
(2014) 12 MAD CK 0109
In the Madras High Court
Case No : W.P. Nos. 743 and 24629 of 2014

S. Rangaraj

APPELLANT

Vs

The Commissioner of Police

RESPONDENT

Date of Decision : 09-12-2014

Acts Referred:

Constitution of India, 1950 — Article 19(2), 226, 23
Criminal Procedure Code, 1973 (CrPC) — Section 94
Immoral Traffic (Prevention) Act, 1956 — Section 10, 12, 13, 13(4), 15
Madras City Municipal Corporation Act, 1919 — Section 287, 347, 347(1), 347(3), 349
Penal Code, 1860 (IPC) — Section 187

Citation : (2015) 1 LW 77

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : P.S. Raman, Senior Counsel, S. Nagarajan, Srinath Sridevan, B. Rabu Mahohar, Ashok Menon, K. Harishankar, K. Dharmaraj, C. Yokesh, R. Thirumalai, D. Sam Nandhakumar, E.P. Senniyangiri, R. Manimuthu, P.H. Arvind Pandian, Additional Advocate General assisted by P. Sanjay Gandhi, AGP, C. Ravichandran and A.P. Balasubramanian, Advocates for the Appellant

Judgement

V. Ramasubramanian, J.—The petitioners in all these writ petitions are running beauty parlours/massage centers/Spas in and around the city of Chennai. They have come up with these writ petitions, seeking the issue of writs of mandamus to forbear the respondents from interfering with the business carried on by them. I have heard Mr. P.S. Raman, learned Senior Counsel appearing for the petitioner in W.P. No. 408 of 2014, Messers. S. Nagarajan, Srinath Sridevan, B. Rabu Mahohar, Ashok Menon, K. Harishankar, K. Dharmaraj, C. Yokesh, R. Thirumalai, D. Sam Nandhakumar, E.P. Senniyangiri, R. Manimuthu, learned counsel appearing for the petitioners in the other writ petitions and Mr. P.H. Arvind Pandian, learned Additional Advocate General appearing for the State and Dr. C. Ravichandran and Mr. A.P. Balasubramanian, learned Standing Counsel appearing for the Chennai Corporation.

2. Admittedly, the petitioners are running beauty parlours or massage centers or

spas. It appears that they are subjected to raids, on a regular basis, by the officials of the Anti-Vice Squad of the Chennai City Police. Therefore, claiming that such raids and the frequent interference by the Police not only spoiled their business but also projected them in poor light and that the same also amounted to an interference with their fundamental right to carry on a lawful business, the petitioners have come up with the above writ petitions.

3. Of all the writ petitions on hand, one writ petition stands out. The said writ petition is the one filed by a company by name Influence Enterprises (India) Private Limited in W.P. No. 408 of 2014. This company had already filed a civil suit in C.S. No. 251 of 2009 on the file of the Original Side of this Court, praying for a decree of mandatory injunction to direct the State to formulate Rules and Regulations for conducting spa centres and for a permanent injunction restraining the respondents from interfering with the peaceful conduct of their business.

4. Along with the suit, the said company also filed an application in O.A. No. 249 of 2009 for an interim order of injunction restraining the respondents from disturbing or interfering with the peaceful conduct of their business. By an order dated 31.7.2009, K. Chandru, J, allowed the application for interim injunction, holding that the Police have no legal right to prevent a health spa run by a citizen, even if some of the services rendered therein are by persons belonging to the opposite sex. Relying upon the decision of the Supreme court, the learned Judge pointed out that majoritarian impulses rooted in moralistic tradition cannot impinge upon individual autonomy. However, the learned Judge added a word of caution as follows:--

"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."

5. As a matter of fact, all the writ petitioners rely upon the aforesaid order of K. Chandru, J. in support of their contention that a lawful business run by them, cannot be painted black with the same brush and that the said decision should be treated more or less as a judgment in rem.

6. Therefore, at the outset, it is necessary to find whether the businesses carried on by the writ petitioners, are lawful or not. To find out if a business is lawful or not, we must see if it is prohibited by law. If it is not prohibited by law, we must then see if it is atleast regulated by law. If it is regulated by law, it would be lawful so long as it is carried on as per the regulations. Otherwise, it would be unlawful.

7. The respondents do not contend that the massage centers/spas etc., run by the petitioners are prohibited by law. They do not even contend that these are regulated by any special law enacted by the Central Government or at least the State of Tamilnadu or that the petitioners are running these centers in violation of such law. If at all there is any requirement under law, for these

establishments, it is only the necessity to obtain a license under the Chennai City Municipal Corporation Act, 1919. This is why the petitioners have made even the Corporation as a party to these proceedings.

8. The only basis on which the police conduct raids in some of these establishments, is an apprehension or suspicion that activities prohibited by law may be carried on in these premises. The police think that some of these establishments are indulging in offences punishable under the Immoral Traffic (Prevention) Act. Therefore, the issues arising for consideration in these cases, have to be analysed from 3 angles, namely (i) the prescription contained in Chennai City Municipal Corporation Act, 1919 (ii) the provisions of the Immoral Traffic (Prevention) Act, and (iii) the need to regulate massage parlours/spas etc., by law, to avoid friction between both sides.

