

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 1746 of 2020**

1. M/s. 3 Kings Restro, Situated At VIP Road, In Front Of Silver Spring, Temri, Dharsiwa, Raipur, District - Raipur, Chhattisgarh Through Its - Proprietor Mr. Amar Nath Yadav
2. Amar Nath Yadav (Proprietor - M/s. 3 Kings Restro), S/o Mr. Lala Ram Yadav, R/o Gouli Para, Byron Bazar, Raipur, District – Raipur, Chhattisgarh.

---- Petitioners**Versus**

1. The State Of Chhattisgarh Through The Secretary, Department Of Home Affairs, Mahanadi Bhawan, Secretariat, Naya Raipur, District – Raipur, Chhattisgarh
2. The Secretary, Department Of Excise, Mahanadi Bhawan, Secretariat, Naya Raipur, District Raipur, Chhattisgarh
3. The Superintendent Of Police, Raipur, District Raipur, Chhattisgarh
4. Station House Officer, Mana Police Station, Raipur, District Raipur, Chhattisgarh

---- Respondents

For Petitioner	:	Mr. Yogendra Pandey, Advocate
For State	:	Mr. Siddharth Dubey, Dy. Govt. Advocate

Hon'ble Shri Justice P. Sam Koshy**Order On Board****16.09.2020**

1. The grievance of the petitioners in the present writ petition seems to be more on the alleged arbitrary, unauthorized and unlawful act on the part of the police personnels under the respondents 3 & 4 in the course of

the petitioners serving Hookah to their customers at the petitioners licensed restaurant premises.

2. According to the petitioners, petitioner no.1 is registered as a “Restaurant” under the regulations framed under Food Safety and Standard Act, 2006 with sitting capacity of more than 30 persons. According to the petitioners, they are authorized to serve food and drinks for consumption of their customers in terms of the regulations governing the field. They have also provided a smoking zone within their premises where the customers allowed smoking and also serve fruit flavored Hookah to those customers who ask for it.
3. The contention of the petitioners is that they ensure that the Hookah is served to only those persons above the age of 18 years. In addition, there are no schools or colleges within a radius of 100 yards from the restaurant premises. According to the petitioners, the smoking zone is regulated under the provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production and Supply and Distribution) Act, 2003 (for short hereinafter referred as “COTPA”). According to the petitioners, they have been running the said business for quite sometime. However, of late the officers under the respondents 3 & 4 have been frequently visiting the petitioners' establishment and forcefully directing the petitioners to stop providing Hookah to their customers and at times the police personnels seize the hookah materials without any seizure proceedings and also threaten the customers of dire consequences if found smoking Hookah. It is this attitude of the police personnels which has forced the petitioners to file the present writ petition.

4. According to the petitioners, in the course of the police personnels seizing equipments and the materials used for smoking of Hookah, the police personnels do not provide any seizure memo or written receipt in respect of the articles and products seized by them. When the petitioners ask them for the same, the police personnels threaten them of sending them to jail. According to the petitioners, they have ensured that the provisions of COTPA is fully and strictly adhered to and the petitioners do not have any objection on the State authorities inspecting the premises but whatever is done, should be done in accordance with the provisions of law.
5. The further contention of the petitioners is that once the petitioners are complying with the provisions of COTPA, they do not require nor does any other law require obtaining of separate licence or permission for serving Hookah to their customers in smoking area within the premises of the petitioners. It is also the contention of the petitioners that unnecessary restrictions and interference being made by the police personnels at the petitioners' establishment amounts to violation of Article 19(1)(g) of the Constitution of India and which also includes Right to Life under Article 21 of the Constitution of India.
6. Referring to COTPA, counsel for the petitioners submits that the very purpose of framing of the said Act was to ensure that the restrictions are put on smoking in public places. The said Act itself authorizes the police authorities to enter and search a premises where they have reason to suspect that the provisions of this Act are being violated and thus, the power so conferred upon the police authorities cannot be denuded. Counsel for the petitioners also does not dispute the

authority of the police personnels in conducting inspection at their premises but all that the petitioners insist upon is that whatever is done, should be done in accordance with law.

