
(2011) 05 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No's. 7962, 7739, 7943, 7958 and 7967 of 2010 with
Writ Petition No. 2477-2479 of 2011

Hotel Priya

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 06-05-2011

Acts Referred:

Bombay Police Act, 1951 — Section 110, 162, 162(1), 28, 33
Constitution of India, 1950 — Article 14, 19(1)(g)

Citation : (2012) 3 BomCR 860

Hon'ble Judges : Salvi U.D., J;Bhosale D.B., J

Bench : Division Bench

Advocate : R.D. Soni instructed by and Ram and Co, for the Appellant; V.S. Gokhale A.G.P. for State, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard learned Counsel for the parties. Rule. Rule made returnable forthwith. By consent of the parties the petitions are taken up for final hearing. Mr. Gokale, learned A.G.P. waives service on behalf of the respondent-State.

2. The challenge raised in these writ petitions is similar and hence they are being disposed of by common order.

3. The petitioners in this group of writ petitions have challenged the similar orders, all dated 12.9.2009, alongwith continuation sheets of premises license whereby the Commissioner of Police, Brihan Mumbai has imposed additional conditions to their Premises License. The petitioners are in the business of restaurants. They hold all necessary licenses including the premises licence issued under Licensing and Controlling Places of Public Amusement (Other than Cinemas) and Performance for Public Amusement including cabaret Performance, Melas and Tamashas Rules, 1960 (for short "the Rules"). The Commissioner of Police in exercise of the powers conferred on him by Clause (w)(i), (w)(ii) of section 33 and section 162(1) of Bombay Police Act, 1951 (Bom XII of 1951) and

under Rule 108-A, 109, 118, 207 and 209 of the Rules in addition to the existing terms and conditions mentioned in the Premises License have added the following terms and conditions thereto by the impugned letters/orders dated 12.9.2009:

- (1) The licensee is permitted to keep only 04 women singers/artists & 04 male singers/artists to remain present on permitted stage.
- (2) Only 08 artists are permitted to remain present on the permitted stage (04 male & 04 women).
- (3) The artists at any time are not permitted to sit or mix with customer/customers or present in the area other than the stage.
- (4) The Licensee should issue identity card with his seal and signature to each artist with their photographs and other details such as name, age, address, signature etc. and to display it during their presence in hotel premises.
- (5) The licensee should maintain datewise register for every show/performance which gives details of name, age and address of artists participated in it.
- (6) The orders, directions issued from time to time by the State Government/Licensing Authority will be applicable and shall be binding on licensee.

4. Mr. Soni, learned Counsel for the petitioners at the outset submitted that he has instructions to confine the challenge to the first two conditions only. He submitted that the nature of conditions/restrictions is in fact specified in Rule 101-A of the Rules. This does not include any restrictions on number of artists in the Orchestra that may be engaged by the establishment for performance on the basis of their gender. He submitted that imposing any restriction on number of artists, whether male or female, would be clearly violative of the provisions of Article 14 and 19(1)(g) of the Constitution of India. In other words, he submitted that identification of particular number of artists has absolutely no bases either in the rules and/or in the statute and that it has no nexus to the purpose sought to be achieved. In short, he submitted that there is absolutely no rational in fixing number of male and female artists and imposing any such restriction is totally arbitrary and it is in breach of Article 14 and 19(1)(g) of the Constitution. The restaurant owners have a choice to select the artists irrespective of their gender and no restriction on their choice can be imposed by the concerned authority. He then invited our attention to the affidavit dated 13th December, 2007 filed by the Deputy Commissioner of Police in Writ Petition No. 4168 of 2007, to contend that assurance was given that till the new/amended rules are brought into force, the police shall not initiate any action against holders of the license granted under the Rules for having committed violation of the provisions of Bombay Shops and Establishment Act, 1948 and the rules framed thereunder with regard to female artist or other lady employees. Despite the assurance, Mr. Soni submitted that imposing the impugned conditions would amount to perjury. He submitted that draft rules were placed before this Court as per the directions issued earlier and,

therefore, till the draft rules are approved and are brought into force the Commissioner of Police ought not to have issued the impugned additional conditions. In support Of his contentions Mr. Soni placed reliance upon the judgment of the Supreme Court in Anuj Garg and Others Vs. Hotel Association of India and Others, and unreported judgment of the High Court of Karnataka in Writ Petition Nos. 3743 of 2008 with Writ Petition No. 9345 of 2008, decided on 24th September, 2008.

5. On the other hand Mr. Gokhale, learned A.G.P. invited our attention to their reply affidavit dated 14.12.2010 to contend that in view of the peculiar facts and circumstances in which the restaurant owners, such as the petitioners, run their restaurants with Premises and Performance License it was necessary to impose such conditions. He submitted that under the guise of Permisses and Performance License the restaurant owners indulge in sexual exploitation of women artists and waitresses working in their restaurant, which forced to impose the impugned conditions. He submitted that if the impugned restrictions are not imposed their is a likelihood of the restaurants being converted into dance bars after midnight. He then submitted that having regard to size of the stage on which the artists perform, the number of artist are restricted to eight. He further submitted that after these conditions are imposed the number of cases u/s 110 of the Bombay Police Act have drastically come down. In short, Mr. Gokhale submitted that the conditions imposed by the Commissioner of Police are reasonable and are also necessary in the interest of the artists and more particularly female artists performing in the restaurant till late night.