Chennai City Municipal Corporation Act, 1919

9. For using any premises within the city of Chennai, for the purpose of carrying on any business, the person seeking to run the business is required by the Chennai City Municipal Corporation Act, 1919, to obtain a valid licence from the Municipal Corporation. Sections 287 to 290 of the Madras City Municipal Corporation Act, 1919, deal with industries and factories. Sub-section (1) of Section 287 stipulates that no place within the limits of the City shall be used for any of the purposes mentioned in Schedule VI without a licence obtained from the Commissioner and except in accordance with the conditions specified therein.

10. But, the Proviso to Sub-section (1) of Section 287 exempts lodging houses as defined in the Madras Public Health Act, 1939 from the requirement of a licence under the 1919 Act, if the keeper of the lodging house has registered under the Madras Public Health Act, 1939. Sub-section (2) of Section 287 empowers the Commissioner to prohibit the use of any place within a distance of three miles of the limits of the city, for any of the purposes mentioned in Schedule VI without a valid licence, provided that the Commissioner had issued a public notification in the Official Gazette to that effect and had already obtained the sanction of the State Government. Sub-section (3) enables the owner or occupier of every place, for the use of which, a licence is required under Sub-section (1), to apply to the Commissioner.

11. Clause (a) of Sub-section (5) of Section 287 enables the Commissioner to grant a licence specifying the conditions, subject to which, the licence is granted. Clause (b) of Sub-section (5) obliges the Commissioner to cause a full and complete investigation to be made before granting or refusing the licence. Clause (c) of Sub-section (5) empowers the Commissioner to revoke or suspend the licence, if the licence had been obtained under misrepresentation or the licensee failed to comply with the conditions stipulated in the licence. Clause (d) empowers the Commissioner even to vary or amend a licence granted under Clause (a). The licence granted under Clause (a) of Sub-section (5) is valid only for one year as seen from Sub-section (6). Therefore, Sub-section (7) provides

for renewal.

12. Section 288 of the Act deals with the construction or establishment of any factory, workshop or workplace, in which, it is proposed to employ steam power, water power or other mechanical power or electrical power. Section 289 empowers the Commissioner to issue directions for the abatement of any nuisance caused by any kind of fuel used or by the noise or vibration created in a factory, workshop or workplace, in which, steam power or water power or other mechanical power or electrical power is used. Section 289-A empowers the Commissioner to issue appropriate directions for keeping a factory, workshop or other work place, in a cleanly state. Section 289-C empowers the Commissioner or any persons authorised by him to enter upon any factory, or workshop or workplace, subject to the stipulations contained in Sub-section (1). The State Government is also conferred with powers under Section 289-D to issue orders or directions generally or in any particular case, under Sections 288, 289, etc.

13. Section 379-A enables the Commissioner to direct the alteration, removal or restoration of a place to its original state, whenever it is found that an activity, which requires licence under the Act, was carried on without such licence or permission.

14. Keeping the above provisions in mind, if we go to Schedule VI, to which a reference is made under Section 287, it is seen that Schedule VI contains a list of purposes, for which, places within the city may not be used without a licence. The purposes or activities, for which, a licence is required, are arranged in the alphabetical order. Beauty parlours, massage centres and spas are not activities, which are included in Schedule VI. But fortunately, Schedule VI contains the following purposes/activities:

"(1) Hair-Storing, packing, pressing, cleansing, preparing or manufacturing by any process whatever dyeing or drying.

(2) Keeping a shaving or hairdressing saloon."

15. Therefore, it appears that all the writ petitioners herein have obtained licences from the City Municipal Corporation, indicating their business activity to be "keeping a shaving or hairdressing saloon". Fortunately, none of the petitioners has taken a stand that spas and massage centres are not activities included in Schedule VI and that therefore, no licence is required to carry on those activities. If they had taken such a stand, they would have been legally right and I would have been in a fix. The petitioners have chosen to obtain licences from the Corporation, for the activity that is closest to the ones carried on by them at present.

16. In so far as the petitioner in W.P. No. 408 of 2014 is concerned, they have gone one step further and they have obtained licence for running a spa itself, though it is not one of the activities listed in Schedule VI. This fact is admitted by the Police in their counter.

17. Schedule VII of the Madras City Municipal Corporation Act prescribes ordinary penalties that could be levied upon the persons, who contravene the provisions of the Act. It is seen from the Table under Schedule VII that the penalty for violation of Section 287(1) namely that of using a place for any of the purposes specified in Schedule VI without a valid licence or contrary to licence, is a fine of Rs. 200/-. Therefore, in the background of the provisions of the Madras City Municipal Corporation Act and in the background of the fact that the petitioners have obtained the one and only licence possible under the Statute, the City Municipal Corporation has not come up with any serious objection to the business of the writ petitioners. The petitioners do not complain of any harassment by the officials of the Corporation.

18. But the main grievance of the petitioners is against the police. The police conduct raids in the business premises of the petitioners on the suspicion that activities punishable under The Immoral Traffic (Prevention) Act, 1956 are carried on in these premises. Therefore, let me now turn on to the second issue namely the one revolving around the said Act.