7. It would be relevant at this juncture to refer to the provisions of COTPA for better understanding of the issue involved. “**Public place**” stands defined under Section 3 (l) of the said Act:

“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;

Similarly, “**smoking**” also has been defined under Section 3(n) of the said Act:

“smoking” means smoking of tobacco in any form whether in the form of cigarette, cigar, beedies or otherwise with the aid of a pipe, wrapper or any other instruments;

Likewise, “**Tobacco products**” referred to under Section 3(p) means products specified in the Schedule and in the Schedule, item no.5 reads as under:-

“Cigarette Tobacco, Pipe Tobacco and **Hookah Tobacco**”

8. These definitions which have been referred to herein above would clearly demonstrate that smoking by Hookah is not prohibited except that it shall be subject to the restrictions as provided under COTPA. It is also worthwhile at this juncture to reproduce the provisions of Sections 11 to 13 of COTPA which deals with **testing, power of entry and search and also the power to seize**. For ready reference these three

sections are also reproduced hereinunder:

“11. Testing laboratory for nicotine and tar contents.- For purpose of testing the nicotine and tar contents in cigarettes and any other tobacco products the Central Government shall by notification in the Official Gazette grant recognition to such testing laboratory as that Government may deem necessary.

12. Power of entry and search-(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 being not below the rank of Sub-Inspector of Police, authorised 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.

13. Power to seize (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 reason 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 materials 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.”

9. The Central Govt. in the year 2008 framed rules under the aforesaid Act i.e. the **Prohibition of Smoking in Public Places Rules, 2008** (in short “the Rules of 2008”). The said Rules also define “**public place**” and “**smoking area or spaces**”. Public place and smoking area or space are defined under Sections 2(d) and 2(e) of the Rules of 2008 which again for ready reference is being reproduced hereinunder:

“2(d) “public place” defined in section 3(1) of the Act shall also include work places, shopping malls, and cinema halls.

2(e) “smoking area or space” mentioned in the proviso to section 4 of the Act shall mean a separately ventilated smoking room that-

- (i) is physically separated and surrounded by full height walls on all four sides;
- (ii) has an entrance with an automatically closing door normally kept in close position;
- (iii) has an air flow system, as specified in Schedule I,
- (iv) has negative air pressure in comparison with the remainder of the building.”

10. Section 3 of the Rules of 2008 strictly prohibits smoking in a public

place. For ready reference, Section 3 of the Rules of 2008 is also reproduced hereinunder:

“3. Prohibition of smoking in a public place – (1) The owner, proprietor, manager, supervisor or in charge of the affairs of a public place shall ensure that:

(a) No person smokes in the public place (under his jurisdiction/implied).

(b) The board as specified in Schedule II is displayed prominently at the entrance of the public place, in case there are more than one entrance at each such entrance and conspicuous place(s) inside. In case if there are more than one floor, at each floor including the staircase and entrance to the lift/s at each floor.

(c) No ashtrays matches lighters or other things designed to facilitate smoking are provided in the public place.

(2) The owner, proprietor, manager, supervisor or incharge of the affairs of a public place shall notify and cause to be displayed prominently the name of the person(s) to whom a complaint may be made by a person(s) who observes any person violating the provision of these rules.

(3) If the owner, proprietor, manager, supervisor or the authorized officer of a public place fails to act on report of such violation, the owner, proprietor, manager, supervisor or the authorized officer shall be liable to pay fine equivalent to the number of individual offences.”

11. Section 149 of the CrPC provides power of the police personnels to intercourse to the best of their ability ensuring prevention of Commission of a cognizable offence.

12. If we read the provisions of COTPA, there are large number of restrictions and prohibitions imposed under the said Act. Under Section

12 of the said Act, the police authorities have been provided the power of entry and search to ensure that the restrictions and prohibitions of COTPA are not violated or breached.

- 13.** The High Court of Telangana had the occasion of dealing with a similar issue in a series of writ petitions, the leading among which being WP No. 3202 of 2014 in the case of Palais Fumeurs Coffee Lounge Vs. Government of Andhra Pradesh. The Telangana High Court vide its common judgment dated 27.01.2017, while dismissing the writ petition, in paragraphs 15 to 20 held as under:

“15. In view of the object and the provisions of the Act coupled with Section 149 Cr.P.C and taking into consideration the violations pointed by the respondents-police, this Court is of the view that serving of hookah in the restaurants of the petitioners without complying the provisions of the Act and the Rules and without displaying statutory and pictorial warnings and notices, amounts to violation as pointed out by the police.

16. Insofar as the interference of the police are concerned, it is pertinent to note that the provisions of Section 12 of the COTPA Act confer powers to the police not below the rank of Sub Inspector of Police or any officer of the 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, 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 at factory, building, business or any other place.

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.

20. Accordingly, all the above Writ Petitions are dismissed. No Costs. Miscellaneous petitions pending, if any, shall stand dismissed.”

