

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

AD-HOC NO. WP-LD-VC-178 OF 2020

Mr. Pramod Pandey S/o. Late R.S.L. Pandey)
Adult, aged about 70 years)
Indian Inhabitant residing at 102, Juhu Abhishek,)
Juhu Versova Link Road, Andheri (West),)
Mumbai – 400 053.)...Petitioner

Versus

State of Maharashtra,)
Principal Secretary, Entertainment & Tourist Department,)
to be served through Government Pleaders, High Court,)
Mumbai)...Respondent

ALONGWITH

AD-HOC NO. WP-LD-VC-197 OF 2020

Mr. Ashok Saraogi for the Petitioners.
Mrs. Purnima H. Kantharia, Government Pleader for the Respondent.
Mr. Sharan H. Jagtiani, Senior Advocate, Amicus Curiae a/w Mrs. Shweta Sangtani
and Mr. Priyank Kapadia.

CORAM : **S.J. KATHAWALLA AND**
R.I. CHAGLA, JJ.

RESERVED ON: **29TH JULY, 2020**

PRONOUNCED ON: **7TH AUGUST, 2020**

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JUDGMENT (PER S.J. KATHAWALLA, J.) :

1. Writ Petition-LD-VC-178 of 2020 is filed by Shri Pramod Pandey an actor by profession, who is performing small roles in films and TV serials since the last 40 years. Writ Petition-LD-VC-197 of 2020 is filed by the Indian Motion Pictures Producers Association. Both the Writ Petitions challenge one condition contained in the Government of Maharashtra's Resolution ("GR") No. Covid-2020/C.R. 37/C.A.1 dated 30th May 2020 continued vide an explanatory GR No. Covid-2020/C.R. 37/C.A.1 dated 23rd June 2020, whereby persons above the age of 65 years are prohibited from remaining present at the site of shooting of films / television series / Over The Top Media ("OTT") (the "**Impugned Condition**").
2. The GR of 30th May 2020 as explained or clarified by the GR of 23rd June 2020, have been issued to permit the reopening of the film and television industry pursuant to representations made to the Government of Maharashtra from various organizations in this field. The Impugned Condition is one of the several conditions contained in the said GRs, subject to which the Government of Maharashtra has permitted such shootings as well as pre-production and post-production works. This GR is one of several Government Resolutions issued by the Government of Maharashtra since the imposition of the lockdown in response to the Covid-19 pandemic.
3. The main ground of challenge is that the GRs are discriminatory,

arbitrary and violative of Article 14 of the Constitution of India, because at the time the GRs were issued, the Central Government as well as the Government of Maharashtra had relaxed the general prohibition on movement of persons above the age of 65 years, and made it advisory in nature and the prohibition under general restrictions was no longer in force. As against this, a prohibition on the movement of persons above the age of 65 years continued to operate in the film and television industry. It is also submitted that the Impugned Condition is an unreasonable restriction on the Petitioners' right to carry on their trade and occupation, as also the Impugned Condition deprives the Petitioner in WP-LD-VC-178 OF 2020 of his right to earn a livelihood with dignity. These submissions are based on Article 19(1)(g) and Article 21 of the Constitution, respectively.

I. THE IMPUGNED CONDITION

4. The GRs dated 30th May 2020 and 23rd June 2020 which contain the Impugned Condition are issued by the Government of Maharashtra through the Department of Tourism and Cultural Affairs. The GR dated 30th May 2020 is titled "*Guidelines for the Shooting Works of the Films, Television Series / OTT on the Background of Covid-19*". The GR dated 30th May 2020 refers to the following Lockdown Orders issued under the provisions of the Disaster Management Act, 2005 ("**DM Act**") :

i. Ministry of Home Affairs, Government of India ("**MHA**") Orders dated 1st May 2020, 11th May 2020 and 17th May 2020; and

ii. Department of Revenue and Forest, Disaster Management, Relief and Rehabilitation, Government of Maharashtra Orders dated 2nd May 2020, 3rd May 2020, 5th May 2020, 11th May 2020, 17th May 2020.

5. The relevant extracts from the GR dated 30th May 2020 are set out below :

“Introduction:

In order to prevent the outbreak of Covid-19 virus, the government has brought restrictions on various matters / works as per the above specified government orders. Also some restrictions have been relaxed as required during the reconsideration. Requests have been received by the Government from various organizations in this field with reference to give permission to start shooting of closed film, television series / OTT in the background of Covid-19. As the economic progress of the country has been hampered due to the outbreak of Covid-19, the government has given permission to start the industry by relaxing the restrictions to some extent by the order, dated 19.05.2020 in above specified No.1. In that context, the government had been considering to allow the shooting works of film, television series / OTT in a controlled manner. In this regard, the government has taken the following decision.

Government Resolution:

With reference to shooting of film, television series / OTT in the background of covid-19, the government is approving to start this work in a controlled manner subject to the guidelines of Appendix-A (Appendix-A) attached with this Government

Resolution. The matter regarding the works of pre-production and post-production will be handle as per this guidelines. Considering the noble intention of the government to grant this permission, all concerned should carry out their work in such a manner that it will not be breach of any restrictions regarding Covid-19. If it is found that these guidelines have been violated, the Government will reconsider the approval by closing concerned works as where it is.

.....”

