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

WRIT PETITION (L) NO. 1531 OF 2011

Berrys Hotel Pvt.Ltd. (MOCHA) a private limited company,incorporated in India, under the Companies Act, 1956, having its registered office at 82, Nagin Mahal, Veer Nariman Road, Churchgate, Mumbai-400 020. ... Petitioner

Versus

1. The Municipal Corporation of Greater Mumbai, a public body constituted under the provisions of the Mumbai Municipal Corporation Act, 1888, having its office at Mahapalika Marg, Mumbai-400 001.

2. The Municipal Commissioner of Greater Mumbai, having his office at Mahapalika Marg, Mumbai -400 001.

3. The Executive Health Officer, Greater Mumbai Municipal Corporation, having office in F/South Ward Building, Parel, Mumbai- 400 012.

4. The Medical Officer of Health, `A' Ward, BMC, 134F, S.B. Singh Road, Fort, Mumbai - 400 001.

5. The Commissioner of Police, .. Respondents having his office at Police Headquarters, Opp. Mahatma Phule Market, Mumbai-400 001.

ALONGWITH
WRIT PETITION (LODGING) NO.1532 OF 2011

Maestro Entertainment &
Hospitality Pvt.Ltd. (MOCHA) a
private limited company incorporated in
India, under the Companies Act, 1956,
having its registered office at S-18,
Nirmal Life Style, L.B.S.Marg,
Mulund (West), Mumbai - 400 080. ... Petitioner

Versus

1. The Municipal Corporation of Greater Mumbai,
a public body constituted under the provisions
of the Mumbai Municipal Corporation Act, 1888,
having its office at Mahapalika Marg,
Mumbai-400 001.

2. The Municipal Commissioner of Greater Mumbai,
having his office at Mahapalika Marg,
Mumbai -400 001.

3. The Executive Health Officer,
Greater Mumbai Municipal Corporation,
having office in F/South Ward Building,
Parel, Mumbai- 400 012.

4. The Medical Officer of Health, `A' Ward,
BMC, 134E, S.B. Singh Road,
Fort, Mumbai - 400 001.

5. The Commissioner of Police, having his
office at Police Headquarters, Opp. Mahatma
Phule Market, Mumbai-400 001.

ALONGWITH
WRIT PETITION (LODGING) NO.1533 OF 2011

Munib Abdul Hamid Birya of Mumbai,
aged 32 years, Indian Inhabitant, Partner of
M/s. Birya's Super Super a Partnership firm,
registered under the Partnership Act, 1932,
having its registered office at B & C, Shalimar Estate,
(Sitaram Building), Dr.D.N.Road, Mumbai-400 001. ... Petitioner

Versus

1. The Municipal Corporation of Greater Mumbai,
a public body constituted under the provisions of the
Mumbai Municipal Corporation Act, 1888,
having its office at Mahapalika Marg,
Mumbai-400 001.

2. The Municipal Commissioner of Greater Mumbai,
having his office at Mahapalika Marg,
Mumbai -400 001.

3. The Executive Health Officer,
Greater Mumbai Municipal Corporation,
having office in F/South Ward Building,
Parel, Mumbai- 400 012.

4. The Medical Officer of Health, `A' Ward,
BMC, 134E, S.B. Singh Road,
Fort, Mumbai - 400 001.

5. The Commissioner of Police, having his office at
Police Headquarters, Opp. Mahatma Phule Market,
Mumbai-400 001. .... Respondents

ALONGWITH
WRIT PETITION (LODGING) NO.1540 OF 2011

1. Narinder S. Chadha Age 69 years, of Mumbai,
Indian Inhabitant, residint at Asha Colony,
Bungalow No.6, Juhu Tara Road,
Mumbai-400 049.

2. Suneet S. Chadha, Age 44 years, of Mumbai,
Indian Inhabitant, residing at Oxford C.H.S.Ltd.,
15th Road, Bandra (W), Mumbai-400 050.

3. Devendra Mahendra Sanghvi, Age 28 years,
of Mumbai, Indian inhabitant, residing at 1101,
D-Wing, Gundecha Garden, Opp. Ganesh Talkies,
Lalbaug, Mumbai- 400 012.

4. Harshad Sanjay Shah, Age 28 years, of Mumbai,
Indian Inhabitant, residing at A/702,
Poonam Appartments, Dr.Annie Besant Road,
Worli, Mumbai-400 018. ... Petitioner

Versus

1. Municipal Corporation of
Greater Mumbai, a Body Corporate,
constituted under the provisions of the
Mumbai Municipal Corporation Act, 1888,
having its office at Fort,
Mumbai-400 001.

2. The Municipal Commissioner for
Greater Mumbai, having his office at
Fort, Mumbai -400 001.

3. The Executive Health Officer,
Greater Mumbai Municipal Corporation,
having office in F/South Ward Building,
Parel, Mumbai- 400 012.

