

ast

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

PUBLIC INTEREST LITIGATION (L) NO. 111 OF 2010

Crusade Against Tobacco (A branch of
The Nell Charitable Trust) & ors. .. Petitioners.
vs
Union of India & ors. .. Respondents

Mr. A. Zal Ardhyarujina, Mr. Sanjay V. Kadam, Ms. Apeksha
Sharma i/b. Kadam & Co., advocate for petitioners.

Mr. K.R.Belosay, "A" Panel Counsel for State.

Ms. Geeta Joglekar, advocate for BMC.

Mr. Shyam Mehta, Rajinder Kumar & Mr. K.R.Chaudhary, advocate
for respondent No.1.

Mr. S.U.Kamdar, Sr. Advocate with Ms. Pooja Patil i/b. Munir
Merchant, advocate for intervenors/respondent Nos. 8 and 9.

CORAM: **MOHIT S. SHAH, C. J. AND**
GIRISH GODBOLE, J
13 July, 2011

P.C.

1. The Petitioner is a NGO dedicated to the cause of tobacco control in the interest of public health. The Chairman of the petitioner NGO has also been awarded a certificate of appreciation from the World Health Organization in recognition of his

outstanding services towards tobacco control. In this PIL, the petitioner has made grievance that the respondent authorities are not effectively implementing the provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter referred to as COPTA) and the rules framed thereunder including the Prohibition of Smoking in Public Places Rules (popularly known as Smoke Free Rules, 2008). The particular grievance is that the eating houses which are granted licenses also run hukka bars in violation of the aforesaid statutory provisions. At the last hearing on 5 May 2011, this Court had noticed that licenses issued by Municipal Corporation, Greater Mumbai under section 479 of the Mumbai Municipal Corporation Act, 1888 did not incorporate terms and conditions for implementation of the above provisions. This Court had therefore observed that the Municipal Corporation shall incorporate the necessary terms and conditions in the licenses of eating houses, including existing licenses, to provide that licensees shall comply with the aforesaid statutory provisions and breach of any of the provisions of the above Act and Rules shall entail cancellation/suspension of license.

2. Accordingly, the Municipal Corporation of Greater Mumbai has issued circular dated 1/7/2011 for incorporation of condition Nos. 35 to 37 to the General conditions, which shall be deemed to be incorporated in all the eating house licenses, including the existing licenses issued under section 394 of the MMC Act. The relevant conditions read thus:

“Condition No. 35 – The licensee shall not keep or allow to keep or sell or provide any tobacco or tabacco related products in any form whether in the form of cigarette, cigar, bidis or otherwise with the aid of a pipe, wrapper or any other instrument in the licensed premises.

The Commissioner may permit smoking area as per Section 4 of Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production Supply and Distribution) Act, 2003 (COTPA) in an eating house having seating capacity of thirty persons or more.

A) The smoking area shall mean 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 doors normally kept in close position;*
- iii) has an air flow system that*
 - a. is exhausted directly to the outside and not mixed back into the supply air for the other parts of the building.*
 - b. is fitted with a non-recirculation exhaust ventilation system or an air cleaning system, or by a combination of the two, to ensure that the air discharges only in a manner that does not re-circulate or transfer it from a smoking area or space to non-*

smoking areas.

iv) has negative air pressure in comparison with the remainder of the building.

B) The Smoking area shall not be established at the Entrance or Exit of the eating house and shall be distinctively marked as "Smoking Area" in English & in Marathi as per the COTPA.

C) The Smoking area shall be used only for the purpose of smoking and no other service(s) or any apparatus designed to facilitate smoking shall be provided.

D) The smoking area shall not be less than 100 Sq. ft. with each side of the room shall not be less than 8 ft. and height of the room shall not be less than 9 ft. The smoking area shall be included in the licensed area of the eating house.

(E) The total area of the smoking room shall not be more than 30% of the total licensed service area of the eating house.

Condition No. 36 - *No person below the age of 18 years shall be permitted in the smoking area.*

Condition No. 37 – *The owner, proprietor, manager, supervisor in charge of the eating house shall notify and caused 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 provisions of COTPA."*
(emphasis supplied)

3. Some of the persons who are issued such different licenses and have been running hukka bars have come forward for impleading as party respondents and they have been impleaded as party respondents. The learned counsel for the licensees have vehemently submitted that such conditions cannot be incorporated

to the existing licenses. It is contended that, at the most conditions may be incorporated in the licenses to be issued hereinafter. Since the respondents have been granted licenses in exercise of the powers conferred by section 479 read with section 394 of the MMC Act, the relevant provisions are stated herein below :

“479. Licences and written permission to specify condition etc., on which they are granted.

