

(2008) 09 KAR CK 0001

In the Karnataka High Court

Case No : Writ Petition No's. 3743 and 9345 of 2008

Sri C. Ramesh, Ms. Elizabeth and Ms. Lya Shohthong Neithiem **APPELLANT**

Vs

State of Karnataka and Others
 Mr. R. Roopa and **RESPONDENT**
Others Vs State of Karnataka and Others

Date of Decision : 24-09-2008

Acts Referred:

Karnataka Excise (Sale of Indian and Foreign Liquor) Rules, 1968 — Rule 9, 9 (1)
Karnataka Excise Act, 1965 — Section 20, 20 (2)

Citation : (2008) 09 KAR CK 0001

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : N. Devhadass for K.S. Anusuya Devi, for Nyayamitra in WP No. 3743 of 2008 and N.K. Ramesh, in WP No. 9345 of 2008, for the Appellant; Udaya Holla, General, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.

ORDER Re: WP No 3743 of 2008:

1. The first petitioner in this writ petition is the proprietor of a bar and restaurant by name Chef-inn Regency and having a licence to run a bar and restaurant under the provisions of the Karnataka Excise Act, 1965 [for short, the Act] having obtained a licence under the provisions of Karnataka Excise (Sale of Indian & Foreign Liquor) Rules, 1968, issued in form CL-9, popularly known as CL-9 licence, which was current at the time of presentation of the writ petition.

2. It is the version of the first petitioner that the petitioner is desirous of employing women as hostess for providing better facilities to the customers for projecting that the facilities provided at his hotel are comparable to international standards and is keen to employ the second and the third petitioners, who have applied for the job of hostess in the first petitioner's restaurant so that they can

function as hostess in all sections of the hotel including the bar and restaurant; that the first petitioner being satisfied about the experience and suitability for the job is desirous of providing employment to the second and the third petitioners in his restaurant, but in view of the provisions Sub-section (2) of Section 20 of the Act read with Rule 9 of the Karnataka Excise Licences (General Conditions) Rules, 1967 [for short, the Rules], as the first petitioner cannot so employ the second and the third petitioners without obtaining a permission from the Deputy Commissioner in writing in terms of Sub-section (2) of Section 20 of the Act, but the so-called permission having become an illusion, as Rule 9 of the Rules totally prohibits employment of women by a licensee in terms of Sub-rule (1) of Rule 9 of the Rules petitioners have joined together to file this petition questioning the legality of these statutory provisions.

3. The provisions of Section 20 of the Act and the Rule 9 of the Rules read as under:

Section 20 of the Act:

20. Prohibition of employment of children and of women. - (1) No person who is licensed to sell any intoxicant for consumption on his premises shall, during the hours in which such premises are kept open for persons, employ or permit to be employed, either with or without remuneration, any children under such age as the State Government may, by rule, prescribe in this behalf, in any part of such premises in which such excisable article is consumed by the public

(2) No person who is licensed to sell any intoxicant for consumption at his premises shall, without the previous permission in writing of the Deputy Commissioner, during the hours in which such premises are kept open for persons, employ or permit to be employed, either with or without remuneration, any women in any part of such premises in which such excisable article is consumed by the public.

(3) Every permission granted under Sub-section (2) shall be endorsed on the licence and may be modified and withdrawn

Rule 9 of the Rules:

9. Employment of Women and Certain others prohibited. - (1) The licensee shall not employ any women;

(2) He shall not employ any person who has been convicted.

(3) The licensee shall not employ, in any capacity, a person who is below the age of 18 years or a person who is suffering from any contagious disease.

4. The second and the third petitioners, who are persons aspiring for the job of hostess in the first petitioner's hotel, are aggrieved that their job opportunity is lost due to the provisions of the Act and the Rules referred to above. In such circumstances, the petitioners have joined together to challenge the legality of the provisions contending that a provision of this nature is unconstitutional, is

violative of Articles 14, 15, 16, 19, 21 and 39 of the Constitution of India. The provisions of Article 21 of the Constitution of India is invoked in the context of affectation by this provision on the second and the third petitioners.