**“GUIDING PRINCIPLES TO RESTART MEDIA ENTERTAINMENT
INDUSTRY IN MAHARASHTRA**

A. MANAGING COVID-19 RISKS ON THE SET / STUDIO AND EDIT FACILITIES

.....

B. PRODUCTION OFFICE / TRAILER / TENTS

.....

C. STUDIO PREMISES INCLUDING SETS

.....

XVI. Any cast / crew members above the age of 65 years will be not be (sic.) allowed at the site. ”

6. It is therefore clear that the Impugned Condition at Guideline C -XVI, prohibits persons above the age of 65 years from remaining present at the site of shooting of films / television / OTT.

7. Since certain issues were raised regarding difficulties faced by the concerned institutions / organizations while implementing the guidelines set out in the GR dated 30th May 2020, the Government of Maharashtra issued a GR dated 23rd June 2020 as an explanatory order. The issue raised and explanation given as regards the Impugned Condition reads as follows:

<i>Sr. No.</i>	<i>Earlier Guideline</i>	<i>Suggested Amendment</i>	<i>Clarification</i>
...	...	...	...
7	<i>Any cast / crew member above the age of 65 years will be not be (sic.) allowed at the site</i>	<i>Since all suspended shoot will resume with continuity, several cast and crew may be 65 years and above. We request that this guideline be amended to ensure adequate / enhanced safety precautions are in place to safeguard the well-being of such personnel. In addition, declarations of co-morbidities and existing conditions along with disclaimers from each member will be sought to ensure that any participation in shoot by such cast and / or crew is voluntary.</i>	<i>As per prevalent lockdown orders.</i>

8. The Petitioners have in their respective Writ Petitions challenged the aforestated Guideline No. C-XVI of GR dated 30th May, 2020 which is clarified / explained vide GR dated 23rd June, 2020 (“**Impugned Condition**”). Though the response vide GR dated 23rd June, 2020 with regard to some of the other clarifications

sought was that the stipulation is only recommendatory, the same was not the response in relation to the Impugned Condition.

II. RELIEFS SOUGHT BY THE PETITIONERS :

9. The main relief sought in both the above Petitions are essentially the same, with minor differences in the prayers.

10. The main relief in WP-LD-VC-178 OF 2020 (*Pramod Pandey vs. State of Maharashtra*) reads as follows :

*“a) That this Hon’ble Court be pleased to issue appropriate writ, order and direction to quash and set aside the condition appearing in the guidelines dated 30th May, 2020 and 23rd June, 2020 issued by the respondents whereby, the persons above the age of 65 years of age are barred from participating in any activities with respect to shootings on such terms as this court may deem fit and proper.
.....”*

11. The main relief in WP-LD-VC-197 OF 2020 (*Indian Motion Pictures Producers Association vs. State of Maharashtra*) read as follows :

(a) that this Hon'ble court be pleased to issue an appropriate writ, order and directions directing quashing of the directives issued by the respondents prohibiting the persons who are aged about 65 years or above from participating in the shooting of the

films, TV Serials and other programmes on such terms as this Hon'ble Court may deem fit and proper in the matter.

.....”

III. ORDERS PASSED BY THIS COURT :

12. On 21st July 2020 we had passed an Order in WP-LD-VC-178 OF 2020 directing the State of Maharashtra to file a reply. The State of Maharashtra was also directed to specifically address the queries raised in Paragraph 3 of the Order.

13. The Order dated 21st July 2020 reads as follows:

P.C. :

1. By the above Writ Petition, the Petitioner seeks quashing/setting aside of the condition appearing in the Government Guidelines dated 30th May, 2020 stating that “Any cast/crew members above the age of 65 years will not be allowed at the site.”

2. The Petitioner is performing small roles in films and TV serials since the last 40 years. He has submitted that he does not have any other source of livelihood and is solely dependent on such jobs in the film studios. He has submitted that though he is physically fit, he is not allowed to go to the studios and participate in any shootings and he is thereby deprived of earning his livelihood. He has submitted that if the facts and figures are called for from the Respondents, it will be found that the majority of the persons affected by the pandemic are below the age of 65 years. He has therefore, submitted that grave hardship and prejudice will be caused to him if he is prevented from

participating in any of the activities during the shootings since he will not be able to survive with dignity and self respect.

2. The learned Advocate appearing for the State has informed the Court that the guidelines also provides that when possible, castings should be done remotely via Facetime, Zoom, Skype, etc. The learned Advocate for the State had to be reminded that the actors performing small roles are required to go to the studios and request for work to enable them to have their two meals, and no Producer/Director is going to shoot their role via Facetime, Zoom, Skype etc.

3. In view of the above, we direct the Respondents to interalia file its Affidavit explaining how a physically fit person who is 65 years or above is expected to live a dignified life if he is not allowed to go out and earn his livelihood. The Respondents shall in its Affidavit also set out the following :

(i) Whether any data/reports/statistics were taken into consideration before issuing the impugned Guidelines restraining any cast/crew members above the age of 65 years from attending the studios/shooting sites;

(ii) Whether a similar rule is made applicable to individuals who are 65 years and above and are travelling by trains/buses/aircrafts etc.;

(iii) Whether a similar rule is made applicable to the employers/staff who are currently attending shops/private offices;

(iv) Whether a similar rule is made applicable to the individuals (approximately 30) who are allowed to attend funerals or marriage reception/s etc.

