(2013) 01 MAD CK 0062

Madras High Court

Case No: Writ Petition No. 11311 of 2012 and M.P. No. 1 of 2012

N.V. Sankaran alias Gnani	APPELLANT
Vs	
The State of Tamil Nadu	RESPONDENT

Date of Decision: Jan. 23, 2013

Acts Referred:

- Constitution of India, 1950 - Article 13, 14, 19, 19(1)(a), 19(2)
- Penal Code, 1860 (IPC) - Section 124A

Citation: (2013) 1 CTC 686 : (2013) WritLR 222

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: R. Yashod Vardhan, for Sundar Narayanan, for the Appellant; A. Navaneethakrishnan, Advocate General Assisted by V. Jayaprakash Narayanan, Special Government Pleader, for the Respondent

Final Decision: Dismissed

Judgement

K. Chandru, J.

This Writ Petition raises an important Constitutional question as to whether the Tamil Nadu Dramatic Performances Act,

1954 (Tamil Nadu Act 33 of 1954) is Constitutionally valid? and whether it is liable to be struck down as it infringes Articles 14 & 19 of the

Constitution? The Petitioner is a Writer and Journalist. He is also having a Theatre Group called ""Pareeksha"" established in the year 1976. The said

Theatre group have put up several plays both in Theatre as well as street plays. The contention of the Petitioner was that whenever he puts a play

in the theatre, the script of the play has to get prior clearance from the Commissioner of Police if it is performed in the city of Chennai, who

determines whether there is anything objectionable in the content of the plays. As a result of the said restriction, managers of the theatre halls

require the Petitioner to get permission from the Commissioner of Police. The office of the Commissioner of Police (Third Respondent) normally

ask two copies of the script to be submitted to their office three weeks in advance before the date of performance of any play or drama. On

submission of the script, the Third Respondent office, on satisfying themselves that there was nothing objectionable in the play, grant the approval

or licence to stage the play. Normally, such permissions are granted only a day before the play. Vesting such a discretion at the hands of the Third

Respondent, who is neither an artist or aesthetic sensibility to judge whether the play is objectionable, is clearly uncalled for. The Petitioner had

arranged to put up a play by name ""Kamala"" based on a book written by an eminent Marathi playwright Vijay Tendulkar. An approval from the

Third Respondent office was never given even three hours before the schedule time of play. The Petitioner was asked to cut several dialogues from

the script of the play which the Third Respondent felt objectionable, though in normal situation, no reasonable man would have termed any part of

the play as obscene or tinged with any political overtones. If the Petitioner did not accept the dictates of the official Respondent, then it will result in

cancellation of the performance. Therefore, they were forced to compromise on their artistic freedom and had accepted such cuts. The play was

performed starting from 8.00 p.m., instead of 6.30 p.m. None of the city auditoriums are giving permission to put any play without prior censorship

of the script by the Police. Censoring was normally done by the person in the rank of the Inspector of Police, who is neither artistic or literary skills

to judge the script. To the knowledge of the Petitioner, Tamil Nadu is the only State where the Police is empowered to censor the script of the

play or drama.

2. The Tamil Nadu Dramatic Performance Act, 1954 is a relic of colonial rule in India, who had promulgated the Dramatic Performance Act, 1876

to regulate the theatre scene in India. The Act outlined the restrictions that public performances of a play, pantomime or any other drama would

have to adhere to. If the Government judged any play to be of a scandalous nature or disrupting social values or felt that it might excite feelings of

disaffection against the Government established by law or that it would corrupt persons, the said performance would stand prohibited. If any

person who was served with such prohibitory order, refused to comply with the same, then such person or group is liable to be punished. The

penalty for disobedience of the terms of the Act was either imprisonment for a term extending three months or fine or both in some cases. The Act

conferred upon the Government the right to receive information, by which right, the persons as empowered by the Act can demand for production

of all such plays for verification that whose content might violate one or many terms of the Act. The Police was granted permission to enter, arrest

and seize any persons, scenery, costumes, articles whose use or intended use in the performance was prohibited under the terms of the Act. By

virtue of the Act, no performance can take place in any local area without the sanction of a licence. It must be noted that the Colonial Government

had wanted to gag the free speech and noticing that the public theatre can be the place where germs of the nationalist movement can grow, came

down heavily upon theatre groups and individual directors of play. One would think that such plays put up by patriotic citizens raised the sympathy

of the people against the misleading of the Colonial Government and finally resulted in India became independent on 15.8.1947. Thereafter, the

Constitution of India was adopted with effect from 26.1.1950. On knowing that the pre-constitutional Act such as Dramatic Performance Act,

1876 will not pass the Constitutional test, under Article 13 of the Constitution, many State Governments have started introducing their own version

of censorship of plays. Thus, the First Respondent-State had introduced the Tamil Nadu Dramatic Performance Act, 1954 (Tamil Nadu Act 33 of

1954). By virtue of the said Act, the original Act, i.e., Dramatic Performance Act, 1876 was repealed. So far as its application in the State of

Tamil Nadu is concerned, it was stated that the object of the Act was to provide for the better control of public dramatic performances in the State

of Tamil Nadu. Rules have also been framed in terms of Section 13, known as Tamil Nadu Dramatic Performance Rules, 1955.

3. Section 2(1) of the Act defines the term ""objectionable performance"" and it reads as follows:

2. Definitions.-- In this Act, unless the context otherwise requires-

(1) ""objectionable performance"" means any play, pantomime or other drama which is likely to-

(i) incite any person to resort to violence or sabotage for the purpose of overthrowing or undermining the Government established by law in India

or in any State thereof or its authority in any area; or

(ii) incite any person to commit murder, sabotage or any offence involving violence; or

(iii) seduce any member of any of the armed forces of the Union or of the Police forces from his allegiance or his duty, or prejudice the recruiting of

persons to serve in any such force or prejudice the discipline of any such force; or

(iv) incite any section of the citizens of India to acts of violence against any other section of the citizens of India; or which

(v) is deliberately intended to outrage the religious feelings of any class of the citizens of India by insulting or blaspheming or profaning the religion

or the religious beliefs of that class; or

(vi) is grossly indecent, or is scurrilous or obscene or intended for blackmail; and includes any indecent or obscene dance.

Explanation I-A-- performance shall not be deemed to be objectionable merely because in the course thereof words are uttered, or signs or visible

representations are made, expressing disapprobation or criticism of any law or of any policy or administrative action of the Government with a

view to obtain its alteration or redress by lawful means.

Explanation I-A-- The expression ''play, pantomime or other drama'' shall include dance whether or not such dance forms part of such play,

pantomime or other drama.

Explanation II.-- In judging whether any performance is an objectionable performance, the play, pantomime or other draw shall be considered as a

whole.

4. The term ""public place"" is defined u/s 2(2), which reads as follows:

(2) ""public place"" means any building or enclosure, or any place in the open air and any pandal where the sides are not enclosed to which the

public are admitted to witness a performance.

5. u/s 3(1), when the State Government is satisfied that any play, pantomime or other drama performed or about to be performed in a public place

is an objectionable performance, then by order stating the grounds on which they consider the performance objectionable, can prohibit the

performance. Section 3(2) mandates the Government to give a reasonable opportunity to the organizers or persons responsible for the conduct of

the performance to show cause as to why the performance should not be prohibited. Apart from the power to prohibit the performance of the

play, Section 4 also gives power to the Commissioner of Police in respect of the Presidency town and the District Collector in respect of other

districts, that if in their opinion any play, pantomime or other drama performed being in the nature specified in Section 2, is likely to lead to a

breach of peace, by order stating the grounds for such opinion can prohibit the performance. The very same authority has also power to review the

said order on an Application made by the person affected. The authority, if he is of the opinion that the order should continue to be in force, by

such further order or orders, he may extend the period of such prohibition to such further period or periods not exceeding two months at a time as

may be specified in such order or orders.

