REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO._____/2022
(ARISING OUT OF SLP (C) NO. 13764 OF 2012)

HOTEL PRIYA, A PROPRIETORSHIP ...APPELLANT(S)

VERSUS

STATE OF MAHARASHTRA & ORS. ...RESPONDENT(S)

WITH

CIVIL APPEAL NO.__ __/2022
(ARISING OUT OF SLP (C) NO. 15953 OF 2012)

AND

CIVIL APPEAL NO._____/2022
(ARISING OUT OF SLP (C) NO. 8992/2013)

JUDGMENT

S. RAVINDRA BHAT, J.

1. Leave granted. These appeals arise from a judgment of the High Court of Bombay (and an order which followed it subsequently)[1] which upheld the conditions imposed under order dated 12.09.2009.

[1] Dated 6th May 2011 in W.P. No. 7962/2010 and connected cases; as well as the judgment and order dated 19.12.2012 in WP 2883/2012, which had followed the decision in the judgment dated 6th May 2012.

Summary of Facts

2. The appellants are either owners or are operating restaurants and bars with the requisite licenses/permissions. Orchestra performances are a common feature in their premises. They, hence, go by the appellation *"Orchestra Bars".* For this feature, they are required to secure Premises and Performance licenses under Licensing and Performance for Public Amusement including Cabaret Performance, Melas and Tamashas Rule, 1960 (hereafter "Rules, 1960") framed under the Maharashtra Police Act, 1951 (hereafter "Act, 1951"). The Commissioner of Police, Brihan Mumbai, exercising powers under Section 33 (1) (w)(i) and (w)(ii), Section 162(1) of Act, 1951 read with Rule 108A, 109, 118, 207 and 209 of the Rules, 1960, by orders dated 12.09.2009 in additional to the existing conditions mentioned in the Premises License, added several conditions. Certain conditions were challenged by the petitioners in W.P No. 7962/2010 and connected matters. However, at the stage of hearing, the challenge was confined to the following conditions:

(1) The licensee is permitted to keep only four women singers/artists and four male singers/artists to remain present on permitted stage.

(2) Only eight artists are permitted to remain present on the permitted stage (four male and four women).

3. Before the High Court, the appellants had contended that identification of particular number of artists or imposing any restrictions on the number of artists, whether male or female, has no bases either in Act, 1951 or Rules, 1960 and violates Article 14 and Article 19(1)(g) of the Constitution of India.

4. The High Court repelled the challenge to the conditions imposed by the Commissioner, holding that the power to impose them was traceable to provisions of the Act, 1951, and rules framed under it. It was also held that the commissioner was granted liberty to issue such conditions as were essential, for the operation of the orchestra bars. The High Court, therefore, rejected the writ petitions, holding that the Commissioner acted well within the power to impose such conditions.

Submissions of the Parties

5. Mr. Prasenjit Keswani and Mr. Manoj K. Mishra, learned counsel for the appellants submitted that the impugned conditions restricting the establishments to engage only eight artists and further, strictly, four male and four female artistes, are violative of Article 14 and Article 19(1)(g) of the Constitution.Counsel argued that the restriction on the number with a further restriction on gender of the performers in an orchestral combination is restrictive of the performers' right as well as the right of the organisers, i.e. the bar or owners of the place of entertainment. If there are all-male bands orchestras or all-female bands or orchestras or any of them containing different permutations, the numerical restriction will have the impact of altogether prohibiting the participation of such bands. This would be completely unreasonable and would violate Article 19(1)(g). It is pointed out that none of the reasonable restrictions clauses under Article 19(6) would be attracted to save such condition.

6. The Appellants submitted that the conditions have no *rationale* with the purported object sought to be achieved. It is pointed out that an artistic performance such as orchestra, or single band performance can have different permutations and combinations with respect to the number and gender of the performers. The composition of performers, is entirely on how the band or the group wishes to organize its business. This would depend on what is played, how popularly or well received it is, and which of the performers have popularity A strict and rigid numerical division of equal gender participation in the orchestra band, serves no rational basis. Counsel argued that in a given situation, an item or piece can involve all male performers, or all females, or few males and majority female, or vice versa. There may also be participation of transgender persons. While not disputing that the overall limit of eight performers on stage at any given point of time is reasonable, the insistence that limits the number of performers of either gender is unreasonable and manifestly arbitrary. Learned counsel submitted even a rule or provision of the

plenary enactment which contains such a condition cannot be justified and would be struck down as arbitrary. It would also fail the test of classification.

