REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2705 OF 2006

State of Maharashtra & Anr.
...Appellants

VERSUS

Indian Hotel & Restaurants Assn. & Ors.
...Respondents

WITH

CIVIL APPEAL NO.2704 OF 2006

State of Maharashtra & Ors. Etc. Etc.
..Appellants

VERSUS

Ramnath Vishnu Waringe Etc. Etc.
...Respondents

WITH

CIVIL APPEAL NO._5504____ OF 2013
[Arising out of S.L.P. (C) No.14534 of 2006]

Ghar Hakka Jagruti Charitable Trust
...Appellant

VERSUS

State of Maharashtra & Ors.
...Respondents

J U D G M E N T

SURINDER SINGH NIJJAR,J.

1. Leave granted in SLP (C) No.14534 of 2006.

2. These civil appeals seek to challenge common judgment and final order dated 12th April, 2006 in Writ Petition No.2450 of 2005, W.P. No.2052 of 2005, W.P.No.2338 of 2005 and W.P.No.2587 of 2005 passed by the High Court of Judicature at Bombay, whereby Section 33A of the Bombay Police Act, 1951 as inserted by the Bombay Police (Amendment) Act, 2005 has been declared to be *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India.

Summary of Facts –

3. Brief facts leading to the filing of the aforesaid writ petitions are –

The Bombay Police Act, 1951 (hereinafter 'the Act') was enacted in the year 1951 with the object of consolidating and amending the law relating to the regulation of the exercise of powers and performance of the functions by the State Government for maintenance of public order. Section 33 of the Act authorises the State Government to frame rules regulating places of public amusement and entertainment. By virtue of Section 33 of the Act, the *"Rules for Licensing and Controlling Places of Public Amusement (other than*

Cinemas) and Performances for Public Amusement including Melas & Tamashas, 1960" (hereinafter 'the Rules') were enacted to regulate and maintain discipline in places of public amusement, melas etc.

4. In 1986, orchestra and dance in hotels was permitted to be performed pursuant to the Rules and such institutions functioned under terms and conditions laid down therein. However, several cases relating to violation of the terms and conditions of performance licences came to be registered. It is claimed that 20,196 cases were registered under Section 33(w), 110 and 117 of the Act from the year 2000 till 2005. Also, various cases of minor girls being rescued from dance bars were reported during the said period 2002-2005. The appellants have referred to the case histories from the Government Special Rehabilitation Centre for Girls (Special Home) of 10 girl children rescued from such establishments under Immoral Traffic (Prevention) Act, 1956 by Mumbai Police, which according to the appellants, correctly depict the prevailing situation.

The Government of Maharashtra, Home Department, on 10th December, 2002 passed resolution No. REH 012002/153/SE-5, noting therein :

> "It has come to notice that prostitution rackets are being run through pick up points in hotel establishments in which dance programmes are being conducted (Dance Bars) and that dance forms being presented therein are horrid and obscene and that criminals are being sheltered in such hotels. Such undesirable practices going on in hotel establishments have an adverse effect on society."

It was resolved to form a committee to make suggestions for amending the rules to deal with:

a) Remedial measures to check other undesirable practices going on in hotel establishments presenting dance programmes.

b) To prevent prostitution in hotel establishments

c) Remedial measures to see that criminals are not sheltered in hotel establishments;

d) To frame a code specifying what type of dance forms should be presented in hotel establishments.

e) Creating a roving squad to check undesirable practices in hotel establishments and take strict action against owner of those establishments.

5. Pursuant to the aforesaid resolution, the Committee submitted its recommendations which were incorporated and circulated to all the concerned authorities through the letter of the Home Department No. REH 012002/153/SB-5 dated 16th July, 2004. In this letter, the suggested regulations were summarized as follows:

a. There should be restrictions on the attire of the dancers.

b. Dancing area must have a railing 3 feet high around it, and customer seats should be at least 5 feet away from the railing.

c. Dance floor to be of dimension of 10 x 12 ft so not more than 8 dancers can dance simultaneously.

d. Customer rewards for dancing are to be routed through management of the establishment and customers are banned from going near the dancers or "showering money".

e. Names of dancers are to be registered with the establishment, a record kept of their employment, including details of identity/citizenship and place of residence.

6. This letter instructed all Judicial Magistrates and Police Commissioners to implement these recommendations with immediate effect.

7. On 6th August, 2004 the Chairperson of the Maharashtra State Commission for Women wrote to the State Government about the ongoing racketeering to lure girls to work in dance bars and their consequent acts of prostitution and immoral trafficking stating:

> "Number of rackets indulging into physical and financial exploitation of girls working in dance bars by forcibly bringing them into this profession are found to be increasing alarmingly. In the metropolis

> of Mumbai, the problems of the bar girls have acquired grave dimensions and have resulted even into death of many bar girls. These women are forcibly induced into prostitution leading to total destruction of their life."....

Further

> "Most of the girls working in Dance Bars of Maharashtra State do not hail from State of Maharashtra, but come from other States."
> ....
>
> "In the future this problem in all the probability would spoil our social health by acquiring increasingly grave dimensions, not confined only to Mumbai but extending to the National and even International levels."

8. The letter went on to recommend a ban on such establishments by stating:

> "I therefore, request you that the system of issuing permits to the Bar Girls by various departments of Government should be stopped forthwith, thereby relieving the women from their physical, sexual and financial exploitation in the future."

9. According to the appellant, the seriousness of the issues involved is well documented of which the Home Department was fully aware. The material available before the Home Department was as under:

a. Copies of case history of 10 girl children rescued from dance bar(s) under Immoral Traffic (Prevention) Act, 1956.

b. Copies of complaints of victims' families against illicit relations with bar dancers.

c. Copies of complaints of Social Organizations against dance bars.

d. Copies of FIRs of cases registered in relation to dance bars.

e. Summary of cases registered under the Immoral Traffic (Prevention) Act, 1956, u/s 294 IPC, u/s 33(w) & 110 of Bombay Police Act, 1951 during the period 2000-2005 regarding dance bars.

10. Apart from this, a study of the socio-economic situation and rehabilitation needs of the women in dance bars was conducted by PRAYAS (a field action project of the Tata Institute of Social Sciences) in 2005. This study pointed out the relevant facts regarding exploitation of minor girls in dance bars. The study also pointed out that there was presence of the *element* of human trafficking in the entire process; and that the *environment* of the dance bars was found to have *negative impact* on the physical and mental health of the minor girls. The study also pointed out that the atmosphere in the dance bars increased the vulnerability of the minor children to sexual exploitation. It is also the case of the appellants that independent of registration of offences under Bombay Police Act and PITA Act as well as IPC, several complaints had been received from various segments of society urging the State

Government to take steps for closure of the dance bars by legislative action.

11. Taking into consideration the aforesaid material, the members of the Maharashtra Legislative Assembly expressed deep concern over the ill effects of dance bars on youth and dignity of women. The Assembly further felt that the existing measures were insufficient to tackle the subject. Just at that time, a 'Call Attention Motion' was tabled by Shri Vivek Patil in the State Legislative Assembly on 30th March, 2005. A detailed reply was given by Shri R.R. Patil, Hon'ble Dy. Chief Minster to the same, on 21st July, 2005. Taking stock of the entire situation, the State Government came to a tentative opinion that 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 and/or injure public morality. It was evident on the basis of the material available to the Government that permit rooms or beer bars licensed under the relevant rules, were indulging in exploitation of women by permitting the performance of dances in an indecent obscene or vulgar manner. The Government, therefore, considered it expedient to prohibit

such dance performances in eating houses or permit rooms or beer bars.

12. It was emphasised that even prior to the aforesaid decision, the attention of the Government had been invited to mushrooming growth of illegal dance bars and their ill- effects on the society in general, including ruining of some families. The dance bars were also used as meeting points by criminals and pick up joints of girls indulging in immoral activities. Young girls desirous of earning easy money were being attracted to such dance bars and getting involved in immoral activities. The decision was, therefore, taken by the State Government to prohibit performance of dance in eating houses or permit rooms or beer bars by suitably amending the Bombay Police Act, 1951.

13. The State Government took a conscious decision upon consideration of the various factors to add Sections 33A and 33B to the Bombay Police Act. The necessary amendment was introduced in Maharashtra Legislative Assembly on 14th July, 2005. The Bill was passed by the Legislative Assembly on 21st July, 2005 and by the

Legislative Council on 23rd July, 2005. The amended Act No. 35 of 2005, incorporating Sections 33A & 33B in the Bombay Police Act, 1951, came into force after receiving the assent of the Governor of the Maharashtra by publishing in the Maharashtra Gazette on 14th August, 2005.

Writ Petitions before the High Court of Bombay

14. The Amendment to the Bombay Police Act of 1951, introducing Sections 33A and 33B, was challenged as being unconstitutional in several writ petitions before the High Court of Bombay, which are tabulated as under:

Writ Petition Number	Party
WP 2450/2005	Indian Hotel and Restaurants Owners Association, 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.
WP 2052/2005	Bharatiya Bar Girls Union, a registered trade union claiming a membership of 5000, whose members work as bar girls in different parts of Maharashtra.
WP 2338/2005	The Parties in this petition are a group of six petitioners, who are women's organizations working in the field of women's development.
WP 2587/2005	The 1st petitioner is a trust registered under the Public Trust Act, working with sex workers in the Malvani area of Malad in Mumbai. The 2nd petitioner is the Ekta Self Group which consists of 10 bar dancers.
WP 1971/2005 Criminal WP	The petitioner is the Association of Dance Bar owners duly registered under the Trade Unions Act, and have as their members 344 dance bars.
WP 6930-6931/2005	Proprietors of two establishments who are affected by the amendments to the Police Act.
WP 5503-5504/2005	Proprietors of two establishments who are

	affected by the amendments to the Police Act.

It was contended:

- That the State of Maharashtra does not have the legislative competence to enact the impugned law as 'morality' does not fall within the ambit of List II of Schedule 7 and that the impugned enactment falls in the concurrent list.

- That the impugned amendment was not reserved for the assent of the President and therefore is unconstitutional under Article 254 of the Constitution and also that the State does not have the power to implement international conventions and hence this enactment amounts to fraud on the Constitution.

- That the enactment results in interference with the independence of judiciary as no reasons are provided under S. 33A(2) of the Act for awarding lesser punishments.

- That the affidavit filed by Youraj Laxman Waghmare was not in compliance with Order 19 Rule 3 of the Civil Procedure Code as no verification clause was provided.

- That the establishment of the petitioners is a place of public entertainment and public amusement as defined under S. 2(10) and 2(9) respectively and not an "eating place" under S.2(5A) of the Bombay Prohibition Act, 1951 and hence the provisions do not bind the petitioners.

- That S. 33A and 33B are arbitrary under Article 14 as they provide for different standards of morality to institutions with similar activities and that the activities in S. 33A establishments are less obscene but nonetheless the classification bears no nexus to the object of the Amendment.

- That S. 33A is violative of Article 15 on the basis of gender discrimination as the dancers are mainly women.

- That there is violation of Article 19 (1)(a) as dance is a form of

expression and that the impugned enactment is an unreasonable restriction and it is not by protected by Article 19(2).

- That there is an unreasonable restriction on 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 of their right to carry on business and bar dancers the right to carry on their profession.

- That right to life under Article 21 is infringed as right to life includes right to livelihood and that the State has not provided for any rehabilitation.

15. The State of Maharashtra defended the challenge to enactment as follows:

- That the impugned enactment is covered by the List II. Entries 1- Public Order, 2- Police, 6- Public Order, 8- Intoxicants, 33- Entertainment or Amusement, 64- Offences against laws.

- That the 'eating houses' are covered in the impugned enactment as they would fall in public entertainment places, as license is issued to an eating house, which enjoys an additional facility to serve liquor, wine and beer.

- That there is no violation of Article 19(1)(a) as the dance being conducted is not an expression but a profession where restrictions can be imposed.

- That there is no violation of Article 15 as the ban on obscene dance applies to men and women.

- That the several minor girls danced to get rewarded with cash by enticing customers, that led to a competition between performers leading to greatest rewards reserved for the greatest indignities which escalated prostitution which lead to registration of several cases under Prevention of Immoral Trafficking Act and under Bombay Police Act. That this led the legislatures to make an independent

classification of these establishments to safeguard the dignity of women, and public morality. That there are only six exempted establishments and that obscene performances are not permitted in such exempted establishments. Hence there is no violation of Article 14.

- That with regard to Article 19(I) (g) there is no absolute right to conduct trade or profession and that the same is subject to public order, decency and morality and hence the restriction is reasonable and justified.

- That there is no violation of Article 21 as special cell has been constituted by Women and Child Welfare Department to train and assist the "bar girls" in availing benefits of the various Government Schemes for employment and providing alternative dignified vocations.

16. After considering the aforesaid arguments of both the sides, the High Court has, *inter alia*, held that the type of dancing in both categories of establishments differs and while the difference is not capable of precise legislative definition, it is sufficient to constitute intelligible differentia. However, the fact of different types of dancing being performed bears no nexus with the object sought to be achieved, which, as understood by the Bombay High Court, was limited to the exploitation of women dancers. Consequently, the operation of the impugned enactment is discriminatory.

17. With these observations, the High Court declared that Sections 33A and 33B of the Bombay Police Act, 1951 are *ultra vires* Articles 14 and 19(1)(g) of the Constitution of India.

18. We have heard the learned counsel for the parties at some length. But before we notice the submissions at this stage it would be appropriate to reproduce the provisions in Sections 33A and 33B of the Bombay Police Act, 1951.

Sections 33A and 33B of the Bombay Police Act:

19. The provisions read as under:

"33A(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, performance, of any kind or type, in an eating house, permit room or beer bar shall stand cancelled.

