

IN THE LAHORE HIGH COURT LAHORE

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Lahore High Court, Lahore

W.P. NO. 23510/2012

M/s Olive Grill Restaurant, 20-C-1, M.M. Alam Road, Lahore a Proprietorship through Muhammad Naseer Malik son of Malik Muhammad Sadique its sole proprietor.

...PETITIONER.

VERSUS

1. Province of the Punjab through Secretary to the Government of the Punjab, Home Department, Civil Secretariat, Lahore.
2. The City District Government Lahore through its Administrator.
3. The Administrator City District Government Lahore/DCO Lahore.
4. CCPO Lahore.
5. District Officer (Environment) City District Government Lahore.
6. Additional Secretary (Internal Security) Home Department, Government of the Punjab.

...RESPONDENTS.

**WRIT PETITION** under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

The petitioner humbly submits as follows:-

1. The petitioner, as is obvious from its name is a restaurant which is open to general public and offers them food and drinks etc. as per their desire. The respondents herein are continuously



interfering in the lawful business and trade of the petitioner by raiding the restaurant and sealing it on the pretext of alleged violations of Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002.

2. The afore said Ordinance i.e. Ordinance No. LXXIV of 2002 (hereafter the Ordinance) was promulgated by the then President of the country and is, thus, Federal Legislation. The same was formulated with the purposes of providing for the prohibition of smoking and other tobacco uses in places of public work or use and in public service vehicles as also to protect the health of non-smokers. (Copy of the Ordinance is attached as Annexure "A").

3. Section 2(c) of the Ordinance defines the term "Place of Public Work or Use" as follows:-

"Place of public work or use means any place declared as such under Section 3 and includes auditoriums, buildings, health institutions, amusements centers, restaurants, public offices, court buildings, cinema halls, conference or seminar halls, eating houses, hotel lounges, other waiting lounges, libraries, bus stations or stands, sports stadium, educational institutions, libraries and the like which are visited by general public but does not include any open place;"



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7. Similarly vide Notification No. 956(1)/2008 dated 6-9-2008 guide lines were issued for permitting and setting of designated smoking areas. (Annexure "C").

The afore stated Notification was, however, withdrawn on 15-6-2009. (Annexure "D").

8. The Constitution 18<sup>th</sup> Amendment Act was promulgated on 20-4-2010 with the result that Environment and Health were no longer within the legislative competence of the Federal Government.

9. Article 270-AA of the Constitution provided for the enforceability of the existing laws in the following manner:-

**270-AA. Declaration and continuance of laws etc.**

(1) .....

(2).....

(3).....

(4).....

(5).....

(6) Notwithstanding omission of the Concurrent Legislative List by the Constitution (Eighteenth Amendment) Act, 2010, all laws with respect to any of the matters enumerated in the said List (including Ordinances, Orders, rules, bye-laws, regulations and notifications and other legal instruments having the force of law) in force in



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Pakistan or any party thereof, or having extra-territorial operation, immediately before the commencement of the Constitution (Eighteenth Amendment) Act, 2010, shall continue to remain in force until altered, repealed or amended by the competent authority.

(7).....

(8) On the omission of the Concurrent Legislative List, the process of devolution of the matters mentioned in the said List to the Provinces shall be completed by the thirtieth of June, two thousand and eleven.

(9).....

10. The Province of the Punjab has not so far carried out any amendments in the Ordinance so as to enable itself to give effect to the provisions thereof. Resultantly, the provisions of the Ordinance are practically unenforceable for want of appropriate adaptations/amendments by the appropriate legislature. It, therefore, follows as a natural corollary, that no person or authority within the Provincial Hierarchy is vested with the competence to enforce the provisions of the Ordinance.

11. The respondents No. 2, 3 and 5 also seek to enforce the provisions of Section 146(D)(2) and 195 read with Clause 48 of the 6<sup>th</sup> Schedule of the Punjab Local Government Ordinance 2001 which



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has no application in the present case. (Copies of the Notices are appended as Annexure "E").

12. A perusal of the relevant provisions of the Punjab Local Government Ordinance leaves no doubt that the same cannot be deployed for carrying out raids on the petitioner's restaurant for confiscating material available therein, as also sealing the same.

13. Clause 48 of the 6<sup>th</sup> Schedule to the Punjab Local Government Ordinance is actually relatable to the prevention of pollution of air by gases, dust or other substances exhausted or omitted by automobile engine, factories, brick or lime kilns, crushing machines for grains, stone, salt or other materials. It is wholly un-understandable as to how and under what authority the provisions of Punjab Local Government Ordinance could be deployed to initiate action against the petitioner on one pretext or the other.



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14. Simultaneously the respondent No. 3 issued repeated notifications in purported exercise of his powers under Section 144 Cr.PC. prohibiting "Sheesha" smoking in public places. (Copies of the notifications are attached as Annexure "F").

15. The afore stated notifications, issued one after the other, are not only manifestly

incompetent but are wholly without any lawful jurisdiction.

