

Madhya Pradesh High Court

Restaurant And Lounge Vyapari ... vs The State Of Madhya Pradesh on 21 August, 2015

HIGH COURT OF MADHYA PRADESH : JABALPUR

SINGLE BENCH : JUSTICE J.K. MAHESHWARI

WRIT PETITION NO.15487 OF 2014

ITIONERS : 1. Restaurant and Lounge Vyapari Association, Bhopal  
through its Secretary, Piyush Sarkari, s/o Shri Parvez  
Sarkari, aged about 28 years, r/o G-87/33, Tulsi Nagar,  
Bhopal, M.P.

2. Uzair Alvi, s/o Shri  
Z.U.Alvi, aged about 30  
years, r/o E-5/16, Raksha  
Tower, Bittal Market,  
Huzur, Bhopal, M.P.

Vs.

ONDENTS : 1. State of Madhya Pradesh, through its Secretary ,  
Department of Public Health and Family Welfare, Vallabh  
Bhawan, Bhopal (M.P)

2. The Commissioner and  
Controller, M.P. Food  
Drugs Administration,  
Idgah Hills, District: Bhopal  
(M.P)

3. The Collector, Bhopal,  
District: Bhopal (M.P)

4. The Inspector General of  
Police, Bhopal Division,  
Dist: Bhopal (M.P)

5. The Superintendent of  
Police, Bhopal, District:  
Bhopal (M.P)

6. Bhopal Municipal  
Corporation, through its,  
Commissioner, Sadar

Manzil, Nagar Nigam,  
Bhopal (M.P)

7. The Deputy Director,  
Food and Drugs  
Administration, Idgah Hills,  
District: Bhopal (M.P)
8. The Food Safety Officer,  
Food and Drugs  
Administration, Idgah Hills,  
District: Bhopal (M.P)

Whether approved for reporting : (yes/no).

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Shri Brain Da Silva, Senior Advocate with Shri Rohit  
Sohgaura, Advocate for the petitioners.

Shri Amit Seth, Govt. Advocate for respondents No.1 to 5, 7  
and 8.

#### ORDER

(21/08/2015) This petition under Article 226 of the Constitution of India has been filed by an Association registered in the name of â Restaurant and Lounge Vyapari Association, Bhopalâ through its Secretary and one other, assailing the order annexure P/6 dated 4.8.2014 passed by respondent no.7, by the said order all the Food Safety Officers, Bhopal, were directed to produce a list within two days of all the Hotels, Restaurants serving Hookah, and Hookah Lounge Bars, and after closing them produce the certificate that in the township of Bhopal, in any Hotel or restaurants, no Hookah Lounge bars are running. It has also been directed that continuous surveillance be made by them to ensure compliance of the said direction otherwise they shall be liable to face disciplinary action. The order annexure P/7 dated 22.9.2014 of the District Magistrate, Bhopal, passed in exercise of the power under section 144 of the Cr.P.C. has also been assailed, by the said ex-parte prohibitory order, Hookah Bars/ Sheesha Lounges were directed to be seized, otherwise action under section 188 of I.P.C. may be taken.

2. The facts briefly stated in the petition that under 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 â the COTP Actâ ; and The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004, hereinafter referred to as â the COTP Rulesâ ; and also The Prohibition of Smoking in Public Places Rules, 2008, hereinafter referred to as â the Rules of 2008â , absolute prohibition of smoking at a public place, i.e. Hotels and restaurants are not specified. However, if the members of the petitioner Association are running their hotels and restaurants and offering hookah following the provisions of the Act and the Rules, it

cannot be closed or seized either as per the order, annexure P/6, or by passing ex-parte prohibitory order, annexure P/7 in exercise of power under section 144 of the Cr.P.C. It is further his contention that the order passed by the Collector may remain in operation only for two months, but consecutive orders are made by District Magistrate on expiry of the period of two months. It is said that such power can be evoked only to the anticipated action for time being, however, meaning of word "prohibition" under the Act do not postulate absolute prohibition, however, seizure of Hookah bar hotels and restaurants is not permissible even in exercise of power under section 144 Cr.P.C. Placing reliance on a recent judgment of Hon'ble the Supreme Court in the case of Narinder S. Chadha & Ors. Vs. Municipal Corporation of Greater Mumbai & Ors., reported in AIR 2015 SC 756, submitted that the court has set aside the order passed by the Bombay, Madras and Gujarat High Courts holding that the restriction imposed in the licence is in contravention to the COTP Act and Rules. It is explained that prohibitory order in exercise of the power under section 144 of Cr.P.C. can be passed only for limited period, however, contended that the blanket direction issued vide annexure P/6 and the prohibitory order of the Collector, annexure P/7, may be quashed.

