

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.25439 of 2018

ORDER:

The petitioner states to be running a restaurant-cum-coffee shop in the name and style of *Churros Decaf* which has a seating capacity of more than 30 persons and has made separate provision (space) for smoking area in compliance of the provisions of Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2000, ("the Act" for short) and it has a variety of other food and beverages in the shop. As part of his business, the petitioner also offers hookah pot to its customers after subjective satisfaction that the visiting customers are above 18 years of age by taking a photocopy of the proof evidence to that effect.

2. The grievance of the petitioner is that the respondent-Police are interfering with his business activity in serving flavoured hookah in the designated smoking area in the restaurant and preventing him from doing trade which is in

violation of Article 14 and 19 (1) (g) of the Constitution and for issuance of appropriate consequential directions to the respondents. Hence, this writ petition.

3. Counter affidavit is filed by the 2nd respondent wherein it is stated that the Ministry of Health and Family Welfare Department, by notification dated 23-05-2017 amended sub-Rule (3) of Rule 4 by way of Prohibition of Smoking in Public Places (Amendment) Rules, 2017, (for short, “the Rules”) as under:-

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

It is stated that in view of the amendment to sub-Rule (3) of Rule 4 of the Rules, the petitioner can not serve tobacco related products *i.e.* hookah tobacco to its customers even in the smoking zone allocated for that purpose. That the petitioner is not entitled to take shelter on the decision of the Supreme Court in **NARINDER S CHADHA vs. MUNICIPAL**

CORPORATION OF GREATER MUMBAI,¹ as amendment to sub-Rule (3) of Rule 4 of the Rules is brought in the year 2017.

That numerous complaints against the hookah centres/coffee shops are received complaining statutory violations and the Police are keeping surveillance over all the hookah centres/coffee shops and conducting checks to ensure for any minor children below the age of 18 years are being allowed and see that the hookah centres do not conduct business beyond permitted hours of business. That in order to prevent the Police from taking any legal action in the event of any unlawful activities going on, under the guise of hookah centres, the petitioner filed the present writ petition with false and baseless allegations. That universally tobacco is regarded as one of the major public health hazards and it is responsible directly or indirectly for an estimated 8 lakhs deaths annually in the country. It has been found that in the treatment of the tobacco related diseases and the loss of productivity in the

¹ LAWS (SC) 2014 1214

country is much more than all the benefits recurring in the form of revenue and employment generated by the tobacco industry. That the managements of these hookah centres are learnt to have been earning disproportionate profits by charging Rs.500 to Rs.1,500/- from each of the customer of hookah without a time limit. Continuous exposure of youth to smoking for hours together without a time limit, by taking advantage of their adolescent age will adversely impact on public health negating the objectives sought to be achieved by law. That the relief sought for by the petitioner cannot be granted in view the peculiar facts and circumstances of the case and the writ petition is liable to be dismissed.

4. Sri D. Vijaya Kumar learned senior counsel appearing for the petitioner strenuously faulted the action of the respondent-Police in interfering with the trade of the petitioner in offering hookah services in the designated smoking area of the restaurant as excessive action on the part of the respondent-Police. It is stated that by way of amendment to

sub-Rule (3) of Rule 4 of the Rules, which connotes smoking area or space provided for that purpose shall be used only for the purpose of smoking, and no other service(s) shall be allowed, cannot be construed and understood as restricting supply of flavoured hookah, which is a tobacco product and defined as such under the term “tobacco products” in Section 3 (p) of the Act inasmuch as tobacco products includes cigarette tobacco, pipe tobacco and *hookah* tobacco. Learned senior counsel also submits that to make available hookah tobacco to its customers is not a “service”, but a “sale” for consideration.

5. Learned Government Pleader for Home, on the other hand, submits that amendment to sub-Rule (3) of Rule 4 of the Rules was brought in keeping in view the larger interest of the youth and the respondent-Police are taking steps in exercise of the power conferred under Sections 12 and 13 of the Act. It is also stated that in view of the amendment to sub-Rule (3) of Rule 4 of the Rules, *hookah* tobacco service cannot

be sold in smoking area as it is a “service”. It is further submitted that the petitioner if he is so informed, ought to have challenged the amended to sub-Rule (3) of Rule 4 of the Rules and without challenging the amendment to the Rule, cannot seek for immunity thereof.

6. The short point that arises for consideration in this case is whether hookah tobacco can be permitted to be offered in a zone specified as smoking area in the light of the amendment to Rule 4 (3) of the Rules which connotes “*no service shall be allowed in any smoking area or space provided for smoking*”.