(1) Whenever it is provided in this Act that a licence or a written permission may be given for any purpose, such licence or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted, and shall be given under the signature of the Commissioner or of a municipal officer empowered under section 68 to grant the same.

(2)

(3)

(4) When licence or written permission is revoked etc., grantee to be deemed to be without a licence or written permission.

When any such licence or written permission is suspended or revoked or when the period for which the same was granted has expired the person to whom the same was granted shall for all purposes of this act, be deemed to be without a licence or written permission until the Commissioner's order for suspending or revoking the licence or written permission is cancelled by him or until the license or written permission is renewed, as the case may be.

(5)

“394. Certain articles or animals not to be kept, and certain trades, processes and operations not to be carried on, without a licence; and things liable to be seized, destroyed, etc., to prevent danger or nuisance.

(1) Except under and in accordance with the terms and

conditions of the licence granted by the Commissioner, no person shall—

- (a)
- (b)
- (c)

(d) keep or use, or suffer or allow to be kept or used, in or upon any premises, any article or animal which, in the opinion of the Commissioner, is dangerous to life, health or property, or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the same is, or is proposed to be, kept or used or suffered or allowed to be kept or used;

(e) carry on, or allow or suffer to be carried on, in or upon any premises.—

(i) any of the trades specified in Part IV of Schedule M, or any process or operation connected with any such trade;

(ii) any trade, process or operation, which in the opinion of, the Commissioner, is dangerous to life, health or property, or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the, same is, or is proposed to be carried on;

- (f)
- (2)

(3) A person shall be deemed—

(a) to have known that keeping any article [or animal] or carrying on a trade process or operation is, in the opinion of the Commissioner, dangerous or likely to create a nuisance within the meaning of clause (d) or , as the case may be, paragraph (ii) of clause (e), of sub-section (1), after written notice to that effect, signed by the Commissioner, has been served on such person or affixed to the, premises to which it relates;

(b) to keep or to suffer or allow the keeping of an article or animal or to carry on or to allow to be carried on a trade, process or operation within the meaning of clause (d) or, as the case may be, paragraph (ii) of clause (e) of sub-section (1), if he does any act in furtherance of keeping

of such article or animal or carrying on of such trade, process or operation or is in any way engaged or concerned therein whether as principal, agent, clerk, master, servant, workman, handicraftsman, watchman or otherwise.

(4) If it appears to the Commissioner that the keeping of any article or animal or the carrying on of any trade, process or operation, in or upon any premises, is dangerous or likely to create a nuisance within the meaning of clause (d), or paragraph (ii) of clause (e), of sub-section (1), the Commissioner may, by written notice, require the person keeping the article or animal or suffering or allowing it to be kept or the person carrying on the trade, process or operation or, allowing it to be carried on, as the case may be, to take such measures (including discontinuance of the use of the premises for any such purpose) as may be specified by him in such notice in order to prevent such danger or nuisance and if such measures are not taken within the specified time, the Commissioner may seize and carry away or seal such article or animal or any machinery or device used in connection with such trade, process or operations.

*(5) It shall be in the discretion of the Commissioner—
 (a) to grant any licence referred to in sub-section (1), subject to such restrictions or conditions (if any,) as he shall think fit to specify, or
 (b) for the purposes of ensuring public safety, to withhold any such licence:*

Provided that, the Commissioner when withholding any such licence shall record his reasons in writing for such withholding and furnish the person concerned a copy of his order containing the reasons for such withholding:

Provided further that, any person aggrieved by an order of the Commissioner under this sub-section may, within sixty days of the date of such order, appeal to the Chief Judge of the Small Cause Court, whose decision shall be final.”

(emphasis supplied)

4. Perusal of the above provisions makes it clear that there is no prohibition against the Municipal Corporation imposing any valid restrictions and conditions which were not incorporated at the time of issuance of licenses. Apart from that, firstly Smoke Free Rules are statutory provisions which are binding on all the persons and authorities within the country and therefore, the action of Municipal Corporation incorporating such restrictions or conditions even in the existing licenses cannot be said to be without any authority of law. Secondly, the licenses are in any case issued on annual basis from 1 April to 31 March of the next year. The Municipal Corporation would therefore, in any case have power to incorporate such restrictions and conditions at the time of renewal of the licenses.