3. On the other hand, respondents no.1 to 5, 7 and 8 by filing their return emphasized that as per various press reports about the illegal business run by the Hotel and restaurant owners in the shape of Hookah Bar /Opium Center/ Hookah Lounge in uncontrolled manner and also looking to the fact that youngsters including school going students were joining such activities, which reveals from the reports of the C.M.H.O. indicating consumption of Nicotine, facilitating through Hookah coupled with the flavour of molesis, glycerin and various other chemical substances, however, the orders, annexures P/6 and P/7, have rightly been passed. In support of such contention, reliance has been placed on a Single Bench judgment of this Court in the case of All India Caf   and Sheesha Association through its President Shri Harish Vs. State of M.P. and others, reported in 2012(3) M.P.H.T. 212, and submitted that this Court has upheld the validity of the consecutive orders passed by the District Magistrate, Indore, directing the authorities to ensure strict compliance of the COTP Act and Rules by taking appropriate action.

4. Shri Brain Da   Silva, learned senior counsel has strenuously urged that the general instructions issued by the respondent no.7 to close the Hookah Lounge Bars and to produce the closure certificate is based on the newspaper cuttings without having any cogent material to support the news items. The orders impugned do not indicate any violation of the COTP Act and the Rules. However, the blanket order passed by the respondent no.7 instructing subordinate officers, affects the constitutional right conferred under Articles 14, 19, 21 and 301 of the Constitution of India. It is further his contention that without indicating the violation of the COTP Act and Rules in running the restaurants, causing nuisance, and anticipated danger to the citizens, presuming emergency passing an order without recording satisfaction in exercise of the powers under section 144 of the Cr.P.C. is not in conformity to law, therefore, both the orders may be quashed.

5. Shri Amit Seth, learned Govt. Advocate representing the respondent/State relying upon the observations made by the learned Single Judge in the case of All India Caf   and Sheesha Association (supra) contends that looking to the inspection reports, attached with the return, violation of COTP Act and Rules were found, therefore, the orders impugned were passed, which do not warrant any interference.

6. In view of the pleadings and the arguments put forth by the parties and the reliefs sought in this petition, the moot questions arises for determination as to whether the direction issued in general on 4.8.2014 vide annexure P/6 by the respondent no.7 travelled beyond the spirit of the provisions of the COTP Act and the Rules or it is necessary to evoke the provisions of the Act and the Rules? It is to be further examined that in the facts and circumstances of the case, the order, annexure P/7, dated 22.9.2014 passed by the respondent no.3 in exercise of the power under section 144 of the Cr.P.C. is in accordance with law?

7. After hearing rival contentions of the parties at length and to determine the said issues, it would be necessary to refer the relevant statutory provisions of the COTP Act, 2003.

â Section 3. Definitions.- In this Act, unless the context otherwise requires,-

(k) â productionâ , with its grammatical variations and cognate expressions, includes the 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 named called) or snuff and shall include-

(i) packing, labelling or re-labelling, of containers;

(ii) re-packing from bulk package to retail packages; and

(iii) the adoption of any other method to render the tobacco product marketable;

(l) â public placeâ 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.

(n) â smokingâ means smoking of tobacco in any form of cigarette, cigar, beedies or otherwise with the aid of a pipe, wrapper or any other instruments;

(p) â tobacco productsâ means the products specified in the Schedule.

## THE SCHEDULE

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.

Section 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 education institution.

Section 21. Punishment for smoking in certain places.- (1) Whoever contravenes the provisions of section 4 shall be punishable with fine which may extend to two hundred rupees.

(2) An offence under this section shall be compoundable and shall be tried summarily in accordance with the procedure provided for summary trials in the Code of Criminal Procedure, 1973.

8. The Central Govt. in exercise of powers conferred by section 31 of the COTP Act framed the rules which are known as COTP Rules, 2004. Rules 3 thereof deals with prohibition of smoking in a public place, which is reproduced as under :-

3. Prohibition of smoking in a public place-(1) The owner or the manager or in charge of the affairs of a public place shall cause to be displayed prominently a board, of a minimum size of sixty centimetre by thirty centimetre in the Indian language(s) as applicable at least one at the entrance of the public place and one at conspicuous place(s) inside, containing the warning â No Smoking Area-Smoking here is an Offence.â (2) The owner or the manager or in charge of the affairs of a hotel having thirty rooms or restaurant having seating capacity of thirty persons or more and the

manager of the airport shall ensure that-

- (i) the smoking and non-smoking areas are physically segregated;
- (ii) the smoking area shall be located in such manner that the public is not required to pass through it in order to reach the non-smoking area; and
- (iii) each area shall contain boards indicating thereon â Smoking Area/Non-Smoking Areaâ .