7. Counsel urged that it is pernicious on the part of the license conditions governing an orchestra performance requiring restriction on the number or gender of the artists. The petitioners cite the decision of this court in *State of Maharashtra & Anr. v. Indian Hotel and Restaurant Association & Ors.*[2] (hereafter (*"IHRA-I")* and *Indian Hotel and Restaurant Association & Anr. v. State of Maharashtra & Ors*. (hereafter *"IHRA-III")*[3], and urge that this court in those decisions while rejecting the argument of public morals (banning dancing bars) by the state, also ruled that "*dancing in bars could not be held to be res extra commercium."*

8. The appellants submit that under Sections 33(1)(w), (wa)(i) and (wa)(ii), the Commissioner of Police is empowered to make rules to license or control places of public amusement or entertainment and also to frame rules with respect to matters relating to licensing or controlling in the interest of public order, decency, or morality or in the interest of general public, the musical, dancing, mimicry, or any other performances for public amusement. Those provisions also empower making rules to regulate in the interest of public order, decency, or morality or in the interest of general public the employment of artists and the conduct of the artists and audience at such performances. The Commissioner's powers are not under challenge. The appellants however urge that on reading of those provisions, it is clear that the licensing and controlling can only be through rules or orders. Even though the commissioner has the powers, such powers have to be exercised under Section 33(2)(ii) and Section 33(6). Under Section 33(2)(ii), the power of making, altering or rescinding rules under clauses of Sub-section 1 [except for clause (a) and (c)] are subject to the previous sanction of that government; and under Section 33(6)- a previous publication of the alteration in the rules is mandated. Therefore, the

[2] (2013) 8 SCC 519.
[3] (2019) 3 SCC 429.

licensing and controlling can only be achieved by rules and not by executive instructions/decisions.

9. It is argued that the powers of the commissioners are governed by Rules 108, 108A, 109, 118, 120, 121, 122, Form-D and Form -E of the Rules, 1960. The appellants argue that Rule 108-A of the Rules, 1960, - does not include restrictions on the number of artistes or the gender of such artistes who can be engaged by the establishments in the Orchestra Performances. Further, that the conditions for grant of license as under Sections 108A, 120 and 122, have already enacted the norms in public interest, to protect the dignity of women, public order, and public morals. This court in *IHRA-I* while considering these rules held that this statutory regime was sufficient to safeguard the dignity of women. (Paras 127, 128, 129, 130, 131, 132). It is also submitted that Section 162 of the Act does not empower the Commissioner to impose any conditions, it only envisages that the license granted would specify the conditions and restrictions subject to which the license has been granted.

10. Discussing Rule 109, the appellants submits that if the Licensing Authority is allowed to construe that Rule 109 empowers the Commissioner to, in the exercise of her or his discretion, impose *any* type of condition, such power would suffer from the vice of excessive delegation. The rule cannot curtail the fundamental rights given under Article 19(1)(a) and 19(1)(g), since the conditions imposed under the said Rule continue to be executive instructions, they cannot curtail the enjoyment of Fundamental Rights as executive instructions are not law within the meaning of Article 13(3)(a) and for the purpose of Article 19(6). Reliance is placed on the judgments of this court in *Bijoe Emmanuel & Ors. v. State of Kerala & Ors*[4] and *Union of India v. Naveen Jindal*[5]. Hence, imposition of restriction on number of the artists and their gender has no basis in law.

11. Attacking the reasoning advanced by the state to justify imposition of the numerical restrictions that they are in the interests of the general public; subserve the

[4] (1986) 3 SCC 615.
[5] (2004) 2 SCC 510.

larger interests of public morality, tend to protect women and to improve their working conditions so that orchestra bars do not take advantage of the situation and exploit women artists and waitresses, the appellants submit that the reasoning has no basis in fact. Even though they were accepted by the High Court, by virtue of this Court's decision in *IHRA-I*, that reasoning is no longer acceptable. In *IHRA-I,* Sections 33A and 33B of the Act, 1951 which had completely banned dancing, in liquor bars, but permitted them in clubs and three starred hotels and higher establishments were in issue. This court held that such provisions are discriminatory and thus violates Article 14, and that the total ban on dance in liquor bars was not justified as a reasonable restriction under 19(6) of the Constitution. It is submitted that the same logic would apply in the present case because the restriction on the number of performers tends to keep out a number of performers who might otherwise be entitled to join a band. It tends to regulate the business and occupation of the performers and in that sense, they have to bear a disproportionate burden by ensuring that in all bars in Maharashtra, the bands do not have a certain number of performers belonging to either gender. Hence, limiting the number of performers to a certain gender has no rational basis, is excessive, and therefore unreasonable.

12. Further, dealing with the argument of the state that the restrictions are necessary in the interest of protection of public morality it was pointed out that the same judgements extensively deal with this aspect. Additionally, that the standards of morality in a society change with the passage of time, thus a particular activity treated as immoral at one-time may not be so later. The court was dealing with dance performance and held that dignified forms of dance are socially acceptable and nobody can take exception. Reliance was placed upon the observations that a practice which may not be immoral by societal standards cannot be thrusted upon the society as immoral by the state with its own notion of morality and thereby exercise social control. Furthermore, any legislation of this nature has to pass the muster of constitutional provisions as well in court. It is therefore argued that the restriction

imposed by the condition in challenge cannot be justified on the grounds that it seeks to prevent prohibited activity and is injurious to public morals.

