Supreme Court of India

Indian Hotel And Restaurant ... vs The State Of Maharashtra Home ... on 17 January, 2019

Author: A Sikri

Bench: A Bhushan, A Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) NO. 576 OF 2016

INDIAN HOTEL AND RESTAURANT

ASSOCIATION (AHAR) & ANR. .....APPELLANT(S)

VERSUS

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

WITH

WRIT PETITION (CIVIL) NO. 24 OF 2017

AND

WRIT PETITION (CIVIL) NO. 119 OF 2017

JUDGMENT

A.K. SIKRI, J.

This batch of three Writ Petitions was heard together and is being disposed of by this Common Judgment as similar issues and prayers are raised in all these petitions.

2) The instant writ petitions have been preferred under Article 32 of the Signature Not Verified Digitally signed by ASHWANI KUMAR Constitution of India, challenging certain provisions of the Maharashtra Date: 2019.01.17 16:46:53 IST Reason:

Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (Working therein) Act, 2016 (hereinafter referred to as the 'Act') and also the Rules framed there under being the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurant and Bar Rooms and Protection of Dignity of Women (Working therein) Rules, 2016 (hereinafter referred to as the 'Rules') which, as the Petitioners submit, violate the Fundamental Rights of the Petitioners guaranteed under Articles 14, 15, 19 (1)(a), 19 (1)(g) and 21 of the Constitution of India.

3) The petitioner No. 1 in Writ Petition (Civil) No. 576 of 2016 is an Association of various Hotel Owners and Bar Owners and/or Conductors of the same, who carry on business of running Restaurants and Bars in Mumbai and is duly registered under the Trade Unions Act. Petitioner No. 2 is the secretary of petitioner No. 1 and is a citizen of India, who runs a restaurant and bar.

The petitioner in Writ Petition (Civil) No. 24 of 2017, R.R. Patil Foundation is a registered Union under the provisions of the Bombay Public Trust Act and the President thereof has been authorised to file the writ petition.

The petitioner in Writ Petition (Civil) No. 119 of 2017 is the Bhartiya Bargirls Union, registered under the Trade Union Act, 1926 and represented through its Hony. President. The petition is filed in a representative capacity on behalf of a large number of women dancers, singers and waitresses.

4) Respondent No.1 in all the three writ petitions is the State of Maharashtra. The other respondents in the three petitions comprise of various departments/authorities of the State of Maharashtra.

5) A brief historical description behind enacting this Act and the Rules is as follows:

Any person intending to start an Eating House and Restaurant is required to obtain permission from the Municipal Corporation under the Mumbai Municipal Corporation Act as also the Food and Drugs Administration. After a Grade-I licence is granted to the establishment, and the establishment complies with the requirements under Rules 44 and 45 of the Bombay Foreign Liquor Rules, 1953 framed under the provisions of the Bombay Prohibition Act, 1949, the establishment is granted an FL III licence for sale of Indian Made Foreign Liquor (IMFL) in the Restaurant. Further, persons desiring to serve only Beer in the Restaurant apply for a licence under the Special Permit and Licenses Rules framed under the provisions of the Bombay Prohibition Act, 1949 and are granted licenses in Form 'E' for running a Beer Bar. The persons having Eating Houses besides obtaining an FL III or Form 'E' licence under the provisions of the relevant Rules framed under the Bombay Prohibition Act, 1949, are required to have licence under the Bombay Police Act, 1951, called the Public Entertainment Licence, from respondent No.2, which is the Licensing Authority under the Rules framed for Licensing and Controlling Places of Public Entertainment in Greater Mumbai, 1953. It is stated that the requirement of having multiplicity of licenses is being done away by respondent No.1. Further, any restaurant owner desiring to have music and dance or either music or dance in the restaurant is also required to obtain Premises and Performance Licence under the Rules for Licensing and Controlling Places of Public Amusements (other than Cinemas) and Performances for Public Amusement, including Melas and Tamasha's Rules, 1960 (hereinafter referred to as the 'Amusement Rules') framed by respondent No.2 under the powers vested in him under Section 33 of the Maharashtra Police Act, 1951. According to the provisions of Section 33 of the Maharashtra Police Act, 1951, respondent No.2 i.e. the Commissioner of Police has been conferred with the power to frame Rules. The Commissioner of Police can frame Rules for not only licensing and controlling places of public amusement and entertainment but also for taking necessary steps to prevent inconvenience etc. to residents or passers-by or for maintaining public safety and for

taking necessary steps in the interests of public order, decency and morality. The Commissioner of Police has accordingly framed Rules for Licensing and Controlling Places of Public Entertainment, 1953 and the Amusement Rules. According to the provisions of Chapter 8 of the said Amusement Rules, a Premises Licence is granted after all the requirements prescribed under Rules 108 and 108(A) are complied with. Chapter 9 of the said Amusement Rules prescribes all the conditions for grant of a Performance Licence. As per the petitioners, their members have been granted valid licences under the provisions of the said Entertainment Rules and Amusement Rules and have been carrying on business since the past several years and their licences have been renewed from time to time.

6) As per the respondent State, it noticed that prostitution rackets were being run in hotel establishments in which dance programmes were being conducted. Even such dance forms were observed as obscene by the State. This resulted in the formation of a Committee for suggestions to deal with aspects mentioned above. After considering guidelines given by the aforesaid Committee and independent studies on socio-economic situations of women involved in dance bars, Section 33A and 33B were added vide Bombay Police Amendment Act, 2005 in Maharashtra Police Act, 1951, (erstwhile Bombay Police Act, 1951) which prohibited any kind of dance performance in an eating house, permit room or beer bar. Section 33B provided an exception to Section 33A, in cases where the dance performance was held in a theatre, or a club where entry was restricted to members only. The said amendment was struck down as unconstitutional by High Court of Bombay and that judgment of the High Court was upheld by this Court in the matter of State of Maharashtra & Anr. v. Indian Hotel and Restaurants Association & Ors.1 {hereinafter referred to as the 'Indian Hotel and Restaurants Association (1)'}

7) Thereafter, the State of Maharashtra introduced a fresh provision vide amendment in the year 2014 referred to as Maharashtra Police (Second Amendment) Act, 2014 and added Section 33A to the Maharashtra Police Act, 1951, while Section 33B came to be deleted. A petition bearing Writ Petition (Civil) No.793 of 2014 came to be filed in this Court, on behalf of Indian Hotel and Restaurants Association under Article 32 of the Constitution of India, whereby the Maharashtra Police (Second Amendment) Act, 2014 vide which vires of Section 33A, came to be challenged on the ground of the same being violative of Article 14, 19 (1)(a), 19 (1)(g) and 21 of the Constitution of India. This Court issued notice in the above writ petition and respondent State of Maharashtra filed a counter affidavit, thereby opposing the writ petition. This Court, vide order dated October 15, 2015, stayed the operation of the provisions enshrined under Section 33A(1) of the Act with a rider that no performance of dance shall remotely be expressive of any kind of obscenity. It is, thereafter, that respondent No. 1 enacted the impugned Act and the Rules, certain provisions whereof have been challenged in these petitions. In view of the developments, Writ Petition (Civil) No. 1 (2013) 8 SCC 519 793 of 2014 was disposed of as infructuous.

The impugned Act and the Rules:

8) The Preamble to the Act mentions that it is an Act to provide for prohibition of obscene dance in hotels, restaurants, bar rooms and other establishments and to improve the conditions of work, protect the dignity and safety of women in such places with a view to prevent their exploitation. The Act extends to the whole of the State of Maharashtra. Section 2 of the Act provides definitions to certain terms and the relevant among these are reproduced below:

"2(3) “bar room” means a place, to which the owner or proprietor admits the public and where dances are staged by or at the instance of the owner or proprietor of such establishment for the entertainment of customers;

(4) “dancer” means any artist performing dance on the stage or in any part of the premises;

(8) “obscene dance” means a dance that is obscene within the meaning of Section 294 of the Indian Penal Code and any other law for the time being in force and shall include a dance, -

(i) which is designed only to arouse the prurient interest of the audience; and

(ii) which consists of a sexual act, lascivious movements, gestures for the purpose of sexual propositioning or indicating the availability of sexual access to the dancer, or in the course of which, the dancer exposes his or her genitals or, if a female, is topless;

(10) “place” includes a establishment, house, building, tent and any means of transport whether by sea, land or air;”

9) As per Section 3, no person is entitled to start hotel, restaurant, bar room or any other place where dances are staged, without obtaining a licence under this Act and without complying with the conditions and restrictions imposed by the Act and the Rules. Section 4 mentions licensing authority, competent to grant licence. Section 5 stipulates certain conditions which are to be fulfilled in the absence whereof licensing authority is not to grant licence under the Act. It reads as under:

"5. The licensing authority shall not grant licence under this Act unless it is satisfied that,-

(a) the conditions prescribed by this Act and the Rules have been complied with by the applicant,

(b) adequate conditions of work and provisions for safety in respect of women employed in the hotel, restaurant or bar room as prescribed have been provided, and

(c) adequate precautions have been taken in the place, in respect of which the licence is to be given, to provide for the safety of the persons visiting such place.”

10) Section 6 lays down the procedure for grant of licence. For this purpose, any person desirous to obtain the licence will have to move an application as per the format prescribed and fulfill the eligibility criteria as prescribed. As per sub-section (4) of Section 6 the licensing authority is not supposed to grant licence for the place for which a licence for Discotheque or Orchestra have been granted. Exact language of this sub-section (4) is as under:

"(4) Notwithstanding anything contained in the Maharashtra Police Act, no licence shall be granted for Discotheque or Orchestra, in the place for which the licence under this Act is granted, nor a licence shall be granted under this Act for the place for which a licence for Discotheque or Orchestra has been granted.”

11) Section 8 prescribes criminal and civil consequences for using the place in contravention of Section 3 i.e. without obtaining the licence. It is to the following effect:

"8(1) The owner or proprietor or manager or any person acting on his behalf, who uses the place in contravention of section 3 shall, on conviction, be punished with imprisonment for a term which may extend to five years or fine which may extend to rupees twenty-five lakhs, or with both; and in case of continuing offence, further fine of rupees twenty-five thousand for each day during which the offence continues.

(2) The owner or proprietor or manager or any person acting on his behalf, shall not allow any obscene dance or exploit any working woman for any immoral purpose in any place and the person committing such act shall, on conviction, be punished with imprisonment for a term which may extend to three years or a fine which may extend to rupees ten lakhs, or with both; and in case of continuing offence, further fine which may extend to rupees ten thousand for each day during which the offence continues.

(3) The offences under sub-sections (1) and (2) shall be cognizable and non-bailable and triable by a Judicial Magistrate of the First Class.

(4) No person shall throw or shower coins, currency notes or any article or anything which can be monetized on the stage or hand over personally or through any means coins, currency notes or any article or anything which can be monetized, to a dancer or misbehave or indecently behave with the working women or touch her person, in any place. Any person who commits such act or abets the

commission of such acts shall, on conviction, be punished with imprisonment for a term which may extend to six months or a fine which may extend to rupees fifty thousand, or with both.

(5) The offence punishable under sub-section (4) shall be non-cognizable and bailable and triable by a Judicial Magistrate of the First Class.

(6) Any person who contravenes any of the provisions of this Act for which no other punishment has been provided, shall, on conviction, be punished with imprisonment for a term which may extend to three months or fine which may extend to rupees twenty-five thousand, or with both."

12) The provisions are also made for appeal, revision etc. against the order of the licensing authority refusing to grant licence. As per Section 12, Grievance Redressal Committee is to be constituted by the State Government to ensure that the conditions of service of women working in the hotel, restaurant, bar rooms and establishment to which the provisions of this Act apply are duly observed. This Committee is given the task to redress the grievances of such women in such manner as may be prescribed.

13) We may mention here that challenge in these writ petitions is laid to the provisions of Sections 2(8)(i), Section 6(4), Section 8(1)(2) and (4) of the Act.

14) Section 14 of the Act empowers the State Government to make rules to carry out the purposes of the Act for which notification in the Official Gazette is to be issued. These rules are to be laid before each House of the State Legislature. Section 15 gives powers to the State Government to issue orders in case any difficulty arises in giving effect to the provisions of the Act.

15) In exercise of powers conferred by Section 14 of the Act, Rules have been framed. Rule 3 pertains to the application for licence and lays down the conditions for making such an application. It is couched in the following language:

"3. Application for licence. - A person shall be entitled to obtain or hold a licence under these Rules, if he,-

(i) has attained 21 years of age;

(ii) is a citizen of India or a partner of partnership firm registered under the Indian Partnership Act, 1932 or a company registered under the Companies Act, 1956 or the Companies Act, 2013;

(iii) possess a good character and antecedents and shall not have any history of criminal record in the past:

Provided that, the licensing authority shall consider the history of criminal record of the applicant upto ten years before the date of application; and

(iv) complies with the conditions specified in Part-A of the Schedule."

16) Schedule attached to the Rules mentions the conditions which are to be complied with. Part A thereof stipulates those conditions which are to be fulfilled before grant of licence whereas Part B stipulates the conditions which are to be fulfilled after grant of licence. It is not necessary to reproduce all those conditions. Since, condition Nos. 2 and 11 of Part A and condition Nos. 2, 6, 9, 12, 16, 17 and 20 of Part B are the subject matter of challenge in these petitions, we are reproducing these conditions hereinbelow:

"SCHEDULE General Conditions PART-A Conditions to be complied before grant of Lincence

2. One stage should not be less than 10ft. x 12ft. in size in bar room, with non-transparent partition between hotel, restaurant and bar room area. If the applicant is holding permit room licence then there shall be fixed partition between the permit room and dance room.

xx xx xx

11. The place shall be at least one kilometer away from the educational and religious institutions.

PART-B Conditions to be fulfilled after grant of Licence

2. The working women, the dancers and waiters/ waitresses must be employed under a written contract on a monthly salary to be deposited in their bank accounts (with all other benefits as required by law, including provident fund) and a copy of such contract must be deposited with the licensing authority.

xx xx xx

6. Customer shall not be permitted to thrown or shower coins, currency notes or any article or anything which can be monetized on the stage in the direction of the dancer. Customers may, however, make payment of a tip in appreciation of all the dancers by adding a sum to the amount of the bill. Such tip shall be paid by the licensee to the dancers of that evening and under no circumstances such sum shall be deducted from the monthly salary.

xx xx xx

9. The bar room where dances are staged shall be open for public only between 6.00 P.M. to 11.30 P.M.

xx xx xx

12. No alcoholic beverage shall be served in the bar room where dances are staged.

xx xx xx

16. The Licensee shall ensure that the employees have no criminal antecedents.

17. The Licensee shall not allow any modification or alternation in the premises without the permission of the licensing authority.

xx xx xx

20. The Licensee shall ensure that all entrances of the bar room, other places of amusement or public entertainment and the area which falls under the definition of public place shall be covered by CCTV cameras and recording shall be preserved for 30 days for the inspection by the Competent Police Authority, if it is requisitioned by him."