4. The Medical Officer of Health,
H/West Ward, BMC, 56,
Martin Road, Bandra (West),
Mumbai.

5. State of Maharashtrta
(notice to be served on the
Government Pleader, High Court,
Original Side, Mumbai). ... Respondents

ALONGWITH
WRIT PETITION (LODGING) NO.1558 OF 2011

Pankaj Harisingh Rathod,
M/s. Cafe Cabana,
T 3585, C.S.T. No.667 (PT),
Mulund Goregaon Link Road,
Nahur Village, Mulund (West),
Mumbai-400 080. ... Petitioner

Versus

1. Union of India,
Through the Secretary,
Ministry of Health & Family Welfare,
Nirman Bhavan, New Delhi-110 001.

2. The State of Maharashtra.
Through the Secretary,
Department of Health,
Mantralaya, Mumbai.

3. The Commissioner,
Food & Drug Administration,
Bandra Kurla Complex, Mumbai.

4. The Commissioner,
Municipal Corporation of Greater Mumbai,
Mahapalika Bhavan,
Mahapalika Marg,
Fort, Mumbai-400 001.

5. The Commissioner of Police, Mumbai,
Office of the Commissioner of Police,
Opp. Crawford Market, Mumbai-1.

6. Crusade Against Tobacco (A Branch of the Neil Charitable Trust), through its Chairman Mr.Vincent Nazareth, Having its retgistered office at 16, Prajakta, Bamanwada, Vile Parle (E), Mumbai-09. ... Respondents

Mr. Zal Andhyarujina with Sanjay Kadam and Apeksha Sharma i/b. M/s. Kadam & Co. advocate for petitioner(PIL(L) No. 111/2010.)

Dr. Milind Sathey, Sr. Advocate with Rajiv Narula & A. Dasgupta i/b. M/s. Jhangiani, Narula Associates for petitioner in WPL 1540/11.

Ms. Veena Thadani for petitioners in WPL 1531, 1532 & 1533/2011.

Mr. Amit Karande, for petitioners in WPL 1558/11.

Mr. K.R. Belosey, 'A' Panel counsel with Shekhar Ingawale, AGP for respondent State.

Mrs. Geeta Joglekar, advocate for respondent BMC.

Mr. Rajinder Kumar with Mr. D.P. Singh, advocate for Union of India.

CORAM: MOHIT S. SHAH, C. J. AND GIRISH GODBOLE, J.

11 ***August 2011***

ORAL JUDGMENT (Per Chief Justice)

Rule. Rule made returnable forthwith and taken up for hearing by consent of the learned Counsel appearing for the petitioners and the respondents.

2. These 5 petitions are filed by owners of restaurants which were granted licences under section 394 of the MMC Act,

1888 for running eating houses. The petitioners also claim to have seating capacity of 30 persons or more and "smoking area" in their restaurant under Rule 4(1) of the Prohibition of Smoking in Public Places Rules, 2008 (hereinafter referred to as 'Smoke free Rules). The petitioners challenge circular dated 4 July 2011 issued by the Municipal Corporation of Greater Mumbai incorporating condition Nos. 35 to 37 in the general conditions of licence issued under section 394 of the M.M.C. Act.

3. The conditions impugned in these petitions are as under:-

> "**Condition No. 35** – The licensee shall not keep or allow to keep or sell or provide any tobacco or tobacco 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)

4. The legality of this very circular came to be challenged by owners of the restaurants who were joined as respondent Nos. 8 and 9 in PIL (L) No. 111 of 2010. In fact WP (L) No. 1533 of 2011 is filed by M/s. Birya's Super Supper, which partnership firm had filed Chamber Summons No. 200 of 2011 for being impleaded as party respondent in the said PIL and the said Chamber Summons was allowed and M/s. Birya's Super Supper, partnership firm was joined as respondent No. 8 in the said PIL. The learned counsel for the said party had thereafter argued the matter and raised the challenge to the legality of the above circular dated 4 July 2011. After hearing the learned counsel for the said party as well as learned counsel for the Municipal Corporation, learned counsel for the petitioner in the said PIL and learned counsel for the State; this Court had by order dated 13/7/2011 upheld the legality of the said circular dated 4/7/2011.

5. The present group of petitions including the said WP(L) No. 1533 of 2011 are filed by the owners of the restaurants which have been granted licences of "eating house" under section 394 of M.M.C. Act, 1888 as indicated above. It is contended that since the present petitioners except petitioner in Writ Petition (L) No. 1533 of 2011 were not parties, the order dated 13/7/2011 does not bind the petitioners. It is further submitted that the petitioners have various contentions to raise to challenge the legality of the said circular and that therefore the petitioners may be heard on their own merits.

6. Since the present petitioners, except the petitioners in Writ Petition (L) No. 1533/2011 were not parties to the above numbered PIL, we have heard the learned counsel for the petitioners at length. Learned counsel for the petitioners raised same contentions that the authorities under the MMC Act have no power to impose any condition on the basis of the Smoke Free Rules of 2008 which are framed by the Central Government.