9. Recently, the Central Govt. in exercise of the power conferred by section 31 of the COTP Act and in supersession to Rule 3 of the COTP Rules, 2004, framed the rules which are known as the Prohibition of Smoking in Public Places Rules, 2008, either to prohibit or regulate the smoking at a public place. However, some of the definitions and rules are relevant, which is quoted as thus :-

2. Definitions.- In these rules, unless the context otherwise requires,-

(c) â open spaceâ mentioned in section 3(1) of the Act shall not include any place visited by the public such as open auditorium, stadium, railway station, but stop/stand and other such places.

(d) â public placeâ defined in section 3(1) of the Act shall also include work places, shopping malls, and cinema halls.

(e) â smoking area or spaceâ 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.

(f) Words and expressions used herein and not defined in these rules but defined in the Act shall have the meanings, respectively, assigned to them in the Act.

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.

(Explanation- For the purpose of these rules the word offence means a person found violating any provision of the rules).

4. Hotels, Restaurants and Airports.- (1) The owner, proprietor, manager, supervisor or in-charge of the affairs of a hotel having thirty or more rooms or restaurant having seating capacity of thirty persons or more and the manager of the airport may provide for a smoking area or space as defined in rule 2(e).

(2) Smoking area or space shall not be established at the entrance or exit of the hotel, restaurant and the airport and shall be distinctively marked as "Smoking Area" in English and one Indian language, as applicable.

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

(4) The owner, proprietor, manager, supervisor or in-charge of the affairs of a hotel having thirty or more rooms may designate separate smoking rooms in the manner prescribed as under:

(a) all the rooms so designated shall form a separate section in the same floor or wing, as the case may be. In case of more than one floors/wings the room shall be in one floor/wing as the case may be.

(b) all such rooms shall be distinctively marked as "Smoking rooms" in English and one Indian language, as applicable.

(c) the smoke from such room shall be ventilated outside and does not infiltrate/permeate into the non-smoking areas of the hotel including lobbies and the corridors.

10. The COTP Act and the Rules were introduced because the tobacco is one of the major public health hazards for human life. However, the Parliamentary Committee recommended the need for comprehensive legislation to prohibit advertising and regulation of production, supply and distribution of cigarettes and tobacco products. The sale of tobacco products to the minor and nearby educational institutions is prohibited and its service to be regulated on the public place as per the Rules of 2008. Thus, in the context of Article 47 of the Constitution of India, the said enactment and rules were brought by legislation in 2008 expanding the scope of Rule 3 of the COTP Rules, 2004, regarding prohibition of smoking in public places. Thus, it is luculent that smoking by tobacco products at a public place may be permissible in the manner specified in the Rules of 2008; otherwise its use is prohibited.

11. In the fact situation of this case to advert the rival contentions and looking to the provisions of the COTP Act, smoking of tobacco in any form of cigarettes, cigars, beedis, or otherwise with the aid of a pipe, wrapper or any other instrument is prohibited at a public place defined under section 3(l) of the COTP Act and rule 2(d) of the Rules of 2008. The hotel and restaurants shall come within the purview of definition of public place. In the context and looking to the definitions of "tobacco products" as per section 3(p), "pipe tobacco" and "Hookah tobacco" falls within the said definition. As per definition of word "production" under section 3(k) also, Hookah tobacco and pipe tobacco has been specified. The definition of smoking under section 3(n) includes smoking tobacco with the aid of a pipe or any other instrument. Section 4, as set forth above, makes it clear that smoking by any citizen on any public place is prohibited; but, in case of a hotel having 30 rooms or more or a restaurant having seating capacity of 30 persons or more or in airports, separate provision of smoking area or place ought to be made. Section 4 and its proviso has been regulated in the manner specified by the Rules of 2008, while Section 6 of the COTP Act puts embargo on the sale of cigarettes or other tobacco products to a person below the age of eighteen years and in an area within the radius of hundred yards of any educational institutions. Any violation or contravention of the provision of section 4 shall be punishable as specified in Section 21 of the Act. Thus, it is clear that absolute prohibition of sale of cigarettes is only nearby to the educational institutes and to the minors as specified in the Act. But the prohibition specified in the proviso of section 4 is not absolute, and smoking is permitted in an area known as "smoking area or place" as specified in rule 2(e) of the Rules of 2008 subject to the compliance of the Rules.