5. In the first place the learned counsel for the private respondents have sought liberty to challenge the conditions in these proceedings even though they have not filed separate petitions. Without raising any technical issues on this, this Court has permitted the learned Counsel for the private respondents to make all the submissions for challenging the conditions.

6. Before referring to the individual challenges it is necessary to

refer to the relevant statutory provisions of COPTA. Section 4 provides that 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 will be made. “Public place” is defined by section 3(l) as under :

"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 “smoking” as under :

"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;"

“Tobacco products” is defined under section 3(p) as the products specified in the Schedule to the Act which includes various tobacco products including cigar tobacco, pipe tobacco and hukka tobacco. It is thus clear that smoking in public place including restaurant is prohibited by the Legislature and only exception is made as far as restaurant is concerned that smoking is permissible in separate smoking area or space in restaurant having seating capacity of 30 persons or more. The Smoke Free Rules, 2008 define “restaurant” in Rule 2(b) as under :

“(b) "restaurant" shall mean any place to which the public has access and where any kind of food or drink is supplied for consumption on the premises by any person by way of business for consideration monetary or otherwise and shall include the open space surrounding such premises and includes-

(i) refreshment rooms, banquet halls, discotheques, canteen, coffee house, pubs, bars, airport lounge, and the like.”

Definition of “public place” defined in section 3(1) is further expanded by Rule 2(d) by including the places such as work places, shopping malls and cinema halls. Smoking area or space mentioned in the proviso to section 4 of the Act is defined in Rule 2(e) as under :

“(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 closed 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;”

Rule 3 imposes a duty upon the owner and manager of a public place including restaurant to ensure that no person smokes in the public place which would include a restaurant. Rule 3(1)(c) also contains the following prohibition- *“No ashtrays, matches, lighters*

or other things designed to facilitate smoking are provided in the public place.” Rule 4 further provides that the owner/manager of the restaurant having seating capacity of thirty persons or more may provide for a smoking area or space as defined in rule 2(e); while sub rule (2) of rule (4) provides that space shall not be established at the entrance or exit of the restaurant, hotel and airport and shall be distinctively marked as “Smoking Area” in English and one Indian language, as applicable. Sub rule (3) rule (4) reads as under :

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

7. Learned Counsel for the private respondents submits that condition No. 35(C) is contrary to the provisions of the Act and the Rules. It is vehemently contended that the impugned conditions are violative of Article 19 of the Constitution of India.

8. It is vehemently submitted on behalf of the private respondents running hukka bars in different places that the prohibition contained in Rule 3(1) (b) and (c) against providing ashtrays, matches, lighters or other things designed to facilitate smoking is applicable to a public place which is not a smoking area

or smoking space. It is submitted that smoking area or smoking space is governed by Rule 4(3). It is submitted that it is open to the owner/manager of the eating places having hukka bar to provide ashtrays, matches, lighters or other things (including hukka) designed to facilitate smoking and it is also open to the owner/manager of the eating houses to provide hukka tobacco.

9. The learned government pleader as well as the learned counsel for the Municipal Corporation as well as the learned counsel for the petitioner have submitted that the ban against providing ashtrays, matches, lighters or other things designed to facilitate smoking are as much applicable to the smoking areas as to other public places. It is further submitted that if the contentions advanced on behalf of the private respondents is accepted, this Court would be permitting the private respondents to commit violation of the COPTA and Smoke Free Rules, which have been specifically enacted by the legislature to ensure that no person in charge of the public place facilitates smoking. It is also submitted that young students below age 18 years visiting different places such as restaurants having hukka bars are thrown into smoking hukka and the owner and manager of the restaurants provide hukka as well as tobacco.

10. At this stage we may also refer to the circular/letter DO No. P-16011/5/08-PH which appears to have been issued in the year 2008, which is relied upon by the counsel for the hukka bar owners. The circular/letter gives various clarifications in response to the representation made by the Federation of Hotels and Restaurants Association of India, New Delhi. Some of the clarifications which are relevant for the purpose of the present petition are as under :

“(d) As per the provisions of the Act restaurants and hotels are to be smokefree. It is only by way of exception a provision has been made that hotels with 30 rooms and more or restaurants with 30 or more seating capacity may create smoking area or space. The specifications of such ‘smoking area or space’ are prescribed under the Rules so that the air from the smoking area or space do not mix with the air or the rest of the building so as to protect the public from the ill effects of second hand smoking.