17) Before we advert to the arguments advanced by the counsel for the petitioners on the basis of which validity of the aforesaid provisions of the Act and the Rules is questioned, it would be necessary to discuss the judgment of this Court rendered in 2013 in the case of Indian Hotel and Restaurants Association (1). The reason for this course of action is that many arguments of the petitioners proceed on the basis that some of the provisions in the Acts and the Rules are akin to Sections 33A and 33B which were inserted vide Bombay Police Amendment Act, 2005 in Maharashtra Police Act, 1951. Even otherwise, the reasoning contained in the said judgment on the basis of which the aforesaid provisions were struck down was heavily relied upon by the petitioners.

18) Indian Hotel and Restaurants Association (1) As already noted above, any person intending to start an eating house and restaurant is required to have certain licenses under the Bombay Police Act which is known as public entertainment licence. Likewise, any restaurant owner desirous to have music or dance

or either music or dance in the restaurant is further required to obtain Premises and Performance Licence under the Amusement Rules. This power to give licence is vested with the Commissioner of Police as per Section 33 of the Maharashtra Police Act, 1951. Sections 33A and 33B were added by Amendment Act, 2005. These provisions along with Statement of Objects and Reasons are as under:

"Statement of Objects and Reasons

21. The Statement of Objects and Reasons clause appended to Bill No. 40 of 2005 as introduced in the Maharashtra Legislative Assembly on 14-6-2005 reads as under:

“(1) The Commissioner of Police, District Magistrates or other officers, being Licensing Authorities under the Rules framed in exercise of the powers of sub-section (1) of Section 33 of the Bombay Police Act, 1951 have granted licences for holding dance performance in the area under their respective charges in the State. The object of granting such performance licence is to hold such dance performance for public amusement. It is brought to the notice of the State Government that the eating houses or permit rooms or beer bars to whom licences to hold dance performance, have been granted are permitting the performance of dances in an indecent, obscene or vulgar manner. It has also been brought to the notice of the Government that such performance of dances are giving rise to exploitation of women. The Government has received several complaints regarding the manner of holding such dance performances. The Government considers that the performance of dances in eating houses, permit rooms or beer bars in an indecent manner is derogatory to the dignity of women and is likely to deprave, corrupt or injure the public morality or morals. The Government considers it expedient to prohibit the holding of such dance performances in eating houses or permit rooms or beer bars.

(2) In the last Budget Session of the State Legislature, by way of a calling attention motion, the attention of the Government was invited to mushroom growth of illegal dance bars and their ill effects on the society in general including ruining of families. The members of the State Legislature, from ruling and opposition sides, pointed out that such dance bars are used as meeting points by criminals and pick-up joints of girls for indulging in immoral activities and demanded that such dance bars should, therefore, be closed down. These dance bars are attracting young girls desirous of earning easy money and thereby such girls are involved in immoral activities. Having considered the complaints received from general public including the people's representatives, the Government considers it expedient to prohibit the performance of dance, of any kind or type, in an eating house or permit room or beer bar, throughout the State by suitably amending the Bombay Police Act, 1951. However, a provision is also made to the effect that holding of a dance performance in a drama theatre or cinema theatre or auditorium; registered sports club or gymkhana; or three-starred or above hotel; or in any other establishment or class establishments which the State Government may specify having regard to tourism policy for promotion of tourism in the State or cultural activities, are not barred but all such establishments shall be required to obtain performance licence in accordance with the said Rules, for holding a dance performance.

3. The Bill is intended to achieve the following objectives. 33-A.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 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.

33-B. 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."

19) It is the validity of these provisions which was the subject matter of the appeals before the Supreme Court as Bombay High Court had declared these provisions as unconstitutional, being violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. It may be noted that in the writ petitions filed in the High Court, these provisions were challenged as violative of Articles 15(1) and 21 as well. However, challenge on these grounds was repelled by the High Court. The High Court had held that these provisions suffer from the vice of arbitrariness and, therefore, violative of Article 14 of the Constitution, as they provide for different standards of morality to institutions with similar activities and the activities in Section 33A establishments are less obscene but nonetheless the classification bears no nexus to the object of the Amendment. It was also held that there is a violation of Article 19(1)(a) as dance is a form of expression and the impugned enactment is unreasonable restriction which is not protective by Article 19(2) of the Constitution. Further, these provisions amount to an unreasonable restriction on the right to freedom of profession as the State Government permitted and granted licenses for running such establishments being res commercium and that it deprives the bar owners on their right to carry on their profession and bar dancers to carry on their profession.

20) While upholding the decision of the High Court founded on invidious discrimination and, as such, violative of Article 14 of the Constitution, this Court, inter alia, stated the following reasons: "118. The High Court, in our opinion, has rightly declined to rely upon the PRAYAS and Shubhada Chaukar's Reports. The number of respondents interviewed was so miniscule as to render both the studies meaningless. As noticed earlier, the subsequent report submitted by SNDT University has substantially contradicted the conclusions reached by the other two reports. The situation herein is not similar to the circumstances which led to the decision in Radice [68 L Ed 690 : 264 US 292 (1924)] . In that case, a New York statute was challenged as it prohibited employment of women in restaurants in cities of first and second class between hours of 10 p.m. and 6 a.m., on the ground of: (1) due process clause, by depriving the employer and employee of their liberty to contract, and (2) the equal protection clause, by an unreasonable and arbitrary classification. The Court upheld the legislation on the first ground that the State had come to the conclusion that night work prohibited, so injuriously threatens to impair women's peculiar and natural functions. Such work, according to the State, exposes women to the dangers and menaces incidental to nightlife in large cities. Therefore, it was permissible to enable the police to

preserve and promote the public health and welfare. The aforesaid conclusion was, however, based on one very important factor which was that: (Radice case [68 L Ed 690 : 264 US 292 (1924)] , L Ed p. 694) "The legislature had before it a mass of information from which it concluded that night work is substantially and especially detrimental to the health of women." In our opinion, as pointed out by the learned counsel for the respondents, in the present case, there was little or no material on the basis of which the State could have concluded that dancing in the prohibited establishments was likely to deprave, corrupt or injure the public morality or morals.

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.

122. Incongruously, the State does not find it to be indecent, immoral or derogatory to the dignity of women if they take up other positions in the same establishments such as receptionist, waitress or bartender. The women who serve liquor and beer to customers do not arouse lust in customers but women dancing would arouse lust. In our opinion, if a certain kind of dance is sensuous in nature and if it causes sexual arousal in men it cannot be said to be more in the prohibited establishments and less in the exempted establishments. Sexual arousal and lust in men and women and degrees thereof, cannot be said to be monopolised by the upper or the lower classes. Nor can it be presumed that sexual arousal would generate different character or behaviour, depending on the social strata of the audience. History is replete with examples of crimes of lust committed in the highest echelons of the society as well as in the lowest levels of society. The High Court has rightly observed, relying on the observations of this Court in Gaurav Jain v. Union of India [(1997) 8 SCC 114 : 1998 SCC (Cri) 25] that: (Indian Hotel and Restaurants Assn. Case [(2006) 3 Bom CR 705] , Bom Cr p. 744, para 48) "48. '27.… Prostitution in five-star hotels is a licence given to persons from higher echelons.' (Gaurav Jain case [(1997) 8 SCC 114 : 1998 SCC (Cri) 25] , SCC p. 132, para 27)"

21) Likewise, arguments of the State questioning the opinion of the High Court as the provisions to be ultra vires Article 19(1)(g) were rejected by this Court with the following discussion:

"126. Upon analysing 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 scrutinised the impugned legislation in the light of observations of this Court made in Narendra Kumar [AIR 1960 SC 430 : (1960) 2 SCR 375] , 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 33-A. The High Court has also concluded that the legislation has failed to satisfy the doctrine of direct and inevitable effect. (See Maneka Gandhi case [(1978) 1 SCC 248] .) We see no reason to differ with the conclusions recorded by the High Court. We agree with Mr Rohatgi and Dr Dhavan 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 the Statement of Objects and Reasons of the impugned legislation.

127. The activities of the eating houses, permit rooms and beer bars are controlled by the following regulations:

(i) The Bombay Municipal Corporation Act;

(ii) The Bombay Police Act, 1951;

(iii) The Bombay Prohibition Act, 1949;

(iv) The Rules for Licensing and Controlling Places of Public Entertainment, 1953;

(v) The Rules for Licensing and Controlling Places of Public Amusement other than Cinemas;

(vi) And other orders as are passed by the Government from time to time.

128. The restaurants/dance bar owners also have to obtain licences/permissions as listed below:

(i) Licence and registration for eating house under the Bombay Police Act, 1951;

(ii) Licence under the Bombay Shops and Establishment Act, 1948 and the rules made thereunder;

(iii) Eating house licence under Sections 394, 412-A, 313 of the Bombay Municipal Corporation Act, 1888;

(iv) Health licence under the Maharashtra Prevention of Food Adulteration Rules, 1962;

(v) Health licence under the Mumbai Municipal Corporation Act, 1888 for serving liquor;

(vi) Performance licence under Rules 118 of the Amusement Rules, 1960;

(vii) Premises licence under Rule 109 of the Amusement Rules;

(viii) Licence to keep a place of public entertainment under Section 33(1) clauses (w) and (y) of the Bombay Police Act, 1951 and the said Entertainment Rules;

(ix) FL III licence under the Bombay Prohibition Act, 1949 and Rule 45 of the Bombay Foreign Liquor Rules, 1953 or a Form E licence under the Special Permits and Licences Rules for selling or serving IMFL and beer;

(x) Suitability certificate under the Amusement Rules.

129. Before any of the licences are granted, the applicant has to fulfill the following conditions:

(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.

130. The aforesaid list, enactments and regulations are further supplemented with the regulations protecting the dignity of women. The provisions of the Bombay Police Act, 1951 and more particularly Section 33(1)(w) of the said Act empowers the licensing authority to frame rules:

“licensing or controlling places of public amusement or entertainment and also for taking necessary steps to prevent inconvenience to residents or passers-by or for maintaining public safety and for taking necessary steps in the interests of public order, decency and morality.”

131. Rules 122 and 123 of the Amusement Rules, 1960 also prescribe conditions for holding performances: “122.Acts prohibited by the holder of a performance licence.—No person holding a performance licence under these Rules shall, in the beginning, during any interval or at the end of any performance, or during the course of any performance, exhibition, production, display or staging, permit or himself commit on the stage or any part of the auditorium—

(a) any profanity or impropriety of language;

(b) any indecency of dress, dance, movement or gesture; Similar conditions and restrictions are also prescribed under the performance licence:

*** The licensee shall not, at any time before, during the course of or subsequent to any performance, exhibition, production, display or staging, permit or himself commit on the stage or in any part of the auditorium or outside it:

(i) any exhibition or advertisement whether by way of posters or in the newspapers, photographs of nude or scantily dressed women;

(ii) any performance at a place other than the place provided for the purpose;

(iii) any mixing of the cabaret performers with the audience or any physical contact by touch or otherwise with any member of the audience;

(iv) any act specifically prohibited by the Rules.”

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.

133. From the objects of the impugned legislation and amendment itself, it is crystal clear that the legislation was brought about on the admission of the police that it is unable to effectively control the situation in spite of the existence of all the necessary legislation, rules and regulations. One of the submissions made on behalf of the appellants was to the effect that it is possible to control the performances which are conducted in the establishments falling within Section 33-B; the reasons advanced for the aforesaid only highlight the stereotype myths that people in upper strata of society behave in orderly and moralistic manner. There is no independent empirical material to show that propensity of immorality or depravity would be any less in these high-class establishments. On the other hand, it is the specific submission of the appellants that the activities conducted within the establishments covered under Section 33-A have the effect of vitiating the atmosphere not only within the establishments but also in the surrounding locality. According to the learned counsel for the appellants, during dance in the bars the dancers wore deliberately provocative dresses. The dance becomes even more provocative and sensual when such behaviour is mixed with alcohol. It has the tendency to lead to undesirable results. Reliance was placed upon State of Bombay v. R.M.D. Chamarbaugwala [AIR 1957 SC 699], Khoday Distilleries Ltd. v. State of Karnataka [(1995) 1 SCC 574], State of Punjab v. Devans Modern Breweries Ltd. [(2004) 11 SCC 26], New York State Liquor Authority v. Bellanca [69 L Ed 2d 357 : 452 US 714 (1981)] and R. v. Quinn [(1962) 2 QB 245 : (1961) 3 WLR 611 : (1961) 3 All ER 88 (CCA)] to substantiate the aforesaid submissions. Therefore, looking at the degree of harm caused by such behaviour, the State enacted the impugned legislation.

134. We are undoubtedly bound by the principles enunciated by this Court in the aforesaid cases, but these are not applicable to the facts and circumstances of the present case. In Khoday Distilleries Ltd. [(1995) 1 SCC 574] , it was held that there is no fundamental right inter alia to do trafficking in women or in slaves or to carry on business of exhibiting and publishing pornographic or obscene films and literature. This case is distinguishable because of the unfounded presumption that women are being/were trafficked in the bars. State of Punjab v. Devans Modern Breweries Ltd.[(2004) 11 SCC 26] dealt with liquor trade, whereas the present case is clearly different. The reliance on New York State Liquor Authority [69 L Ed 2d 357 : 452 US 714 (1981)] is completely unfounded because in that case

endeavour of the State was directed towards prohibiting topless dancing in an establishment licensed to serve liquor. Similarly, R. v. Quinn [(1962) 2 QB 245 : (1961) 3 WLR 611 : (1961) 3 All ER 88 (CCA)] dealt with indecent performances in a disorderly house. Hence, this case will also not help the appellants. Therefore, we are not impressed with any of these submissions. All the activities mentioned above can be controlled under the existing regulations.

135. We do not agree with the submission of Mr Subramanium that the impugned enactment is a form of additional regulation, as it was felt that the existing system of licence and permits were insufficient to deal with problem of ever-increasing dance bars. We also do not agree with the submissions that whereas exempted establishments are held to standards higher than those prescribed; the eating houses, permit rooms and dance bars operate beyond/below the control of the regulations. Another justification given is that though it may be possible to regulate these permit rooms and dance bars which are located within Mumbai, it would not be possible to regulate such establishments in the semi-urban and rural parts of the Maharashtra. If that is so, it is a sad reflection on the efficiency of the licensing/regulatory authorities in implementing the legislation.

