights, by preventing a person who has been proved to be a criminal from acting in a way which may be a repetition of his criminal propensities, and the restrictions that it imposes on the individual's right to reside in and move freely in any part of India are reasonable within the meaning of clause (5) of Art. 19 of the Constitution.

(2) The restrictions cannot be said to be unreasonable on the ground that the person dealt with under s. 57 of the Act may be

directed to remove himself altogether outside the limits of the State of Bombay as the Act extends to the whole of the State, because, unless the person makes himself so obnoxious as to render his presence in every part of the State a menace to public peace and safety, every District authority would not think of acting in the same way in respect of the same person.

(3) It cannot be laid down as a universal rule that unless there is a provision for an Advisory Board which could scrutinise the material on which the officers or authority contemplated by s. 57 had taken action against a person, such a legislation would be unconstitutional.

(4) The provisions in ss. 55, 56, 57 and 59 of the Act are not invalid on the ground that only the general nature of the material allegations against the person externed are required to be disclosed and that it would be difficult for him to get the matter judicially examined. The provisions are intended to be used in special cases requiring special treatment, that is, cases which cannot be dealt with under the preventive sections of the Code of Criminal Procedure.

(5) The legality of the order of externment cannot be impugned on the ground that there was not sufficient evidence to bring the charge home to the petitioner, because these are all matters which cannot be examined by this Court in an objective way, when the legislature has provided for the subjective satisfaction of the authorities or officers who have been entrusted with the duty of enforcing the special provisions of the Act.

Gurbachan Singh v. *The State of Bombay* ([1952] S.C.R. 737), followed.

Per JAGANNADHADAS J:—Section 57 of the Act is constitutionally invalid because:

(1) Clause (a) of s. 57 of the Act not being confined to offences serious in their nature or with reference to the attendant circumstances within the Chapters specified therein, prevention of the repetition thereof cannot be considered a reasonable restriction. It is in excess of what may be considered justifiable.

(2) The previous commission of an offence of the category specified, without any reference to the time, environment and other factors has no rational relation to the criterion of "reasonableness in the interest of public".

(3) The exercise of the power not being limited by the consideration of non-availability of witnesses is also not rationally related to the criterion of "reasonableness in the interest of the public".

Gurbachan Singh v. *The State of Bombay* ([1952] S.C.R. 737), distinguished.

ORIGINAL JURISDICTION: Petition No. 272 of 1955.

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Petition under Article 32 of the Constitution of India for the enforcement of Fundamental Rights.

Purshottam Trikamdas, V.R. Upadhya, J.B. Dadachanji and *S. N. Andley*, for the petitioner.

M. C. Setalvad, Attorney-General for India, B. Sen and *R. H. Dhebar*, for the respondents.

1956. May 8. The Judgment of S. R. Das C.J. and Venkatarama Ayyar, B. P. Sinha and Jafer Imam JJ. was delivered by Sinha J. Jagannadhadas J. delivered a separate judgment.

SINHA J.—This petition under article 32 of the Constitution challenges the *vires* of certain provisions of the Bombay Police Act, XXII of 1951, which hereinafter will be referred to as "The Act", with particular reference to section 57 under which the externment order dated the 8th November 1954 was passed against the petitioner by the first respondent, the Deputy Commissioner of Police, Crime Branch (I), C.I.D., Greater Bombay. The second respondent is the State of Bombay. The petitioner, who claims to be a citizen of India, was born in Bombay and had been, before the order of externment in question, residing in one of the quarters of the City of Bombay. He keeps bullock carts for carrying on his business of transport and cows for selling milk. The petitioner alleges that the Prohibition Police of the City instituted twelve prohibition cases against him which all ended either in his discharge or acquittal. An "externment order" was passed against him in August 1950. That order was set aside by the Government in December 1950, on appeal by the petitioner. In December 1953 an order of detention was passed against him under the Preventive Detention Act, 1950, and he was detained in the Thana District prison. He moved the High Court of Bombay under article 226 of the Constitution against the said order of detention. He was released from detention before the said petition was actually heard by the High Court. Thereafter, the petitioner along with others was charged with possession of liquor. The case went

on for about two years when he was ultimately discharged by the Presidency Magistrate on the 24th February 1955 as the prosecution witnesses were not present on the date fixed for hearing of the case. On the night of the 9th October 1954 the petitioner was arrested along with his companions a little after midnight by members of the police force designated "Ghost Squad", which was a special wing of the Crime Branch of the C.I.D., on the allegation made by the police that they were seen running away on the sight of a police van and that they were chased and arrested and were found in possession of knives and other weapons. In October 1954 the petitioner was served with a notice under section 57 read with section 59 of the Act. It is convenient at this stage to set out the said notice *in extenso*, which is Exhibit A to the petition filed in this Court:—

" Notice under section 59 of the Bombay Police Act, 1951.

Name, address & age: Hari *alias* Dada Khemu Gawali, Hindu, aged about 37 years.
Occupation: Bullock cart owner.
Residence: Room No. 45, 1st floor, Haji Kassam Chawl, Lamington Road.

Under section 59 of the Bombay Police Act, 1951 (Bombay Act XXII of 1951), you are hereby informed that the following allegations are made against you in proceedings against you under section 57 of the said Act.