Immoral Traffic (Prevention) Act, 1956

19. It is claimed by the respondent-Police in their counter affidavit that there are about 225 business entities in the city of Chennai, which claim to be beauty parlours, health clubs and therapy centres. According to the respondent-Police, out of these 225 entities, 142 are saloons for men and women and out of remaining 83,23 are star hotel spas, 9 are ayurvedic massage centres and 52 are other massage centres. The respondent -Police claim that they regularly receive information about the nefarious activities carried on in beauty parlours and that in many areas, the neighbours as well as land owners complain to the police about the objectionable activities carried on inside these establishments. According to the respondent - Police, some of these entities employ teenage girls, who are not qualified therapists. The Police further claim that customers are lured to visit these parlours, with a promise that their carnal desires will be satisfied there. Relying upon the last sentence in the decision rendered by K. Chandru, J. the Police contend that there is no prohibition for them to conduct the surprise inspections.

20. The respondent-Police has also filed a list of about 17 cases registered against a few beauty parlours/massage centres/spas during the year 2013 for various offences under the Immoral Traffic (Prevention) Act, 1956. They have also filed a copy of the notice issued by the building owner against one spa centre and a representation made by the landlord in another case to the Corporation not to renew the licence to another spa centre.

21. On the basis of the averments contained in the counter affidavit and the documents produced, it is contended by Mr. P.H. Arvinth Pandian, learned Additional Advocate General that the respondent-Police are just carrying out their statutory obligation to ensure that no premises is used for any unlawful activity.

The learned Additional Advocate General submitted that the intention of the respondent-Police is not to close down these business entities, but only to ensure that the petitioners do not carry on any activity, which is prohibited by law, within their four walls.

22. Since it appears from the counter that the action initiated by the respondent-Police is predominantly on the basis of the registration of cases under this Act, it is necessary to have a look at the provisions of this Act and its historical background.

23. On the 9th day of May, 1950, an International Convention was signed at New York, for the suppression of immoral traffic in persons. The Convention is known as "The International Convention for the Suppression of Immoral Traffic in Persons and Exploitation of the Prostitution of others." India ratified the Convention in 1950 itself. The Constitution of India also mandates under Article 23 that traffic in human beings should be prohibited.

24. In order to give effect to the said International Convention, the Parliament enacted The Suppression of Immoral Traffic in Women and Girls Act, 1956. (Unfortunately people started calling the said Act by its acronym SITA). The Act came into force on 1.5.1958. The principal object of the Act was to prevent commercialisation of the vice of trafficking among women and girls.

25. Under Amendment Act 46 of 1978, the said Act was amended, on the basis of the recommendations of the Law Commission, made in its 64th Report and also on the basis of the recommendations made by an Expert Committee appointed by the Department of Social Welfare. The Act was again amended by Amendment Act 44 of 1986, which made sweeping changes. It was by this Amendment Act, 1986 that the name of the Act was changed to Immoral Traffic (Prevention) Act (and the name SITA was saved). By the amendment, the scope of the Act was widened to cover all persons whether male or female, who are exploited sexually for commercial purposes. One of the important amendments brought forth by the Amendment Act, 1986 was to empower the Licensing Authorities to cancel licenses of hotels where children or minors are detected to be used for the purpose of prostitution.

26. Section 15(1) of the Immoral Traffic (Prevention) Act, 1956, empowers the Special Police Officer or the Trafficking Police Officer to enter and search a premises without warrant, whenever he has reasonable ground to believe that an offence punishable under this Act has been or is being committed in respect of a person living in any premises and that the search of the premises with a warrant cannot be made without undue delay. But, the power conferred under Section 15(1) of the Act is not left uncontrolled or unbridled. Section 15 requires reproduction and hence, it is extracted as follows:--

"15. Search without warrant. -

(1) Notwithstanding anything contained in any other law for the time being in

force, whenever the Special Police Officer [or the Trafficking Police Officer, as the case may be,] has reasonable grounds for believing that an offence punishable under this Act has been or is being committed in respect of a [person] living in any premises, and that search of the premises with warrant cannot be made without undue delay, such officer may, after recording the grounds of his belief, enter and search such premises without a warrant.

(2) Before making a search under Sub-section (1), the Special Police Officer [or the Trafficking Police Officer, as the case may be,] shall call upon two or more respectable inhabitants (at least one of whom shall be a woman) of the locality in which the place to be searched is situate, to attend and witness the search, and may issue an order in writing to them or any of them so to do:

3[Provided that the requirement as to the respectable inhabitants being from the locality in which place to be searched is situate shall not apply to a woman required to attend and witness the search].

(3) Any person who, without reasonable cause, refuses or neglects, to attend and witness a search under this Section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under Section 187 of the Indian Penal Code (45 of 1860).

4[(4) The Special Police Officer or the Trafficking Police Officer, as the case may be, entering any premises under Sub-section (1) shall be entitled to remove therefrom all the persons found therein].

(5) The Special Police Officer [or the Trafficking Police Officer, as the case may be,] after removing [the [person]] under Sub-section (4) shall forthwith produce [him] before the appropriate Magistrate.

1[(5A) Any person who is produced before a Magistrate under Sub-section (5), shall be examined by a Registered Medical Practitioner for the purposes of determination of the age of such person, or for the detection of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases.

