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entirely different. The conviction of the accused is justified under s. 113, because he has been travelling without a proper season ticket or a proper pass, and, as I said before, he has not been convicted by reason of the fact that the railway company has made his act an offence when the statute did not make it an offence. It is the statute itself which lays down that travelling without a proper pass is an offence, and all that r. 39 (b) did was to define what "a proper pass" was.

Then my attention has been drawn by Mr. Khandalawalla to the observations of Mr. Justice Oldfield in *In re Komaran*.⁽¹⁾ There also the Madras High Court was considering the case of reservation of compartments for the use of Anglo-Indians. The rule reserving the compartment was not framed under s. 47, and Mr. Justice Oldfield observes (p. 219):

"...It is not obligatory to obtain that sanction, if the Railway sees its way to enforce the rule without it or a penalty is provided incidentally in some other portion of the Act."

In the present case, the railway authority has seen its way to enforce r. 39 (b) by relying upon the provisions of s. 113, and, therefore, it did not require the sanction of the Central Government for this rule. I must say that the accused was trying to assert the rights of the public, and no moral turpitude whatever attached to what he did. But as his act constitutes a contravention of s. 113, I must uphold the order passed by the learned Presidency Magistrate.

Rule discharged.

M. W. P.

⁽¹⁾ (1921) 45 Mad. 215.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Bhagwati.

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JAGWANT KAUR KESARSING DANG v. THE STATE OF BOMBAY.*

Bombay Land Requisition Act (XXXIII of 1948), ss. 5, 15—Constitution of India, Articles 15 (1), 46—Order made by Collector requisitioning land for establishment of Harijan colony—Formation of opinion by Collector that requisition necessary and expedient, whether could be delegated to Collector by State Government—Whether Order violates

* Civil Application No. 773 of 1951.

art. 15 (1) of the Constitution—Directive principles enumerated in the Constitution, effect of.

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The Collector of Poona made an order on April 16, 1951, under s. 5 of the Bombay Land Requisition Act, 1948, requisitioning certain land as it was "necessary and expedient for the public purpose, viz., establishment of Kashiwadi Harijan Colony for the Poona City Municipal Corporation". This order was made by the Collector to whom the power was delegated under s. 15 of the Act. On the questions (1) Whether the formation of the opinion by the Collector that the requisition was necessary and expedient could be delegated to the Collector under s. 15 of the Act, and (2) whether the order violated the provisions of Art. 15 (1) of the Constitution of India (before the amendment of art. 15) on the ground of discrimination in favour of the Harijans:—

Held, (1) Before the power to requisition can be exercised under s. 5 of the Bombay Land Requisition Act, 1948, the condition precedent to the exercise of that power viz. the formation of the opinion of the State Government that it is necessary and expedient for the public purpose to requisition the property must be satisfied. Not only can the power be delegated but also the duty which is attached to the exercise of that power. A duty is cast upon the State to satisfy the condition precedent, and when the Collector forms an opinion under s. 5 he is discharging a duty and is carrying out the condition precedent.

(2) that the order requisitioning the land for the establishment of a Colony only for Harijans was bad inasmuch as it discriminated in favour of the Harijans and against other members of the public who are not Harijans and thereby violated the provisions of art. 15 (1) (before the amendment of art. 15), and

(3) that the fact that under art. 46 of the Constitution the State is enjoined to promote with special care the educational and economic interests of the Scheduled Caste does not mean that the State is permitted to discriminate in favour of Harijans so as to contravene the fundamental rights conferred upon citizens. An article conferring fundamental rights cannot be whittled down or qualified by the directive principles enumerated in the Constitution which are not justiciable.

Jagwant Kaur and others (Petitioners) owned a plot of land at Poona. On April 16, 1951, the Collector of Poona made an order requisitioning this land. The order stated as follows:—

"Whereas it is necessary and expedient for the public purpose viz. establishment of Kashiwadi Harijan Colony for the Poona City Municipal Corporation to requisition land situated at Poona City Taluka, Poona City District, Poona, specified in the schedule herewith appended..."

On May 22, 1951, the Petitioners applied to the High Court praying for a Writ of Prohibition under art. 226 of the Constitution.

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The application was heard.