12. It is to be noted here that the Govt. in supersession of the Rules of 2004 and to achieve the object of the COTP Act, enacted the Rules of 2008. Under these rules, the public place as defined under section 3(l) of the Act shall include the work place, shopping malls and cinema halls, to which as per rule 3 the owner, proprietor, manager, supervisor or incharge of the affairs of a public place shall ensure no smoking under their jurisdiction. They were required to exhibit the display board as specified in schedule II. It is clarified that no ashtray, matches, lighters and other things designed to facilitate the smoking be provided in the public place. It is further clarified that if violation of the rules were found, they shall be responsible for it and shall also be liable to pay fine equivalent to the number of individual offences. As per rule 4, the hotel, restaurants and airports having capacity of 30 or more rooms or the persons must specify the smoking area or place, for the use of smoking and not for any other services. The owner, proprietor, manager, supervisor, incharge of the affairs of the hotel, restaurants and the airports were required to observe the compliance of sub rule 4 in the



manner as prescribed therein. Thus, it is clear that rule 3 of the Rules of 2008 deals with complete prohibition commensurate the main provision of section 4 of the COTP Act, while rule 4 specify the provisions commensurate to the proviso of the said section. Thus, the COTP Act and the Rules of 2008 provide a complete code and mechanism to deal with or regulate the smoking at public place. In the said context, as per the legal position the sale of cigarettes and other tobacco products to a person below the age of eighteen years and within a radius of hundred yards of educational institutions is completely prohibited. In case of service at public place like hotel, restaurants and airports, applying the proviso of Section 4 of the COTP Act and Rule 4 of the Rules of 2008, smoking may be regulated in the specified area and in the manner provided therein. The said discussion shall fortify from the recent judgment of Honâble the Apex Court in the case of Narinder S. Chadha & Ors. Vs. Municipal Corporation of Greater Mumbai (supra). By the said case a batch of civil appeals were decided and the judgment of Bombay High Court in the case of Crusade against Tobacco (A Branch of the Neli Charitable Trust) and others Vs. Union of India and others, passed in Public Interest Litigation No.111/2010, has been set aside, and the Apex Court held as under :-

â 14. It will be seen that Condition No. 35(C) of the impugned circular essentially reproduces Rule 4(3) of the said Rules and then adds the words "or any apparatus designed to facilitate smoking". The effect of the added words is that a Hookah cannot be provided by the hotel, restaurant or airport being an apparatus designed to facilitate smoking.

15. Mr. Bhatt sought to derive power for the added words from Rule 3(1)(c) and argued that the Hookah would be "other things" designed to facilitate smoking which would be prohibited under Rule 3(1)(c).

16. We find it difficult to accept this contention because, if carefully read, Rule 3 deals with the prohibition of smoking in public places, which is referable to Section 4 (main part) whereas Rule 4 is referable to the proviso to Section 4. Rule 3 would only apply where there is a total prohibition of smoking in all public places as is clear from Rule 3(1)(a) which makes it incumbent on the owner, proprietor, etc. of a public place to ensure that no person smokes in that place. It is in that context that ashtrays, matches, lighters and other things designed to facilitate smoking are not to be provided in public places where smoking is prohibited altogether.

17. On the other hand, where smoking is allowed in a smoking area or space, sub-rule (3) of Rule 4 makes it clear that such place can be used for the purpose of "smoking". Under Rule 2(f) words and expressions not defined in these Rules but defined in the Act shall have the meanings, respectively, assigned to them in the Act.

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.

19. Looked at from another angle, Rule 3(1)(c) and Rule 4(3) have to be harmoniously construed. If the respondents' contention has to be accepted, Rule 4(3) would be rendered nugatory. What is expressly allowed by Rule 4(3) cannot be said to be taken away by Rule 3(1)(c). For this reason also, Mr. Bhatt's contention will have to be turned down.

21. Since we are deciding this case only on the narrow ground that the High Court is incorrect when it holds that all that the Municipal Corporation did in the present case was to follow the Cigarettes Act and the Rules made thereunder, we need not delve on other aspects that were urged before us.

22. We, therefore, set aside the Bombay High Court judgment and delete the first paragraph of Condition No.35 and the added words in (C) of Condition No.35. The appeal succeeds to that extentâ .