7. The learned Senior Counsel Dr. Milind Sathey advanced following submissions :

(a) Relying on the provisions of section 394 of the M.M.C. Act, 1888 it was submitted that the said section essentially provides for prohibition to keep or suffer or allowed to be kept in or upon in premises as indicated in Schedule M to the said Act by providing different restrictions in respect of the Parts- I, II and III of Schedule M. It is submitted that sub-clause (d) of Sub-section 1 of Section 394 of M.M.C. Act, 1888 in so far as it uses the words "dangerous to life, health or property" have to be construed in the context of the Articles enumerated in Schedule M only. Further relying on section 479 of the said Act it is argued that though the said section provides that the licences and written permissions to be given for any purpose as provided in the Act shall specify "restrictions and conditions" subject to which the same is granted, the power to impose such restrictions and conditions is relatable only to a restriction or condition which can be imposed under the M.M.C. Act, 1888 and that the Commissioner does not have any power to impose a condition or restriction not emanating from the provisions of the said Act.

b) Relying on parts-I, II and III of Schedule M, it is submitted that since tobacco is not one of the articles enumerated in

the Schedule M, the storage of tobacco cannot be construed to be "dangerous to life, health and property" and, hence, the Municipal Commissioner has no jurisdiction to impose any condition in the licences relatable to tobacco.

c) Criticizing condition No. 35, which has been added by the impugned circular in the new licences as also the existing licences for eating houses (restaurants) it was submitted that since there is no reference to the articles of tobacco or to the articles "tobacco or hookah" in Schedule M of the Act, the Municipal Commissioner had no powers to impose any condition regarding the provision of “smoking area” nor had the Municipal Commissioner any power regarding implementation of COTPA, 2003 or the Smoke Free Rules, 2008. It was argued that the said condition No. 35 is even otherwise unconstitutional since according to the learned counsel, the said condition even prohibits keeping or selling of tobacco or tobacco related products in any form whether in the form of cigarettes, cigar, bidies or otherwise with the aid of pipe, wrapper or any other instruments in the licenced premises. It is submitted that even COTPA, 2003 and the Smoke Free Rules, 2008 do not impose an absolute prohibition against sale of tobacco products, the Municipal Commissioner could not have imposed such a prohibition in the form of opening words of impugned condition No. 35.

d) It was also submitted that the Municipal Commissioner had no jurisdiction to prescribe any conditions regarding the size of the room which should be designated as a "smoking area" under section 4 of the COTPA 2003 or to prescribe minimum height of such room.

e) Criticising the other conditions added by the Municipal Commissioner it was submitted that the only restriction which can

be placed under Smoke Free Rules is in respect of the smoking area.

f) It was further contended that the only restriction which can be placed under the Smoke Free Rules is in respect of "smoking area" which is to be found in Rule 3(4), which states that the smoking area or space shall be used only for the purpose of smoking and no service of things designed to facilitate smoking shall be allowed. It is contended that "no other services" could only mean no service which is not related to smoking shall be allowed. However, when the owner of restaurant provides hookah in smoking area, there is no violation of sub-rule 3 of rule 4, because rule 3(1) (c) will not apply. It is vehemently submitted that rule 3(1) (c) would only apply to non-smoking area in a "public place" but restriction contained in Rule 3(1) (c) cannot apply to smoking area because Rule 4 is intended to be an exception to the Rule 3.

(g) Heavily relying on the judgment of the Supreme Court of India in the case of *Godawat Pan Masala Products I.P.Ltd. and Anr. v/s. Union of India & ors.*[1] it was submitted that field in question was an occupied field. It was submitted that considering the fact that COTPA, 2003 was a Central enactment and the Smoke Free Rules 2008 have also been framed by the Central Government, even the State Legislature will not have any jurisdiction to pass any such order as the one which has been passed by the Municipal Commissioner. By relying on section 31 of COTPA, 2003 it was submitted that even the power to frame Rules, which is a power of subordinate legislation, has been conferred only on the Central Government and, hence, when even the State Legislature or the State Government having no authority to exercise any power of subordinate or executive legislation in respect of any matter covered by COTPA, 2003 or the Rules thereunder; Municipal Commissioner

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1*(2004) 7 SCC 68*

can never exercise any such powers, as, according to the learned counsel, issuance of the impugned circular and imposition of condition No. 35 to 37 amounts to a legislation which is impermissible. In support of this proposition, very strong reliance was placed on the observations of the Supreme Court in the case of *Godawat Pan Masala (Supra*) and particularly paragraphs- 24 to 28 of the said Judgment have been relied upon. Further reliance has been placed on the observations in paragraph-36 to 42 of the said Judgment to contend that the Supreme Court having conclusively laid down that the provisions of the COTPA, 2003 being a special statute dealing with tobacco and tobacco products must override the provisions of any other enactment and since COTPA, 2003 is a special law as against M.M.C. Act, 1888 which according to the Counsel is a general law, and since COTPA, 2003 is enacted by Central Legislature as against M.M.C. Act, 1888 which has been enacted by State Legislature, the special law will displace the general law to the extent of inconsistency and since, the special law does not impose any absolute prohibition against the sale of tobacco products, such prohibition could not have been imposed by the State enactment.