In order to give you opportunity of tendering your explanation regarding the said allegations, I have appointed 11 a.m. on 25-10-1954 to receive your explanation and to hear you and your witnesses, if any, in regard to the said allegations. I, N. P. Paranjapye, Superintendent, C.B.I., C.I.D., therefore require you to appear before me at H. P. O. Annexe I (place) on the said date viz. 25-10-1954 at 11 a.m. for the said purpose and to pass a bond in the sum of Rs. 500 with one surety in like amount for your attendance during the inquiry of the said proceedings. Should you fail to appear before me and to pass the

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bond as directed above, I shall proceed with the inquiry in your absence. Take note:

Allegations:—

1. That you have been convicted of offences as per particulars mentioned below:—

Serial No.	Court & District	Date of Conviction	Section of law	Sentence	Police Station & case No.
1.	H. C. Bombay	14-10-1938	304/109 I. P. C. 324/109 I. P. C.	6 yrs. R.I. 2 yrs. R.I. (Concurrently).	Nagpada PS C. R. No. 127/38

2. That you were arrested on 29-3-1948 in connection with Nagpada P.S.C.R. No. 273 of 1948 u/s 143, 147, 148, 149, 353, I.P.C. wherein you along with one Ramchandra Ishwarbhai and others committed rioting and criminal assault on a public servant, viz. a police constable No. 4459/D to deter him from the execution of his lawful duties but you were discharged in the said case due to lack of sufficient evidence.

3. That you were again arrested on 2-5-1948 in connection with Nagpada P.S.C.R. No. 353 u/s 143, 144, 146, 147, 148, 149, 324, I.P.C. wherein you along with one Rajaram Khemu Gawli and 7 others committed rioting armed with deadly weapons, viz., lathis, sodawater bottles etc. and caused hurt to one Gopal Khemu Gawli but you were discharged in the said case for want of sufficient evidence.

4. That you were again arrested on 3-6-1949 in connection with Nagpada P.S.C.R. No. 336 of 1949 u/s 143, 147, 149, 225, 225-B, 332, I.P.C. wherein you along with one Shri Vithal Baloo and others committed rioting, assaulted a public servant, viz. a police officer (Shri S. K. Kothare) to deter him from the lawful discharge of his duties and made 3 persons in the lawful custody of the police to escape, but were discharged in the said case for want of sufficient evidence.

5. That now you have been arrested on 9-10-1954 at about 12-50 a.m. in the company of 7 others, viz.

(1) Amir Masud (2) Francis Sherao @ China (3) Antoo Narayan (4) Abdul Wahab Abdul Gafoor (5) Laxman Rama (6) Narayan Tukaram and (7) Rajaram Vishnoo out of whom persons mentioned at Nos. 1 and 6 are previous convicts and that at the time of arrest you and persons mentioned at Nos. 1, 2, 3 and 4 were armed with deadly weapons to wit, clasp knives, iron bar and a lathi, and thus you were reasonably suspected to be out to commit an offence either against property or person; And that you are likely again to engage yourself in the commission of a similar offence falling either under Chapter XVI or XVII of the Indian Penal Code.

Sd. N. P. Paranjapye
Superintendent of Police, Crime
Branch (I), C.I.D.

L.T.I. of Hari @ Dada Khemu Gawli. "

The petitioner appeared before the Superintendent on the 8th November 1954 with his counsel and filed a long petition containing allegations running into 16 paragraphs showing cause against the order of externment proposed to be passed against him. That petition is Ex. B. The petitioner accepted the correctness of the allegation contained in the first paragraph of Ex. A set out above, but denied the truth of the other allegations made therein against him which he characterised as based on "old prejudice and suspicion". As regards his conviction referred to in the first paragraph aforesaid, he stated:—

"I had unfortunately a conviction in 1938 when I was a mere youth. I have lived a clean and honourable life ever since."

Then he goes on to make reference to the other cases charged against him and claimed that he had been "discharged in those cases for want of sufficient evidence"

The first respondent aforesaid ultimately passed the order of externment which is Exhibit C to the petition, on the 8th November 1954. After reciting the previous conviction which was for offences under Chapter XVI, Indian Penal Code and that the petitioner was likely again to engage in the commission

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of similar offences and saying that he was satisfied about the matters contained in the previous notice, the first respondent directed the petitioner under section 57 of the Act to remove himself outside the limits of Greater Bombay within two days from the date of the final order in the case pending against him, as noted in the order, for a period of two years from the date of the order, and not to enter or return to the said area of Greater Bombay without the permission in writing of the Commissioner of Police, Greater Bombay, or the Government of Bombay. The petitioner preferred an appeal to the Government of Bombay against the said order of externment. But the appeal was dismissed. Substantially on those allegations this Court has been moved under article 32 of the Constitution.

The first respondent has sworn to the affidavit filed in this Court to the effect that the petitioner has been fully heard by the authorities before the order impugned in this case was passed. It is further stated in the affidavit that in the previous case in which the petitioner had been convicted he had been found guilty along with his brother Rajaram of having caused the death of a person who had given evidence against them in a previous trial. The first respondent further stated in the affidavit that the material examined by him before passing the order impugned showed that since 1948 the petitioner had been resorting to violence and was concerned in a number of cases involving acts of violence, namely:—

1. In March 1948 a police constable was assaulted. Though the petitioner was one of the persons concerned with the crime, he was not charge-sheeted because sufficient evidence was not forthcoming against him.

