IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.07.2009

CORAM

THE HONOURABLE MR.JUSTICE K.CHANDRU

O.A.NO.249 OF 2009
IN
C.S.NO.251 OF 2009

M/s.Influence Lifestyle
Stores Pvt. Ltd.,
rep. By its Managing Director
Mr.V.Naresh Kumar,
No.01-03,Sigma Wing, A-Block,
Ground Floor,
Raheja Towers,
No.177, Anna Salai,
Chennai-600 002 .. Applicant

Vs.

1.Government of Tamil Nadu,
rep. By its Secretary (Home),
Fort St. George,
Chennai-600 009.
2.The Director General of Police,
Rajaji Salai,
Mylapore,
Chennai-600 004.
3.The Commissioner of Police,
Greater Chennai City,
Pantheon Road,
Egmore,
Chennai-600 008. .. Respondents

O.A.No.249 of 2009 is filed seeking an order of interim injunction restraining the respondents, their men, agents, representatives, successors in office or anyone claiming through them or under them from in any way disturbing or interfering with the peaceful conduct of the business offering various Spa therapies by both sexes for members belonging to both sexes under the name and style of INFLUENCE SPA at No.91, Poonamallee High Road, Near Hotel Dasaprakash, Chennai-600 084 pending disposal of the suit.

For Applicant : Mr.A.V.K.Ezhilmani

For Respondents: Mrs.Bhavani Subbarayan, Spl. G.P.

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ORDER

We are only running an health Spa in the name and style of Influence Spa says the applicant and the respondent police counters it by stating that it will have evil influence over our youth. The applicant asserts that running an health spa where cross massages are done by opposite sex is world wide phenomena and there is no legal prohibition. The respondent police contradicts it by saying that such activities are nothing but a ruse to carry on immoral activities and under the 'parens patriae' power of the State, it has power to curtail such nefarious activities.
2.The short question that arises in this application is whether the applicant can be allowed to run their Spa center without any interdiction by the respondent state?
3.The applicant/plaintiff filed the suit for the relief of a mandatory injunction to direct the State to formulate rules and regulations for conducting Spa centers and for a permanent injunction to restrain the respondents from interfering with the peaceful conduct of the business in offering various Spa therapies by both sexes for members of both sexes in their business premises.
4.The present application is for a temporary relief on the prayer 'b' in the plaint. It is the stand of the applicant that they are a private limited company incorporated under the Companies Act, 1956. They have invested huge amounts and have also borrowed monies from the Bank to run their business. They have established a Spa center at Chennai and have offered to their customers various health packages including massage therapies. They have recruited many trained therapists from both sexes and there was nothing illegal in a trained therapies belonging to one sex doing massage therapies to the customers of opposite sex. Such practices are offered all over the world and there is no legal prohibition in doing so. It is their case that the respondents 2 and 3 are interfering with their lawful business. Such activities are carried on in a leading city Hospital also.
5.On notice from this Court, the third respondent Commissioner of Police has filed a counter affidavit controverting the stand of the applicant. It is stated by him that the City Police Act, 1888 obligates the applicant to get a license. In the interest of public and orderly society and prevention of nefarious activities, which may be carried out covertly in the name of Spa centers, some control is absolutely necessary. Article 19(6) clothes the State with power to impose reasonable restriction on the exercise of the right under Article 19(1)(g) of the Constitution in the interest of general public. It has reason to suspect that the applicant is contemplating to indulge in unusual and unhealthy activities.
6.The third respondent Commissioner of Police further stated that as per existing rules, any sort of indulgence of body massage in the name of health Spa is not at all permissible and if permitted may lead to unwarranted problems such as immoral activities. The blanket restraint order sought by the applicant is only to engage girls to do the massage to men thereby attracting more youth to their place which amounts to immoral activities. According to the Commissioner of Police, it was clearly established that the applicant is going to conduct a massage parlour with teenaged girls and there is every possibility to attract men of questionable character and antisocial elements to the parlour and such massage parlours were already closed by him in the past. He further denied that any police official ever visited the Spa center run by the applicant, but it was an established law that police have the power to check illegal activities wherever it happens and coverage of unethical business with legal permission cannot be allowed.
7.Arguments were addressed by counsels on both sides on similar lines. But the learned Special Government Pleader was unable to bring it to the notice of this court any specific legal provision under the Madras City Police Act, 1888 which obliges a Spa center to be licensed by the Police Commissioner. In the absence of a law, the only argument of the State was based upon moral and ethical grounds.
8.In order to appreciate the rival contentions, it is necessary to refer to certain legal precedents which may have a bearing on the subject. The Supreme Court and several High Courts including this

Court had occasions to consider the State/Police power to prohibit dance shows in Restaurants, video-parlours running video games for youth and children as rules prohibiting women from serving in Bars. Similar contentions based on moral questions and ethical standards were also raised in those cases. The power of the State to curb such activities were also sought to be justified under the touchstone of Article 19(6) of the Constitution.

