

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION Nos. 22060 of 2017 and 23213 of 2017

COMMON ORDER:

1) W.P.No.22060 of 2017 came to be filed, seeking issuance of writ of mandamus declaring the action of the respondents in interfering with the business of the petitioner, in serving flavoured hookahs at "Chill on Hill Lounge" situated at D.No.5-9-225/ LII, F-1, 3rd floor, Sanali Mall, Abids, Hyderabad, as illegal and arbitrary; and consequently direct the respondents not to harass the petitioner in running his business.

2) W.P.No.23213 of 2017 came to be filed seeking issuance of writ of mandamus declaring the action of the respondents in seizing the petitioners' business concerns, as illegal, arbitrary and contrary to the provisions of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short "the Act"); and consequently direct the third respondent to handover the keys to the petitioners forthwith.

3) Since the issues in both the writ petitions are one and same, they are heard together and a common order is passed by taking W.P.No.23213 of 2017 as a lead petition.

4) The first petitioner is doing business in the name and style of "Ignite Lounge Cafe United". Similar such business is being

done by all the petitioners but in different name and style. All the petitioners herein though named in different passion, run restaurants/ coffee shops. The petitioners herein also claimed to have obtained appropriate trade licences, copies of which are placed on record. It is further stated that pursuant to the directions of the Apex Court, separate smoking area has been earmarked in each coffee shop which is inclusive of smoking of hookah. In the present writ petitions, the action of police in closing down the business of the petitioners though no impermissible activity is going on in the said premises, is challenged.

5) Referring to judgments of the Apex Court and also the various provisions of the Act, Sri P.Venugopal, learned Senior Counsel would contend that the police have no right or authority to enter the premises and seize the shops, more so, when the business is lawful and legal. He mainly contends that under the guise of Regulation there cannot be any prohibition. It is stated that when the counter is silent as to the power which the respondents have to interfere and close down the business, imposing a blanket ban is illegal and improper. He further submits that if the petitioners serve hookah in the smoking area or space provided for smoking, then only they can be made liable. In the absence of any material to show that the petitioners are indulging in service in the place ear marked for smoking and since there is no ban for sale of smoking substances, it is urged that the

respondent authorities have acted without jurisdiction in interfering with the business of the petitioners.

6) On the other hand, the learned Government Pleader for Home while reiterating the stand taken in the counter would submit that the allegation of respondents closing down the shops is totally false. According to him, the police never sealed or closed the shops/restaurants/coffee shops of any of the petitioner. Referring to Sections 4,6,7,13 and 29 of the Act and also referring to the judgment of the Apex Court as well as this Court, the Government Pleader contends that the writ petitions deserve to be rejected.

7) In order to appreciate the rival arguments advanced it would be useful to refer to certain provisions of the Act and Rules made thereunder.

“Section 3 (l) defines public place:

Public place means any place to which the public have access, whether as of right or not, and includes auditorium, hospital buildings, railway waiting room, amusement centres, restaurants, public offices, court buildings, educational institutions, libraries, public conveyances and the like which are visited by general public but does not include any open space.”

“Section 3 (n) defines the word “Smoking”

Smoking means smoking of tobacco in any form whether in the form of cigarette, cigar, beedis or otherwise with the aid of a pipe, wrapper or any other instruments.”

Section 4 prohibits smoking in a public place, which reads as under:

4. Prohibition of smoking in a public place: No person shall smoke in any public place.

Provided that in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in the airports, a separate provision for smoking area or space may be made.

Section 6. Prohibition on sale of cigarettes or other tobacco products to a person below the age of eighteen years and in particular area: No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product ---

(a) to any person who is under eighteen years of age, and

(b) in an area within a radius of one hundred yards of any educational institution.

Section 12 deal with powers of police officer to search, which reads as under:

(1) Any police officer, not below the rank of a sub-inspector or any officer of State Food or Drug Administration or any other Officer, holding the equivalent rank belong not below the rank of Sub-Inspector of Police, authorized by the Central Government or by the State Government may, if he has any reason to suspect that any provision of this Act has been, or is being, contravened, enter and search in the manner prescribed, at any reasonable time, any factory, building, business premises or any other place---

(a) where any trade or commerce in cigarettes or any other tobacco products is carried on or cigarettes or any other tobacco products are produced, supplied or distributed; or

(b) where any advertisement of the cigarettes or any other tobacco products has been or is being made.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply to every search and seizure made under this Act.

Section 13 deals with power to seize, which reads as under:

(1) If any police officer, not below the rank of a sub-inspector or any officer of State Food or Drug Administration or any other officer, holding the equivalent rank being not below the rank of Sub-Inspector of Police, authorized by the Central Government or by the State Government, has any reasons to believe that, ----

(a) in respect of any package of cigarettes or any other tobacco products, or

(b) in respect of any advertisement of cigarettes or any other tobacco products, the provisions of this Act have been, or are being, contravened, he may seize such package or advertisement material in the manner prescribed.