6. u/s 6, any person, on whom a copy of the order referred to in Section 3 of Section 4 is served, disobeys the said order, is liable to be punished

with imprisonment for a term which may extend to three months or fine which may extend to Rs. 1000/- or with both. Apart from that, Section 7 of

the Act penalises not only the organizer, but also any person who took part in the performance prohibited, for same penalty. Further, u/s 7(2), any

person who being the owner or occupier or having the use of any public place allowing the prohibited play to be performed is also liable for the

same penalty. u/s 8, the State Government or any officer empowered by an order require the organizers or other principal persons responsible for

the conduct of such plays to furnish such information as the State Government or the delegated officer may think necessary. Section 8 makes it

mandatory to furnish such information. Section 9 once again gives power to the State Government and to the Commissioner of Police in the

Presidency Town and to the District Collector in respect of other districts, to call for a copy of piece of the play to be furnished not less than seven

days before the performance to the said authority. In case, if the person aggrieved in terms of the order passed u/s 3(1) or Section 4, he can file an

Appeal to this Court and upon such Appeal, this Court can pass such order as may deem fit and that the Appeal will have to be heard by the

Bench of not less than Two Judges. Apart from the penalty and prohibition, in respect of the violations of Sections 3 & 4, the person is liable for

prosecution in terms of the provisions of the IPC. In the Rules framed by virtue of Section 13, it was stated in Rule 4 that full information regarding

the play shall be required to be furnished in terms of Section 8(1) for the grant of permission for conducting the play.

7. In view of the provisions of the Act, it is now contended that the Act purports to effect a regime of pre-censorship by subjecting the permission

to stage a dramatic performance to the dictates of the Commissioner of Police or District Collectors, whose ipse dixit is final. Though the Act

purports to grant an opportunity of hearing before an order of prohibition can be passed, such procedure insofar as it vests to the discretion of the

officials, is an empty formality. The practice hitherto followed shows that the authorities, who are far from possessing the artistic sensibilities to

judge a play or drama, have invariably imposed their dictates by granting approval only if necessary excisions were made to the script, thus

compromising on artistic freedom. The Act moreover penalizes any person for committing disobedience of any order passed in effect prohibiting

the dramatic performance as adjudged by the official Respondents. Though the Act nowhere prescribed the demand for prior submission of every

script of play, by virtue of the provisions of Rule 4, the authority can demand full information regarding the play for the grant of permission. Though

Rule 4 refers to Section 8, it does not talk about any permission by the authority, but yet Rule 4 uses the term prior permission. Using this

draconian provision, the Commissioner of Police made a blanket requirement of prior submission of all scripts irrespective of their potential to

cause breach of peace.

8. Under Article 19(1)(a) of the Constitution, every citizen has right to freedom of speech and expression. Though the said right is hedged by a

reasonable restrictions stipulated under Article 19(2), the impugned Act is draconian as it infringes the fundamental right of the Petitioner to free

speech and expression guaranteed under Article 19(1)(a) of the Constitution. If a comparison is made to the Cinematograph Act, 1952, it vest

with the discretion on grant of a certificate for a motion picture to an Advisory Board consisting of eminent artists. But the impugned Act is

pernicious as the procedural provisions of the Act imposes unreasonable restrictions on the right guaranteed under Article 19(1)(a) as it vest with

the discretion to the officer as to whether performance is objectionable to the subjective satisfaction of the officer so notified, who lacks the

sensibilities to judge whether a performance is objectionable or not. The Act insofar as it confers the power on the official Respondents to demand

the production of any script of a play is draconian as it muzzles and stifles the free speech and expression and is a negation of the right conferred

under Article 19(1)(a). The Act being a relic of a pre-Constitutional enactment has no place in the sovereign and democratic republic and it

infringes the right guaranteed under Articles 14, 19 & 21 of the Constitution. Section 2(1) defines ""objectionable performance"" and it confers

untrammeled powers on the official Respondents without any procedural guidelines to adjudge whether a dramatic performance is objectionable.

The impugned Act also gives excessive delegation without any guidelines for the exercise of such power by the delegated authorities.

9. In normal circumstances, theatre owners only seek permission from the police for loudspeaker licence in terms of the Madras City Police Act

and Public Halls Act. But the Police combining those legislations are now demanding submission of the entire script for prior approval. It will not

be out of place to refer to the case of a play organized by the Times of India called as ""Vagina Monologues"" (in English), which was prohibited in

Chennai, whereas the same play was performed all over India in other States. Armed with the said Act and the use of draconian powers, the

police authorities are refusing permission to perform the play in open spaces, such as parks and the beach. Street theatre throughout the World is

known to be spontaneous and it is performed without any prior script based solely on the artistic improvisations of the actors. In such a situation, it

is impossible to write a prior script for street theatre. The action of the Respondents in asking such submission of prior script is also like asking the

political leader to submit a written speech before delivering the speech every time. If any theatre group or organizers of any public performance are

closer to the ruling party (like in the case of Chennai Sangamam), then no such permission was ever asked for. Likewise, if such plays are

performed in the Consulate Offices of foreign countries, there is no requirement of submission of scripts before the Police for prior censorship. In

the light of the above, it was prayed that the Act should be struck down as unconstitutional.

10. When the Writ Petition came up on 20.4.2012, notice was directed to be taken by the learned Special Government Pleader. Notice was also

issued to the learned Advocate General since vires of the said enactment was involved. On taking notice, on behalf of the First and Second

Respondents, a common Counter Affidavit, dated 3.7.2012 was filed. On behalf of Third Respondent, a separate Counter Affidavit, dated

4.7.2012 was also filed.

11. It is the stand of the official Respondents that the Act was intended to provide for the better control of public dramatic performance by the

State, which was the special enactment and the self-contained code provides for regulatory mechanism to control and prohibit objectionable public

dramatic performance in the State. The term ""objectionable performance"" is defined u/s 2(1) of the Act. The Act is the post independent legislation

brought into force with effect from 12.1.1955. Free speech and expression guaranteed u/s 19(1)(a) is subject to restrictions under Article 19(2).

The script of the play or drama will be considered as objectionable only if it falls within any of the six sub clauses mentioned in Section 2(1) of the

impugned Act. The Act stood for more than 60 years and safeguards the lager public interest to maintain public peace. Reasonableness of

restriction has to be determined in an objective manner and from the stand point of the interest of the general public and community at large and not

from the point of view of persons like the Petitioner. The provisions of the Act is well within Article 19 of the Constitution. It confers power on the

official Respondents to demand the production of any script of the play.

12. In the Counter Affidavit filed by the Third Respondent, i.e., Commissioner of Police, the very same averments have been made. It is

noteworthy that the Third Respondent did not spell out as to how his office deals with the script submitted to them. The allegation that it is dealt

with at the level of the Inspector of Police attached to the office also not specifically denied. There is only general denial without revealing to this

Court the mechanism by which the Commissioner of Police can go into the artistic nature of any play. On the other hand, the person who sworn to

the Affidavit himself is not from Tamil Nadu and how far his understanding of Tamil language can be made use of to decide the so-called objection

in the play.