9.While dealing with the power of the State to regulate the video game parlours, the Supreme Court emphasised the scope of the State's power as well as the right to life guaranteed under Article 21 of the Constitution, in its decision in M.J.Sivani and others Vs. State of Karnataka and others reported in (1995) 6 SCC 289. In paragraphs 18 to 20 it has been held as follows:

"18.The question then emerges whether regulation of video games violates the fundamental right to trade or business or avocation of the appellants guaranteed under Articles 19(1)(g) and 21. It is true that they have fundamental right to trade or business or avocation but it is subject to control by Article 19(6) which empowers to impose by law reasonable restrictions on the exercise of the right in general public interest. In applying the test of reasonableness, the broad criterion is whether the law strikes a proper balance between social control on the one hand and the right of the 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. The court cannot proceed on general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or a class of persons on whom the restrictions are imposed. In order to determine reasonableness of the restriction, regard must be had, as stated earlier, to the nature of the business and the prevailing conditions in that trade or business which would differ from trade to trade. No hard and fast rules concerning all trades etc. could be laid. The said, with a view to prohibit illegal or immoral trade or business injurious to the public health or welfare, is empowered to regulate the trade or business appropriate to the conditions prevailing in the trade/business. The nature of the business and its indelible effect on public interest etc. therefore, are important elements in deciding the reasonableness of the restriction. No one has inherent right to carry on a business which is injurious to public interest. Trade or business attended with danger to the community may be totally prohibited or be permitted subject to such conditions or restrictions as would prevent the evils to the utmost.

19.The licensing authority, therefore, is conferred with discretion to impose such restrictions by notification or order having statutory force or conditions emanating therefrom as part thereof as are deemed appropriate to the trade or business or avocation by a licence or permit, as the case may be. Unregulated video game operations not only pose a danger to public peace and order and safety; but the public will fall a prey to gaming where they always stand to lose in playing the games of chance. Unless one resorts to gaming regularly, one can hardly be reckoned to possess skill to play the video game. Therefore, when it is a game of pure chance or manipulated by tampering with the machines to make it a game of chance, even acquired skills hardly assist a player to get extra tokens. Therefore, even when it is a game of mixed skill and chance, it would be a gaming prohibited under the statute except by regulation. The restriction imposed, therefore, cannot be said to be arbitrary, unbridled or uncanalised. The guidance for exercising the discretion need not ex facie be found in the notification or orders. It could be gathered from the provisions of the Act or Rules and a total consideration of the relevant provisions in the notification or order or conditions of the licence. The discretion conferred on the licensing authority, the Commissioner or the District Magistrate, cannot be said to be arbitrary, uncanalised or without any guidelines. The regulations, therefore, are imposed in the public interest and the right under Article 19(1)(g) is not violated.

20.It is true that the owner or person in charge of the video game earn livelihood assured under Article 21 of the Constitution but no one has the right to play with the credulity of the general public or the career of the young and impressionable age school or college-going children by operating unregulated video games. If its exhibition is found obnoxious or injurious to public welfare, it would be permissible to impose total prohibition under Article 19(6) of the Constitution. Right to life under