(e) The Rule 3(1) (c), does not prescribe ban on sale of tobacco products, it only require that no items (lighter, ashtray, matches etc.) should be placed in a manner that facilitates smoking.

(g) As per the provisions of the hotels and restaurants are included under the definition of public place and as such nobody shall smoke in these places. It is only by way of exception a provision has been made that hotels with 30 room and more or restaurants with 30 or more seating capacity may create smoking area or space.

(h) As per the provision of the Act, only the hotels with 30 rooms and more or restaurants with 30 or more seating capacity and the airports may have a smoking area or space and not any smaller restaurants or hotels. It has been stipulated that the said smoking area or space shall not be

established at the entrance or exit so as to ensure that people (nonsmokers') are not forced to pass through the smoking area or space.

(i) For the effective implementation of the Act, it has been provided that no services shall be allowed in the 'smoking area or space'. However services in the rooms designated as 'smoking room' are not prohibited.

It is contended on the basis of the above circular/letter that services in rooms designated as 'smoking room' are not prohibited. Hence the other services are also permissible in the smoking area of the restaurant.

11. Having heard the learned counsel for the parties, we see no merit in the submissions/contentions raised on behalf of the private respondents running restaurants with hukka bars. The COPTA is a central enactment made pursuant to the resolution passed by the 39th World Health Assembly on 15 May 1986 to implement the measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco. Article 47 of the Constitution of India enjoins the State to achieve improvement of public health in general. The Statement of Objects and Reasons of COPTA recognises the fact that tobacco is universally regarded as one of the major public health hazards and

is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco related diseases and the loss of productivity caused therein cost the country almost Rs.13,500 crores annually, which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry. The COPTA is enacted to achieve healthier lifestyle and the protection of life enshrined in the Constitution and seeks to improve public health. Section 2 reads thus :

“(2) Declaration as to expediency of control by the Union:- It is hereby declared that it is expedient in the public interest that the Union should take under its control the tobacco industry.”

A eating house, which is called a restaurant, is declared to be a public place. Section 3(n) reads thus :

“(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;”

Section 4 imposes a prohibition on smoking in any public place and the proviso thereto has carved out an exception whereby a separate provision for smoking area or space can be made in certain specified Hotels/Restaurants. The entire premises of a hotel or a restaurant referred to in the proviso continue to be a “public place” and “smoking area or space” defined under Rule 2 (e) is essentially

a part of such public place. This is also clear from Rule 4. Rule 3 casts a statutory obligation on person in charge of the affairs of public place and sub-rule 3 of Rule 4 prohibits any other services being allowed in a smoking area or space. Sub-Rule 4 of Rule 4 again carves out an exception in respect of a hotel having 30 rooms or more. Considering the scheme of the Act and the Rules, it is not possible to accept the submission that the “smoking area or space” cannot be considered to be a “public place”. As discussed above, proviso to section 4 is in the nature of exception and there is nothing in the said section or Rule 2 (e) which would warrant the interpretation advanced on behalf of the private respondents. If such interpretation is accepted, it would amount to defeating the very purpose of enactment and would also not be in consonance with the settled norms of interpretation of Statute. An exception cannot be interpreted in the manner which will defeat the substantive statutory provisions.

12. It is also not possible to accept the submission that prohibition contained in Rule 3 (1) (c) is not applicable in a “smoking area or space” within a restaurant/hotel and the contention that there is no prohibition against supplying ashtray, matches, lighters or other things designed to facilitate smoking in

such smoking area or space. This argument cannot be accepted since it would defeat the legislative intent. The definition of the word “smoking” includes “any other instruments” and tobacco products defined in Section 2 (p) r/w the Schedule includes hookah tobacco. The “smoking area or space” within a public place, which is an exception carved out, is thus in the nature of a concession which has been given to an individual and cannot be construed to be conferring any right on the owner, proprietor, manager, supervisor or person in charge of any restaurant or hotel. It was also sought to be contended that in view of Rule 4 (4), since “services” are allowed to be provided in specified separate smoking rooms in a hotel, there is no justification for prohibiting such “services” in a “smoking area or space” in a restaurant or a hotel. This argument clearly overlooks that Rule 4 (4) deals with only “separate smoking rooms” which cannot be equated with a “smoking area or space”. The articles mentioned in Rule 3 (1) (c) are those “designed to facilitate smoking” and cannot be termed as “services” as contemplated by Rule 4 (3). Rule 4 (3) imposes blanket restriction against providing any services in “smoking area or space” and such a restriction will obviously apply to such smoking area or space in a restaurant or in hotel.