136. The end result of the prohibition of any form of dancing in the establishments covered under Section 33-A 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 the dance bar establishments have been 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 counter-productive and cannot be sustained being ultra vires Article 19(1)(g).” Submissions of the petitioners:

22) Mr. Jayant Bhushan, learned senior counsel began his submissions with a fervent plea that the respondent State was bent upon banning altogether dance performances in the bars/permit homes or restaurants etc. His argument was that earlier two attempts of identical nature made by the respondents failed to pass the constitutional muster. The provisions of Sections 33A and 33B inserted vide Amendment Act, 2005 to the Bombay Police Act, 1951 had been struck down as unconstitutional being in contravention of Articles 14 and 19(1)(g) of the Constitution. In spite thereof, the State did not grant licences to any person including the petitioners. This deliberate inaction on the part of the State led to filing of the contempt petition by the petitioners in which notice was issued on May 05, 2014. After receiving the notice in the said contempt petition, the State brought on the statute book Section 33A in another avtar by amendment Act on June 25, 2014. According to the petitioners, it was verbatim similar to Section 33A which was already held unconstitutional and it is, for this reason, in Writ Petition (Civil) No. 793 of 2014 wherein constitutionality of this provision was challenged, this Court passed orders dated October 15, 2015 staying the operation of newly added Section 33A of the Bombay Police Act. Thereafter, on November 26, 2015, this Court directed licences to be granted in two weeks. In order

to frustrate the aforesaid directions of this Court, respondents came up with 26 new conditions for grant of licence. As the petitioners had objection to some of the conditions, another application was moved in Writ Petition (Civil) No. 9793 of 2014. After orders dated March 02, 2016 were passed by the Court modifying some of the said 26 conditions, on April 18, 2016, this Court granted one week time to the respondents to comply with its directions. Again, with intention to frustrate the effect of the judgment of this Court, the respondents passed the impugned legislation and also framed impugned rules thereunder.

23) Mr. Bhushan further pointed out that even when certain orders were passed by the Supreme Court for issuance of the licence and for processing other applications on the principle of parity, till date not a single licence has been issued to any of the petitioners/members of the association. All this amply shows that the only intention of the State is to put an absolute ban on dance bars, as the respondent State is ensuring that licences are rejected on one ground or the other. He also endeavoured to demonstrate this by reading the orders passed by the State rejecting each and every application that has been made for grant of licence even under the new Act and Rules.

24) Mr. Bhushan specifically referred to the following passage from the earlier judgment wherein plea of public interest or morality was repelled:

"53. With regard as to whether there is any infringement of rights under Article 19(1)(g), it is submitted by the learned Senior Counsel that the fundamental right under Article 19(1)(g) to practise any profession, trade or occupation is subject to restrictions in Article 19(6). Therefore, by prohibiting dancing under Section 33-A, no right of the bar owners are being infringed. The curbs imposed by Sections 33-A and 33-B only restrict the owners of the prohibited establishments from permitting dances to be conducted in the interest of general public. The term “interest of general public” is a wide concept and embraces public order and public morality. The reliance in support of this proposition was placed on State of Gujarat v. Mirzapur Moti Kureshi Kassab Jamat [(2005) 8 SCC 534 : AIR 2006 SC 212]. Reference was also made to Municipal Corpn. of the City of Ahmedabad v. Jan Mohammed Usmanbhai [(1986) 3 SCC 20], wherein this Court gave a wide meaning to “interest of general public” and observed as follows: (SCC p. 31, para 19) “19. The expression ‘in the interest of general public’ is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution.” xx xx xx

55. The SNDT Report also shows that only 17.40% of the bar girls are from the State of Maharashtra. The bar owners have been exploiting the girls by sharing the tips received and also capitalising on their performance to serve liquor and improve the sales and business. Again reliance is placed on the observations made in PRAYASReport at p. 47 which is as under:

“The women working as either dancers or waiters were not paid any salary, but were dependent on tips given by customers in the bar, which varies from day to day and from women to another. This money is often shared with the bar owner as per a fixed ratio ranging from 30 to 60%.” xx xx xx

59. It was next submitted that the High Court wrongly concluded that the activity of young girls/women being introduced as bar dancers is not res extra commercium. Such activity by the young girls is a dehumanising process. In any event, trafficking the girls into bar dancing completely lacks the element of conscious selection of profession. An activity which has harmful effects on the society cannot be classified as a profession or trade for protection under Article 19(1)(g) of the Constitution. Such dances which are obscene and immoral would have to be considered as an activity which is res extra commercium. The High Court has wrongly concluded otherwise. Reliance is also placed on the observations made by this Court in State of Bombay v. R.M.D. Chamarbaugwala [AIR 1957 SC 699] . In that case, it was observed by this Court that activity of gambling could not be raised to the status of trade, commerce or intercourse and to be made subject-matter of a fundamental right guaranteed by Article 19(1)(g).

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72. The same principle was reiterated by this Court in State of Bihar v. Bihar Distillery Ltd. [(1997) 2 SCC 453] in the following words: (SCC p. 466, para 17) “17. … The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it. The court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ironed out as part of attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that cannot be lightly interfered with. The unconstitutionality must be plainly and clearly established before an enactment is declared as void.” xx xx xx

85. Mr Rohatgi submits that the impugned legislation has achieved the opposite result. Instead of creating fresh job opportunities for women it takes away whatever job opportunities are already available to them. He emphasised that the ban also has an adverse social impact. The loss of livelihood of bar dancers has put them in a very precarious situation to earn the livelihood. Mr Rohatgi submitted that the dancers merely imitate the dance steps and movements of Hindi movie actresses. They wear traditional clothes such as ghagra cholis, sarees and salwar kameez. On the other hand, the actresses in movies wear revealing clothes: shorts, swimming costumes and revealing dresses. Reverting to the

reliance placed by the appellants on the PRAYAS Report and Shubhada Chaukar Report, Mr Rohatgi submitted that both the reports are of no value, especially in the case of PRAYAS Report which is based on interviews conducted with only few girls. The SNDT Report actually indicates that there is no organised racket that brings women to the dance bars. The girls' interview, in fact, indicated that they came to the dance bars through family, community, neighbours and street knowledge. Therefore, according to Mr Rohatgi, the allegations with regard to trafficking to the dance bars by middlemen are without any basis. Most of the girls who performed dance are generally illiterate and do not have any formal education. They also do not have any training or skills in dancing. This clearly rendered them virtually unemployable in any other job. He, therefore, submits that the SNDT Report is contradictory to the PRAYAS Report. Thus, the State had no reliable data on the basis of which the impugned legislation was enacted."

25) Adverting specifically to those provisions of the Act and the Rules which have been challenged as unconstitutional, Mr. Bhushan submitted that insofar as Section 2(8)(i) is concerned, the definition of 'obscene dance' contained therein is totally vague. He argued that this definition of 'obscene dance' includes 'a dance which is designed only to arouse the prurient interest of the audience', which was totally loose expression incapable of any precise meaning.

26) It was submitted that such a definition was susceptible to various perceptions depending upon the subjective opinion of the concerned persons and, therefore, different persons may reach different conclusions after seeing the same dance performance. According to Mr. Bhushan, when obscene dance is made as an offence under the Act, a vague definition of this term was anathema to the principles of criminology and was opposed to the rule of law.

27) Another provision, validity whereof is questioned on the premise that the same is arbitrary and violative of Article 14 of the Constitution, is Section 6(4) of the Act. This provision bars the grant of licence under the Act in respect of a place where licence for discotheque or orchestra is granted. Conversely, it also prohibits grant of licence for discotheque or orchestra where licence under this Act is granted. Simply put, the purport behind this provision is to see that in respect of a particular place either licence is granted for dance bars or for discotheque and orchestra and there would not be a licence for a place, both for dance bars and discotheque or orchestra, at the same time. It was submitted that there was no rational behind such a provision based on intelligible differentia. Reference was made to the judgment in M.P. AIT Permit Owners Assn. and Another v. State of M.P.2, which was relied upon in the subsequent judgment in Engineering Kamgar Union v. Electro Steels Castings Ltd. and Another3 wherein it was held as under:

"21. The Central Act and the State Act indisputably cover the same field. The jurisdiction of the State Legislature to enact a law by a parliamentary legislation is not impermissible. Subject to the provisions contained in Article 254 of the Constitution of India, both will operate in their respective fields. The constitutional scheme in this behalf is absolutely clear and unambiguous. In this case, this Court is not concerned with the conflicting legislations operating in the same field by reason of enactments made by Parliament and the State in exercise of their respective legislative powers contained in List I and List II of the Seventh Schedule of 2 (2004) 1 SCC 320 3 (2004) 6 SCC 36 the Constitution of India but admittedly the field being the same, a question would arise as regards the effect of one Act over the other in the event it is found that there exists a conflict. For the said purpose, it is not necessary that the conflict would be direct only in a case wherein the provisions of one Act would have to be disobeyed if the provisions of the other are followed. The conflict may exist even where both the laws lead to different legal results.

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24. The judgments of this Court clearly lay down the law to the effect that if two Acts produce two different legal results, a conflict will arise.

28) He further submitted that for contravening the provisions of Section 6(4) of the Act, the punishment provided under Section 8(2) of the Act was imprisonment for a term which may extend to three years or fine which may extend to Rs.10 lakhs or both. This, according to him, was impermissible inasmuch as such an act, namely, obscene dance, would amount to obscenity which is made an offence under Section 294 of the Indian Penal Code (IPC) and that offence is punishable with imprisonment which may extend to three months. He, thus, argued that such a provision was not only arbitrary and violative of Article 14, there was a clear conflict between the central law (i.e. the IPC) and the State Act (the impugned Act). According to him, in such an eventuality, it is the central law which has to prevail and, therefore, Section 8(2) of the Act needed to be struck down on this ground.

29) Adverting to the challenge in respect of Section 8(4) of the Act, he submitted that this provision makes throwing or showering coins, currency notes or any article or any thing which can be monetised on the stage or handing over personally such things, etc. to a dancer is also made an offence under this provision, which again suffers from the vice of arbitrariness. He submitted that in the first instance such a prohibition is only qua the dancers and not singers or waitresses. Contention was that giving such things to a dancer only amounts to tipping her on appreciation of her performance which was the same thing as appreciating a singer for her performance or a waitress for her service and there was absolutely nothing wrong about it and such an act cannot be made an offence. It was, according to him, manifestly arbitrary and violative of Article 14. The learned senior counsel relied upon the following averments in Nikesh Tarachand Shah v. Union of India and Another4:

"23. Insofar as “manifest arbitrariness” is concerned, it is important to advert to the majority judgment of this Court in Shayara Bano v. Union of India [Shayara Bano v. Union of India, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277] . The majority, in an exhaustive review of case law under Article 14, which dealt with legislation being struck down on the ground that it is manifestly arbitrary, has observed: (SCC pp. 91-92 & 99, paras 87 & 101) “87. The thread of reasonableness runs through the entire fundamental rights chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14. Further, there is an apparent contradiction in the three-Judge Bench decision in McDowell [State of A.P. v. McDowell & Co., (1996) 3 SCC 709] when it is said that a constitutional challenge can succeed on the ground that a law is “disproportionate, excessive or unreasonable”, yet such challenge would fail on the very ground of the law being “unreasonable, unnecessary or 4 (2018) 11 SCC 1 unwarranted”. The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution.

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101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v.

Union of India, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.” This view of the law by two learned Judges of this Court was concurred with by Kurian, J. in para 5 of his judgment.

24. Article 21 is the Ark of the Covenant so far as the Fundamental Rights Chapter of the Constitution is concerned. It deals with nothing less sacrosanct than the rights of life and personal liberty of the citizens of India and other persons. It is the only article in the Fundamental Rights Chapter (along with Article

20) that cannot be suspended even in an emergency [see Article 359(1) of the Constitution]. At present, Article 21 is the repository of a vast number of substantive and procedural rights post Maneka Gandhi v. Union of India [Maneka Gandhi v. Union of India, (1978) 1 SCC 248]. Thus, in Rajesh Kumar [Rajesh

Kumar v. State, (2011) 13 SCC 706 : (2012) 2 SCC (Cri) 836] at pp. 724-26, this Court held: (SCC paras 56-63) “56. Article 21 as enacted in our Constitution reads as under: ‘21. Protection of life and personal liberty.—No person shall be deprived of his life or personal liberty except according to procedure established by law.’

57. But this Court in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] held that in view of the expanded interpretation of Article 21 in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , it should read as follows: (Bachan Singh case [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , SCC p. 730, para 136) ‘136. … “No person shall be deprived of his life or personal liberty except according to fair, just and reasonable procedure established by valid law.” In the converse positive form, the expanded article will read as below:

“A person may be deprived of his life or personal liberty in accordance with fair, just and reasonable procedure established by valid law.” ’

58. This epoch-making decision in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] has substantially infused the concept of due process in our constitutional jurisprudence whenever the court has to deal with a question affecting life and liberty of citizens or even a person. Krishna Iyer, J. giving a concurring opinion in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] elaborated, in his inimitable style, the transition from the phase of the rule of law to due process of law. The relevant statement of law given by the learned Judge is quoted below: (SCC p. 337, para 81) ‘81. … “Procedure established by law”, with its lethal potentiality, will reduce life and liberty to a precarious plaything if we do not ex necessitate import into those weighty words an adjectival rule of law, civilised in its soul, fair in its heart and fixing those imperatives of procedural protection absent which the processual tail will wag the substantive head. Can the sacred essence of the human right to secure which the struggle for liberation, with “do or die” patriotism, was launched be sapped by formalistic and pharisaic prescriptions, regardless of essential standards? An enacted apparition is a constitutional illusion. Processual justice is writ patently on Article 21. It is too grave to be circumvented by a black letter ritual processed through the legislature.’

59. Immediately after the decision in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] another Constitution Bench of this Court rendered decision in Sunil Batra v. State (UT of Delhi) [Sunil Batra v. State (UT of Delhi), (1978) 4 SCC 494 : 1979 SCC (Cri) 155] specifically acknowledged that even though a clause like the Eighth Amendment of the United States Constitution and concept of “due process” of the American Constitution is not enacted in our Constitution text, but after the decision of this Court in Rustom Cavasjee Cooper [Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] and

Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] the consequences are the same. The Constitution Bench of this Court in Sunil Batra [Sunil Batra v. State (UT of Delhi), (1978) 4 SCC 494 : 1979 SCC (Cri) 155] speaking through Krishna Iyer, J. held: (Sunil Batra case [Sunil Batra v. State (UT of Delhi), (1978) 4 SCC 494 : 1979 SCC (Cri) 155] , SCC p. 518, para 52) '52. True, our Constitution has no "due process" clause or the Eighth Amendment; but, in this branch of law, after Cooper [Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248] and Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , the consequence is the same.'