13. Learned counsel relied heavily on the judgment in *IHRA-III* which had struck down the Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (working therein) Act, 2016 (Act of 2016). It was pointed out by counsel that the state's argument to justify those provisions on the basis of intelligible differentia and that women who perform in such establishments belong to deprived backgrounds and are vulnerable to trafficking or forced into bar dancing which they may not be otherwise inclined to was held to be unjustified. It is submitted that likewise, the restrictions impugned in the present case, do not in any manner further the Statement of Objects and Reasons of the Police Act. Hardly any material was placed on the record to show how the numerical restriction furthered the case of the state that public order is achieved.

14. Mr. Sachin Patil, arguing for the respondent, urged that the history of the legislation showed that orchestra bars are a new form of dance bars where the same women who were previously employed in the dance bars, now perform as orchestra artistes. These places exploit women by making them do obscene dance moves and also engage in sexual activities with the customers. The condition of having only four women has been made under Article 15(3) for safety of women employees/artistes and in the interest of general public.

15. It was contended that there are in all 254 establishments where orchestral shows are held and only three of them (the present appellants) have challenged the impugned conditions. Several criminal cases have been filed against these three establishments. Further, counsel submits that the said conditions have not been challenged by a single artist or association of artists.

16. Next, the respondent submits that the impugned conditions do not violate Article 14. Article 14 permits reasonable classification as long it is based upon intelligible differentia and such differentia has reasonable nexus to the object sought to be achieved by the law, or the executive measure. Article 15(3) allows the state to

make special provisions for women. To violate Article 14, two conditions have to satisfied. Firstly, that the person aggrieved has been treated differently from others and also from the similarly situated persons; and secondly, such treatment has to be meted out without any rational basis and without justification. In the present case, the conditions apply to all 254 establishments. It is not the case that fewer number of women have been permitted or vice versa; all establishments have been permitted to engage the same number of women, in each performance. The restrictions have only been applied to protect the interests of women and prevent their exploitation. It is submitted that instrumentalists are besides the artistes.

17. It is urged by the respondent that in the W.P. No. 793/2014, (filed by the Indian Hotels and Restaurants Associations of which the appellants are members) the petitioner-Association had, after detailed deliberation accepted the conditions with respect to the number of dancers. Reference is made to this court's order dated 02.03.2016 in Writ Petition (C) No. 793/2014. By that order, this Court approved the dimensions of the stage (10 ft x 12 ft) on which performances can be upheld, and the overall number of artistes.

18. It is urged that the orchestras that perform in other venues like auditoriums, halls, grounds etc. are altogether different from the kind of orchestras in hotel bar establishments like the appellants. In case of the former the orchestras or theatrical programs are the sole events and members of the public attend them as audiences. In the hotel bar establishments like that of the appellants, orchestra performances are only ancillary to the alcohol served there. Such programs are not professional like the public performances of orchestra or musical groups. These establishments under the pretext of artists performing for the orchestra actually require waitresses or bar girls who are known to indulge in explicit activities with the customers within the premises of the establishment or who go away with customers. The profits generated from such activities, induce the license holders to misuse such places of public amusement as contact points for prostitution. It was urged that between 2009 and March 2013, in

Mumbai, a total of 217 cases were registered under Section 294 IPC and 97 cases under Sections 3,4,5 of the Immoral Trafficking (Prevention) Act, (PITA) 1956.

19. The respondents submit that the said conditions are not in violation of Article 19(1)(g) as reasonable restrictions can be imposed under Article 19(6) in the interests of the general public. Such restrictions are also essential to protect the dignity of women and prevent their exploitation; they are reasonable and saved, in addition, by Article 15 (3) of the Constitution of India.

20. The respondent state urges that the later judgment in *Karnataka Live Band Restaurants Association v. State of Karnataka*[6] recognized the need for regulations, of the kind that have been challenged. Therefore, the present impugned conditions are reasonable.

Analysis and Findings

I. *Statutory provisions*

21. By Section 2 (9) of Act, 1951 a *"place of public_amusement"* is defined as follows:

> *"place of public amusement" means any place where music, singing dancing, or any diversion or game, or the means of carrying on the same, is provided and to which the public are admitted either on payment of money or with the intention that money may be collected from those admitted and includes a race course, circus, theatre, music hall, billiard room, bagatelle room, gymnasium, fencing school, swimming pool or dancing hall.*

Section 2 (10) of Act, 1951 defines a *"place of public entertainment"* as follows:

> *"place of public entertainment" means a lodging-house. boarding and lodging-house or residential hotel, and includes any eating- house in which any kind of liquor or intoxicating drug is supplied (such as a tavern, a wine shop, a beer shop or spirit, arrack, toddy, ganja, bhang or opium shop) to the public for consumption in or near such place.*

Section 33 of Act, 1951 is the rule and regulation making power; it *inter alia*, reads as follows:

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[6] (2018) 4 SCC 372.