13. The Court in the same judgment has also set aside the judgment of the Gujarat High Court as well as Madras High Court, upholding the order of District Magistrate passed in exercise of powers under section 33 of the Bombay Police Act read with section 144 of the Cr.P.C. and observed as thus :-

â 24. In the Gujarat High Court case, an order dated 14th July, 2011, purportedly made under Section 33 of the Bombay Police Act read with Section 144 of the Code of Criminal Procedure prohibited hotels and restaurants from providing the facility of hookah and prohibited hookah bars. In the course of a lengthy judgment, the Division Bench referred to the evil effects of smoking and generally of tobacco products and ultimately came to the conclusion that Section 33 of the Bombay Police Act would include the power to prohibit, stating that the word "regulate" would include "restriction" and even "prohibition". Several authorities were stated for this proposition, but the one authority binding on the High Court was missed. In Himat Lal K. Shah v. Commissioner of Police, Ahmedabad, (1973) 1 SCC 227, the Supreme Court had to construe the word "regulate" under the very Act i.e. Section 33 of the Bombay Police Act. The Court held:

"15. Coming to the first point raised by the learned counsel, it seems to us that the word "regulating" in Section 33(o) would include the power to prescribe that permission in writing should be taken a few days before the holding of a meeting on a public street. Under Section 33(o) no rule could be prescribed prohibiting all meetings or processions. The section proceeds on the basis that the public has a right to hold assemblies and processions on and along streets though it is necessary to regulate the conduct and behaviour or action of persons constituting such assemblies or processions in order to safeguard the rights of citizens and in order to preserve public order. The word "regulate", according to Shorter Oxford Dictionary, means, "to control, govern, or direct by rule or regulation; to subject to guidance or restrictions". The impugned Rules do not prohibit the holding of meetings but only

prescribe that permission should be taken although it is not stated on what grounds permission could be refused. We shall deal with this aspect a little later."

25. From a reading of Himat Lal's case, it is clear that the word "regulate" would not include the power to prohibit. Further, Section 144 of the Code of Criminal Procedure provides a power to grant only temporary orders which cannot last beyond 2 months from the making thereof (see Section 144(6) of the Code of Criminal Procedure). Despite this being pointed out to the High Court, the High Court held:

"There is no dispute as regards the position of law and we accept the contentions on behalf of the petitioners so far as Section 144 of the Code is concerned. However, solely on this ground alone the entire action on the part of the Police Commissioner cannot be said to be unlawful or beyond his jurisdiction. Prima facie, we are convinced that the notification invoked under Section 144 of the Code was issued with a definite idea and the idea was to immediately give true effect to the addition of the condition in respect of licences of persons running eating house/restaurant. It appears that the authorities felt that it would be difficult to stop the activity of providing hookah at eating house/restaurant by solely adding one of the conditions not to provide hookah at a eating house/restaurant. It appears from the affidavit-in-reply filed by the Police Commissioner that with a view to meet with such an emergent situation prevailing in the city and as it was very difficult to keep constant vigilant and monitoring as regards compliance of the condition which was added in the licence, the Police Commissioner thought fit to invoke Section 144 of the Code.

Assuming for a moment that the action of the Police Commissioner of the city of Ahmedabad in issuing the notification in purported exercise of powers under Section 144 of the Code is not tenable in law by itself would not be sufficient to grant the relief as prayed for by the petitioners. Though we do not find error in the same but assuming for a moment that it is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it in public interest. It is a settled principle of law that the remedy under Article 226 of the Constitution of India is discretionary in nature and in a given case even if such action or order challenged in the petition is found to be improper and invalid, the High Court while exercising its extraordinary jurisdiction thereunder can refuse to upset it."

26. We are at a loss to understand the aforesaid reasoning. If Section 144 is to be invoked, the order dated 14th July, 2011 would have expired 2 months thereafter. The High Court went on to state that while administering the law it is to be tempered with equity and if an equitable situation demands, the High Court would fail in its duty if it does not mould relief accordingly. It must never be forgotten that one of the maxims of equity is that 'equity follows the law'. If the law is clear, no notions of equity can substitute the same. We are clearly of the view that the Gujarat High Court

judgment dated 2nd December, 2011 deserves to be set aside not only for following the Bombay High Court judgment impugned in the appeals before us but for the reasons stated hereinabove.