Explanation.- In this Sub-section, "Registered Medical Practitioner" has the same meaning as in the Indian Medical Council Act, 1956 (102 of 1956)].

(6) The Special Police Officer [or the Trafficking Police Officer, as the case may be,] and other persons taking part in, or attending, and witnessing a search shall not be liable to any civil or criminal proceedings against them in respect of anything lawfully done in connection with, or for the purpose of, the search.

1[(6A) The Special Police Officer or the Trafficking Police Officer, as the case may be, making a search under this Section shall be accompanied by at least two women police officers, and where any woman or girl removed under Sub-section (4) is required to be interrogated, it shall be done by a woman police officer and if no woman police officer is available, the interrogation shall be done only in the presence of a lady member of a recognised welfare institution or organisation.

Explanation.- For the purposes of this Sub-section and Section 17-A, "recognised welfare institution or organisation" means such institution or organisation as may be recognised in this behalf by the State Government.]

[(7) The provisions of the Code of Criminal Procedure, 1973, (2 of 1974) shall, so far as may be, apply to any search under this Section as they apply to any search made under the authority of a warrant issued under Section 94 of the said Code]."

27. A careful look at the provisions of Section 15 would show that a Special Police Officer or a Trafficking Police Officer can enter upon any premises and cause a search without warrant, only after satisfying the following:

"(i) he should have reasonable grounds for believing that an offence punishable under this Act has been or is being committed;

(ii) he must believe that such an offence is committed in respect of a person living in the premises;

(iii) he should believe that the search of the premises with warrant cannot be made without undue delay; and

(iv) he must record the grounds of his belief before entering the premises."

28. The expression "Special Police Officer" is defined in Section 2(i) of the Act, to mean a Police Officer appointed by or on behalf of the State Government to be in charge of police duties within a specified area for the purpose of this Act. Similarly, the expression "Trafficking Police Officer" is defined in Section 2(j) to mean a Police Officer appointed by the Central Government under Section 13(4). I do not know and I have not come across any such Trafficking Police Officer appointed by the Central Government in terms of Section 13(4), at least in the State of Tamil Nadu.

29. Under Sub-section (2) of: Section 15, the Special Police Officer or the Trafficking Police Officer should also call upon two or more respectable inhabitants, at least one of whom should be a woman of the locality in which the place to be searched is situate, to attend and witness the search. For the purpose of enforcing the attendance of such respectable inhabitants, the Police Officer is obliged to issue an order in writing to them. If the person, who is called upon to attend and witness the search, refuses or neglects to comply with the notice, despite an order in writing being delivered to him, he is liable to be punished for an offence under Section 187 of the IPC, by virtue of Sub-section (3) of Section 15. An immunity is granted under Sub-section (6) of Section 15 to persons taking part in or attending and witnessing a search, from any civil or criminal proceedings in respect of anything lawfully done in connection with the search.

30. The Special Police Officer or the Trafficking Police Officer, who makes a search, should be accompanied by at least two women Police Officers. If any

woman or girl is removed under Sub-section (4) from the premises of search, she could be interrogated only by the woman Police Officer.

31. Day in and day out, newspapers compete with each other in publishing reports along with photographs of girls, whenever any search is carried out under Section 15 of the Act and any woman is removed from a place. The website of the National Crime Records Bureau shows that a total of about 2,44,270 incidents of crime against women were reported in the whole country during the year 2012. Out of them, about 2563 constitute cases under the Immoral Traffic (Prevention) Act, 1956. Interestingly, 19.5% of such cases (about 500 cases out of those 2563 cases) were reported only in Tamil Nadu. This can be taken either as an indication that incidents of crime under the said Act is on the increase in Tamil Nadu or as an indication of the role played by the Police in the State of Tamil Nadu in taking the crimes under this Act more seriously than what their counterparts in the other States do.

32. Unfortunately, no accountability is fixed on the police to see whether all the requirements of Section 15 are complied with or not. No one calls upon the Special Police Officer or the Trafficking Police Officer (i) to produce records to show whether he has minuted the grounds of his belief that an offence punishable under the Act is committed or has been committed in respect of a person living in any premises, (ii) to produce records to show his subjective satisfaction that the search of the premises with warrant cannot be made without undue delay, (iii) to produce records to show whether two respectable inhabitants of the locality attended and witnessed the search, (iv) to show whether persons removed from such premises were subjected to medical examination and produced before the appropriate Magistrate immediately, and (v) to produce proof to show that two women Police Officers accompanied them and the interrogation of any woman was done only by them.

33. Many times, even persons who are booked under the provisions of this Act, do not appear to challenge the procedure adopted. This is perhaps due to the fact that in most of the cases, the Police find it convenient to book a person only for an offence under Section 8, which is punishable on first conviction, either with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 5,000/-. Therefore, it appears that people choose to plead guilty and pay the fine even on the first occasion and get off, instead of going through the mill, by facing the prosecution and challenging the procedure followed by the Police. The remedy is seen as worse than the disease.