(2) Notwithstanding anything contained in Section 131, any person who holds or causes or permits to be held a dance performance of any kind or type, in an eating house, permit room or beer bar in contravention of Sub-section (1) shall, on conviction, be punished with imprisonment for a term which may extend to three years and with fine which may extend to rupees two lakhs:
Provided that, in the absence of special and adequate reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than rupees fifty thousand.

(3) If it is, noticed by the Licensing Authority that any person, whose performance licence has been cancelled under Sub-section (1), holds or causes to be held or permits to hold a dance performance of

any kind or type in his eating house, permit room or beer bar, the Licensing Authority shall, notwithstanding anything contained in the rules framed under section 33, suspend the Certificate of Registration as an eating house and the licence to keep a Place of Public Entertainment (PPEL) issued to a permit room or a beer bar and within a period of 30 days from the date of suspension of the Certificate of Registration and licence, after giving the licensee a reasonable opportunity of being heard, either withdraw the order of suspending the Certificate of Registration and the licence or cancel the Certificate of Registration and the licence.

(4) .....

(5).....

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

33B. Subject to the other provisions of this Act, or any other law for the time being in force, nothing in section 33A 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."

Statement of Objects and Reasons

20. The Statement of Objects and Reasons clause appended to Bill No. LX of 2005 as introduced in the Maharashtra Legislative Assembly on 14th June, 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 Page 1267 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 peoples' 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."

Preamble

"Whereas the Commissioners of Police, District Magistrates and certain other Officers, have granted performance licences for holding dance performance;

And whereas the object of granting such performance licences is to hold such dance performance for public amusement;

And whereas it is brought to the notice of the State Government that the eating houses, permit rooms or beer bars to whom licences to hold a dance performance have been granted are permitting performance of dances in an indecent, obscene or vulgar manner;

And whereas it has also been brought to the notice of the Government that such performance of dances are giving rise to exploitation of women;

And whereas the Government has received several complaints regarding the manner of holding of such dance performance;

And whereas the Government considers that such performance of dances in eating houses, permit rooms or beer bars are derogatory to the dignity of woken and are likely to deprave, corrupt or injure the public morality or morals.

And whereas the Government considered it expedient to prohibit such holding of performance of dances in eating houses, permit rooms and beer bars."

Legal Submissions:

21. Mr. Harish N. Salve, Mr. Gopal Subramanium and Mr. Shekhar Naphade, learned senior counsel, have on different occasions made submissions on behalf of the appellants. Mr. Gopal Subramanium has supplemented the oral submissions by written submissions. The common submissions are noted with the appellation of learned senior counsel, referring to all the aforesaid learned senior counsel.

22. Learned senior counsel have made submissions confined only to the issue as to whether Sections 33A and 33B of the Bombay Police Act infringe Article 14 and with regard to the provisions being *ultra vires* Article 19(1)(g) of the Constitution as all the other issues raised by the respondents were rejected by the High Court. The High Court had specifically rejected the challenge to the *vires* of the provisions under Article 15(1), 19(1)(a) and Article 21.

23. Learned counsel for the appellants submitted that the classification made by the impugned enactment is based on intelligible differentia, having a nexus with the object

sought to be achieved. It is submitted that the impugned order suffers from flawed reasoning. The classification made between establishments under Sections 33A and 33B is not solely on the basis of the different kinds of dance performances but also on differing social impact such establishments have, by virtue of having differing dance performances and surrounding circumstances including the customers. Therefore according to Mr. Gopal Subramanium, the establishments must be understood in broader terms than is understood by the High Court. According to Mr. Harish Salve and Mr. Gopal Subramanium, the judgment of the High Court is too restrictive.

24. It was emphasised by the learned senior counsel that the High Court has failed to understand the distinction between the two provisions and the object sought to be achieved. Mr. Gopal Subramanium has listed the differences factored into the classification made by the impugned enactment. According to the learned senior counsel, the impugned enactment is based on intelligible differentia which could be categorized under the following broad heads:

(i) Type of dance; (ii) Form of remuneration; (iii) Demand for vulnerable women; (iv) Degree of Harm; (v) Regulatory feasibility.

25. It was submitted that in the banned establishments, the women who dance are not professional dancers. In fact, they are majorly trafficked into this profession or have taken this profession when they had no other option. Further, the dance is vulgar and obscene. Women are showered with money when they are dancing, which does not happen in the exempted establishments. Learned senior counsel further submitted that the classification based on type of dance need not be scientifically perfect but ought not to be palpably arbitrary. According to the learned senior counsel, in the present case, it is not just that the type of dance performed is different but the surrounding circumstances are also different. In the exempted establishments, the distance between the dancing platform and the audience is greater than at the banned establishments. This, according to the learned senior counsel, is sufficient to justify the classification between the exempted establishments and the banned establishments. Therefore, it cannot be said that the classification is *palpably arbitrary*. In support of the

submissions, the learned senior counsel relied on the observations made by this Court in **Shashikant Laxman Kale & Anr.** Vs. **Union of India & Anr.**[1] wherein this Court observed as follows :-

> "We must, therefore, look beyond the ostensible classification and to the purpose of the law and apply the test of 'palpable arbitrariness' in the context of the felt needs of the times and societal exigencies informed by experience to determine reasonableness of the classification.

26. Reliance was also placed **Welfare Association, A.R.P., Maharashtra & Anr.** Vs. **Ranjit P. Gohil & Ors.**[2], wherein this Court observed that:

> ".....It is difficult to expect the legislature carving out a classification which may be scientifically perfect or logically complete or which may satisfy the expectations of all concerned, still the court would respect the classification dictated by the wisdom of the legislature and shall interfere only on being convinced that the classification would result in pronounced inequality or palpable arbitrariness on the touchstone of Article 14."

27. With regard to the form of remuneration, learned senior counsel submitted that remuneration to dancers in banned establishments is generally made out of the money which is showered on them. This creates an unhealthy competition between the dancers to attract the attention of the customers. Therefore, each dancer tries to outdo her competitors in terms of sexual suggestion through

[1] (1990) 4 SCC 366
[2] (2003) 9 SCC 358

dance. This, in turn, creates an unsafe atmosphere not just for the dancers, but also for the other female employees of such establishments.

28. Relying on the report by **Shubhada Chaukhar**, learned senior counsel submitted that 84% of the bar dancers are from outside the State of Maharashtra. These girls are lured into bar dancing on false pretext. Supporting this submission, the following observations are pointed out in the same report:

> "Some unmarried girls have entered the world of bars just because of its glamour. Not a few have come of their own free will. Many less educated girls are attracted to a livelihood that makes them quick money".

29. On the basis of the aforesaid, learned senior counsel submitted that the activities that are carried out in establishments covered under Section 33A i.e. not just the dance itself but the surrounding circumstances of the dance are calculated to raise the illusion of access to women, irrespective of the consent or dignity of women, in men who are often in an inebriated condition. In this context, learned senior counsel relied on the case history of girl children rescued from the dance bar(s) under Immoral Traffic (Prevention) Act, 1956; complaints of

victims family against illicit relations with bar dancers; complaints of social organizations against dance bars; copies of First Information Reports of cases registered in relation to dance bars; summary of cases registered under PITA Act, 1956, under Section 294 IPC, under Section 33(w) & 110 of Bombay Police Act, 1951 during the period 2000-2005 regarding dance bars.

30. It is submitted by the learned senior counsel for the appellants that by comparison such complaints have been minimal in the case of exempted establishments. The same kind of behaviour is not seen as a norm. Learned senior counsel submitted that undesirable, anti social and immoral traffic is directly relatable to certain kind of dancing activities performed in prohibited establishments which are not performed in exempted establishments. Therefore, there is a rational distinction between the exempted establishments and the prohibited establishments. In support of the submissions, reliance was placed on the judgment of this Court in the case of **State of Uttar Pradesh** Vs. **Kaushailiya & Ors.**[3], wherein the constitutional validity of Immoral Traffic in Women and Girls Act, 1956 was called in question. This Court upheld the validity of the classification between a prostitute who is a public nuisance and one who is not.

[3] AIR 1964 SC 416

31. Taking up the next head on which the classification has been sought to be justified as intelligible differentia, i.e. "the demand for vulnerable women," learned senior counsel relied on certain observations made by one **Cathatine Mackinnon** (1993) in an article entitled "*Prostitution and Civil Rights"* which appeared in Michigan Journal of Gender & Law, Volume I : 13-31. The argument given by the author therein was that:

> "If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?... The money thus acts as a form of force, not as a measure of consent. It acts like physical force does in rape."

32. Taking cue from the aforesaid comments, learned senior counsel submitted that the dancing that takes place in the banned establishments has a similar effect on the psyche of the woman involved, and functions within the same parameters of the understanding of consent. It was emphasised that as a general rule, dancing in a dance bar is not a profession of choice, but of necessity, and consequently, there is a demand not for women of means and options, but *vulnerable women,* who may not have families and communities to turn to and are completely dependent on their employers. In support of the aforesaid

submissions, reliance was placed upon **Prayas** and **Shubhada Chaukar** Reports.

33. It was submitted that the High Court erroneously ignored the contents of the reports extracted above.

34. Now coming to the next head: "Justifying the classification on the criterion of "Degree of Harm." The appellants emphasised that the characteristics of the dancing that is sought to be prohibited have, to a greater degree than the activities that may be comparable at first blush, created an atmosphere where physical and emotional violence to women was both profitable and normalized. It is, therefore, rational to classify these establishments as a separate class based on the degree of harm that they trigger. Support for this submission is sought from the observations made by this Court in **Ram Krishna Dalmia** Vs. **Justice S.R. Tendolkar**[4] wherein it was observed as follows:

> "The decisions of this Court further establish – (d) that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest."

35. Reliance was also placed on the observations made in

[4] AIR 1958 SC 538

the case of **Joseph Patsone** Vs. **Commonwealth of Pennsylvania**[5]. This was a case whereby an Act in Pennsylvania made it unlawful for unnaturalised foreign born residents to kill wild game, except in defence of person or property. The possession of shot guns and rifles by such persons was made unlawful. The Act was challenged as being unconstitutional under due process and equal protection provisions of the 14th Amendment of the United States Constitution. The Court upheld the Act as constitutional and observed as follows:

> "The discrimination undoubtedly presents a more difficult question, but we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if as a matter of fact, it is found that the danger is characteristic of the class named. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61,80,81. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses'…….. The question therefore narrows itself to whether this court can say that legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalised aliens were the peculiar source of the evil that it desired to prevent. Barrett v Indiana, 229 U.S. 26, 29.

[5] 232 U.S. 138 (1914)

> Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the stale legislature was wrong in its facts. *Adams v Milwaukee, 228 US. 572, 583.* If we might trust popular speech in some states it was right - but it is enough that this Court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."

36. Reliance was also placed on the observations made in **Keokee Consolidated Coke Co.** Vs. **Taylor**[6], which are as follows:

> "It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature to judge unless the case is very clear."

37. The next judgment relied upon by the appellants is **Radice** Vs. **People of the State of New York**[7], in which the 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. The Court upheld the legislation in the following words :

> “Nor is the statute vulnerable to the objection that it constitutes a denial of the equal protection of the laws. The points urged under this head are (a) that the act discriminates between cities of the first and second class and other cities and communities; and

[6] 234 U.S.224 (1913)
[7] 264 U.S. 292 (1924)

> (b) excludes from its operation women employed in restaurants as singers and performers, attendants in ladies' cloak rooms and parlors, as well as in lunch rooms or restaurants conducted by employees solely for the benefit of their employees.
>
> The limitation of the legislative prohibition to cities of the first and second class does not bring about an unreasonable and arbitrary classification. *Packard v Banton, ante, 140; Hayes v Missouri*, *120 U.S. 68*. Nor is there substance in the contention that the exclusion of restaurant employees of a special kind, and of hotels and employees' lunch rooms renders the statute obnoxious to the Constitution. *The statute does not present a case where some persons of a class are selected for special restraint from which others of the same class are left free (Connolly v Union Sewer Pipe Co., 184 U.S. 540, 564); but a case where all in the same class of work are included in the restraint.* Of course, the mere fact of classification is not enough to put a statute beyond reach of equality provision of the Fourteenth Amendment. Such classification must not be "purely arbitrary, oppressive or capricious". *American Sugar Refining Co. V Louisiana, 179 U.S. 89, 92*. But the mere production of inequality is not enough. Every selection of persons for regulation so results, in some degree. The inequality produced, order to counter the challenge of the constitution must "actually and palpably unreasonable and arbitrary." .....

The U.S. Court then relied upon the observations made in **Joseph Patsone's case (supra), Keokee Consolidated Coke Co. case (supra)** which we have already noticed.

38. Further, learned counsel supported the submissions by relying upon the case of **Mohd. Hanif Quareshi** Vs. **State of Bihar**[8], wherein the court held as under:

[8] AIR 1958 SC 731

> ".....The Courts, it is accepted, must presume that the legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. It must be borne in mind that the legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest and finally that in order to sustain the presumption of Constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

39. On the basis of the aforesaid extracts, learned counsel submitted that the classification between the exempted establishments and prohibited establishment is also based on "Degree of Harm". The legislature is the best judge to measure the degree of harm and make reasonable classification.