5. It is the version of the petitioners that having regard to the social developments, current social norms, trends and trade and commerce in India having expanded and having become global, the restriction of the nature sought to be imposed in terms of Sub-section (2) of Section 20 of the Act and Rule 9 of the Rules, are totally outdated, archaic, does not fit into the modern thinking and outlook of gender equality, emancipation of women and weaker sections of society, but more importantly violates the fundamental rights guaranteed by the Constitution in terms of Articles 14, 15, 16, 19 and 21 of the Constitution of India, occurring in Part-III and so also Article 39 of the Constitution of India in Part-IV; that the Supreme Court while examining a challenge of the present nature to a like legislation, in the case of Anuj Garg and Others Vs. Hotel Association of India and Others, having declared an identical provision viz., Section 30 of the Punjab Excise, 1914 [Punjab Act 1 of 1914] [for short, the Punjab Act], as violative of Articles 14 and 16 of the Constitution of India, the present situation is squarely covered by the law declared by the Supreme Court in that case and therefore the prayer sought for in this writ petition should be granted and the statutory provisions of Sub-section (2) of Section 20 of the Act should be declared as unconstitutional and unenforceable.

6. Writ petition had been admitted for examination by issue of Rule. Respondents - state and the excise commissioner - had been put on notice and they have entered appearance through the learned government advocate. Statement of objections and additional statement of objections have been filed on behalf of the respondents. The factual averments in the writ petition are denied. It is averred that the second and the third petitioners are persons who have been set up by the first petitioner and without any bona fides; the credentials put forward by the petitioners are disputed; it is urged that the challenge to the validity of the section and the rule is without merit; that the provision is only meant to protect the dignity of women and not to the contrary; that a licensee under the provisions of the Rules has no fundamental right to carry on trade or business in vending liquor and that not employing women in a licenced place is a condition of the licence and that cannot be questioned as violative of Articles 14, 19 and 21 of the Constitution of India, as the licensee in the first instance has no fundamental right at all to carry on business in liquor; that the prohibition of employment of women in a place where liquor is served like the licenced place in terms of CL-9 licence, is a reasonable restriction imposed with the object of protecting the dignity and safety of women and to prevent their exploitation and harassment at such places; that the recent trend of increasing violence and heinous offences committed against women at such places is proof of the justification of such law and imposition of such restrictions; that the provisions have a salient social purpose to serve in protecting the safety and dignity of women and weaker sections; that it is a valid piece of legislation and a

competent legislation and with a specific social purpose to achieve; that the restrictions imposed in most of the other parts of the world in such situation is far greater; that the restrictions in terms of the section and the rule is also one in consonance with the culture and social norms in our country; that the provisions of the Karnataka Act & Rules are not in pari materia with Section 30 of the Punjab Act; that the judgment of the Supreme Court in the case of Anuj Garg [supra], while is not applicable to the present situation, it is averred that the judgment is per incuriam and therefore is not a binding precedent and therefore the respondents have prayed for dismissal of the writ petition.

7. While in the first instance, only the legality of Rule 9 of the Rules had been challenged, by a later amendment, the petitioners have, on the ground of the statutory provision being unconstitutional, sought to be included in respect of Section 20(2) of the Act also, the respondents have filed additional statement of objections and it is contended that Sub-section (2) of Section 20 of the Act is a valid and sustainable piece of legislation; that it is neither violative of Articles 14 and 16 of the Constitution of India; that being a special provision for women, the provision of Sub-section (2) of Section 20 of the Act is saved both in terms of Article 15(3) and 16(4) of the Constitution of India; that it is not even violative of Article 21 of the Constitution of India and therefore the challenge is untenable and is to be rejected.

8. I have heard Sri N Devhadass, learned senior counsel and Sri N.K. Ramesh, Advocate appearing for the petitioners and Sri Udaya Holla, learned Advocate General appearing for the respondents.

9. Submission of Sri Devhadass, learned senior counsel appearing for the petitioners is that the provision is clearly a violation or negation of right to equality in favour of women; that it goes even beyond the bar against the state in denying equal opportunity to women by exclusively singling out women for denial of job opportunity; that it is a provision which brings about gender based discrimination; that a provision of this nature is clearly hit by Articles 14 and 15(1) of the Constitution of India. Submission is that a provision of this nature even assuming that it was valid at the time the legislation was enacted i.e. in the year 1965, which is a successor to the Mysore Excise Act, 1901, containing analogues provisions, are all to be treated as pre-constitutional laws, which, though assuming to have been held valid at some point of time earlier, is nevertheless to be tested on the touchstone of Constitutional provisions of Articles 14, 15, 16, 19, 21 and 39 of the Constitution of India by applying the present social norms, developments in the society, international Conventions and a host of legislations providing for upholding of human dignity, removing gender based discrimination and exploitation and like laws and if so tested fails the test of being a valid law and particularly in the wake of the law declared by the Supreme Court in the case of Anuj Garg [supra], when the Supreme Court examined the constitutionality and legality of the provisions of Section 30 of the Punjab Act - an analogous provision in that Act - and therefore the writ petition

should be allowed and the statutory provisions declared as unconstitutional and unenforceable.