(h) Relying on the Judgment of the Supreme Court in the case of *S.N. Rao & ors. v/s. State of Maharashtra & ors.*[2] it is contended that in any case and assuming that condition Nos. 35 to 37 could have been imposed while issuing a new licence or renewing the existing licence, the Commissioner had no jurisdiction to impose the said conditions by adding them to the existing licence. In support of this submission, reliance was placed on the observations in paragraph-8 of the said Judgment.

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2 *(1988) 1 SCC 586*

8. Mrs. Thadani appears for petitioners in Writ Petition (L) Nos. 1531, 1532 & 1533 of 2011 advances following submissions.

(a) Heavy reliance is placed upon the Judgment of the Supreme Court in the case of *Godawat Pan Masala (Supra)* and particularly observations in paragraph 53 of the said Judgment. It was submitted that when the parliament had not considered hookah to be a product inherently or viciously dangerous to health, it is not open for the Municipal Commissioner to treat the activity of smoking of hookahh with tobacco, which according to Mrs. Thadani is used in small quantities, as dangerous or injurious to public health. It was submitted that by the impugned circular the Municipal Commissioner has virtually treated hookahh as an article *res extra commercium.* It is further submitted that in any event, whether an article is to be prohibited as *res extra commercium* is a matter of legislative policy and must arise out of an Act of the Legislature and not by a mere circular or notification issued by the Municipal Commissioner who has only an administrative/executive authority. Mrs. Thadani also relied upon provisions of Section 479 of M.M.C., 1888 Act to contend that imposition of the impugned conditions was entirely de-horse the provisions of the said Act.

b) Mrs. Thadani further submitted that on smoke analysis of cigar and bidies it shows very high contents of tar, nicotine and carbon monoxide, samples of viper flavoured molasses which is allegedly used in hookah being served in the eating houses/restaurants of the petitioners have no nicotine or very less nicotine and chlorides and hence, the said hookah can never be construed to be dangerous or injurious to health. Relying on the definition of the word “smoking” under section 3(n) of the COTPA, 2003 it was submitted that the impugned circular virtually amounts

to imposition of blanket ban on smoking which can not be done by the Municipal Commissioner.

(c) Mrs. Thadani also relied on Schedule II of the Smoke Free Rules, 2008 referable to Rule 3(b) of the Rules to contend that since the Central Government has framed rules indicating requirements for compliance of provisions of the Act and the Rules, Municipal Commissioner does not have jurisdiction to impose any further/other conditions. By relying on Schedule III of the said Rules it was submitted that the Municipal Commissioner or Officers of the Municipal Corporation were not authorised officers for taking any action for violation of Section 4 of COTPA.

9. Mr. Amit Karande, learned counsel for the petitioner in Writ Petition (L) No. 1558 of 2011 adopted the submissions of Dr. Milind Sathey and Mrs. Thadani.

10. Mrs. Geeta Joglekar, learned counsel appearing for Respondent No.1 Corporation and its officers opposed the petitions with the following submissions :

a) Various issues and submissions which are sought to be raised/advanced by the respective advocates for the petitioners have already been conclusively decided against them by the Judgment of this very Division Bench delivered on 13th July, 2011 in PIL (L) No. 111 of 2010. She supported the impugned circular by relying upon the Statement of Objects and Reasons of COTPA 2003.

b) The learned counsel submitted that the submission that section 394 or Schedule M does not empower the Commissioner to impose such conditions clearly overlooks the provisions of Section

394 itself. She submitted that sections 394(1)(d) and 394(1)(e)(i) and (ii) clearly empower the Municipal Commissioner to impose such condition.

c) Relying on the various entries in Part-IV of the Schedule M of the M.M.C. Act, 1888, it was urged that for the activity of keeping of or running an eating house or catering establishment, it was essential to obtain a licence as contemplated by section 479 and 394 of the Act. It was submitted that any commercial activity without licence under section 394 is illegal and that merely because a licence is issued under the Bombay Shops and Establishments Act; it does not empower licensee to carry on business without a licence under the M.M.C. Act, 1888 when such licence is required.

d) Relying on clause 3 and 10 of Schedule III to the Smoke Free Rules, 2008, it was submitted that the Municipal Commissioner, Medical Officer of Health Department and other officers of the public health department of the MCGM were duly authorised to impose and collect the fine against the violation of section 4.