40. Coming to the next factor– **Regulatory Feasibility**, which, according to the learned senior counsel, supports the validity of the classification. It was submitted that the import of the impugned enactment is not that, what is prohibited in establishments under Section 33A is to be permitted in establishments under Section 33B. It is submitted by the appellants that the acts which are degrading, dehumanising and facilitating of gender violence in society do not cease to be so simply by virtue

of it being made exclusively available to an economically stronger sections of society. It is the submission of the appellants that the State has already made extensive regulatory provisions under various enactments. This relates to the grant of nature of license, terms and conditions of such licence, performance permits. All these regulatory measures are with a view to cure social evils. The impugned enactment, according to the appellants, is a form of an *additional* regulation. It is justified on the ground that the existing system of licenses and permits is not sufficient to deal with the problem of ever increasing "dance bars". Relying on the observations made by this Court in **S.P. Mittal** Vs. **Union of India & Ors.**[9] it was submitted by the appellants that it is the prerogative of the Government to decide if certain forms of regulation are insufficient, to provide for additional regulation. Reliance was also placed on the observations made in the case of **Radice** Vs**. People of the State of New York (supra)** which are as under :-

> "The basis of the first contention is that the statute unduly and arbitrarily interferes with the liberty of two adult persons to make a contract of employment for themselves. The answer of the state is that night work of kind prohibited, so injuriously threatens to impair their peculiar and natural functions, and so exposes them to the dangers and menaces incident to night life in large cities, that a statute prohibiting

[9] (1983) 1 SCC 51

such work falls within the police power of the state to preserve and promote the public health and welfare.

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. We cannot say that the conclusion is without warrant..... The injurious consequences were thought by the legislature to bear more heavily against women than men and considering their delicate organism, there would seem to be good reason for so thinking. The fact, assuming it to be such, properly may be made the basis of legislation applicable only to women. Testimony was given upon the trial to the effect that the night work in question was not harmful; but we do not find it convincing. Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker. The state legislature here determined that the night employment of the character specified, was sufficiently detrimental to the health and welfare of women engaging in it to justify its suppression; and, since we are unable to say that the finding is clearly unfounded, we are precluded from reviewing the legislative determination".

41. Relying on the aforesaid, it is submitted that exempted establishments as understood by Section 33B are gymkhanas, three starred or above hotels. In order to be considered three stars or above establishments, such establishments have to meet greater degrees of scrutiny, both from Government and from private associations (hoteliers, reviewers etc). *In fact, such establishments generally maintain standards higher than the standards*

expected of them under the regulation. Therefore, the regulation of such establishments is significantly easier, as opposed to the prohibited establishments. These establishments function, according to the appellants, to a greater degree, outside the constant scrutiny of the law. It is also pointed out that it is significantly easier to police the exempted establishments, which at present are six in number, than attempting to police the much greater number of prohibited establishments. It is also pointed out that in cases where an exempted establishment is found carrying out activities prohibited in S.33A, it is incumbent on the relevant authority to revoke the permission for such acts. Therefore, it was submitted that the significant difference in feasibility of regulation is another basis for classifying prohibited establishments. The High Court, according to the counsel, failed to examine the two provisions in a proper perspective.

42. The next submission of the appellants is that "the objective of the Act is an expression of the Obligation on the State to secure safety, social order, public order and dignity of women." It is submitted that a bare perusal of the Preamble of the amending Act and the Statement of

Objects and Reasons would make it clear that the State enacted the legislation only after receipt of complaints from various social organizations as well as from various individuals. The Preamble makes it clear that the legislature had enough material to show that the performance of dance in the said bars gives rise to exploitation of women, and further that the performance of dances in eating houses, permit rooms or beer bars are derogatory to the dignity of women and are likely to deprave, corrupt or injure the public morality or morals. The High Court ought to have considered the Statement of Objects and Reasons and Preamble of the Act to discern the true intention of the legislature. In support of the submission that the Court ought to have looked at the objects and reasons, reliance is placed on the observations of this Court in **Shashikant Laxman Kale (supra),** wherein it is observed as follows:

> "It is first necessary to discern the true purpose or object of the impugned enactment because it is only with reference to the true object of the enactment that the existence of a rational nexus of the differentia on which the classification is based, with the object sought to be achieved by the enactment, can be examined to test the validity of the classification...."

43. It was reiterated that the High Court has given a very restrictive interpretation to the phrase "exploitation of women". The expression would include not only the women who dance in the prohibited establishments but also the waitresses who work in the same establishments. It would also include the effect of the dance bar on gender relations of not just the bar dancer, but for the women around the area. The High Court, according to the appellants, failed to take into account the object that the statutory provisions are in respect of an activity of exploitation of women conducted for financial gain by bar owners and their intermediaries. It is emphasised that the issue involved in this matter is not merely about dancing in the bars, but involves larger issues of dignity of women, the destruction of environments and circumstances where it is profitable to keep women vulnerable. In such circumstances, the law is being used as a tool for dealing with the evils of human trafficking and prostitution, rather than simply prohibiting such activity without the administrative resources to effectively implement such prohibition. It is further submitted that the State is bound by this duty to protect the interest of its citizens especially its weaker sections under the Constitution. The legislation

is sought to be justified on the touchstone of Article 23, Article 39(e) and Article 51A(e) of the Constitution. The action of' the Government is also justified on the ground that it is necessary to emancipate women from male dominance as women in dance bars are looked upon as objects of commerce. It is emphasised that the bar dancing is obscene, vulgar and casts considerable amount of negative influence on institutions like family, society, youth etc.

44. Mr. Gopal Subramanium also emphasised that the State cannot shut its eyes to the larger social problems arising out of bar dancing which is uncontrolled and impossible to regulate. He sought to justify the aforesaid submission by taking support from some observations made in **Paris Adult Theatre I Et. Al** Vs. **Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Et. Al**[10]. This case provides, according to the learned senior counsel, a discussion on relation with obscenity and pornography and the duty of the state to regulate obscenity. Reliance is placed on the following observations at pp 58, 60, 63, 64 and 69.

[10] 413 U.S. 49 [1973]

"It is not for us to resolve empirical uncertainties underlying state legislation, save in exceptional Case where that legislation plainly impinges upon rights protected by the Constitution itself."

.....

"Although there is no conclusive proof of a connection between anti social behaviour and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect the social interest in order and morality." Roth v. United States, 354 U.S.., at 485, quoting Chaplinsky v New Hampshire, 315 US. 568, 572 (1942)."

.....

"The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and action on it legislatively simply because there is no conclusive evidence or empirical data."

.....

"The states have the power to make a morally neutral judgment that public exhibition of obscene material or commerce in such material has a tendency to injure community as a whole, to endanger the public safety or to jeopardise in Mr. Chief Justice Warren's words, the States' "right ... to maintain a decent society". Jacobellis v Ohio 378 US at 199 (dissenting opinion)"

45. It is further pointed out that the decision to ban obscene dancing is also in consonance with Convention on the Elimination of All Forms of Discrimination Against Women (CEADAW). Learned senior counsel further

submitted that establishments covered by Section 33A have a greater direct and indirect effect on the exploitation of women, and the resultant and causative violence against women. It is submitted that the degree of effect on the subjects covered by the objects of the enactment are greater than any effect that might be attributable to exempted establishments.

46. In any event, *exempted establishments will also not be permitted to carry out such performances,* but are left to the operation of parallel regulation simply because they are significantly fewer in number and their very nature facilitates effective regulation. Therefore, according to the learned senior counsel, the impugned enactment is not discriminatory as it makes a reasonable legislative classification which has a direct nexus with the object sought to be achieved by the Act. In support of the proposition that there is a reasonable classification and that the State has the power to make such classification, reliance is placed on the observations made by this Court in **Kedar Nath Bajoria & Anr.** Vs. **The State of West Bengal**[11] which are as follows:

> "Now it is well settled that the equal protection of the laws guaranteed by Article 14 of the Constitution does not mean that all laws must be general in

[11] 1954 SCR 30

character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purpose of legislation. To put it simply all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentia which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the intelligible differentia having a reasonable relation to the legislative purpose."

47. Reliance is also placed on the observations of this Court in **Ram Krishna Dalmia** Vs**. Justice S.R. Tendolkar (supra)** for outlining the scope and ambit of Article 14 of the Constitution of India.

48. Finally, it is submitted that the Government had various documents and reports based on which they felt it important to regulate the menace of trafficking and to uphold the dignity of women. On the basis of the aforesaid material, it is submitted that the Government of Maharashtra enacted the amendment in good faith and knowledge of existing conditions after recognizing harm, confined the restrictions to cases where harm to women, public morality etc. was the highest. The High Court has failed to appreciate all the documentary evidence placed

and gave a narrow meaning to the object of the Act which is in the larger interest of the women and society.

Article 19(1)(g) -

49. With regard 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 practice any profession, trade or occupation is subject to restrictions in Article 19(6). Therefore, by prohibiting dancing under Section 33A, no right of the bar owners are being infringed. The curbs imposed by Sections 33A and 33B 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** Vs. **Mirzapur Moti Kureshi Kassab Jamat & Ors.**[12] Reference was also made to **Municipal Corporation of the City of Ahmedabad & Ors.** Vs. **Jan Mohammed Usmanbhai & Anr.**[13], wherein this Court gave a wide meaning to "interest of general public" and observed as follows :

[12] AIR 2006 SC 212
[13] (1986) 3 SCC 20

> "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."

50. Factually, it was emphasised that the history of the dance bars and the activities performed within the dance bars show that they are not set up with an intention to propagate art, exchange ideas or spread knowledge. It is submitted that the dance performances in these prohibited establishments were conducted in obscene and objectionable manner to promote the sale of liquor. Therefore, the main activity conducted in these prohibited establishments is not a fundamental right. There is no fundamental right in carrying business or sale in liquor and Government has power to regulate the same. There is also overwhelming evidence on record to show that girls have not opted for this profession out of choice but have been brought into this by middle men or other exploitative factors. There is no free and informed choice being made by the bar dancers. This is sought to be supported by the observations in the *Prayas* Report where it is stated :

> "In conclusion, the study has shown that most women did not know the nature of their employment at the time of getting into dance bars for work, and they were brought into this work through middle men. The basic elements of trafficking were found to

be present in the process of entry, though it may not have been in its overt form. Having come here and seeing no other options, they had no choice but to continue in this sector……".

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

"The women working as either dancers or waiters were not paid any salary, but were dependant 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 percent."

52. The same conclusion is also found in ***Shubadha Chaukar Report*** where it is stated that :

"Tips given by enamoured customers are the main income of girls working in the bars. Normally dancers do not get a salary as such. The bar owner makes it look like he is doing a favour by allowing them to make money by dancing. So he does not give them a salary. On the contrary a dancer has to hand over to the owner 30 to 40 per cent of what she earns. This varies from bar to bar."

53. On the basis of the above, it was submitted that the bar owners with a view to attract customers introduced dance

shows where extremely young girls dance in an indecent, obscene and vulgar manner which is detrimental to the dignity of women and depraves and corrupt the morality.

54. The second limb of the submission is that the prohibition does not bar the restaurant owners or the beer parlour owners from running their respective establishments i.e. restaurant business, beer parlours etc. What is being prohibited is only the dancing as a form of entertainment in such establishments. The bar owners can still conduct entertainment programmes like music, orchestras etc which are not prohibited. It is submitted that loss of income cannot be a reason for the bar owners to claim that their right to trade and profession is being infringed. This submission is sought to be supported by the observations of this Court in **T.B. Ibrahim** Vs. **Regional Transport Authority, Tanjore[14].** In this case it is observed by this Court as follows:

> "……There is no fundamental right in a citizen to carry on business wherever he chooses and his right must he subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. The restriction may have the effect of eliminating the use to which the stand has been put hitherto but the restriction cannot be regarded as being unreasonable if the authority imposing such restriction has power to do so. Whether the abolition of stand was conducive to

[14] [1953] 4 SCR 290

> public convenience or not is a matter entirely for the transport authority to judge, and it is not open to the court to substitute its own opinion for the opinion of the Authority, which is in the best position, having regard to its knowledge of local conditions to appraise the situation".

55. 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 the case of **State of Bombay** Vs. **R.M.D. Chamarbaugwala & Anr.**[15] In this 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). Similarly, in this case the

[15] AIR 1957 SC 699

dance bars having negative impact on family, women, youth and has been augmenting the crime rate as well as trafficking and exploitation of women. Reference was again made to the various reports and studies to show the disruptive opinion of the dance bars in the families of the persons employed in such dance bars. Reliance was placed on the judgment of this Court in **Khoday Distilleries Ltd. & Ors.** Vs. **State of Karnataka & Ors.**[16], in support of the submission that the trading in liquor is not a fundamental right. This Court further observed that trafficking in women or in slaves or in counterfeit coins or to carry on business of exhibiting or publishing pornographic or obscene films and literature is not a fundamental right as such activities are vicious and pernicious. Reliance was placed on the following observations:

> "The correct interpretation to be placed on the expression "the right to practice any profession, or to carry on any occupation, trade or business" is to interpret it to mean the right to practice any profession or to carry on any occupation, trade or business which can be legitimately pursued in a civilised society being not abhorrent to the generally accepted standards of its morality. .....This is apart from the fact that under our Constitution the implied restrictions on the right to practice any profession or to carry on any occupation, trade or business are made explicit in clauses (2) to (6) of Article 19 of the Constitution and the State is permitted to make law for imposing the said restrictions."

[16] (1995) 1 SCC 574

> "It does not entitle citizens to carry on trade or business in activities which are immoral and criminal and in articles or goods which are obnoxious and injurious to health, safety and welfare of the general public, i.e., *res extra commercium,* (outside commerce). There cannot be a business in crime. (c) Potable liquor as a beverage is an intoxicating and depressant drink which is dangerous and injurious to health and is, therefore, an article which is *res extra commercium* being inherently harmful. A citizen has, therefore, no fundamental right to do trade or business in liquor. Hence the trade or business in liquor can be completely prohibited."