2. In April 1948 the petitioner's brother had charged him and eight others with having thrown sodawater bottles and used lathis. The Presidency Magistrate, 17th Court, Mazgaon, Bombay, had to adjourn the case several times for recording evidence of witnesses who remained absent and ultimately the court refused to grant further adjournment for the

production of witnesses and the case ended in a discharge for want of evidence.

3. In May 1949 the police had arrested three persons including Rajaram aforesaid, the petitioner's brother for being concerned in sale of illicit liquor. While those arrested persons were being taken to the police lorry for being taken to the police station, the petitioner and other persons forcibly rescued those arrested persons from the custody of the police. But the case ultimately failed in August 1950 because the witnesses failed to turn up to give evidence against the accused including the petitioner.

4. At about 12-50 a.m. on 9th October 1954, the Special Squad, Crime Branch, C.I.D., Bombay, while proceeding on their rounds noticed the petitioner and seven others armed with an iron bar and lathi. On seeing the police van, they started running away and were chased and arrested by the police force. On arrest the petitioner and his other associates were found carrying "clasp knives". The petitioner and three of the seven arrested persons were found smelling of alcohol. The petitioner was placed on his trial for offences under the Bombay Prohibition Act and the Bombay Police Act. He was acquitted by the learned trial Judge because of discrepancies in the evidence of some of the prosecution witnesses. The respondent further averred that after examining all the material against him in the light of his previous conviction under sections 304/109 and 324/109, Indian Penal Code, he was satisfied that the petitioner was likely again to engage in the commission of offences similar to those for which he had been previously convicted. Accordingly he passed the order of externment against the petitioner, as set out above.

In support of the petition which was heard along with Petitions Nos. 439 and 440 of 1955 (in which the orders impugned had been passed under section 56 of the Act and which are being disposed of by a separate judgment) the leading argument by Shri Purshotham raised the contentions,—(1) that section 57 of the Act contravened clauses (d) and (e) of article 19(1) of the Constitution and that the provisions

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of that section imposed unreasonable restrictions on the petitioner's fundamental rights of free movement and residence; and (2) that the order passed under section 57 against the petitioner is illegal inasmuch as it is based on vague allegations and inadmissible material, for example, on orders of discharge or acquittal. Each of the two broad grounds has been elaborated and several points have been sought to be made under each one of those heads. It has been contended that the police have been vested with unlimited powers in the sense that any person whom they suspect or against whom they have their own reasons to proceed can be asked to remove, not only from any particular area, like Greater Bombay, but from the entire State of Bombay. Even if one order does not ask a person to remove himself out of the entire State, each authority within its respective local jurisdiction can ask a particular person to go out of that area, so that that person may find himself wholly displaced without any place to go to. Unlike the law relating to preventive detention, there is no provision for an Advisory Board which could examine the reasonableness of the order proposed to be passed or already passed, so that there is no check on the exercise of power by the police authorities under the Act, however flagrant the abuse of the power may have been. It is also contended that the provisions as regards hearing by the police authorities and appeal to the State Government are illusory. The police is both the prosecutor and the judge and the remedy provided by the Act is a mere eye-wash. It is also pointed out that all kinds of offences have been clubbed together which have no rational connection with one another. Reliance was placed on certain observations made by this Court in a number of decisions, viz., *Chintaman Rao* v. *The State of Madhya Pradesh*(1); *The State of Madras* v. *V. G. Row*(2); *Thakur Raghubir Singh* v. *Court of Wards, Ajmer*(3); *Messrs Dwarka Prasad Laxmi Narain* v. *State of U.P.*(4); and *Ebrahim Vazir Mavat* v. *State of Bombay*(5).

(1) [1950] S.C.R. 759.
(2) [1952] S.C.R. 597.
(3) [1953] S.C.R. 1049.
(4) [1954] S.C R. 803.
(5) [1954] S.C.R. 933.

Section 57 of the Act which is particularly impugned in this case is in these terms:—

"Removal of persons convicted of certain offences.

———

If a person has been convicted—

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code, or

(b) twice of an offence under section 9 of the Bombay Beggars Act, 1945, or under the Bombay Prevention of Prostitution Act, 1923, or

(c) thrice of an offence within a period of three years under section 4 or 12-A of the Bombay Prevention of Gambling Act, 1887, or under the Bombay Prohibition Act, 1949,

the Commissioner, the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself.

Explanation—For the purpose of this section 'an offence similar to that for which a person was convicted' shall mean—

(i) in the case of a person convicted of an offence mentioned in clause (a), an offence falling under any of the Chapters of the Indian Penal Code mentioned in that clause, and

(ii) in the case of a person convicted of an offence mentioned in clauses (b) and (c), an offence falling under the provisions of the Acts mentioned respectively in the said clauses".