13. Mr. R. Yashod Vardhan, learned Senior Counsel for Mr. R. Sunil Kumar, learned counsel appearing for the Petitioner submitted that the

argument that the Act stood the test for more than 60 years and therefore it cannot be challenged was thoroughly unacceptable. Even assuming that

the particular legislation was valid and acceptable at a particular point of time, can, in the course of time, become discriminatory. The Court can still

hold such provisions are invalid.

14. In this context, he referred to a judgment of the Supreme Court in Rattan Arya and Others Vs. State of Tamil Nadu and Another, , and

referred to the following passage found in paragraph 4, which reads as follows:

4. ...As held by this Court in Motor General Traders and Another Vs. State of Andhra Pradesh and Others, a provision which was perfectly valid

at the commencement of the Act could be challenged later on the ground of unconstitutionality and struck down on that basis. What was once a

perfectly valid legislation, may in course of time, become discriminatory and liable to challenge on the ground of its being violative of Article 14.

After referring to some of the earlier cases Venkataramiah, J. observed: (SCC p. 239, para 24)

The garb of Constitutionality which it may have possessed earlier has become worn out and its unconstitutionality is now brought to a successful

challenge.

15. On the question of right of free expression guaranteed under Article 19(1)(a), the learned Senior Counsel referred to a judgment of the

Supreme Court in Life Insurance Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation, and

referred to the following passages found in paragraphs 21, 22 & 23, which reads as follows:

21. In the United States prior restraint is generally regarded to be at serious odds with the First Amendment and carries a heavy presumption

against its Constitutionality and the authorities imposing the same have to discharge a heavy burden on demonstrating its justification See New

York Times Vs. US, 1971 402 US 4713 . Traditionally prior restraints, regardless of their form, are frowned upon as threats to freedom of

expression since they contain within themselves forces which if released have the potential for imposing arbitrary and at times irrational decisions.

Since the function of any Board of Film Censors is to censor it, it immediately conflicts with the Article 19(1)(a) and has to be justified as falling

within permissible restraint under Article 19(2) of the Constitution. A similar question came up before this Court in K.A. Abbas Vs. The Union of

India (UOI) and Another, , wherein Chief Justice Hidayatullah exhaustively dealt with the question of prior restraint in the context of the provisions

of the Constitution and the Act. The learned Chief Justice after setting out the various provisions to which we have already adverted posed the

question: ''How far can these restrictions go and how are these to be imposed ?'' The documentary film ''A Tale of Four Cities'' made by K.A.

Abbas portrayed the contrast between the luxurious life of the rich and the squalor and poverty of the poor in the four principal cities of the country

and included therein shots from the red light district of Bombay showing scantily dressed women soliciting customers by standing near the doors

and windows. The Board of Film Censors granted ''A'' Certificate to the film and refused the ''U'' Certificate sought by Abbas. This was on the

ground that the film dealt with relations between sexes in such a manner as to depict immoral traffic in women and because the film contained

incidents unsuitable for young persons. Abbas challenged the Board''s decision on the ground (i) that pre-censorship cannot be tolerated as it was

in violation of the freedom of speech and expression, and (ii) even if it is considered legitimate it must be exercised on well-defined principles

leaving no room for arbitrary decisions. This Court held that censorship in India had full justification in the field of exhibition of films since it was in

the interest of society and if the legitimate power is abused it can be struck down. While dealing with the grounds on which the ''U'' Certificate was

refused, the learned Chief Justice observed: (SCC p. 802, para 49)

The task of the censor is extremely delicate and his duties cannot be the subject of an exhaustive set of commands established by prior

ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and

expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the

protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we

set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with

some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and for ever from human thought

and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of

social life and not only in its ideal form and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked

portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an

average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman''s legs in everything, it cannot be helped. In our

scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth.

In Ramesh Dalal Vs. Union of India (UOI) and Others, a Petition was filed to restrain the screening of the serial ""Tamas"" on the ground that it

violated Articles 21 & 25 of the Constitution and Section 5-B of the Act. Based on the novel of Bhisma Sahni this serial depicted the events that

took place in Lahore immediately before the partition of the country. Two Judges of the Bombay High Court saw the serial and rejected the

contention that it propagates the cult of violence. This Court after referring to the observations of Hidayatullah, C.J. in K.A. Abbas, proceeded to

state as under: (SCC p. 680, para 21)

It is no doubt true that the motion picture is a powerful instrument with a much stronger impact on the visual and aural senses of the spectators than

any other medium of communication; likewise, it is also true that the television, the range of which has vastly developed in our country in the past

few years, now reaches out to the remotest comers of the country catering to the not so sophisticated, literary or educated masses of people living

in distant villages. But the argument overlooks that the potency of the motion picture is as much for good as for evil. If some scenes of violence,

some nuances of expression or some events in the film can stir up certain feelings in the spectator, an equally deep, strong, lasting and beneficial

impression can be conveyed by scenes revealing the machinations of selfish interests, scenes depicting mutual respect and tolerance, scenes

showing comradeship, help and kindness which transcend the barriers of religion. Unfortunately, modern developments both in the field of cinema

as well as in the field of national and international politics have rendered it inevitable for people to face realities of internecine conflicts, inter alia, in

the name of religion. Even contemporary news bulletins very often carry scenes of pitched battle or violence. What is necessary sometimes is to

penetrate behind the scenes and analyse the causes of such conflicts. The attempt of the author in this film is to draw a lesson from our country''s

past history, expose the motives of persons who operate behind the scenes to generate and foment conflicts and to emphasise the desire of

persons to live in amity and the need for them to rise above religious barriers and treat one another with kindness, sympathy and affection. It is

possible only for a motion picture to convey such a message in depth and if it is able to do this, it will be an achievement of great social value.

This Court upheld the finding of the Bombay High Court that the serial viewed in its entirety is capable of creating a lasting impression of this

message of peace and Co-existence and there is no fear of the people being obsessed, overwhelmed or carried away by scenes of violence or

fanaticism shown in the film.

22. As already pointed out earlier this Court in S. Rangarajan Vs. P. Jagjevan Ram and Others, , emphasised that the freedom conferred on a

citizen by Article 19(1)(a) includes the freedom to communicate one''s ideas or thoughts through a newspaper, a magazine or a movie. Although

movie enjoys that freedom it must be remembered that movie is a powerful mode of communication and has the capacity to make a profound

impact on the minds of the viewers and it is, therefore, essential to ensure that the message it conveys is not harmful to the society or even a section

of the society. Censorship by prior restraint, therefore, seems justified for the protection of the society from the ill-effects that a motion picture may

produce if unrestricted exhibition is allowed. Censorship is, thus, permitted to protect social interests enumerated in Article 19(2) and Section 5-B

of the Act. But such censorship must be reasonable and must answer the test of Article 14 of the Constitution. In this decision the fundamental

difference between the U.S. First Amendment and the freedom conferred by 19(1)(a), subject to Article 19(2) has been highlighted and we need

not dwell on the same.