6. From bare perusal of the continuation sheet of the Premises License attached to the impugned letter dated 12.9.2009 it is clear that the impugned conditions have been imposed by the Commissioner of Police in exercise of the powers conferred on him by section 33 and section 162(1) of the Bombay Police Act, 1951 (Bom XII of 1950) and under Rule 108-A, 109, 118, 207 and 209 of the Rules. Insofar as the power to impose conditions is concerned, Mr. Soni did not challenge the same, however, he submitted that the first two conditions imposed by the Commissioner are unreasonable and in violation of Article 14 of the Constitution of India. Mr. Soni submitted that for imposing the first two conditions there is absolutely no basis either in the rules and/or any statute. We would like to examine the first contention of Mr. Soni that whether the Commissioner was right in imposing the first two conditions/restriction on the number of artists on the permitted stage. The additional condition Nos. 1 and 2 clearly shows that there cannot be more than eight artists to remain present on the permitted stage. In the reply affidavit filed on behalf of respondent Nos. 1 to 3 it is stated that they had discussion with the association of restaurant owners who run Orchestra and as a outcome thereof restrictions on the size of stage, being 10 ft. by 12 ft., has been imposed. Insofar as the restriction on the size of the stage is concerned, the petitioners do not have any grievance and that they have not challenged the same in these petitions. Their challenge is to the restriction on the number of artists. The State, in their reply have stated that the

stage admeasuring 10 ft. by 12 ft. cannot accommodate more than eight artists at a time and in view thereof the restriction, after deliberation with the Association, on the number of artists has been imposed by the Commissioner of Police. The contention urged on behalf of the petitioners that the Licensing Authority has no power to impose such conditions, in our opinion, deserves to be rejected outright. The restriction on the total number of artists ,having regard to size of the stage, in our opinion, is not only reasonable but it is also practicable .There are several provisions and more particularly section 162 of the Bombay Police Act which give power to the Licensing Authority to impose such condition.

7. At this stage we would like to make reference to the order passed by this Court in a group of criminal writ petitions dated 20th August, 2009. In that group of writ petitions, the grievance was that the petitioners were not being allowed to keep their restaurant/bars open upto 1.30 am and that they were also not being allowed to engage more than two women in Orchestra. That writ petition was disposed of by the Division Bench of (Bilal Nazki and A.R. Joshi, JJ.,) with the following observations :

... The learned Additional Public Prosecutor submits that since the space for use for such orchestra is restricted, therefore, it would not be possible to have, within orchestra, more than two women. It is difficult for this Court to come to a conclusion as to what space would be needed for an orchestra having two or more than two women. The learned Counsel for the petitioners accept that even if two women are employed in the orchestra, they perform in batches. In any case, we have not found any rule allowing the respondents to place restrictions on engaging of more than two women for orchestra. Therefore, such an action by the respondents is clearly without jurisdiction. This Court has already passed an order On 29th December, 2006 in Writ Petition (Stamp) No. 31262 of 2006, (Chandrakant M. Shetty Vs. The State of Maharashtra & ors.)², and other connected matters, allowing the restaurants/bars to be kept open till 1.30 a.m.

4. We allow these petitions, and hold that the petitioners be allowed to run their restaurants/bars up to 1.30 a.m., and they shall also be allowed to engage any persons, irrespective of sex, in the orchestra in any number they want However, if the respondents want to restrict the number for any reason whatsoever, they are at liberty to take any action in that regard in accordance with law, like framing of rules.

(emphasis supplied)

8. After disposal of these petitions the application was taken out by learned A.P.P. for speaking to minutes of the said order dated 20.8.2009. The very same Division Bench vide order dated 11th September, 2009 rejected the application made by the learned A.P.P. and while doing so observed that "If they want to impose any condition and if they are authorised to do so under the law, they do not need any order from this Court". It is against this backdrop the

Commissioner of Police has imposed the impugned conditions. After drawing our attention to these orders, Mr. Soni further invited our attention to the draft rules and submitted that till the draft rules are approved and brought into force it was wrong on the part of the Commissioner of Police to impose the impugned conditions. We are not in agreement with Mr. Soni. It is, true that the draft rules were placed before this Court and they are still under consideration, and as submitted by Mr. Gokhale, learned A.G.P., they will be considered and will be brought into force soon. We are not concerned with the draft rules in the present petition. The impugned conditions are imposed by the Commissioner of Police in exercise of the powers conferred on him under various provisions of the Act and the Rules and, therefore, the question that we are considering in this group of writ petitions is whether those conditions are reasonable. Before we proceed further we may also record that in the course of arguments we specifically asked Mr. Soni whether it is possible for the petitioners to wait till the new rules are brought into force. His reply was in the negative.

