

In the High Court of Judicature at Madras

Dated: 05.01.2017

Coram

The Honourable Mr.JUSTICE B.RAJENDRAN

W.P.No.38903 of 2016

and

WMP No.33325 of 2016

1 Mr.Mustafa Inayath [PETITIONER]

Vs

1 State Rep. by the
The Commissioner - Corporation of Chennai
Rippon Building, Chennai-600 003.

2 The Health Officer
Corporation of Chennai,
Rippon Building,
Chennai-600 003.

3 The Assistant Commissioner of Police,
Nungambakkam Range,
Greams Road,
Chennai-600 006.

4 Inspector of Police
F-4 Thousand Lights Police Station,
Greams Road,
Chennai-600 006.

[RESPONDENTS]

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of mandamus to direct the 3rd and 4th respondents from unlawfully interfering with the petitioners business "Love Peace Karma" situated at No.20B, 2nd Floor, khader Newaz, Khan Road, Chennai.

For Petitioner : Mr.Abudukumar Rajarathinam

For Respondents: Mr.S.Rajeswaran

Special Government Pleader

ORDER

The petitioner has filed this writ petition for a mandamus to direct the 3rd and 4th respondents from unlawfully interfering with the petitioners business "Love Peace Karma"

situated at No.20B, 2nd Floor, khader Newaz, Khan Road, Chennai.

2. According to the petitioner, he is running a restaurant under the name "Love Peace Karma" and he obtained all necessary approvals and permissions from Chennai Corporation, license for fire service and also NOC from the police department. In the said restaurant, there is a smoking zone in accordance with rules and regulations, which is a closed room. Though the petitioner offered Hookah to the customers inside the smoking room, no person below 18 years aged were given the said hookah. Thus, they followed all rules and regulations under the Cigarettes Act, 2003. According to him, on 01.11.2016, the fourth respondent police without any order forced him to close the restaurant as well as smoking room and sent out all the customers without any basis and they never even cared to look after the papers. When he approached the police, there was no response. They are running this business without any blemish record. According to the petitioner, the fourth respondent police is not allowing to carry on his hookah business. Hence, the present writ petition.

3. The fourth respondent filed a counter affidavit stating that without any permission or license, the petitioner is running hookah bar attached to the restaurant offering tobacco products which causes health hazards like cancer and it is illegal. Therefore, they contend that they have never ever unlawfully disturbed their running of business. Hence, the writ petition is not maintainable.

4. Learned counsel for the petitioner has relied on the decision of the Apex Court reported in 2014(15) SCC 689, Narinder S.Chadha vs. Municipal Corporation, for the proposition that Hookah smoking is not an offence if they follow the rules under the Cigarettes Act. Even in the decision of this court, it was held that there is no bar for the owner of the restaurant providing tobacco to persons who are not minors and they cannot stop the customers who are smoking tobacco either by chewing or swallowing it. In that view of the matter, he would only contend that the right to the police is always there but it should not be unnecessarily affect the right of business man to conduct the business so long he is not violating the rules. Paragraphs 14 to 18, 23, 25 and 26 of the above decision are as follows:-

"14. It will be seen that Condition No. 35(C) of the impugned circular essentially reproduces Rule 4(3) of the said Rules and then adds the words "or any apparatus designed to facilitate smoking". The effect of the added words is that a Hookah cannot be provided by the hotel, restaurant or airport being an apparatus

designed to facilitate smoking.

15. Mr. Bhatt sought to derive power for the added words from Rule 3(1)(c) and argued that the Hookah would be "other things" designed to facilitate smoking which would be prohibited under Rule 3(1)(c).

16. We find it difficult to accept this contention because, if carefully read, Rule 3 deals with the prohibition of smoking in public places, which is referable to Section 4 (main part) whereas Rule 4 is referable to the proviso to Section 4. Rule 3 would only apply where there is a total prohibition of smoking in all public places as is clear from Rule 3(1)(a) which makes it incumbent on the owner, proprietor, etc. of a public place to ensure that no person smokes in that place. It is in that context that ashtrays, matches, lighters and other things designed to facilitate smoking are not to be provided in public places where smoking is prohibited altogether.

17. On the other hand, where smoking is allowed in a smoking area or space, sub-rule (3) of Rule 4 makes it clear that such place can be used for the purpose of "smoking". Under Rule 2(f) words and expressions not defined in these Rules but defined in the Act shall have the meanings, respectively, assigned to them in the Act.