Article 21 does protect livelihood, but its deprivation cannot be extended too far or projected or stretched to the avocation, business or trade injurious to public interest or has insidious effect on public morale or public order. Therefore, regulation of video games or prohibition of some video games of pure chance or mixed chance and skill are not violative of Article 21 nor is the procedure unreasonable, unfair or unjust."
(Emphasis added)
10.The aforesaid decision of the Supreme Court came to be followed by this Court in its judgment in K.Rajesh Vs. The Commissioner of Police, Madras and others reported in 1999 MLJ (Supp.) 357. In paragraph 8 it was observed as follows:
"8.For the above conclusions arrived at by the Apex Court, on reasons, thus bringing video games business within the purview of the Madras City Police Act, 1988 and the Tamil Nadu Gaming Act, 1930, wherein the District Magistrate-cum-District Collector and the Police Commissioner are designated as the licensing authorities, the version of the petitioner that the penal provisions of no Act are attracted nor could it be said that there is any provision at all to obtain any permission from any authority and that the insistence for obtaining the permission from the third respondent is a sort of interference made into the constitutional rights of the petitioner is absolutely wrong and such of the contentions of the petitioner are hereby rejected only as illusion in the light of the conclusions arrived at by the Apex Court in its judgment cited supra."
11.This Court in its judgment in D.P.Anand Vs. State of Tamil Nadu represented by the Secretary, Home Department, Chennai and another reported in 1997 (2) MLJ 413, while dealing with the power of the Police to curb immoral and indecent activities held that dehors the powers vested by the legislature they cannot curb any activities as being immoral and courts cannot clothe them with such powers. A reference to para 27 may be made in this regard and it reads as follows:
"27....there are methods enumerated by the Madras City Police Act as well as the Indian Penal Code to curb the activities of persons indulging in immoral and indecent or obscene activities. They could be punished by the criminal court and the licensing authority by suspending or cancelling their licence or forfeiture of their security deposit. But in the absence of a provisions for refusing to grant a licence when a person commits an offence with reference to decency, morality or obscenity or for that matter commits the offence again and again the court is helpless except to state that person has to be allowed to carry on the business, without detriment to his fundamental rights guaranteed under Art.19(1)(g) of the Constitution of India. But at the same time, the authorities cannot remain as silent spectators. He could interfere and prevent the person by imposing the penalties mentioned above. The authority concerned has not been empowered to deprive the persons of the chance of carrying on the business. When the Legislatures themselves have not chosen to provide such a power, the court cannot confer such a power upon the said authority. The power of the court, however high it may be, is only to interpret the law and enforce it, not to embark upon enacting laws, even though to a limited extent it can suggest the authorities concerned to do so."
(Emphasis added)
12.The Andhra Pradesh High Court in its decision in Big Way Bar & Restaurant and etc. vs. Commissioner of Police, Hyderabad and another reported in 2003 Crl.L.J. 1360 dealt with the scope of Article 19(1)(g) being restricted by Article 19(6) and held that the total prohibition of dancing in Hotels by the invocation of the Andhra Police Act was invalid. In case of violation, the police can always take action. There is no requirement of total prohibition of such performances. The court emphasised the balancing of the rights under Article 21 to eke out a living and the State's right to regulate a trade under Article 19(6). It will be useful to extract the following passages found in paragraphs 65, 66 and 74 which are as follows:
65....The power of the State to impose reasonable restrictions in respect of any profession or business or for that matter to impose a total prohibition or to regulate the same is not in dispute. But, whether total prohibition of conduct, of music, singing and dances on the ground of obscenity or indecency would be justified is the question that arises for consideration in these matters. It may be that some of the licensees might have violated the licence conditions and are indulging in conduct of

dances in vulgarity and cases might have also been booked against them for violation of the conditions of licence. Merely because some of the licensees have violated the conditions of licence or there was opposition by some people can a total prohibition be imposed prohibiting the music and singing and dances when the statute has not allowed such prohibition? In our considered opinion, the same would amount to negating the fundamental right guaranteed under Art.19(1)(g) of persons who are interested in applying for amusement licences. The right of such persons cannot be deprived merely because others who have been issued licences have violated the conditions of amusement licence or because of sentiments of some section of the public. Therefore, the policy decision taken by the Commissioner of Police prohibiting total prohibition of conduct of music, singing and dances in bars and restaurants, in our opinion, would amount to unreasonable restriction. Any restriction the State wants to bring in must be a reasonable one within the meaning of Art.19(6) of the Constitution of India. In Chintamanrao v. State of M.P. (AIR 1951 SC 118), it was held that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interest of the public. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Art. 19(1)(g) and the social control permitted by Clause (6) of Art.19, it must be held to be wanting in that quality. Herein no care has been taken to strike a balance between the freedom guaranteed in Art.19(1)(g) and the so called general public interest and a total prohibition is sought to be imposed under the guise of obscenity or vulgarity in the performance of dances.

