

<i>First Regular Settlement</i>		<i>Present</i>	1936
Survey number		Survey number	
5.	787 corresponding to	835	KAMTA PRASAD
6.	805 ditto	853	v. RAJA
7.	1073 ditto	5 biswas and 5 biswansis land of 1156	PITHIPAL SINGH
8.	1074 ditto	1158	Srivastava and
9.	1094/1, 1094/2 corresponding to	1183	Nanavutty, J.
10.	1096 corresponding to	1185	
11.	1100/1, 1100/2 corresponding to	1192	

*Appeal allowed.*

## REVISIONAL CRIMINAL

*Before Mr. Justice Bisheshwar Nath Srivastava and  
Mr. Justice E. M. Nanavutty*

GANGA PRASAD (APPLICANT) *v.* THE MUNICIPAL BOARD,  
FYZABAD (OPPOSITE-PARTY)\*

1936  
April, 15

*United Provinces Municipalities Act (II of 1916), section 298 H, clause (e)—Byelaw no. 1, proviso and no. 2 of Fyzabad Municipality—Provision vitiating byelaw no. 1 whether ultra vires—Breach of byelaw no. 1, if an offence—General prohibition, applicability of—Breach of byelaw no. 2, whether an offence.*

While the byelaw no. 1 framed by the Fyzabad Municipality under section 298 H (e), Municipalities Act, prohibits the residing of public prostitutes in the specified area, the proviso appended thereto allows such public prostitutes who own houses in the prohibited area to live therein for their life-time. The proviso thus vitiates the prohibition contained in byelaw no. 1 and is *ultra vires*. Hence a conviction for breach of byelaw no. 1 cannot stand. *Emperor v. Naziran* (1), *Chanchal v. King-Emperor* (2), and *Emperor v. Bal Kishan* (3), relied on. *Emperor v. Mannu* (4), referred to. *Municipal Board of Fyzabad v. Vidyadhari* (5), distinguished.

\*Criminal Revision No. 127 of 1935, against the order of R. B. Pandit Manmatha Nath Upadhyay, Sessions Judge of Fyzabad, dated the 8th of August, 1935.

(1) (1932) I.L.R., 54 All., 611. (2) (1932) A.L.J., 23.  
(3) (1902) I.L.R., 24 All., 439. (4) (1920) I.L.R., 42 All., 294.  
(5) (1921) 24 O.C., 157.

1936

GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FYZABAD

The prohibition contained in byelaw no. 2 framed by Fyzabad Municipality under section 298, I, H (e), Municipalities Act, against keeping a brothel or letting any building to any prostitute or for keeping a brothel within the specified area, is of universal applicability and the byelaw no. 2 is not vitiated by any proviso like that vitiating byelaw no. 1. The conviction for breach of byelaw no. 2 cannot, therefore, be interfered with.

Mr. A. N. Mulla, for the applicant.

Mr. S. N. Roy, for the opposite party.

SRIVASTAVA and NANAVUTTY, JJ.:—These are two connected applications for revision against an order of the learned Sessions Judge of Fyzabad upholding the conviction of the applicants for violating the bye-laws framed by the Municipality of Fyzabad under section 298 H (e) of the Municipalities Act, and sentencing each of them to pay a fine of Rs.25.

The facts which have given rise to Criminal Revision No. 129 of 1935 are briefly as follows:

Musammam Ram Piari, her sister Musammam Buggan and her niece Musammam Ram Dulari, who are all three prostitutes, were prosecuted for breach of Municipal bye-laws made by the Municipality of Fyzabad under section 298 H (e) of the Municipalities Act on the allegation that they were public prostitutes who resided in a prohibited area in Mohalla Nakhas on the provincial road that runs from Chauk to Naka Muzafra inside the Municipal limits of the town of Fyzabad. All three accused admitted that they resided in the house as alleged by the prosecution but asserted that they did not carry on their profession of prostitution. The learned Special Magistrate, Sheikh Mehdi Hasan, held upon the evidence on the record that these three prostitutes did carry on their profession while residing in this house which is situate in Mohalla Nakhas where, according to the bye-laws of the Fyzabad Municipality, no prostitute is allowed to reside. He believed the evidence of P. W. 7, the Sanitary Inspector, who verified the list exhibit II which showed that these

three prostitutes were residing in a house within the prohibited area, and that Musammat Ram Piari was the owner of that house. He therefore convicted all three prostitutes, Musammat Ram Piari, Musammat Buggan and Musammat Ram Dulari of a breach of the Municipal bye-law mentioned above and sentenced each of them to pay a fine of Rs.25, or in default to undergo one week's simple imprisonment.