3. Stand over to 24th July, 2020.

4. This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

14. On 24th July 2020, we had passed a common Order in WP-LD-VC-178 of 2020, WP-LD-VC-197 OF 2020 and WP-LD-VC-188 of 2020 which reads as follows:

P.C. :-

1. Though the Learned Government Pleader has requested for some time to tender the Affidavit of the State in WP-LD-VC-178 of 2020, she has responded to the queries put to her by the Court. Also heard Mr. Saraogi for the Petitioner. The said Writ Petition is treated as part-heard and placed for final hearing at the stage of admission on 29th July, 2020 alongwith WP-LD-VC-197 of 2020 and WP-LD-VC-188 of 2020. The State shall file its Affidavit by 11.00 a.m. on 25th July, 2020. We appoint Mr. Sharan Jagtiani, Senior Advocate as Amicus Curaie in the above matters.

2. This order will be digitally signed by the PA/PS of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

IV. PETITIONERS' SUBMISSIONS :

15. The Advocate for the Petitioners has submitted :

i. That the Impugned Condition in the GR dated 30th May 2020 as explained or clarified by the GR dated 23rd June 2020 is discriminatory and therefore liable to be quashed.

ii. That the Impugned Condition violates Article 19 of the Constitution and is not in the nature of a reasonable restriction on the right guaranteed under Article 19(1)(g) of the Constitution.

iii. That the general prohibition on persons above the age of 65 years is now relaxed and is only advisory in nature, is clear from the Order dated 5th June 2020 passed by the Karnataka High Court in Writ Petition No. 7220 of 2020, wherein the clarification given by the Additional Solicitor General is specifically recorded.

iv. That there is no justification for the said prohibition by way of the Impugned Condition being applied only in respect of the Petitioners / persons whose occupation and trade is in relation to the film or television industry.

V. SUBMISSIONS BY THE RESPONDENT STATE:

16. The Learned Government Pleader appearing for the Respondent State reiterated the submissions made in the Affidavit in Reply filed by the Respondent. Some of the important submissions, made in the Affidavit in Reply dated 25th July 2020, filed by the State of Maharashtra and made across the Bar, are as follows:

- i. That the Government of Maharashtra's resolutions are based on Central Government orders passed under the DM Act.
- ii. That the Impugned Condition No. C-XVI in GR dated 30th May 2020 clarified by the GR dated 23rd June 2020 is reasonable and is subject to future relaxation. This condition is imposed in the interest of health and safety of vulnerable classes of persons. The restrictions are in the interest of persons with low or weak immunity as the disease is easily communicable.
- iii. That the restriction on persons who are 65 years of age and above is consistent across various Central and State Government orders restricting businesses and movement during lockdown.
- iv. That the restriction is not absolute. Persons above the age of 65 years may work from home, over video conferencing, email, video sharing etc.
- v. That the State Government has adopted the orders issued by the Central Government from time to time. The Impugned Condition No. C-XVI in the GR dated 30th May 2020, clarified by the GR dated 23rd June 2020, is based on the Orders dated 1st May 2020 and 17th May 2020 issued by the Ministry of Home Affairs ('MHA') and the Orders dated 2nd May 2020 and 19th May 2020 issued by the Department of Revenue and Forest, Disaster Management, Relief and Rehabilitation, Government of Maharashtra under the DM Act, which are binding on the State Government and have the force of law. The Cultural Department of the State Government cannot, in issuing guidelines permitting resumption of activities, override these orders.

vi. That if the Central Government relaxes its guidelines pertaining to persons above the age of 65 years, the State Government will adopt guidelines of the Central Government and relax restrictions imposed on persons above the age of 65 years.

vii. That until the Central and State Governments relax the guidelines, the Respondent is bound to strictly implement the aforesaid Orders issued under the DM Act, as the MHA Orders specifically provide for strict enforcement of the Lockdown Orders by the respective State Governments;

viii. That though the Impugned Condition reads as a prohibition, no coercive action will be taken against anyone above the age of 65 years who chooses to remain present at the site of shooting of films / television series / OTT. The prohibition is issued in the interest of the health and safety of persons who are above the age of 65 years, and is to be read as such.

ix. That the Impugned Condition which is part of the guidelines for reopening of the film and television industry pursuant to representations made by them, is only a temporary condition or restraint. The Impugned Condition was based on the earlier guidelines and conditions issued by the MHA and the Government of Maharashtra.

17. In response to the Court's question on whether the Impugned Condition is to be read as an advisory, given the general relaxation on the prohibition of movement of persons above the age of 65 years in the guidelines issued by the MHA

dated 30th May 2020 and the Order issued by the Respondent / State of Maharashtra on 31st May 2020, the Learned Government Pleader repeated that this condition must be followed in the interest of the said class of persons themselves, although the Learned Government Pleader did not indicate how the Impugned Condition would be enforced, if violated.

18. The response of the State with regard to the queries of the Court recorded in Paragraph 3 of the Order dated 21st July 2020, is reproduced hereunder along with the said queries:

“3. In view of the above, we direct the Respondents to interalia file its Affidavit explaining how a physically fit person who is 65 years or above is expected to live a dignified life if he is not allowed to go out and earn his livelihood. The Respondents shall in its Affidavit also set out the following :”

The restriction is imposed in the interest of health and safety of persons above the age of 65 years who are required to stay at home except for meeting essential requirements and for health purposes;

The restrictions are imposed pursuant to the binding guidelines issued from time to time by the Central Government and State Government under the DM Act;

This restriction will be modified when the Central Government and State Government modifies the same;

Persons who are unable to go to studios can work from home as is being done by many individuals in private

offices. Alternate arrangements should be adopted for earning livelihood during the pandemic.