10. Learned senior counsel for the petitioners also submits that while the section does indicate that prior permission is to be obtained before employing women in a licenced place, the rule having totally prohibited a licensee to do so, the authority is not allowed any freedom or discretion to permit or not to permit and therefore it is a total prohibition of employment of women in a licenced premises and is squarely violative of Articles 14 and 15 of the Constitution of India.

11. It is further submitted that the section is also bad in law for want of any guidelines as to in what circumstance the permission can be denied and in what circumstance permission can be granted and the rule having allowed no discretion, the section becomes bad, as the implementation of the section is only for total prohibition and therefore even failing it as a reasonable restriction.

12. Attention is drawn to the judgment of the Supreme Court in the case of Anuj Garg [supra], particularly paragraphs 25, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44 and 45.

13. It is also submitted that the provision is not one which can be saved in terms of Article 15 of the Constitution of India for the reason that the special provision for women is only to provide immunity from a possible act of discrimination in terms of Article 15(1) and not to enable the State to violate the provisions of Article 15(1) against women by taking shelter under Article 15(3). In support of this submission, reliance is placed on the decision of the Supreme Court in the case of C. Masilamani Mudaliar and Others Vs. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli and Others, .

14. Sri N Devhadass would also seek support for the contention that the statutory provisions are clearly violative of Articles 14 and 15 of the Constitution of India by applying the present norms in the society, by referring to an article written by Dr Justice Jitendra N Bhat of Patna High Court, titled Gender Justice: Human Rights Perspective, Triumph or Turmoil: Victor or Vanquished? reported in the journal section of (2006) 4 SCC 3.

15. Learned senior counsel would submit that Section 20 directly restricts the employment opportunity of women in work place and that right for equal opportunity in employment cannot be denied on the ruse of maintaining moral standards or in the guise of protecting women from exploitation and harassment in work place. It is submitted that what is saved by a special provision made in terms of Article 15(3) of the Constitution of India is a provision which promotes the interest of women and enhances opportunities for women vis-a-vis men and not a provision like the Section 20, which works to the contrary.

16. Sri Devhadass would also submit that it is not open to the state to put forth the argument that the judgment of the Supreme Court in the case of Anuj Garg [supra] as either per incuriam or the judgment is distinguishable for the reason

that the Supreme Court was directly involved with the very question and has declared the law and the distinction sought to be made by the state in the present case is not a distinction in the eye of law and therefore the writ petition should be allowed.

17. In support of the submission that the judgment in the case of Anuj Garg [supra] should be applied as the declaration of law having regard to the settled legal principles as to what is precedent and what binds a court in the lower tier, reliance is placed on the decision of the Supreme Court in the case of Government of Karnataka v. Gowramma AIR 2008 SCW 182 -para 9. Here again, it is submitted that while in the employer's prospective, a person having a licence, if is imposed any unreasonable restrictions in working out the licence, he can definitely question the legality of the provision, the effect of such a condition being directly on the second and the third petitioners and violating their fundamental rights, the defence put forth by the state that the petitioners have no right to trade in liquor, is only to avoid the question and not to answer the real issue in this case.

18. On the other hand, appearing on behalf of the state, Sri Udaya Holla, learned Advocate General, has sought to defend the validity of the legislation by urging that no person has a fundamental right to trade in liquor and such being the settled legal position as settled by the rulings of several Constitutional Benches of the Supreme Court, this Court when examining the validity of the provisions in the Act and the Rules, which are only provisions in the context of regulation of a privilege parted by the state and not a subject matter in which petitioners have any fundamental right, and therefore, submitted that the provisions cannot be tested on the touchstone of Articles 14, 15, 16, 19, 21 and 39 of the Constitution of India. Reliance is placed on the following decisions:

- * State of Punjab and Another Vs. Devans Modern Breweries Ltd. and Another,
- * The State Government, Madhya Pradesh Vs. Ramkrishna Ganpatrao Limsey and Others, .
- * Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others,
- * Synthetics and Chemicals Ltd. and Others Vs. State of U.P. and Others, .
- * Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, .