In order to attract the provisions of this section, two essential conditions must be fulfilled, viz., (1) that there should have been a previous conviction under Chapter XII, XVI or XVII, Indian Penal Code, or two previous convictions under the Acts mentioned

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in clause (b), or three previous convictions within a period of three years under the Acts mentioned in clause (c); and (2) that the authority named should have reason to believe that a person coming within the purview of any of the clauses (a), (b) and (c) is likely again to engage himself in the commission of an offence similar to that for which he had been previously convicted; that is to say, for an offence falling under any of the three chapters mentioned in clause (a), or if he had been twice convicted under the Beggars Act, or the Prevention of Prostitution Act, or thrice convicted under the Prevention of Gambling Act or the Prohibition Act; so that, a previous conviction for "offences relating to coin and Government stamps" has been equated with one for "offences affecting the human body" (chapter XVI) or "offences against property" (chapter XVII) of the Indian Penal Code. Chapter XII contains sections 230 to 263(A). Chapter XVI contains section 299 to section 377 and Chapter XVII contains section 378 to section 462 of the Code. In other words, one convicted for counterfeiting coin may in terms of the impugned section 57 be said to have engaged himself in the commission of a similar offence if he is likely to use criminal force or to commit theft or extortion or robbery or dacoity or criminal misappropriation of property or criminal breach of trust. It has therefore been rightly pointed out on behalf of the petitioner that the range of the offences referred to in clause (a) of section 57 is very wide indeed and that it is difficult to point out any rational basis for clubbing them together. A person convicted under Chapter XII, Indian Penal Code of counterfeiting Indian Coin or Government stamps may rightly be called the enemy of public finance and revenue, but is far removed from a person who may be convicted of murder or other offences against human body or against private property. But the legislature in its wisdom has clubbed all those offences togther and it is not for this Court to question that wisdom provided the provisions of the Act do not impose unreasonable restrictions on right to freedom. Conviction

under the Bombay Beggars Act and the Bombay Prevention of Prostitution Act have been clubbed together under clause (b) and similarly previous convictions under the Bombay Prevention of Gambling Act and Bombay Prohibition Act have been clubbed together. So the previous convictions under the three clauses aforesaid have been placed in three different categories.

Article 19 of the Constitution has guaranteed the several rights enumerated under that article to all citizens of India. After laying down the different rights to freedom in clause (1), clauses (2) to (6) of that article recognise the right of the State to make laws putting reasonable restrictions on those rights in the interest of the general public, security of the State, public order, decency or morality and for other reasons set out in those sub-clauses, so that there has to be a balance between individual rights guaranteed under article 19(1) and the exigencies of the State which is the custodian of the interests of the general public, public order, decency or morality and all other public interests which may compendiously be described as social welfare. For preventing a breach of the public peace or the invasion of private rights the State has sometimes to impose certain restrictions on individual rights. It therefore becomes the duty of the State not only to punish the offenders against the penal laws of the State but also to take preventive action. "Prevention is better than cure" applies not only to individuals but also to the activities of the State in relation to the citizens of the State. The impugned section 57 is an instance of the State taking preventive measures in the interest of the public and for safeguarding individual's rights. The section is plainly meant to prevent a person who has been proved to be a criminal from acting in a way which may be a repetition of his criminal propensities. In doing so the State may have to curb an individual's activities and put fetters on his complete freedom of movement and residence in order that the greatest good of the greatest number may be conserved. The law is based on the principle that it is desirable in the larger

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interests of society that the freedom of movement and residence of a comparatively fewer number of people should be restrained so that the majority of the community may move and live in peace and harmony and carry on their peaceful avocations untrammelled by any fear or threat of violence to their person or property. The individual's right to reside in and move freely in any part of the territory of India has to yield to the larger interest of the community. That the Act is based on sound principle cannot be gainsaid. Now the only question is whether the provisions of the impugned section are not justified in the larger interest of the community, or, in other words, whether they impose a larger restriction than is reasonably necessary to meet the situation envisaged by the section. From that point of view we shall now examine the other arguments advanced to show that the provisions of the impugned section are unreasonable restrictions on individual right to reside in and move freely in any part of India.

It has been observed by this Court in the case of *Gurbachan Singh* v. *The State of Bombay*(1) at p. 742, as per Mukherjea, J. (as he then was):—

"It is perfectly true that the determination of the question as to whether the restrictions imposed by a legislative enactment upon the fundamental rights of a citizen enunciated in article 19(1)(d) of the Constitution are reasonable or not within the meaning of clause (5) of the article would depend as much upon procedural part of the law as upon its substantive part; and the court has got to look in each case to the circumstances under which and the manner in which the restrictions have been imposed".

In this case the attack against section 57 of the Act is directed both against the procedural part of the law and the substantive part. It has been contended that the person dealt with under section 57 may be directed to remove himself altogether outside the limits of the State of Bombay because the Act extends to the whole of the State of Bombay. The provisions of section 57 can be applied either by the Commis-

(1) [1952] S.C.R. 737.