23. Every right has a corresponding duty or obligation and so has the fundamental right of speech and expression. The freedom conferred by

Article 19(1)(a) is, therefore, not absolute as perhaps in the case of the U.S. First Amendment; it carries with it certain responsibilities towards

fellow citizens and society at large. A citizen who exercises this right must remain conscious that his fellow citizen too has a similar right. Therefore,

the right must be so exercised as not to come in direct conflict with the right of another citizen. It must, therefore, be so exercised as not to

jeopardise the right of another or clash with the paramount interest of the State or the community at large. In India, therefore, our Constitution

recognises the need to place reasonable restrictions on grounds specified by Article 19(2) and Section 5-B of the Act on the exercise of the right

of speech and expression. It is for this reason that this Court has recognised the need for prior restraint and our laws have assigned a specific role

to the censors as such is the need in a rapidly changing societal structure. But since permissible restrictions, albeit reasonable, are all the same

restrictions on the exercise of the fundamental right under Article 19(1)(a), such restrictions are bound to be viewed as anathema, in that, they are

in the nature of curbs or limitations on the exercise of the right and are, therefore, bound to be viewed with suspicion, thereby throwing a heavy

burden on the authorities that seek to impose them. The burden would, therefore, heavily lie on the authorities that seek to impose them to show

that the restrictions are reasonable and permissible in law.

16. The learned Senior Counsel, in the light of the above observations of the Supreme Court, submitted that the attempt by the Respondents to get

prior censorship by the Police or District Collector is totally uncalled for and a mechanism like the Cinematograph Act was not available to them.

17. He also referred to a judgment of a division bench of the Allahabad High Court in The The State Vs. Baboo Lal and Others, . In that case, the

Allahabad High Court dealt with the provisions of the Dramatic Performance Act, 1876. The division bench in that case had raised the following

questions:

13. ... Still there are two questions which need decision in this case. Firstly, whether the Dramatic Performance Act is ''ultra vires'' of the

Constitution of India or not and secondly, even if it is held to be ''intra vires'', whether the prosecution of the accused in the circumstances of the

case was a bona fide prosecution or merely a victimisation of persons who have a different political ideology than the ideology of the party in

power.

18. Insofar as the first question was concerned, the Division Bench held that the State must have some power to deal in an emergent manner with

the spoken word. The Dramatic Performance Act, 1876 is a preventive measure. But, when it was contended about the procedure followed for

gagging the play, the Division Bench in paragraphs 17, 18, 19, 22 & 23 held as follows:

17. We now come to the procedure laid down for the enforcement of these restrictions. We will only reproduce Section 10 of this Act for it

contains the procedure adopted in this case. Section 10 reads:

Whenever it appears to the Provincial Government that the provisions of this Section are required in any local area, it may declare, by Notification

in the Official Gazette that such provisions are applied to such area from a day to be fixed in the Notification.

On and after that day, the Provincial Government may order that no Dramatic performance shall take place in any place of public entertainment

within such area, except under a licence to be granted by such Provincial Government or such officer as it may specially empower in this behalf.

The Provincial Government may also order that no dramatic performance shall take place in any place of public entertainment within such area,

unless a copy of the piece, if and so far as it is written, or some sufficient account of its purport, if and so far as it is in pantomime, has been

furnished, not less than three days before the performance, to the Provincial Government, or to such officer as it may appoint in this behalf.

A copy of any order under this Section may be served on any keeper of a place of public entertainment; and if thereafter he does, or willingly

permits, any act in disobedience to such order, he shall be punishable on conviction before a Magistrate with imprisonment for a terra which may

extend to three months or with fine or with both.

18. It would be seen from the above quoted Section that an officer specially empowered, who in this case was the Additional District Magistrate

(E) is made the final authority to determine the question whether a particular play offends against any of the clauses of Section 3 or not. The Act

has made no provision for appointing any Higher Authority (judicial or otherwise), who can review or reconsider the order passed by the District

Magistrate or the Additional District Magistrate.

The order of such an officer may be absolutely arbitrary and unreasonable, but the aggrieved party cannot question it. It is left entirely to the sweet

will and understanding of this Executive Officer whether he imposes such a restriction or not. The way the District Magistrates are likely to impose

these restrictions is fully illustrated by the manner in which the prohibitory order was issued in this case. It may be that the abuse of power by the

Executive Authority is irrelevant for the true interpretation of the law, but it cannot be completely ignored in considering the reasonableness of the

procedural part of the law.

19. Even an opportunity to make a representation against the prohibitory order passed by the Executive Authority u/s 3 is not provided under the

Act. Again as there would be a different District Magistrate in every District the clauses of Section 3 may be interpreted differently in different

Districts.

A play which was prohibited in the district may be staged in another District and even in the same District, the next year because in the meanwhile

the District Magistrate has been transferred. The fundamental rights guaranteed to the citizens under Article 19 cannot be restricted in such an

unreasonable manner. One can accept that a prohibitory order u/s 3 may be passed as an emergent measure, but there is no reasonable

justification for making this order final.

Where the restriction imposed by means of a prohibitory order passed as a measure of emergency is amenable to objective determination by a

Court of Law or some other body, but no such provision is made in the procedural part of the impugned law, it cannot be held to be a reasonable

restriction. The final order cannot be left to the mere subjective determination of an executive officer whose decision is not open to review or

reconsideration.

22. Similarly in Madanlal Kapur Vs. The State of Rajasthan, the learned Judges held that the Rajasthan Dramatic Performances and

Entertainments Ordinance (29 of 1949) contravened the provisions of Article 19 of the Constitution. The provisions of that ordinance were almost

similar to the provisions of the Dramatic Performances Act, 1876. Clauses (a) & (c) of Section 3 of that Ordinance and the Dramatic

Performances Act are word for word the same. The learned Judges observed:-

The conclusion is that so long as no procedure is prescribed by Rules u/s 11 of the Ordinance regarding issue of notice, an opportunity of making a

representation to an authority or a tribunal to consider it, the provisions of Sections 3, 4, 6 & 8 of the Ordinance cannot be regarded as

enforceable, because they do not come within the limits or reasonableness of Clause (6) of Article 19 of the Constitution.

Sections 3, 4, 6 & 8 of the Ordinance therefore, without the provision of such procedure, become inconsistent with Article 19 of the Constitution.

Section 3 of the Ordinance as it now stands, imposes an unreasonable restriction on the right of a citizen guaranteed by Article 19(g) of the

Constitution, not because it suffers with any unreasonableness relating to its substantive provisions, but because no reasonable procedure has yet

been made by the Government under its Rule-making powers.

23. We agree with the rule of law laid down in the above mentioned decisions. In our opinion the Dramatic Performances Act is ultra vires of the

Constitution of India, because its procedural part imposes such restrictions on the right of freedom of speech and expression which cannot be

covered by the saving clause in Article 19(2).

Therefore, the learned Senior Counsel submitted that the present Act having similar procedures also suffers from the same vires as found in the

Central Act. Therefore, the provisions of the Act should be struck down.

19. The learned Advocate General referred to certain passages from the written submissions made by the Respondent-State and contended that

the Petitioner cannot be said to be an aggrieved person. He cannot theoretically challenge the provisions of the Act without there being any injury

to him.

20. The Petitioner is certainly a person affected by the provisions of the Act as he had spelt out the sufferings undergone at the hands of the official

Respondents over the years. If the provisions of law is not Constitutional, then the person affected need not show any further prejudice as held by

the Supreme Court in Namit Sharma Vs. Union of India (UOI), , and in paragraph 12, the Supreme Court had observed as follows:

12. Since great emphasis has been placed on the violation of fundamental rights, we may notice that no prejudice needs to be proved in cases

where breach of fundamental rights is claimed. Violation of a fundamental right itself renders the impugned action void. A.R. Antulay Vs. R.S.

