

ITEM NO.11

COURT NO.5

SECTION X

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Writ Petition(s) (Civil) No(s). 793/2014

INDIAN HOTEL & RESTAURANT ASSOCIATION & ANR.

Petitioner(s)

VERSUS

STATE OF MAHARASHTRA & ANR.

Respondent(s)

WITH

CONMT.PET.(C) No. 275/2014 In C.A. No. 2705/2006

(With appln.(s) for exemption from personal appearance and Office Report for Direction)

CONMT.PET.(C) No. 248/2014 In C.A. No. 2705/2006

(With appln.(s) for exemption from personal appearance and Office Report for Direction)

Date : 15/10/2015 These petitions were called on for hearing today.

CORAM : HON'BLE MR. JUSTICE DIPAK MISRA

HON'BLE MR. JUSTICE PRAFULLA C. PANT

For Petitioner(s)

Mr. Kapil Sibal, Sr. Adv.
Mr. Jayant Bhushan, Sr. Adv.
Mr. Presenjit Keswani, Adv.
Mr. Satyajit Saha, Adv.
Mr. Siddharth Kaushik, Adv.
For Mrs V. D. Khanna, Adv.

Ms. Anusha Nagrajan, Adv.

For Respondent(s)

Mr. Tushar Mehra, ASG
Mr. Nishant R. Katneshwarkar, Adv.
Mr. Mongesh N., Adv.

Mr. Ravindra Keshavrao Adsure, Adv.

UPON hearing counsel the Court made the following

O R D E R

We have heard Mr. Kapil Sibal and Mr. Jayant Bhushan, learned senior counsel along with Mr. Presenjit Keswani and Mr. Satyajit Saha, learned counsel appearing for the petitioners and Mr. Tushar Mehta, learned Additional Solicitor General along

with Mr. Nishant R. Katneshwarkar, learned counsel appearing for the State of Maharashtra.

The Writ Petition has been filed for issuance of an appropriate Writ for declaring Section 33A inserted by way of an amendment by Maharashtra Police (Second Amendment) Act, 2014 as unconstitutional. There is an application for interim prayer, which is to the following effect:-

"Grant ad-interim ex-parte order staying the implementation, operation and effect of the provision of Sections 33A of the Bombay Police Act, 1951 as introduced by the Maharashtra Police (Second Amendment) Act, 2014."

To appreciate the prayer made by way of an interim measure, it is requisite to sit in a time machine to understand the controversy. The Bombay Police Act, 1951 (for brevity, "the Act") was enacted with the object of consolidating and amending the law relating to the regulation of the exercise of powers and performance of the functions by the State Government for maintenance of public order. Section 33 of the Act authorises the State Government to frame regulations in that regard. It is apt to mention here that by virtue of Section 33 of the Act, the Rules for Licensing and Controlling Places of Public Amusement (other than Cinemas) and for Performances for Public Amusement including Melas and Tamashas, 1960 were enacted to regulate and maintain discipline in places of public amusement, melas etc.

There was no difficulty with the said provisions. However, an amendment was brought in by addition of Sections 33A and 33B to the Act by 'Act 35 of 2005', which came into effect on 14.08.2005. The Constitutional validity of Sections 33A and 33B of the earlier Act were assailed before the High Court of Bombay in a Writ Petition. Sections 33A and 33B at that time read as follows :-

"33A. Prohibition of performance of dance in eating house, permit room or beer bar and other consequential provisions :-

(1) Notwithstanding anything contained in this Act or the rules made by the Commissioner of Police or the District Magistrate under sub-section (1) of Section 33 for the area under their respective charges, on and from the date of commencement of the Bombay Police (Amendment) Act, 2005 -

(a) holding of a performance of dance, of any kind or type, in any eating house, permit room or beer bar is prohibited;

(b) all performance licences, issued under the aforesaid rules by the Commissioner of Police or the District Magistrate or any other officer, as the case may be, being the Licensing Authority, to hold a dance performance, of any kind or type, in an eating house, permit room or beer bar shall stand cancelled.

(2) Notwithstanding anything contained in Section 131, any person who holds or causes or permits to be held a dance performance of any kind or type, in an eating house, permit room or beer bar in contravention of Sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to rupees two lakhs:

Provided that, in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than rupees fifty thousand.

3) If it is, noticed by the Licensing Authority that any person, whose performance licence has been cancelled under Sub-section (1), holds or causes to be held or permits to hold a dance performance of any kind or type in his eating house, permit room or beer bar, the Licensing Authority shall, notwithstanding anything contained in the rules framed under section 33, suspend the Certificate of Registration as an eating house and the licence to keep a Place of Public Entertainment (PPEL) issued to a permit room or a beer bar and within a period of 30 days from the date of suspension of the

Certificate of Registration and licence, after giving the licensee a reasonable opportunity of being heard, either withdraw the order of suspending the Certificate of Registration and the licence or cancel the Certificate of Registration and the licence.