“(a) Whether any data/reports/statistics were taken into consideration before issuing the impugned Guidelines restraining any cast/crew members above the age of 65 years from attending the studios/shooting sites;”

No data / reports / statistics were taken into consideration before issuing the Impugned guideline restraining cast / crew members above the age of 65 years from attending studios / shooting sites.

The Central and State Government orders and guidelines issued under the Disaster Management Act, 2005 have been taken into consideration *‘and the same can be treated as the data / reports taken into consideration before issuing the guidelines’*.

(b) Whether a similar rule is made applicable to individuals who are 65 years and above and are travelling by trains/buses/aircrafts etc.;”

Except essential services, train services are not available to the general public, therefore the question of individuals above the age of 65 years travelling by train does not arise.

There is no specific restriction for persons above the age of 65 years to travel by bus.

With regard to aircrafts, revised guidelines dated 19th May 2020 and 31st May 2020, specifically prohibit travel by air unless approved by a special operating procedure.

(c) Whether a similar rule is made applicable to the employers/staff who are currently attending shops/private

offices;

Persons above the age of 65 years are permitted to visit shops for essential requirements and health purposes.

There are restrictions imposed for operating shops and attendance of personnel etc. and work from home is encouraged, however, no age bar is mentioned.

(d) Whether a similar rule is made applicable to the individuals (approximately 30) who are allowed to attend funerals or marriage reception/s etc.”

There is no restriction on persons above the age of 65 years from attending funeral and marriage gatherings.

VI. SUBMISSIONS BY AMICUS CURIAE :

19. Mr. Sharan Jagtiani, Senior Advocate, who by our Order dated 24th July, 2020 was appointed as Amicus Curiae to assist the Court, has circulated detailed Written Submissions. In addition to the factual and legal submissions set out therein, Mr. Jagtiani submitted / pointed out as follows :

i. That if the State of Maharashtra was to expressly clarify that the Impugned Condition is to be read as an advisory and not an obligatory requirement, it would undoubtedly resolve the challenge in these Petitions. However, if one is to go by the language of the Impugned Condition, it appears that the same is mandatory or obligatory and is not worded as an advisory. In fact, the reply filed by the State of Maharashtra proceeds on this basis as well, but states that if there is a relaxation in the generally applicable guidelines by the MHA or the State of Maharashtra, then a

relaxation of the Impugned Condition would also be considered.

ii. That looking to the scheme of the DM Act, the Impugned Condition contained in the GR dated 30th May 2020 and clarified by the GR dated 23rd June 2020 is an administrative or executive action pursuant to the powers conferred by the DM Act. They may also be regarded as “measures” contemplated by Section 2 of the Epidemic Diseases Act. Although Section 2 of the Epidemic Diseases Act does seem to confer powers to frame regulations, which would have the character of delegated or subordinate legislation, the GRs containing the Impugned Condition are not “Regulations” in exercise of that power. In any event, the Impugned Condition is an administrative or executive action.

iii. That in the Order issued by the MHA and State of Maharashtra on 30th May 2020 and 31st May 2020 respectively, the general guideline pertaining to restriction / prohibition on the movement of persons above 65 years of age that operated from about 4th May 2020 to 31st May 2020, was relaxed and made an advisory. In contrast, the Impugned Condition issued on 30th May 2020 and clarified on 23rd June 2020 reads as an obligatory requirement, prohibiting all persons above 65 years of age from working on a film set as cast or crew. In other words, in respect of the film industry, the stipulation restraining persons from working as cast or crew at a film set based on age above 65 years, is mandatory whereas persons above 65 years of age who are engaged or occupied or working in other essential and non-essential business activities and sectors that are allowed to operate, may attend their workplace,

since the general guideline or Order applicable to them now reads only as an advisory.

iv. That there is no material, data or explanation in the reply filed by the State of Maharashtra to justify the differential treatment to persons above the age of 65 years generally and those above the age of 65 years who are engaged or involved in the production of films / televisions series / OTT. In fact, the Reply of the State of Maharashtra, when referring to the basis of the said GR's containing the Impugned Condition, does not take into consideration the guidelines / Order issued by the MHA and the State of Maharashtra on 30th May 2020 and 31st May 2020 respectively that relaxed the earlier prohibition based on age, to an advisory. That therefore there is no rational basis for the general stipulation being in the nature of an advisory and the Impugned Condition being mandatory or an obligatory requirement for the film and television industry.

v. That there may be merit in both aspects of the Article 14 challenge – i.e. that the Impugned Condition is discriminatory as well as arbitrary for want of proper application of mind, given that at that time the Impugned Condition was imposed, or shortly thereafter, the MHA and the Government of Maharashtra relaxed the prohibition on movement of persons above the age of 65 years and made it an advisory. If the Impugned Condition is unreasonable and arbitrary especially in light of the general relaxation based on age to an advisory, the Court may also consider the challenge under Article 19 and Article 21 which are elaborated in the Written Submissions.

vi. That the above submissions are fortified by the following decisions of the Hon'ble Supreme Court :

- i. Sube Singh & Ors. vs. State of Haryana & Ors.;¹
- ii. Kailash Chand Sharma vs. State of Rajasthan & Ors.;²
- iii. Om Kumar & Ors. vs. Union of India³.
- iv. Indian Express Newspapers vs. Union of India⁴;

CHRONOLOGY OF LOCKDOWN ORDERS / GUIDELINES AND ISSUANCE OF THE IMPUGNED CONDITION :

Precursor to lockdown :

20. The Government of Maharashtra, vide Notification No. Corona 2020/CR-58/Aarogya-5 dated 13th March 2020 invoked provisions of the Epidemic Diseases Act, 1897. In exercise of the powers conferred under Sections 2, 3 and 4 of the Epidemic Diseases Act, 1897, the Government of Maharashtra framed the Maharashtra COVID-19 Regulations, 2020.