56. The aforesaid observations were reiterated in **State of Punjab & Anr.** Vs. **Devans Modern Breweries Ltd. & Anr.**[17] Relying on the aforesaid observations, it was submitted that in the banned establishments, the dance is performed amidst consumption of liquor and the State has every right and duty to regulate the consequence emanating from such circumstances. In support of this submission, the appellants relied on the judgment of the United States Supreme Court in **New York State Liquor Authority** Vs. **Dennis BELLANCA, DBA The Main Event, Et Al.**[18]. In this case, the question raised was about the power of a State to prohibit topless dancing in an establishment licensed by State to serve liquor. It was claimed that the prohibition was violative of United States Constitution. U.S. Supreme Court, upon consideration of the issue, observed as follows:

[17] (2004) 11 SCC 26
[18] 452 U.S. 714 (1981)

> "In short, the elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of reasonable restriction upon establishments which sell liquor for on-premises consumption. Given the "added presumption in favour of the validity of the state regulation" conferred by Twenty first Amendment, California v LaRue, 409 U. S., at 118, we cannot agree with the New York Court of Appeals that statute violates United States Constitution. Whatever artistic or communicative value may attach to topless dancing is overcome by State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty first Amendment makes that a policy judgment fin- the state legislature, not the courts."

57. It was also submitted that in the present case the dance is conducted in an obscene manner and further the dance bars eventually happen to be pick up locations that also propagate prostitution in the area, which is sought to be prevented by the legislation. The appellants also relied on the judgment in **Regina** Vs. **Bloom[19].** In this case, the appellants were proprietors of the clubs who were charged with keeping a disorderly house, which arose out of matters that occurred in course of strip tease performances. The Court of Criminal Appeal (England) held that as regards the cases in which indecent performances or exhibition are alleged, a disorderly house is a house conducted contrary to law and good order in that matters

[19] 1961 3 W.L.R. 611

performed or exhibited are of such a character that their performance or exhibition in a place of common resort amounts to an outrage of public decency or tends to corrupt or deprave the dignity of women and public morality. Therefore in the present circumstances, the State, in the interest of dignity of women, maintenance of public order and morality has banned dances in such establishments where regulation is virtually impossible. Since the obscene and vulgar dancing is a *res extra commercium*, the establishments cannot claim a fundamental right to conduct dance therein.

58. It is further submitted that the legislation also does not infringe any fundamental right of the bar dancers. The prohibition contained under Section 33A is not absolute and the dancers can perform in exempted establishments. This apart, the dancers are also free to dance in auditoriums, at parties, functions, musical concerts, etc. According to the appellants, another important facet of the same submission is that the rights of the bar girls to dance are subject to the right of the bar owners to run the establishment. In other words, the right of the bar girls are derivative and they do not have absolute right to dance as

a vocation or profession in the dance bars. This right would be automatically curtailed in case the dance bar is closed for economic reasons or as a result of licence being cancelled. In support of the submission, the appellants relied on a judgment of this Court in **Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors.** Vs. **Union of India & Ors.**[20] in which it is held as under :-

> "14. The right of the petitioners to carry on the occupation of industrial workers is not, in any manner, affected by the impugned sale. The right to pursue a calling or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment. If the workers are retrenched consequent upon and on account of sale, it will be open to them to pursue their rights and remedies under the industrial laws. But the point to be noted is that the closure of an establishment in which a workman is for the time being employed does not by itself infringe his fundamental right to carry on an occupation which is guaranteed under article 19(1)(g) of the constitution."

59. Relying on the above, it is submitted that there is no absolute right for the bar girls to be employed in the dance bars and that the right to work would be subject to the continuation of the establishment. Hence, it is a derivative right emanating from the right of the dance bar owners to run the establishments subject to restrictions imposed.

[20] AIR 1981 SC 344

60. It is next submitted that the right to trade and profession is subject to reasonable restriction under Article 19(6) of the Constitution. The decision to impose the ban was to defend the weaker sections from social injustice and all forms of exploitation. In the instant case, the moral justification is accompanied with additional legitimate state interest in matters like safety, public health, crimes traceable to evils, material welfare, disruption of cultural pattern, fostering of prostitution, problems of daily life and multiplicity of crimes. Learned senior counsel for the appellants strongly relied upon the Statement of Objects and Reasons and the Preamble of the amending Act to reiterate that the State is enjoined with the duty to protect larger interest of the society when weaker sections are being exploited as objects of commerce and when there is issue of public order and morality involved.

61. The appellants have relied on a number of judgments of this Court to illustrate the concept of "reasonable restriction" and the parameters within which the court will examine a particular restriction as to whether it falls within the ambit of Article 19(6). Reference was made to the **State of Madras** Vs. **V.G. Row**[21], **B.P. Sharma** Vs.

[21] AIR 1952 SC 196

Union of India & Ors.[22], **M.R.F. Ltd.** Vs. **Inspector Kerala Govt. & Ors.**[23]. Since the principles are all succinctly defined, we may notice the observations made by this Court in **B.P. Sharma's case (supra)**.

> "The main purpose of restricting the exercise of the right is to strike a balance between individual freedom and social control. The freedom, however, as guaranteed under article 19(1)(g) is valuable and cannot be violated on grounds which are not established to be in public interest or just on the basis that it is permissible to do so. For placing a complete prohibition on any professional activity there must exist some strong reason for the same with a view to attain some legitimate object and in case of non-imposition of such prohibition, it may result in jeopardizing or seriously affecting the interest of the people in general. If it is not so, it would not be a reasonable restriction if placed on exercise of the right guaranteed under article 19 (1) (g). The phrase ''in the interest of the general public" has come to be considered in several decisions and it has been held that it would comprise within its ambit interests like public health and morals (refer to State of Maharashtra v Himmatbhai Narbheram Rao (AIR 1970 SC 1157), economic stability On consideration of a catena of decisions on the point, this Court, in a case reported in 'IMF Ltd v Inspector, Kerala Government (1998) 8 SCC 227 has laid certain tests on the basis of which reasonableness of the restriction imposed on exercise of the right guaranteed under Article 19 (1)(g) can be tested. Speaking for the Court, Saghir Ahmad (as he then was), laid down such considerations as follows:
>
> "(1) While considering the reasonableness of the restrictions, the court has to keep in mind the directive principles of State policy.
>
> (2) Restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirement of the interest of general public.
>
> (3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed

[22] (2003) 7 SCC 309
[23] (1998) 8 SCC 227

principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to the changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.

(4) A just balance has to be struck between the restrictions imposed and the social control envisaged by clause (6) of article 19.

(5) Prevailing social values as also social needs which are intended to be satisfied by restrictions have to be borne in mind. (see State of U.P. v Kaushailiya)

(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of constitutionality of the Act will naturally arise."

62. Thereafter, Mr. Subramanium has cited **State of Gujarat** Vs. **Mirzapur Moti Kureshi Kassab Jamat (supra)** in support of the submission that Statement of Objects and Reasons would be relevant for considering as to whether it is permissible to place a total ban under Article 19(6). After considering the principles laid down earlier, this court concluded as under:-

"We hold that though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of general public, yet, in the present case banning slaughter of cow progeny is not a prohibition but only a restriction."

63. Relying on the aforesaid, it was submitted that while

considering the reasonableness, the court should consider the purpose of restriction imposed, extent of urgency, prevailing conditions at the time when the restriction was imposed. According to the appellants, in the instant case, the social order problems in and around the dance bars had reached such heights which were beyond the tolerable point. The tests laid down earlier were reiterated in **M.J. Sivani & Ors.** Vs. **State of' Karnataka & Ors.**[24] In this case, it is observed as follows :

> "18..... In applying the rest of reasonableness, the broad criterion is whether the law strikes a proper balance between social control on the one hand and the right of individual on the other hand. The court must take into account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied by the law, its extent and urgency, how far the restriction is or is not proportionate to the evil and the prevailing conditions at that time."

64. Relying on the aforesaid, it was submitted that the larger issue involved was the trafficking of young women and minors into dance bars and also incidentally leading to prostitution which could have been prevented to a large extent only by imposing the ban. In support of this, learned counsel have relied on the *Prayas* Report which shows that 6% of the women working in dance bars are minors and 87% are between the age of 18-30 years.

[24] (1995) 6 SCC 289

Similarly, SNDT report states that minors constitute upto 6.80 % and those between 19 to 30 years of age constitute 88.20%. *Prayas* Report further states that "It was found that the women respondents did not find any dignity in this work. This is borne out by the fact that 47% of women did not reveal their work to family members and outsiders. They are often exposed to the sexual overtures of overenthusiastic customers and are aware of their vulnerability to get exploited". The appellants also relied on a number of complaints and the various cases of minor girls being rescued from dance bars during the period 2002-05 to buttress their submission that the young girls were subjected to human trafficking. Learned senior counsel also submitted that the High Court has erroneously concluded that if the women can safely work as waitress in the Restaurants why can they not work as dancers. The learned senior counsel also submitted that the High Court wrongly proceeded on the basis that there was no evidence before the State or the Court in support of the legislation. On the basis of the above, it is submitted that the restrictions imposed are reasonable and the legislation deserves to be declared *intra vires* the constitutional provisions.

65. Further, it was submitted that the legislative wisdom cannot be gone into by the court. The Court can only invalidate the enactment if it transgresses the constitutional mandate. It is submitted that invalidation of a statute is a grave step and that the legislature is the best judge of what is good for the community. The legislation can only be declared void when it is totally absurd, palpably arbitrary, and cannot be saved by the court. It is reiterated that the principle of "Presumption of Constitutionality" has to be firmly rebutted by the person challenging the constitutionality of legislation. The United States Supreme Court had enunciated the principle of constitutionality in favour of a statute and that the burden is upon the person who attacks it to show that there has been a clear transgression of any Constitutional provision. The appellants relied on the observations made in **Charanjit Lal Chowdhury** Vs. **Union of India & Ors.**[25] wherein this Court observed as follows :

> "It must be presumed that a legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds"

[25] AIR 1951 SC 41

66. The same principle was reiterated by this Court in **State of Bihar & Ors.** Vs. **Bihar Distillery Ltd. & Ors.**[26] in the following words :

> "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 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 a part of attempt to sustain the validity/constitutionality of the enactment. After all, an act 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."

67. On the basis of the above, it was submitted that the burden of proof is upon the Respondents herein to prove that the enactment/amendment is unconstitutional. Once the respondents prima facie convince the Court that the enactment is unconstitutional then the burden shifts upon the State to satisfy that the restrictions imposed on the fundamental rights satisfy the test of or reasonableness. The High Court, according to the appellants, failed to apply the aforesaid tests.

68. Finally, it was submitted that in the event this Court is

[26] (1997) 2 SCC 453

not inclined to uphold the constitutionality of the impugned provisions, it ought to make every effort to give the provision a strained meaning than what appears to be on the face of it. This is based on the principle that it is only when all efforts to do so fail, the court ought to declare a statute to be unconstitutional. The principle has been noticed by this Court in **Government of Andhra Pradesh & Ors.** Vs. **P. Laxmi Devi (Smt.)**[27] wherein it is observed as follows :

> "46. In our opinion, there is one and only one ground for declaring an Act of the legislature (or a provision in the Act) to be invalid, and that is if it clearly violates some provision of the constitution in so evident a manner as to leave no manner of doubt. This violation can, of course, be in different ways But before declaring the statute to be unconstitutional, the court must be absolutely sure that there can be no two views that are possible, one making the statute constitutional and the other making it unconstitutional, the former view must always be preferred. Also, the court must make every effort to uphold the constitutional validity of a statute, even if that requires giving strained construction or narrowing down its scope vide Rt. Rev. Msgr. Mark Netto v State of Kerala (1979) 1 SCC 23 para 6.

69. The same principle was reiterated in **Kedar Nath Singh** Vs. **State of Bihar**[28] which is as follows :

> "It is well settled that if certain provisions of law, construed in one way, would make them consistent with the Constitution and another interpretation

[27] (2008) 4 SCC 720
[28] AIR 1962 SC 955

would render them unconstitutional, the court would lean in favour of the former construction."

70. On the basis of the above, it was submitted that this Court ought to read down the provision in the following manner:

"All dance" found in Section 33A of the Police Act may be read down to mean that "dances which are obscene and derogatory to the dignity of women". This would ensure that there is no violation of any of the rights of the girls who dance as well as that of the owners of the establishments. Still further, it was submitted that even if the reading of the provisions as mentioned above is not accepted, Section 33A can still be saved by applying the doctrine of severability. It is submitted that the intention of the legislature being to prohibit and ban obscene dance in the interest of society and to uphold the dignity of women, by severing the exempting section, namely, Section 33B and the provision which is contained in Section 33A can be declared to be in accordance with the object of legislature. This would remove the vice of discrimination, as declared by the High Court.

Respondents' Submissions:

71. In response to the aforesaid elaborate submissions, learned senior counsel appearing for the respondents have also submitted written submissions. Mr. Mukul Rohatgi, learned senior counsel appeared for respondent – Indian Hotel and Restaurants Association in C.A.No.2705 of 2006, whereas Dr. Rajeev Dhawan, learned senior counsel, appeared on behalf of Bhartiya Bar Girls Union in C.A.No.2705 of 2006. Mr. Anand Grover, learned senior counsel, appeared for respondent Nos. 1 to 6 in W.P.No.2338/2005 and respondent No. 1 and 2 in W.P. No.2587 of 2005.