Criminal Revision No. 127 of 1935 arises out of the prosecution of Musammat Patti and Musammat Dulari prostitutes along with Ganga Prasad Tamoli of Mohalla Nakhas for a similar breach of the bye laws framed by the Fyzabad Municipality. It was alleged on behalf of the prosecution that Ganga Prasad had let out his house situate on the provincial road running from Dilkusha to Bahu Begam's Tomb to the two prostitutes Musammat Patti and Musammat Dulari who carried on their profession as prostitutes in the house rented to them. Both the prostitutes admitted that they resided in the house of Ganga Prasad, but denied that they carried on the profession of prostitutes. The accused Ganga Prasad admitted that he let his house to these two prostitutes, but he alleged that he had done so in order to oblige a certain wealthy person, whose name he did not wish to disclose, and who had asked him to let this house to these two prostitutes, Musammat Patti and Musammat Dulari.

Upon the evidence of the prosecution witnesses the learned Special Magistrate held that the house in dispute was situate on the provincial road within the prohibited area of the Fyzabad Municipality and that the house belonged to Ganga Prasad and that he had let it to the two prostitutes who carried on their profession of prostitution. The Magistrate therefore found Musammat Patti and Musammat Dulari guilty of a breach of bye-law No. 1 and Ganga Prasad guilty of a breach of bye-law No. 2 framed by the Fyzabad Municipality, under section 298 H (e) of the Municipalities

1936

GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FYZABAD

*Srivastava,  
and  
Nanavutty,  
JJ.*

1936

GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FYZABAD

Srivastava  
and  
Nanavatty,  
J.J.

Act, and sentenced each of them to pay a fine of Rs.25 or in default to undergo fifteen days' simple imprisonment.

Musammat Patti and Musammat Dulari have not filed any revision in this Court, but Ganga Prasad has filed a revision and this has been numbered as No. 127 of 1935. The revision filed by Musammat Ram Piari, Musammat Buggan and Musammat Ram Dulari has been numbered as No. 129 of 1935.

These two criminal revisions first came up for hearing before one of us, who, by his order dated the 27th of February, 1936, certified that the cases were fit to be decided by a Bench of two Judges under section 14(2) of the Oudh Courts Act.

We have heard the learned counsel for the applicants at some length. In the first place it has been strenuously argued before us by Mr. A. N. Mulla, the learned counsel for Ganga Prasad, that bye-law No. 1 is clearly *ultra vires* and his conviction is therefore illegal. In support of his contention he has relied upon a Bench decision of the Allahabad High Court reported in *Emperor v. Naziran* (1). In this case it was held by the learned CHIEF JUSTICE and Mr. Justice YOUNG that a Municipal Board was competent to frame a bye-law under section 298, List I, sub-head H(e) of the Municipalities Act, prohibiting prostitutes from residing within the Municipal limits except in certain specified streets. It was further held that where such a bye-law contained an exemption from its operation in the case of those prostitutes who owned houses within the prohibited area, and thereby created an invidious distinction in favour of one group of prostitutes, then the said bye-law must be held to be *ultra vires*, as there should be no distinction of this kind, and the prohibition to reside in a certain specified area ought to be general and of universal application, and must not make any exception in favour of any particular group or class of prostitutes. In this case an earlier decision of the

(1) (1932) I.L.R., 54 All. 611.

same Court reported in *Chunchal v. The King-Emperor through the Secretary, Municipal Board of Aligarh* (1), was followed. In this later case it was held by the learned CHIEF JUSTICE of the Allahabad High Court that the intention of the Legislature in enacting section 298, List I, Group H, clause (e) of the United Provinces Municipalities Act was that the prohibition must be general and of universal application within the specified street or area, and must not hit particular prostitutes while leaving other prostitutes free to ply their trade within the specified streets or area. It was further held, that where the Municipal Board framed a bye-law prohibiting public prostitutes from residing within a certain specified area or streets, but permitted those who owned and resided in houses within that area in March, 1925, to continue to live there as before, that such a bye-law was not in accordance with the provisions of section 298 of the Municipalities Act, because it did not amount to a prohibition of the residence of public prostitutes but merely to a prohibition against a particular class of prostitutes. In this case the decision in *Emperor v. Bal Kishan* (2), was relied upon. In *Emperor v. Bal Kishan* (2), it was held by Mr. Justice KNOX that the English law as to the necessity of bye-laws being reasonable was applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India, and that, where the Municipal Board of Naini Tal passed a bye-law to the effect that no coolie, whether bearing loads or not, and no servant, except one in attendance on his master, and no prostitute shall use the upper north Mall at any time, that the words "no servant, except one in attendance on his master" made the bye-law an unreasonable one, as it made an invidious distinction between different classes of coolies and servants, and the Court declined to give effect to it, and set aside the conviction and fine and directed the fine to be refunded.

1936

GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FYZABAD

*Srivastava  
and  
Naravally,  
J.J.*

(1) (1932) A.L.J., 28.

(2) (1902) 22 A.W.N., 117.

1936

GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FYZABAD

Srivastava  
and  
Narasimlu,  
J.J.