34. Though the Police have taken a stand in the counter affidavit that there are about 225 business entities in the city of Chennai, which carry on the business of running salons, spas and massage centres and that so far, 17 cases were registered against some of them for the offences under the Immoral Traffic (Prevention) Act, 1956, I do not know whether the Police actually followed the steps indicated in Section 15. As a matter of fact, the petitioners would have been defenceless, if the Police had followed all the steps prescribed in Section

15, namely (i) recording the grounds of belief that an offence is being committed in any premises, (ii) recording the grounds of belief that a search with warrant cannot be made without undue delay, (iii) causing the search in the presence of two respectable inhabitants of the locality and (iv) removing the persons from the place of search and producing them before the Magistrate after medical examination. If all these steps had been followed whenever the police visited the business premises of the petitioners, then the actual Court to which the petitioners should have gone is the Court of the Magistrate/Special Court. The Police have not produced records to show that in the case of any of the petitioners herein, a search as prescribed in Section 15 was carried out. It would have been easy for me to dismiss the writ petitions of some of these parlours/massage centres/spas, if the Police had produced records to show that they carried out a search in their premises, after following all the steps prescribed in Section 15.

35. Therefore, the only presumption that I can draw is that as against the writ petitioners herein, the Police did not carry out a search by following all the steps prescribed in Section 15. When the mandate of the law is so clear in Section 15, the respondents cannot carry out a search de hors Section 15.

36. The conclusion that we can arrive at, on the basis of the above discussion, is two fold. If the Police carry out a search of the premises where the petitioners are carrying on business activities, after following all the steps prescribed in Section 15, the petitioners cannot come under Article 226, but may have to seek redressal somewhere else. But, if the respondents are in the habit of carrying out searches in a manner not prescribed by Section 15, then the same actually tantamount to an unlawful interference with the fundamental right of the petitioners to carry on any business or profession which is not declared as unlawful by any legislation.

37. We have so far addressed two issues, one relating to the license to be obtained from the Chennai City Municipal Corporation under the provisions of the Chennai City Municipal Corporation Act, 1919 and the other relating to the action initiated by the police under the Immoral Traffic (Prevention) Act, 1956. There is one more issue that relates to the unregulated growth of massage centres/spas. Unfortunately, there is no law in any State in India which regulates the functioning of massage centres. Therefore, we may now have to take an overseas tour, of course at no cost, for educational purposes.

Global Scenario on The Regulation of Massage Centres

38. In Singapore, there is an enactment known as Massage Establishments Act, issued way back in 1959 as Ordinance 61 of 1959. The expression "massage" is defined in Section 2 of the said Act to mean massage, manicure, chiropody, light electric vapour or other baths or other similar treatment. Under Section 4 of the Act, every person, who wishes to carry on an establishment for massage, is required to obtain a licence from a Licensing Officer appointed by the Ministry by

Notification in the Gazette. Under Section 5 of the Act, no license to run an establishment for massage can be granted (1) to a person under 21 years of age; (2) to a person, who is unsuitable to hold a licence; (3) in respect of an establishment, in which, any curative massage or other curative treatment may be administered by a person, who does not possess the technical qualification as may be necessary; (4) in respect of the premises, in which, the accommodation is not reasonable, adequate or suitable; and (5) in respect of an establishment, which is carried on in contravention of the Act. Section 8 of the Act empowers the Licensing Officer or any Officer duly authorised by him to enter and inspect any premises, which are used as an establishment for massage and examine all books or other documents. The refusal by a person running an establishment for massage, to permit the Licensing Officer to enter and inspect the premises, is an offence punishable under Section 9 of the Act. But, Section 10 of the Act makes it clear that the provisions of the Act would not apply to hair-dressers, whose premises or establishment are used for massage, merely by reason of face or scalp massage or manicure treatment being administered to female customers only or being administered in his shop or saloon in full view of all customers resorting thereto. Every establishment for massage is declared under Section 12 to be deemed to be a public place. Section 13 empowers the Minister to make rules for regulating the establishments.

39. In exercise of powers conferred by Section 13 of the Act, the Singapore Administration has issued a set of Rules for regulating massage establishments. Under Rule 7(1) of the Rules, no licensee can employ in his establishment for massage, any person (1) who is a prostitute or of bad character; (2) who is below 18 years of age; and (3) who has not undergone and passed medical health screening. Rule 7(2) mandates that a licensee can employ in his establishment only those persons, in respect of whom, prior written approval is granted by the Licensing Officer. Rule 8 enjoins an obligation upon the licensee not to permit the entry of a person of bad character or a person, who is a prostitute, to enter into his establishment for massage.

40. Similarly, the State of California also has a law to regulate massage establishments. This law is part of the Business and Professions Code. Chapter 10.05, commencing with Section 4600, added to Division-2 of the Business and Professions Code, is known as Massage Therapy Act. The intent of the Legislature in enacting such a law is spelt out in Section 4600.05, as follows:--

"(1) To ensure that schools approved by the Council provide a high level of training and assist local Governments and law enforcement in meeting their duty to maintain the highest standards of conduct in massage establishments by vetting and disciplining certificate holders, to provide for a self-funded non-profit oversight body to certify massage professionals and ensure full compliance with all the requirements of the Act.

(2) To adopt best practices in massage regulation that will ensure patient privacy and dignity of the profession of massage therapy. Under the Act, the Council

known as California Massage Therapy Council was established. The Act provides for certification of individuals as Massage Therapists. A person would qualify for certification as a Massage Therapist only if he is 18 years of age and above and had successfully completed the curricula in massage and related subjects totally for a minimum of 500 hours. Out of this 500 hours, a minimum of 100 hours of instruction shall address anatomy and physiology, contraindications, health and hygiene, and business and ethics. After this 500 hours of curricula, the individual should have also passed competency assessment examination."