72. Since the High Court has accepted the submissions made on behalf of the respondents (writ petitioners in the High Court), it shall not be necessary to note the submissions of the learned senior counsel as elaborately as the submissions of the appellants herein. Mr. Mukul Rohatgi submitted that, at the heart of the present case, the controversy revolved around the right to earn a livelihood more so than the right of a person to choose the vocation of their calling. It was submitted that apart from the reasoning given in the judgment of the High Court, the challenge to the impugned legislation can be sustained on

other grounds also. He submits that a classification of the establishments into three stars and above, and below is not based on any intelligible differentia and is *per se* discriminatory and arbitrary. Bar dancers have a right to livelihood under Article 21 and the ban practically takes away their right to livelihood. He therefore, submits that the ban is violative of Articles 14, 19(1)(a) and 19(1)(g) and 21 of the Constitution. Relying on the observations made by this Court in the case of **I.R. Coelho (Dead) by LRs.** Vs. **State of T.N.**[29], he submits that these articles are the very heart and soul of the Constitution and are entitled to greater protection by the Court than any other right. Mr. Rohatgi submits that the submissions made by the appellants with regard to the protecting the dignity of women and preventing trafficking in women are misconceived. There are adequate measures in the existing provisions, licensing conditions which would safeguard the dignity of women. Relying on Sections 370 and 370A of the IPC, he submits that there are adequate alternate mechanisms for preventing trafficking in women. Elaborating on the submissions that dance is protected by Article 19(1)(a) of the Constitution being a part of fundamental right of speech and expression, he relied

[29] (2007) 2 SCC 1

upon the observations made by this Court in **Sakal Papers (P) Ltd. & Ors.** Vs. **The Union of India**[30]. He has also made a reference to some decisions of the High Court recognizing that dancing and cabaret are protected rights under Article 19(1)(a). He points out that it is always open to a citizen to commercially benefit from the exercise of the fundamental right. Such commercial benefit could be by a bar owner having dance performance or by the dancers themselves using their creative talent to carry on an occupation or profession. The impugned amendment prohibits the bar owners from carrying on any business or trade associated with dancing in these establishments and the bar girls from dancing in those premises. He then submits that the amendment violates Article 19(1)(g), by imposing restrictions by way of total prohibition of dance. Even though the freedom under Article 19(1)(g) of the Constitution is not absolute, any restriction imposed upon the same have to fall within the purview of clause 6 of Article 19. Therefore, the restriction imposed by law must be reasonable and in the interest of general public. It was also submitted that while such restriction may incidentally touch upon other subjects mentioned above, such as morality or decency, the same cannot be imposed only in

[30] (1962) 3 SCR 842

the interest of morality or decency. Mr. Rohatgi then submitted that the reasons set out in the objects and reasons of the amendment are not supported by any evidence which would demonstrate that there was any threat to public order. There is also no material to show that the members of the Indian Hotel and Restaurants Association were indulging in human trafficking or flesh trade. Therefore, according to Mr. Rohatgi, the ban was not for the protection of any interests of the general public. In fact, Mr. Rohatgi emphasised that the Statement of Objects and Reasons does not refer to trafficking. The compilation of 600 pages given to the respondents by the appellants does not contain a single complaint about trafficking. All allegations relating to trafficking have been introduced only to justify the ban on dancing. He, therefore, submits that the total ban imposed on dancing violates the fundamental right guaranteed under Article 19(1)(g). Learned senior counsel further submitted that dancing is not *res extra commercium*. He emphasised that if the dancing of similar nature in establishments, mentioned in Section 33B is permissible, the prohibition of similar dance performance in establishments covered under Section 33 cannot be termed as reasonable and or

"in the interest of general public". Therefore, according to Mr. Rohatgi, the restrictions do not fall within the scope of Article 19(6). He relied on the judgment of this Court in **Anuj Garg & Ors.** Vs. **Hotel Association of India & Ors.**[31], wherein a ban on employment of women in establishment where liquor was served, was declared discriminatory and violative of Articles 14, 15, 19 and 21. In this case, it was held as under :

> ".....Women would be as vulnerable without State protection as by the loss of freedom because of the impugned Act. The present law ends up victimising its subject in the name of protection. In that regard the interference prescribed by the State for pursuing the ends of protection should be proportionate to the legitimate aims. The standard for judging the proportionality should be a standard capable of being called reasonable in a modern democratic society.
>
> Instead of putting curbs on women's freedom, empowerment would be a more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modelling done in this behalf.
>
> Also with the advent of modern State, new models of security must be developed. There can be a setting where the cost of security in the establishment can be distributed between the State and the employer."

73. Relying on the **State of Gujarat** Vs**. Mirzapur Moti Kureshi Kassab Jamat (supra)**, Mr. Rohatgi submitted that the standard for judging reasonability of restriction or restrictions which amounts to prohibition remains the

[31] (2008) 3 SCC 1

same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate. The State has failed to even examine the possibility of the alternative steps that could have been taken. He has also relied on the judgments with regard to the violation of Article 14 to which reference has already been made in the earlier part of the judgment. Therefore, it is not necessary to reiterate the same. However, coming back to Section 33B, Mr. Rohatgi submitted that dancing that is banned in the establishments covered under Section 33A is permitted under the exempted establishments under Section 33B. According to learned senior counsel, the differentia in Section 33A and 33B does not satisfy the requirement that it must be intelligible and have a rational nexus sought to be achieved by the statute. He submits that the purported "immorality" gets converted to "virtue" where the dancer who is prohibited from dancing in an establishment covered under Section 33A, dances in an establishment covered under Section 33B. The discrimination, according to Mr. Rohatgi, is accentuated by the fact that for a breach committed by the licensees in the category of Section 33B only their licenses will be cancelled but the licensees of establishments covered

under Section 33A would have to close down their business. He further submits that the provision contained in Section 33A is based on the presumption of the State Government that the performance of dance in prohibited establishments having lesser facilities than three star establishments would be derogatory to the dignity of women. The State also presumed that dancing in such establishments is likely to deprave, corrupt or injure public morality. The presumption is without any factual basis. The entry of women in such establishments is not banned. There is also no prohibition for women to take up alternative jobs within such establishments. They can serve liquor and beer to persons but this does not lead to the presumption that it would arouse lust in the male customers. On the other hand, when women start dancing it is presumed that it would arouse lust in the male customers. He emphasised the categorization of establishments under Sections 33A and 33B does not specify the twin criteria: (i) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational nexus or relation to the object sought to be achieved by the legislation. He

submits that there is a clear discrimination between the prohibited establishments and the exempted establishments. He points out that the only basis for the differentiation between the exempted and prohibited establishments is the investment and the paying capacity of patrons. Such a differentiation, according to Mr. Rohatgi, is not permissible under the Constitution.

74. The next submission of Mr. Rohatgi is that Article 21 guarantees the right to life which would include the right to secure a livelihood and to make life meaningful. Article 15(1) of the Constitution of India guarantees the fundamental right that prohibits discrimination against any citizen, *inter alia*, on the ground only of sex. Similarly Article 15(2) lays down that no citizen shall, on grounds only of, inter alia, sex, be subject to any disability, liability, restriction or condition with regard, *inter alia*, to "access to shops, public restaurants, hotels and places of public entertainment." The provision in Article 15(3) is meant for protective discrimination or a benign discrimination or an affirmative action in favour of women and its purpose is not to curtail the fundamental rights of women. He relied

on the observations made by this Court in **Government of A.P.** Vs. **P.B. Vijayakumar & Anr.**[32] :-

> *"The insertion of clause (3) of Article 15 in relation to women is a recognition of the fact that centuries, women of this country have been socially and economically handicapped. As a result, they are unable to participate in the socio-economic activities of the nation on a footing of equality. It is in order to eliminate this socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15. Its object is to strengthen and improve the status of women. An important limb of this concept of gender equality is creating job opportunities for women....."*
>
> (Emphasis supplied)

75. He 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

[32] (1995) 4 SCC 520

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 organized racket that brings women to the dance bars. The girls' interview, in fact, indicated that they came to the dance bars through family, community, neighbors and street knowledge. Therefore, according to the 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. Mr. Rohatgi further submitted that there are sufficient provisions in various statutes which empowered the Licensing Authority to frame rules and regulations for licensing/controlling places of public amusement or entertainment. By making a reference to

Rules 120 and 123 framed under the Amusement Rules, 1960; he submits that no performers are permitted to commit on the stage or any part of the auditorium any profanity or impropriety of language. These dancers are also not permitted to wear any indecent dress. They are also not permitted to make any indecent movement or gesture whilst dancing. Similar provisions are contained under the Performance License. Although learned senior counsel has listed all the regulatory provisions contained under the Bombay Police Act, it is not necessary to notice the same. The submission based on this regulation is that there is wide amplitude of power available to the appellants for controlling any perceived violation of dignity of women through obscene dances. He submits that the respondents are being made a scapegoat for lethargy and failure of police to implement the provisions of law which are already in place and are valid and subsisting. Failure of the appellants in not implementing the necessary rules and regulations would not justify the impugned legislation. Learned senior counsel has also submitted that the State Government, in its effort to regulate the conduct of dances, had formed a Committee to make suggestions for amendment of the existing Rules. The Committee had

prepared its report and submitted the same to the State Government. However, the State Government did not take any steps for implementation of the recommendation which was supported by the Indian Hotel and Restaurant Association. He submits that the judgment of the High Court does not call for any interference.

76. Dr. Rajeev Dhawan, learned senior counsel, has also highlighted the same issues. He has submitted that the provisions contained in Section 33A(1) prohibit performance of dance of any kind or type. Since the Section contained the Non Obstante Clause, it is a stand alone provision absolutely independent of the Act and the Rules. He submits that the provisions are absolutely arbitrary and discriminatory. Under Section 33A(1), there is an absolute provision which is totally prohibiting dance in eating houses, permit rooms or beer bars. On the other hand, Section 33B introduced the discriminatory provision which allows such an activity in establishments where entry is restricted to members only and three starred or above hotels. He also emphasised that the consequence of violation of Section 33A is punishment up to 3 years imprisonment or Rs. 2 lakhs fine or both and with a

minimum 3 months and Rs.50,000/- fine unless reasons are recorded. The Section further contemplates that the licence shall stand cancelled. Section 33A(6) makes the offence cognizable and non-bailable. According to Dr. Rajeev Dhawan, the provision is absolute and arbitrary. He reiterates that the non obstante clause virtually makes Section 33A stand alone. Further Section 33A(1) is discretion less. It applied to all the establishments and covers all the activities, including holding of performance of dance of any kind or type in any eating house, permit room or beer bar. There is total prohibition in the aforesaid establishments. The breach of any condition would entail cancellation of licence. According to Dr. Dhawan, Section 33A is a draconian code which is discretion less overbroad, arbitrary with mandatory punishment for offences which are cognizable and non-bailable. He then emphasised that the exemption granted to the establishment under Section 33B introduces blatant discrimination. He submits that the classification of two kinds of establishment is unreasonable. According to Dr. Dhawan, it is clear that Section 33B makes distinction on the grounds of “class of establishments” or “class of persons who frequent the establishment” and not on the form of dance. He

reiterates the submission that if dance can be permitted in exempted institutions it cannot be banned in the prohibited establishments. He submitted that treating establishments entitled to a performance licence differently, even though they constitute two distinct classes would be discriminatory as also arbitrary, considering the object of the Act and the same being violative of Article 14 of the Constitution of India. Answering the submission on burden of proof with regard to the reasonableness of the restriction, Dr. Dhawan submits that the burden of showing that the recourse to Article 19(6) is permissible lies upon the State and not on the citizen, he relies on the judgment of this Court in **M/s. Laxmi Khandsari & Ors.** Vs. **State of U.P. & Ors.**[33]

77. Relying on the **Narendra Kumar & Ors.** Vs. **Union of India & Ors.**[34], he submitted that the total prohibition in Section 33A must satisfy the test of Article 19(6) of the Constitution. Reliance is placed on a number of judgments to which we have made a reference earlier. Dr. Dhawan further emphasised that the reports relied upon by the State would not give a justification for enacting the

[33] (1981) 2 SCC 600
[34] (1960) 2 SCR 375

impugned legislation. He points out that the study conducted by Shubhada Chaukar for Vasantrao Bhagwat Memorial Fellowship entitled “Problems of Mumbai Bar girls” is based on conversations with 50 girls. According to Dr. Dhawan, this report is thoroughly unreliable. The report itself indicates that there are about one lakh bar girls in Mumbai-Thane Region, therefore, interview of 50 girls would not be sufficient to generate any reliable data. The report also states that there are about 1000-1200 bars, but it is based on interaction with seven bar owners. Even then the report does not suggest complete prohibition but suggests a framework which “regulates” the functioning of bars, performances by singers, dancers etc. Similarly, the Prayas Report cannot be relied upon. The study was, in fact, done after the ban was imposed by the State Government. Even this report indicates that after the ban there was urgent need to find alternate source of livelihood for these girls. There was no facility of education for the children. Even this report finds that the families from which these girls come are economically weak. Six percent of minor children comprise the dancing population. They are not provided any specialized training to be bar dancers. They do not live in self owned houses.

The SNDT Report clearly states that the study is based on interaction with 500 girls from 50 bars. The report indicates that there are a number of prevalent myths which are without any basis. It is pointed out that, according to the report, the following are the myths :-

1. It is an issue of trafficking from other States and countries.
2. 75% dancers are from Bangladesh.
3. Only 3% are dancers from Maharashtra.
4. Bar culture is against the tradition of Maharashtra.
5. Girls who dance are minors.
6. Bar Dancers hide their faces.
7. Girls don't work hard.
8. Bar Girls can be rehabilitated in Call Centers.
9. Dancing in Bars is sexual exploitation.
10. Girls are forced into sex work.
11. Dance bars are vulgar and obscene.
12. Ban will solve all these problems.