(2) No package of cigarettes or any other tobacco products or advertisement material seized under clause (a) of sub-section (1) shall be retained by the officer who seized the package or advertisement material for a period exceeding ninety days from the date of the seizure unless the approval of the District Judge, within the local limits of whose jurisdiction such seizure was made, has been obtained for such retention.

Section 14 of the Act deals with confiscation of package: Any package of cigarettes or any other tobacco products or any advertisement material of cigarettes or any other tobacco products, in respect of which any provision of this Act has been or is being contravened, shall be liable to be confiscated:

Provided that, where it is established to the court adjudging the confiscation that the person in whose possession, power or control any such package of cigarettes or any other tobacco products is found is not responsible for the contravention of the provisions of this Act, the court may, instead of making an order for the confiscation of such package, make such other order authorized by this Act against the person guilty of the breach of the provisions of this Act as it may think fit.

8) Section 31 of the Act gives power to Central Government to make Rules in this regard. Pursuant thereto rules were framed in the year 2017. The Central Government issued a notification vide G.S.R. 500 (E), exercising their power under Section 31 of the Act making certain Rules to amend the Prohibition of Smoking in Public Places Rules, 2008, pursuant to which, the following has been inserted in Rule 4 sub-rule 3 of 2008 Rules, which is as under:

“(3) No service shall be allowed in any smoking area or space provided for smoking.

(3A) The owner, proprietor, manager, supervisor or in charge of the affairs of the hotel, restaurant or airport, shall display a board at the entrance of the smoking area or space of minimum size of 60 x 30 cm with a white background and having the message in English and one Indian language as applicable in black colour that----

- (i) tobacco smoking is harmful to your health and the health of non-smokers; and
- (ii) entry of person below the age of eighteen years is prohibited.”

9) Keeping these provisions in background, I shall now proceed to deal with the cases on hand.

10) Admittedly, all the petitioners have a licence to carryout the businesses of running the coffee shop/ restaurant. As per Section 4 of the Act, if the said restaurant has seating capacity of 30 persons or more, a separate provision for smoking area has to be provided. The word Hookah, though not defined, is referred to in Section 3 (k) of the Act which defines “production”. A reading of the said provision would show that the word “production” includes making of cigarettes, cigars, cheroots, beedis, cigarette tobacco, pipe tobacco, hookah tobacco, chewing tobacco, pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called) or snuff -----.

Therefore, the Act takes within its fold hookah tobacco and pipe tobacco as well. If the restaurant or coffee shop falls within the ambit of Section 4 of the Act, then it has to provide a separate smoking zone.

11) The notification which was issued in the month of May, 2017, by the Ministry of Health and Family Welfare, clearly indicate that no service shall be allowed in a smoking area or in the space provided for smoking. Therefore, the restaurant owners shall not involve themselves in the act of service to their customers, in the prohibited area.

12) Section 12 of the Act confers powers to the police officer not below the rank of Sub-Inspector of Police or any officer of

authorized by the Central Government or State Government to search the premises at any reasonable time, if he suspects that the provisions of the Act are contravened namely cigarettes or any other tobacco products are produced, supplied or distributed or whether any advertisement of the cigarettes or any other tobacco products are being made. While affecting a search and seizure, Section 12 of the Act clearly says, that the provisions of the Cr.P.C. have to be followed.

13) A conjoint reading of Section 12 and 13 of the Act, clearly indicate that what is contemplated therein is with regard to the seizure of any package of cigarettes or any other tobacco products but definitely not the premises.

14) Situation some what identical to the case on hand came up for consideration before this Court in W.P.No.3202 of 2016 and Batch, W.P.No.14093 of 2011, W.P.No.4942 of 2012 and Writ Appeal No.307 of 2017.

15) In W.P.No.3202 of 2014 and Batch, this Court dealt with a situation where the police were interfering with the business activities of the petitioners therein, in serving flavoured hookah in their coffee shops. Dealing with the said aspect and also taking into consideration the various provisions of the Act, rejected the request of the petitioners, holding as under:

“17. In the light of this provision and Section 149 Cr.P.C., the contention of the learned Counsel for the petitioners that the acts of the Police amount to infringement of fundamental rights and that the police are not the

competent authority, but it is only the G.H.M.C that is competent to interfere with the business of the petitioners, who are serving Hookhas, does not have any force. Therefore, this Court is of the view that under Section 12 of the Act and Section 149 Cr.P.C., the police including the other authorities as authorized by both Central and State Governments have ample powers to inspect the business premises of the petitioners. In this regard, the learned Counsel for the petitioners has failed to place any such authority, under which, the G.H.M.C is only competent to inspect the business of the petitioners in serving Hookah.