The learned counsel for the opposite party on the other hand invited our attention to the ruling reported in *Emperor v. Mannu* (1), in which Mr. Justice PIGGOTT doubted whether the principle laid down in *Emperor v. Bal Kishen* (2) was a sound one. The decision in *Emperor v. Bal Kishan* (2) was, however, approved of not only in the single Judge decision reported in *Chanchal v. King-Emperor* (3), but also in the Bench decision reported in *Emperor v. Nazirun* (4), already referred to. The learned counsel for the opposite-party has also invited our attention to a ruling of the late Court of the Judicial Commissioner of Oudh reported in the *Municipal Board of Fyzabad v. Musammat Vidyadhari* (5). That decision, however, is of no help to us in the present case because the question that has been raised before us was never raised in that case. In the course of his judgment in that case Mr. Justice LINDSAY observed as follows:

"It cannot, *and indeed has not been*, suggested that the Municipalities Act and the particular section of it to which I have referred is in any way *ultra vires* of the Legislature. Nor can it be contended that the rule which the Municipal Board has framed under the provisions of section 298 is in any way beyond the powers of the Board. It complies exactly with the form which is prescribed by the Act itself, and it is quite clear that no prohibition has been promulgated by this rule which is in excess of the powers delegated to the Municipal Board."

In our opinion, after giving the matter our careful consideration, it appears to us that the proviso in by-law No. 1 framed by the Municipal Board of Fyzabad under section 298H(e) of the Municipalities Act and set forth in paragraph 1 of Notification No. 1312/191-139, dated the 20th of January, 1919, is *ultra vires* in

(1) (1920) I.L.R., 42 All., 294.

(2) (1902) I.L.R., 24 All., 439: 22 A.W.N., 117.

(3) (1932) A.L.J., 28.

(4) (1932) I.L.R., 54 All., 611.

(5) (1921) 24 O.C., 157.

so far as it lays down that public prostitutes who, on the 20th of January, 1919, the date on which these rules came into force, owned houses in prohibited areas may continue to live in such houses for their lifetime. As this proviso is *ultra vires* it vitiates the prohibition contained in paragraph 1 of the Notification that no public prostitutes shall reside within the area or in the streets specified.

It has, however, been contended by the learned counsel for the opposite-party that Ganga Prasad has not been held guilty of breach of bye-law No. 1 framed by the Municipality, but has been found guilty in respect of bye-law No. 2 which lays down that no person shall keep a brothel or let or otherwise grant the use or occupation of any building to any prostitute or for the purpose of keeping a brothel within the area or in the streets specified in bye-law No. 1. Ganga Prasad has stated that he rented the house in question at the request of a certain person, whose name he did not wish to disclose, for the special purpose of allowing these two prostitutes Musammat Patti and Musammat Dulari to live in it. It is, therefore, obvious that bye-law No. 2 has been violated by Ganga Prasad; this bye-law is not vitiated by any proviso like the one which has vitiated bye-law No. 1. The prohibition in bye-law No. 2 is of universal applicability, and we therefore see no reason to interfere with the conviction and sentence passed upon Ganga Prasad in respect of a breach of bye-law No. 2. We accordingly dismiss the application of Ganga Prasad and confirm the conviction and sentence passed upon him.

As regards the conviction of the applicants Musammat Ram Piari, Musammat Buggan and Musammat Ram Dulari, we are of opinion that they cannot be convicted of a breach of bye-law No. 1, which has been held by us to be *ultra vires*. We, however, consider that Musammat Ram Piari can be legally convicted of a breach of bye-law No. 2. She is the owner of the

1936

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GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FY/ABAD

Srivastava  
and  
Nanavaty,  
JJ.

1936

GANGA  
PRASAD  
v.  
THE  
MUNICIPAL  
BOARD,  
FYZABAD

Srivastava  
and  
Nanavaty,  
J.J.

house in which she and her sister Musammat Buggan and her niece Musammat Ram Dulari are carrying on the profession of prostitutes. She has virtually converted her house into a brothel and, in our opinion, the conviction of Musammat Ram Piari in respect of a breach of bye-law No. 2 can be legally sustained. We therefore set aside the conviction of Musammat Ram Piari in respect of breach of bye-law No. 1, but convict her instead of breach of bye-law No. 2, and maintain the sentence imposed upon her; with this modification we dismiss her application for revision.

As regards Musammat Buggan and Musammat Ram Dulari, we are of opinion that their case does not fall within the purview of bye-law No. 2. They cannot be said to be persons who kept a brothel or let or granted the use or occupation of any building to public prostitutes or for the purpose of keeping a brothel, and, as we have already held that bye-law No. 1 is *ultra vires*, Musammat Buggan and Musammat Ram Dulari cannot be convicted under that bye-law. The result therefore is that we allow the application of Musammat Buggan and Musammat Ram Dulari, set aside their convictions and sentences and acquit them of the offence charged. The fines, if paid, will be refunded to them.

In conclusion we would invite the attention of the Chairman of the Fyzabad Municipal Board to the proviso appended to bye-law No. 1 set forth in Notification No. 1312/191—139, dated the 20th January, 1919, which in our opinion is *ultra vires*, and the sooner that proviso is deleted the better it is for all concerned.