78. The study, in fact, recommends that the dance bars should not be banned. There should be regularization of working conditions of bar dancers. There should be monitoring and prevention of entry of children into these

establishments. There should be protection against forced sexual relations and harassments. There should be security of earning, medical benefits and protection from unfair trade practices. The report recommends that there is a need for development that increases rather than reduces options for women. The report also indicates that the ban had an adverse impact in that respect. It will lead to women becoming forced sex workers. The second report of SNDT is based on empirical interviews. It recommends that the ban imposed should be lifted immediately. Dr. Dhawan has further elaborated the shortcomings of the Prayas Report. He has also emphasised that both the SNDT and Prayas Report substantiate the fact that dancers were the sole bread winners in their families earning approximately Rs.5,000/- to Rs.20,000/- per month. They were supporting large families in Mumbai as well as in their native places. After the ban, these families are left without a source of income and have since then been rendered destitute. He also points out that the SNDT study indicates that many dancers came from environments/employments where they had been exploited (maid servants, factory workers, etc.). Most of these women had taken employment as

dancers in view of the fact that it afforded them financial independence and security. The SNDT Report points out that not a single bar dancer has ever made any complaint about being trafficked. The reports, according to Dr. Dhawan, clearly indicate that complete prohibition is not the solution and regulation is the answer.

79. Dr. Dhawan then submitted that the conclusions recorded by the High Court on equality and exploitation need to be affirmed by this Court. He has submitted that to determine the reasonableness of the restriction, the High Court has correctly applied the direct and inevitable effect test. He seeks support for the submission, by making a reference to the observations made by this Court in **Rustom Cavasjee Cooper** Vs. **Union of India**[35] and **Maneka Gandhi** Vs. **Union of India & Anr.**[36], he emphasised that the direct operation of the Act upon the rights forms the real test. The principle has been described as the doctrine of intended and real effect or the direct and inevitable effect, in the case of **Maneka Gandhi (supra).** Dr. Dhawan also emphasised that dancing is covered by Article 19(1)(a) even though it has been held

[35] (1970) 1 SCC 248
[36] (1978) 1 SCC 248

by the High Court that it is not an expression of dancers but their profession. He relied on the observations of this Court in **Bharat Bhawan Trust** Vs. **Bharat Bhawan Artists' Association & Anr.**[37] wherein it is held that the acting done by an artist is not done for the business. It is an expression of creative talent, which is a part of expression.

80. Illustrations submitted by Dr. Dhawan are that the legislation cannot be saved even by adopting the doctrine of proportionality which requires adoption of the least invasive approach. Dr. Dhawan has reiterated that the suggestions made by the Committee pursuant to the resolution dated 19th December, 2002 ought to be accepted. According to Dr. Dhawan, acceptance of such suggestions would lead to substantial improvement. If the State really seeks to control obscene bar dancing, he submitted that the solution can be based on ensuring that:- bar girls are unionized; there is adequate protection to the girls and more involvement of the workers in self improvement and self regulation. Dr. Dhawan does not agree with Mr. Gopal Subramanium that this should be

[37] (2001) 7 SCC 630

treated as a case of trafficking with complicated crisis centric approach.

81. Mr. Anand Grover, learned senior counsel has rebutted the factual submissions made by the appellants. He submits that the State has wrongly mentioned before the court that women who dance in the bar are trafficked or compelled to dance against their will and that the significant number of dancers are minor or under the age of 18 years; that the majority of dancers are from states outside Maharashtra which confirms the allegation of inter-state trafficking; that dancing in bars is a gateway to prostitution; that bar dancing is associated with crime and breeds criminality; that the conditions of dance bars are exploitative and dehumanizing for the women. Lastly, that bar dancing contributes to social-ills and illicit affairs between dancers and the male visitors break up of family and domestic violence against wives of men visiting the dance bars. According to Mr. Grover, the aforesaid assertions are founded on incorrect, exaggerated or overstated claims. Learned senior counsel has also indicated that there is great deal of fudging of figures by police with regard to complaints and cases registered

under the dance bars to substantiate their contentions. He has relied on the official data on the incidence of trafficking crimes from the National Crime Records Bureau report for the year 2004-2011 to show that there is no nexus between dance bars and trafficking in women. Learned senior counsel has reiterated the submission that Section 33A and Section 33B of the Bombay Police Act violate Article 14 of the Constitution. He has relied on the judgment of this Court in **D.S. Nakara & Ors.** Vs. **Union of India**[38]. Learned senior counsel also reiterated that the classification between the establishment under Section 33A and Section 33B is unreasonable.

82. The High Court, according to the learned senior counsel, has wrongly accepted the explanation given by the appellants in their affidavits that the classification is based on the type of dance performed in the establishments. This, according to learned senior counsel, is contrary to the provisions contained in the aforesaid sections. He reiterated the submissions that the distinction between the establishments is based not on the type of dance performance but on the basis of *class* of such establishments. He makes a reference to the affidavit in

[38] (1983) 1 SCC 305

reply filed in Writ Petition No.2450 of 2005 at paragraph 33 *inter alia* stated as follows :-

> "Even otherwise five star hotels are class themselves and can't be compared with popularly known dance bars....the persons visiting these hotels or establishments referred therein above stand on different footing and can't be compared with the people who attend the establishments which are popularly known as dance bar. They belong to different strata of society and are a class by themselves."

83. These observations, according to learned counsel, are contrary to the decision of this Court in **Sanjeev Coke Manufacturing Company** Vs. **M/s Bharat Coking Coal Limited & Anr.**[39] Mr. Grover has also reiterated the submission that classification between Sections 33A and 33B establishments has no rational nexus with the object sought to be achieved by the impugned legislation. He submits that whereas Section 33A prohibits any kind or type of dance performance in eating house, permit room or beer bar, i.e., dance bars, Section 33B allows all types and kinds of dances in establishments covered under Section 33B. Learned senior counsel further submits that the object of the impugned legislation is to protect women from exploitation by prohibiting dances, which were of indecent, obscene and vulgar type, derogatory to the

[39] (1983) 1 SCC 147

dignity of women and likely to deprave, corrupt or injure the public morality, or morals. This is belied by the fact that all kinds of dances are permitted in the exempted establishments covered under Section 33B. He has also given the example that most of the Hindi film songs or even dancing in discos are much more sexually explicit than the clothes worn by the bar dancers.

84. Learned senior counsel further submitted that exploitation of women is not limited only to dance bar. Such exploitation exists in all forms of employment including factory workers, building site workers, housemaids and even waitresses. In short, he reiterated the submission that the legislation does not advance the objects and reasons stated in the amendment Act. Mr. Grover further submitted that the impugned law violates the principle of proportionality. He has pointed out that gender stereotyping is also palpable in the solution crafted by the legislature. The impugned statute does not affect a man's freedom to visit bars and consume alcohol, but restricts a woman from choosing the occupation of dancing in the same bars. The legislation, patronizingly, seeks to 'protect' women by constraining their liberty,

autonomy and self-determination. Mr. Grover has also reiterated the submission that Section 33A is violative of Article 19(1)(a) of the Constitution. According to Mr. Grover, restriction imposed on the freedom of expression is not justified under Article 19(6) of the Constitution. He submits that dancing in eating houses, permit rooms or beer bars is not inherently dangerous to public interest. Therefore, restrictions on the freedom of speech and expression are wholly unwarranted. Mr. Grover also emphasised that dancing is not inherently dangerous or pernicious and cannot be treated akin to trades that are *res extra commercium*. Bar dancers, therefore, have a fundamental right to practice and pursue their profession/occupation of dancing in eating houses, beer bars and permit rooms. The social evils projected by the appellants, according to Mr. Grover, are related to serving and drinking of alcohol and not dancing. Therefore, there was no rational nexus in the law banning all types of dances. He also emphasised that the women can be allowed to work as waitresses to serve liquor and alcoholic drinks. There could be no justification for banning the performance of dance by them. Mr. Grover also submitted that the ban contained in Section 33A violates Article 21 of

the Constitution. He submits that the right to livelihood is an integral part of the right to life guaranteed under Article 21 of the Constitution. The deprivation of right to livelihood can be justified if it is according to procedure established by law under Article 21. Such a law has to be fair, just and reasonable both substantively and procedurally. The impugned law, according to Mr. Grover, does not meet the test of substantive due process. It does not provide any alternative livelihood options to the thousands of bar dancers who have been deprived of their legitimate source of livelihood. In the name of protecting women from exploitation, it has sought to deprive more than 75,000 women and their families from their livelihoods and their only means of subsistence. Mr. Grover has submitted that there is no viable rehabilitation or compensation provision offered to the bar dancers, in order to tide over the loss of income and employment opportunities. According to learned senior counsel, in the last 7 years, the impact of the prohibition has been devastating on the lives of the bar dancers and their families. This has deprived the erstwhile bar dancers of a life with dignity. In the present context, the dignity of bar dancers (of persons) and dignity of dancing (work) has

been conflated in a pejorative way. According to Mr. Grover, the bar dancing in establishments covered under Section 33A has been demeaned because the dancers therein hail from socially and economically lower castes and class. It is a class based discrimination which would not satisfy the test of Article 14.

85. Lastly, he has submitted that the plea of trafficking would not be a justification to sustain the impugned legislation. In fact, trafficking is not even mentioned in the Statement of Objects and Reasons, it was mentioned for the first time in the affidavit filed by the State in reply to the writ petition. According to learned senior counsel, the legislation has been rightly declared *ultra vires* by the High Court.

86. We have considered the submissions made by the learned senior counsel for the parties. We have also perused the pleadings and the material placed before us.

87. The High Court rejected the challenge to the impugned Act on the ground that the State legislature was not competent to enact the amendment. The argument was

rejected on the ground that the amendment is substantially covered by Entries 2, 8, 33 and 64 of List II. The High Court further observed that there is no repugnancy between the powers conferred on the Centre and the State under Schedule 7 List II and III of the Constitution of India. The High Court also rejected the submissions that the proviso to Section 33A (2) amounts to interference with the independence of the judiciary on the ground that the legislature is empowered to regulate sentencing by enactment of appropriate legislation. Such exercise of legislative power is not uncommon and would not interfere with the judicial power in conducting trial and rendering the necessary judgment as to whether the guilt has been proved or not. The submission that the affidavit filed by Shri Youraj Laxman Waghmare, dated 1.10.2005, cannot be considered because it was not verified in accordance with law was rejected with the observations that incorrect verification is curable and steps have been taken to cure the same. The submissions made in Writ Petition 2450 of 2005 that the amendment would not apply to eating houses and would, therefore, not be applicable in the establishments of the petitioners therein was also rejected. It was held that the “place of public

interest" includes eating houses which serve alcohol for public consumption. It was further observed that the amendment covered even those areas in such eating houses where alcohol was not served. The High Court also rejected the challenge to the amendment that the same is in violation of Article 15(1) of the Constitution of India. It has been observed that dancing was not prohibited in the establishments covered under Section 33B only on the ground of sex. What is being prohibited is dancing in identified establishments. The Act prohibits all types of dance in banned establishments by any person or persons. There being no discrimination on the basis of gender, the Act cannot be said to violate Article 15(1) of the Constitution.

88. The High Court has even rejected the challenge to the impugned amendment on the ground that the ban amounts to an unreasonable restriction, on the fundamental right of the bar owners and bar dancers, of freedom of speech and expression guaranteed under Article 19(1)(a). The submission was rejected by applying the doctrine of pith and substance. It has been held by the High Court that dance performed by the bar dancers can

not fall within the term "freedom of speech and expression" as the activities of the dancers are mainly to earn their livelihood by engaging in a trade or occupation. Similarly, the submission that the provision in Section 33A was *ultra vires* Article 21 of the Constitution of India was rejected, in view of the ratio of this Court, in the case of **Sodan Singh & Ors.** Vs. **New Delhi Municipal Committee & Ors.**[40] wherein it is observed as follows :-

> "We do not find any merit in the argument founded on Article 21 of the Constitution. In our opinion, Article 21 is not attracted in a case of trade or business – either big or small. The right to carry on any trade or business and the concept of life and personal liberty within Article 21 are too remote to be connected together."

89. Since, no counter appeal has been filed by any of the respondents challenging the aforesaid findings, it would not be appropriate for us to opine on the correctness or otherwise of the aforesaid conclusions.

90. However in order to be fair to learned senior counsel for the respondents, we must notice that in the written submissions it was sought to be argued that in fact the amendments are also unconstitutional under Articles 15(1), 19(1)(a) and 21. Dr. Dhawan has submitted that the High Court has erroneously recorded the finding that the

[40] (1989) 4 SCC 155

dancing in a bar is not an expression of dancers but their profession, and, therefore, it can not get the protection of Article 19(1)(a). Similarly, he had submitted that the High Court in the impugned judgment has erroneously held that the challenge to the amendment under Article 21 is too remote. The respondents, therefore, would invite this Court to examine the issue of "livelihood" under Article 142 of the Constitution of India being "question of law of general public importance. According to Dr. Dhawan, the High Court ought to have protected the bar dancers under Articles 19(1)(a) and 21 also. As noticed earlier, Mr. Rohatgi and Mr. Grover had made similar submissions. We are, however, not inclined to examine the same in these proceedings. No separate appeals have been filed by the respondents specifically raising a challenge to the observations adverse to them made by the High Court. We make it very clear that we have not expressed any opinion on the correctness or otherwise of the conclusions of the High Court with regard to Sections 33A and 33B not being *ultra vires* Articles 15(1), 19(1)(a) and Article 21. We have been constrained to adopt this approach:

1) Because there was no challenge to the conclusions of the High Court in appeal by respondents.

2) The learned senior counsel of the appellants had no occasion to make submissions in support of the conclusions recorded by the High Court.

3) We are not inclined to exercise our jurisdiction under Article 142, as no manifest injustice has been caused to the respondents. Nor can it be said that the conclusions recorded by the High Court are palpably erroneous so as to warrant interference, without the same having been challenged by the respondents. We, therefore, decline the request of Dr. Rajeev Dhawan.

91. This now brings us to the central issue as to whether the findings recorded by the High Court that the impugned amendment is *ultra vires* Article 14 and 19(1)(g) suffers from such a jurisdictional error that they cannot be sustained.

Is the impugned legislation *ultra vires* Article 14?