60. The Eighth Amendment (1791) to the Constitution of the United States virtually emanated from the English Bill of Rights (1689). The text of the Eighth Amendment reads, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". The English Bill of Rights drafted a century ago postulates, "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

61. Our Constitution does not have a similar provision but after the decision of this Court in Maneka Gandhi case [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] jurisprudentially the position is virtually the same and the fundamental respect for human dignity underlying the Eighth Amendment has been read into our jurisprudence.

62. Until the decision was rendered in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] , Article 21 was viewed by this Court as rarely embodying the Diceyian concept of the rule of law that no one can be deprived of his personal liberty by an executive action unsupported by law. If there was a law which provided some sort of a procedure it was enough to deprive a person of his life or personal liberty. In this connection, if we refer to the example given by S.R. Das, J. in his judgment in A.K. Gopalan [A.K. Gopalan v. State of Madras, AIR 1950 SC 27 : (1950) 51 Cri LJ 1383] that if the law provided the Bishop of Rochester "be boiled in oil" it would be valid under Article 21. But after the decision in Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248] which marks a watershed in the development of constitutional law in our country, this Court, for the first time, took the view that Article 21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair. And it was held that the concept of reasonableness runs like a golden thread through the entire fabric of the Constitution and it is not enough for the law to provide some semblance of a procedure. The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the court it is for the court to determine whether such procedure is reasonable, just and fair and if the court finds that it is not so, the court will strike down the same.

63. Therefore, “law” as interpreted under Article 21 by this Court is more than mere “lex”. It implies a due process, both procedurally and substantively.”

25. Given the parameters of judicial review of legislation laid down in these judgments, we have to see whether Section 45 can pass constitutional muster.” His further submission relating to this provision was that it was even violative of Article 19(1)(g) of the Constitution inasmuch as for dancers, singers, waitresses, etc., tips are th major part of their earnings which was sought to be taken away by this provision.

30) Attacking the validity of Rule 3 of the Rules, he submitted that Condition No.2 contained in Part A of the Schedule attached to these Rules is contrary to the judgment in Indian Hotel and Restaurants Association (1). He also submitted that distance of 1 k.m. of such dance bars from the educational and religious institutions, as stipulated in Condition No.11 of Part A of the Schedule, was illogical and impractical. According to him, it was, in fact, an impossible condition to be fulfilled in a congested city like Mumbai where educational and religious institutions existed within 1 k.m. from each and every building. He pointed out that for the Bars under liquor Rules, distance prescribed is 75 mts., which was reasonable and valid provision and could be incorporated here as well.

31) Insofar as Condition No.2 contained in Part B of the Schedule is concerned, it is challenged on the ground that under the guise of this condition the respondent wanted that employment of the bar dancers in the said bars becomes imperative. This was violative of Article 19(1)(g) of the Constitution, both for the owners as well as for such women dancers and waitresses, as it was taking away the freedom of these performers to work on contract basis if they so wanted.

32) As far as Condition No.6 relating to giving of tips is concerned (which goes along with Condition No. 11 of Part A), argument is that the State cannot impose a condition that such an amount has to be necessarily added in the bill.

33) Timings of the dance bars from 6:00 p.m. to 11:30 p.m. stipulated in Condition No. 9 of Part B is challenged on the ground that it does not serve any purpose. Moreover, discotheque or orchestra and liquor bars are allowed to be open till 01:30 a.m.

34) Similarly, argued the petitioners, Condition No.12 which prohibits serving alcoholic beverages in the dance bars is irrational.

35) Validity of Condition No.16 read with Rule 3(iii) is challenged on the ground that such a condition is again vague in nature inasmuch as the expression 'good character' and 'criminal record in the past' are not capable of any precise definition. He submitted that till the time there is no conviction, there cannot be any bar on the employment of a person. Further, even if there is a conviction, the bar should be attached only in those cases where conviction is for a serious offence.

36) Condition No.17 of Part B to the Schedule which prohibits any modification or alteration in the premises without the permission of the licensing authority is questioned as arbitrary. Attention of the Court was drawn to the order dated March 02, 2016 passed in Writ Petition (Civil) No. 793 of 2014, which reads as under:

"On the last occasion, the Court had noted 7 (seven) conditions which had been taken exception to by Mr. Jayant Bhushan, learned senior counsel appearing for the petitioners. The exceptions relate to condition nos.1, 2, 5, 10, 12 and 15.

Condition no.1 reads as follows :

"1) This licence is valid for only one stage of 10 ft. x 12 ft. in size in restaurant area as per approved plan of the excise department for F.L.-III with non-transparent partition between restaurant and permit room area." It is submitted by Ms. Pinky Anand, learned Additional Solicitor General on the basis of the affidavit that as per the approved plan of the Excise Department for permit rooms with FL-III licence, there is always a necessity for providing a non-transparent partition between the restaurant and the permit room area. It is urged by her that the intention of the Excise Department behind incorporation of the said condition is to keep the permit room area separate from the restaurant area where alcohol is not served. Be it noted, the said condition has been modified to the following extent :

"This licence is valid for only one stage 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 said condition is accepted by the petitioners and, therefore, we shall not dwell upon the same.

As far as the condition no.2 is concerned, it reads as follows:

“2) The stage should cover from all sides by a non removable partition of 3 ft. height.” In the affidavit filed by the State, the said condition has been modified as follows :

“(2) There shall be a railing of 3 ft. height adjacent to the dance stage. There should be distance of 5 ft.

between the railing and seats for the customers. In respect of dance bars which have secured licenses earlier, provisions mentioned above be made binding. It should be made binding on dance bars seeking new licenses to have railing of 3 ft. height adjacent to the stage and leaving a distance of 5 ft between the railing and sitting arrangement for customers.” Mr. Bhushan, learned senior counsel would submit that regard being had to the suggestions noted in State of Maharashtra & Anr. vs. Indian Hotel and Restaurants Association & Ors. [(2013) 8 SCC 519, the railing of 3 ft. height can be put in praesenti subject to the further arguments to be canvassed at a later stage but there cannot be non-removable partition. Having heard learned counsel for the parties, we accept the submission of Mr. Bhushan, learned senior counsel and direct that there should be railing of 3 ft. height and not the non-removable partition. The railing is meant for creating barrier between the performers and the audience.

Condition No.5 is to the following effect :

“5) The licensee is permitted to keep only 04 dancers/artists to remain present on the permitted stage.” It is submitted by Mr. Bhushan that he has no objection to the said condition but it may be clarified that other artists can remain present in the premises to which there is no objection by learned Additional Solicitor General. Hence, we clarify that four dancers can perform on the stage at one time but there can be other artists at other places inside the premises.

Condition no.10 reads as follows :

“10) The Licensee shall ensure that the character and antecedents of all employees is verified by the police.” Though there is no suggestion in the affidavit as regards the said condition, it is submitted by Mr. Bhushan, learned senior counsel, that it has to be restricted to criminal antecedents. We agree with the same. Any employee who is engaged, his/her criminal antecedents are to be verified. It is imperative.

Condition No.11 reads as follows :

“11) The Licensee shall not allow any addition or alternation to be made to the premises except without the written permission of the Competent Authority i.e. DCP (HQ-I) for Mumbai or concerned DCP/SP for

other areas.” The aforesaid condition is modified to the extent that the premises shall not be altered/modified without the permission of the competent authority under the statute. However, it is hereby directed that if there will be any grievance on this score, the parties are at liberty to approach this Court.

Condition no. 12 reads as follows :

“12) The Licensee shall ensure that no concealed cavity or a room is created within the premises in order to conceal performers/staff.” Mr. Bhushan, learned senior counsel submitted that he has no objection to the said condition but there should be a room which can be utilised as a green room. We so direct. Be it clarified, green room means green room in the manner in which it is understood in the classical sense.

Condition no. 15 on which the parties are at real cavil reads as follows :

“15)The Licensee shall ensure that adequate number of CCTV cameras which will live feed continuously to police control room be installed to cover the entire premises which will record the entire daily performance and the same will be monitored by a specially appointed person on a monitor/display. The daily recording of performance of last 30 days would preserved and will be made available to any competent authority as and when required for viewing.” Having heard learned counsel for the parties, Dr. Rajeev Dhawan, learned senior counsel, who sought permission to file an application for intervention and Mr. Sandeep Deshmukh, learned counsel for the 5th respondent, we are inclined to modify the said condition to the extent that CCTV cameras shall be fixed at the entrance of the premises in question but shall not be fixed in the restaurant or the permit area or the performance area.

As we have clarified the conditions, the modified conditions along with conditions on which there is no cavil shall be complied with within three days and the respondents shall issue the licences within ten days therefrom. We are sure, the authorities shall act in accordance with the command of this Court and not venture to deviate.

Let the matter be listed after two weeks.

Liberty to mention.”

37) Condition No.20 was also challenged on the same ground referring to the same order dated March 02, 2016.

38) In addition, it was argued that requirement for having CCTV cameras at such places will have chilling effect, which was also violative of the right to privacy that is now declared as a fundamental right in K.S. Puttaswamy and Another v. Union of India and Others5.

39) Mr. Nikhil Nayyar, learned counsel appearing for the writ petitioner in Writ Petition (Civil) No. 119 of 2017, submitted that the petitioner Union, namely, Bharatiya Bar Girls Union comprises of women artists and talented professionals (collectively to be called as 'women performers') working in varied roles such as dancers, singers or waitresses in bars, restaurants, beer rooms, etc. (collectively referred to as 'dance bars'). It has 5000 members who were working in such establishments in the State of Maharashtra alone. However, after the imposition of ban for a prolonged period, which has resulted in rendering these women performers unemployed, the membership has shrunk to 110 women performers. He submitted that many have sought alternative employment and even migrated to other parts of the country and many are living under the conditions of extreme penury as they are facing unemployment. He argued that the members of the petitioner union have voluntarily embraced professional dancing at dance bars (i) 5 (2017) 10 SCC 1 entirely out of free will and choice; (ii) to earn livelihood; and (iii) personal autonomy and dignity. The existing literature and empirical studies have identified the women's desire to lead an independent and self-sustaining life as the primary motivation to work in dance bars. For many, the opportunity to work in dance bars have allowed them to break-away from stigmatic hereditary or caste profession. Some of the key findings of these studies are as follows:

(i) Nearly 82.6% of women performers (out of the sample size of 500) surveyed in Mumbai were migrants, and forced to leave their homes due to 'poverty and destitution' and for 'seeking a better life for themselves and their dependents'6.

(ii) Another study found that 42% of women dancers (out of 800) were the only breadwinners in their family. Most of them lacked basic education or technical skills. Some of them were previously engaged in sex work, but turned towards dance bars to lead a dignified life with safer working conditions7.

(iii) Another ethnographic study has shown that a vast majority of women performers worked in exploitative or constricted environment (viz., rag pickers, domestic helpers, etc.,). Many performers also belonged to marginalized and traditional dancing communities (viz., 6 See Feminist Contributions from the Margins: Shifting Conceptions of Work and Performance of the Bar Dancers of Mumbai XLV Econ. & Pol. Weekly (48) 2010 7 See RCWS (SNDT University, Mumbai), 'Working Women in Mumbai Bars: Truths behind the controversy' (Jul' 2005); RCWS (SNDT University, Mumbai), 'After the Ban – Women

Working in Dance Bars' (Dec' 2006) Bedia, Deredar, Kanjhar, Nat, Rajnat, etc.,) and other societies that have had a history of 'alternate' sexual morality8.

40) As with other professional artistes, and until the year 2004, the women performers have had complete freedom to choose which bars or restaurants to perform; day, time or duration of their performance; and had the bargaining capacity to negotiate remuneration with bar owners. In other words, the women performers were never the 'employees' of such establishments – either by virtue of a contract or under a statutory provision. As a matter of fact, many women performers do not expect any or adequate compensation from bar owners as it has been customary for performers to accept tips or rewards from patrons offered as a token of appreciation for their performance. This decades' old practice is akin to customary practices of Mujras, Lavani (traditional Marathi song and dance) or Tamasha (traditional Marathi theatre) who earn their living in the form of Bakshisi offered by audiences. The said practice is still widely prevalent across the country.

41) Adverting to the secondary effects and colonial-era stigma, Mr. Nayyar pointed out that the dramatic performances in dance bars often imitate Bollywood performances or the 'mainstream' culture – both in form and character. However, the State Government has viewed dance 8 See Dalwai, Sameena, 'Performing caste: the ban on bar dancing in Mumbai' Keele University (2012) bars an innately vulgar, undesirable, and as threatening the moral fabric of the society. The State's perception is premised on popular beliefs and public sentiment associated with art and entertainment.

42) 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'. Anna Morcom, a noted scholar, argues that the societal views on 'bar girls' bear close resemblance to oppressive treatment meted out to traditional dancing communities (Devadasis, courtesans, nautch, etc.,) during British-era9.

43) Insofar as challenge to the Act and Rules is concerned, this petition challenges some of the provisions which are also the subject matter of challenge in Writ Petition (Civil) No. 576 of 2016, on which we have noted the arguments of Mr. Jayant Bhushan, learned senior counsel. Adopting those arguments, Mr. Nayyar also made some additional submissions which are as under:

In the first place, the learned counsel took support of the legal principles settled in the judgment of this Court in Indian Hotel and Restaurants Association (1). He argued that in that case the Court considered the rational offered by the State Government threadbare and 9 Anna Morcom, Courtesans, Bar Girls and

Dancing Boys: Illicit Worlds of Indian Dance (Hachette India, 2014) found no basis or justification for imposition of prohibition.

44) He submitted that the present Act and rules were nothing but old wine in a new bottle with same kind of provisions which have already been struck down in Indian Hotel and Restaurants Association (1). In addition, the argument of Mr. Nayyar was that the moral anxiety and the reasons advanced by the State Government for introducing the legislation are entirely irrational and without demonstrable proof or evidence. Illustratively:

(I) Social Profile of Bar girls: It has been claimed that bar girls are usually minors or victims of trafficking or prostitution and other forms of flesh trade. However, the State Government has failed to produce any material – be it crime statistics or any other studies – in support. On the other hand, few available historical literature and research studies on bar dances suggest a diagonally opposite point of view. A study conducted by SNDT University, for instance, found that many women performers took up dancing to rehabilitate themselves from exploitative flesh trade. All the above social factors clearly suggest that the bar girls have voluntarily embraced dance bars to live with dignity and earn their livelihood. Moreover, the available literature further noted dance bars have had positive externalities on the women performers as it opened newer opportunities and the option to leave exploitative sex work if they chose.

(ii) Non-obscene performances: In any event, this Court in Indian Hotel and Restaurants Association (1) and several other High Courts previously had categorically held that the performances in dance bars cannot be considered as 'obscene'. The Bombay High Court in State of Maharashtra v. Joyce Zee alias Temiko10, dealing with cabaret shows, held as under:

"An adult person, who pays and attends a cabaret show in a hotel runs the risk of being annoyed by the obscenity or being entertained by the very obscenities according to his taste. Even assuming that such a hotel where anyone can buy tickets is concerned to be a public place, it cannot be held that the obscenity and annoyance which are punishable under S.294 of IPC are caused without the consent, express or implied, of such adult person. Such a person cannot complain in a criminal court of annoyance." (emphasis added) This proposition has been reiterated and followed in Sadhna v.