> *"**Section 33. Power to make rules or regulations of traffic and for presentation of order in public place, etc.***
>
> *(1) The Commissioner with respect to any of the matters specified in this sub section, the District Magistrate with respect to any of the said matters (except those falling under Clauses[(a), (b), (d). (db), (e), (g), (r), (t) and (u)]) thereof and the Superintendent of Police with respect to the matters falling under the clauses aforementioned read with Clause (y) to this sub-section], in areas under their respective charges or any part thereof, may make, alter or rescind rules or orders not inconsistent with this Act for-……*
> *(w) (i) licensing or controlling places of public amusement or entertainment; (ii) prohibiting the keeping. of places of public amusement or entertainment or assembly, in order to prevent obstruction, inconvenience, annoyance, risk, danger or damage to the residents or passengers in the vicinity;*
> *.....*
> *(wa) (i) licensing or controlling 2[in the interest of public order decency or morality or in the interest of the general public with such exceptions as may be specified, the musical, dancing, mimetic or theatrical or other performances for public amusement, including melas and tamashas;*
> *(ii) regulating in the interest of public order, decency or morality or in the interest of the general public, the employment of artists and the conduct of the artists and the audience at such performances;*

Section 33(1) (2), Act, 1951 enables the making, alteration or rescinding of rules; it *inter alia*, reads as follows:

> *"Section 33 (1)…..*
> *(2) (i) The power of making, altering or rescinding rules under Clauses (a), (b) and (c) of sub-section (1) shall be subject to the control of the State Government.*
> *(ii) The power of making, altering, or rescinding rules under the remaining clauses of sub- section (1) shall be subject to the previous sanction of that Government."*

22. The power to make, alter or rescind rules (under Section 33(2)) is circumscribed by the condition in Section 33 (6) of previous publication in the concerned locality. Section 162 (1) enacts those licenses and written permissions have to specify conditions, etc; Section 162 (2) enables revocation of licenses or written permissions.

23. As precondition for the grant of the licences required for functioning of the said premises, applicants have to fulfil several conditions such as[7]:

[7] Rules 108, 109 and 120 of the 1960 Rules.

(i) Any application for premises licence shall be accompanied by the site plan indicating inter alia the distance of the site from any religious, educational institution or hospital.

(ii) The distance between the proposed place of amusement and the religious place or hospital or educational institution shall be more than 75 m.

(iii) The proposed place of amusement shall not have been located in the congested and thickly populated area.

(iv) The proposed site must be located on a road having width of more than 10 m.

(v) The owners/partners of the proposed place of amusement must not have been arrested or detained for anti-social or any such activities or convicted for any such offences.

(vi) The distance between two machines which are to be installed in the video parlour shall be reflected in the plan.

(vii) No similar place of public amusement exists within a radius of 75 m.

(viii) The conditions mentioned in the licence shall be observed throughout the period for which the licence is granted and if there is a breach of any one of the conditions, the licence is likely to be cancelled after following the usual procedure.

24. The above provisions are supplemented with the regulations protecting the dignity of women. The provisions of the Bombay Police Act, 1951 and more particularly Section 33 (1) (w) empowers the licensing authority to frame rules.

25. Rules 122 and 123 of the Amusement Rules, 1960 also prescribe restrictive conditions for holding performances. These restrictions include any profanity or impropriety of language; any indecency of dress, dance, movement or gesture;

Similar conditions and restrictions are also prescribed under the performance licence; any exhibition or advertisement whether by way of posters or in the newspapers, photographs of nude or scantily dressed women; any performance at a place other than the place provided for the purpose; any mixing of the cabaret performers with the audience or any physical contact by touch or otherwise with any member of the audience.

II. *Previous litigation*

26. This court is no stranger to controversies relating to prohibition, and restriction in participation of women from performances in establishments in Maharashtra. The first judgment: *IHRA-I* considered the validity of Sections 33A and 33B, introduced to the Act, 1951, with effect from 14.8.2005. Section 33A, prohibited, absolutely, the holding *"of a performance of dance, of any kind or type, in an eating house, permit room or beer bar".* Existing licenses too were cancelled; to hold such performances became an offence. By Section 33B (introduced by the amendment of 2005) the prohibition was inapplicable, *"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"* 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."*

27. The two provisions (Sections 33A and 33B) were the subject matter of challenge before the Bombay High Court, which, by a common judgment, held them to be violative of Articles 14 and 19 (1)(g) of the Constitution of India.[8] The State of Maharashtra appealed; this court upheld the view of the Bombay High Court (in *IHRA-I*).

[8] In the judgment reported as *State of Maharashtra* v *Indian Hotel & Restaurant Assn,* 2006 SCC Online Bom 418.

28. The stage was now set for the second innings, as it were. The State amended the Act, 1951, enacting new provisions with effect from 26.05.2014. containing fresh restrictions. The Indian Hotel & Restaurant Association challenged these amendments, by filing a writ petition[9]. This court, by its reasoned order, having regard to *IHRA-I,* stayed operation of the impugned provision (newly inserted Section 33A). The said order *Indian Hotel and Restaurant Association v. State of Maharashtra*[10] (hereafter *IHRA-II*) stated, *inter alia* that

> *"...we think it appropriate to stay the operation of the provisions enshrined under Section 33-A(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."*

29. The Maharashtra legislative Assembly intervened again; this time, by a further enactment[11] Section 33A was repealed. As a consequence, this court had no occasion to consider the validity of the amendments, made in 2014. The writ petition in *IHRA-II* was disposed of by an order dated 30.08.2018.[12]

30. The Maharashtra Legislative Assembly, through the Act repealing the 2014 amendment (with effect from 30.08.2016), also enacted the Act of 2016. The Indian Hotel and Restaurant Association once again approached this court, under Article 32 of the Constitution, complaining that the provisions of the Act, 2016 were unconstitutional, and enacted on the teeth *IHRA-I.* This court, in its elaborate judgment in *IHRA-III,* held several provisions of the enactment, as well as rules framed under it, and conditions imposed by forms, etc (under the rules) to be violative of Articles 14 and 19 (1) (g) of the Constitution.

