

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 04.01.2022

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THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WP (MD)No.22667 of 2021

Payel Biswas

... Petitioner

Vs.

1. The Commissioner of Police,
Trichy City.

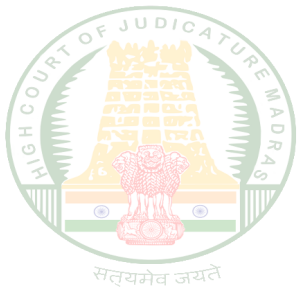
2. The Inspector of Police (L & O),
Thillai Nagar police station,
Trichy City –600 017.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Mandamus to direct the second respondent to issue a No Objection Certificate to the petitioner to run a "SPA" i.e., cross massage in the name and style of "QUEEN AYURVEDIC CROSS SPA CENTRE" at No.A.A.18, King Square, Anna Nagar, Thillai Nagar Main Road, Tennur, Trichy District – 17 by passing orders on the petitioner's representation dated 17.11.2021.

For Petitioner : Mr.N.Edwin Jeyakumar,
for Mr.S.Leonard Vasanth.

For Respondents : Mr.M.Sakthi Kumar,
Government Advocate.

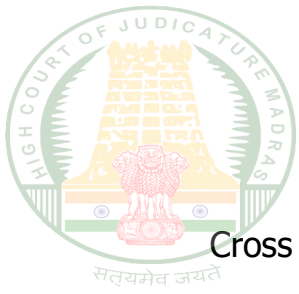


ORDER

WEB COPY After a tiring day trekking in the forest, Lord Rama chose a resting place. He dropped his bow and arrows on the ground. When he woke up the next morning, he found that one of his arrows had fatally pierced a frog. The frog was about to breathe its last. The anguished Rama asked the frog as to why it did not raise an alarm. The innocent frog replied, "when others hurt me, I call your name "Rama Rama"-but when you are the source of trouble-who else can I call?" .

2.Any constitutional democracy (the prefix 'constitutional' is significant. An authoritarian political arrangement can claim to be people's democracy) rests on three pillars. When the individual liberty is threatened by legislative or executive action, one turns to judiciary for relief and remedy. In ***State of Madras v. V.G.Row (AIR 1952 SC 196)***, Justice M.Patanjali Sastri, C.J. remarked that the Supreme Court had been assigned the role of a sentinel on the qui vive as regards the fundamental rights. I venture to think that this applies with equal force to every court and not just the constitutional courts.

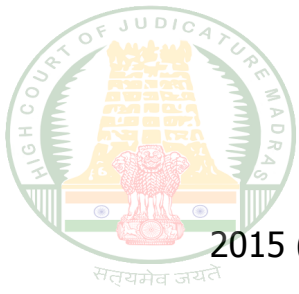
3.Why such reflections and prefatory remarks? The petitioner herein is running a Spa in the name and style of "Queen Ayurvedic



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Cross Spa Centre” at Trichy. Originally, there was no law regulating the said business and no license was required from any governmental authority. Since vide Gazette Notification No.252 dated 16.07.2018, obtaining of license has been made mandatory, the petitioner applied for such license. Since no action was taken on his request, he filed this writ petition for directing the police authority to issue “no objection certificate”. He also wanted this Court to restrain the police from interfering with the running of the Spa. The petitioner's counsel relied on an earlier order dated 12.08.2021 made in WP No.16811 of 2021. A learned Judge of this Court had directed the authorities concerned to issue “no objection certificate”, if the applicant satisfied all the requirements. In the event of granting such NOC, the respondents were restrained from interfering with the activities of the Spa so long as it is run in accordance with law. I was informed that a number of such orders have been passed. In line with the same, I disposed of the writ petition on 21.12.2021.

4.While so, the learned Government counsel made a mention that another learned Judge of this Court (His Lordship The Hon'ble Mr.Justice S.M.Subramaniam), while dealing with a similar writ petition, had issued the following directions vide order dated 20.12.2021 in WP No.37089 of



2015 (C.P.Girija vs. The Superintendent of Police, Villupuram District and

WEB COPY two others) :

"1)The respondents are directed to issue appropriate orders to all the Spa and Massage centers, Therapy centers etc., across the State of Tamil Nadu to install CCTV cameras which must be functional in all circumstances.