13. The submission made on behalf of the private respondents on the basis of instruction (i) is also misconceived. All that this instruction means is that the prohibition against providing any services in a smoking area or space does not apply to smoking rooms in a hotel. That is to say, in a smoking room in a hotel, food and beverages may be provided by way of room services, but such services cannot be provided in the smoking area/space in a restaurant.

14. The rationale underlying instruction (i) is obvious. A smoking room in a Hotel may be occupied by the guest for one day or several days. Such a guest can not be denied food and beverages by way of room service or other services like laundry service or entertainment through television watching in the smoking room in a hotel.

15. On the other hand, the customer in a restaurant, who is otherwise not allowed to smoke in any public place including a restaurant [Sec. 3 (1)] is merely given a concession to smoke in a separate area or space called smoking area or smoking space in the restaurant. He may smoke one cigarette or more in the smoking area, but the rule making authority, in consonance with the

legislative object as emerging from the Preamble and the Statement of Objects and reasons for the Act, does not want to encourage the customer in the restaurant to spend long hours in the smoking area of the restaurant. He would be encouraged to spend long hours in the smoking area if he were to be provided with services like food and beverages there or were to be provided other services like entertainment through television watching in the smoking area.

16. It, therefore, stands to reason that the rule making authority, which prohibits person in charge of public places including restaurants as defined in the Sec. 3 (l) from providing devices like lighter which facilitate smoking and which prohibits a restaurant owner from providing any services to the customers in the smoking area of the restaurant, could not be attributed the intention to permit the restaurant owner to provide gadgets like hookas in the smoking area of the restaurant. Hooka is more than a device that facilitates smoking. Hooka is the gadget through which the person smokes. Providing a gadget like hooka to young boys and girls with impressionable minds is not merely facilitating them to smoke, but indeed encouraging and even exciting them to smoke. However exciting the service may be, it falls within the mischief of Sub-rule (3) of Rule 4.

17. The last submission that the impugned conditions are violative of Article 19 of the Constitution of India, need not detain us long since the impugned conditions provide what is mandated by the Central Statute and Rules and are in the nature of reasonable restrictions. Article 19 (1) (g) permits imposition of a reasonable restriction on the ground of protection of the interests of the general public. Article 47 of the Constitution contains a Directive Principle of the State Policy and provides that the State shall regard the improvement of public health as amongst its primary duties. While considering the effect of the Directive Principles contained in part IV of the Constitution of India, particularly in the context of principles of interpretation of a statute, in case of U. P. State Electricity Board and Anr. v/s. Hari Shanker Jain and ors. AIR 1979 SC 65, the Hon'ble Supreme Court has observed thus :

“The mandate of Art. 37 of the Constitution is that while the Directive Principles of State Policy shall not be enforceable by any Court, the principles are ‘nevertheless fundamental in the governance of the country’ and ‘it shall be the duty of the State to apply these principles in making laws’. Addressed to Courts, what the injunction means is that while Courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of Judges when interpreting statutes which concern themselves directly or

indirectly with matters set out in the Directive Principles of State Policy.”

While interpreting the provisions of COPTA and the Rules framed thereunder, we must have due regard to Article 47 and the fact that the Act was enacted with the expressly stated objective of improving public health and in accordance with the resolutions passed by the WHO. Section 2 of COPTA contains declaration of expediency to enact the Act in public interest. Hence the challenge based on Article 19 is also without substance.

18. For the aforesaid reasons we repel the challenge levelled by the private respondents who are running restaurants with hukka bars against the circular/letter issued on 1/7/2011 by the Municipal Corporation, Greater Mumbai. In fact we are of the view that similar conditions ought to be incorporated by the Municipal Corporations and Municipal Councils in other regions of the State. Counsel for the State of Maharashtra states that this shall also be done within one month from today. Stand over to 28 July, 2011.

CHIEF JUSTICE

GIRISH GODBOLE, J