18. This takes us to the definition of "smoking" contained in Section 3(n) of the Act which has been set out hereinabove. A perusal of this definition shows that it includes smoking of tobacco in any form with the aid of a pipe, wrapper, or any other instrument, which would obviously include a Hookah. That being the case, "smoking" with a Hookah would be permissible under Rule 4(3) and the expression "no other service shall be allowed" obviously refers to services other than the providing of a Hookah. It is, thus, evident that the added words in clause (C) of Condition No.35 are clearly ultra vires the Act and the Rules.

23. In the Madras High Court judgment a notice dated 5th July, 2011 was upheld by the High Court. The notice is obviously ultra vires the Cigarettes Act and the Rules made thereunder as it prevents the owner of the hotel/restaurant from providing tobacco to persons who are not minors and asking such persons affirmatively to stop people from sucking and swallowing tobacco. Further, sale of tobacco can only be prohibited within a radius of 100 yards of an

educational establishment and not 300 feet as is stated in the impugned notice. This judgment also deserves to be set aside. 25. From a reading of Himat Lal's case, it is clear that the word "regulate" would not include the power to prohibit. Further, Section 144 of the Code of Criminal Procedure provides a power to grant only temporary orders which cannot last beyond 2 months from the making thereof (see Section 144(6) of the Code of Criminal Procedure). Despite this being pointed out to the High Court, the High Court held:

"There is no dispute as regards the position of law and we accept the contentions on behalf of the petitioners so far as Section 144 of the Code is concerned. However, solely on this ground alone the entire action on the part of the Police Commissioner cannot be said to be unlawful or beyond his jurisdiction. Prima facie, we are convinced that the notification invoked under Section 144 of the Code was issued with a definite idea and the idea was to immediately give true effect to the addition of the condition in respect of licences of persons running eating house/restaurant. It appears that the authorities felt that it would be difficult to stop the activity of providing hookah at eating house/restaurant by solely adding one of the conditions not to provide hookah at a eating house/restaurant. It appears from the affidavit-in-reply filed by the Police Commissioner that with a view to meet with such an emergent situation prevailing in the city and as it was very difficult to keep constant vigilant and monitoring as regards compliance of the condition which was added in the licence, the Police Commissioner thought fit to invoke Section 144 of the Code.

Assuming for a moment that the action of the Police Commissioner of the city of Ahmedabad in issuing the notification in purported exercise of powers under Section 144 of the Code is not tenable in law by itself would not be sufficient to grant the relief as prayed for by the petitioners. Though we do not find error in the same but assuming for a moment that it is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it in public interest. It is a settled principle of law that the remedy under Article 226 of the Constitution of India is discretionary in nature and in a given case even if such action or order challenged in the petition is found to be

improper and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it."

26. We are at a loss to understand the aforesaid reasoning. If Section 144 is to be invoked, the order dated 14th July, 2011 would have expired 2 months thereafter. The High Court went on to state that while administering the law it is to be tempered with equity and if an equitable situation demands, the High Court would fail in its duty if it does not mould relief accordingly. It must never be forgotten that one of the maxims of equity is that 'equity follows the law'. If the law is clear, no notions of equity can substitute the same. We are clearly of the view that the Gujarat High Court judgment dated 2nd December, 2011 deserves to be set aside not only for following the Bombay High Court judgment impugned in the appeals before us but for the reasons stated hereinabove."

5. One thing is clear that the petitioner has obtained license to run a restaurant. But in the restaurant, he is also running hookah bar. There is no specific provision to have a separate license for running the bar and it is form of sale of tobacco which will come under the purview of the Cigarettes Act and Rules. The conditions are equally applicable when there is a tobacco hookah bar. Further, it is mandatory that he cannot sell a tobacco to the minors who aged below 18 years and it is also mandatory fact that this can only be done in a separate room with necessary chimney provision and not inside the restaurant. When such safeguards are made, then the police normally will not interfere. It is only a restricted one when there is violation of the rules, the police got their right to look into the matter and restrict a restaurant unlawfully running bar. Therefore, mandamus is granted to the extent that the police will not unlawfully interfere with the petitioner's business with specific direction if the petitioner violates any rules or regulations definitely this order would not be a bar to the police to take necessary action including raid as and when necessary.

The writ petition is disposed of accordingly. No costs. The connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1 State Rep. by the
The Commissioner - Corporation of Chennai
Rippon Building, Chennai-600 003.

2 The Health Officer
Corporation of Chennai,
Rippon Building,
Chennai-600 003.

3 The Assistant Commissioner of Police,
Nungambakkam Range,
Greaves Road,
Chennai-600 006.

4 Inspector of Police
F-4 Thousand Lights Police Station,
Greaves Road,
Chennai-600 006.

+1cc to Mr.V.S. Senthilkumar, Advocate, S.R.No.1511
+1cc to the Government Pleader, S.R.No.1666

ss(CO)
md(08/02/2017)

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