2)Appropriate directions are to be issued to ensure that these Spa, Massage centers, Therapy centers etc., are conducting their business activities in a transparent manner and avoid secluded or closed rooms paving way for illegal activities.

3)In the event of any reasonable suspicion, information or complaint, the Police authorities are directed to initiate all appropriate actions in the manner known to law."

The learned Government counsel felt that it was his bounden duty to bring it to my notice about the passing of such an order a day prior to the disposal of the present writ petition.

5.I wondered if I should recall the order earlier passed and refer the matter to My Lord the Hon'ble Chief Justice. The Hon'ble Supreme Court in ***S.Kasi vs. State (AIR 2020 SC 2921)*** had held that a coordinate Bench cannot take a contrary view and that it can only refer



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the matter for consideration by a Larger Bench. But where the law has already been laid down by the Hon'ble Supreme Court, in view of Article 141 of the Constitution of India, one is obliged to follow the same.

6. In my humblest opinion, and I say this with the greatest of respect to my revered brother Judge, the judgment in ***C.P. Girija v. The Superintendent of Police and Others*** appears to run counter to the law laid down by the 9-judge bench judgment of the Hon'ble Supreme Court in ***K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1***. Article 21 of the Constitution guarantees to all persons the fundamental right to privacy. Through a unanimous verdict, the Hon'ble Supreme Court declared in ringing terms that the right to life and personal liberty guaranteed in Article 21 also includes implicitly within it a right to privacy. This right to privacy is seen as both possessing inherent value in that it is important for every person's basic dignity, and also instrumental value in that it furthers a person's ability to live life free of interference. The Court held that privacy as guaranteed in Article 21 takes several different forms-it includes a right to bodily autonomy, a right to informational privacy and a right to a privacy of choice. The installation of CCTV equipment inside premises such as a spa would unquestionably infract upon a person's bodily autonomy.



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These are inviolable spaces where the prying eye of the state simply cannot be allowed to enter.

7.The following observations from the judgment in *Puttaswamy* are apposite:

"While the legitimate expectation of privacy may vary from intimate zone to the private zone and from the private to the public arena, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place." (Chandrachud, J, at para 3(f) of his conclusion)

"The entitlement to such a condition is not confined only to intimate spaces such as the bedroom or the washroom but goes with a person wherever he is, even in a public place." (J. Bobde at para 22)

The judgment in CP Girija directs the installation of CCTV cameras not in public spaces but in what are intimate, private spaces. It is clear from



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the Hon'ble Supreme Court's judgment that any invasion of life or personal liberty must meet the three-fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them. In the first place, unless a legislature mandates by law that CCTV cameras ought to be installed in a certain space, to do so would violate Article 21. In this case, the notification issued by the Government contemplates installation of CCTV cameras only at the entry and exit points. It consciously caveats that this would be without prejudice to the individual's privacy. Thus, the executive while enacting subordinate legislation has been conscious of the privacy concerns of the citizens.

8.No right including a fundamental right can be absolute. But the restrictions can be put in place only by the legislature or the executive. The sweep and the reach of the fundamental rights cannot be curtailed by any judicial measure. The Hon'ble Supreme Court alone can do so in exercise of its power under Article 142 of the Constitution. A decision to install a CCTV camera which has a bearing on a person's privacy requires the most careful of considerations—it requires the government to apply its mind prudently and determine what manner of regulations ought to be put in place for its proper use.



WEB COPY 9. The right to life and personal liberty enshrined in Article 21 of the Constitution of India includes the right to relax. This right can be exercised in a variety of forms. The Puttaswamy verdict posits that there are three essential features of privacy – repose, sanctuary and intimate decisions. “Repose” refers to freedom from unwarranted attention, “sanctuary” refers to the freedom of keeping things to oneself and “intimate decisions” refers to the freedom of autonomy to make personal life choices. The right of an individual to avail means of relaxation (in this case, via spa) falls within the ambit of the right of repose and sanctuary. Therefore, any intrusion into the right to relax shall necessarily have to satisfy the test of legality, legitimate aim and proportionality.