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[9] W.P. No. 793/2014.
[10] (2015) 16 SCC 100.
[11] Maharashtra Act No. 12 of 2016.
[12] The order is reported as 2018 SCC Online (SC) 3127.

III. *Discussion*

31. It is apparent from the above discussion that the power of the state to regulate has not been disputed. However, what is in issue, is whether the restriction imposed through conditions of license, are impermissible because they are not part of the rules or have not been enacted in any provision of law, and whether the conditions are violative of Articles 14 and 19 (1) (g) of the Constitution of India.

32. In the previous decisions of this court, the issue decided was whether a *total ban* on dancing in bars was justified, and whether it violated Articles 14 and 19 (1) (g) of the Constitution of India. The issue in *IHRA-I* was the validity of Sections 33A and 33B of the Act, 1951. This court rejected two submissions of the state: one, that there was a reasonable classification between establishments that were three star and above rating hotels and restaurants, where dancing was permitted in bars, and others, because of the nature of their likely clientele; and two, that the women who performed as dancers, were from deprived backgrounds and susceptible to exploitation. It was held in *IHRA-I inter alia*, that:

> ***"119.*** *The next justification for the so-called intelligible differentia is on the ground that women who perform in the banned establishment are a vulnerable lot. They come from grossly deprived backgrounds. According to the appellants, most of them are trafficked into bar dancing. We are unable to accept the aforesaid submission. A perusal of the Objects and Reasons would show that the impugned legislation proceed on a hypothesis that different dance bars are being used as meeting points of criminals and pick-up points of the girls. But the Objects and Reasons say nothing about any evidence having been presented to the Government that these dance bars are actively involved in trafficking of women. In fact, this plea with regard to trafficking of women was projected for the first time in the affidavit filed before the High Court. The aforesaid plea seems to have been raised only on the basis of the reports which were submitted after the ban was imposed. We have earlier noticed the extracts from the various reports. In our opinion, such isolated examples would not be sufficient to establish the connection of the dance bars covered under Section 33-A with trafficking. We, therefore, reject the submission of the appellants that the ban has been placed for the protection of the vulnerable women.*
>
> ***120.*** *The next justification given by the learned counsel for the appellants is on the basis of degree of harm which is being caused to the atmosphere in the banned establishments and the surrounding areas. Undoubtedly as held by this Court in Ram Krishna Dalmia case [AIR 1958 SC 538] , the legislature is free to recognise the degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. We also agree with the observations of the US Court in Patsone case [58 L Ed 539 : 232 US 138 (1914)] that the State may direct its law against what it deems the evil as it actually exists without covering the whole field of*

possible abuses, but such conclusion have to be reached either on the basis of general consensus shared by the majority of the population or on the basis of empirical data. In our opinion, the State neither had the empirical data to conclude that dancing in the prohibited establishment necessarily leads to depravity and corruption of public morals nor was there general consensus that such was the situation. The three reports presented before the High Court in fact have presented divergent viewpoints. Thus, the observations made in Patsone [58 L Ed 539 : 232 US 138 (1914)] are not of any help to the appellant. We are also conscious of the observations made by this Court in Mohd. Hanif Quareshi [AIR 1958 SC 731] , wherein it was held that there is a presumption that the legislature understands and appreciates the needs of its people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. In the present case, the appellant has failed to give any details of any experience which would justify such blatant discrimination, based purely on the class or location of an establishment.

121. *We are of the opinion that the State has failed to justify the classification between the exempted establishments and prohibited establishments on the basis of surrounding circumstances, or vulnerability. Undoubtedly, the legislature is the best judge to measure the degree of harm and make reasonable classification but when such a classification is challenged the State is duty-bound to disclose the reasons for the ostensible conclusions. In our opinion, in the present case, the legislation is based on an unacceptable presumption that the so-called elite i.e. rich and the famous would have higher standards of decency, morality or strength of character than their counterparts who have to content themselves with lesser facilities of inferior quality in the dance bars. Such a presumption is abhorrent to the resolve in the Preamble of the Constitution to secure the citizens of India "equality of status and opportunity and dignity of the individual". The State Government presumed that the performance of an identical dance item in the establishments having facilities less than three stars would be derogative to the dignity of women and would be likely to deprave, corrupt or injure public morality or morals; but would not be so in the exempted establishments. These are misconceived notions of a bygone era which ought not to be resurrected.*