Nayak and Another, .

Hence, the objection raised regarding the locus standi of the Petitioner is rejected.

21. It must be noted that the Supreme Court vide judgment in N.K. Bajpai Vs. Union of India (UOI) and Another, , held that the right to freedom

of speech and expression is the most valuable right and if any exercise of legislative power in that respect by the State can be subject to judicial

review. In paragraphs, 11, 12, 16, 17 & 20, the Supreme Court had observed as follows:

11. Part III of the Constitution is the soul of the Constitution. It is not only a charter of the rights that are available to the Indian citizens, but is even

completely in consonance with the basic norms of human rights, recognised and accepted all over the world. The fundamental rights are basic

rights, but they are neither uncontrolled nor without restrictions. In fact, the Framers of the Indian Constitution themselves spelt out the nature of

restriction on such rights. Exceptions apart, normally the restriction or power to regulate the manner of exercise of a right would not frustrate the

right.

12. Take, for example, the most valuable right even from amongst the fundamental rights i.e. the right to freedom of speech and expression. This

right is conferred by Article 19(1)(a) but in turn, the Constitution itself requires its regulation in the interest of ''public order'' under Article 19(2).

The State could impose reasonable restrictions on the exercise of the rights conferred, in the interest of the sovereignty and integrity of India, the

security of the State, friendly relations with foreign States, public order, decency or morality or in relation to Contempt of Court, defamation or

incitement to an offence. Such restrictions are within the scope of Constitutionally permissible restrictions. The exercise of legislative power in this

respect by the State can be subjected to judicial review, of course, within a limited ambit. Firstly, the challenger must show that the restriction

imposed, at least prima facie, is violative of the fundamental right. It is then that the burden lies upon the State to show that the restriction applied is

by due process of law and is reasonable. If the restriction is not able to satisfy these tests or either of them, it will vitiate the law so enacted and the

action taken in furtherance thereof is unconstitutional. It is difficult to anticipate the right to any freedom or liberty without any reasonable

restriction. Besides this, the State has to function openly and in public interest. The width of the expression ''public interest'' cannot be restricted to

a particular concept. It may relate to a variety of matters including administration of justice.

16. No person can be divested of his fundamental rights. They are incapable of being taken away or abridged. All that the State can do, by

exercise of its legislative power, is to regulate these rights by imposition of reasonable restrictions on them. Upon an analysis of the law, the

following tests emerge:

(a) The restriction can be imposed only by or under the authority of law. It cannot be imposed by exercise of executive power without any law to

back it up.

(b) Each restriction must be reasonable.

(c) A restriction must be related to the purpose mentioned in Article 19(2).

17. The questions before us, thus, are whether the restriction imposed was reasonable and whether the purported purpose of the same squarely fell

within the relevant clauses discussed above. The legislative determination of what restriction to impose on a freedom is final and conclusive, as it is

not open to judicial review. The judgments of this Court have been consistent in taking the view that it is difficult to define or explain the word

''reasonable'' with any precision. It will always be dependent on the facts of a given case with reference to the law which has been enacted to

create a restriction on the right. It is neither possible nor advisable to state any abstract standard or general pattern of reasonableness as applicable

uniformly to all cases.

20. As difficult as it is to anticipate the right to any freedom or liberty without any reasonable restriction, equally difficult is it to imagine the

existence of a right not coupled with a duty. The duty may be a direct or indirect consequence of a fair assertion of the right. Although Part III of

the Constitution of India confers rights, still the duties and restrictions are inherent thereunder. These rights are basic in nature and are recognised

and guaranteed as natural rights, inherent in the status of a citizen of a free country, but are not absolute in nature and uncontrolled in operation.

Each one of these rights is to be controlled, curtailed and regulated, to a certain extent, by laws made by Parliament or the State Legislature. In

spite of there being a general presumption in favour of the Constitutionality of a legislation under challenge in case of allegations of violation of the

right to freedom guaranteed by clause (1) of Article 19 of the Constitution, on a prima facie case of such violation being made out, the onus shifts

upon the State to show that the legislation comes within the permissible restrictions set out in clauses (2) to (6) of Article 19 and that the particular

restriction is reasonable. It is for the State to place appropriate material justifying the restriction and its reasonability on record.

Hence, this Court has power to judicially review any statute regarding its Constitutionality.

22. The learned Advocate General further submitted that the Act has given well defined legislative guidelines in defining what is objectionable

performance u/s 2(1) and restrictions set out in Section 2(1) is referable to Article 19(2) of the Constitution, wherein reasonable restrictions can be

imposed with reference to protect the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order,

decency or morality or in relation to contempt of Court, defamation or incitement to an offence. Section 2(1) comes within the parameters of

Article 19(2) of the Constitution and that can be protected by operation of any law.

23. He referred to a judgment of the Supreme Court in Ramji Lal Modi Vs. The State of U.P., . Reliance was placed upon paragraph 9, wherein it

was observed as follows:

9. ... In the first place clause (2) of Article 19 protects a law imposing reasonable restrictions on the exercise of the right to freedom of speech and

expression "in the interests of public order", which is much wider than "for maintenance of public order. If, therefore, certain activities have a

tendency to cause public disorder, a law penalising such activities as an offence cannot but be held to be a law imposing reasonable restriction "in

the interests of public order'' although in some cases those activities may not actually lead to a breach of public order. ï¿½.

24. Similarly, he referred to a judgment of the Supreme Court in The Superintendent, Central Prison, Fatehgarh Vs. Dr. Ram Manohar Lohia, .

Reliance was placed upon paragraph 21, wherein it was observed as follows:

21. ...in the interests of public order, the State could legitimately re-draft it in a way that it would conform to the provisions of Article 19(2) of the

Constitution. It is not this Court''s province to express or give advice or make general observations on situations that are not presented to it in a

particular case. It is always open to the State to make such reasonable restrictions which are permissible under Article 19(2) of the Constitution.

25. The learned Advocate General further cited the judgment of the Supreme Court in Santokh Singh Vs. Delhi Administration, and referred to

paragraph 10, wherein it was observed as follows:

10. We of course agree with Shri Agarwal that the fundamental right guaranteed by Article 19(1)(a) and the interest of public protected by Article

19(2) must be properly adjusted and reasonable balance struck between the two. There can be no dispute that there is no such thing as absolute

or unrestricted freedom of speech and expression wholly free from restraint for that would amount to uncontrolled licence which would tend to

lead to disorder and anarchy. The right to freedom of speech and expression is undoubtedly a valuable and cherished right possessed by a citizen

in our Republic. Our governmental set-up being elected, limited and responsible we need requisite freedom of animadversion, for our social interest

ordinarily demands free propagation of views. Freedom to think as one likes, and to speak as one thinks are, as a Rule, indispensable to the

discovery and spread of truth and without free speech discussion may well be futile. But at the same time we can only ignore at our peril the vital

importance of our social interest in, inter alia, public order and security of our State. It is for this reason that our Constitution has rightly attempted

to strike a proper balance between the various competing social interests. It has permitted imposition of reasonable restrictions on the citizen''s

rights of freedom of speech and expression in the interest of, inter alia, public order, security of State, decency or morality and impartial justice, to

serve the larger collective interest of the nation as a whole. Reasonable restrictions in respect of matters specified in Article 19(2) are essential for

integrated development on egalitarian, progressive lines of any peace-loving, civilised society. Article 19(2) thus saves the Constitutional validity of

Section 9 of the Act. The analogy between Section 124A, I.P.C. and Section 9 of the Act is wholly misconceived and in view of the

comprehensive sweep of Article 19(2) we are unable to restrict Section 9 of the Act only to those speeches and expressions which incite or tend

to incite violence.