41. Section 4609 lists out some acts, which, if carried on by a certificate holder, would be considered as a violation of the Act. They are as follows:--

"(1) Engaging in sexually suggestive advertising related to massage services.

(2) Engaging in any form of sexual activity in the premises of a massage establishment.

(3) Engaging in sexual activity while providing massage activity for compensation.

(4) Providing massage of the genitals or anal region.

(5) Providing massage on female breasts, without a referral from a licensed California health care provider.

(6) Dressing in attire that is transparent, see-through, or substantially exposes the certificate holder's undergarments.

(7) Dressing in swim attire.

(8) Dressing in a manner that exposes the private parts of the certificate holder."

42. It is interesting to note that under Section 4618, the Legislature recorded a State wide concern in terms of the California Constitution that an uniform standard of certification of massage practitioners and massage therapists was required.

43. But interestingly, Section 51034 of the Government Code was also simultaneously amended by the State Legislature of California, so that each City Municipal Council or County Municipal Council did not enact a law, which was in conflict with Chapter 10.05. While recognizing the power of the individual Municipal Council to enact laws, the California State Legislature also stated that the City or County Municipal Councils cannot do any of the following:--

"(1) Prohibit a person of one sex from engaging in the massage of a person of the other sex.

(2) Require a massage establishment to have windows or walls that do not extend from the floor to ceiling or have other internal physical structures including windows that interfere with the clients reasonable expectation of privacy.

(3) Impose the client draping requirements that mandate the client to wear special clothing.

(4) Prohibit a massage establishment from locking its external doors.

(5) Require a massage establishment to pose any notice that may be viewed by the client that contains an explicit language describing sexual acts."

44. In pursuance of the aforesaid enactment of the State Legislature, the City Council of California enacted a set of Regulations known as Massage Therapy Regulations. In the preamble to the Regulations, the City Council recorded the recognition of the fact that unless properly regulated, the practice of massage therapy and the operation of massage business may be associated with unlawful activities and pose a threat to the quality of life in the local community. The preamble also indicated that the purpose and the intent of the Regulation were to discourage prostitution and related illegal activities carried on under guise of massage therapy.

45. The aforesaid Regulations require any individual, who practises massage therapy to obtain a certificate from the California Massage Therapy Council. The massage establishment should also obtain annual business registration from the City Municipal Council. But, before the issuance of business registration, a verification by the local police is also mandated. These Regulations also restrict the time, during which, the business of a massage establishment may be conducted. The massage establishments are required to keep a record of the services rendered by each practitioner and the date and time, at which, such services were rendered. The operators and employees of massage establishments are obliged under these Regulations to wear clean non-transparent outer garments. The Regulations even prescribe minimum lighting to be provided in each room or enclosure where the services are provided. The Regulations prohibit the carrying on of massage therapy behind locked, closed doors. Detailed requirement relating to the attire are also stipulated in the Regulations to ensure that the establishment is not used to provoke the baser instincts. All the massage establishments are required, by these Regulations, to permit representatives of the County Health Department, the officials of the Police Department and Community Development Department to conduct a reasonable inspection of the premises used as a massage establishment. Violation of any of the prescriptions contained in the Regulations, is considered to be a public nuisance warranting penal action. Interestingly, Clause 5.40.150 of the Regulations declares that the violation of any provision of this Chapter will be deemed to be contrary to public interest and that such violation would create a cause for an injunctive relief.

46. Likewise, the State of Georgia has an Act known as Georgia Massage Therapy Practice Act. It is incorporated as Chapter 24A under Title 43 that relates to Professions and Business. Under this Act, a Board known as Georgia Board of Massage Therapy is created. This Board is vested with the powers to determine

the qualifications and also issue licence to practice massage therapy. No person can practice massage therapy in the State of Georgia without a licence from the Board. Interestingly, the Act stipulates that any applicant for a licence as massage therapist must not only be of at least 18 years of age, but also a person of good moral character. This Act declares as unlawful, any massage therapy service combined with escort or dating services or adult entertainment.

47. The Commonwealth of Pennsylvania also has an Act known as Massage Therapy Law. This law contemplates the creation of a State Board of Massage Therapy, which has the power to issue licenses for therapists. Section 5 of the Act, which prescribes qualifications for licensure, stipulates that the applicant should be of a good moral character and should have completed a massage programme of at least 600 hours of in-class Post Secondary Education Instruction.

48. The State of Tennessee also has a set of Rules governing massage therapists and establishments. These Rules indicate that massage therapy is one of the healing arts and that as such, the practice is restricted only to those issued with a credential by the Board. These Rules also require an applicant for license, to submit evidence of good moral character. These Rules also contain a Chapter, which lays down "Professional and Ethical Standards for therapists and establishments". One of the standards so fixed is that they should refrain under all circumstances, from initiating, arranging for or engaging in any sexual conduct, sexual activity or sexualizing behaviour involving a client. Even if a client attempts to sexualize the relationship, the therapists are expected to refrain from dating or having a sexual relationship.