State11 and Narendra H. Khurana v. Commissioner of Police12. Thus, it is evident that the impugned Act and Rules perpetuate a myth that dance bars pose any danger to law and order or cause disturbance to peace and tranquility.

(iii) Lack of Reliable Data: It is pertinent to note that there has been a complete prohibition on dance bars since 2005 across the State of Maharashtra. Therefore, the data purportedly relied upon by the State Government is not only negligible, if any, but also outdated. Be that as it may, the very reasons proclaimed by the State Government currently 10 (1973) ILR 1299 (Bom) 11 (1981) 19 DLT 210 12 (2004) 2 Mah LJ 72 have been considered and rejected by this Court in Indian Hotel and Restaurants Association (1) for the lack of cogent evidence. Therefore, the belief of the State Government that the working women in dance bars are involved in immoral activities such as prostitution, or that minors are being employed, are entirely baseless and irrational.

(iv) Conditions of work: The concerns of the State Government that women dancers are subjected to unsafe and exploitative working conditions is entirely false. Various studies indicate that many bar girls felt 'greater security in the bars due to the support network among the dancers as well as the protection provided by the owners'. It was further noted that the bar owners, on the demands made by bar girls, provides taxis and auto rickshaws for women travelling late at night. Although bar girls worked under the constant gaze of bar owners, they are neither contractually employed nor subservient to them. Few other performers have also expressed complete freedom to shift from one dance bar to another at their will. Therefore, the claims that the women performers are working under unsafe or exploitative conditions are hugely exaggerated. Having said that, there is certainly a grave necessity to improve working conditions of bar girls. However, the same can be achieved by strengthening the rights of thees women and organisations such as the petitioner-Union without the intervention from state apparatus.

(v) Social Vulnerabilities: The prolonged ban on dance bars has had adverse effect on bar girls and women entertainers. After the ban, the RCWS & FAOW study pointed out that income of almost all women was reduced to less than 50% of their original earnings, and at least 1/4th of the women found their income slashed by 90% of their original earnings. At least 57.5% of the women reported having used all their savings in the form of jewellery, cash or property and at least 26% of these women have been forced to take additional loans, ranging between the amounts of couple of thousands to lakhs. The study further pointed that the access to health care and education of dancers and their families has reduced drastically. Moreover, the lack of social security has resulted in sexual harassment and also driven women to take up exploitative sex work. In this backdrop, and contrary to the stated objects, the increased interference by the State Government could further jeopardise the livelihood of women. This Court in Indian Hotel and Restaurants Association (1) also expressed anguish as ban on dance bars 'has proved to be totally counter-productive' as many women performers were 'compelled to take up prostitution out of necessity for maintenance of their families'.

(vi) Res Extra Commercium: The State Government contended that the dancing – when mixed with alcohol – has the tendency to result in unwelcomed or undesirable outcome. However, this Court in Indian Hotel and Restaurants Association (1) dealt with similar argument and observed that 'we are not

impressed with any of these submissions' as the submission was based on 'unfounded presumption that women are being/were trafficked in the bars'.

According to him, the impugned Act has been enacted as a retaliatory measure to disenfranchise women from performing at dance bars at any cost. It is contended that the legislative declaration of facts and beliefs, as noted above, are patently false and entirely irrational and devoid of any material.

45) He further submitted that onus was on the State to justify fairness and reasonableness which is the principle of law laid down in the case of Ram Krishna Dalmia v. Justice S.R. Tendolkar & Ors. 13, State of Maharashtra & Anr. v. Basantibai Mohanlal Khetan & Ors. 14 and M/s Laxmi Khandsari & Ors. v. State of U.P. & Ors.15.

According to him, the State has not discharged this onus.

46) Mr. Nayyar also made detailed submissions on the standards of 'obscenity' which prevail in this country as per the parameters laid down in various judgments and the development of law on this subject. In this hue, he also argued that public policy or general public interest cannot be valid grounds to restrict freedom of speech under Article 19(1)(a) of 13 (1959) SCR 279 14 (1986) 2 SCC 516 15 (1981) 2 SCC 600 the Constitution. Neither majoritarian or societal notions formed the basis to restrict such a fundamental right. According to him, on the contrary, constitutional values of personal autonomy and individual choices which have been held to be the facets of right to privacy, giving it the status of fundamental rights, had to be respected. His plea was that the impugned legislation and rules violate such rights as well.

47) Mr. Nayyar also, like Mr. Jayant Bhushan, touched upon specific provisions of the Act and the Rules. On Section 2(8) of the Act, his submission was that it is a provision which was utterly vague and creates a chilling effect; puts restrictions on dance which are excessive and disproportionate; and suffers from rigidity, overbreadth and manifest arbitrariness. Insofar as Section 8(4) of the Act, which prohibits offering tips by the customers to the performers is concerned, submission of Mr. Nayyar is that it is manifestly arbitrary and unreasonable inasmuch as this provision infuses criminalisation into and otherwise benign or harmless act and was contrary to well-recognised customary practice thereby suffering from manifest arbitrariness.

48) The learned counsel also laid attack on the legality of some of the licence conditions. His submission in this behalf was that the Grievance Redressal Committee constituted under Section 12 of the impugned Act is highly inadequate and disproportionate. The composition of the Committee, tasked with the duty to ensure proper conditions of service of women, does not contain any participation or representation of bar dancers in any manner. The composition of the Committee, as provided by Rule 10, is restricted to Group 'A' officers. As it is the workplace of these women, it is imperative that they must be represented when an issue regarding their working condition is being decided.

49) Mr. Nayyar termed condition B(2) as disproportionate, excessive and ultra vires the intent and object of the impugned Act. The provisions adversely affect women dancers by (i) restricting their freedom to move from one bar to another at their will, if the work conditions or the returns are not suitable; (ii) prohibit them from monetizing dances other than by way of receiving salary or shared tips. More importantly, the State Government has failed to show any compelling public interest to curtail the choices of women performers.

50) Conditions B(7) and B(8) are questioned on the premise that women dancers are indirectly prohibited from receiving tips, rewards or remuneration offered by their patrons, is unreasonable, excessive, manifestly arbitrary and violates Articles 14 and 19 of the Constitution. The suggestion from the State Government that tips could be added to the bill or handed over to waiters is irrational.

51) Condition B(9) wherein the dance performances are restricted to 6:00 pm to 11:30 pm is challenged as unreasonable and manifestly arbitrary. It is irrational and manifestly arbitrary to prohibit dances after 11:30 pm, when the establishments can be open until 01:30 am (next day) or 12:30 am (next day), as the case may be 16.

52) According to him, condition B(12) wherein the bar owners are prohibited from serving of any alcoholic beverage at areas where dances are staged is disproportionate and manifestly arbitrary. The State Government has failed to provide any cogent material or demonstrate any reasonable basis which warrants interference of this nature. As such, the restriction is excessive and disproportionate consider other licence conditions (distance, railing, green room, age restrictions, etc.,) to prevent any untoward incident.

53) Validity of Section B(20) wherein the mandate to install CCTV cameras to maintain complete surveillance and recording of activities in such places is questioned as excessive, causes unwarranted invasion of privacy and violative of Articles 19(1)(a) and 21. In support, he referred to para 247(3) of K.S.

Puttaswamy and Another wherein this Court examined the concept of 'unpopular privacy' - of which two facets are particular relevant – viz. "(c) decisional privacy which protects the right of citizens to make intimate choices about their rights from intrusion by 16 See Notification (bearing MSA. 07/2016/C.R. 218/Lab-10) issued by the State Government also placed on record before this Court in Writ Petition (Civil) No. 576 of 2016. the State; (d) proprietary privacy which relates to the protection of one's reputation." Given the societal stigma associated with dance bars, the monitoring, recording, storage and retention of dance performances causes unwarranted invasion of privacy and would even subject women performers to threat and blackmail. If the concerns are security, it can be adequately met having at the entrance. Hence, the complete surveillance of activities inside the premises is excessive and disproportionate.

54) Condition B(23) wherein the dance performances that maybe "expressive of any kind of obscenity, in any manner, even remotely" are prohibited is labelled by Mr. Nayyar as highly vague, excessive and creates a chilling effect on dancers.

55) Mr. Nayyar also supported his aforesaid arguments by citing various judgments which shall be taken note of and discussed at a later stage.

56) Rebuttal to the aforesaid arguments was given by Mr. Naphade, learned senior advocate, who appeared for the State of Maharashtra and supported by Ms. Pinky Anand, learned ASG who represented Union of India.

57) Mr. Naphade opened his argument with the submission that arbitrariness or unreasonableness are value judgments and any legislation on the aforesaid parameters is to be judged keeping in mind the 'context' in which such a legislation is passed. Adverting to the context of the impugned Act, he referred to the preamble of the Act which stipulates as under:

"An Act to provide for prohibition of obscene dance in hotels, restaurants, bar rooms and other establishments and to improve the conditions of work, protect the dignity and safety of women in such places with a view to prevent their exploitation."

58) From the above, the learned senior counsel pointed out that the Act sought to achieve the following objectives:

(a) prohibit obscene dance in hotels, restaurants, bar rooms and other establishments;

(b) improve the conditions of work of women dancers and other women working therein; and

(c) protect the dignity as well as safety of such women.

59) He emphasised that moral structure of the Act flows from the aforesaid preamble. According to him, it could not be disputed by anybody, nor was it done by the petitioners, that the aforesaid objectives were lawful and in larger public interest, particularly in the interest of women working at such places. Proceeding on that basis, Mr. Naphade submitted that insofar as controlling the activity through licensing is concerned, the same is accepted by the petitioners as well. Section 3 of the Act which mandates obtaining a licence for starting a hotel, restaurant, bar room or any other place where dances are staged, has not been challenged. This is core of the Act. Further, there is no challenge to Section 14 which gives power to the State Government to make rules in furtherance of the objectives i.e. to carry out the purpose of the Act. It was also not the case of the petitioners that the impugned Act or Rules framed thereunder were ultra vires and not within the competence of the State legislature insofar as the Act is concerned or the State Government insofar as the Rules are concerned. In addition to Section 3 of the Act dealing with the licensing requirement, he referred to Section 6 of the Act which deals with eligibility criteria for grant of such licenses and submitted that the idea was to have stringent conditions to achieve the purpose behind the Act.

60) With this introductory remarks, Mr. Naphade dealt with individual provisions of the Act and the Rules in the following manner:

Section 2(8) of the Act which defines 'obscene dance' was defended by arguing that it is not vague or contains imprecise definition as it includes a dance which is aimed at arousing the 'prurient interest' of the audience and where that is the only purpose behind a dance. He argued that the expression 'prurient interest' has a definite connotation in dictionary and this expression finds presence in Section 292 of the IPC as well which makes obscenity as an offence. Therefore, argued the learned senior counsel, it confirms to judicially manageable standards. Further submission in this behalf was that, no doubt, standards of morality have changed over a period of time, however, the moot question is, where to draw the line. This has to be left to the legislature. In the present case, legislature in its wisdom has considered particular types of dances as obscene which in the wisdom of legislature is the reasonable standard of obscenity. He also argued that the very test of "reasonableness" is fluid and, therefore, it is situation centric. Since, the Act aims at prohibiting obscene dance, the standard of obscenity has to be looked into from that perspective in mind. He relied upon the judgment in the case of Ranjit D. Udeshi v.

State of Maharashtra17 where the term ‘obscene’ has been construed by the Court in the following manner:

"8. Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292 of the Indian Penal Code manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality. The word obscenity is really not vague because it is a word which is well understood even if persons differ in their attitude to what is obscene and what is not. Lawrence thought James Joyce's Ulysees to be an obscene book deserving 17 (1965) 1 SCR 65 suppression but it was legalised and he considered Jane Eyre to be pornographic but very few people will agree with him.

9. The former he thought so because it dealt with the excretory functions and the latter because it dealt with sex repression. (See Sex, Literaturet Censorship pp. 26, 201). Condemnation of obscenity depends as much upon the mores of the people as upon the individual. It is always a question of degree or as the lawyers are accustomed to say, of where the line is to be drawn. It is, however, clear that obscenity by itself has extremely poor value in the propagation of ideas, opinions and informations of public interest or profit. When there is propagation of ideas, opinions and photographs collected in book form without the medical text would may become different because then the interest of society may tilt the scales in favour of free speech and expression. It is thus that books on medical science with intimate illustrations and photographs, though in a sense immodest, are not considered to be obscene but the same illustrations and photographs collected in book form without the medical text would certainly be considered to be obscene. Section 292 of the Indian Penal Code deals with obscenity in this sense and cannot thus be said to be invalid in view of the second clause of Article 19. The next question is when can an object be said to be obscene?

xx xx xx

28. This is where the law comes in. The law seeks to protect not those who can protect themselves but those whose prurient minds take delight and secret sexual pleasure from erotic writings. No doubt this is treating with sex by an artist and hence there is some poetry even in the ugliness of sex. But as Judge Hand said obscenity is a function of many variables. If by a series of descriptions of sexual encounters described in language which cannot be more candid, some social good might result to us there would be room for considering the book. But there is no other attraction in the book. As, J.B. Priestley said, “Very

foolishly he tried to philosophize upon instead of merely describing these orgiastic impulses: he is the poet of a world in rut, and lately he has become its prophet, with unfortunate results in his fiction. [The English Novel, p. 142 (Nelson)]. The expurgated copy is available but the people who would buy the un-expurgated copy do not care for it. Perhaps the reason is as was summed up by Middleton Murray:

"Regarded objectively, it is a wearisome and oppressive book; the work of a weary and hopeless man. It is remarkable, indeed notorious for its deliberate use or unprintable words." "The whole book really consists of detailed descriptions of their sexual fulfilment. They are not offensive, sometimes very beautiful, but on the whole strangely wearisome. The sexual atmosphere is suffocating. Beyond this sexual atmosphere there is nothing, nothing," [Son of Women (Jonathan Cape)].

No doubt Murray says that in a very little while and on repeated readings the mind becomes accustomed to them but he says that the value of the book then diminishes and it leaves no permanent impression. The poetry and music which Lawrence attempted to put into sex apparently cannot sustain it long and without them the book is nothing. The promptings of the unconscious particularly in the region of sex is suggested as the message in the book. But it is not easy for the ordinary reader to find it. The Machine Age and its impact on social life which is its secondary theme does not interest the reader for whose protection, as we said, the law has been framed."