(emphasis supplied)

14. In the said context and to understand the purpose to which section 144 Cr.P.C. was brought, is also required to be referred, however, reproduced as thus :-

144. Power to issue order in urgent cases of nuisance of apprehended danger.

(1) In cases where, in the opinion of a District Magistrate, a Sub-divisional Magistrate or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct any person to abstain from a certain act or to take certain order with respect to certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed ex parte. (3) An order under this section may be directed to a particular individual, or to persons residing in a particular place or area, or to the public generally when frequenting or visiting a particular place or area.

(4) No order under this section shall remain in force for more than two months from the making thereof: Provided that, if the State Government considers it necessary so to do for preventing danger to human life, health or safety or for preventing a riot or any affray, it may, by notification, direct that an order made by a Magistrate under this section shall remain in force for such further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired, as it may specify in the said notification.

(5) Any Magistrate may, either on his own motion or on the application of any person aggrieved, rescind or alter any order made under this section, by himself or any Magistrate subordinate to him or by his predecessor-in-office. (6) The State Government may, either on its own motion or on the application of any person aggrieved, rescind or alter any order made by it under the proviso to sub-section (4). (7) Where an application under sub-section (5) or sub-section (6) is received, the Magistrate, or the State Government, as the case may be, shall afford to the applicant an early opportunity of appearing before him or it, either in person or by pleader and showing cause against the order; and if the Magistrate or the State Government, as the case may be, rejects the application wholly or in part, he or it shall record in writing the reasons for so doing.

A bare perusal of the aforesaid, it is apparent that the District Magistrate on having satisfied with the sufficiency of the ground to proceed for immediate prevention and for speedy remedy may direct any person to abstain from certain act or to take certain order with respect to certain property in his possession or under his management in case it is likely to prevent or tend to prevent obstruction, annoyance or injury to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquility, or a riot or an affray. The said order can be passed ex-parte in case of emergency or the circumstances do not admit the serving in due time of notice upon the person against whom the order is required to be made. The order can be passed against individual or to persons residing in a particular place or area or to the public generally when frequenting or visiting a particular place or area. It is further made clear that such an ex-parte order shall not remain in force for more than two months from the date of passing such an order until the State Govt. considers it necessary so to do for preventing danger to human life, health, safety or preventing any riot or any affray. In the said case, by way of a notification, the period of the order passed by the Magistrate may be extended as it deemed fit, not exceeding six months. It has also been clarified that the order passed ex-parte may be rescinded or altered by the District Magistrate. The State Govt. has also been conferred with a similar power of rescinding or altering the order on an application by the aggrieved person or suo motu exercise of power. Thus, it is clear that the purpose to give the jurisdiction to the competent authority under section 144 of Cr.P.C. is to mitigate the urgent situation of nuisance or apprehended danger to human life, health and safety, meaning thereby it is to prevent the anticipated situation of the kind as specified therein.

15. Before the Apex Court the constitutional validity of section 144 Cr.P.C. was challenged by filing a petition under Article 32 of the Constitution in the case of Babulal Parate Vs. State of Maharashtra, reported in AIR 1961 SC 884, seeking relief to not to enforce the section. The Court held that section 144 Cr.P.C. enables the Magistrate to pass an order in the interest of general public, which is the wider term to maintain the public order as specified under clauses (2) and (3) of Article 19 of the Constitution of India, therefore, it falls within the purview of reasonable restriction. It is also held that later part of section 144 Cr.P.C. emphasis that the Magistrate to set out the facts, however, without holding an enquiry and recording satisfaction it would not be possible to pass the order, therefore, the said section does not confer any arbitrary power on the Magistrate in making the order. The Court has also considered that the power of section 144 Cr.P.C. can be exercised only in case of emergency and for the purpose of preventing obstruction, annoyance or injury to any person lawfully employed or danger of human life, health or disturbance of public tranquility or riot or an affray. Thus, these powers should be exercised while making the order legitimately and honestly as the anticipated emergent situation is required to be dealt with which may confer the power to the Magistrate in an emergency where danger or public order is genuinely apprehended by the action. Thus, concluded that the powers conferred under section 144 Cr.P.C. is not unreasonable.