e) Referring to the submissions about lack of jurisdiction of the Commissioner or the State Legislature which was essentially based on the Judgment of the Supreme Court in the case of Godawat(supra) it was submitted that the Commissioner has not issued any circular which is either contrary to the provisions of COTPA, 2003 or Smoke Free Rules, 2008 nor do condition Nos. 35 to 37 violate the statutory provisions and, hence, there was no question of any conflict between the Central Enactment and the

State enactment. Judgment in the case of Godawat(Supra) was considering the situation where officers of the State Governments exercising powers under the provisions of the Prevention of Food Adulteration Act, 1954 and the Rules framed therein had sought to impose complete ban on the sale of gutka and in that context the Judgment of the Supreme Court will have to be read. Hence the ratio of the said Judgment is completely inapplicable to the facts of the case. The action of adding condition No. 35 to 37 was in fact in aid of and in furtherance of the provisions of the COTPA, 2003 and Smoke Free Rules, 2008 and hence any administrative action which facilitates implementation of the COTPA, 2003 and Smoke Free Rules, 2008 will have to be construed to be an action in aid of the implementation of the said statutory provisions which have been enacted in larger public interest.

f) Reliance placed on the Judgment of the Supreme Court in the case of S.N. Rao, 1988(1) SCC 586 does not carry the petitiner's case any further as the said Judgment deals with grant of a development permission and does not consider any provision of the M.M.C. Act 1888.

g) Relying on Rule 4 of the Smoke Free Rules, 2008, it was submitted that the principal activity which is being carried on by the petitioners is that of eating houses and it is the duty of the Municipal Commissioner to ensure that the principal activity is carried out in consonance with the provisions of COTPA and Smoke Free Rules, 2008.

h) In respect of the submission regarding the minimum size, height etc. of the room which is to be provided as a smoke free

area; she invited attention of the Court to various provisions of the General Development Control Regulations (GDCR) 1991, Greater Mumbai which are statutory development control rules framed under the Maharashtra Regional and Town Planning Act, 1966 and pointed out that all that has been done is to provide for the minimum areas and the minimum heights of the roof in consonance with the aforesaid D.C. Regulations and there was no prohibition to have a higher roof or bigger room as a smoking area.

11. Learned Advocate for the State Government has also supported the submissions advanced by Mrs. Joglekar.

12. Mr. Zal Andhyarujina, learned counsel appearing for the petitioner in PIL (L) No. 111/2010 advanced following submissions:

a) The learned counsel relied extensively on the Statement of Objects and Reasons of COTPA, 2003 by pointing out that tobacco is universally regarded as one of the major public health hazards and that comprehensive legislation was enacted in furtherance of article 47 of the Constitution of India with a view to improve public health in general.

b) The learned counsel also supported the submissions advanced by Mrs. Joglekar and the interpretation of section 394, Schedule M and section 479 as advanced by Mrs. Joglekar as advanced by Mrs. Joglekar by emphasising that section 394(1)(e)(i) and (ii) specifically deal with health and nuisance to the general public.

c) Relying on the 7th Schedule of the Constitution of India it was submitted that entry No. 6 in List II i.e. State list empowers the State Legislature to legislate in respect of "public health and sanitation; hospital and dispensaries" and hence the submission of the petitioners to the effect that there was a complete lack of legislative competence in the State Government is not well founded. Reliance was placed on the Judgment of this Court in the case of Northern Marine Management v/s. MCGM decided on 9/9/2009 (Criminal Writ Petition No. 239 of 2009). He also relied upon the Judgment in the case of *Seema Thadani(Seema Wines) v/s. Municipal Commissioner, Mumbai*[3]. Countering the submissions of the advocate for petitioners that rule 3(1)(c) of the Smoke Free Rules does not prohibit the offering of service of hookah as an apparatus; it was pointed out that hookah is an apparatus which facilitates smoking and the words "other things designed to facilitate smoking" are wide enough to include hookah and consequently service of providing hookah was also banned.

13. In rejoinder the learned senior counsel Dr. Sathey and Mrs. Thadani submitted that condition No. 35 in the impugned circular uses the word "or otherwise with the aid of a pipe, rubber, or any other instrument in the licenced premises" and, hence, this condition No. 35 virtually amends the rule No.3(1)(c) of the Smoke Free Rules, 2008. It was also submitted that the rules have to be read and implemented in their totality and as they are and no addition could have been made to the rules under the guise of imposing conditions in existing licence or in new licence. It was reiterated that under section 31 rule making power vested exclusively with the Central Government, so it was an entirely

3 *2007(1) Mh. L. J. 115 = 2006(6) All M.R. 686*

occupied field and the action of the Municipal Commissioner imposing condition No. 35 virtually amounts to amending the rules framed by the Central Government and is a case of transgression of the legislative functions and the authorities of the Central Government.

14. We have carefully considered the submissions of the learned counsel for the respective parties, the provisions of M.M.C. Act, 1888, COTPA, 2003, the Smoke Free Rules, 2008 and various Judgments which were relied upon.