7. It is worthwhile to refer to certain provisions of the Act:-

Section 3 (l) defines “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 conveniences and the like which are visited by general public but does not include any open space. Section 3 (m) defines

“Sale” means with its grammatical variations and cognate expressions, any transfer of property in gross by one person to another, whether for cash or credit, or by way of exchange and whether wholesale or retail, and includes an agreement for sale, and offer for sale and exposure for sale.

8. Section 3 (n) defines “smoking” means smoking of tobacco in any form whether in the form of cigarette, cigar, *beedis* otherwise with the aid of a pipe, a wrapper of any other instruments. (emphasis supplied)

9. Where the act of smoking is permitted is stated in proviso to Section 4 of the Act. Section 4 of the Act stipulates that no person shall smoke in any public place; provided that in a hotel having 30 rooms or a restaurant having seating capacity of 30 persons and more and in the airports, a separate provision for smoking area or space may be made.

10. The tobacco products which can be used in the act of smoking are defined in Section 3 (p) of the Act as “tobacco products” means the products specified in the Schedule. In the

Schedule appended to Section 3 (p) of the Act, tobacco products used in smoking includes; 1.cigarettes, 2.cigars, 3.cheroots, 4.beedis, 5.cigarette tobacco, pipe tobacco and *hookah tobacco*, 6.chewing tobacco, 7.snuff, 8. pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called), 9.gutka & 10.tooth powder containing tobacco.

Rule 4 (3) pre-amended reads as follows:-

“The smoking area or space shall be used only for the purpose of smoking and no other service(s) shall be allowed”

Rule 4 (3) post amendment reads as follows:-

“No service shall be allowed in any smoking area or space provided for smoking”

11. The respondent-Police are purportedly restricting the petitioner in doing trade and sell hookah in the smoking area treating it as “service.” It is the contention of the learned senior counsel that the act of providing flavoured hookah for human consumption in the space provided for smoking amounts to a “sale” and not a “service” therefore, the

respondent-Police misplaced themselves in construing the amendment to the sub-Rule (3) of Rule 4 of the Rules.

12. The Supreme Court in **NARINDER S CHADHA's** case (1 supra) considered an identical issue and with reference to Rule 4 (3) of the Rules, therein it was canvassed that inasmuch as in a smoking area "no other service shall be allowed," sale of tobacco or tobacco related products would amount to a service and that cannot be allowed. The Supreme Court while refuting this contention at paras 13 and 18 held thus:-

".....First and foremost, it is difficult conceptually to say that "sale" and "service" are interchangeable items. "Sale" is defined under the Act as meaning a transfer of property in goods for consideration. It is obvious that "sale" has to be understood in this sense, and property so understood would not include "service" which would refer not to transfer of property in goods but to "service" as is understood in its ordinary sense."

"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."

13. It is to be seen that in the amended Rule 4(3) of the Rules what is “service” and what does not includes service is not defined. A reading of the definition of sale in Section 3 (m) of the Act, it is understood that it is a transfer of property in goods for consideration and in other words, it is a transfer of hookah tobacco for consideration. The instrument used in hookah is an aid to smoke the hookah tobacco and providing an instrument for smoking cannot be construed as offering any “service” in terms of the definition of smoking provided under Section 3(n) under the Act which reads as;

3(n) “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;”

14. I am also fortified in my view in the light of the law laid down by the Supreme Court in **NARINDER S CHADHA’s** case (1 supra) and the amendment brought in Rule 4 (3) of the Rules cannot make any difference. This Court has all the concern for the protection of the health of the adolescents falling prey to this menace of smoking tobacco products in

whatever form, but so long as tobacco products, which includes hookah tobacco and consumption thereof is permitted in smoking zone as per proviso to Section 4 of the Act, use of such a tobacco product by persons above the age of 18 years, in a space provided for that purpose cannot be stopped unless and until the law circumscribes and prohibits such consumption of hookah tobacco in the smoking zones.

15. In the result, the writ petition is allowed. However the order will not preclude the authorities from enforcing the provisions of the Act and the Rules made thereunder, especially Sections 4 and 6 of the Act and take action for violation of the provisions of the Act and the rules, if any.

Miscellaneous petitions if any pending shall stand disposed of.

There shall be no order as to costs.

A.RAJASHEKER REDDY, J

Dated: 13-11-2018
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