sioner of Police for Greater Bombay and other areas for which a Commissioner may be appointed under section 7 or by the District Magistrate or a Sub-Divisional Magistrate specially empowered by the State Government in that behalf. Any one of the aforesaid authorities has power to direct an individual dealt with under section 57 to remove himself outside the area within the local limits of his jurisdiction. Hence none of those authorities has the power to direct that person to remove himself outside the entire State of Bombay. The situation envisaged by the argument that a person may be called upon to remove himself out of the limits of the entire State of Bombay would not ordinarily arise because the idea underlying the provisions of sections 55 to 57 is the "dispersal of gangs and removal of persons convicted of certain offences" as would appear from the sub-heading II in chapter V, which is headed "special measures for maintenance of public order and safety of State". A gang of criminals or potential criminals operates or may intend to operate within certain local limits and the idea behind the provisions of section 57 is to see to it that a person with previous conviction who may have banded together with other such persons should be disbanded and hounded out of the limits of his ordinary activities, his associates also are to be similarly dealt with, so that the gang is broken up and the different persons constituting it may be removed to different parts of the State so as to reduce their criminal activities to the minimum. Unless a person makes himself so obnoxious as to render his presence in every part of the Bombay State a menace to public interest including public peace and safety, every Commissioner of Police or District Magistrate or Sub-Divisional Magistrate would not think of acting in the same way in respect of the same person. Hence, in our opinion, there is no substance in this argument. It may be mentioned in this connection that previous to the enactment of the impugned Act there was the Bombay District Police Act IV of 1890 which applied to the whole Presidency of Bombay except the Greater Bombay (omitting all references to Sind) and the City

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of Bombay Police Act, IV of 1902, applied to the City of Bombay except certain specified sections which applied to the whole of the Presidency of Bombay; so that the two Acts aforesaid covered the whole of the State of Bombay as it was constituted after Independence. The two Acts aforesaid were repealed by the impugned Act which consolidated the law for the regulation of the Police Force in the State of Bombay which appears from the following preamble of the Act:—

"Whereas it is expedient to amalgamate the District and Greater Bombay Police Forces in the State of Bombay into one common Police Force and to introduce uniform methods regarding the working and control of the said Force throughout the State".

Broadly speaking, section 46 of Act IV of 1890 and section 27 of Act IV of 1902 correspond to the provisions of sections 56 and 57 of the Act.

It was next contended that unlike Preventive Detention laws there was no provision in the impugned law for an Advisory Board which could scrutinise the material on which the officers or authorities contemplated by section 57 had taken action against a person. It cannot be, and has not been laid down, as a universal rule that unless there is a provision for such an Advisory Board such a legislation would necessarily be condemned as unconstitutional. The very fact that the Constitution in article 22(4) has made specific provision for an Advisory Board consisting of persons of stated qualifications with reference to the law for Preventive Detention, but has made no such specific provision in article 19 would answer this contention. In this connection reference may also be made to the decision of this Court in the case of *N. B. Khare* v. *State of Delhi*(1) which dealt with the constitutionality of the East Punjab Public Safety Act of 1949 with reference to the provisions of article 19 of the Constitution. In that legislation there was a provision for an Advisory Board whose opinion, however, had no binding force. The Act was not struck down by this Court. On the other hand, in the case

(1) [1950] S.C.R. 519.

of *State of Madras* v. *V. G. Row*(1), section 15(2)(b) of the Indian Criminal Law (Amendment) Act, 1908, as amended by the Indian Criminal Law Amendment (Madras) Act, 1950, was held to be unconstitutional as the restrictions imposed on the fundamental right to form associations were not held to be reasonable in spite of the fact that there was a provision for an Advisory Board whose opinion was binding on the Government. Hence it cannot be said that the existence of an Advisory Board is a *sine qua non* of the constitutionality of a legislation such as the one before us.

It was next contended that the proceedings are initiated by the police and it is the police which is the judge in the case and that therefore the provisions of the Act militate against one of the accepted principles of natural justice that the prosecutor should not also be the judge. In order to appreciate this argument reference has to be made to the provisions of section 59 of the Act. It provides that before action is taken under sections 55, 56 or 57 of the Act, the authority entrusted with the duty of passing orders under any one of those sections or any officer above the rank of an Inspector authorised by that officer or authority shall inform the person proceeded against in writing "of the general nature of the material allegations against him" in order to give him a reasonable opportunity of explaining his conduct. If that person wishes to examine any witnesses, he has to be given an opportunity of adducing evidence. That person has the right to file a written statement and to appear in the proceeding by an advocate or attorney for the purpose of tendering his explanation and adducing evidence. If the person fails to appear or to adduce evidence, the authority or officer has the right to proceed with the enquiry and to pass such order as may appear fit and proper. It is thus clear that the criticism against the procedure laid down in section 59 is not entirely correct. The evidence or material on the basis of which a person may be proceeded against under any one of the sections 55,

(1) [1952] S.C.R. 597.

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56 or 57 may have been collected by police officers of the rank of an Inspector of Police or of lower rank. The proceedings may be initiated by a police officer above the rank of Inspector who has to inform the person proceeded against of the general nature of the material allegations against him. But the order of externment can be passed only by a Commissioner of Police or a District Magistrate or a Sub-Divisional Magistrate specially empowered by the State Government in that behalf. Hence the satisfaction is not that of the person prosecuting, if that word can at all be used in the context of those sections. The person proceeded against is not prosecuted but is put out of the harm's way. The legislature has advisedly entrusted officers of comparatively higher rank in the police or in the magistracy with the responsible duty of examining the material and of being satisfied that such person is likely again to engage himself in the commission of an offence similar to that for which he had previously been convicted. The proceedings contemplated by the impugned section 57 or for the matter of that, the other two sections 55 or 56 are not prosecutions for offences or judicial proceedings, though the officer or authority charged with the duty aforesaid has to examine the information laid before him by the police. The police force is charged with the duty not only of detection of offences and of bringing offenders to justice, but also of preventing the commission of offences by persons with previous records of conviction or with criminal propensities. As observed by Patanjali Sastri, C. J. in the case of *State of Madras* v. *V. G. Row*(1), "externment of individuals, like preventive detention, is largely precautionary and based on suspicion". To these observations may be added the following words in the judgment of Patanjali Sastri, C. J., (supra) with reference to the observations of Lord Finlay in *Rex* v. *Halliday*(2):—

"The court was the least appropriate tribunal to investigate into circumstances of suspicion on which such anticipatory action must be largely based".

