

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO.3978 OF 2019

Munib Birya & Ors.Petitioners
Versus
The State of Maharashtra & Ors.Respondents

Mr. Vineet Naik, Senior Advocate a/w. Amogh Singh i/b.Jeet Gandhi,
Advocate for the Petitioner.

Mr. S.V. Kamdar, Senior Advocate a/w. Mr. Deepak Thakare, PP a/w. Mrs.
A.S. Pai, APP for the Respondent-State.

Mr. Kunal Waghmare, Advocate for the Respondent No.2-MCGM.

**CORAM : RANJIT MORE &
N.J. JAMADAR, JJ.**

DATE : 22nd AUGUST, 2019.

P. C. :

1. Heard learned counsel for the respective parties.

2. The petition is filed for the following reliefs:-

(a) *That this Hon'ble Court may be pleased to examine the legislation and its non-application to tobacco free products and issue necessary directions to the effect that no coercive action of any nature ought to be initiated if hookah is served without tobacco;*

(b) *In-the alternative, this Hon'ble Court may be pleased to; direct that Respondents cannot take any coercive steps against the Petitioner for serving herbal tobacco free hookah unless there are conclusive scientific findings that tobacco is present in the hookah served by the Petitioner."*

3. The Criminal Writ Petition No.2719 of 2019 came to be disposed of by the Division Bench of this Court by an order dated 15th July, 2019. Reliefs claimed in the said petition are similar to the reliefs claimed in the present petition. The case of the petitioner in Writ Petition No.2719 of

2019 was that he served tobacco free hookahs in this restaurant and for that purpose he used product by brand name "Soex". Mr. Kamdar, learned senior counsel for the respondent-state in the said petition submitted that the petition is premature and as a matter of fact, the petitioner is not prohibited from running a business of restaurant or serving hookah which according to the petitioner does not contain tobacco or nicotine. Mr. Kamdar also made a statement that the State is duty bound for implementation of prohibition under the amendment to the Cigarettes and Other Tobacco Products Act, 2003 (COTPA). We accepted the statement and disposed of the said petition.

4. Mr. Naik, learned senior counsel for the petitioners submitted that petitioners in this petition are also running a business of restaurant and serving herbal hookahs. It is the specific contention of Mr. Naik that despite the order dated 15th July 2019 passed in Writ Petition No.2719 of 2019, the petitioners are harassed by the Corporation and police. The petitioners are not allowed to serve herbal hookahs in their restaurant. In Paragraph 14 of the petition, the petitioners have made following averments:-

"The Petitioner states that, even after the order passed by this Hon'ble Court in Writ Petition No.2819 of 2019 dated 15th July, 2019, the Respondent authorities are not permitting the use of Herbal hookah by the Petitioners in their outlets. There is a constant fear of coercive action being taken by the Respondent authorities. The Petitioners are constrained to approach this Hon'ble Court through this Writ Petition as the Respondents are not permitting the Petitioners to carry on with their profession. The Petitioners have tried to convince the Authorities not to take any coercive steps if the Petitioners serves hookah without the

tobacco products and not to treat the Petitioners at par with those who serve hookah with tobacco products and thereby fall Square within the ambit of COTPA. The lack understanding or initiative to appreciate the law and treats the Petitioner's herbal tobacco free hookah with the same yardstick as that of the tobacco based hookah."

5. We have also perused the provisions of COTPA as amended in the year 2018. By the said amendment, in Section 3 of the said Act, after Clause (e), Clause (ee) is inserted which reads as under:-

"hookah bar" means an establishment where people gather to smoke tobacco from a community hookah or narghile which is provided individually."

By inserting Section 4A, this Act seeks to prohibit a person, either on his own or behalf of any other person to open or run any hookah bar in any place including the eating house.

The conjoint reading of these provisions makes it clear that what is prohibited under COTPA is smoking tobacco in a hookah bar.

6. Mr. Kamdar, learned senior counsel, reiterates his statement made in Writ Petition No.2719 of 2019. In the facts and circumstances referred above, he states that the petitioners are not prohibited from running business or serving hookah, which according to them do not contain tobacco or nicotine. He also stated that the State is duty bound for implementation of prohibition under the provision of COTPA and except what is prohibited under 2018 amendment Act, nothing would be prohibited. The statement is accepted.

7. Needless to state that, in case, there is any infraction of the provisions of the COTPA as amended in the year 2018, the police officer, not below the rank of the Assistant Police Inspector, is empowered to take legal action for the infringement of the conditions imposed under COTPA act as well as taking action on the hookah parlours where drugs/narcotics are provided and consumed which falls under the purview of Police Department.

8. In other words as long the petitioners comply with the provisions of COTPA and do not serve any prohibited substance in the hookah parlour then no action can be taken against them. However, it is made clear that if it is found that the petitioners are selling/using any substance prohibited under the COTPA then surely an action can be taken against them. We find that at this stage no direction more than what is stated above is necessary.

9. Subject to above, we dispose of the petition.

10. The learned PP is directed to communicate this order to all the concerned authorities.

[N.J. JAMADAR, J.]

[RANJIT MORE, J.]