R. B. Kotwal, for the petitioners.

G. N. Joshi and V. T. Gambhirwalla, with Little & Co., for the respondents.

CHAGLA C. J. This is an application for a writ under art. 226 of the Constitution. By this application an order made by the Collector of Poona under s. 5 of the Bombay Land Requisition Act is being challenged. The order was made on April 16, 1951, and the order states:

"Whereas it is necessary and expedient for the public purpose, viz. establishment of Kashiwadi Harijan Colony of the Poona City Municipal Corporation to requisition land situated at Poona City taluka, Poona City District, Poona, specified in the schedule herewith appended."

It is for this purpose and in exercise of the powers conferred upon him by s. 5 that the Collector has requisitioned the land in question. It would appear that there was a scheme called the Town Planning Scheme No. 3 framed by the Poona City Municipality in 1935 and this particular plot was earmarked for a Harijan Colony, and it was at the instance of the Municipal Corporation that the Collector in 1951 has requisitioned this particular plot.

Three points have been urged by Mr. Kotwal for challenging the validity of this order. The first is that the order is made by the Collector to whom the power has been delegated by the State of Bombay under s. 15 of the Land Requisition Act, and Mr. Kotwal's contention is that all that can be delegated under s. 15 is a power conferred or a duty imposed on the State Government by the Act. Mr. Kotwal's contention is that to the extent that the Collector has requisitioned the land, he has exercised a power properly delegated to him, but as far as the formation of the opinion is concerned, viz. that the requisition is necessary or expedient, that is neither a duty nor a power and the formation of the opinion cannot be delegated under s. 15 to the Collector. Therefore, Mr. Kotwal's contention comes to this that although a land may be requisitioned by a delegated authority, the opinion in the first instance under s. 5 must be formed by the State Government. In our opinion that is not a tenable contention because before the power can be exercised under s. 5 the condition precedent to the exercise of that power must be satisfied, and the condition precedent is that in the opinion of the State Government

it is necessary or expedient to requisition the property. Therefore, a duty is cast upon the State to satisfy the condition precedent before it exercises the power conferred upon it; and not only the power can be delegated but also the duty which is attached to the exercise of the power, and therefore when the Collector forms an opinion under s. 5, he is discharging a duty and is carrying out the condition precedent laid down in s. 5. Therefore, there is no substance in this point, and the Collector has rightly formed the opinion necessary under s. 5 before he could exercise the power to requisition the property.

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The more substantial objection, however, to the validity of the order is that it contravenes the provisions of the Constitution. It is pointed out that the land is being requisitioned for the purpose of building a colony only for Harijans and in doing so the State is discriminating in favour of the Harijans and against other members of the public who are not Harijans and thereby violating the provisions of art. 15 (1) of the Constitution. Now, we have had occasion to construe that article in various cases and it has been pointed out that arts. 14 and 15 must be read together and the effect of these two articles is not that the State cannot discriminate or cannot pass unequal laws, but if they do discriminate or they do pass unequal laws, the discrimination or the inequality must be based on some reasonable ground, and art. 15 (1) expressly states that discrimination merely on the ground of religion, race, caste, sex or place of birth is not and cannot be a reasonable ground. Therefore, if the State takes any action which is of a discriminatory nature and the discrimination is based merely on the ground of the religion, race or caste of a person or of a section of the public, then the action can be successfully challenged under art. 15. As the order stands, there can be no doubt that the colony which is intended to be constructed is intended for the benefit only of Harijans. Mr. Joshi has drawn our attention to the condition in which even today Harijans find themselves in this country, and Mr. Joshi says that the object of erecting this colony is to help people who are in a bad economic condition, who may not find houses to live in, and who deserve the support and sympathy of the State. Undoubtedly this is a very laudable object, but is there any reason why that laudable object should be confined only to Harijans as Harijans? There are members of the public belonging to other communities who are in an equally sad plight and, if the colony was being erected to meet the

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needs of people in a particular position or belonging to a particular stratum of society then undoubtedly it would be a public purpose which would not in any way be discriminatory under art. 15 (1). But when the State picks out members of a particular caste and wishes to give those members particular facilities, although other members of the public may equally be in need of those facilities, then undoubtedly the action is discriminatory and the only reason why this discriminatory action is taken is because the State wants to help members of a particular caste or community.

Mr. Joshi draws our attention to the fact that the Constitution itself treats the scheduled caste as a community to be specially favoured. Our attention is drawn to art. 46 which contains a directive principle of State policy and which provides that

“the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Caste and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.”