61) Mr. Naphade submitted that this position has not undergone any change by the judgments of this Court rendered thereafter. Thus, the test to be applied is as to whether a particular dance performance has tendency to deprave and corrupt by immoral influences. According to him, in a given case, this test/standard can always be applied by the Court to determine whether a particular dance performance is obscene or not. Mr. Naphade also relied upon the judgment in the case of Pawan Kumar v. State of Haryana & Anr.18 where the expression 'moral turpitude' is defined by judiciary fixing standards of morality by linking it with obscenity and it comes from the societal norms and thinking about the same, which is highlighted in the following passage from that judgment:

18 (1996) 4 SCC 17 "12. "Moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity. The Government of Haryana while considering the question of rehabilitation of ex-convicts took a policy decision on 2-2-1973 (Annexure E in the Paper-book), accepting the recommendations of the Government of India, that ex-convicts who were convicted for offences involving moral turpitude should not however be taken in government service. A list of offences which were considered involving moral turpitude was prepared for information and guidance in that connection. Significantly Section 294 IPC is not found enlisted in the list of offences constituting moral turpitude. Later, on further

consideration, the Government of Haryana on 17/26-3-1975 explained the policy decision of 2-2-1973 and decided to modify the earlier decision by streamlining determination of moral turpitude as follows: "… The following terms should ordinarily be applied in judging whether a certain offence involves moral turpitude or not;

(1) whether the act leading to a conviction was such as could shock the moral conscience of society in general. (2) whether the motive which led to the act was a base one. (3) whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society.

Decision in each case will, however, depend on the circumstances of the case and the competent authority has to exercise its discretion while taking a decision in accordance with the above-mentioned principles. A list of offences which involve moral turpitude is enclosed for your information and guidance. This list, however, cannot be said to be exhaustive and there might be offences which are not included in it but which in certain situations and circumstances may involve moral turpitude." Section 294 IPC still remains out of the list. Thus the conviction of the appellant under Section 294 IPC on its own would not involve moral turpitude depriving him of the opportunity to serve the State unless the facts and circumstances, which led to the conviction, met the requirements of the policy decision above-quoted."

62) Mr. Naphade also banked upon the following discussion in Director General, Directorate General of Doordarshan & Ors. v. Anand Patwardhan & Anr.19:

"22. One of the most controversial issues is balancing the need to protect society against the potential harm that may flow from obscene material, and the need to ensure respect for freedom of expression and to preserve a free flow of information and ideas. The Constitution guarantees freedom of expression but in Article 19(2) it also makes it clear that the State may impose reasonable restriction in the interest of public decency and morality.

23. The crucial question therefore, is, "what is obscenity?" The law relating to obscenity is laid down in Section 292 of the Penal Code, which came about by Act 36 of 1969.

24. Under the present Section 292 and Section 293 of the Penal Code, there is a danger of publication meant for public good or for bona fide purpose of science, literature, art or any other branch of learning being declared as obscene literature as there is no specific provision in the Act for exempting them from operations of those sections.

25. The present provision is so vague that it becomes difficult to apply it. The purposeful omission of the definition of obscenity has led to attack of Section 292 of the Penal Code as being too vague to qualify as

a penal provision. It is quite unclear what the provisions mean. This unacceptably large “grey area”, common in laws restricting sexual material, would appear to result not from a lack of capacity or effort on the part of drafters or legislators.

26. The Penal Code on obscenity grew out of the English law, which made the court the guardian of public morals. It is important that where bodies exercise discretion, which may interfere in the enjoyment of constitutional rights, that discretion must be subject to adequate law. The effect of provisions granting broad discretionary regulatory powers is unforeseeable and they are open to arbitrary abuse.

27. In Samaresh Bose v. Amal Mitra [(1985) 4 SCC 289 : 1985 SCC (Cri) 523] it was observed by this Court: (SCC p. 314, para

29) “The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally 19 (2006) 8 SCC 433 expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the judge in the first place should try to place himself in the position of the author and from the viewpoint of the author the judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic value. The judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292 IPC by an objective assessment of the book as a whole and also of the passages complained of as obscene separately.”

28. This is one of the few liberal judgments the courts have given. The point to worry about is the power given to the Judge to decide what he/she thinks is obscene. This essentially deposits on the Supreme Court of India, the responsibility to define obscenity and classify matters coming on media as obscene or otherwise. This Court has time and again adopted the test of obscenity laid down by Cockburn, C.J. The test of obscenity is, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and in whose hands a publication in media of this sort may fall.

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37. In yet another case of Ramesh v. Union of India [(1988) 1 SCC 668 : 1988 SCC (Cri) 266] this Court has observed that: (SCC p. 676, para 13) "… that the effect of the words must be judged from the standards of reasonable, strong-minded, firm and courageous men, and not those of weak and vacillating minds, nor of those who scent danger in every hostile point of view. This in our opinion, is the correct approach in judging the effect of exhibition of a film or of reading a book. It is the standard of ordinary reasonable man or as they say in English law 'the man on the top of Clapham omnibus'."

63) Another judgment, sustenance wherefrom was drawn by the learned senior counsel is Ajay Goswami v. Union of India & Ors.20 wherein again 'norms of the society' test was applied by the Court in the following manner:

"67. In judging as to whether a particular work is obscene, regard must be had to contemporary mores and national standards. While the Supreme Court in India held Lady Chatterley's Lover to be obscene, in England the jury acquitted the publishers finding that the publication did not fall foul of the obscenity test. This was heralded as a turning point in the fight for literary freedom in UK. Perhaps "community mores and standards" played a part in the Indian Supreme Court taking a different view from the English jury. The test has become somewhat outdated in the context of the internet age which has broken down traditional barriers and made publications from across the globe available with the click of a mouse.

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70. In S. Rangarajan v. P. Jagjivan Ram [(1989) 2 SCC 574] , while interpreting Article 19(2) this Court borrowed from the American test of clear and present danger and observed: (SCC pp. 595-96, para 45) "[The] commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far-fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interest. [In other words, the expression should be inseparably] like the equivalent of a 'spark in a power keg'."

71. The test for judging a work should be that of an ordinary man of common sense and prudence and not an "out of the ordinary or hypersensitive man". As Hidayatullah, C.J. remarked in K.A. Abbas [K.A. Abbas v. Union of India, (1970) 2 SCC 780] : (SCC p.

802, para 49) "If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped." 20 (2007) 1 SCC 143 xx xx xx

75. The definition of obscenity differs from culture to culture, between communities within a single culture, and also between individuals within those communities. Many cultures have produced laws to define what is considered to be obscene, and censorship is often used to try to suppress or control materials that are obscene under these definitions.

76. The term obscenity is most often used in a legal context to describe expressions (words, images, actions) that offend the prevalent sexual morality. On the other hand, the Constitution of India guarantees the right to freedom of speech and expression to every citizen. This right will encompass an individual's take on any issue. However, this right is not absolute, if such speech and expression is immensely gross and will badly violate the standards of morality of a society. Therefore, any expression is subject to reasonable restriction. Freedom of expression has contributed much to the development and well-being of our free society."

64) Insofar as Section 6(4) of the Act is concerned, plea of Mr. Naphade was that idea was to impose stringent licence conditions for dance bars in order to avoid any possibility of obscene dance and that was a rationale for keeping place of dance away from the place where there is a discotheque or orchestra.

65) Qua Section 8(2), justification of the learned senior counsel was that this provision is to be read along with Section 8(1) of the Act. Section 8(1) makes the Act of using the place in contravention of Section 3 as punishable offence. In this hue, sub-section (2) of Section 8 provides that such place would not be allowed for obscene dance or to exploit any working woman for any immoral purpose at such a place, making such Act also an offence punishable under the Act. In that sense, argued Mr. Naphade, Section 8(2) is a separate offence prescribed in a separate law that is under the Maharashtra Act which is distinct from Section 292 IPC.

66) In respect of Section 8(4) of the Act which prescribes giving of tips to dancers, Mr. Naphade defended the same with the submission that it is a matter of cultural ethos of the society. Herein, when the purpose is to protect the dignity of women, such a prohibition would be justified. In this vein, his further argument in support of such a provision was that showering money is a method of inducement which has to be checked. In any case, such is the the perception of the State prompting the legislature to make a provision of this kind, which cannot be labelled as fanciful. Mr. Naphade also referred to Section 354A of IPC which has widened the scope of 'sexual harassment' and made it an offence. He submitted that it can be treated as moral code of the society. Therefore, Section 8(4) has to be judged through such a lens. In the alternative, he argued that principle of severability can always be applied and the provision should be saved by excising offending portions therefrom.

67) Rule 2(b) of the Rules which defines 'criminal record' was sought to be justified on the ground that this provision is made to instill purity in public life. It takes its colour from 'moral turpitude' as mentioned in the definition itself. According to the learned senior counsel, the question was as to whether such a record has to be based on conviction or even when there is FIR/complaint against a particular person, cognizance whereof is taken by the Court. His suggestion, in this behalf, was that this provision was capable of reading down and the Court was free to do so.

68) Argument of the petitioners predicated on Article 19(1)(a) of the Constitution, namely, fundamental rights of the dance bars or that of dancers was sought to be placated with the submission that balancing between that right on the one hand and prevention of obscenity on the other hand was necessitated. In this behalf, he referred to clause (2) of Article 19 as per which reasonable restriction can be imposed inter alia in the interest of 'public order, decency or morality'. Therefore, morality aspects had to be taken into consideration while adjudging the validity of these provisions, argued the learned senior counsel. On the same lines, Mr. Naphade also tried to meet the argument based on Article 19(1)(g) of the Constitution by taking shelter under clause (6) of Article 19 which permits the State to make law imposing reasonable restrictions in the interest of general public.

69) With respect to Schedule under Rule 3, Mr. Naphade's defence of Condition No. 2 thereof was that it ensures safety. Likewise, Condition No. 11 of Part A is a matter of policy and it is the prerogative of the law maker to fix the distance. Regarding Condition No. 2 of Part B, submission of the learned senior counsel was that it is based on economic reality that there is an exploitation of such working clause and, therefore, the rule maker rightly laid down the condition that the working women must be employed under a written contract on a monthly salary which needs to be deposited in their bank accounts. Similarly, other clauses were also in public interest and to achieve the purpose behind the Act qua clause (20) of Part B, specific submission was that right to privacy comes to an end when there is a possibility of commission of trying and this clause aimed at preventing such a crime. Summing up his arguments, Mr. Naphade took the matter to another level by arguing that international trend is to frame the law based on morality. Such a noble purpose which this Act seeks to achieve cannot be countenanced. He paraphrased it with the following legal proposition:

(i) Activity which has a criminal colour can always be regulated or even banned by the legislature.

(ii) Principle of res extra commercium had to be kept in mind which lays down that there is no fundamental right in those economic activities which come under the aforesaid maxim. However, it is the State which still permits these activities and, therefore, State has every right to permit such an

activity within a particular regulatory framework. It is that which was precisely done by the various provisions under the Acts and the Rules.

(iii) Test of reasonableness is contextual and varies in different situations. It is based on proportionality. This test would be stricter where there is freedom of trade and such a stricter test is justified in the present context.

70) Ms. Pinky Anand, learned ASG, supported and adopted the aforesaid submissions of Mr. Naphade. She emphasised that the present Act was regulatory and not prohibitory in nature. Keeping in view this purpose of the Act, earlier judgment of the year 2013 in the case of Indian Hotel and Restaurants Association (1) will not apply. Another submission of the learned ASG was that the Act prohibits obscenity, which is even otherwise illegal under the IPC, therefore, principle of res extra commercium would apply. She referred to the following judgments to buttress her submission:

(i) State of Bombay v. R.M.D. Chamarbaugwala & Anr.21 "41. It will be abundantly clear from the foregoing observations that the activities which have been condemned in this country from ancient times appear to have been equally discouraged and looked upon with disfavour in England, Scotland, the United States of America and in Australia in the cases referred to above. We find it difficult to accept the contention that those activities which encourage a spirit of recklesss propensity for making easy gain by lot or chance, which lead to the loss of the hard earned money of the undiscerning and improvident common man and thereby lower his standard of living and drive him into a chronic state of indebtedness and eventually disrupt the peace and happiness of his humble home could possibly have been intended by our Constitution makers to be raised to the status of trade, 21 1957 SCR 874 commerce or intercourse and to be made the subject-matter of a fundamental right guaranteed by Article 19(1)(g). We find it difficult to persuade ourselves that gambling was ever intended to form any part of this ancient country's trade, commerce or intercourse to be declared as free under Article 301. It is not our purpose nor is it necessary for us in deciding this case to attempt an exhaustive definition of the word “trade”, “business”, or “intercourse”. We are, however, clearly of opinion that whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Articles 19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Article 19(1)(g) or Article 301 of our Constitution.”

(ii) State of Tamil Nadu represented by its Secretary, Home, Prohibition and Excise Department & Ors. v. K. Balu & Anr.22 "16. We are conscious of the fact that the policy of the Union Government to discontinue liquor vends on National highways may not eliminate drunken driving completely. A driver of a motor vehicle can acquire liquor even before the commencement of a journey or, during a journey at a place other than a national or State highway. The law on preventing drunken driving also requires proper enforcement. Having said this, the Court must accept the policy of the Union Government for more than one reason. First and foremost, it is trite law that in matters of policy, in this case a policy on safety, the Court will defer to and accept a considered view formed by an expert body. Second, as we have seen, this view of the Union Government is based on statistics and data which make out a consistent pattern year after year. Third, the existence of liquor vends on highways presents a potent source for easy availability of alcohol. The existence of liquor vends, advertisements and signboards drawing attention to the availability of liquor coupled with the arduous drives particularly in heavy vehicles makes it abundantly necessary to enforce the policy of the Union Government to safeguard human life. In doing so, the Court does not fashion its own policy but enforces the right to life under Article 21 of the Constitution based on the considered view of expert bodies." 22 (2017) 2 SCC 281 Consideration by the Court:

71) In Indian Hotel and Restaurants Association (1) case, Section 33A was held to be unconstitutional as it was found foul of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. We have reproduced Section 33A of the said Act as well as the Statement of Objects and Reasons appended to the Bill vide which the aforesaid amendment was introduced. Statement of Objects and Reasons thereto shows that the main purpose behind inserting Section 33A in Maharashtra Police Act was to check the performance of dances in eating houses, permit rooms or bear bars in an indecent manner. It noted that such places to whom licenses to hold dance performance were granted, were permitting the performance of dances in an indecent, obscene and vulgar manner. Further, such performance of dances were giving rise to exploitation of women and were derogatory to the dignity of women. They were also likely to deprave, corrupt or injure the public morality or morals. Because of these reasons, the Government of Maharashtra considered it expedient to prohibit altogether the holding of such dance performances in eating houses or permit rooms or bear bars. To achieve this purpose, Section 33A prohibits holding of the performance of dance, of any kind or type, in any eating house, permit room or bear bar. To make this prohibition effective, all such licenses given earlier were cancelled by the said statutory provision. Holding of such performances was also made a punishable offence. At the same time, Section 33B provided exception to Section 33A inasmuch as Section 33A was made inapplicable in certain cases. As per Section 33B, provisions of Section 33A was not to apply to the holding of the 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.