(1) [1952] S C.R. 597, 609.

(2) [1917] A.C. 260, 269.

It is thus clear that in order to take preventive action under section 57 of the Act the legislature has entrusted police officers or magistrates of the higher ranks to examine the facts and circumstances of each case brought before them by the Criminal Investigation Department. But the legislature has provided certain safeguards against tyrannical or wholly unfounded orders being passed by the higher ranks of the police or the magistracy.

It was next contended that the provisions relating to hearing any evidence that may be adduced by the police or by the person proceeded against and right of appeal to the State Government conferred by section 60 of the Act are illusory. We cannot agree that the right of appeal to the State Government granted to the person proceeded against by an order under section 57 is illusory because it is expected that the State Government which has been charged with the duty of examining the material with a view to being satisfied that circumstances existed justifying a preventive order of that nature, will discharge its functions with due care and caution. Section 61 has provided a further safeguard to a person dealt with under section 57 by providing that though an order passed under section 55, section 56 or section 57, or by the State Government under section 60 on appeal shall not be called in question in any court, he may challenge such an order in a court on the ground (1) that the authority making the order or any officer authorised by it had not followed the procedure laid down in section 57, or (2) that there was no material before the authority concerned upon which it could have based its order, or (3) that the said authority was not of opinion that witnesses were unwilling to come forward to give evidence in public against the person proceeded against. In this connection it was argued on behalf of the petitioner that section 59 only required the general nature of the material allegations against the person externed to be disclosed and that, as it did not further provide for particulars to be supplied to such a person, it would be very difficult for him to avail of at least the second ground

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on which section 61 permits him to get the matter judicially examined. But in the very nature of things it could not have been otherwise. The grounds available to an externee had necessarily to be very limited in their scope because if evidence were available which could be adduced in public, such a person could be dealt with under the preventive sections of the Code of Criminal Procedure, for example, under section 107 or section 110. But the special provisions now under examination proceed on the basis that the person dealt with under any of the sections 55, 56 or 57 is of such a character as not to permit the ordinary laws of the land being put in motion in the ordinary way, namely, of examining witnesses in open court who should be cross-examined by the party against whom they were deposing. The provisions we are now examining are plainly intended to be used in special cases requiring special treatment, that is, cases which cannot be dealt with under the preventive sections of the Code of Criminal Procedure. Reliance was placed on a number of decisions of this Court referred to above on behalf of the petitioner to show that the terms of section 57 impugned in this case could not come within the permissible limits laid down by the Constitution in clause (5) of article 19. But arguments by analogy may be misleading. It has been repeatedly said by this Court that it is not safe to pronounce on the provisions of one Act with reference to decisions dealing with other Acts which may not be *in pari materia*. The case nearest to the present one is the decision of this Court in *Gurbachan Singh* v. *State of Bombay*(1), where section 27(1) of the City of Bombay Police Act was under challenge and the Court upheld the constitutionality of that section. If anything, section 57 impugned in this case provides a surer ground for proceeding against a potential criminal in so far as it insists upon a previous conviction at least. At least in clauses (b) and (c) it insists upon more than one previous order of conviction against the person proceeded against, thus showing that the authority dealing with such a

(1) [1952] S.C.R. 737.

person had some solid ground for suspecting that he may repeat his criminal activities. It has not been contended before us that the decision of this Court referred to above does not lay down the correct law or that it was open to challenge in any way. We do not think it necessary therefore to consider in detail the other cases relied upon on behalf of the petitioner.

It now remains to consider the legality of the order itself. The *bona fides* of the order have not been questioned. What has been urged against the legality of the order impugned is that it is based on previous orders of discharge or acquittal. It is said that those orders were passed because there was not sufficient evidence to bring the charge home to the accused. The insufficiency of the evidence itself may have been due to witnesses not being available to depose in open court or they may have been overawed and their testimony tampered with. These are all matters which cannot be examined by this Court in an objective way, when the legislature has provided for the subjective satisfaction of the authorities or officers who have been entrusted with the duty of enforcing those special provisions of the Act. It cannot be laid down as a general proposition of law that a previous order of discharge or acquittal cannot be taken into account by those authorities when dealing with persons under any one of the provisions we have been examining in this case. It is not for us to examine afresh the materials and to be satisfied that the order impugned is correct. But the materials placed on the record of this case in the affidavit sworn to by the officer who was responsible for the order impugned show at least one thing, namely, that the petitioner has not been a victim of an arbitrary order.

For the reasons aforesaid, in our opinion, no grounds have been made out for issuing any writ or direction to the authorities concerned or for quashing the orders impugned. The application is therefore dismissed.