21. The Government of Maharashtra, in exercise of the powers conferred under Section 2 of the Epidemic Diseases Act, 1897 read with other enabling provisions of the DM Act, notified a lockdown in the entire State of Maharashtra vide its Notifications dated 23rd March 2020 and 24th March 2020 which lockdown was to

1 (2001) 7 SCC 545 at Paragraph 10-11/Page 548 and 549.

2 (2002) 6 SCC 562 at Paragraph 5/Page 570, Paragraph 9/Page 571-572, Paragraph 11/Page 572-573, Paragraph 17/Page 578, Paragraph 18/Page 578-579, Paragraph 31/Page 584-585, Paragraph 33/Page 586 and Paragraph 34/Page 586-587.

3 Ibid at Paragraph 59/Page 409 and Paragraph 67/Page 411.

4 (1985) 1 SCC 641 at Paragraph 78 and 80.

remain in effect till 31st March 2020. At this stage, no specific restrictions were prescribed with respect to persons above the age of 65 years. Under Paragraph 5 of the Government of Maharashtra's Notification dated 23rd March 2020, all residents (except for those engaged in essential services) were required to stay at home. Under Paragraph 9 all business sectors and activities other than essential services were not allowed to operate.

LOCKDOWN - 25TH MARCH, 2020 TO 14TH APRIL, 2020

22. The MHA vide its Order dated 24th March 2020 issued under the DM Act imposed a nationwide lockdown to contain the spread of Covid-19 and notified certain guidelines for implementation by respective State Governments, which guidelines were revised vide Addendum dated 25th March 2020.

23. Since it was expedient for the Government of Maharashtra to revise and align its lockdown orders with the guidelines issued by the MHA, the Government of Maharashtra issued Lockdown Guidelines dated 25th March 2020 which superseded the earlier guidelines issued in this regard.

24. At this stage there was no specific restriction for persons above the age of 65 years. All businesses and activities except essential services were prohibited.

LOCKDOWN - 15TH APRIL, 2020 TO 3RD MAY, 2020

25. MHA issued consolidated Guidelines dated 15th April 2020 extending the lockdown till 3rd May 2020.

26. The Government of Maharashtra issued an Order dated 17th April 2020,

which was to remain in force till 3rd May 2020 to implement the guidelines issued by the MHA dated 15th April 2020.

27. A perusal of the Orders dated 15th April 2020 and 17th April 2020 issued by the MHA and Government of Maharashtra respectively, show that a policy decision was taken to permit select activities with effect from 20th April 2020. These activities / business sectors include, among others, financial services, data call centres, agricultural activities, public utilities, movement of goods and cargo (inter and intra state) etc. with certain conditions and exceptions.

28. In the aforesaid MHA and State Government Orders dated 15th and 17th April 2020 respectively, there was an advisory with respect to persons above 65 years of age, i.e. they were encouraged to work from home. The relevant advisory issued by MHA and the State Government, which are in identical terms, reads as follows:

*“Annexure 1 – National Directives for Covid-19
Management*

.....

9. Persons above 65 years of age and persons with co-morbidities and parents of children below the age of 5 may be encouraged to work from home.”

(emphasis supplied)

It is pertinent to note that at this stage, the specific restriction on movement of persons above the age of 65 years was issued in the nature of an advisory and not as a mandatory or obligatory requirement.

LOCKDOWN – 4TH MAY, 2020 TO 17TH MAY, 2020

29. The 15th and 17th April 2020 Orders issued by the MHA and Government of Maharashtra respectively were to remain in effect till 3rd May 2020.

30. MHA issued consolidated guidelines dated 1st May 2020 which were to remain in force from 4th May 2020 to 17th May 2020.

31. The Government of Maharashtra issued an Order dated 2nd May 2020 which was to remain in force from 4th May 2020 to 17th May 2020 to implement the guidelines issued by the MHA dated 1st May 2020.

32. Both the MHA and State of Maharashtra Order, for the first time, introduced an obligatory requirement that persons above the age of 65 years must stay at home. The relevant extract from the MHA and State Government Orders, which are in identical terms, read as follows:

*“In all zones, persons above 65 years of age, persons with co-morbidities, pregnant women, and children below the age of 10 years, **shall stay at home**, except for meeting essential requirements and for health purposes, as per the National Directives.”*

(emphasis supplied)

33. During this period of lockdown, the Central Government permitted private offices to operate at 33% strength, with remaining persons working from home. Similarly, the State of Maharashtra permitted private offices in the area, excluding the

area of all Municipal Corporations within the Mumbai Metropolitan Region, Malegaon Municipal Corporation, Pune Municipal Corporation, and Pimpri-Chinchwad Municipal Corporation, to operate with upto 33% strength with the remaining persons working from home. Even for permitted activities and sectors, a prohibition was operative as regards persons above the age of 65 years.