26. He further referred to a judgment of the Supreme Court in The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, for contending that the

burden of proof in challenging the statutory provisions as violative of Article 14 is for the party who challenges the validity of the provisions and

they must establish before the Court that the Act was discriminatory in character. He contended that in this case the Petitioner has not discharged

the obligation in proving as to how the Act was ultra vires.

27. He also referred to a judgment of the Supreme Court in Union of India and Others Vs. The Motion Picture Association and Others etc. etc.,

and placed reliance on the following passage found in paragraph 13, which reads as follows:

13. Undoubtedly, free speech is the foundation of a democratic society. A free exchange of ideas, dissemination of information without restraints,

dissemination of knowledge, airing of differing viewpoints, debating and forming one''s own views and expressing them, are the basic indicia of a

free society. This freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their

social, economic and political rights in a free society in an informed manner. Restraints on this right, therefore, have been jealously watched by the

courts. Article 19(2) spells out the various grounds on which this right to free speech and expression can be restrained. Thus, in Express

Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others, this Court stressed that: (SCC p. 195, para 75)

[F]reedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic

form of government which proceeds on the theory that the problems of the Government can be solved by the free exchange of thought and by

public discussion of the various issues facing the nation.... This right is one of the pillars of individual liberty - freedom of speech, which our

Constitution has always unfailingly guarded.... however precious and cherished the freedom of speech is under Article 19(1)(a), this freedom is not

absolute and unlimited at all times and under all circumstances but is subject to the restrictions contained in Article 19(2).

28. He also referred to a judgment of the Supreme Court in Directorate of Film Festivals and Others Vs. Gaurav Ashwin Jain and Others, and

placed reliance on the following passage found in paragraph 15, which reads as follows:

15. The right of a film-maker to make and exhibit his film, is a part of his fundamental right of freedom of speech and expression under Article

19(1)(a) of the Constitution. A film is a medium for expressing and communicating ideas, thoughts, messages, information, feelings and emotions. It

may be intended either for public exhibition (commercial or non-commercial) or purely for private use. The requirement under Sections 4 & 5-A of

the Act relating to certification by the Board, where the film is intended for public exhibition, by applying the guidance principles set out in Section

5-B, is a reasonable restriction on the exercise of the said right of speech and expression contemplated under Article 19(2), and therefore,

constitutional vide K.A. Abbas Vs. The Union of India (UOI) and Another, ; S. Rangarajan Vs. P. Jagjevan Ram and Others, and Life Insurance

Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation, But the question here is not whether

the requirement that films can be released for public exhibition, only if they possess a certificate issued by the Central Board of Film Certification, is

a reasonable restriction. The question is whether the Government can impose a condition that the entry of films for the Awards will be restricted to

only those which possess a certificate issued by the Board u/s 5-A of the Act. Whether the Government should encourage the production of films

with aesthetic and technical excellence and social relevance, whether such encouragement should be by giving awards periodically or annually, and

if it decides to give such awards, whether the field of competition should be restricted only to films which have been certified by the Board, are all

matters of policy of the Government.

29. He lastly referred to a judgment of the Supreme Court in State of M.P. Vs. Rakesh Kohli and Another, for contending that unless the Court is

able to hold beyond any iota of doubt that violations of Constitutional provisions are so glaring that the legislative provision under challenge cannot

stand and without violation of the Constitutional provisions, the law made by the State legislature cannot be declared bad. Therefore, he submitted

that the impugned Act is intra vires of the Constitution and that the restrictions imposed are coming within the four corners of Article 19(2) of the

Constitution.

30. He also got written instructions from the State Government which was circulated in the form of a letter addressed to him by the Additional

Secretary to Government, Home (Cinema) Department, dated 16.7.2012, stating that the State Government is agreeable to provide a provision in

the rules making it mandatory for referring the submission of play to the Tamil Nadu Iyal Isai Nataka Mandram for better appreciation of the

artistic nuances by the Collector/Commissioner before taking a final decision. The operative portion of the statement reads as follows:

In view of the provisions contained in the said Act, the challenge to the Act is to be opposed. At the same time, the State Government agrees to

provide a clause in the Rules, making it mandatory for a reference to the Eyal Esai Nataka Mandram for better appreciation of the artistic nuances

by the Collector/Commissioner, before taking the final decision. In addition, a nodal officer in the offices of the Commissioner of Police and the

District Collector shall be nominated under the Rules to interact with organizers of plays to ensure timely clearance and prompt handling of the

procedures as per the law.

(Emphasis added)

31. The learned Advocate General stated that this will cure the alleged deficit regarding the Commissioner and the District Collector being not

familiar with the artistic nuances of the theatre. He further submitted that assuming that if an erroneous order was passed by the authority

concerned, the Act also provides for an Appeal to the High Court, which will cure the defect. Hence, he prayed for dismissal of the Writ Petition.

32. Taking the last argument of the learned Advocate General, i.e., even if any erroneous order is passed either by the delegated officers u/s 4 or

by the State Government u/s 3, an Appeal lies to the High Court before a Division Bench and therefore, necessary safeguard has been taken into

account in the enactment, the Court is of the opinion that the said argument cannot be legally acceptable. Uncanalised and absolute discretion

cannot be vested with the officer. Mere providing for an Appeal will not cure the defect of excessive delegation given to the officer. The method by

which the officer will exercise his discretion is not set out and the officers themselves do not have necessary expertise in dealing with the issue on

hand. The impugned Act do not oblige the authority concerned either to give opportunity before prohibiting a play or make him to write a speaking

order.

33. Further what is meant by the reasonable opportunity came to be considered in a judgment of the Supreme Court in K.I. Shephard and Others

Vs. Union of India (UOI) and Others, it was observed as follows:

12. Mullan in Fairness: The New Natural Justice has stated:

Natural justice co-exists with, or reflected, a wider principle of fairness in decision-making and that all judicial and administrative decision-making

and that all judicial and administrative decision-makers had a duty to act fairly.

In the case of State of Orissa Vs. Dr. (Miss) Binapani Dei and Others, , this Court observed:

It is true that the order is administrative in character, but even an administrative order which involves Civil consequences as already stated, must be

made consistently with the Rules of Natural Justice after informing the First Respondent of the case of the State, the evidence in support thereof

and after giving an opportunity to the First Respondent of being heard and meeting or explaining the evidence. No such steps were admittedly

taken: the High Court was, in our judgment, right in setting aside the order of the State.

In A.K. Kraipak and Others Vs. Union of India (UOI) and Others, a Constitution Bench quoted with approval the observations of Lord Parker in

Re: (H) K (an infant), 1967 (1) All ER 226 (QBD). Hegde, J. speaking for the Court stated: (SCC p. 272, para 20)

Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or

unreasonably. But in the course of years many more subsidiary Rules came to be added to the Rules of Natural Justice. Till very recently it was the

opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for

the application of the Rules of Natural Justice. The validity of that limitation is now questioned. If the purpose of the Rules of Natural Justice is to

prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Oftentimes it is not easy to

draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are

now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative

enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi-judicial enquiry.