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JAGANNADHADAS J.—I regret I am unable to persuade myself to agree with the view, which has commended itself to the majority of the Court, as to the constitutional validity of section 57(a) of the Bombay Police Act, 1951 (Bombay Act XXII of 1951) (hereinafter referred to as the Act). This is a provision which *prima facie* infringes the fundamental right of a citizen under article 19(1)(d) and (e) of the Constitution. It can be supported only if, having regard to all the circumstances, it is possible to reach a satisfactory conclusion that the imposition of the restrictions as provided thereunder is in the interests of the general public *and* reasonable. The fact that our Constitution which declares fundamental rights also permits a law of preventive detention under very limited safeguards and that such laws have taken the pattern of the exercise of power by the Government or by its officers for specified purposes on the basis of their subjective satisfaction, has made us prone to reconcile ourselves to other kinds of restrictive laws affecting personal liberty though based on the subjective satisfaction of executive officers, if only they provide for certain minimum safeguards such as supply of grounds, right of representation, and the scope for review by a superior authority or by an advisory body. If one is to adopt this standard as furnishing the *sine qua non* of what is a reasonable law of preventive restriction of personal liberty, it may be possible to say that the provision under question satisfies the test. But the law of preventive detention stands on a very exceptional footing in our Constitution inasmuch as it is specifically provided for in the Constitution. The same Constitution has left the imposition of other restrictions on personal liberty to be judged by the courts with reference to the standards of reasonableness, in the interests of the public. While undoubtedly the above three safeguards may be taken as the minimum required to satisfy the standard of reasonableness, I am not prepared to assume that they are sufficient. It appears to me that the constitutional validity of laws of proventive restriction, as opposed to the laws of

preventive detention, have to be judged with reference to standards which this Court has generally accepted as regards the validity of restrictions on the other fundamental rights under article 19(1) of the Constitution. As repeatedly held by this Court, a proper balance must be struck between the fundamental right of the citizen and the social control by the State in order to evolve the permissible restriction of the fundamental right under the Constitution.

Now there can be no doubt that the ordinary provisions in the Criminal Procedure Code enabling the executive to take preventive measures are often enough felt inadequate, particularly in large cities and towns wherein there are loose congregations of population. In a general way therefore it may be said that to arm the executive officers with powers for preventive action against commission of offences is not in itself unreasonable. Section 57 of the Act appears in Chapter V of the Act headed "Special measures for maintenance of public order and safety of State" and is under the sub-head II "Dispersal of gangs and removal of persons convicted of certain offences". The substantive provisions under head II are sections 55, 56 and 57. Section 55 relates to control and dispersal of gangs. Section 56 relates to removal of persons about to commit offences and section 57 relates to removal of persons previously convicted of certain offences. Sections 56 and 57 of the Act run as follows:

"56. Whenever it shall appear in Greater Bombay and other areas for which a Commissioner has been appointed under section 7 to the Commissioner and in other area or areas to which the State Government may, by notification in the Official Gazette, extend the provisions of this section, to the District Magistrate, or the Sub-Divisional Magistrate specially empowered by the State Government in that behalf (a) that the movements of acts of any person are causing or calculated to cause alarm, danger or harm to person or property, or (b) that there are reasonable grounds for believing that such person is engaged or is about to be engaged in the commission of an offence involv-

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ing force or violence or an offence punishable under Chapter XII, XVI or XVII of the Indian Penal Code, or in the abetment of any such offence, and when in the opinion of such officer witnesses are not willing to come forward to give evidence in public against such person by reason of apprehension on their part as regards the safety of their person or property, or (c) that an outbreak of epidemic disease is likely to result from the continued residence of an immigrant, the said officer may, by an order in writing duly served on him or by beat of drum or otherwise as he thinks fit, direct such person or immigrant so to conduct himself as shall seem necessary in order to prevent violence and alarm or the outbreak or spread of such disease or to remove himself outside the area within the local limits of his jurisdiction by such route and within such time as the said officer may prescribe and not to enter or return to the said area from which he was directed to remove himself.

57. If a person has been convicted—

(a) of an offence under Chapter XII, XVI or XVII of the Indian Penal Code, or

(b) twice of an offence under section 9 of the Bombay Beggars Act, 1945, or under the Bombay Prevention of Prostitution Act, 1923, or

(c) thrice of an offence within a period of three years under section 4 or 12-A of the Bombay Prevention of Gambling Act, 1887, or under the Bombay Prohibition Act, 1949,

the Commissioner, the District Magistrate or the Sub-Divisional Magistrate specially empowered by the State Government in this behalf, if he has reason to believe that such person is likely again to engage himself in the commission of an offence similar to that for which he was convicted, may direct such person to remove himself outside the area within the local limits of his jurisdiction, by such route and within such time as the said officer may prescribe and not to enter or return to the area from which he was directed to remove himself.

Explanation:—For the purpose of this section "an

offence similar to that for which a person was convicted" shall mean—

(i) in the case of a person convicted of an offence mentioned in clause (a), an offence falling under any of the Chapters of the Indian Penal Code mentioned in that clause, and

(ii) in the case of a person convicted of an offence mentioned in clauses (b) and (c), an offence falling under the provisions of the Acts mentioned respectively in the said clauses".