18. In view of the foregoing discussion, this Court is of the view that the action of the respondents-police is in accordance with law and any interference by this Court with the powers of the police in this regard by exercising the powers under Section 226 of the Constitution of India, is not warranted.

19. Further, the Director General of Police, Telangana State, is directed to take appropriate action against the officers for their inaction in respect of the restaurants being used as hookah centres and also to take action against the high-handed acts of the officers, who interfered with the restaurants, which are being run without there being any violations.

16) The said issue again came up for consideration before this Court in W.P.No.14093 of 2011. A learned Single Judge of this Court after referring to the order passed in W.P.No.3202 of 2014 and the judgment of the Apex Court in *Narinder S.Chadha and others v. Municipal Corporation of Greater Mumbai*, held as under:

“The facts in W.P.No.3202 of 2014 and batch are same and similar to the facts asserted in the instant writ petition.

Further, as rightly pointed out by the respondents there can't and ought not to be a blanket direction against the respondents for such direction virtually prevents the Police from even knowing or investigating what is actually happening in the name of flavoured hookahs. The decision of Hon'ble Supreme Court is distinguishable to the fact situation of this case, for a Circular was challenged in the reported case and the legality of the Circular was considered and decided. Whereas in the case on hand the prayer and the cause of action are on alleged interference by Police against flavoured hookahs serving and no written order or proceeding is placed on record to examine the legality of such order or proceeding. Therefore, having regard to the view taken in the common order dated 27-01-2017 in W.P.No.3202 of 2014 and batch, I am satisfied that the instant writ petition can be dismissed by adopting the same reasons."

17) The two judgments referred to above dealt with situation where the interference of the police in the business of the petitioners in serving flavoured hookah was in challenge. Situation on hand now is totally different and still verse in view of the notification dated 23.05.2017 which prohibited service in smoking area or space provided for smoking. Admittedly, hookah is a product which contains tobacco and when any product contains tobacco, the same has to be puffed in a non-smoking zone. In view of the circular issued by the Government, service of hookah even in the no-smoking zone would be impermissible.

18) It is to be noted here that the above said provision will apply if the hotel/restaurant has 30 rooms and the coffee shop has seating capacity of 30 persons or more, which does not mean that

hookah can be freely supplied in a restaurant where seating capacity is less than 30 or a hotel where there are less number of rooms.

19) Having regard to the above, and taking into consideration the reasoning given by the learned Judge in W.P.No.302 of 2014 and Batch, I do not find any illegality in police officers, not below the rank of the Sub-Inspector of Police entering into the premises and searching the same, so as to find out whether the owners of the restaurants have floated or violated any of the provisions of the Act and Rules made thereunder. But at the same time, under the guise of implementing the Regulation, the police shall not resort to cause inconvenience or any harassment to the customers/ persons present there or to the owners of the restaurant. It is needless to mention that any search and seizure shall be as contemplated under Section 12 of the Act, which prescribes the authorities to follow the procedure under Cr.P.C.

20) At this stage, the counsel for the petitioners would submit that without following the procedure contemplated under law, the police have locked and sealed the premises and kept the keys with them. The Government Pleader for Home disputes the same. He submits that though the police have conducted a raid to find out whether there are any illegal activities are going in the shops of the petitioners, but disputed the closure and seizure of the said places.

21) Though the learned counsel for the petitioner vehemently urged that even the premises has been sealed and that the keys of the said premises are with the police, but the same is strongly disputed by the learned Government Pleader. However, photographs showing closure of business premises are placed on record. To resolve the same, it would be appropriate to give a direction to the concerned police to prepare a panchanama to that effect disclosing the present status of the business premises, take the signature of the owner of the shop on the panchanama along with that of two independent witnesses and submit a copy of the same to a Court of Judicial Magistrate of First Class within whose jurisdiction the said police station falls. A copy of the said panchanama shall also be given to the person, who is running the business, so as to enable him to take appropriate action, if aggrieved.

22) It is also directed that if any of the police are found to act in a highhanded manner, the shop owners are always at liberty to bring the same to the notice of the Director General of Police/ Commissioner of Police, as directed by this Court in W.P.No.3202 of 2014, in which event the said authority shall forthwith take necessary steps in that regard.

23) With the above directions, both the writ petitions are disposed of. There shall be no order as to costs.

24) Consequently, miscellaneous petitions, if any, pending in these Writ Petitions shall stand closed. There shall be no order as to costs.

JUSTICE C. PRAVEEN KUMAR

02.08.2017
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