16. The Apex court in the case of Acharya Jagdishwaranand Avadhuta etc. Vs. Commissioner of Police, Calcutta and another, AIR 1984 SC 51, mandated that the proviso to sub section (4) of section 144 Cr.P.C. confers the powers to the State Govt. to pass the prohibitory order not exceeding six months, extending the period of order made by the Magistrate from the date it was passed. Thus, the legal position is clearly indicative of the legislative intent with respect to the life of an order under section 144 Cr.P.C. when made by Magistrate to remain in force only for a period of two months and

if extended then it may be as per proviso of sub section (4) by a notification of the State Govt. However, held that the Scheme of the section does not contemplate repetitive orders to be passed by the District Magistrate. In the said judgment Honâ ble Apex court has considered the full Bench judgment of Calcutta High Court consist of twelve Judges in the case of Gopi Mohun Mullick Vs. Taramoni Chowdharani (1879) ILR 5 Cal 7, passed in the context of the provisions of the old Cr.P.C. The Apex Court has also referred the views taken by various other High Courts on the same guideline and principles, however the ratio is as under :-

â We have no doubt that the ratio of these decisions represents a correct statement of the legal position. The proviso to sub-section (4) of Section 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order under Section 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders and in case the situation so warrants, steps have to be taken under other provisions of the law such as Section 107 or Section 145 of the Code when individual disputes are raised and to meet a situation such as here, there are provisions to be found in the Police Act. If repetitive orders are made it would clearly amount to abuse of the power conferred by Section 144 of the Codeâ .

In para 15 of the said judgment, the Apex court has further observed as under :-

Similar view was expressed by this Court in Gulam Abbas & Ors. v. State of U.P. & Ors., where it was said that "the entire basis of action under section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquility ...." Certain observations in Gulam Abbas's decision regarding the nature of the order under s. 144 of the Code-judicial or executive-to the extent they run counter to the decision of the Constitution Bench in Babulal Parate's case, may require reconsideration but we agree that the nature of the order under section 144 of the Code is intended to meet emergent situation. Thus the clear and definite view of this Court is that an order under section 144 of the Code is not intended to be either permanent or semi-permanent in character. The concensus of judicial opinion in the High Courts of the country is thus in accord with the view expressed by this Court. It is not necessary on that ground to quash the impugned order of March 1982 as by efflux of time it has already ceased to be effective.

(emphasis supplied)

17. In the case of Harish Arora Vs. District Magistrate, Shahdol, 2001(2) MPLJ 197, this Court relying upon the judgment of Acharya Jagdishwaranand Avadhuta etc. (supra) has crystallized the law holding that the order under section 144 Cr.P.C. cannot be passed to earn the status of

permanent or semi-permanent character. Learned Single Bench of this Court in the case of All India CafÃ© (supra) has also recognized the said legal position.

18. It is to be noted here that in the judgment of the learned Single Judge of this Court in the case of All India CafÃ© (supra), relied by the respondents, has also accepted that passing the repeated prohibitory orders is not permissible. But, in the said case third order was passed by the District Magistrate on the basis of the new material brought before him, therefore, its validity was upheld. But, the Court observed that on each and every table of the restaurants, Sheesha lounges and Hookah bars, Hookah and relative products for use were found as per the reports produce before them, however, directed that the provision of the COTP Act as well as the Rules of 2008 should be strictly observed in the entire State of M.P. and in case of violation action shall be taken as per the COTP Act and the Rules.

19. Thus, it is apparent that the provisions of section 144 Cr.P.C. have been introduced by the legislature permitting the appropriate Authority to pass order for anticipated action or to put anticipatory restriction upon particular kinds of act in an emergent situation maintaining public order. However, the said provision postulates a situation which is temporary in character and not of semi-permanent or perennial in nature. As in the present case the period stipulated in the order, annexure P/7, has already been elapsed, though it is a second order, however, in the above context, the respondent no.3 is directed to exercise the power in the emergent situations and not in routine manner, thus merit of the contention to pass the order, annexure P/7, is not required to be dealt with due to elapse of the period.

20. In the context of the provisions of COTP Act and the Rules of 2008, the directions as contained in annexure P/6 issued by the respondent no.7 is required to be analysed. In the order, annexure P/6, reference of newspaper cuttings have been made by the Authority, stating that it has given bad name to the reputation of the administration, however, directed to all Food and Safety Officers to produce the list of Hookah Lounge Bars within two days, and also produce the certificate of their closure, and keep continuous surveillance otherwise disciplinary action may be taken against the Food Officers. It is seen that the said order does not contemplate non-observance of the COTP Act, 2003 and the Rules of 2008, however, in absence thereto, general order passed by the authority can be sustained in law ?