72) Two features of these provisions may be noted:

(i) In the first place, there was absolute prohibition of dance performances in the establishments covered by Section 33A. Such dance performances were treated, per se, obscene. In contrast, the present regime prohibits 'obscene dance' and defines this term as well.

(ii) In contrast, in the establishments covered by Section 33B, there was no bar on such performances.

73) Striking down the provisions of Section 33A as discriminatory, the Court held that there was no reasonable basis for any classification between those places where such performance of dance was prohibited under Section 33A and those places where such a performance was permitted as specified in Section 33B of the Maharashtra Police Act. Discussion in this behalf is contained, more specifically, in paras 118 to 122 of the judgment which have already been reproduced above. That reason may not apply to the impugned Act and Rules herein inasmuch as no such distinction is made now. At the same time, some of the discussion from this judgment would be relevant. The Court also held that Section 33A offended Article 19(1)(a) of the Constitution inasmuch as dance is a form of expression and the said provision amounted to unreasonable restriction which is not protected by Article 19(2) of the Constitution. Further, the basis on which Section 33A was found to be violative of Article 19(1)(g) may also be relevant. We would, therefore, like to cull out the main features of the discussion contained in Indian Hotel and Restaurants Association (1) Indian Hotel and Restaurants Association (1). These are:

(a) There was little or no material on the basis of which the State could have concluded that dance in the prohibited establishments was likely to deprave, or injure the public morality or morals.

While making these remarks, the Court specifically rejected the findings in PRAYAS and Shubhada Chaukar's Reports.

(b) Argument of the State to justify the provision based on intelligible differentia, viz., that women who perform in the banned establishment come from grossly deprived backgrounds and are a vulnerable lot who are trafficked into bar dancing, was specifically rejected by pointing out that there was no material/evidence to support such a plea. Nothing in this behalf was stated in the Statement of Objects and Reasons and this plea was projected for the first time in the affidavit filed before the High Court. The Court, in the process, held that such a plea was based on PRAYAS and Shubhada Chaukar's Reports.

In the opinion of the Court, isolated examples given therein would not be sufficient to establish the connection of dance bars covered under Section 33A with trafficking.

(c) Performance of dance in such places could not be covered by the principle of res extra commercium. Prohibition on such a commercial activity, which was a fundamental right, had to meet the test of 'reasonable restriction'. However, held the Court, the State had failed to establish that the restriction is reasonable or that it is in the interest of general public.

(d) There are already sufficient rules and regulations and legislations in place which, if efficiently apply, would control (if not eradicate) all the dangers to the society enumerated in the preamble and the Statement of Objects and Reasons of the impugned legislation. Such legislations as well as rules and regulations were specifically noted in Paras 127 to

131.

(e) The Court held, in para 132 of the judgment, that the Rules under the Bombay Police Act have been framed in the interest of public safety and social welfare and to safeguard the dignity of women as well as to 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.

(f) Argument of the State that impugned enactment is a form of additional regulation, as it was felt that the existing system of licence and permits were insufficient to deal with the problem of ever increasing dance bars, was specifically rejected.

(g) The Court also mentioned the effect of Section 33A in the following words:

"136. The end result of the prohibition of any form of dancing in the establishments covered under Section 33-A 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 the dance bar establishments have been 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 counter-productive and cannot be sustained being ultra vires Article 19(1)(g)."

74) In contrast, the object which the impugned Act seeks to subserve is to provide for prohibition of obscene dance in hotels, restaurants, bar rooms and other establishments. It also seeks to improve the conditions of work, as well as to protect the dignity and safety of women in such places with a view to prevent their exploitation. As pointed out above, this Act applies to all such hotels, restaurants, bar rooms and establishments and the Act does not carve out two categories of such places unlike Sections 33A and 33B of the Maharashtra Police Act. In that sense, argument of discrimination based on creating two classes without any reasonable basis, is not available, nor was it argued. It also cannot be denied that the aforesaid objectives are in general public interest inasmuch as nobody can argue that there should not be any prohibition of dances which are obscene, nor can it be argued that suitable provisions should not be made to protect the dignity and safety of women in such places with a view to prevent their exploitation. It is for this reason that the petitioners have not questioned the validity of the Act and the Rules framed therein, in their entirety. Instead, they feel aggrieved by certain provisions which, according to them, are unreasonable and have the effect of putting a complete prohibition on any type of dance performances, even if they are not obscene. They have also argued that the conditions and restrictions which are imposed by the Act and the Rules for obtaining a licence under the said Act are so severe and impossible to perform, with the result no person would be able to obtain a licence under this Act. It is also emphasised that in spite of categorical observations in Indian Hotel and Restaurants Association (1) case that there was no material before the State to support its plea that women at such places were exploited, the legislature has passed the Act almost on the same lines on which Section 33A in Maharashtra Police Act was inserted, without any fresh exercise or empirical study in this behalf. These arguments shall be touched upon while dealing with the specific provisions of the Act and the Rules, validity whereof is questioned in these petitions. As a matter of fact, we may point out at this juncture itself, that not a single establishment is given any licence so far under Section 3 of the impugned Act. This was candid statement made by Mr. Naphade at the bar. It shows that some of the conditions and restrictions imposed by the Act and the Rules are such which are impossible to perform and, therefore, in each and every case, without exception, the applications for grant of licence under this Act have been rejected.

75) We would like to deal at this stage with the argument of morality, as advanced by by Mr. Naphade. The question is to what extent the State can go in imposing 'morality' on its citizens? In the first instance, we would take note of certain judgments of this Court touching upon this aspect. Following discussion in State of Punjab & Anr. v. Devans Modern Breweries Ltd. & Anr.23 may be relevant in this behalf:

"48. Dealing in a commodity which is governed by a statute cannot be said to be inherently noxious and pernicious. A society 23 (2004) 11 SCC 26 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 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.

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51. From the analysis of decisions rendered by this Court in Cooverjee B. Bharucha [AIR 1954 SC 220 : 1954 SCR 873], R.M.D. Chamarbaugwala [AIR 1957 SC 699 : 1957 SCR 874], Har Shankar [(1975) 1 SCC 737 : AIR 1975 SC 1121 : (1975) 3 SCR 254] or Khoday Distilleries [(1995) 1 SCC 574] it will appear that a person cannot claim any right to deal in any obnoxious substance on the ground of public morality. The State, therefore, is entitled to completely prohibit any trade or commerce in potable liquor. Such prohibition, however, has not been imposed. Once a licence is granted to carry on any trade or business, can it be said that a person is committing a crime in carrying on business in liquor although he strictly complies with the terms and conditions of licence and the provisions of the statute operating in the field? If the answer to the said question is to be rendered in the affirmative it will create havoc and lead to anarchy and judicial vagaries. When it is not a crime to carry on such business having regard to the fact that a person has been permitted to do so by the State in compliance with the provisions of the existing laws, indisputably he acquires a right to carry on business. Even in respect to trade in food articles or other essential commodities either complete prohibition or restrictions are imposed in the matter of carrying on any trade or business, except in terms of a licence granted in that behalf by the authorities specified in that behalf. The distinction between a trade or business being carried out legally or illegally having regard to the restrictions imposed by a statute would have, therefore, to be judged by the fact as to whether such business is being carried out in compliance with the provisions of the statute(s) operating in the field or not. In other words, so long it is not made impermissible to carry on such business by reason of a statute, no crime can be said to have been committed in relation thereto. The doctrine of res extra commercium, thus, would not be attracted, whence a person carries on business under a licence granted in terms of the provisions of the regulatory statutes.

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317. The matter is covered by statutory provisions. The court cannot interpret equality, freedom or commerce clauses of the Constitution in such a manner so as to take away the rights and obligations created under a statute on the ground of public morality or otherwise. When a statute permits a trade, morality takes a back seat as “legislature” as contradistinguished from “judiciary” is supposed to be the authority to consider the morality or otherwise of certain things prevailing in the society.

76) We may also note, with profit, the following discussion in Gobind v. State of Madhya Pradesh & Anr.24:

"22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.” 24 (1975) 2 SCC 148 Some of the moral aspects are discussed in the context of obscenity in the judgments cited by Mr. Naphade as well.

77) It needs to be borne in mind that there may be certain activities which the society perceives as immoral per se. It may include gambling (though that is also becoming a debatable issue now), prostitution etc. It is also to be noted that standards of morality in a society change with the passage of time. A particular activity, which was treated as immoral few decades ago may not be so now. Societal norms keep changing. Social change is of two types: continuous or evolutionary and discontinuous or revolutionary25. The most common form of change is continuous. This day-to-day incremental change is a subtle, but dynamic, factor in social analysis. It cannot be denied that dance performances, in dignified forms, are socially acceptable and nobody takes exceptions to the same. On the other hand, obscenity is treated as immoral. Therefore, obscene dance performance may not be acceptable and the State can pass a law prohibiting obscene dances. However, 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, and in any case, any legislation of this nature has to pass the muster of 25 See A. Etzioni and E. Etzioni (eds.), Social Change (1964); W. Moore, Social Change (1963), W. Moore and R. Cook (eds.), Readings on Social Change (1967). constitutional provisions as well. We have examined the issues raised in the aforesaid context.

78) This brings us to the Principle of res extra commercium. Insofar as dance performances are concerned, it has already been held that it is not res extra commercium. We would, at this stage, again refer to Indian Hotel and Restaurants Association (1) where these aspects are dealt with as under:

(i) Human Trafficking: The State Government contended that several women performers are victims of illegal trafficking, or minors, and dance bars are used for soliciting flesh trade. It was suggested that bar girls hail from depraved backgrounds, and hence, vulnerable to prostitution and other offences under the Immoral Traffic (Prevention) Act, 1956. This Court entirely rejected the said contention in the following words:

"119. ...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." (emphasis added)

(ii) Injury to Public Morals: TheCourt 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.

79) Keeping in mind the aforesaid principles, we advert to the specific provisions.

Re: Section 2(8)(i) of the Act

80) Section 2(8) defines obscene dance. In the main body, it states that any dance which comes within the meaning of Section 294 of IPC and any other law for time being in force, shall be treated as 'obscene dance'. To this extent, there is no quarrel. The argument is that the definition of obscene dance is expanded beyond Section 294 of the IPC by specifically including following forms of dance:

"2(8)(i) which is designed only to arouse the prurient interest of the audience; and

(ii) which consists of a sexual act, lascivious movements, gestures for the purpose of sexual propositioning or indicating the availability of sexual access to the dancer, or in the course of which, the dancer exposes his or her genitals or, if a female, is topless;"

81) Insofar as clause (ii) is concerned, it is a reflection of Section 294 of IPC. Therefore, the petitioners have not taken any exception to this provision. The grievance is on the inclusion of clause (i). The submission is that the expression 'arouse the prurient interest of the audience' is vague, incapable of giving precise meaning thereto. It may be difficult to accept such a submission for the reason that in explaining as to what kind of books, pamphlets, papers, writings, drawings, paintings, representations, figures or any other object will be deemed as obscene, Section 292 of the IPC itself uses this very expression when it lays down that such books etc. shall be deemed to be obscene if they are 'lascivious or appeals to the prurient interest...'. In a way, therefore, Section 2(8) incorporates the definition of obscenity as laid down in the IPC which also makes obscene books etc. (Section 292 IPC) as well as obscene acts and songs (Section 294 IPC) as punishable offences.

82) Concise Oxford Dictionary (Tenth Edition, revised) defines the term 'prurient' as under:

"Prurient – adj. Having or encouraging an excessive interest in sexual matters.

- Derivatives prurience n. pruriency n. pruriently adv.

- origin C16 (in the sense 'having a craving'): from L. prurient-, prurire 'itch, long, be wanton'."

83) Other dictionary meanings given to this expression are:

"(i) Characterised by an inordinate interest in sex; prurient thoughts. When arousing or appealing to an inordinate interest in sex; prurient literature.

(ii) Inordinately interested in matters of sex, lascivious. In Psychology, a person who is unusually or morbidly interested in sexual thoughts or practices is known as prurient. Likewise, anything which

excites or encourages lustfullness and/or eroticism is termed as prurient. As per English language, therefore, such literature or other acts which are marked or tending to arouse sexual desire or interest or are of laturus, salacious, lascivious, voyeuristic would be treated as prurient and be categorised as obscene."

84) Thus, prurient interest in the context of dance performance would be a performance which has or which encourages an excessive interest in sexual matters.

85) We may also point out that the expression 'prurient interest' has come up for judicial determination as well. The U.S. Supreme Court in Brockett v. Spokane Arcades Inc.26 has discussed the issue of obscenity and, in the process, specifically dealt with the expression 'prurient', as can be discerned from the following observations: 26 1985 SCC Online US SC 165: 472 US 491 (1985) : 105 S.Ct. 2794 : 86 L.Ed.2d 394 "9. The Court of Appeals was of the view that neither Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), nor later cases should be read to include within the definition of obscenity those materials that appeal to only normal sexual appetites. Roth held that the protection of the First Amendment did not extend to obscene speech, which was to be identified by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."Id., at 489, 77 S.Ct., at 1311 (footnote omitted). Earlier in its opinion, id., at 487, n. 20, 77 S.Ct., at 1310, n. 20, the Court had defined "material which deals with sex in a manner appealing to prurient interest" as:

"I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines prurient, in pertinent part, as follows: " '. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . .' "Pruriency is defined, in pertinent part, as follows: " '. . . Quality of being prurient; lascivious desire or thought. . . .' "See also Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 242 [35 S.Ct. 387, 390, 59 L.Ed. 552 (1915)] where this Court said as to motion pictures: '. . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. . . .' (Emphasis added.) "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent.Draft No. 6, 1957), viz.:

" '. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .' See Comment, id., at 10, and the discussion at page 29 et seq."

xx xx xx

12. The Court of Appeals was aware that Roth had indicated in footnote 20 that material appealing to the prurient interest was "material having a tendency to excite lustful thoughts" but did not believe that Roth had intended to characterize as obscene material that provoked only normal, healthy sexual desires. We do not differ with that view. As already noted, material appealing to the "prurient interest" was itself the definition of obscenity announced in Roth; and we are quite sure that by using the words "lustful thoughts" in footnote 20, the Court was referring to sexual responses over and beyond those that would be characterized as normal. At the end of that footnote, as the Court of Appeals observed, the Roth opinion referred to the Model Penal Code definition of obscenity—material whose predominate appeal is to "a shameful or morbid interest in nudity, sex, or excretion" and indicated that it perceived no significant difference between that definition and the meaning of obscenity developed in the case law. This effectively negated any inference that "lustful thoughts" as used earlier in the footnote was limited to or included normal sexual responses. [This conclusion is bolstered by a subsequent footnote, 354 U.S., at 489, n. 26, 77 S.Ct., at 1311, n. 26, referring to a number of cases defining obscenity in terms of "lust" or "lustful." See Parmelee v. United States, 72 App.D.C. 203, 210, 113 F.2d 729, 736 (1940) (material is protected if "the erotic matter is not introduced to promote lust"); United States v. Dennett, 39 F.2d 564, 569 (CA2 1930) (sex education pamphlet not obscene because tendency is to "rationalize and dignify [sex] emotions rather than to arouse lust"); United States v. One Book Called "Ulysses," 5 F.Supp. 182, 184 (SDNY 1933), aff'd, 72 F.2d 705 (CA2 1934) (meaning of the word "obscene" is "[t]ending to stir the sex impulses or to lead to sexually impure and lustful thoughts"); Commonwealth v. Isenstadt, 318 Mass. 543, 549-550, 62 N.E.2d 840, 844 (1945) (material is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"); Missouri v. Becker, 364 Mo. 1079, 1085, 272 S.W.2d 283, 286 (1954) (materials are obscene if they "incite lascivious thoughts, arouse lustful desire"); Adams Theatre Co. v. Keenan, 12 N.J. 267, 272, 96 A.2d 519, 521 (1953) (BRENNAN, J.) (question is whether "dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire' ").] It would require more than the possible ambiguity in footnote 20 to lead us to believe that the Court intended to characterize as obscene and exclude from the protection of the First Amendment any and all speech that aroused any sexual responses, whether normal or morbid."