LOCKDOWN - 18TH MAY, 2020 TO 31ST MAY, 2020

34. MHA issued consolidated Guidelines dated 17th May 2020 which were to remain in force till 31st May 2020.

35. The Government of Maharashtra issued an Order dated 19th May 2020 which were to remain in force till 31st May 2020 to implement the Guidelines issued by the MHA dated 17th May 2020.

36. Both the MHA and Government of Maharashtra Order continued the obligatory requirement that persons above the age of 65 years must stay at home. The relevant extract from the MHA Order dated 17th May 2020, reads as follows:

*Persons above 65 years of age, persons with co-morbidities, pregnant women, and children below the age of 10 years, **shall stay at home**, except for meeting essential requirements and for health purpose.*

(emphasis supplied)

37. The relevant extract from the Government of Maharashtra's Order

dated 19th May 2020 reads as follows:

*Persons above 65 years of age, persons with co-morbidities, pregnant women, and children below the age of 10 years, **shall stay at home**, except for meeting essential and medical services.*

(emphasis supplied)

38. During this period of lockdown, the Central Government permitted private offices to operate at 33% strength with remaining persons working from home.

39. The State Government provided that all activities which were allowed and permitted before its Order dated 19th May 2020 shall continue to be permitted. However, all private offices were directed to remain shut.

PHASED REOPENING / MISSION BEGIN AGAIN - 1ST JUNE, 2020 TO 30TH JUNE, 2020

40. MHA issued consolidated Guidelines dated 30th May 2020, which were to remain in force till 30th June 2020. The GR dated 30th May 2020 containing the Impugned Condition was also issued at this time.

41. The Government of Maharashtra issued an Order dated 31st May 2020, which was to remain in force till 30th June 2020 to implement the Guidelines issued by the MHA dated 30th May 2020.

42. As part of Phase III of Mission Begin Again, the State Government permitted private offices to operate with up to 10% strength as per requirement, with

remaining persons working from home with effect from 8th June 2020.

43. In the MHA and State Government Orders for this period, the prohibition against movement of persons above the age of 65 years was substituted by an advisory, i.e. persons above 65 years of age were advised to work from home. The relevant advisory issued by MHA and the State Government, which are in identical terms, reads as follows:

*Persons above 65 years of age, persons with co-morbidities, pregnant women, and children below the age of 10 years **are advised to** stay at home, except for essential and medical purposes.”*

(emphasis supplied)

44. The Government of Maharashtra issued a GR dated 23rd June 2020 clarifying, *inter alia*, the Impugned Condition.

PHASED REOPENING / MISSION BEGIN AGAIN - 1ST JULY, 2020 TO 31ST JULY, 2020

45. MHA issued Guidelines dated 29th June 2020, which were to remain in force till 31st July 2020.

46. The Government of Maharashtra issued an Order dated 29th June 2020, which was to remain in force till 31st July 2020.

47. As per the State Government's Order dated 29th June 2020, all private

offices within the Mumbai Metropolitan Region including MCGM, Municipal Corporations of Pune, Solapur, Aurangabad, Malegaon, Nashik, Dhule, Jalgaon, Akola, Amravati and Nagpur, can operate up to 10% strength or 10 people, whichever is more.

48. The MHA retained the advisory with respect to persons above the age of 65 years which reads as follows:

*7. Persons above 65 years of age, persons with co-morbidities, pregnant women, and children below the age of 10 years **are advised** to stay at home, except for essential and health purposes.*

(emphasis supplied)

49. There is no specific mention of restrictions as regards persons above the age of 65 years in the State Government's Order dated 29th June 2020.

PHASED REOPENING / MISSION BEGIN AGAIN - 1ST AUGUST, 2020 TO 31ST AUGUST, 2020

50. After the hearing which took place on 29th July 2020, the MHA and the Government of Maharashtra issued Orders, both dated 29th July 2020, with respect to phased reopening of further activities during lockdown. These Orders were circulated by the Learned Government Pleader after mentioning the matter on 31st July 2020.

51. Paragraph 7 of the MHA Order retains the advisory with respect to persons above the age of 65 years:

*7. Persons above 65 years of age, persons with co-morbidities, pregnant women, and children below the age of 10 years **are advised** to stay at home, except for essential and health purposes.*

(emphasis supplied)

52. There is no specific mention of the restrictions as regards persons above the age of 65 years in the State Government's Order dated 29th July 2020.

VII. FINDINGS AND REASONS :

53. The GR dated 30th May 2020 containing the Impugned Condition refers to *inter alia*, the DM Act and various prior Orders issued by the MHA and the Government of Maharashtra. However, it does not refer to MHA's Order dated 30th May 2020. The GR dated 23rd June 2020 only refers to the GR dated 30th May 2020 containing the Impugned Condition and does not refer to the Order dated 30th May 2020 issued by the MHA or the Order dated 31st May 2020 issued by the Government of Maharashtra.

54. Sections 38 and 39 of the DM Act empower the State Government to take measures to deal with the disaster at hand, which in this case is the Covid-19 pandemic. The GRs of 30th May 2020 and 23rd June 2020 appear to be such measures and are therefore in the nature of executive actions or administrative acts. A Full

Bench of this Court in the case of *Yash Pramesh Rana vs. State of Maharashtra*⁵ considered a challenge under Article 14 to a Government Resolution and this Court held that the Government Resolution in question is at best an executive act that does not enjoy the benefit of the presumption of constitutionality.