The respondent No. 3 has failed to comprehend that Section 144 Cr.P.C. is a transitory provision meant to cater for temporary situation or to facilitate stop gap arrangements. Issuance of a notification under Section 144 Cr.P.C. in the instant case is nothing but a mala-fide attempt so as to deny the fundamental rights guaranteed to the petitioner by Article 18 of the Constitution of Islamic Republic of Pakistan, 1973.

16. The notifications above referred issued by the respondent No. 3 are also opposed to basic ingredient of Section 144 Cr.P.C. which envisages that there should be sufficient grounds for proceeding under the said section for immediate prevention of obstruction, annoyance or injury to any person lawfully employed or danger to human life health or safety or a disturbance of public tranquility or a riot or affray.

17. Considering that notification under Section 144 Cr.P.C. for a period of one month could not have been issued by the respondent No. 3, a notification dated 23-8-2012 has now been issued by the Provincial Government i.e. the respondent No. 1 without comprehending that the provisions



Attorney General  
 Punjab  
 Lahore High Court



of Section 144(6) Cr.P.C. were hardly available in the given circumstances.

18. The law on the subject as enunciated by the superior courts of the country expressly deprecates issuance of repeated notifications on the same subject in order to achieve something indirectly which could not be achieved directly.

19. It has repeatedly been held by this August Court that the provisions of Section 144 Cr.P.C. cannot be deployed to deny the citizens their fundamental rights as guaranteed by the Constitution of Islamic Republic of Pakistan, 1973.

20. Although it is seriously debatable as to whether being the Administrator of the City District Government, the DCO could at all have issued such notifications as apparently he does not enjoy the powers of the Zila Nazim it is also not discernible from the said notification as to whether any written recommendations were submitted to him by the CCPO Lahore or the EDO concerned.

21. The last Notification dated 23-8-2012 i.e. the one issued by the respondent No. 1 has equally no legs to stand on as much as the Provincial Government has no authority to extend an incompetent order issued by the respondent No. 3 in the instant case.



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22. In the instant case litigation has taken place between the respondents and the restaurant owners. Pursuant to the orders issued by this Honourable Court, the matter was taken up by the respondent No. 1 and on 18-8-2012, the Additional Secretary (Internal Security) Home Department issued an order directing proper and strict enforcement of the Protection of Non-Smokers Health Ordinance, 2002. The afore stated direction was issued in the back drop of Section 2(c) of the said Ordinance which explicitly excludes open places from the preview of "Place of public work or use". Admittedly the petitioner, being a considerate businessman had only been offering Sheesha to the desiring customers in an open area being the backyard of his restaurant and, thus, no violation, whatsoever, even of the inapplicable Protection of Non-Smokers Health Ordinance, 2002 had taken place.



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23. The stubbornness and the audacity with which the respondents are defying their own order dated 18-8-2012 are simply beyond comprehension.

24. The petitioner premises were lastly sealed on 3-9-2012 for a period of one week, although the prescribed penalties either under Section 188 Cr.P.C. and or under the Punjab Local



Government Ordinance do not permit the sealing/closure of the business premises in such a blatant manner. Repetition of such illegal sealing/closure of the petitioner's premises is bound to happen.

25. The petitioner is left with no other adequate alternate remedy but to invoke the constitutional jurisdiction of this Honourable Court.

It is, therefore, most respectfully prayed that this petition be allowed, the acts of the respondents in deploying the provisions of the Protection of Non-Smokers Health Ordinance 2002, the Punjab Local Government Ordinance, 2001 as also the provisions of Section 144 Cr.P.C. to interfere in the lawful trade and business of the petitioner through raids, harassment and sealing of his business premises may kindly be declared as illegal, incompetent and without lawful authority.

An appropriate writ/direction be issued to the respondents restraining them perpetually from interfering in the business of the petitioner, raiding his business premises, harassing the staff and from sealing the same in any manner whatsoever.

It is further prayed that the Notifications dated issued by the respondent may graciously be struck down being wholly illegal and violative of the Constitution of Islamic Republic of Pakistan.



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Any other relief this Honourable Court deems fit in the circumstances of the case may also very kindly be granted.

Costs be also awarded.

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Authorized Under Article 87 of  
Qanun-e-Shahadat Order, 1984



MUHAMMAD SHAHZAD SHAUKAT  
ADVOCATE SUPREME COURT  
3-FANE ROAD, LAHORE  
(C.C. # PLH-1553)

**NOTE**

1. This is first petition on this subject as per instructions.
2. Certified that the petition has arisen from violation/non-fulfillment of obligation and that alternative remedy provided by law has been availed by the petitioner.

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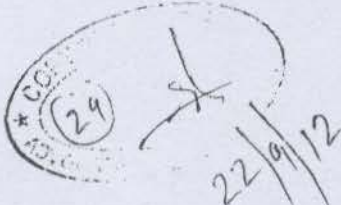
In Case No. 235/12

Examiner: JIS (Writ Branch)  
Lahore High Court, Lahore.

ADVOCATE

**LIST OF BOOKS**

1. Constitution of Islamic Republic of Pakistan, 1973.
2. Citations from PLD and other relevant publications.



ADVOCATE



Petition No. 22745  
Case No.  
Date of Presentation of Application 04-10-12  
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