10. The Commissioner, Greater Chennai Corporation had issued Notification under Section 373 of the Chennai City Municipal Corporation Act, 1919 and the same was also published in Tamil Nadu Government Gazette No.9, dated 27.02.2019. It reads as follows :



NOTIFICATIONS BY HEADS OF DEPARTMENTS, ETC.

GREATER CHENNAI CORPORATION

REVENUE DEPARTMENT.

**Inclusion of Beauty Parlour, Spa and Massage Parlours in Schedule-VI for Trade Licence
(under Section 373 of the Chennai City Municipal Corporation Act, 1919)**

(R.D.C.No.TL/7630/2013)

No. SRO-C-2/2019.

As per Section-287 of the Chennai City Municipal Corporation Act, 1919, No place within the limits of the city shall be used for any of the purposes mentioned in Schedule VI without a licence obtained from the commissioner and except in accordance with the conditions specified therein. Since there was no provision to issue licence for Beauty Parlour, Spa and Massage Centres, licences were issued under the head of Hair cutting saloon for such trades.

The Hon'ble High Court in its order dated 11-09-2014 in W.P.No.24629 of 2014 and 22 other W.P's. has passed a common order to the Government to take appropriate steps for bringing in either a new legislation or a subordinate legislation in terms of the provisions of the Chennai City Municipal Corporation Act or the Chennai City Police Act, so that public order, decency and morality, which can form the basis for a regulatory law under Article 19 (2) of the constitution, are taken care of in respect to issuance of licence to the spa and massage parlours.

The Government in its Gazette Notification No.252, dated 16-07-2018 has amended the Schedule-VI of the Chennai City Municipal Corporation Act as follows:-

In Schedule VI to the 1919 Act, for the entry "Keeping a shaving or hair dressing saloon", the following entries shall be substituted, namely:-

"Hair Cutting Saloon & Beauty Parlour, without partition or room.

Beauty Parlour, Spa or Massage Parlour, with partition or room or sauna or bathing facilities

Provided that no licence shall be granted unless the applicant produces no objection certificates from the Health Department of the Corporation and from such police officer as may be specified by the Commissioner".

The Government in its G.O. No.15, M.A. & W.S (M.C-1). Department, dated 31-01-2019 has notified in *Tamil Nadu Government Gazette* No.38, dated:31-01-2019 that this act shall come into force with effect from 01-02-2019. Accordingly, the Greater Chennai Corporation Council in Resolution No.141/2019, date 25-02-2019 has resolved to include it in its licencing schedule and levy licence fee for the trade of Beauty parlour, spa and massage parlour.

The Commissioner of Police has specified the following rules to regularize the Spa and Massage Parlour.

Regulation of Massage / Spa Centres:

1. Separate license for conducting massage / spa shall be granted by the Corporation / District authority imposing conditions for the regulation of such massage / Spa establishments.
2. Police Verification shall be part of the condition before granting license.
3. Conditions for granting license may include.
 - (a) The external doors of the Massage / Spa establishment to be kept open during the working hours.
 - (b) Minimum lighting facilities are provided in each room or enclosure where the massage services to be provided.
 - (c) The Massage services are not to be provided behind locked door.



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Feb. 27, 2019]

TAMIL NADU GOVERNMENT GAZETTE

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4. Uniforms and identity Cards.

(a) The licensee should possess a degree offered by any of the recognized universities in.

(i) Physiotherapy (BPT) with 4 years duration and 6 months compulsory internship:

(ii) B.Sc., (Occupational Therapy).

(iii) M.Sc., (Occupational Therapy). or

(iv) Diploma in Physiotherapy with 3 years duration.

(b) The masseur / masseuse should possess a certificate in.

(v) Occupational therapy with one year duration offered by any of the recognized universities.

(vi) The masseur / masseuse should possess a certificate in.

(a) Acupressure therapy.

(b) Acupressure yoga science.

(c) Acupressure and Magneto therapy.

5. CCTV Cameras with recording facility at the entry and exit points without prejudice to the privacy of the clients and employees.