55. Keeping the above in mind and being fully conscious of the hardship and risks posed by the Covid-19 pandemic, we will first consider the challenge to the Impugned Condition under Article 14 of the Constitution of India. There are two aspects under Article 14 that require consideration. The first is whether, at the time the Impugned Condition was issued as part of the GR dated 30th May 2020, there was any intelligible differentia to justify the differential treatment to persons above the age of 65 years who are working in the film industry on the one hand, and persons above the age of 65 years who are working in any other industry or sector that has been allowed to operate or reopen, subject to compliance with various precautions and conditions.

56. The second aspect is whether, the Impugned Condition is arbitrary as suffering from non-application of mind and failing to take into consideration the relevant circumstances, namely the general relaxation of the general condition based on age to an advisory by the MHA Order dated 30th May 2020 and the Government of Maharashtra Order dated 31st May 2020.

57. In our view, the Impugned Condition is not based on any intelligible

⁵ 2020 SCC OnLine Bom 678, Paragraph 111/Page 20.

differentia between the two identical classes of persons above the age of 65 years as set out above. Whilst there may be a nexus with the object sought to be achieved, i.e. to protect vulnerable people from the Covid-19 pandemic, there is no intelligible differentia between persons who are 65 years of age or above in the cast/crew of films and TV shootings on the one hand and persons who are 65 years of age or above in other sectors and services, permitted under prevailing lockdown orders.

58. Prior to the issuance of the GRs containing the Impugned Condition i.e. prior to 30th May 2020, and for the period of lockdown 4th May 2020 to 31st May 2020, the restriction on persons based on age (above 65 years) was uniform, regardless of the sector or the activity. All persons above 65 years of age were required to stay at home. In other words, even though the nature of activities or businesses which may have been allowed to open and operate during this period of lockdown gradually increased, the age based restriction for persons above the age of 65 years was uniformly applicable even to those permitted activities or businesses.

59. As regards the period commencing from 30th May 2020 (Phased Reopening / Mission Begin Again – 1st June 2020 to 30th June 2020), the age based restriction was now substituted by an advisory. The combined effect of the age restriction being only an advisory, and the relaxation granted with respect to various activities and sectors, is that it is legally possible for a person aged 65 years and above to be engaged or participate in the permitted activities such as attending private

offices and non-essential businesses, shops etc..

60. In the Reply filed by the State of Maharashtra, there is no pleading as to intelligible differentia and the basis on which it has been formulated as between the class of persons above the age of 65 years who work in the film / television industry as cast or crew on the one hand, and persons of the same class of 65 years and above who work in other permitted sectors or activities, including in private offices. In response to the queries raised by this Court in its Order dated 21st July 2020, the State Government has confirmed that there are no specific restrictions on persons above the age of 65 years in relation to other activities such as attending marriages or funerals, travel by bus etc. In the case of *Sube Singh* (supra) and *Kailash Chand Sharma* (supra), the action in question was struck down under Article 14 for want of any material or data or information to justify the classification and disparate treatment between similarly placed persons. We are of the view that the same principles and approach ought to be applied in the present case.

61. In our view, there is discrimination in the disparate treatment of persons who are 65 years of age or above in the film or television industry and in the other permitted sectors and permitted activities. The same is not based on any intelligible differentia and no explanation to this effect is to be found in the Reply of the State Government. The Impugned Condition therefore cannot be sustained in view of the well settled principles enunciated under Article 14 of the Constitution of India.

62. The Impugned Condition also fails to take into consideration the

relevant material, namely the relaxation contained in Orders dated 30th May 2020 and 31st May 2020, issued by MHA and the Government of Maharashtra respectively, which reads as an advisory for persons above the age of 65 years. The Reply does not take into account the change from an obligatory requirement to an advisory. As per the State of Maharashtra's Affidavit in Reply, the Impugned Condition is issued pursuant to a binding direction contained in the MHA and the Government of Maharashtra Orders, which require persons who are 65 years of age or above (among others) to stay at home except for essential or medical purposes. That direction is, as per the MHA's Order dated 30th May 2020, a recommendation or an advisory and is not mandatory. This aspect has not been considered by the Government of Maharashtra, especially in addressing clarifications vide GR dated 23rd June 2020 or in its Affidavit in Reply dated 25th July 2020. In fact, the State of Maharashtra in its Reply has stated that if the Central Government relaxes this condition, a similar relaxation will be issued by the State Government. As noted above, this relaxation has been made by the MHA as on 30th May 2020 and in the Orders issued by MHA thereafter, however, the corresponding relaxation is not made by the State of Maharashtra with respect to the film / television / OTT industry. The change from the age based stipulation being an obligatory requirement, to an advisory, is also provided for in the general Order dated 31st May 2020 issued by the Government of Maharashtra.

63. Again, the advisory nature of the Central Government's restriction on persons above the age of 65 years, is also acknowledged by the Additional Solicitor

General in the proceedings before the High Court of Karnataka at Bengaluru. The clarification given by the Additional Solicitor General to the High Court as recorded in its Order dated 5th June 2020 is as follows :

“This Writ Petition is filed under Article 226 of the Constitution of India praying to quash the prohibition on movement of senior citizens above the age of 65 years as contained in the order No. RD 158 TNR 2020 dated 18.05.2020 of the respondent No.2 at Annexure-C, etc.