(4) ... (5).....

(6) The offence punishable under this section shall be cognizable and non-bailable.

33B. Non-applicability of the provisions of Section 33-A in certain cases - Subject to the other provisions of this Act, or any other law for the time being in force, nothing in Section 33-A shall apply to the holding of a dance performance in a drama theatre, cinema theatre and auditorium; or sports club or gymkhana, where entry is restricted to its members only, or a three starred or above hotel or in any other establishment or class of establishments, which, having regard to (a) the tourism policy of the Central or State Government for promoting the tourism activities in the State; or (b) cultural activities, the State Government may, by special or general order, specify in this behalf.

Explanation - For the purposes of this section, "sports club" or "gymkhana" means an establishment registered as such under the provisions of the Bombay Public Trusts Act, 1950, or the Societies Registration Act, 1860 or the Companies Act, 1956, or any other law for the time being in force."

The High Court of Bombay by its Judgment dated 12.04.2006 declared the provisions of Sections 33A and 33B as unconstitutional being ultra vires the Articles 14 and 19(1)(g) of the Constitution of India.

Aggrieved by the aforesaid Judgment rendered by the High Court of Bombay, the State of Maharashtra preferred an appeal by way of Special Leave, which was ultimately decided by a two-Judge Bench of this Court in "State of Maharashtra And Anr. Vs. Indian Hotel and Restaurants Association and others" reported in (2013) 8 SCC 519.

After deliberating on the submissions of the learned counsel for the parties at length, the two-Judge Bench came to hold in paragraph 126 as follows :-

"126. Upon analyzing the entire fact situation, the High Court has held that dancing would be a fundamental right and cannot be excluded by dubbing the same as res extra commercium. The State has failed to establish that the restriction is reasonable or that it is in the

interest of general public. The High Court rightly scrutinized the impugned legislation in the light of observations of this Court made in Narendra Kumar (supra) , wherein it was held that greater the restriction, the more the need for scrutiny. The High Court noticed that in the guise of regulation, the legislation has imposed a total ban on dancing in the establishments covered under Section 33A. The High Court has also concluded that the legislation has failed to satisfy the doctrine of direct and inevitable effect [See: Maneka Gandhi's case (supra). We see no reason to differ with the conclusions recorded by the High Court. We agree with Mr. Rohatgi and Dr. Dhawan that there are already sufficient rules and regulations and legislation in place which, if efficiently applied, would control if not eradicate all the dangers to the society enumerated in the Preamble and Objects and Reasons of the impugned legislation."

Thereafter, it opined as under :-

"136. The end result of the prohibition of any form of dancing in the establishments covered under Section 33A leads to the only conclusion that these establishments have to shut down. This is evident from the fact that since 2005,

most if not all dance bar establishments have literally closed down. This has led to the unemployment of over 75,000 women workers. It has been brought on the record that many of them have been compelled to take up prostitution out of necessity for maintenance of their families. In our opinion, the impugned legislation has proved to be totally counterproductive and cannot be sustained being ultra vires Article 19(1) (g)."

137. We are also not able to agree with the submission of Mr. Subramaniam that the impugned legislation can still be protected by reading down the provision. Undoubtedly, this Court in the case of *Government of Andhra Pradesh & Ors. Vs. P. Laxmi Devi (Smt.)* upon taking notice of the previous precedents has held that the legislature must be given freedom to do experimentations in exercising its powers, provided it does not clearly and flagrantly violate its constitutional limits, these observations are of no avail to the appellants in view of the opinion expressed by us earlier. It is not possible to read down the expression "any kind or type" of dance by any person to mean dances which are obscene and derogatory to

the dignity of women. Such reading down cannot be permitted so long as any kind of dance is permitted in establishments covered under Section 33B.

138. We are also unable to accept the submission of Mr. Subramaniam that the provisions contained in Section 33A can be declared constitutional by applying the doctrine of severability. Even if Section 33B is declared unconstitutional, it would still retain the provision contained in Section 33A which prohibits any kind of dance by any person in the establishments covered under Section 33A."

We may ingeminate that Sections 33A and 33B, which were treated ultra vires by the High Court was given the stamp of approval by this Court. We will be failing in our duty if we do not reproduce Paragraph 139 of the Judgment for the sake of completeness. Paragraph 139 reads as under :-

"139. In our opinion, it would be more appropriate that the State Government re-examines the recommendations made by the Committee which had been constituted by the State Government comprising of a Chairman of AHAR, Public and Police Officials and chaired by the Principal Secretary (E.I.), Home

Department. The Committee had prepared a report and submitted the same to the State Government. The State Government had in fact sent a communication dated 16th July, 2004 to all District Judicial Magistrates and Police Commissioner to amend the rules for exercising control on Hotel Establishments presenting dance programmes."