Re-Contention Nos. (a) and (b) of Dr. Sathey :

15. In so far as submissions Nos. (a) and (b) advanced by learned senior counsel Dr. Sathey are concerned, they clearly overlook the scheme of sections 394, 479 and Schedule M of the M.M.C. Act, 1888. Section 394 of the M.M.C. Act specifically provides that except under and in accordance with the terms and conditions of the licence granted by the Commissioner, no person shall carry on, or allow to be carried on, in or upon any premises – any of the trades specified in Part IV of Schedule M, or any process or operation connected with any such trade. Part IV of Schedule M includes following item- “keeping of an eating house or catering establishment”. It is thus clear that no eating house or catering establishment can be opened or run without licence issued by the Municipal Commissioner under section 394 of the MMC Act. In fact, there is no dispute about the fact that the petitioners claim to run Hookah Bars in smoking areas in restaurants as contemplated under Rule 4 of the Smoke Free Rules of 2008 under which the owner, proprietor, manager, supervisor of a restaurant having

seating capacity of 30 persons or more may provide for a smoking area or space as defined in rule 2(e). Rule 2(e) reads thus:

> *"2(e) "smoking area or space" mentioned in the proviso to Section 4 of the Act shall mean a separately ventilated smoking room that:*
>
> *(i) is physically separated and surrounded by full height walls on all four sides;*
>
> *(ii) has an entrance with an automatically closing door normally kept in 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;"*

16. It is thus clear that smoking area or space is part of a restaurant and therefore since licence is required to be obtained from the Municipal Commissioner under section 394 of the M.M.C. Act, 1988 for opening restaurant, the Municipal Commissioner while issuing licence for opening or running restaurant can impose such terms and conditions which are consistent with the provisions of the Smoke Free Rules, 2008. The contention of the learned counsel for the petitioners that the Municipal Commissioner has no power to enforce the provisions of the Smoke Free Rules, 2008 cannot be accepted because Smoke Free Rules, 2008 having been framed by the Central Government cannot be permitted to be ignored by any other Statutory Authority while issuing licence for opening or running an eating house or catering establishment i.e. a restaurant. The conditions imposed by the impugned circular dated 4/7/2011 are consistent with the said Rules. For instance, Rule 2(e) provides that the smoking area shall be a separately ventilated smoking room, i.e., entrance with an automatically closing door

normally kept in closed position with an air flow system and shall have negative air pressure in comparison with the remainder of the building. These conditions are provided in sub-clause (i) to (iv) of condition (A) of Condition No. 35 which read as under :

> *"**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."*

17. Accepting the submissions of Dr. Sathey would clearly amount to overlooking sub-section 1(e) of section 394. Clauses (a)

and (b) essentially deal with keeping or suffering or allow to be kept various articles in or upon any premises and different provisions have been made in respect of the articles specified in Parts- I, II and III of the Schedule in sub-clause (a) and (b). Sub-clause (c) deals with animals whereas sub-clause (d) deals with any article or animal which is likely to create a nuisance either from its nature or by the 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. Sub-clause (c) and (d) of section 394(1) are not referable to Schedule M of the Act. Section 394(1)(e) reads thus :

> *394(1)(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;*

Thus, the Statute empowers the Municipal Commissioner to issue a licence for carrying on any trade specified in Part-IV of the Schedule M or any "**process or operation connected with any such trade**". (emphasis supplied). As stated above, it is not in dispute that all the petitioners are holding eating house licences which is a trade specified in Part-IV of Schedule M and hence such activity can always be regulated by the Municipal Commissioner by imposing conditions in the licence which are not in consistent with the provisions of the M.M.C. Act, 1888. Section 394(1)(e)(ii) empowers the Municipal Commissioner to impose conditions in the licence so as to ensure that any "**trade, process or operation**" which is dangerous to health or likely to create a nuisance shall not

be carried on in or upon any premises. Section 394(1)(e)(ii) is couched in negative terms by using the words “no person shall”. Section 394(1)(c)(ii) thus prohibits a person from carrying on in or upon any premises any trade, process or operation, which, in the opinion of the Commissioner, is dangerous to health 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. In the present case when the Parliament has enacted COTPA, 2003 and the Central Government has framed Smoke Free Rules, 2008, it is clear that the provisions of the said Act and the Rules are obviously in the nature of a statutory recognition that the activity of smoking which includes activity of smoking tobacco through hookah, is dangerous to health and is likely to create a nuisance and when the Act and the Rules regulate the manner in which and the limited extent to which such activity is permitted; provisions of the Act and the Rules are in the nature of statutory formation of opinion by the Parliament and the Rule making authority being the Central Government and if the Municipal Commissioner merely follows the said provisions and incorporates them in the form of conditions in the existing licences issued under section 394 r/w section 479; it is difficult to hold that the said action of the Commissioner is de hors the provisions of M.M.C. Act, 1888. Hence the contention Nos. (a) and (b) of Dr. Sathey have no merit and the same are rejected.