86) South African Court followed the aforesaid American approach, which can be seen from the following discussion in Patrick v. Minister of Safety and Security27:

"40. Attempts to produce and apply a definitive, certain and satisfactory definition of obscenity have taxed the ingenuity of American judges. In Jacobellis v. Ohio, Justice Potter Stewart famously declared: "I shall not today attempt further to define [obscenity] … and perhaps I could never succeed in intelligibly doing so. But I know it when I see it." [378 U.S. 184, 197 (1964) (concurring).] The Court has

attempted to clarify the Miller test by defining a “prurient” interest in sex as a “shameful or morbid” interest, as opposed to a “normal and healthy” interest. [Brockett v. Spokane Arcades, Inc.,, 472 U.S. 491, 504-05 (1985).] In my opinion, that elaboration does not, in itself, furnish a great deal of guidance.”

87) Even Delhi High Court has accepted the manner in which American Courts have dealt with the subject, which can be seen from the following observations in Amitabh Bachhan Corporation Ltd. v.

Om Pal Singh Hoon28:

"22. Question also arose before the U.S. Supreme Court in F.C.C. v. Pacifica Foundation (1978) 438 U.S. 726) as to the meaning of of word ‘indecent’. It was contended, relying on certain rulings that the particular words used in the radio broadcast were not ‘obscene’ and therefore not ‘indecent’, as both words were synonymous. The majority of the Court rejected the contention. The argument was stated as follows: “Pacifica argues, however, that this Court has construed the term ‘indecent’ in related statutes as obscene”. Rejecting the same, Stevens, J held:

“The words ‘obscene, indecent or profane’ are disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of ‘indecent’ merely refers to non-conformance with accepted standards of morality.” 27 1996 SCC Online ZACC 8 : [1996] ZACC 7 28 1996 SCC Online Del 268 : (1996) 37 DRJ 352 (DB) He quoted the meaning from Webster's Third New International Dictionary (1960): “Unseemly, not conforming to generally accepted standards of morality”.

88) This Court in Raj Kapoor & Ors. v. State & Ors.29 considered the question: When can a film to be publicly exhibited be castigated as prurient and obscene and violative of norms against venereal depravity. Thus, nowhere it is challenged as a vague term, incapable of precise definition.

89) It, therefore, cannot be said that a dance which is aimed at arousing the prurient interest of the audience is vague term, incapable of definite connotation. It is, more so, when Section 292 IPC particularly uses this expression in the deeming provision relating to obscenity. Re: Whether Section 6(4) of the Act is violative of equality clause enshrined in Article 19(1) of the Constitution?

90) This provision forbids grant of licence for discotheque or orchestra where licence under this Act is granted. Conversely it also forbids grant of licence under this Act for the place for which a licence for discotheque or orchestra has been granted. It means that in respect of a particular place, a licence would be granted either for dance bars or for discotheque/orchestra and not for both purposes. Submission is that there is no rationale for such a provision. The reply given by the 29 (1980) 1 SCC 43

respondents is that the purpose behind the aforesaid provision is to put stringent licence conditions for dance bars, which would not be possible if discotheque or orchestra as also on the same place where there is a dance bar. We hardly find this to be a valid justification. The impugned provision, in our view, is totally arbitrary and irrational and has no nexus with the so-called purpose sought to be achieved. We, therefore, strike down Section 6(4) of the Act as unconstitutional. Re: Whether punishment provided under Section 8(2) of the Act is discriminatory and offends Article 14 of the Constitution?

91) Precise submission of the petitioners in this behalf is that this punishment is for those who allow obscene dance etc. Obscenity is also an offence under Section 294 IPC which is punishable with imprisonment that may extend to three months. In contrast, as per the impugned provision, the imprisonment may extend to three years. It is, thus, argued that for the same offence, whereas the Central Act prescribes imprisonment upto three months, the prescription of imprisonment upto three years in Section 8(2) of the Act is violative of Article 14 and is in conflict with the IPC i.e. the central law. We are not impressed with this argument. As rightly argued by the respondents, sub-section (2) has to be read along with sub-section (1) of Section 8. Under Section 8(1), if the place is used in contravention of Section 3, it is made a punishable offence. It means that where a hotel, restaurant, bar room or any place is used for staging dances without obtaining a licence under Section 3 of the Act, that is made a punishable offence. 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 which is clear from the language of Section 294, that reads as under:

"294. Obscene acts and songs.—Whoever, to the annoyance of others—

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

92) Challenge to the validity of Section 8(2) of the Act, therefore, fails.

Re: Whether Section 8(4) of the Act is arbitrary and violative of Article 14?

93) This provision is to be read with condition Nos. 6, 7 and 8 of Part B. It makes throwing or showering coins, currency notes or any article or anything which can be monetized on the stage or handing over personally such notes, to a dancer is banned and treated as an offence. Further stipulation in these provisions is that any tip to be given should be added in the bill only and is not to be given to the

performers etc. The justification given by the State is that showering of money etc. is a method of inducement which has to be curbed keeping in view that Act aims to protect the dignity of women. According to the respondents, Section 354A of IPC which is a moral code of the society and the State is only attempting to preserve this moral code by enacting such a provision. 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.

94) Vide Section 12, Grievance Redressal Committee is constituted. Grievance of Mr. Nayyar, as noted above, is that it should have representation of bar dancers as well. Though, such a representation may be desirable, that by itself cannot be a ground to invalidate a legislation. We, therefore, leave it to the law makers to consider this aspect.

Legality of certain Rules

95) Insofar as Rule 3(3)(i) is concerned, there is a substance in the submission of the petitioners that it is quite vague. As per this sub-rule, a person is entitled to obtain or hold licence who possesses a ‘good character’ and ‘antecedents’ and he should not have any history of ‘criminal record’ in the past ten years. However, the terms ‘good character’ or ‘antecedents’ or ‘criminal record’ are not definite or precise. These expressions are capable of any interpretation and, therefore, it is left to the wisdom of the licensing authority to adjudge whether a particular person possesses good character or good antecedents or not. Likewise, insofar as history of criminal record is concerned, it is not spelled out as to whether such a criminal record is based on conviction in a case or mere lodging of FIR would be termed as criminal record. We, therefore, quash the provision in the present form, but, at the same time, give liberty to the rule making authority to have suitable provision of precise nature. Consequently, condition No. 16 of Part B in the present form is also set aside, with liberty as aforesaid.

96) Adverting to Condition No. 2 of Part A of general conditions (GOC), it can be dissected as under:

(i) Size of stage in the bar room should not be less than 10 feet x 12 feet. There is no objection to this.

(ii) It further stipulates that the stage in bar room has to be with non-transparent partition between hotel, restaurant and bar room area. In essence, it segregates bar room area from hotel and restaurant.

(iii) Fixed partition is prescribed between permit room and dance room.

97) It is this part which is taken exception of by the petitioners. We find that on an earlier occasion, similar condition was struck down by this Court. Even otherwise, we do not find any rationality or justification in imposing such a condition which appears to be quite unreasonable and there cannot be any rationale in this provision having regard to any objective sought to be achieved. Therefore, this provision is struck down.

98) As far as condition No.11 of Part A is concerned which stipulates that the place where dance is to be performed shall be at least 1 km away from the educational and religious institutions, the petitioners are right in their submission that such a condition does not take into account the ground realities particularly in the city of Mumbai where it would be difficult to find any place which is 1 km away from either an education institution or a religious institution. This, therefore, amounts to fulfilling an impossible condition and the effect thereof is that, at no place, in Mumbai, licence would be granted. Therefore, this condition is also held to be arbitrary and unreasonable and is quashed, with liberty to the respondents to prescribe the distance from educational and religious institutions, which is reasonable and workable.

99) Insofar as condition No.2 of Part B is concerned, it imposes an obligation on the employers to the effect that working women, the dancers and waiters/waitresses must be employed under a written contract on a monthly salary. Further, this monthly salary is to be deposited in their bank accounts with all the benefits required under the law. Copy of such contracts is to be deposited with the licensing authority as well. Insofar as provision relating to entering into a written contract as well as depositing of the remuneration in the bank accounts is concerned, it appears to be justified as it would make the conditions on which such working women, dancers and waiters/waitresses are employed, transparent thereby eliminating or minimising any chances of exploitation or other disputes. However, the condition of employing such persons on monthly salary does not stand the judicial scrutiny. This shows that such

persons are to be employed in a particular manner i.e. on monthly basis. There can be other modes of employment permissible in law and the employers have legal right to adopt such modes. For example, it could be employment on contract basis i.e. where the remuneration can be fixed for each performance. Moreover, it impinges upon the rights of such workers as well who may, otherwise, be free to give their performances at more than one place. Therefore, it imposes restriction even upon such employees and infringes their right under Article 19(1)(g). This is the grievance raised on behalf of such women in the petition argued by Mr. Nayyar who submitted that the provisions adversely affect women dancers by (i) restricting their freedom to move from one bar to another at their will, if the work conditions or the returns are not suitable; (ii) prohibit them from monetizing dances other than by way of receiving salary or shared tips. More importantly, the State Government has failed to show any compelling public interest to curtail the choices of women performers. We find substance in the aforesaid submission and, therefore, set aside this part of Condition No. 2. We make it clear that the provisions for written contract, deposit of the remuneration in the bank accounts of the employee as well as submission of these written contracts with the licensing authority are appropriate. Rest of the provision is struck down.

100) Adverting to the condition No. 9 of Part B which prescribes timing of such dance performances only between 6 pm to 11:30 pm, we do not find it to be manifestly unreasonable. Merely because establishments are otherwise open until 1:30 am (next day) or 12:30 am (next day) does not mean that the State has no power to restrict the time of dance performances till 11:30 pm. Even a period of 6 pm to 11:30 pm for dance performances is quite sufficient and substantial as it allows 5½ hours of such performances. We, therefore, uphold this condition.

101) 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.

102) Condition No. 20 of Part B mandates installing of CCTV Cameras. This again would be totally inappropriate and amounts to invasion of privacy and is, thus, violative of Articles 14, 19(1)(a) and 21 of the Constitution as held in K.S. Puttaswamy case, where the Court observed:

"247.3. Anita Allen has, in a 2011 publication, developed the concept of “unpopular privacy” [Id, at p. 500] . According to her, Governments must design “unpopular” privacy laws and duties to protect the common good, even if privacy is being forced on individuals who may not want it. Individuals under this approach are not permitted to waive their privacy rights. Among the component elements which she notices are: (a) physical or spatial privacy — illustrated by the privacy in the home; (b) informational privacy including information data or facts about persons or their communications; (c) decisional privacy which protects the right of citizens to make intimate choices about their rights from intrusion by the State; (d) proprietary privacy which relates to the protection of one's reputation; (e) associational privacy which protects the right of groups with certain defined characteristics to determine whom they may include or exclude. [Id, at pp. 500-501]” This condition is also set aside.

103) Before parting, we would like to re-emphasise that the State cannot take exception to staging dance performances per se. It appears from the history of legislative amendments made from time to time that the respondents have somehow developed the notion that such performances in the dance bars do not have moralistic basis. Initially the law was passed in the year 2005 by inserting Sections 33A and 33B in the Maharashtra Police Act, 1951. At that time, by the said amendment, State desired total prohibition on the performance of dance in eating house, permit room or bear bar on the premise that such performances are always indecent, obscene or vulgar. It was also on the notion that such performances were giving rise to exploitation of women as well. However, while upholding the decision of the High Court declaring Section 33A of Maharashtra Police Act, 1951 to be unconstitutional, this Court found and specifically held that there was no material or empirical data in the aforesaid perception garnered by the State. This Court also held that the impugned provision did not pass the muster of constitutional provisions as it was found to be violative of Articles 14, 19(1)(a) and 19(1)(g) of the Constitution. The Court also categorically observed that there were enough statutory provisions in number of Acts and Rules (which are stipulated in Paras 127 to 131 of the said judgment).

104) The present legislation is given a cloak of bringing regulatory regime to regulate the places where there are dance performances. For this purpose, the impugned Act does not permit dance performances without obtaining licence under Section 3 of the Act. Further, it makes obscene dances as penal offence. No quarrel on this. However, at the same time, many conditions are stipulated for obtaining the licence, which are virtually impossible to perform. It is this reason that not a single establishment has been issued licence under the impugned Act even when it was passed in the year 2014. In fact, after the amendment in Maharashtra Police Act in 2005, no licences have been granted for dance bars. Thus, even when the impugned Act appears to be regulatory in nature, the real consequences and effect is to prohibit such dance bars. The State, thereby, is aiming to achieve something indirectly which it could not do directly. Such a situation is beyond comprehension and cannot be countenanced. We have quashed those provisions of the Act and the Rules which we have found as unreasonable and unconstitutional. We hope that applications for grant of licence shall now be considered more objectively and with open

mind so that there is no complete ban on staging dance performances at designated places prescribed in the Act.

105) The writ petitions stand partly allowed and are disposed of in the aforesaid terms.

.....J.

(A.K. SIKRI) .....J.

(ASHOK BHUSHAN) NEW DELHI;

JANUARY 17, 2019.