49. Even in the State of Texas, there is a set of Rules known as "Massage Therapy Licensing Programme Rules". These Rules are incorporated in Sub-Chapter (H) in Chapter 140 under Title 25, which deals with Texas Administrative Code. These Rules contain a separate Chapter relating to sexual misconduct. The Rules prohibit a licensee from engaging in sexual conduct with a client. Any inappropriate behaviour, gestures or expression that may reasonably be interpreted to be seductive or sexual is also prohibited by these Rules. Specific qualifications are prescribed for therapists. Unless a person possesses these qualifications, he will not be recognised as a therapist. Sub-Chapter 140.361 lists out general requirements for massage establishments. Some of these requirements are:

"(i) that a massage establishment may not employ a minor;

(ii) that they shall not allow a nude or partially nude employee to provide massage therapy to customers;

(iii) that they shall not allow any individual to engage in sexual conduct."

What constitutes "sexual conduct" is also defined in the Sub-Chapter.

50. New York has a separate law for regulating the Massage Industry. As per the

law, one has to obtain licence to be a Massage Therapist. Licence is granted, under the law, only to persons of good moral character and who have completed a course in Cardio Pulmonary Resuscitation. Under the New York law, the licence of a massage therapist can be cancelled for immoral conduct. The practice of massage by a person who is not properly dressed is considered as immoral conduct.

51. In Philippines, the Spa Industry is regulated by Executive Order No. 10 dated 30.01.1987. The expression Spa itself is defined in Section 1 of the said Executive Order to mean the facility which exudes a tranquil environment offering various amenities and services intended to relieve stress, pamper the body and make one feel relaxed and rejuvenated to promote healthier way by life. Chapter III of the Executive Order prescribes minimum standard requirement for accreditation of Spa. One of the requirements is that the staff wear clear, proper and non-transparent uniform at all times. Under Section 27 of the Executive Order, the accreditation granted to a Spa can be cancelled on several grounds, one of which is the use of the establishment for prostitution or for immoral or illegal activities.

52. Even the State of Rhode Island has a set of Rules and Regulations for licensing Massage Therapists. Under these Regulations, a person should have completed a programme approved by the Commission of Massage Therapy Accreditation , to be a Massage Therapist. Section 3.0 of these Rules which stipulates the qualifications for licensure, states that an applicant for licence should be of a good moral character.

53. In so far as the country of Thailand is concerned, Thai massage and spa are encouraged by the Department of Health Services Support, Ministry of Public Health of the country, as part of health care and health related services. In 2004, Thailand embarked on a five year strategic plan spearheaded by the Ministry itself to establish Thailand as a Centre of Excellent Health of Asia. This plan focuses on three areas namely (i) medical services; (ii) health care services; and (iii) herbal products. The statistics show that the country generated huge revenue and made remarkable progress as "Medical Hub of Asia". But, strict standards are prescribed for the spa operators of Thailand. It is professionally trained therapists and masseuses, who are employed in the industry.

54. India itself has a potential to develop this industry in view of the availability of experts in the field of yoga, naturopathy, ayurveda, siddha and varma, who are well trained to provide health care services. It is quite unfortunate that the very word "massage" has come to be looked down upon, due to the abuse of these centres by a few individuals. Therefore, it may be necessary for the Government to regulate, by law, the industry and provide certain basic parameters. All over the world, qualifications are prescribed for persons engaged in these centres. If qualifications are prescribed for persons engaged to render services in these centres, this industry may develop as one that compliments alternative systems of indigenous medicine. With the sprout of several colleges

on the private sector, teaching Yoga, Naturopathy, Ayurvedha, Unani, Siddha, etc., the employment opportunities for medical and paramedical personnel coming out of these institutions with a degree or diploma may increase manifold. In other words, if health clubs, massage centres and spas are properly regulated and if qualifications are fixed for persons employed therein to render services, they would provide enormous employment opportunities to students coming out of colleges teaching alternative, indigenous systems of medicine. This will also remove the kind of stigma now sought to be attached to these centres. As a matter of fact, specialists in the art and science of varma, which is now slowly getting extinct (with probably a few individuals still left in places like Kanyakumari), can do wonders in massage centers. Therefore, regulating the industry of health clubs, massage centres and spas and prescribing qualifications for persons employed therein, would make the industry, a place for the highly skilled and professionalised one.

What Next:

55. We have so far seen the provisions of (i) the Chennai City Municipal Corporation Act, 1919; (ii) the Immoral Traffic (Prevention) Act, 1956; and (iii) the various laws in many of the foreign countries regulating massage centres and spas. Unfortunately, neither the State of Tamilnadu nor the Central Government has any enactment to regulate these centres. I have indicated in the previous paragraph, the need to regulate the industry by law. Let me now see how it could be done.

56. Public order and police find a place in Entry Nos. 1 and 2 of List II (State List) of the Seventh Schedule to The Constitution. Public health and sanitation are in Entry No. 6. Similarly, "Inns and inn-keepers" are at Entry No. 31 of List II. Entry No. 64 of the State List relates to offences against laws with respect to any of the matters in the State List. Criminal law is in Entry No. 1 of List III (Concurrent List). Therefore, if at all any law, regulating the profession/business of these massage centres/spas could be enacted, the State is competent to do.