6. Prohibition of engaging in any form of sexual activity in the premises of the massage / spa establishment.

7. Maintenance of register for clients.

8. Minimum qualification may be fixed for the licensee and employees.

9. Authorising the police officers to inspect the license, registers of the Massage / Spa establishments during the course of taking action based on information about the commission of offences committed by the licensee / employees violating other laws in force.

10. Closure of premises by the licensing authority on the report of the police officer in case of violation of conditions / commission of offences relating to other laws in force, especially the Immoral Traffic (Prevention) Act, 1956.

11. Opening of massage parlour / spa must be in between 9.00 Hrs – 21.00 Hrs.

Application for licence to run a Beauty Parlour, Spa or Massage Parlour in the limits of Chennai City should be submitted only after obtaining and production of "No objection certificates" from the Commissioner of Greater Chennai Police and concerned Zonal Asst. Health Officer of Greater Chennai Corporation.

Henceforth, the trade Beauty parlour, spa and massage parlour is included in the licencing Schedule -VI, with the annual licence fee structure as for other trades i.e. (a) Rs.200/- Non a/c. Hair cutting saloon or beauty parlour, without partition or room and Rs.500/- for A/c. Hair cutting saloon or beauty parlour, without partition or room and (b) for Beauty Parlour, Spa or Massage Parlour, with partition or room or sauna or bathing facilities, at Rs.2500/- upto 500 Sq. feet, Rs.5000/- for 501 to 1000 Sq. feet and at Rs.7500/- for those above 1000 Sq. feet and the issue of trade licence will commence with effect from 01-04-2019. (other fee / charges wherever applicable).

The above notice issued under section 98 A (1) (2) of the Chennai City Municipal Corporation Act, 1919.

Chennai-600 003,
27th February 2019.

G. PRAKASH,
Commissioner.
Greater Chennai Corporation.

DTP—III-2 (9)—2

DTP—III-2 (9)—1



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It is not known as to whether other local bodies have passed similar notifications. C.P.Girija judgment refers to the aforesaid notification. In the said notification, while a hair cutting saloon and beauty parlour can be without partition or room, a Spa or massage parlour are to have partition/room/Sauna/bathing facilities. When the executive notification itself contemplates that Spa/Massage parlours should have partitions or rooms, there is no need to issue a further direction that the licensees should conduct their business activities in a transparent manner and avoid secluded or closed rooms. One can take judicial notice of the fact that after a massage session, the customer might prefer to take a soothing hot water bath. That is why, the aforesaid notification refers to Sauna/bathing facilities. They have to be necessarily in closed rooms. There cannot be transparency in such matters.

11.Suspicion that immoral activities are taking place in massage centres cannot be reason enough to intrude into an individual's right to relax for it intrinsically is part and parcel of his fundamental right to privacy. The question of whether concerns of breach of morality can be made a ground for intruding into one's private space was pondered over in ***Govind v. State of MP (AIR 1975 SC 1378)***. While the Hon'ble Supreme Court did not answer this question, it did however set forth a principle. Para 22 of the judgment is as follows:



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"If the court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling state interest test. Then the question would be whether a state interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible state interest, the characterisation of a claimed right as a fundamental privacy right would be of far less significance."

When Govind decision was rendered, privacy was not recognised as a fundamental right. Post Puttaswamy judgment, privacy right can be curtailed only on grounds set out therein. Morality cannot be invoked as a mere incantation to justify such curtailment. This was also the essence of the landmark "Section 377" verdict of the Hon'ble Supreme Court in which it was held that in matters of one's private affairs, constitutional morality shall trump public morality. (***Navtej Singh Johar and Ors. vs. Union of India (UOI) and Ors. (2018) 10 SCC 1***).