These observations in A.K. Kraipak case, were followed by another Constitution Bench of this Court in Chandra Bhavan Boarding and Lodging,

Bangalore Vs. The State of Mysore and Another, . In Swadeshi Cotton Mills Vs. Union of India (UOI), , a Three-Judge Bench of this Court

examined this aspect of Natural Justice. Sarkaria, J. who spoke for the Court, stated: (SCC pp. 683-84, para 28)

During the last two decades, the Concept of Natural Justice has made great strides in the realm of administrative law. Before the epoch-making

decision of the House of Lords in Ridge v. Baldwin, 1964 AC 40: 1963 (2) All ER 66 (HL), it was generally thought that the rules of Natural

Justice apply only to judicial or quasi-judicial proceedings; and for the purpose, whenever a breach of the Rule of Natural Justice was alleged,

Courts in England used to ascertain whether the impugned action was taken by the Statutory Authority or tribunal in the exercise of its

administrative or quasi-judicial power. In India also, this was the position before the decision dated February 7, 1967, of this Court in Dr Binapani

Dei case; wherein it was held that even an administrative order or decision in matters involving Civil consequences, has to be made consistently

with the Rules of Natural Justice. This supposed distinction between quasi-judicial and administrative decisions, which was perceptibly mitigated in

Binapani Dei case, was further rubbed out to a vanishing point in A.K. Kraipak v. Union of India,...

On the basis of these authorities it must be held that even when a State agency acts administratively, Rules of Natural Justice would apply. As

stated, natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be

given adequate notice of what is proposed so that they may be in a position (a) to make representations on their own behalf; (b) or to appear at a

hearing or enquiry (if one is held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet.

15. Fair play is a part of the public policy and is a guarantee for justice to citizens. In our system of Rule of Law every social agency conferred with

power is required to act fairly so that social action would be just and there would be furtherance of the well-being of citizens. The Rules of Natural

Justice have developed with the growth of civilisation and the content thereof is often considered as a proper measure of the level of civilisation and

Rule of Law prevailing in the community. Man within the social frame has struggled for centuries to bring into the community the concept of fairness

and it has taken scores of years for the Rules of Natural Justice to conceptually enter into the field of social activities. We do not think in the facts

of the case there is any justification to hold that rules of natural justice have been ousted by necessary implication on account of the time frame...

34. A similar view was projected by the Supreme Court after approving K.I. Shephard and Others Vs. Union of India (UOI) and Others, , in H.L.

Trehan and Others Vs. Union of India (UOI) and Others, and in paragraphs 12 &13, it was observed as follows:

12. It is, however, contended on behalf of CORIL that after the impugned circular was issued, an opportunity of hearing was given to the

employees with regard to the alterations made in the conditions of their service by the impugned circular. In our opinion, the post-decisional

opportunity of hearing does not subserve the Rules of Natural Justice. The authority who embarks upon a post-decisional hearing will naturally

proceed with a closed mind and there is hardly any chance of getting a proper consideration of the representation at such a post-decisional

opportunity. In this connection, we may refer to a recent decision of this Court in K.I. Shephard and Others Vs. Union of India (UOI) and Others,

.

13. The view that has been taken by this Court in the above observation is that once a decision has been taken, there is a tendency to uphold it and

a representation may not yield any fruitful purpose. Thus, even if any hearing was given to the employees of CORIL after the issuance of the

impugned Circular, that would not be any compliance with the Rules of Natural Justice or avoid the mischief of arbitrariness as contemplated by

Article 14 of the Constitution. The High Court, in our opinion, was perfectly justified in quashing the impugned circular.

(Emphasis added)

35. In essence, a defective order cannot be cured in an effective Appeal. Further, in this situation when a play is sought to be enacted in a public

place, time is the essence. It cannot be left to the party for ever to wait for an approval by the authorities as the Act itself does not give any time

limit and thereafter to file an Appeal to the High Court against such a defective order. By that time, the very attempt to enact the creative work

before the public is lost. Hence, it has to be seen, de hors the Appeal provision, whether the discretion given to a proper authority and whether the

authorities are competent to decide the question as to which portion of the play constitutes objectionable performance. Though the learned

Advocate General stated on instructions that the matter will be mandatorily referred to the opinion of the Tamil Nadu Iyal Isai Nataka Mandram by

amending the Rules, the same does not merit any legal acceptance. The Act do not contemplate any such requirement for the officer to refer to an

outside agency for any opinion. Even if such opinion was tendered by an outside authority, as long as the Act do not make such opinion binding on

the authority, the said opinion remains as an advisory. By making an amendment to the Rule, the defect found in the Act cannot be cured. Hence

this Court is not persuaded with the alternate stand taken by the Respondents.

36. Further, it will not be out of place to note that the functions of the society, i.e., Tamil Nadu Iyal Isai Nataka Mandram is not clearly spelt out. It

is only a society, for which office bearers are nominated by the party in power. Such nominees made by that Government are not expected to act

independently and mostly will toe the line of the party in power.

37. In this context it will not be out of place to refer to a judgment of the Supreme Court where the power given to the Commissioner of Police for

the grant of licence came to be considered and similar situation was repealed by the Supreme Court vide its judgment in Kishan Chand Arora Vs.

Commissioner of Police, Calcutta, and in paragraph 20, it was observed as follows:

20. ... The first part of the section confers a free and unqualified discretion on the Commissioner to grant a licence. A discretionary power to issue

a licence necessarily implies a power to refuse to issue a licence. The word ''may'' is an enabling one and in its ordinary sense means ''permissible''.

When coupled with the words ''at his discretion'' it emphasises the clear intention of the legislature to confer on the Commissioner an unrestrained

freedom to act according to his own judgment and conscience. If the section stops there, it is common case that the power of the Commissioner is

uncontrolled and uncanalised. ï¿½.

38. In the very same judgment, the Supreme Court was also not satisfied with the stand taken by the State that the power was given to an higher

officer in the Police Department. Such an argument was rejected by the Court and in paragraphs 20 & 22, it was observed as follows:

20. ...Firstly, it is to rewrite the section. If the legislature intended to guide the discretion by laying down objective criteria it would have stated so in

express terms; it would not have left the matter to the absolute discretion of the Commissioner. ...

22. ... The suggestion that the authority is a high officer in the police department and that he can be relied upon to exercise his discretion properly

does not appeal to us for two reasons, namely, (1) as we have already pointed out, the Constitution gives a guarantee for the fundamental right

against the State and other authorities; and (2) the status of an officer is not an absolute guarantee that the power will never be abused.

Fundamental rights cannot be made to depend solely upon such presumed fairness and integrity of officers of State, though it may be a minor

element in considering the question of the reasonableness of a restriction. Therefore, it is clear to our mind that the exercise of the power also

suffers from a statutory defect as it is not channelled through an appropriate machinery. ...

39. Further, in this context, it is necessary to refer to the experience in the State of Maharashtra, where censorship of plays was done under the

provisions of Bombay Police Act, 1951. In exercise of power u/s 33 of the said Act, the Maharashtra Government had framed Rules for Licensing

and Controlling places of Public Amusement (other than cinemas) and Performances for Public Amusement including Melas and Tamashas, 1960.

