

Form No. HCSB/C-121

ORDER SHEET

IN THE LAHORE HIGH COURT LAHORE JUDICIAL DEPARTMENT

Case No: WP No. 23510-2012

Versus
M/s. Olive Grill Restaurant

Province of Pb etc.

S. No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties' counsel, where necessary.
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10.12.2012. Mr. M. Shahzad Shaukat, Advocate for petitioner.
Mr. Ahmad Rauf, Addl: A.G.
Mr. Iftikhar Ahmad Mian, Advocate for CDGL.
Mr. Muhammad Abdullah Amin, Advocate for applicant in
CM No. 3708-2012.
Muhammad Younas Zahid, Deputy District Officer,
Environment for respondent No.2.
Syed Zulfiqar Hussain, Consultant, Anti-Drug/Narcotics.

The matter in issue is whether the notification bearing S.R.O 51(KE) dated 15.06.2009 issued by the Ministry of Health, Government of Pakistan, declaring all public places listed in Section 3 of the Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002 ("**Ordinance**") and in S.R.O 653(I)/2003 dated 03.07.2003 to be "*completely smoke free*" areas, can be adopted by the Provincial Government to prohibit smoking of *Sheesha* in reserved spaces open to sky located within bounded premises of *Sheesha* cafés in Lahore.

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2. Learned counsel for the petitioner submits that provisions of Section 5 of the Ordinance empower~~s~~ the Federal Government to issue guidelines for permitting designated smoking areas in premises or places where adequate arrangements are made to protect the health of non-smokers. By notification dated 21.10.2006 issued by the Ministry of Health, the powers of the Federal Government under the Ordinance have been delegated to the Provincial Governments. The 18th Amendment to the Constitution has also devolved the subject of "health" to the Provincial Governments. Consequently, the learned counsel for the petitioners urges that the right granted to smokers under Section 5 of the Ordinance has to be duly implemented by the Punjab Government. The Punjab Government has not exercised its powers under the Ordinance but has delegated the subject of environmental control and pollution to the District Government under Section 14 of the Punjab Local Government Ordinance, 2001

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("PLGO") read with Section 35 thereof. The respondent city district government Lahore has used such powers to curtail sheesha smoking in open to sky cafés through the impugned notices under Section 146-D of the PLGO dated 24.07.2012, 03.09.2012 and under Section 144 Cr.P.C. vide orders dated 16.06.2012 and 21.06.2012.

3. The aforementioned prohibitory notification by the Federal Government dated 15.06.2009 may in exercise of powers delegated under notification dated 21.10.2006 be lawfully implemented by provincial authorities. This would be in pursuance of the provisions of Section 3 of the Ordinance which is re-produced below:

"As soon as may be after the commencement of this Ordinance the Federal Government may from time to time, by notification in the official Gazette, declare any place of public work or use to be a no-smoking and no-tobacco use place for the purpose of this Ordinance."

The expression "any place of public work or use" has been defined in Section 2(c) of the Ordinance which is reproduced below:

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

4. The petitioner is a restaurant and maintains a *Sheesha* café within its premises. The café does not have ~~it~~ walls or ceiling and is open to the sky. The petitioner maintains that the space reserved for sheesha smoking is actually an open place that is excluded from the meaning of the defined term "*place of public work or use*". Consequently, it is prayed that sheesha smoking activity should be permitted by respondents in the said place pursuant to the right of smokers recognized in Section 5 of the Ordinance.

5. The respondent District Government has attempted to define the expression "*open place*" by actually defining expression "*public place*". That effort reflected in notification dated 03.11.2012 is of no relevance to the controversy in issue and is accordingly disregarded in the

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present discussion. Taking a common sense view of the expression "open place" used in the definition given in Section 2(c) of the Ordinance, it can be gathered that "open place" is meant to be a place that is not either of public work or of public use. To ascertain other attributes of the expression, one can examine the meaning of the word "place" as defined in Black's Law Dictionary:

"This word is a very indefinite term. It is applied to any locality, limited by boundaries, however large or however small. It may be used to designate a country, state, county, town, or a very small portion of a town. The extent of the locality designated by it must generally be determined by the connection in which it is used. In its primary and most general sense means locality, situation, or site, and it is also used to designate an occupied situation or building". (Black's Law Dictionary 9th Edition)

In the present context of Section 2(c) of the Ordinance an "open place" is a place that first of all does not have/cater public interaction and secondly, is open in the sense of being "not closed, settled, fixed or terminated". (*Black's Law Dictionary 9th Edition*).

6. According to Section 2(c) of the Ordinance, any place that is open to the sky but is cordoned in a manner to accommodate persons engaging in smoking within the enclosed restricted area cannot be described as an "open place". Therefore, an open place in the present context must necessarily be a place where an individual exercises his preference of smoking individually and not collectively. Consequently, to the extent that the District Government is taking prohibitory action against enclosed places open to the sky situated within the *Sheesha* cafés is concerned, such action is lawful within the meaning of Section 3 read with Section 2(c) of the Ordinance.

7. Now taking up the basis of the petitioner's claim, namely, right contained in Section 5 of the Ordinance, the question is what constitutes the limits of such a right; more importantly what are the criteria for assessing the nature and composition of such right? The petition is silent in the foregoing respects.

Therefore, the manner in which Section 5 of the Ordinance may be implemented in the background of the notifications mentioned above is a matter that requires careful deliberation. In this behalf, learned counsel for the petitioner submits that he would like to bring a fresh challenge based on Section 5 of the Ordinance to address the matters noted above.

8. In view of the foregoing, this petition is disposed of.

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 Authorized Under Article 87 of
 Qanun-e-Shahadat Order, 1989

Sd/-UMAR ATA BANDIAL
 CHIEF JUSTICE

APPROVED FOR REPORTING

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 14/12/12
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 Case No.....
 Date of Presentation of Application.....
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