He also draws our attention to the fact that even as far as elections are concerned for a period of ten years the scheduled caste has to be treated as a favoured class. Therefore, Mr. Joshi wants us to hold that when the State takes a discriminatory step and the discrimination is in favour of the scheduled caste, it is doing something which is reasonable because it is doing what the Constitution itself envisages and directs the State to do. Therefore, according to Mr. Joshi, there is an exception to art. 15 and that exception is that whenever there is a discrimination in favour of Harijans, that discrimination would not be bad and must be upheld by the Courts of law. Now, as has been recently pointed out by the Supreme Court, art. 15 or indeed any article conferring fundamental rights cannot be whittled down or qualified by anything that is contained in Chapter IV of the Constitution. Whereas fundamental rights are justiciable, the directive principles enumerated in Part IV are not justiciable and the provisions of Part IV must be read as subsidiary to the fundamental rights contained in Part III. Therefore, the fact that under art. 46 the State is enjoined to promote with special care the educational and economic interests of the scheduled caste does not mean that the State is permitted to discriminate in favour of Harijans so as to contravene the fundamental right conferred upon citizens by art. 15 (1). It is because this difficulty

was realised that the Constitution had to be amended, and the amendment to art. 15 provides that nothing in art. 15 shall prevent the State from making any special provision for the advancement of any socially backward class of citizens or for the scheduled castes and the scheduled tribes. We dare say that after the amendment it would be possible for the State to put up a Harijan colony in order to advance the interest of the backward class. But till that amendment was enacted, as art. 15 stood, it was not competent to the State to discriminate in favour of any caste or community. Therefore, in our opinion, the order as it stands contravenes the provisions of art. 15.

Mr. Joshi has contended that the affidavit made by the Collector shows that one of the reasons for constructing the Harijan colony was to abolish slum areas in Poona and to transfer the slum population to this colony. Perhaps Mr. Joshi might have had an arguable case if it was the case of the Government that all the persons living in the slums belonged to the scheduled caste. But Mr. Joshi cannot take up that contention and the utmost he can urge is that a large majority of those living in the slums are Harijans. But if you provide for facilities for a large majority of people living in the slums, is there any reason why even a small minority should be discriminated against? We see no reason whatever why the same facilities should not be given to all persons living in the slums, whatever their caste or community might be.

It is then urged by Mr. Joshi that the purpose indicated in the order is a public purpose, that we should not go behind it, and at this stage we are not concerned with the provisions of the Constitution. We do not think that Mr. Joshi seriously wishes to urge that a purpose can be a public purpose when the purpose is unlawful or is unconstitutional. Whatever might have been the position before the Constitution was enacted, before the amendment of the Constitution it was unconstitutional for the State to arrange for any project which would be discriminatory within the meaning of art. 15 (1), and if the State wanted to acquire this land for a purpose which offended against Article 15 (1), then quite clearly such a purpose could not be described as a public purpose. No purpose can be public within the meaning of the

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Land Requisition Act which is either unlawful or unconstitutional, and if we are right in the view that we are taking that to establish a Harijan colony offends against Article 15 (1), then the establishment of a Harijan colony can never be a public purpose within the Land Requisition Act.

The third point urged by Mr. Kotwal is that the public purpose did not exist at the date of the requisition. Mr. Kotwal urges with considerable force that under the Town Planning Act once the scheme has been prepared by the Municipality it has got to be considered by an arbitrator, objections have to be heard by him and the scheme has to be finalized, and the scheme as finalized has got to receive the sanction of the Provincial Government. Mr. Kotwal says that the arbitrator has not yet disposed of the scheme. Therefore, it would be quite open to the arbitrator to hold that the Harijan colony may be established in some other part of the plot which is the subject-matter of the Town Planning Scheme rather than the plot which has been acquired. Therefore, till the arbitrator decides and the Government sanctions the scheme it is entirely premature to requisition this particular plot. We express no opinion on this contention urged by Mr. Kotwal because the point has not been taken in the petition and it has been urged for the first time before us when the petition came on for hearing. But it is sufficient to dispose of this petition on the second ground urged by Mr. Kotwal that the public purpose for which the land has been requisitioned is contrary to Article 15 of the Constitution and therefore it is not a public purpose within the meaning of the Act.

The result is that the petition must succeed and a writ must be issued directing the Respondents to cancel the order of requisition, dated April 16, 1951, and to restore the land in question to the Petitioners. Respondents must pay the costs.

Order accordingly.

K. B. S.