On such premise it is submitted by the learned Advocate General that the judgment of the supreme court rendered by a bench of two learned judges, being at variance with the law declared by the earlier larger benches as referred to above, the ruling of the supreme court in Anju Garg's should neither be followed nor applied as law declared by Supreme Court. It is therefore submitted that the judgment rendered in the case of Anuj Garg [supra] is per incuriam as not taking note of this legal position. In support of such proposition, reliance is placed on the decisions of the Supreme Court in the case of Mallulal v. Radhelal

reported in AIR 1974 SC 1596 and P. Ramachandra Rao Vs. State of Karnataka, . Submission is that the observation as contained in para-25 of the decision in the case of Anuj Garg [supra] is directly contrary to the law as declared by the Supreme Court in the earlier larger Constitutional Bench decisions, declaring that no one can claim a fundamental right in trade of liquor.

19. Learned Advocate General seeks to distinguish the judgment of the Supreme Court in the case of Anuj Garg [supra] by submitting that there was no effort made in that case to defend the validity of the legislation with reference to the provisions of Article 15(3) of the Constitution of India In this context, it is submitted that the provisions of Section 20 and Rule 9 of the Rules being provisions for protecting the dignity and safety of the women in vulnerable place like the place where liquor is served and patronized by persons who are aggressive and many a times not sober due to intoxication, no fault can be found with the provisions; that even if it is taken for argument's sake that it is in violation of Article 15(1) of the Constitution of India on the premise of making gender based distinction, it is still saved by Article 15(3) being a special provision and in support of this, draws attention to the judgments of the Supreme Court rendered in the case of Yusuf Abdul Aziz v. State of Bombay AIR 1954 SC 321. Reliance is also placed on the decision in the case of Cooverjee B. Bharucha Vs. The Excise Commissioner and the Chief Commissioner, Ajmer and Others, - PARA-7. Particular reference is made to the following observation of the Supreme Court in this decision.

The statistics of every State shows a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source.

20. Sri Udaya Holla, learned Advocate General would also submit that the provisions of Section 30 of the Punjab Act are not in pari materia with Section 20 of the Act; that under the Punjab Act, which was the subject matter of decision in the case of Anuj Garg [supra], there was an absolute embargo on employment of women in a licenced premises where liquor or intoxicant is consumed by public, but under the Karnataka Act, only prior permission is required; that if the Rule is one which is ultra vires, it can be so declared, but the Section can nevertheless be sustained, as one imposing a reasonable restrictions. Submission is that the provision is one imposing a reasonable restriction in the interest of safety and welfare of women and that cannot be characterized as a provision simply denying the right to women and it is in support of such submission, the following cited decisions are relied upon.

* Mohd. Hanif Quareshi and Others Vs. The State of Bihar,

* Krishnan Kakkanth Vs. Government of Kerala and ohters,

* M.J. Sivam and Ors. v. State of Karnataka and Ors. AIR 199S SC 1770

21. In the light of such rival submissions, the writ petition calls for examination,

particularly to the challenge posed to Sub-section (2) of Section 20 of the Act and Rule 9(1) of the Rules.

22. While it cannot be said that first petitioner-licence and the second and the third petitioners have locus to maintain this petition and to question the legality of the provisions, as they are complaining that these provisions affect either business interest or one imposing unreasonable restrictions in the context of grant of licence and in the case of 2nd and 3rd petitioners seeking employment affecting his/her fundamental right to employment etc., examination can be undertaken on the touchstone of the relevant provision with reference to each of the petitioner.

23. Rule 9(1), which prohibits employment of women in a licenced place where liquor is served, which is a rule purporting to be framed for the purpose of implementing the provisions of Section 20 of the Act, undoubtedly is a rule which goes beyond the scope of the Section, inasmuch as the section does not prohibit employment of women per se, but employment is sought to be regulated through a prior permission to be obtained from the Deputy Commissioner. Therefore, the Rule is undoubtedly ultra vires and is not sustainable and to be declared as ultra vires Section 20 and beyond the Rule making power and beyond the intent of Section 20 and is therefore void and unenforceable.