9. The next we would like to consider whether imposing the impugned conditions/restriction on the number of male and female artists would amount to gender bias. Mr. Soni in support of this contention placed reliance upon the judgment of the Supreme Court in Anuj Garg's case (*supra*). On the basis of this judgment it was submitted that protection of women cannot be a ground for restricting the number of women to work in restaurants by imposing such conditions/restriction. The concerned authority, he submitted, is thereby denying an opportunity and/or right of employment and, therefore, it is violative of Article 14 of the Constitution. It is pertinent to note that these petitions are filed by the restaurant owners. None of the female artists and/or their group and/or their association has come forward making such grievance. From perusal of the judgment of Anuj Garg's case it appears that Constitutional validity of section 30 of the Punjab Excise Act, 1914 prohibiting employment of "any man under the age of 25 years" and/or "any women" in any part of such premises in which liquor or intoxicating drugs is consumed by the Public was examined. While considering the constitutional validity of the said section the Supreme Court in paragraphs 33 and 34, to which our attention was specifically invited to, observed thus :

33. The fundamental tension between autonomy and security is difficult to resolve. It is also a tricky jurisprudential issue. Right to Self-Determination is an important offshoot of Gender Justice discourse. At the same time, security and protection to carry out such choice or option specifically, and state of violence-free being generally is another tenet of the same movement. In fact, the latter is apparently a more basic value in comparison to right to options in the feminist matrix.

34. Privacy rights prescribe autonomy to choose profession whereas security concerns texture methodology of delivery of this assurance. But it is a reasonable proposition that that the measures to safeguard such a guarantee of autonomy

should not be so strong that the essence of the guarantee is lost. State protection must not translate into censorship.

10. Similarly, in the unreported judgment of the Karnataka High Court in Writ Petition Nos. 3743 of 2008 and 9345 of 2008 sub-section (2) of section 20 of the Karnataka Excise Act, 1965 and Rule 9 of the Karnataka Excise License (General Conditions) Rules, 1967 were under challenge. By these provisions condition was imposed on the restaurant owners to obtain a permission from the Deputy Commissioner in writing for employing female employees. In the light of the challenge it was held that Rule 9(1) is the rule which goes beyond the scope of section 28 of the Act, inasmuch as the section does not prohibit employment of women per se, but employment is sought to be regulated and a prior permission to be obtained from the Deputy Commisisoner. Therefore, the rule was declared ultra vires of section 28 and beyond the Rule making power.

11. None of the judgments relied upon by Mr. Soni would apply to the facts of the present case for more than one reason. Firstly, we do not find any discrimination made between male artists and female artists in the Rules. On the contrary the impugned Rules treat male and female artists on par with each other. Secondly, there is no discrimination or total prohibition of female artists, as was there in both the judgments relied upon by Mr. Soni. We are in agreement with the submissions advanced by Mr. Gokhale, learned A.G.P. that if restrictions on the number of male and female artists are not imposed the restaurant owners, such as the petitioners, are likely to take advantage of the situation, and would gradually convert their restaurants into dance bars, which activity is strictly prohibited in the State of Maharashtra.

12. Freedom of profession, trade or business is undoubtedly the right guaranteed by Article 19(1)(g) of Constitution of India. It is, however, subject to the limits/restrictions as may be imposed by the State in the interest of the public. In other words, a business run by a private individual involving public interest can be subjected to reasonable restrictions/limitations by the State. In our opinion, the owner of a restaurant has no unrestricted/unlimited right on the number of artists in the Orchestra in his restaurant. As long as the limitations/restrictions are reasonable and/or they are imposed in the interest of the general public and more particularly women-artists, performing/working till late night, they cannot be said to be unreasonable. The interest of general public would also mean and include interest of public moral or to make working conditions of women better. In the present case, the impugned conditions are reasonable and, in our opinion, they are necessary in the larger interest of the general public/women. If restriction on the number of women workers/artists is not imposed there is a possibility of the restaurant owners indulging in prohibited activities under the guise of premises license. In our opinion, in order to prevent sexual exploitation of the women artist and waitress, working in the restaurants, the impugned conditions are necessary and in any case they cannot be termed as unreasonable. They are also necessary from their security point of view. It

appears that the restaurant/bar owners do not make adequate and full proof arrangements for transport of women artists who work till 1.30 am. The State has so stated in their reply affidavit. They have further stated that number of the cases u/s 110 of the Bombay Police Act in the year prior to imposing the impugned conditions were about 1031, whereas after imposing the conditions number of cases in the succeeding year came down to 787. Section 110 of the Bombay Police Act provides for action against behaving indecently in public. This shows that the objective sought to be achieved seems to have been achieved by imposing such restrictions/conditions. Thus, the writ petition fails on this count also. Insofar as the contention in respect of the affidavit dated. 13th December, 2007 filed in Writ Petition No. 4168 of 2007 is concerned, we do not find any substance and in our opinion is devoid of any merits. Framing of rules and imposing impugned conditions are two independent actions. Imposing the impugned condition, in our opinion, is well within the powers of the Commissioner of Police. As a matter of fact, the petitioners ought to have waited till the Rules were enacted and brought into force. In the circumstances, we find absolutely no merit in these writ petitions. Hence the petitions are dismissed. No costs.