It is also necessary to refer to Paragraph 141 as to how the Court had perceived the whole controversy. Paragraph 141 of the Judgment reads as under :-

"141. Despite the directions made by the State Government, the authorities have not taken steps to implement the recommendations which have been submitted by AHAR. On the contrary, the impugned legislation was enacted in 2005. In our opinion, it would be more appropriate to bring about measures which should ensure the safety and improve the working conditions of the persons working as bar girls. In similar circumstances, this Court in the case of Anuj Garg (supra) had made certain observations indicating that instead of putting curbs on women's freedom, empowerment would be more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State

as well as law modeling done in this behalf. In our opinion, in the present case, the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance. In fact, a large number of imaginative alternative steps could be taken instead of completely prohibiting dancing, if the real concern of the State is the safety of women."

After this Court accepted the view of the Bombay High Court, the State Legislature brought the amendment on 25.06.2014. The amendment provisions contained in Section 33A read as under :-

"(1) Notwithstanding anything contained in this Act or the rules made by the Commissioner of Police or the District Magistrate under sub-section (1) of Section 33 for the area under their respective charges, on and from the date of commencement of the Maharashtra Police (Second Amendment) Act, 2014-

(a) holding of a performance of dance, of any kind or type, in an eating house, permit room or beer bar is prohibited;

(b) performance licences issued, if any, by the Commissioner of Police or the District

Magistrate or any other officer, as the case may be, being the Licensing Authority under the aforesaid rules, to hold a dance performance, of any kind or type, in an eating house, permit room or beer bar shall stand cancelled.

(2) Notwithstanding anything contained in Section 131, any person who holds or causes or permits to be held a dance performance of any kind or type, in an eating house, permit room or beer bar in contravention of Sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to rupees five lakhs:

Provided that, in the absence of special and adequate reasons to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than rupees one lakh.

3) If it is noticed by the Licensing Authority that any person, whose performance licence has been cancelled under Sub-section (1), holds or causes to be held or permits to hold a dance performance of any kind or type in his eating house, permit room or beer bar, the Licensing Authority shall, notwithstanding anything contained in the rules framed under section 33,

suspend the Certificate of Registration as an eating house and the licence to keep Place of Public Entertainment (PPEL) issued to a permit room or a beer bar and within a period of thirty days from the date of such suspension of the Certificate of Registration and licence, after giving the licensee a reasonable opportunity of being heard, either withdraw the order of suspending the Certificate of Registration and the licence or cancel the Certificate of Registration and the licence.

(4) A person aggrieved by an order of the licensing authority cancelling the Certificate of Registration and the licence under sub-section (3) may, within a period of thirty days from the date of receipt of the order, appeal to the State Government. The decision of the State Government thereon shall be final.

(5) Any person whose performance licence stands cancelled under sub-section (1) may apply to the licensing authority, who has granted such licence, for refund of the proportionate licence fee. The licencing authority, after making due inquiry, shall refund the licence fee on pro-rata basis, within a period of thirty days

from the date of receipt of such application.

(6) The offence punishable under this section shall be cognizable and non-bailable."

Be it noted that by virtue of the Amendment, Section 33B has been deleted.

It is submitted by learned senior counsel appearing for the petitioners that the provision that was declared ultra vires in the earlier form has come back in the present incarnation, which is the same and, therefore, it deserves to be stayed. Mr. Tushar Mehta, learned Additional Solicitor General, has submitted that the provisions are different. The difference that is perceptible from the provisions which have been reproduced above are really immaterial.

There are situations when a Judgment is delivered by this Court declaring a provision as unconstitutional and the Legislature steps in to remove the base of the Judgment to validate the provisions or brings an amendment whereby the defects pointed out by the Court are removed. Significantly, in the present case, similar provision has been introduced by enhancing the sentence of fine.

In view of the aforesaid and regard being had to the pronouncement in *Indian Hotel Case* (supra), we think it appropriate to stay the operation of the provisions enshrined under Section 33A(1) of the Act. However, we add a rider that no performance of dance shall remotely be expressive of any kind

of obscenity in any manner. We may hasten to clarify that in the earlier Judgment, it has been clearly stated that sufficient power is vested with the Licensing Authority to safeguard any violation of the dignity of women through obscene dances. Regard being had to the same, the Licensing Authority can take steps so that the individual dignity of a woman is not affected and there remains no room for any kind of obscenity.

As we are staying the provision, if the members of the petitioner apply for licence, the same shall be considered in accordance with law without taking note of the restriction as Section 33A has been stayed by us.

Counter Affidavit be filed within two days. Rejoinder Affidavit, if any, shall be filed within two weeks therefrom.

As agreed by the learned counsel for the parties, the matters be listed for final disposal on 05.11.2015 at 02.00 PM. It is hereby made clear that no adjournment shall be granted on that day.

(Jayant Kumar Arora)
Sr. P.A.

(H. S. Parasher)
Court Master