14. Similarly, the High Court of Karnataka also in a similar writ petition had given a direction in the nature of writ of mandamus restraining the respondents from interfering with the lawful activities carried on by the petitioners. The High Court of Karnataka in WP No. 14226/2015, in the case of Diamond Enterprises Vs. State of Karnataka and others, vide its judgment dated 03.09.2015, in paragraphs 4 & 5 has held as under:

“4. If that be the position, the use of the instrument known as Hooka cannot be prohibited as long as such smoking is of

Tobacco through the Hooka and no other prohibited substance is used. Therefore, if the said Hooka is used for any other illegal purpose, certainly the law enforcing authorities including the jurisdictional police would be entitled to take appropriate action in accordance with law.

5. Therefore, the only direction that is required to be issued in the instance petition to the respondents is not to insist upon the petitioner to obtain licence for the use of Hooka in the smoking zone provided by the petitioner in their premises, if such facility is provided only for smoking Tobacco through Hooka. However, if any credible information is received and in the process of monitoring, if any illegal activity is found including use of any banned substance, certainly the respondents or such other law enforcing authorities would be entitled to take action in accordance with law.”

15. Again in another matter, in the case of M/s Hangover V. The Govt. of Karnataka and others, WP No. 18596 of 2019, the Karnataka High Court vide its judgment dated 24.04.2019, in paragraph-4, has made the following observations:

“The said contention deserves to be accepted for the simple reason that under the guise of smoking hookah, customers at the petitioner-restaurant cannot be allowed to use ganja marijuana, etc. That apart, smoking of hookah should not cause inconvenience to other customers, since smoking having been prohibited in public places, an exclusive area with separate enclosure requires to be reserved for hookah bar. Hence, in addition to the conditions noted hereinabove, an additional condition requires to be imposed on the petitioner and it shall be as under:

- (a) Petitioner shall earmark exclusively a separate area/place(s) with appropriate enclosure in the restaurant/hotel premises and necessarily after obtaining license for the purpose of hookah smoking and no other area or portion of premises shall be used by the customers of the petitioner for smoking hookah.
- (b) Under the guise of inspection, the respondent-jurisdictional police shall not harass the petitioner. However, it does not deter them from inspecting the premises at periodical intervals with notice to the petitioner, if necessary.”

16. Similarly, the Madras High Court also in WP No. 710 of 2017, in the case of M/s. Vapour Lounge Vs. The Commissioner of Police Grater Chennai & another, vide its judgment dated 10.01.2017, in paragraph-6, has held as under:

“6.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 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 has 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 they (petitioner) violate 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.”

17. From the aforesaid judicial pronouncement and the provisions of law reproduced in the preceding paragraphs, read with section 149 of the CrPC, it goes without saying that there is no specific restriction on the petitioners in serving Hookah to their customers subject to the restrictions provided under COTPA and the rules framed therein under the Rules of 2008. It further goes without saying that the police authorities also will not unnecessarily and illegally interfere with the functioning of the petitioners' establishment unless of course the police authorities have reason to believe that the provisions of the Act and the Rules framed therein are being violated or breached or in the garb of serving Hookah the petitioners should not indulge in the activities which are otherwise unlawful.
18. The police authorities definitely have the authority to keep a check upon the petitioners' establishment and such other similar establishments to the extent of ensuring that no smoking is permitted in a public place within the petitioners' establishment except for the area exclusively marked by the petitioners for smoking which includes Hookah.
19. It is often seen that the Restaurant people initially start their business by serving Hookah to their customers and thereafter in the guise of permitting Hookah to be smoked, they allow the use of Ganja and other similar banned and prohibited products to their customers. Such misuse has to be sternly dealt with and which is possible only on a frequent and regular check by the police authorities in this regard.
20. For all the aforesaid discussions held, this Court is of the opinion that the present writ petition also can be disposed of directing the

respondents and the police authorities to ensure that the provisions of COTPA is strictly adhered to by all the stake holders. However, in the process, the police authorities should not unnecessarily harass the petitioners or any of the customers unless there is a clear breach or violation of the provisions of law detected and in the event of a breach being detected, due procedure of law should be followed.

21. At the same time, this Court also directs the petitioners that they should also ensure that in the course of serving Hookah, they do not commit breach of the provisions of COTPA and it must be ensured that smoking of Hookah is permitted only within the restricted area exclusively meant for smoking and under no circumstances should smoking of cigarette or smoking of Hookah be permitted in the public place particularly at the Restaurant area.
22. With the aforesaid direction and observations, the writ petition stands disposed of.

Sd/-
P. Sam Koshy
Judge