24. While Section 20 no doubt does not by itself prohibit employment of women in such places, what it mandates is seeking of a prior permission from the Deputy Commissioner. As to in what circumstances such permission can be granted is nowhere spelt out. There are no guidelines for the manner in which the Section can be worked by the Deputy Commissioner to grant or refuse permission. If the Rule were to be providing for such guidelines it could have been taken as a guiding factor. Unfortunately, the Rule being only for a total prohibition and therefore having been found to be ultra vires, it is of no use to throw light on the manner in which the Deputy Commissioner is required to exercise his power to grant permission. Now the section when viewed from the context of a licensee by itself cannot be said to be a provision which affects the right of the licensee, more basically for the reason that the licensee fundamentally has no right to trade in liquor and therefore a condition of such nature on the licensee while per se may not be a provision which can be said to be falling foul on any of the other provision of the Constitution, as the test could have been only as to the reasonableness of the restriction on the touchstone of Articles 14 and 19 of the Constitution of India and if there should not have been any further impact on any one else, perhaps on the strength of the arguments advanced by the learned Advocate General, that a licensee has no fundamental right to trade in liquor, the state could have succeed in the sustenance of the validity of the provisions. But as the effect and impact of such a provision is directly on the other petitioners, whose job opportunities are denied as in the present case, the examination goes beyond from the angle of the 2nd and 3rd petitioners also and it is here Section 20 fails the test of articles 14 and 15(1) of

the Constitution of India.

25. Though in the Punjab Act, the examination was focused in the context of denial of job opportunity to the male counterpart below the age of 25 years as the present day youth get themselves geared up for taking up assignments and employment even at the age of 20 to 21 years and deferring that to the age of 25 years, was found to be obnoxious, the judgment has at length discussed the negative impact on the employment opportunities to women and in the light of the developing trend across the globe. Whether a loss of job opportunity is not in respect of a very honourable or secured job, as is contended by the learned Advocate General on behalf of the State or else where there cannot be any denial that it is a denial of job opportunity to women. It is for this reason, the learned Advocate General has made a valiant effort to sustain the legality of such provision on the basis of the provisions being a protective provision for the benefit of women and being a special provision for women and to sub-serve the interest of protecting their safety and dignity.

26. In so far as the discrimination based on sex is concerned, it is there for every one to see and the burden is undoubtedly on the state to justify. The denial of job opportunity based on the sex while may not fall foul of Article 14 of the Constitution of India directly, as it is not a direct job opportunity in employment opportunities under the State, a law of this nature which treats a man and woman differently only based on the gender, is violative of the requirement of laws providing equal protection even within the requirement of Article 14 of the Constitution of India and specifically violates Article 15(1) being discrimination based only on sex, though the employment opportunity may be in a private employment that job opportunity being denied by law made by the State, it is for the state to defend the validity of such a law and such law is definitely amenable to scrutiny on the touchstone of the constitutional provisions in the jurisdiction of judicial review of legislative action.

27. A provision of this nature is directly in conflict with Article 39 of the Constitution of India also. The state, instead of endeavouring to achieve the equal opportunities to men and women to provide a right to an adequate means to livelihood, on the other hand positively deprives the female section of the society an equal opportunity even where it was available. A law of this nature definitely falls foul on articles both in Part-III and Part-IV of the Constitution of India.

28. Sub-section (2) of Section 20 of the Act while is one to be found as a provision conferring an unguided power on the Deputy Commissioner in granting or refusing permission and as violative of Article 14 of the Constitution of India also violates Articles 15 and 39 of the Constitution of India as indicated above.

29. In so far as the argument of the learned Advocate General that the judgment of the Supreme Court in the case of Anuj Garg [supra] is per incuriam and should not be applied for examination of the statutory provision in the present case is