Re-Contention Nos. (c) and (g) of Dr. Sathey :

18. The submission of Dr. Sathey that condition No. 35 in so far as it prohibits keeping, selling or providing any tobacco or tobacco related products in any form whether in the form of

Cigarettes, Cigar, bidies or otherwise with the aid of pipe, wrapper or any other instrument in the licensed premises when the COTPA 2003 and Smoke Free Rules 2008 do not impose such blanket prohibition; is misconceived.

19. As regards the contention that COTPA does not prohibit sale of tobacco to persons above the age of 18 years and therefore, the first part of Condition No. 35 goes beyond the provisions of COTPA, 2003, it is necessary to note that the impugned condition does not impose any prohibition against sale of tobacco or tobacco related products within the Municipal limits of City of Mumbai. Condition No.35 merely regulates sale of tobacco and tobacco related products by not permitting the licensee to keep or sell or provide any tobacco related products in the licensed premises i. e. in an eating house. It does not prohibit a person above the age of 18 years from bringing from outside cigarettes, cigars, bidis or other tobacco related product inside the smoking area of a restaurant with seating capacity of 30 persons or more seats in respect of which the license is granted by the Municipal Commissioner.

20. We may refer to the preamble and statement of objects and reasons for COTPA. The preamble specifically states that COTPA is enacted 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.

The preamble further mentions that "the 43rd World Health Assembly in its fourteenth Plenary meeting held on 17 May 1990, reiterated the concerns expressed in the above resolution and urged Member States to consider in their tobacco control strategies plans for legislation and other effective measures for protecting their citizens with special attention to ..... discourage the use of tobacco and impose progressive restrictions and .....

AND WHEREAS, it is considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health.

AND WHEEAS, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjouined by article 47 of the Constitution;

(emphasis supplied)

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 COTPA 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 COTPA is enacted to achieve healthier lifestyle and the protection of life enshrined in the Constitution and seeks to improve public health.

21. The legal submission of Dr. Sathey is based on the so-called conflict between provisions of the Central Statute, Rules and State enactment and the submission that the field being allegedly an occupied field, the Municipal Commissioner and even the State Legislature lack jurisdiction. In support of this submission, as stated above, heavy reliance is placed on the Judgment of the Supreme Court in Godawat Pan Masala (supra). In our considered opinion this submission clearly overlooks the provisions of section 394(1)(e)(i) and (ii) of the M.M.C. Act 1888, COTPA 2003 and Smoke Free Rules 2008. None of the petitioners in the present petitions are claiming to have obtained licence for storage of any of the articles as indicated in Parts- I, II, III of the Schedule M of the M.M.C. Act 1888 as specified in section 394(1)(a) and (b) nor are they claiming to have any licence referable to sub-clause (c) or (d) of section 394(1). They hold licences under section 394(e)(i) r/w Part IV of Schedule M of the Act. They thus essentially hold licences for carrying on the trades of eating houses or catering establishments in Part-IV. The submissions of Dr. Sathey in our opinion, proceed on a misconception that the activity of selling cigarettes, tobacco or other tobacco products or of providing hookah is an activity which is a "***process or operation connected with***" the trade of eating houses or catering establishments. If and only if this interpretation of Dr. Sathey is to be accepted, then condition No. 35 would be exposed to the criticism that it seeks to prohibit something which is not prohibited by the Central enactment or the Rules. If the Municipal Commissioner was to prohibit use of a gas stove/burner, electric cooker or refrigerator or water dispenser or tea/coffee/beverages making machine or sale of any eatables/edible products by imposing a condition in the licence, such prohibition would certainly amount to a prohibition to carry on "***any process or***

operation connected with" the trade of running a eating house or catering establishment. The moot question is : Can the activity of selling cigarettes or tobacco or providing hookah with tobacco can even remotely be considered to be an activity of "***any process or operation connected with***" the trade of running a eating house or catering establishment and the answer has to be a resounding negative.

22. It is now necessary to consider the submissions of Dr. Sathey that the law laid down by the Judgment of the Supreme Court in the case of Godawat Pan Masala (supra) is applicable to the facts of the present case. The said Judgment no doubt deals with the provisions of COTPA 2003. However, the factual and legal controversy involved in that case was entirely different. Various Pan Masala/gutka manufacturer from the State of Maharashtra, State of Karnataka, State of Tamil Nadu and State of Goa had challenged the notifications of 2002 and 2003 issued by the Officers of the Food and Drug Administration of the States of Maharashtra, Andhra Pradesh, Tamil Nadu and Goa which officers were having different designation. All the notifications had been issued in purported exercise of powers conferred by Section 7(iv) of the Prevention of Food Adulteration Act, 1954 thereby completely banning the manufacture, sale and distribution of Pan Masala/Gutaka; in some cases for a period of 5 years for State of Maharashtra and Tamil Nadu, and without specifying any outer limit in Andhra Pradesh and Goa. The respective Writ Petitions were therefore filed in the Supreme Court and 2 other cases, parties who had earlier approached the Bombay High Court and Andhra Pradesh High Court had filed appeals in the Supreme Court for challenging the orders of dismissal of the Writ Petitions filed by them.