21. The State Govt. to support their action and to substantiate the reasonings, has filed the return producing the newspaper cuttings as well as copies of Panchanamas prepared at seven Hookah Lounges namely Sunshine Hotel, Agrawah CafÃ© and Restaurant, the Black Jack CafÃ© and Lounge, the Den CafÃ© and Restaurant, Sip of CafÃ© and Usha Gaibeen Zone, Bluestone Lounge, the Sheesha Lounge. On going through the contents of the said Panchanamas it is clear that the tobacco products were found including the Hookah pipes. At some restaurants open space was available but at some restaurants open space was not available. At some restaurants students were found without indicating their age, while at some restaurants youngsters of 24-25 years of age were present; at some restaurants no-one was using Hookah. However, looking to the aforesaid, contravention of the COTP Act and the Rules of 2008 has not been reflected.

22. In view of the foregoing facts and looking to the definition of the "production" and "tobacco products", it is clear that under the COTP Act, the production of pipe tobacco, Hookah tobacco, chewing tobacco is permissible and the "tobacco products" would include the same. The said "tobacco products" may be used in smoking. As per the definition, "smoking" means smoke of tobacco in any form of cigarettes, cigars, beedis or otherwise with the aid of pipe, wrapper or "any other instruments". Thus, smoking of the tobacco products is permissible with the aid of pipe or by any other instrument, popularly known as Hookah. As per section 4 of the COTP Act, the prohibition of smoking at public place has been specified, but, in case of hotel having more than 30 rooms or restaurants having seating capacity of such persons or in the airports a separate provision for smoking area or "Open space" may be made. It is made clear here that rule 3 of the Rules of 2008 is commensurate to the main body of section 4 of the COTP Act while rule 4 is commensurate to the proviso of the said section. The case in hand relates to hotel and restaurants governed by the proviso of section 4 of the COTP Act and rule 4 of the Rules of 2008, and in the manner as prescribed therein. Thus, in the considered opinion of this court, in the hotels having capacity of 30 or more rooms or restaurants having seating capacity of 30 persons or more, smoking may be permitted in the manner as prescribed in the Act and the Rules in smoking area or space, not otherwise. However, without indicating the violation of the provisions of the COTP Act and the Rules by the particular hotel or restaurants passing a general order due to giving the bad name to administration is unsustainable. In such circumstances, the order, annexure P/6, passed with general remarks is without following the provisions of the COTP Act and the Rules, however, quashed.

23. In view of the discussion made hereinabove, and looking to the basic provisions of the COTP Act, 2003 and the Rules of 2008 and also in the light of the judgment of the Apex court in the case of Narinder S. Chadha & Ors. (supra) and also looking to the judgment of All India Café and Sheesha association (supra) passed by a learned Single Judge of this Court, certain guidelines are required to be issued. But, simultaneously, it is to be restated that the provision of section 144 of Cr.P.C. has been introduced with intent to deal with the emergent and anticipated situation. However, passing the consecutive order by the District Magistrate is against the spirit of Section 144 of the Cr.P.C. as specified by the judgment of Hon'ble Apex court in the case of Acharya Jagdishwaranand Avadhuta etc. (supra). However, directed that the authorities are bound to act as per the spirit of the Cr.P.C. In view of the foregoing observations, both the questions are answered accordingly.

24. Consequently, in my considered opinion, the order impugned, annexure P/6, passed by the respondent no.7 is hereby quashed. As the life of the order, annexure P/7, has elapsed, however, subject to complying the observations, power under section 144 Cr.P.C. may be exercised by the District Magistrates. Accordingly, this petition is hereby allowed in part with the following directions :-

- i) As the sale of tobacco products is strictly prohibited to the persons below the age of eighteen years, and upto hundred yards of the educational institutions in the State, as per section 6 of the COTP Act, however, directed that in case of any violation action ought to be taken applying the mandate of law.



ii) As per section 4 of the COTP Act, smoking at a public place is prohibited subject to compliance of rule 3 and rule 4 of the Rules of 2008. However, directed that in hotels, restaurants and at other public places smoking can be permitted within the ambit of rule 4 of the 2008 Rules.

iii) The hotel and restaurant owners cannot be permitted to offer Hookah or use of tobacco products by pipe or by any other instrument on each and every table under the garb of service; in fact it can be permitted in a smoking area or space only. However, it is directed that smoking may be permitted in hotel and restaurants only in the smoking area or place, otherwise action may be taken in accordance with law.

iv) In view of the discussion made hereinabove and looking to the spirit of Section 144 of Cr.P.C., the District Magistrate may pass the order in case of emergent situation and to check the anticipated action, visualizing danger to human life, health or safety or disturbance of the public tranquility and in other situations as specified. But, the repetitive orders seems to be of semi-perennial nature which is not permissible in law.

(J. K.

MAHESHWARI) JUDGE HS