When a famous play by Vijay Tendulkar, known as ""Sakharam Binder"" was prohibited by taking the order from the Stage Performance Scrutiny

Board, the same was challenged before the Bombay High Court in M.P. No. 595 of 1972 in PS. Dhurat v. C.P. Godse and others. Justice Kania

(as he then was) by his judgment dated 1.12.1972 held that the Act and Rules were ultra vires. It was also found that the authority, who was

bound to give the certificate, was not obliged to pass a speaking order and also it did not contemplate the hearing of affected party and no time

limit was fixed for the grant of the certificate. It also did not give the authority a direction which will tend to preserve the art and promote it. Similar

defects are found in the impugned Act also.

40. It was argued by the learned Advocate General that the authorities are guided by the provisions relating to the definition of ""objectionable

performance"" u/s 2(1) of the impugned Act. It is not as if all the sub-clauses in the said definition conform to the reasonable restrictions found under

Article 19(2) of the Constitution. For example, Section 2(1)(vi) not only states that objectionable performance includes grossly indecent or

scurrilous or obscene or intended for blackmail. While each one of the terms mentioned therein is highly subjective, in respect of the term

scurrilous"", it is susceptible of giving misleading result. The word ""scurrilous"" has been defined in the Chambers'' Encyclopedic English Dictionary

and it is as follows:

scurrilous: adj. insulting or abusive, and unjustly damaging to the reputation: scurrilous remarks, [from Latin scurrilis, from scurra, buffoon]

41. It is not clear as to how such a term can be brought in as reasonable restriction under Article 19 when the term is likely to give very subjective

result by the officer concerned. It cannot be said that it is also protected by Article 19(2) of the Constitution. On the other hand, if by any

scurrilous remarks any person is affected, the remedy open to the person is to proceed against the organiser of such play and that neither the

Police nor the District Collector can act as pre-censor in prohibiting a play on the ground that it was scurrilous. Certainly it does not meet the

reasonable restrictions in terms of Article 19(2) of the Constitution.

42. As rightly contended by the learned Senior Counsel for the Petitioner, the Cinematograph Act has got censor Board consisting of persons with

high caliber and expertise, who are likely to design the grant of censorship certificate and such censorship certificate if granted is valid for 10 years.

But in the present case, each time when a play is enacted, it requires permission of the Commissioner of Police in the city of Chennai and the

District Collector in other districts. This will result in different orders being passed by different District Collectors and the Commissioner of Police

and therefore, there is no uniform yardstick followed. Therefore, such a power cannot be granted to bureaucrats.

43. The Supreme Court in Raj Kapoor Vs. Laxman, had observed as follows:

7. ... Maybe, art cannot be imprisoned by the bureaucrat and aesthetics can be robbed of the glory and grace and free expression of the human

spirit if Governmental palate is to prescribe the permit for exhibition of artistic production in any department, more so in cinema pictures. So it is

that a special legislation viz. the Act of 1952, sets-up a Board of Censors of high calibre and expertise, provides hearings, Appeals and ultimate

judicial review, pre-censorship and conditional exhibitions and wealth of other policing strategies. In short, a special machinery and processual

justice and a host of wholesome restrictions to protect State and society are woven into the fabric of the Act. ....

11. Going to the basics, freedom of expression is fundamental. The censor is not the moral tailor setting his own fashions but a statutory gendarme

policing films under Article 19(2) from the angle of public order, decency or morality. These concepts are themselves dynamic and cannot be

whittled down to stifle expression nor licentiously enlarged to promote a riot of sensual display.

44. Once it is found that the provisions of the Act are arbitrary and excessive power has been given to the delegates, certainly it has to be held that

it is unconstitutional and violative of Articles 14 & 19 of the Constitution. In such circumstances, the parameters of judicial review came to be

considered by the Supreme Court in Peerless General Finance and Investment Co. Limited and Another Vs. Reserve Bank of India, it was

observed as follows:

49. Once it is established that the statute is prima facie unconstitutional, the State has to establish that the restrictions imposed are reasonable and

the objective test which the Court is to employ is whether the restriction bears reasonable relation to the authorised purpose or is an arbitrary

encroachment under the garb of any of the exceptions envisaged in Part III. The reasonableness is to the necessity to impose restriction; the means

adopted to secure that end as well as the procedure to be adopted to that end.

50. The Court has to maintain delicate balance between the public interest envisaged in the impugned provision and the individual''s right; taking

into account, the nature of his right said to be infringed; the underlying purpose of the impugned restriction; the extent and urgency of the evil sought

to be remedied thereby; the disproportion of the restriction imposed, the prevailing conditions at the time, the surrounding circumstances; the larger

public interest which the law seeks to achieve and all other relevant factors germane for the purpose. All these factors should enter into the zone of

consideration to find the reasonableness of the impugned restriction. The Court weighs in each case which of the two conflicting public or private

interest demands greater protection and if it finds that the restriction imposed is appropriate, fair and reasonable, it would uphold the restriction.

The Court would not uphold a restriction which is not germane to achieve the purpose of the statute or is arbitrary or out of its limits.

45. In the light of the above, this Court is of the opinion that the definition u/s 2(1) defining ""objectionable performance"" is too vague to be brought

within the restriction of Article 19(2) of the Constitution. The power conferred on the State Government u/s 3 as well as to the Police

Commissioner/District Collectors u/s 4 is too wide and highly discretionary. Therefore, it cannot be held to be Constitutionally valid and hence, it is

violative of Article 14 of the Constitution.

46. Similar procedure contemplated under the Dramatic Performance Act, 1876 was frowned upon by the Division Bench of Allahabad High

Court in The The State Vs. Baboo Lal and Others, This Court is fully in agreement with the observations made therein. The mischief found by the

Allahabad High Court also finds a place in the present impugned Act. When discretion is given without any guidelines to officers and that too with

arbitrary procedures, merely providing for an Appeal to the High Court is not a consolation. As already noted, the defective procedures and

reasons adopted by the authorities in the order cannot be cured by an effective Appeal. In essence, at all stages, there must be fairness. Therefore,

providing for an Appeal will not cure the unconstitutional provisions of the said Act. Further the undertaking by the State that a reference will be

made to the opinion of the Tamil Nadu Iyal Isai Nataka Mandram is not acceptable as it does not cure the defect found in the impugned Act. A

mere amendment to the Rule will not save the validity of the Act. Further, the nature and composition of the very society itself is not clear.

Therefore, in the absence of statutory backing, no such mechanism can be introduced by the State nor be suggested to the Court to save the

validity of the Act. In the result, the Writ Petition will have to succeed.

Epilogue:

47. It will not be out of place to refer that though Tamil language comprises of Prose, poetry and drama, insofar as the stage play is concerned,

Tamil Nadu is certainly lagging behind the States like Karnataka, Maharashtra and West Bengal. Very recently, the Hon''ble Chief Minister while

inaugurating the 86th Music Festival at the Music Academy had expressed the hope that Chennai should become the centre for ''Global Art

Festival'' and that she will try to help out in making the festival a reality. Though such a promise is laudable, such Global Art Festivals can be a

reality when there is full guarantee for freedom of expression for artists. If the Tamil stage movement has to advance, the impugned enactment

cannot stand as an obstacle. In the light of the above, the Writ Petition will stand allowed. It is hereby declared that Sections 2(1), 3, 4, 6 & 7 of

the Tamil Nadu Dramatic Performance Act, 1954 and Rule 4 of the Tamil Nadu Dramatic Performances Rules, 1955 are ultra vires and violative

of Articles 14 & 19 of the Constitution. However, the parties shall bear their own costs. Consequently connected Miscellaneous Petition stands

closed.