12.It may not be out of place to refer to the decision of the Hon'ble Division Bench in WA No.576 of 2015 (Raptakos Brett and



Co.Ltd vs. Raptakos Brett Employees Union and ors). The Writ Appeal

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was filed by the appellant after suffering an order of writ of mandamus under Article 226 of the Constitution of India for removal of the Closed Circuit Television Units (CCTVs) installed in the rest room and lockers room. The Hon'ble Division Bench observed that such installation is not only objectionable but also impermissible in law in light of Puttaswamy judgment. The essence of Puttaswamy was summarised in the following terms :

"....the right to privacy is a fundamental right that does not need to be separately articulated, but can be derived from Articles 14, 19 & 21 of the Constitution of India; that it is a natural right that subsists as an integral part to the right to life and liberty; that it is a fundamental and inalienable right and attaches to the person covering all information about that person and the choices that he/she makes; that it protects an individual from the scrutiny of the State in their home, of their movements and over their reproductive choices, choice of partners, food habits, etc., therefore, any action by the State that results in an infringement of the right of privacy is subject to judicial review, in the case on hand, since there is no infringement of privacy by the State, the first respondent/writ petitioner cannot lay their claim before this Court under Article 226 of the Constitution of India. In the judgment of the Hon'ble Apex Court in Justice K.S. Puttaswamy (Retd.) v. Union of



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India (supra), Hon'ble Justice Sanjay Kishan Kaul (in his separate opinion) recognizing the breach of privacy committed by private individuals/private entities/non-State actors, called upon the legislature to legislate on this issue and ensure privacy of individuals against other citizens as well."

The Hon'ble Division Bench of course doubted the maintainability of the Writ Petition only because it was sought to be enforced against a private management.

13. Most of us view privacy as an individual right. Time has come to look beyond. Priscilla M Regan in her seminal work "Legislating Privacy", highlights the importance of developing and understanding of the social importance of privacy. She conceptualizes privacy as a value and as a goal of public policy.

14. In the decision reported in **2015 (1) MLJ 308 (Masti Health and Beauty Private Limited vs. The Commissioner of Police Chennai City)**, a learned Judge of this Court disposed of a similar writ petition in the following terms :

"67. In the light of the above, all the writ petitions are disposed of to the following effect:



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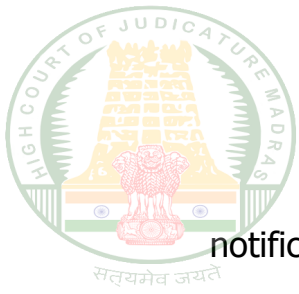


(i) *The respondents shall not, as a matter of routine and without any basis, conduct any raids and interfere with the business carried on by the petitioners;*

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

(iii) *Based upon the laws enacted in various States of the United States of America and Singapore, which I have dealt with in paragraphs 39 to 54, the respondents may take appropriate steps for bringing in either a new legislation or a subordinate legislation in terms of the provisions of the Chennai City Municipal Corporation Act or the Chennai City Police Act, so that public order, decency and morality, which can form the basis for a regulatory law under Article 19(2) of The Constitution, are taken care of. The Government shall file a report on or before 31.3.2015, before this Court, about the decision taken."*

Obviously, pursuant to the aforesaid order, the Chennai City Municipal Corporation issued the Notification dated 27.02.2019. When the



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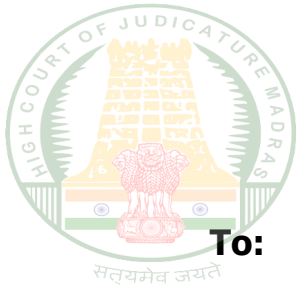
notification issued by the appropriate authority is holding the field, it may not be open to the court to supplement the same. In these circumstances, the first respondent is directed to consider the petitioner's representation dated 17.11.2021 and dispose of the same on merits and in accordance with law within a period of four weeks from the date of receipt of copy of this order. If the first respondent issues No Objection Certificate and if based thereon, the competent authority grants license in favour of the petitioner, of course, the respondents will not thereafter interfere with the petitioner's business so long as it is running in the manner known to law.

15.The writ petition is disposed of. No costs.

04.01.2022

Index : Yes / No
Internet : Yes/ No
skm

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



To:

WEB COPY 1. The Commissioner of Police, Trichy City.

2. The Inspector of Police (L & O),
Thillai Nagar Police Station.
Trichy City – 600 017.

3. The Additional Public Prosecutor,
Madurai Bench of the Madras High Court, Madurai.



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G.R.SWAMINATHAN, J.

SKM

W.P.(MD)No.22667 of 2021

04.01.2022