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123. *In our opinion, the activities which are obscene or which are likely to deprave and corrupt those whose minds are open to such immoral influences, cannot be distinguished on the basis as to whether they are performing in five-star hotels or in dance bars. The judicial conscience of this Court would not give credence to a notion that high morals and decent behaviour is the exclusive domain of the upper classes, whereas vulgarity and depravity is limited to the lower classes. Any classification made on the basis of such invidious presumption is liable to be struck down being wholly unconstitutional and particularly contrary to Article 14 of the Constitution of India."*

33. After considering the existing legal and regulatory *regime* – including the Act of 1951, and the rules involved in this the judgment concluded as follows:

> *"**132.** The Rules under the Bombay Police Act, 1951 have been framed in the interest of public safety and social welfare and to safeguard the dignity of women as well as prevent exploitation of women. There is no material placed on record by the State to show that it was not possible to deal with the situation within the framework of the existing laws except for the unfounded conclusions recorded in the Preamble as well as the Statement of Objects and Reasons. [See State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat [(2005) 8 SCC 534 : AIR 2006 SC 212] wherein it is held that: (SCC p. 573, para 75) the standard of judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate.] The Regulations framed under Section 33(1)(w) of the Bombay Police Act, more so Regulations 238 and 242 provide that the licensing authority may suspend or cancel a licence for any breach of the licence conditions. Regulation 241 empowers the licensing authority or any authorised police officer, not below the rank of Sub-Inspector, to direct the stoppage of any performance forthwith if the performance is found to be objectionable. Section 162 of the Bombay Police Act empowers a competent authority/Police Commissioner/District Magistrate to suspend or revoke a licence for breach of its conditions. Thus, sufficient power is vested with the licensing authority to safeguard any perceived violation of the dignity of women through obscene dances."*

34. The next decision to examine the same issue, was *IHRA-III*. The 2016 Act sought to completely prohibit dancing in bars. This court cited *State of Punjab v. Devans Modern Breweries Ltd & Anr*[13], in the context of the argument that the regulations impugned were essential, having regard to public morals. The court, in *Devans* had observed that:

> *"48. Dealing in a commodity which is governed by a statute cannot be said to be inherently noxious and pernicious. A society cannot condemn a business nor there exists a presumption in this behalf if such business is permitted to be carried out under statutory enactments made by the legislature competent therefor. The legislature being the final arbiter as to the morality or otherwise of the civilised society has also to state as to business in which article(s) would be criminal in nature. The society will have no say in the matter. The society might have a say in the matter which could have been considered in a court of law only under common-law right and not when the rights and obligations flow out of statutes operating in the field. Health, safety and welfare of the general public may again be a matter for the legislature to define and prohibit or regulate by legislative enactments. Regulatory statutes are enacted in conformity with clause (6) of Article 19 of the Constitution to deal with those trades also which are inherently noxious and pernicious in nature; and furthermore, thereby sufficient measures are to be taken in relation to health, safety and welfare of the general public. The courts while interpreting a statute would not take recourse to such interpretation whereby a person can be said to have committed a crime although the same is not*

[13] (2004) 11 SCC 26.

> *a crime in terms of the statutory enactment. Whether dealing in a commodity by a person constitutes a crime or not can only be the subject-matter of a statutory enactment."*

35. In *IHRA-III*, this court relied and followed the previous ruling in *IHRA-I* where the argument about injury to public morals, and also that it offended the dignity of women:

> *"...Injury to Public Morals: The Court categorically rejected the contention that the dance bars affect or cause harm to public morale. In pertinent part, this Court stated that:*
> *"120. ..In our opinion, the State neither had the empirical data to conclude that dancing in the prohibited establishment necessarily leads to depravity and corruption of public morals nor was there general consensus that such was the situation..."*
> *(iii) Res Extra Commercium: The State Government contended that the dance performances in such establishments affect the dignity of women and leads to corruption of public morals. Thus, the respondent justified that the prohibition is a reasonable restriction necessary "in the interest of general public" as under Article 19 (6) of the Constitution. This Court categorically rejected the said contention, and held that the respondent "failed to establish that the restriction is reasonable or that it is in the interest of general public". This Court further added that the prohibition fails to satisfy the doctrine of 'direct and inevitable effect' to justify such restriction, and the insufficiency of the existing regulatory framework."*

36. The court clarified that if any performance amounted to obscenity, it would be punishable under law (Section 294, Indian Penal Code and in addition, Section 8 (2) of the Act of 2016). It also observed that the term "obscenity" is known to law. Furthermore, any premises which permitted obscene shows ran the risk of losing its license:

> *"However, even if licence is obtained, that would not mean that place can be used for obscene dance performances or for exploiting working women for any immoral purpose. It is these acts which are made punishable under sub-section (2). In this manner, the offence under Section 8 (2) is somewhat different from the offence that is stipulated in Section 294 IPC."*

The court repelled the challenge to Section 8 (2), saying that the provision for a higher penalty (3 years) in respect of an act which is an offence under Section 294 was reasonable.