92. Before we embark upon the exercise to determine as to whether the impugned amendment Act is *ultra vires* Article 14 and 19(1)(g), it would be apposite to notice the well established principles for testing any legislation before it can be declared as *ultra vires.* It is not necessary for us to make a complete survey of the judgments in

which the various tests have been formulated and re-affirmed. We may, however, make a reference to the judgment of this Court in **Budhan Choudhry** Vs. **State of Bihar**[41], wherein a Constitution Bench of seven Judges of this Court explained the true meaning and scope of Article 14 as follows :-

> "It is now well established that while article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (*i*) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (*ii*) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also well established by the decisions of this Court that Article 14 condemns discrimination not only by a substantive law but also by a law of procedure."

93. The aforesaid principles have been consistently adopted and applied in subsequent cases. In the case of **Ram Krishna Dalmia (supra),** this Court reiterated the principles which would help in testing the legislation on the touchstone of Article 14 in the following words :

> "(a) That a law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him

[41] AIR 1955 SC 191

and not applicable to others, that single individual may be treated as a class by himself

(b) That there is always presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) That it must he presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) That the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) That in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can he conceived existing at the time of the legislation; and

(f) That while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, *if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may be reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.*"

(Italics are ours)

94. These principles were reiterated by this Court in **Shashikant Laxman Kale (supra).** The relevant observations have already been noticed in the earlier part of the judgment.

95. The High Court has held that the classification under Sections 33A and 33B was rational because the type of dance performed in the establishments allowed them to be separated into two distinct classes. It is further observed that the classification does not need to be scientifically perfect or logically complete.

96. The High Court has, however, concluded that classification by itself is not sufficient to relieve a statute from satisfying the mandate of the equality clause of Article 14. The amendment has been nullified on the second limb of the twin test to be satisfied under Article 14 of the Constitution of India that the amendment has no nexus with the object sought to be achieved. Mr. Subramanium had emphasised that the impugned enactment is based on consideration of different factors, which would justify the classification. We have earlier noticed the elaborate reasons given by Mr. Subramanium to show that the dance performed in the banned establishments itself takes a form of sexual propositioning. There is revenue sharing generated by the tips received by the dancers. He had also emphasised that in the banned establishment women, who dance are not

professional dancers. They are mostly trafficked into dancing. Dancing, according to him, is chosen as a profession of last resort, when the girl is left with no other option. On the other hand, dancers performing in the exempted classes are highly acclaimed and established performer. They are economically independent. Such performers are not vulnerable and, therefore, there is least likelihood of any indecency, immorality or depravity. He had emphasised that classification to be valid under Article 14 need not necessarily fall within an exact or scientific formula for exclusion or inclusion of persons or things. [**See**: **Welfare Association, A.R.P., Maharashtra (supra)**] There are no requirements of mathematical exactness or applying doctrinaire tests for determining the validity as long as it is not *palpably* arbitrary. (**See: Shashikant Laxman Kale & Anr. (supra)**).

97. We have no hesitation in accepting the aforesaid proposition for testing the reasonableness of the classification. However, such classification has to be evaluated by taking into account the objects and reasons of the impugned legislation; (**See: Ram Krishna**

Dalmia's case supra). In the present case, judging the distinction between the two sections upon the aforesaid criteria cannot be justified.

98. Section 33(a)(i) prohibits holding of a performance of dance, *of any kind or type,* in any eating house, permit room or beer bar. This is a complete embargo on performance of dances in the establishment covered under Section 33(a)(i). Section 33(a) contains a non-obstante clause which makes the section stand alone and absolutely independent of the act and the rules. Section 33(a)(ii) makes it a criminal offence to hold a dance performance in contravention of sub-section(i). On conviction, offender is liable to punishment for 3 years, although, the Court may impose a lesser punishment of 3 months and fine, after recording special reasons for the same. We are in agreement with the submission of Dr. Dhawan that it is a particularly harsh provision. On the other hand, the establishments covered under Section 33B enjoy complete exemption from any such restrictions. The dance performances are permitted provided the establishments comply with the applicable statutory provisions, Bye-Laws, Rules and Regulations. The

classification of the establishments covered under Sections 33A and 33B would not satisfy the test of equality laid down in the case of **State of Jammu and Kashmir** Vs. **Shri Triloki Nath Khosa & Ors.**[42], wherein it was observed as under:

> "Classification, therefore, must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved."

99. Further, this Court in **E.V. Chinnaiah** Vs. **State of A.P. & Ors.**[43] held that:

> "Legal constitutional policy adumbrated in a statute must answer the test of Article 14 of the Constitution of India. Classification whether permissible or not must be judged on the touchstone of the object sought to be achieved."

100. Learned senior counsel for the appellants have sought to justify the distinction between two establishments, first of all as noticed earlier, on the basis of type of dance. It was emphasised that the dance performed in the prohibited establishments, itself takes a form of sexual propositioning. It was submitted that it is not only just the type of dance performed but the surrounding circumstances which have been taken into consideration in making the distinction. The distinction is sought to be

[42] (1974) 1 SCC 19
[43] (2005) 1 SCC 394

made under different heads which we shall consider seriatim. It is emphasised that in the banned establishments, the proximity between the dancing platform and the audience is larger than at the banned establishments. An assumption is sought to be made from this that there would hardly be any access to the dancers in the exempted establishments as opposed to the easy access in the banned or prohibited establishments. Another justification given is that the type of crowd that visits the banned establishments is also different from the crowd that visits the exempted establishments. In our opinion, all the aforesaid reasons are neither supported by any empirical data nor common sense. In fact, they would be within the realm of "myth" based on stereotype images. We agree with the submission made by the learned counsel for the appellant, Mr. Mukul Rohtagi and Dr. Dhawan that the distinction is made on the grounds of *"classes of establishments"* or "*classes of persons, who frequent the establishment."* and not on the form of dance. We also agree with the submission of the learned senior counsel for the respondents that there is no justification that a dance permitted in exempted institutions under Section 33B, if

permitted in the banned establishment, would be derogatory, exploitative or corrupting of public morality. We are of the firm opinion that a distinction, the *foundation* of which is classes of the establishments and classes/kind of persons, who frequent the establishment and those who own the establishments can not be supported under the constitutional philosophy so clearly stated in the Preamble of the Constitution of India and the individual Articles prohibiting discrimination on the basis of caste, colour, creed, religion or gender. The Preamble of the Constitution of India as also Articles 14 to 21, as rightly observed in the Constitutional Bench Judgment of this Court in **I.R. Coelho (supra)**, form the heart and soul of the Constitution. Taking away of these rights of equality by any legislation would require clear proof of the justification for such abridgment. Once the respondents had given prima facie proof of the arbitrary classification of the establishments under Sections 33A and 33B, it was duty of the State to justify the reasonableness of the classification. This conclusion of ours is fortified by the observations in **M/s. Laxmi Khandsari (supra)**, therein this Court observed as follow:

> "**14.** We, therefore, fully agree with the contention advanced by the petitioners that where there is a

> clear violation of Article 19(1)(g), the State has to justify by acceptable evidence, inevitable consequences or sufficient materials that the restriction, whether partial or complete, is in public interest and contains the quality of reasonableness. This proposition has not been disputed by the counsel for the respondents, who have, however, submitted that from the circumstances and materials produced by them the onus of proving that the restrictions are in public interest and are reasonable has been amply discharged by them."

101. In our opinion, the appellants herein have failed to satisfy the aforesaid test laid down by this court. The Counsel for the appellant had, however, sought to highlight before us the unhealthy practice of the customers showering money on the dancers during the performance, in the prohibited establishments. This encourages the girls to indulge in unhealthy competition to create and sustain sexual interest of the most favoured customers. But such kind of behaviour is absent when the dancers are performing in the exempted establishments. It was again emphasised that it is not only the activities performed in the establishments covered under Section 33 A, but also the surrounding circumstances which are calculated to produce an illusion of easy access to women. The customers who would be inebriated would pay little heed to the dignity or lack of consent of the women. This conclusion is sought to be supported by a number of

complaints received and as well as case histories of girl children rescued from the dance bars. We are again not satisfied that the conclusions reached by the state are based on any *rational criteria*. We fail to see how exactly the same dances can be said to be morally acceptable in the exempted establishments and lead to depravity if performed in the prohibited establishments. Rather it is evident that the same dancer can perform the same dance in the high class hotels, clubs, and gymkhanas but is prohibited of doing so in the establishments covered under Section 33A. We see no rationale which would justify the conclusion that a dance that leads to depravity in one place would get converted to an acceptable performance by a mere change of venue. The discriminatory attitude of the state is illustrated by the fact that an infringement of section 33A(1) by an establishment covered under the aforesaid provision would entail the owner being liable to be imprisoned for three years by virtue of section 33A(2). On the other hand, no such punishment is prescribed for establishments covered under Section 33B. Such an establishment would merely lose the licence. Such blatant discrimination cannot possibly be justified on the criteria of reasonable

classification under Article 14 of the Constitution of India. Mr. Subramaniam had placed strong reliance on the observations made by the Court in the **State of Uttar Pradesh** Vs. **Kaushailiya & Ors. (supra)**, wherein it was observed as follows:

> "**7.** The next question is whether the policy so disclosed offends Article 14 of the Constitution. It has been well settled that Article 14 does not prohibit reasonable classification for the purpose of legislation and that a law would not be held to infringe Article 14 of the Constitution if the classification is founded on an intelligible differentia and the said differentia has a rational relation to the object sought to be achieved by the said law. The differences between a woman who is a prostitute and one who is not certainly justify their being placed in different classes. So too, there are obvious differences between a prostitute who is a public nuisance and one who is not. A prostitute who carries on her trade on the sly or in the unfrequented part of the town or in a town with a sparse population may not so dangerous to public health or morals as a prostitute who lives in a busy locality or in an over-crowded town or in a place within the easy reach of public institutions like religious and educational institutions. Though both sell their bodies, the latter is far more dangerous to the public, particularly to the younger generation during the emotional stage of their life. Their freedom of uncontrolled movement in a crowded locality or in the vicinity of public institutions not only helps to demoralise the public morals, but, what is worse, to spread diseases not only affecting the present generation, but also the future ones. Such trade in public may also lead to scandals and unseemly broils. There are, therefore, pronounced and real differences between a woman who is a prostitute and one who is not, and between a prostitute, who does not demand in public interests any restrictions on her movements and a prostitute, whose actions in public places call for the imposition of restrictions on her movements and even deporation. The object of the Act, as has already been noticed, is not only to suppress immoral traffic in women and girls, but also to improve public morals

> by removing prostitute from busy public places in the vicinity of religious and educational institutions. The differences between these two classes of prostitutes have a rational relation to the object sought to be achieved by the Act."

102. We fail to see how any of the above observations are of relevance in present context. The so called distinction is based purely on the basis of the class of the performer and the so called *superior class* of audience. Our judicial conscience would not permit us to presume that the class to which an individual or the audience belongs brings with him as a necessary concomitant a particular kind of morality or decency. We are unable to accept the presumption which runs through Sections 33A and 33B that the enjoyment of same kind of entertainment by the upper classes leads only to mere enjoyment and in the case of poor classes; it would lead to immorality, decadence and depravity. Morality and depravity cannot be pigeon-holed by degrees depending upon the classes of the audience. The aforesaid presumption is also perplexing on the ground that in the banned establishments even a non-obscene dance would be treated as vulgar. On the other hand, it would be presumed that in the exempted establishments any dance is non-obscene. The underlying presumption at once puts

the prohibited establishments in a precarious position, in comparison to the exempted class for the grant of a licence to hold a dance performance. Yet at the same time, both kinds of establishments are to be granted licenses and regulated by the same restrictions, regulations and standing provisions.

103. We, therefore, decline to accept the submission of Mr. Subramaniam that the same kind of dances performed in the exempted establishments would not bring about sexual arousal in male audience as opposed to the male audience frequenting the banned establishments meant for the lower classes having lesser income at their disposal. In our opinion, the presumption is *elitist*, which cannot be countenanced under the egalitarian philosophy of our Constitution. Our Constitution makers have taken pains to ensure that equality of treatment in all spheres is given to all citizens of this country irrespective of their station in life. {**See: Charanjit Lal Chowdhury** Vs. **Union of India & Ors. (supra), Ram Krishna Dalmia's case (supra)** and **State of Uttar Pradesh** Vs. **Kaushailiya & Ors. (supra**)}. In our opinion, sections

33A and 33B introduce an invidious discrimination which cannot be justified under Article 14 of the Constitution.

104. The High Court, in our opinion, has rightly declined to rely upon the *Prayas* and Shubhada Chaukar's report. 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 was not similar to the circumstances which led to the decision in the case of **Radice (supra)**. 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 night life 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 "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.

105. 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 the 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 33A with trafficking. We, therefore, reject the submission of the appellants that the ban has been placed for the protection of the vulnerable women.

106. 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 the **Ram Krishna Dalmia's case (supra)**, the Legislature is free to recognize the degrees of harm and may confine its restrictions to those cases

where the need is deemed to be clearest. We also agree with the observations of the U.S. Court in **Joseph Patsone's case (supra)** 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 view points. Thus, the observations made in the case of **Joseph Patsone (supra)** are not of any help to the appellant. We are also conscious of the observations made by this court in case of **Mohd. Hanif Quareshi (supra)**, 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.

107. 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 counter parts 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 3 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 motions of a bygone era which ought not to be resurrected.