concerned, while it is well settled on authority that it is not open to a court at a lower tier to characterize a judgment rendered by a court at an higher tier, as one not binding on the principle of per incuriam, the principle is more attracted in the context of law of precedence to overcome the rigour of the principle of stare decisis. Under the scheme of our Constitution, in so far as the judgment and law declared in the judgment of the Supreme Court is concerned, it is a law which has to be applied by all the courts in the country and is binding on all the courts in terms of Article 141 of the Constitution of India. Therefore, at the best, the argument of the learned advocate general can be taken to be that there is no such law declared in the case of Anuj Garg [supra] by the Supreme Court which is required to be applied as binding declaration in terms of Article 141 of the Constitution of India and that argument is put forth as one attracting the legal principle of per incuriam. Even on this premise, I am afraid the submission cannot be accepted for the simple reason that the Supreme Court was very much conscious of the earlier larger Bench decisions rendered by the court holding that no person has a fundamental right to deal in liquor being res extra commercium, as the Supreme Court itself has noticed in terms of the submission made by Sri Rajiv Dutta, learned senior counsel who appeared for the appellant in the case of Anuj Garg [supra]. If the Supreme Court itself was very much aware of the law as declared by the earlier larger benches of the court irrespective of the law as declared in the decisions referred and relied upon by the learned Advocate General, the Supreme Court itself having made a distinction of those authorities in the case of Anuj Garg [supra], it is only the law as declared in the case of Anuj Garg [supra] and not the law as declared in the earlier decision, that is required to be followed as binding declaration of law by all other courts. It is for this reason, I hold that the ratio and the law as declared in the case of Anuj Garg [supra] has to be applied in the present context also, as the question that arises is identical viz., discrimination against women in the matter of employment opportunities.

30. Though attention is drawn by the learned Advocate General to the various decisions referred to by the Supreme Court in the case of Anuj Garg [supra], particularly the judgment of American courts and as to how a minority view is sought to be followed, a minority view which was not the law laid down by the American courts and in the context of the American decisions, and therefore has sought to submit about the rationale of following such a minority view in Anju Garg's case, it is not for the high court to examine such aspects, but only to apply the law as declared by the Supreme Court to the present situation.

31. Though considerable time was spent by the learned Advocate General in trying to make home the argument that there being no attempt on the part of the State to defend the validity of the legislation in the case of Anuj Garg [supra] with reference to the special provision for women saved under Article 15(3), I find this argument primarily proceeds on the premise that the special provisions need not be in favour of women but any special provision can be imposed with reasonable restrictions. It is for this reason, the endeavour on the part of the

state is to show that a provision of the nature of Sub-section (2) of Section 20 of the Act imposing restriction on a licensee in the matter of employment of women in a licenced place, where liquor is served is a reasonable restriction. Here again, the very premises is fallacious for the reason that a special provision in terms of Article 15(3) of the Constitution of India is a provision which is meant to save situations which are otherwise violative of Article 15(1). While it is no doubt true that under Article 15(1), generally gender based discrimination is prohibited and persons belonging to either sex can complain of violation of the bar on the state under Article 15(1), what is saved under Article 15(3) is only any special provision for women and children. If so, it is very clear that it is only a special provision "in favour of women and children which is saved under Article 15(3) of the Constitution of India. A special provision which favours persons other than women and children or which is a provision for persons other than women and children, is not saved under Article 15(3), is hit by Article 15(1) directly. Therefore, Sri N Devhadass, learned senior counsel for the petitioners is very correct in his submission that a special provision under Article 15(3) can only be a provision which is an enabling provision in favour of women and that can claim immunity from the operation of Article 15(1) of the Constitution of India and not a provision of the present nature, which even if characterized as a special provision, firstly does not get immunity under Article 15(3), secondly, on the other hand acting against the interest of the women, is definitely hit by Article 15(1) and therefore has to be declared as unconstitutional and unenforceable. In this regard, reliance placed by the learned senior counsel appearing for the petitioners on the decision of the Supreme Court in the case of Masilamani Mudaliar [supra] is very apt a reading of paragraphs 21, 22, 23, 24 and 25 of this decision, which reads as under:

21. Article 5(a) of CEDAW to which the Government of India expressed reservation, does not stand in its way and in fact Article 2(f) denudes its effect and enjoin to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-a-vis Articles 1, 3, 6 and 8 of the Convention of Right to Development The directive principles and fundamental rights, though provided the matrix for development of human personality and elimination of discrimination, these conventions add urgently and teeth for immediate implementation. It is, therefore, imperative of the State to eliminate obstacles, prohibit all gender-based discriminations as mandated by Articles 14 and 15 of the Constitution of India By operation of Article 2(f) and other related articles of CEDAW, the State should take all appropriate measures including legislation to modify or abolish gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

22. Article 15(3) of the Constitution of India positively protects such Acts or actions. Article 21 of the Constitution of India reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person's

life including culture, heritage and tradition with dignity of person. The fulfillment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally in order to effectuate fundamental duty to develop scientific temper, humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51-A(h) and (J) of the Constitution of India, facilities and opportunities not only are to be provided for, but also all forms of gender-based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights.