57. As I have pointed out earlier, Schedule VI to the Chennai City Municipal Corporation Act, 1919, lists out businesses for the running of which, in a premises within the city of Chennai, a licence is required in terms of Section 287 of the Act. The Chennai City Municipal Corporation Act also empowers the State Government, under Section 347(1) to make rules to carry out all or any of the purposes of this Act. Under Sub-section (3) of Section 347 of the Chennai City Municipal Corporation Act, 1919, the State Government is empowered to make rules for altering, adding to or cancelling any of the Schedules to the Act. Therefore, it is possible for the State Government today to invoke Section 347 of the Chennai City Municipal Corporation Act and issue a set of rules adding one more entry to Schedule VI with respect to massage centres, spas, etc.

58. Once it is done, then the Municipal Council itself would be able to issue by-laws under Section 349 of the Act for the regulation of these centres. Section

349 of the Act empowers the Council to make by-laws, not inconsistent with the Act or with any other law to provide for various matters indicated in Sub-sections (1) to (29). Sub-section (11) of Section 349 relates to regulation and licensing of hotels, etc. It may be useful to extract Section 349(11), which reads as follows:

"349. Powers of council to make by-laws: The Council may make by-laws, not inconsistent with this Act or with any other law to provide-

.....

(11) for the regulation and licensing of hotels, lodging houses, boarding houses, choultries, rest houses, emigration depots, restaurants, eating houses, cafes, refreshment rooms, coffee houses and any premise to which the public are admitted for repose or for the consumption of any food or drink or any other place where any food or drink is exposed for sale."

59. A careful look at Sub-section (11) of Section 349 extracted above, would show that it is very wide. It includes "any premise to which the public are admitted for repose". The word "repose" in its noun form is defined as "a state of resting after exertion or strain".

60. In any case, there is an omnibus clause in Sub-section (29) of Section 349, which reads as follows:

"349. Powers of council to make by-laws: The Council may make by-laws, not inconsistent with this Act or with any other law to provide-

.....

(29) in general, for securing cleanliness, safety and order and the good government and well being of the city and for carrying out all the purposes of this Act."

61. Therefore, it is clear that if the Government amends Schedule VI by exercising the power under Section 347(3) and includes massage parlours, health centres, spas, etc., in Schedule VI to the Chennai City Municipal Corporation Act, the Municipal Council itself may be able to make by-laws under Section 349(11) and (29) for regulating them.

62. Alternatively, the State Government itself can issue rules under Section 353-A.

63. There is also one more possibility. The Chennai City Police Act mandates, under Section 34(1), that no enclosed place or building, having an area of 46 1/2 sq. meter or upwards, shall be used for public entertainment or resort without a licence from the Commissioner. The word "resort" is not defined in the Act. Under Section 35 of the same Act, no enclosed place or building shall be used as an eating house, coffee house, boarding house, lodging house, hotel, gymnasium or fencing school without a licence from the Commissioner. Section 39 of the Act empowers even the Commissioner to make rules for ensuring order and decency

and for the public safety at all places of public entertainment or resort. It reads as follows:

"Power to make rules:- The Commissioner may make rules for ensuring order and decency and for the public safety at all places of public entertainment or resort, and for regulating the times during which the places referred to in sections 34 and 35 shall be allowed to be open or used, and from time to time may rescind or alter such rules; and in case of breach of any such rules or of the conditions of the licence granted under section 36, may order such places to be closed, and while such order is in force such places so ordered to be closed shall be deemed to be unlicensed places."

64. Section 52 of the Chennai City Police Act empowers the Commissioner to order the owner or the tenant of a house, to discontinue to use the house as a lodging house for prostitutes or as a brothel, if he has reason to believe that the house is used as such. In any case, Section 78 of the Chennai City Police Act empowers the State Government to make by-laws consistent with the Act for more effectively carrying out the objects thereof and for the preservation of order. The word "order" would include public order, decency and morality.

65. Therefore, if the respondents wish to regulate the business/profession of health centres, massage parlours and spas, they must take recourse either to the enactment of a legislation or to the issue of rules/bylaws in exercise of the power conferred by the respective enactments to make subordinate legislation. In the light of the above, all the writ petitions are disposed of to the following effect:

"(i) The respondents shall not, as a matter of routine and without any basis, conduct any raids and interfere with the business carried on by the petitioners;

(ii) In specific cases where the police have reasonable grounds to believe that an offence punishable under the Immoral Traffic (Prevention) Act has been or is being committed, it is open to the police to take action, after scrupulously following all the steps indicated in Section 15 of the said Act. The steps to be followed are narrated by me in paragraph 28 above; and

(iii) Based upon the laws enacted in various States of the United States of America and Singapore, which I have dealt with in paragraphs 39 to 54, the respondents may take appropriate steps for bringing in either a new legislation or a subordinate legislation in terms of the provisions of the Chennai City Municipal Corporation Act or the Chennai City Police Act, so that public order, decency and morality, which can form the basis for a regulatory law under Article 19(2) of The Constitution, are taken care of. The Government shall file a report on or before 31.3.2015, before this Court, about the decision taken. No costs. Consequently, all connected pending MPs are closed."