108. 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 bar tender. The women that serve liquor and beer to customers do not *arouse lust* in customers but women dancing would arouse lust. In our opinion, if 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 degree thereof, cannot be said to be monopolized by the upper or the lower classes. Nor can it be presumed that sexual arousal would generate different character of 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** Vs. **Union of India**[44], that "prostitution in 5 star hotels is a licence given to a person from higher echelon". In our opinion, the activities which are obscene or which are likely to deprave and corrupt those whose minds are open to such immoral influences, cannot be distinguished on the basis as to whether they are performing in 5 star hotels or in dance bars. The judicial conscience of this Court would not give credence to a notion that high morals and decent behaviour is the exclusive domain of the upper classes; whereas vulgarity and depravity is limited to the lower classes. Any classification made on the basis of such invidious presumption is liable to be struck down being wholly unconstitutional and particularly contrary to Article 14 of the Constitution of India.

Is the impugned legislation *ultra vires* Article 19(1)(g) –

109. It was submitted by the learned counsel for the appellants that by prohibiting dancing under Section 33A, no right of the bar owners for carrying on a

[44] (1997) 8 SCC 114

business/profession is being infringed **[See: Fertilizer Corporation Kamgar Union (Regd.), Sindri & Ors. (supra)].** The curbs are imposed by Section 33A and 33B only to restrict the owners in the prohibited establishments from permitting dance to be conducted in the interest of general public. Since the dances conducted in establishments covered under Section 33A were obscene, they would fall in the category of *res extra commercium* and would not be protected by the fundamental right under Article 19(1)(g). The submission is also sought to be supported by placing a reliance on the reports of Prayas and Subhada Chaukar. The restriction is also placed to curb exploitation of the vulnerability of the young girls who come from poverty stricken background and are prone to trafficking. In support of the submission, the learned counsel relied on a number of judgments of this Court as well as the American Courts, including **Municipal Corporation of the City of Ahmedabad (supra)**, wherein it was held that the expression "in the interest of general public" under Article 19(6) inter alia includes protecting morality. The relationship between law and morality has been the subject of jurisprudential discourse for centuries. The questions such as: Is the

development of law influenced by morals? Does morality always define the justness of the law? Can law be questioned on grounds of morality? and above all, Can morality be enforced through law?, have been subject matter of many jurisprudential studies for over at least a century and half. But no reference has been made to any such studies by any of the learned senior counsel. Therefore, we shall not dwell on the same.

110. Upon analyzing the entire fact situation, the High Court has held that dancing would be a fundamental right and cannot be excluded by dubbing the same as *res extra commercium*. The State has failed to establish that the restriction is reasonable or that it is in the interest of general public. The High Court rightly scrutinized the impugned legislation in the light of observations of this Court made in **Narendra Kumar (supra)**, wherein it was held that greater the restriction, the more the need for scrutiny. The High Court noticed that in the guise of regulation, the legislation has imposed a total ban on dancing in the establishments covered under Section 33A. The High Court has also concluded that the legislation has failed to satisfy the doctrine of direct and inevitable effect

[**See: Maneka Gandhi's case (supra)**]**.** We see no reason to differ with the conclusions recorded by the High Court. We agree with Mr. Rohatgi and Dr. Dhawan that there are already sufficient rules and regulations and legislation in place which, if efficiently applied, would control if not eradicate all the dangers to the society enumerated in the Preamble and Objects and Reasons of the impugned legislation.

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

A. Bombay Municipal Corporation Act.
B. Bombay Police Act, 1951.
C. Bombay Prohibition Act, 1949.
D. Rules for Licensing and Controlling Places of Public Entertainment, 1953.
E. Rules for Licensing and controlling Places of Public Amusement other that Cinemas.
F. And other orders are passed by the Government from time to time.

112. The Restaurants/Dance Bar owners also have to obtain licenses/permissions as listed below:

i. Licence and Registration for eating house under the Bombay Police Act, 1951.
ii. License under the Bombay Shops and Establishment Act, 1948 and the Rules thereunder.

iii. Eating House license under Sections 394, 412A, 313 of the Bombay Municipal Corporation Act, 1888.

iv. Health License under the Maharashtra Prevention of Food Adulteration Rules, 1962.

v. Health License under the Mumbai Municipal Corporation Act, 1888 for serving liquor;

vi. Performance License under Rules 118 of the Amusement Rules, 1960 ;

vii. Premises license under Rules 109 of the amusement Rules;

viii. License to keep a place of Public Entertainment under Section 33(1), clause (w) and (y) of the Bombay Police Act, 1951 and the said Entertainment Rules;

ix. FL III License under the Bombay Prohibition Act, 1949 and the Rules 45 of the Bombay Foreign Liquor Rules, 1953 or a Form "E" license under the Special Permits & Licenses Rules for selling or serving IMFL & Beer.

x. Suitability certificate under the Amusement Rules.

113. Before any of the licenses are granted, the applicant has to fulfil the following conditions :

(i) Any application for premises license shall 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 metres.

(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 metres.

(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 offenses.

(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 metres.

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

114. The aforesaid list, enactments and regulations are further supplemented with regulations protecting the dignity of women. The provisions of 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.”

115. Rules 122 and 123 of the Amusement Rules, 1960 also prescribe conditions for holding performances.

"Rule 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."

116. 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 the Objects and Reasons. [**See: State of Gujarat** Vs**. Mirzapur Moti Kureshi Kassab Jamat (supra)**], wherein it is held that the standard of judging reasonability of restriction or restrictions amounting to prohibition remains the same, except that a total prohibition must also satisfy the test that a lesser alternative would be inadequate]. The Regulations framed under Section 33(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 license 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 license 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.

117. 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 fall within Section 33B; 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 33A 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 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** Vs. **R.M.D. Chamarbaugwala & Anr. (supra), Khoday Distilleries Ltd. & Ors.** Vs. **State of Karnataka & Ors. (supra), State of Punjab & Anr.** Vs. **Devans Modern Breweries Ltd. & Anr. (supra), New York State Liquor Authority** Vs. **Dennis BELLANCA, DBA The Main Event, Et Al. (supra), Regina** Vs. **Bloom (supra)** to substantiate the aforesaid submissions. Therefore, looking at the degree of harm caused by such behaviour, the State enacted the impugned legislation.

118. 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. (supra)**, 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 the unfounded presumption that women are being/were trafficked in the bars. The case of **State of Punjab &**

Anr. Vs**. Devans Modern Breweries Ltd. & Anr. (supra)** dealt with liquor trade, whereas the present case is clearly different. The reliance on **New York State Liquor Authority (supra)** 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, **Regina** Vs**. Bloom (supra)** 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.

119. 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.

120. The end result of the prohibition of *any form* of dancing in the establishments covered under Section 33A leads to the only conclusion that these establishments have to shut down. This is evident from the fact that since 2005, most if not all the dance bar establishments have literally closed down. This has led to the unemployment of over 75,000 women workers. It has been brought on the record that many of them have been compelled to take up prostitution out of necessity for maintenance of their families. In our opinion, the impugned legislation has proved to be totally counter productive and cannot be sustained being *ultra vires* Article 19(1)(g).

121. We are also not able to agree with the submission of Mr. Subramanium that the impugned legislation can still be protected by reading down the provision. Undoubtedly,

this Court in the case of **Government of Andhra Pradesh & Ors.** Vs. **P. Laxmi Devi (Smt.) (supra)** upon taking notice of the previous precedents has held that the legislature must be given freedom to do experimentations in exercising its powers, provided it does not clearly and flagrantly violate its constitutional limits, these observations are of no avail to the appellants in view of the opinion expressed by us earlier. It is not possible to read down the expression "any kind or type" of dance by any person to mean dances which are obscene and derogatory to the dignity of women. Such reading down cannot be permitted so long as any kind of dance is permitted in establishments covered under Section 33B.

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

123. In our opinion, it would be more appropriate that the State Government re-examines the recommendations made by the Committee which had been constituted by the State Government comprising of a Chairman of AHAR, Public and Police Officials and chaired by the Principal Secretary (E.I.), Home Department. The Committee had prepared a report and submitted the same to the State Government. The State Government had in fact sent a communication dated 16th July, 2004 to all District Judicial Magistrates and Police Commissioner to amend the rules for exercising control on Hotel Establishments presenting dance programmes. The suggestions made for the amendment of the Regulations were as follows :

(1) Bar girls dancing in dance bars should not wear clothes which expose the body and also there should be restriction on such dancers wearing tight and provocative clothes.

(2) There should 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 who have secured licences earlier, provisions mentioned above be made binding. It should be made binding on dance bars seeking new licences 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.

(3) Area of dance floor should be minimum 10 x 12 ft. i.e. 120 sq. ft. and the area to be provided for such dancer should be minimum of 15 sq. ft. so that more than 8 dancers cannot dance simultaneously on the stage having area of 12- sq. ft.

(4) If the dancers are to be awarded, there should be a ban on going near them or on showering money on them. Instead it should be made binding to collect the said money in the name of manager of the concerned dancer or to hand over to the manager.

(5) Apart from the above, a register should be maintained in the dance bar to take entries of names of the girls dancing in the bar every day. Similarly, holders of the establishment should gather information such a name, address, photograph and citizenship and other necessary information of the dance girls. Holder of the establishment should be made responsible to verify the information furnished by the dance girls. Also above conditions should be incorporated in the licences being granted.

124. Despite the directions made by the State Government, the authorities have not taken steps to implement the recommendations which have been submitted by AHAR. On the contrary, the impugned legislation was enacted in 2005. In our opinion, it would be more appropriate to bring

about measures which should ensure the safety and improve the working conditions of the persons working as bar girls. In similar circumstances, this Court in the case of **Anuj Garg (supra**) had made certain observations indicating that instead of putting curbs on women's freedom, empowerment would be more tenable and socially wise approach. This empowerment should reflect in the law enforcement strategies of the State as well as law modeling done in this behalf. In our opinion, in the present case, the restrictions in the nature of prohibition cannot be said to be reasonable, inasmuch as there could be several lesser alternatives available which would have been adequate to ensure safety of women than to completely prohibit dance. In fact, a large number of imaginative alternative steps could be taken instead of completely prohibiting dancing, *if the real concern of the State is the safety of women.*

125. Keeping in view the aforesaid circumstances, we are not inclined to interfere with the conclusions reached by the High Court. Therefore, we find no merit in these appeals and the same are accordingly dismissed.

126. All interim orders are hereby vacated.

.....**CJI.**
[Altamas Kabir]

.....**J.**
[Surinder Singh Nijjar]

New Delhi;
July 16, 2013.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2705 OF 2006

State of Maharashtra & Anr. ***… Appellants***

Vs.

Indian Hotel & Restaurants Assn.

& Ors. ***…***
Respondents

WITH

Civil Appeal No. 2704 of 2006

and

Civil Appeal No.5504 of 2013

[Arising out of S.L.P. (C) No. 14534 of 2006]

J U D G M E N T

ALTAMAS KABIR, CJI.

1. Having had an opportunity of going through the masterly exposition of the law in the crucible of facts relating to the violation of the provisions of Articles 19(1)(a), 19(1)(g) and 21 of the Constitution read with the relevant provisions of the Bombay Police Act, 1951, I wish to pen down some of my thoughts vis-a-vis the problem arising in all these matters requiring the balancing of

equities under Articles 19(1)(g) and 21 of the Constitution.

2. The expression "the cure is worse than the disease" comes to mind immediately.

3. As will appear from the judgment of my learned Brother, Justice Nijjar, the discontinuance of bar dancing in establishments below the rank of three star establishments, has led to the closure of a large number of establishments, which has resulted in loss of employment for about seventy-five thousand women employed in the dance bars in various capacities. In fact, as has also been commented upon by my learned Brother, many of these unfortunate people were forced into prostitution merely to survive, as they had no other means of survival.

4. Of course, the right to practise a trade or profession and the right to life guaranteed under Article 21 are, by their very nature, intermingled with each other, but in a situation like the present one, such right cannot be equated with unrestricted freedom like a run-away horse. As has been indicated by my learned Brother, at the very end of his judgment, it would be better to treat the cause than to blame the effect and to completely discontinue the livelihood of a large section of women, eking out an existence by dancing in bars, who will be left to the mercy of other forms of exploitation. The compulsion of physical needs has to be taken care of while making any laws on the subject. Even a bar dancer has to satisfy her hunger, provide expenses for her family and meet day to day expenses in travelling from her

residence to her place of work, which is sometimes even as far as 20 to 25 kms. away. Although, it has been argued on behalf of the State and its authorities that the bar dancers have taken to the profession not as an extreme measure, but as a profession of choice, more often than not, it is a Hobson's choice between starving and in resorting to bar dancing. From the materials placed before us and the statistics shown, it is apparent that many of the bar dancers have no other option as they have no other skills, with which they could earn a living. Though some of the women engaged in bar dancing may be doing so as a matter of choice, not very many women would willingly resort to bar dancing as a profession.

5. Women worldwide are becoming more and more assertive of their rights and want to be free to

make their own choices, which is not an entirely uncommon or unreasonable approach. But it is necessary to work towards a change in mindset of people in general not only by way of laws and other forms of regulations, but also by way of providing suitable amenities for those who want to get out of this trap and to either improve their existing conditions or to begin a new life altogether. Whichever way one looks at it, the matter requires the serious attention of the State and its authorities, if the dignity of women, as a whole, and respect for them, is to be restored. In that context, the directions given by my learned Brother, Justice Nijjar, assume importance.

6. I fully endorse the suggestions made in paragraph 123 of the judgment prepared by my learned Brother that, instead of generating

unemployment, it may be wiser for the State to look into ways and means in which reasonable restrictions may be imposed on bar dancing, but without completely prohibiting or stopping the same.

7. It is all very well to enact laws without making them effective. The State has to provide alternative means of support and shelter to persons engaged in such trades or professions, some of whom are trafficked from different parts of the country and have nowhere to go or earn a living after coming out of their unfortunate circumstances. A strong and effective support system may provide a solution to the problem.

8. These words are in addition to and not in

derogation of the judgment delivered by my learned Brother.

.....CJI.

(ALTAMAS KABIR)

New Delhi

Dated: July 16, 2013.