23. Bharat Ratna Dr. B.R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in part IV and the Preamble of the Constitution which constitutes conscience of the Constitution. Covenants of the United Nations add impetus and urgency to eliminate gender-based obstacles and discrimination. Legislative action should be devised suitably to constellate economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins that this Court to breathe life into the dry bones of the Constitution, international conventions and the Protection of Human Rights Act and the Act to prevent gender-based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women.

24. As per the U.N. Report, 1980 "women constitute half the world population, perform nearly two-thirds of work hours, receive one-tenth of the world's income and own less than one-hundredth per cent of world's property". Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Article 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy.

25. In *Valsamma Paul v. Cochin University* & this Court has held thus: (SCC pp.

562-64, paras 26-29).

Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth-cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short, "CEDAW") was ratified by the U.N.O. on 18.12.1979 and the Government of India had ratified as an active participant on 19.6.1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity.

Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc. Article 1 defines "discrimination against women" to mean

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2(b) enjoins upon the State parties, while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting

appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women; to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Clause C enjoins upon the State to ensure legal protection of the rights of women on equal basis with men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins upon the State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate

measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that

the State parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women.

Parliament has enacted the Protection of Human Rights Act, 1993. Section 2(b) defines "human rights" to mean

the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by courts in India.

Thereby, the principles embodied in CEDAW and the concomitant right to development became integral part of the Constitution of India and the Human Rights Act and became enforceable. Section 12 of the Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

Though the Government of India kept its reservations on Articles 5(e), 16(1), 16(2) and 29 of CEDAW, they bear little consequence in view of the fundamental rights in Article 15(1) and (3) and Article 21 and the Directive Principles of the Constitution.

while clearly indicates that the special provision under Article 15(3) should be one necessarily in favour of women and children to claim immunity from the operation of Article 15(1) of the Constitution of India, it also lends support to the view taken by the Supreme Court in the case of Anuj Garg [supra], particularly in the context of current social developments and the need for the courts to understand and interpret statutory provisions while testing their constitutional validity on the touchstone of the current social norms, current perceptions in the society and the developments in the society.

32. In fact it is observed by the Supreme Court that a statutory provision which might have passed the test of Constitutionality at an earlier point of time may, nevertheless, be found wanting on the very touchstone of the constitutional provision at a later of point of time in the wake of the developments that have taken place in the attitude of the members of the society and the living norms of the members of the society, various subsequent legislation that might have been enacted also indicating the current trend and development in both law and social norms and the attitudinal change on the part of the citizens in the context of global developments, if such can be the tests, Sub-section (2) of Section 20 of the Act does not pass the test and hence it has to be declared as unconstitutional and unenforceable.

33. In the course of the examination of the above case, it was noticed that the

judgment rendered by the Supreme court in the case of Anuj Garg [supra] was only affirmation of a judgment rendered by the Delhi High Court declaring Section 30 of the Punjab Act as unconstitutional and while so doing, the Delhi High Court had obtained an undertaking on behalf of the petitioners therein viz., hotel association of India, with whom the potential women employees wanted to work and who may have to serve liquor to customers in the course of their work, will not be compelled to serve liquor to customers in the premises against their wishes and it will be optional for them etc. This judgment of the Delhi High Court with the above condition as a part of it, was affirmed by the Supreme Court, with the undertaking given by the Association operating as a condition on them. In the wake of this factual position and being brought to the notice of the learned Counsel appearing for petitioners in the present writ petition, a like undertaking is placed before the court by first petitioner.

34. But on examination, the present case does not give any scope to obtain any such undertaking from all employers as not all licencees are before the court nor the statutory provisions as of now enables the court to read down the section in such a manner, so as the section achieves this object and thereby sustain its validity. While this development may be an indicator and can throw light as to the various possibilities when the state intends to regulate the manner of functioning of the licenced premises, it is for the legislature to attempt such exercises than for the court to wrangle with such possibilities within the narrow lanes of interpretative process.

34. In the result, this writ petition is allowed. Rule 9 of the Rules is declared to be ultra vires and unenforceable and so also Sub-section (2) of Section 20 of the Act is declared to be unconstitutional, being violative of Articles 14, 15, 16, 21 and 39 of the Constitution of India and therefore not enforceable. Rule made absolute.

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35. In this writ petition also the petitioners who are women complaining of loss of job opportunity due to Section 20(2) of the Act have sought for a like relief, as in the above case on identical grounds. Hence, this writ petition is also allowed. Rule made absolute.