This Writ Petition coming on for Preliminary Hearing this day through Video Conferencing, CHIEF JUSTICE made the following:

ORDER

The learned Additional Solicitor General of India states that a memo has been filed recording that there is no longer a prohibition on movement of senior citizens above the age of 65 years and now, in the order of the Ministry of Home Affairs of the Government of India, there is only an advice incorporated that senior citizens above the age of 65 years are advised not to move out of their houses.

2. Thus, there is no prohibition which exists on the movement of senior citizens above the age of 65 years. Considering the fact that those who have completed 65 years of age may be more prone to getting infected with Novel Corona virus, an advisory has been issued by the Government of India that they should

avoid to go out of their homes.

3. In view of this subsequent development, it is not necessary to entertain this writ petition and the same is disposed of.”

64. The legal principles and tests for appreciating a challenge to an executive action under Article 14 of the Constitution have been considered in the decision in *Yash Pramesh Rana* (supra). That decision discusses the evolved and expanded scope of challenge to an administrative order such as a GR under Article 14 of the Constitution of India. It recognizes that the test of arbitrariness under Article 14 is more than the earlier formulation of comparable discrimination and inequality as determined by the doctrine of classification. Where the challenge is to an executive action the Court would also have to consider if the same suffers from Wednesbury unreasonableness, non-application of mind, failure to consider relevant factors and a consideration of extraneous factors. These principles for considering a challenge based on arbitrariness have also been explained by the Hon’ble Supreme Court in various decisions including in *Om Kumar* (supra) and *Indian Express Newspapers* (supra).

65. For the reasons stated above, we are satisfied that the Impugned Condition fails to satisfy the requirements of Article 14 of the Constitution of India.

66. We have also considered the Impugned Condition in light of Article 21 of the Constitution. The right to earn a livelihood and the right to live with dignity are now well established facets of the Right to Life guaranteed under Article 21 of the

Constitution, as held by the Hon'ble Supreme Court in *Olga Tellis & Ors. vs. Bombay Municipal Corporation & Ors.*⁶ and *Francis Coralie Mullin vs. Administrator Union Territory of Delhi & Ors.*⁷

67. The Hon'ble Supreme Court in *Maneka Gandhi vs. Union of India* has affirmed the inter related nature of Articles 14, 19 and 21 of the Constitution and held that the validity of the procedure established by law for restricting the right under Article 21 of the Constitution of India must be tested not only under Article 21 in isolation, but in conjunction with Articles 14 and Article 19.⁸ Having come to the conclusion that the Impugned Condition cannot be sustained on account of it being discriminatory and arbitrary, we are satisfied that the absolute prohibition as regards persons above the age of 65 years who earn their livelihood from the film industry (which is allowed to operate), is a measure that violates the Petitioner's right to live with dignity under Article 21 of the Constitution and the restriction imposed by the Impugned Condition in relation to a specific sector or industry that is now allowed to operate, cannot constitute a valid procedure established by law.

68. Lastly, in view of our aforesaid observations on the Impugned Condition, there would be merit in the challenge to the Impugned Condition under Article 19(1)(g) of the Constitution. If there is no general prohibition on persons above the age of 65 years from working or practicing their trade in those sectors and

6 (1985) 3 SCC 545 at Paragraph 32.

7 (1981) 1 SCC 608 at Paragraph 7 and 8/ Page 618.

8 (1978) 1 SCC 248 at Paragraph 6/Page 281, Paragraph 48-49/Page 323-324, Paragraph 158/Page 372, Paragraph 198/Page 393, Paragraph 202/Page 304.

businesses which are allowed to operate, an age based prohibition in only one industry, namely the film industry / television / OTT, without any material to support its differential classification, would constitute an unreasonable restriction. When the measure being the Impugned Condition affects the right under Article 19(1)(g) of the Constitution, the onus is on the State to show that the restriction is reasonable. We are of the view that the Impugned Condition that seeks to apply to persons above the age of 65 who are engaged in only one occupation or trade but not to others of the same class, cannot be said to be a reasonable restriction. It would be a different matter if for policy and health considerations, the film industry would not be allowed to operate or open for filming and other related activities. However, having permitted the film industry to operate and open, subject to various conditions, the introduction of the Impugned Condition that places an absolute restriction on persons above the age of 65 years from carrying out their occupation and trade, whilst not similarly restricting persons of the same age who are engaged in other trades or occupations that are permitted to operate and open, would amount to an unreasonable restriction and hence a violation of their right under Article 19(1)(g) of the Constitution.

69. For all of the above reasons, the Impugned Condition in the GR dated 30th May 2020 read with the GR dated 23rd June 2020 is hereby quashed and set aside. It is, however, clarified that the advisory applicable to all persons above the age of 65 years, would also apply to persons associated with the film / television / OTT industry and the same must be taken note of by the persons to whom it applies.

70. For the reasons stated above both Petitions are allowed in terms of prayer clause (a). However, there shall be no order as to costs.

71. Before parting with this Judgment, we would like to record our appreciation with regard to the able assistance rendered by Mr. Sharan Jagtiani, Senior Advocate, as Amicus Curiae in the matter.

(R.I. CHAGLA, J.)

(S.J. KATHAWALLA, J.)