66.If the licensees are violating the conditions and organising semi-nude dances or indulging in other activities encouraging the women dances to expose their bodies in vulgar, obscene and indecent manner, the Commissioner is not without power and he can regulate the same in accordance with the provisions of law including cancellation of licence for such activity. Under sub-section (3) of Section 21 of the Act, it shall always be lawful for the Commissioner of City Police, to refuse licence for or to prohibit the establishment of a place of public amusement or a place of public entertainment by a notorious scoundrel or a bad character. As long as the performance by male and female artists is within the limitation and there is no obscenity or vulgarity in the performance, the same cannot be prohibited nor any restriction can be imposed. Further, if the provisions of the Act and the rules made thereunder are not sufficient to meet the violations of conditions of licence perpetrated by the licencees from time to time it is open to the Commissioner to frame a scheme in exercise of the powers under Section 21 of the Act providing guidelines for running the bars and restaurants and providing punitive measures....

74.The total prohibition underlines by the policy decision is arbitrary and illegal for another reason also. As has been held by the Supreme Court in Chintamanrao v. State of M.P. (AIR 1951 SC 118) and Khoday Distilleries Ltd. v. State of Karnataka only those professions which are inherently vicious or obnoxious or injuries to health, safety and welfare of general public can be prohibited completely because the right to practise profession or to carry on any occupation does not extend to such inherently vicious and pernicious trade or business. By no stretch of imagination, it can be said that the trade or business in music, dance and singing is inherently vicious and pernicious warranting a total prohibition in the interest of general public. Such a restriction is an unreasonable restriction. Singing music and dancing come under the category of amusement or entertainment. The activity of obscenity or indecency being indulged in such performance can always be remedied by appropriate subordinates legislation or by an executive order."

(Emphasis added)

13.The decision of the Andhra Pradesh High Court came to be quoted with approval by a Division Bench of this Court presided by P.Sadasivam, J (as he then was) vide its judgment in The Government of Pondicherry and another Vs. S.Muthukumaraswamy and another reported in 2007 Writ L.R. 267. Paragraphs 18 and 22 from the decision may be quoted below:

"18.....

The above Division Bench decision of the Andhra Pradesh High Court is directly on the point and we are in respectful agreement with the said view since total prohibition underlined by way of policy decision is arbitrary and illegal and opposed to Article 19(1)(g) of the Constitution of India. It is made clear that obscenity and indecency being indulged in such performance cannot be tolerated and the same have to be eliminated with iron hand. However, merely because one or two stray instances being taken place, there cannot be a blanket restriction for grant of licence for performance of Indian classical and allied dances.
22.Inh view of the above discussion, the constitutional right guaranteed under Article 19(1)(g), statutory provisions as referred to above and also various decisions, we are in entire agreement with the conclusion arrived at by the learned single Judge. It is made clear that, as rightly observed by the learned Judge, the police can very well invoke the provisions under Section 352 to prevent misuse or abuse of any licence granted or to be granted. It is also made clear that, if, during the course of inspection, the authority/authorities find the licence being misused by exhibiting obscene dances, they are free to take stringent action against all the persons concerned. Apart from this, based on the report of the Police Officer, the licensing authority, viz., Commissioner, Pondicherry Municipality, may either cancel the licence wholly or suspend the same for a particular period." (Emphasis added)

In the case quoted above also this Court was considering a policy decision taken by the Government of an Union Territory to ban dance shows in Hotels and Restaurants in future. It was claimed such dance shows were vulgar exhibition of human flesh and complaints were received by the authorities. It was asserted by the State that the policy was based upon the right conferred by Article 19(6) wherein reasonable restrictions can be placed on trade in the interest of general public.
14.The Supreme Court in its judgment in Anuj Garg and others Vs. Hotel Association of India and others reported in (2008) 3 SCC 1 had dealt with the vires of Punjab and Delhi Excise rules prohibiting the employment of women bartenders and any man below the age of 25 years being employed in such Bars. The Supreme Court while striking down the impugned rule dealt with several questions such as self determination, individuals best interest and parens patriae power of the State to regulate the trade. The following passages found in paragraphs, 20, 30 and 31 may be usefully extracted below:
"20.At the very outset we want to define the contours of the discussion which is going to ensue. Firstly, the issue floated by the State is very significant, nonetheless it does not fall in the same class as that of rights which it comes in conflict with, ontologically. Secondly, the issue at hand has no social spillovers. The rights of women as individuals rest beyond doubts in this age. If we consider (various strands of) feminist jurisprudence as also identity politics, it is clear that time has come that we take leave of the theme encapsulated under Section 30. And thirdly we will also focus our attention on the interplay of doctrines of self-determination and an individual's best interest.
30.Parens patriae power has only been able to grain definitive legalist orientation as it shifted its underpinning from being merely moralist to a more objective grounding i.e. utility. The subject-matter of the parens patriae power can be adjudged on two counts:
(i)in terms of its necessity, and
(ii)assessment of any trade-off or adverse impact, if any.
This inquiry gives the doctrine an objective orientation and therefore prevents it from falling foul of due process challenge. (see City of Cleburne v. Cleburne Living Center.)
31.Parens patriae power is subject to constitutional challenge on the ground of right to privacy also. Young men and women know what would be the best offer for them in the service sector. In the age of internet, they would know all pros and cons of a profession. It is their life; subject to constitutional, statutory and social interdicts- a citizen of India should be allowed to live her life on her own terms.