Section 58 of the Act provides that a direction made under sections 56 and 57 not to enter a particular area shall be for such period as may be specified thereunder and shall in no case exceed a period of two years from the date on which it is made. This Court has, in *Gurbachan Singh* v. *The State of Bombay*(1) pronounced on the constitutional validity of section 27(1) of the City of Bombay Police Act of 1902 (Bombay Act IV of 1902) which, word for word, is almost the same as section 56 of the Act above quoted omitting (c) thereof. As I understand that judgment, the view of the Court as to the reasonableness of that provision is based on the fact that under the said section it is essential for the exercise of the power, that in the opinion of the officer concerned, witnesses are not willing to come forward to give evidence in public against the person concerned by reason of apprehension on their part as regards the safety of their own person or property. This is clear from the following passage at page 743 of the report:

"The law is certainly an extraordinary one and has been made only to meet those exceptional cases where no witnesses for fear of violence to their person or property are willing to depose publicly against certain bad characters whose presence in certain areas constitutes a menace to the safety of the public residing therein".

The provisions of section 57 of the Act are totally different. This section can be invoked without the requirement of non-availability of witnesses or of any opinion in that behalf being arrived at by the officer concerned.

(1) [1952] S.C.R. 737.

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All that is sufficient for the use of this section is that the person concerned should have been previously convicted of certain specified offences and that the officer concerned has reason to believe that such person is likely again to engage himself in the commission of a similar offence. The powers under this section can, therefore, be invoked in every case where there is likelihood of repetition of offence by a person who has been previously convicted of a similar offence if the offence is of the specified categories, even though witnesses may be willing to come forward. I am not prepared to accept the idea that in such a situation it would be right or reasonable to clothe executive officers with the power to take preventive action restraining the liberty of the citizen instead of taking the chance of the offence being committed and leaving the deprivation of his liberty to the ordinary channels of criminal prosecution and punishment. It is true that in some matters anticipatory prevention is better than *ex post facto* punishment. But in a State where personal liberty is a guaranteed fundamental right, the range of such preventive action must be limited to a narrow compass. What may be called the police power of the State in this behalf must be limited by the consideration that the offence likely to be committed is of a serious nature, that the likelihood of its commission is very probable, if not imminent, and that the perpetrator of the crime, if left to commit it, may go unpunished under the normal machinery on account of witnesses not being willing to come forward. Section 151 of the Criminal Procedure Code authorises a police officer to arrest any person when he knows of his design to commit any cognizable offence and to send him to the nearest Magistrate for such action which he considers fit or as may be feasible under sections 107 to 110 of the Criminal Procedure Code. Section 57 of the Act constitutes a very wide departure from such a provision and there must be clear justification for so serious an encroachment on personal liberty as is contemplated therein. A provision of the kind might not only be justified but may be called for, if confined to serious offences—

serious either because of their nature or of the attendant circumstances—and if witnesses are likely to be terrorised. I am unable to see why a person who may have previously committed any offence of a minor character and in ordinary circumstances, under Chapters XII, XVI or XVII of the Indian Penal Code, should not be left alone to the ordinary channels of prosecution. It appears to me that the proper balance between the fundamental right and social control is not achieved by vesting the power in executive officers in such wide terms as in section 57 of the Act. Such a provision would lead to serious encroachment on the personal liberty of a citizen. While, of course, abuse of power is not to be assumed to test its reasonableness, neither is a power given in wide terms and *prima facie* unreasonable, to be considered reasonable on an assumption of its proper use.

I am also unable to see that the fact of previous commission of any such offence without any limitation as to the period of time that may have elapsed, or the circumstances with reference to which such an offence may have been committed, is any relevant consideration to justify restriction on personal liberty by way of preventive action. I am not aware that there is any accepted theory of criminology which justifies the view that a person who has committed an offence has any inherent tendency to repeat a similar offence—apart from environment, heredity or the like. In a trial for the commission of an offence prior conviction is ruled out as inadmissible. On an evaluation of the tendency to repeat a crime, I do not see how it is permissible material except in cases where repeated previous commission of offences indicates a habit. It has been said that the power under section 57 of the Act will be exercised only when the officer concerned has before him not merely the fact of previous conviction but other material on the basis of which he has reason to believe that the person concerned is likely to engage himself in the commission of the offence. But this ultimately is a question of subjective satisfaction. It is not open to review by a Court. It would be difficult to postulate how far

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such a factor, as previous conviction, might have prejudiced a fair consideration of the other material before the officer. To my mind the law which permits subjective satisfaction to prevail on such material must be considered unreasonable. In my view, therefore, though the procedural portion of the law as provided in sections 59 and 61 of the Act may not be open to serious criticism, the substantive portion of the law relating to content of the power as provided under section 57 of the Act cannot be held to be in the nature of reasonable restriction of the fundamental right, for three reasons.

1. Clause (a) of section 57 of the Act not being confined to offences serious in their nature or with reference to the attendant circumstances within the Chapters specified therein, prevention of the repetition thereof cannot be considered a reasonable restriction. It is in excess of what may be considered justifiable.

2. The previous commission of an offence of the category specified, without any reference to the time, environment and other factors has no rational relation to the criterion of "reasonableness in the interest of public".

3. The exercise of the power not being limited by the consideration of non-availability of witnesses is also not rationally related to the criterion of "reasonableness in the interest of the public".

For all the above reasons I consider that section 57 of the Act is constitutionally invalid.

ORDER.

BY THE COURT.—In accordance with the Judgment of the majority this Petition is dismissed.

Petition dismissed.