37. The court, in *IHRA-III* then proceeded to consider the challenge to conditions, which prohibited throwing currency notes and coins, or showering them, on the performers; the condition also required that any tip offered to the performers, should be included in the bill of the establishment. The court held that throwing or showering monies was not a desirable practice; at the same time, the imposition on the performers to forgo tips meant for them, was held to be invalid:

> *"We are of the opinion that insofar as throwing or showering coins, currency notes etc. is concerned, the provision is well justified as it aims at checking any untoward incident as the aforesaid Act has tendency to create a situation of indecency. Therefore, whatever money, any appreciation of any dance performance, has to be given, can be done without throwing or showering such coins etc. However, there may not be any justification in giving such tips only by adding thereto in the bills to be raised by the administration of the place. On the contrary, if that is done, the person who is rightful recipient of such tips may be denied the same. Further, State cannot impose a particular manner of tipping as it is entirely a matter between an employer and performer on the one hand and the performer and the visitor on the other hand. We, therefore, uphold the provision insofar as it prohibits throwing or showering of coins, currency notes or any article or anything which can be monetised on the stage. However, handing over of the notes to the dancers personally is not inappropriate. We also set aside the provision of giving the tips only by adding the same in the bills."*

38. Other conditions, such as stipulations that the establishments should be located at least a kilometer away from religious and educational institutions, the safety of their structures, inspection of the premises by engineers, and other regulatory conditions were considered. These included the size of the stage, its area, etc. The court was of the opinion that such regulations were unexceptionable. However, the court's conclusion in respect of one condition i.e., that alcohol could not be served in the area where performances were held, was that such a condition was unreasonable:

> *"Condition No. 12 of Part B prescribes serving of alcohol in the bar room where dances are staged. This is totally disproportionate, unreasonable and arbitrary. We see no reason as to why the liquor cannot be served at such places. It seems that State is more influenced by moralistic overtones under wrong presumption that persons after consuming alcohol would misbehave with the dancers. If this is so, such a presumption would be equally applicable to bar rooms where the alcohol is served by women waitresses. However, such conditions have been held to be unreasonable by the Courts. There may be aberrations or sporadic incidents of this nature which can happen not only at the places where dance performances are staged but at other places including bar rooms and even main restaurants. Other measures have to be*

> *adopted to check such a nuance. There cannot be a complete prohibition from serving alcoholic beverages. We, therefore, quash condition No. 12."*

39. It is thus clear that each of the arguments which the state is relying on, were considered in the context of challenge to statutory prohibitions, as well as license conditions. The arguments advanced in the present case, that the restrictions are necessary in the public interest, to promote the welfare of women, prevent human trafficking in women, and their exploitation, and that the restrictions are necessary in the interest of public morals, are well worn, and have been decisively rejected. Apart from regurgitating the same rejected submissions, the state has not justified, independently, how the gender-cap, as for an individual orchestra or band, is regulatory.

40. The order of this court dated 02.03.2016 had recorded that the conditions could limit the size of the stage (where performances were to be held) to an area of 10 ft x 12 ft size *"in restaurant area/permit room as per approved plan of the Excise Department for F.L.-III with non-transparent partition between restaurant and permit room area."* The court was informed that the limit on the number of performers would be four. While an overall limit of the number of performers, which is eight in the present case, cannot be considered unreasonable, since the enclosure (120 sq feet) would also include instrumentalists, that order did not have any occasion to consider the gender-cap for the troupe or band.

41. As far as the decision of this court in *Karnataka Live Band Restaurants Association* (supra) is concerned, the requirement of having to secure a license for a live band was challenged. This court held that the legal requirement of having to obtain a license was reasonable. There, the licensing conditions were not disputed. Therefore, that decision has no bearing on the controversy in the present case.

42. The impugned gender-cap (i.e. four females and four males, in any performance) appears to be the product of a stereotypical view that women who perform in bars and establishments, like the appellants, belong to a certain class of society. Perceptibly, this court observed this, in *IHRA-I:*

> *"The reason for the oppressive and moralistic attitude against dance bars takes root from a patriarchal view that women "engaging in any kind of work or profession outside the home or domestic sphere' carried 'low societal status'"*

43. In *Anuj Garg & Ors. v. Hotel Assciation of India & Ors.*[14] this court examined restrictions on women's employment in the context of the state's arguments that such measures were necessary, to protect them from injury and observed as follows:

> ***36.*** *we do not intend to further the rhetoric of empty rights. Women would be as vulnerable without State protection as by the loss of freedom because of the impugned Act. The present law ends up victimising its subject in the name of protection. In that regard the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.*
>
> ***37.*** *Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf."*

Later, in the course of the same judgment, it was observed that:

> ***"47.*** *No law in its ultimate effect should end up perpetuating the oppression of women. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency until and unless there is a compelling State purpose. Heightened level of scrutiny is the normative threshold for judicial review in such cases."*

44. This thought was articulated more poignantly in one of the concurring judgments of this court in *Joseph Shine v. Union of India*[15] where it was emphasized that:

> *"Society ascribes impossible virtues to a woman and confines her to a narrow sphere of behaviour by an expectation of conformity. [Nandita Haksar, "Dominance, Suppression and the Law" in Lotika Sarkar and B. Sivaramayya (Eds.), Women and the Law: Contemporary Problems, (Vikas Publishing House 1994).] Raising a woman to a pedestal is one part of the endeavour. The second part is all about confining her to a space. The boundaries of that space are defined by what a woman should or should not be. A society which perceives women as pure and an embodiment of virtue has no qualms of subjecting them to virulent attack….. As an embodiment of virtue, society expects the women to be a mute spectator to and even accepting of egregious discrimination within the home. This is part of the process of raising women to a pedestal conditioned by male notions of what is right and what is wrong for a woman."*

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[14] (2008) 3 SCC 1.
[15] (2019) 3 SCC 39.

45. Long ago, in *C.B. Muthamma v. Union of India*[16], this court recognized the unfairness and discrimination apparent in a service rule, which required a woman official of the Indian Foreign Service to secure permission before getting married, and armed the government with power to terminate her services if it was *"satisfied that her family and domestic commitments are likely to come in the way of the due and efficient discharge of her duties as a member of the service"*. This court in very forthright terms held the rule to be void as discriminatory:

> ***"5.*** *Discrimination against women, in traumatic transparency, is found in this rule. If a woman member shall obtain the permission of government before she marries, the same risk is run by the Government if a male member contracts a marriage. If the family and domestic commitments of a woman member of the Service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member. In these days of nuclear families, inter-continental marriages and unconventional behaviour, one fails to understand the naked bias against the gentler of the species. Rule 18 of the Indian Foreign Service (Recruitment, Cadre, Seniority and Promotion) Rules, 1961, runs in the same prejudicial strain:*
>
> *"(1)-(3) * * **
>
> *(4) No married woman shall be entitled as of right to be appointed to the service."*
>
> ***6.*** *At the first blush this rule is in defiance of Article 16. If a married man has a right, a married woman, other things being equal, stands on no worse footing. This misogynous posture is a hangover of the masculine culture of manacling the weaker sex forgetting how our struggle for national freedom was also a battle against woman's thraldom. Freedom is indivisible, so is Justice. That our founding faith enshrined in Articles 14 and 16 should have been tragically ignored vis-a-vis half of India's humanity viz. our women, is a sad reflection on the distance between Constitution in the book and law in action. And if the executive as the surrogate of Parliament, makes rules in the teeth of Part III especially when high political office, even diplomatic assignment has been filled by women, the inference of diehard allergy to gender parity is inevitable."*

46. The justification provided by the respondents, to sustain the restriction, in so far as they claim to *protect* the women, in the opinion of this court, lay it open to the charge of entombing their aspirations. In case there were any real concern for the safety of women, the state is under a duty - as highlighted by *Anuj Garg*, to create situations conducive to their working, to run that extra mile to facilitate their employment, rather than to thwart it, and stifle their choice. Such measures – which claim protection, in reality are destructive of Article 15 (3) as they masquerade as

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[16] (1979) 4 SCC 260.

special provisions and operate to limit or exclude altogether women's choice of their avocation.

47. As far as the question whether a condition entrenched in a law or a rule, goes, the previous judgments of this court in *Bijoe Emmanuel (*supra), *Naveen Jindal* (supra), were cited by the appellants. In the present case, the regulation on the overall number of performers, or even the dimensions of a stage (on which a performance can take place) cannot be characterized as a restriction; they can fall within the legitimate domain of the authority of the commissioner or the government which formulates such conditions. In view of this court's conclusion and findings that the restriction is upon the gender, in the sense that it seeks to cap the number of performers on the basis of gender. This restriction *directly* transgresses Article 15 (1) and Article 19 (1) (g)- the latter provision both in its effect to the performers as well as the license owners. In view of these findings, this court is of the opinion that it is unnecessary to address the question as to whether the condition imposed- and held to be unenforceable and void, is "law"

48. As the authorities of this court have repeatedly emphasized, whenever challenges arise, particularly based on gender, it is the task of the judges to scrutinize closely, whether, if and the extent to which the impugned practices or rules or norms are rooted in historical prejudice, gender stereotypes and paternalism. Such attitudes have no place in our society; recent developments have highlighted areas hitherto considered exclusive male "bastions" such as employment in the armed forces, are no longer so. Similarly, in the present case, this court holds that the gender cap imposed by the impugned condition is void. One hopes that the present judgment would still a lingering and discordant note of a cymbal silenced long back, by previous judgments of this court.

49. For the foregoing reasons, the impugned judgment is hereby set aside. It is hereby declared that the condition imposing a gender cap as to the number of women or men, who can perform in orchestras and bands, in bars licensed under the Rules, 1960 and other allied provisions, is void. While the overall limit of performers in any

given performance cannot exceed eight, the composition (i.e., all female, majority female or male, or vice versa) can be of any combination. The appeals are allowed, but with no order on costs.

.....J
[K.M. JOSEPH]

.....J
[S. RAVINDRA BHAT]

New Delhi,
February 18, 2022.