15.In the very same judgment, the Supreme Court also dealt with the Court's power to review

legislatures enacted due to majoritarian impulses rooted in moralistic tradition and must see to it that it does not impinge upon individual autonomy. It is therefore necessary to refer to the following passages found in paras 41 and 42 from the said judgment which is as follows:
41.Professor Williams in The Equality Crisis: Some Reflections on Culture, Courts and Feminism published in 7 WOMEN'S RTS. L. REP., 175 (1982) notes issues arising where biological distinction between sexes is assessed in the backdrop of cultural norms and stereotypes. She characterises them as "hard cases". In hard cases, the issue of biological difference between sexes gathers an overtone of societal conditions so much so that the real differences are pronounced by the oppressive cultural norms of the time. This combination of biological and social determinants may find expression in popular legislative mandate. Such legislations definitely deserve deeper judicial scrutiny. It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy. This is the backdrop of deeper judicial scrutiny of such legislations world over.
42.Therefore, one issue of immediate relevance in such cases is the effect of the traditional cultural norms as also the state of general ambience in the society which women have to face while opting for an employment which is otherwise completely innocuous for the male counterpart. In such circumstances the question revolves around the approach of the State."
(Emphasis added)

16.The supreme Court in para 43 of the judgment emphasised that the State's duty to ensure circumstances of safety which inspire confidence in women to discharge their duties. Para 43 reads as follows:
43.Instead of prohibiting women employment in the bars altogether the State should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow. Any other policy inference (such as the one embodied under Section 30) from societal conditions would be oppressive on the women and against the privacy rights."
(Emphasis added)
17.The cases referred to earlier are all cases where there was a specific legislation curbing such activities. But in the case of running of a Spa with cross massages done by persons belonging to other sex, there is no law regulating the field. The only two provisions under the Madras City Police Act, 1888 is Sections 34 and 35. They reads as follows:
"34.Places of public resort to be licensed.- (1)No enclosed place or building having an area of [forty-six and half square metres] or upwards shall be used for public entertainment or resort without a licence from the Commissioner:
[Provided that nothing contained in this sub-section shall apply to any church, temple, mosque, or other place of worship].

35.Eating houses, hotels, fencing-schools, etc. to be licensed.- No enclosed place or building shall be used as an eating-house, boarding-house, lodging-house, hotel, gymnasium or fencing-school, without a licence obtained from the Commissioner:
Provided that nothing in this section shall apply to any gymnasium or fencing-school of any educational institution controlled or recognised by the State Government].
In these two provisions providing for grant of licence, there is no reference to the Spa run by the applicant/plaintiff.

18.In the light of the above, it can clearly be seen that the respondent police as on date has no legal right to prevent an health Spa being operated by any citizen of this Country even if it is done by persons belonging to the opposite sex. As pointed out by the Supreme Court in Anuj Garg's case (cited supra) that a majoritarian impulses rooted in moralistic tradition cannot impinge upon

individual autonomy. At the same time, there is no prohibition for the respondent police to inspect and take appropriate action in accordance with law, in cases of any criminal activities prohibited by law.

19.The application is allowed to the extent indicated above. No costs.

31.07.2009
Index : Yes/No
Internet : Yes/No
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K.CHANDRU, J.

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PRE DELIVERY ORDER IN
O.A.NO.249 OF 2009 IN
C.S.NO.251 OF 2009

31.07.2009