23. The core issue in those proceedings was the one noted by the Supreme Court in paragraph 12 which reads thus :

> "*12. These appeals and the writ petition raise the common issue as to the power of the Food (Health) Authority to issue an order of prohibition, whether permanently or quasi-permanently, under Section 7(iv) of the Act.*"

In that context, the provisions of Section 7 of Prevention of Food Adulteration Act, 1954 and the Rules framed thereunder were considered. After consideration of the said provisions, the Supreme Court recorded its conclusions in paragraph-24 and 25 which read thus :

> *24. There appears to be merit in the contentions of the appellants. Rule 3 of the Maharashtra Prevention of Food Adulteration Rules, 1962 and the corresponding rule in the Goa, Daman & Diu Prevention of Food Adulteration Rules, 1982 suggest that the power given to the Food (Health) Authority is only a pro tem power to deal with an emergent situation, such as outbreak of any infectious disease, which may be due to any article of food. In such a contingency, the Food (Health) Authority is empowered to take all such action as it deemed necessary to ascertain the cause of such infectious disease and to prevent the outbreak of such disease or the spread thereof. Certainly, such power would include the power to ban "for the time being" the sale of such injurious articles of food. Hence, correspondingly Section 7(iv) of the Act provides that no person shall manufacture for sale, or store, sell or distribute "any article of food the sale of which is for the time being prohibited by the Food (Health) Authority in the interest of public health." In other words, when a contingency envisaged by Rule 3, or one similar thereto, arises and it becomes necessary for the Food (Health) Authority to take immediate steps, the Food (Health) Authority is empowered to prohibit "for the time being" the concerned injurious article and to take any appropriate step "in the interest of public health".*
>
> *25. On the collocation of the statutory provisions, we are unable to accept the contention of the learned counsel for the States that clause (f) of Section 7 of the Act is an independent source of power. This conclusion of ours is also supported*

by the legislative history. Prior to the amendment by Act 49 of 1964, with effect from 1.3.1965, clause (iv) of Section 7 read as under:

"7. (iv) any article of food the sale of which is for the time being prohibited by the Food (Health) Authority with a view to preventing the outbreak or spread of infectious diseases."

24. The question regarding conflict between the Prevention of Food Adulteration Act, 1954 and COTPA, 2003 was also considered and the effect of the COTPA, 2003 is considered in paragraph-37 which reads thus :-

"37. The aforesaid internal evidence in the statute, by reason of the preamble, and the external evidence in the Statement of Objects and Reasons, indicate that Parliament has evinced its intention to bring out a comprehensive enactment to deal with tobacco and tobacco products. However, the provisions of the statute do not suggest that Parliament had considered it to be expedient to ban tobacco or tobacco products in public interest or to protect public health. Act 34 of 2003 passed by Parliament does not totally ban the manufacture of tobacco or tobacco products. Section 6 merely prohibits sale of cigarettes and tobacco products to a person under the age of eighteen years. There are stringent provisions made in the Act containing the prohibition of advertisement of cigarettes and tobacco products. Section 3(p) defines the expression "tobacco products" as the products specified in the Schedule. Entry 8 of the Schedule to the Act reads:

"8. Pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called)."

Thus, pan masala or any chewing material having tobacco is also one of the products in respect of which the Act could have imposed a total prohibition, if Parliament was so minded. On the other hand, there is only conditional prohibition of these products against sale to persons under eighteen years of age."

25. The conclusions in the Judgment were recorded in paragraph-77 which reads thus :

> *"77. As a result of the discussions, we are of the view that:*
>
> *1. Section 7(iv) of the Act is not an independent source of power for the state authority.*
>
> *2. The source of power of the state Food (Health) Authority is located only in the valid rules made in exercise of the power under Section 24 of the Act by the State Government, to the extent permitted thereunder.*
>
> *3. The power of the Food (Health) Authority under the rules is only of transitory nature and intended to deal with local emergencies and can last only for short period while such emergency lasts.*
>
> *4. The power of banning an article of food or an article used as ingredient of food, on the ground that it is injurious to health, belongs appropriately to the Central Government to be exercised in accordance with the rules made under Section 23 of the Act, particularly, sub-section (1A)(f).*
>
> *5. The state Food (Health) Authority has no power to prohibit the manufacture for sale, storage, sale or distribution of any article, whether used as an article or adjunct thereto or not used as food. Such a power can only arise as a result of wider policy decision and emanate from Parliamentary legislation or, at least, by exercise of the powers by the Central Government by framing rules under Section 23 of the Act.*
>
> *6. The provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 are directly in conflict with the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954. The former Act is a special Act intended to deal with tobacco and tobacco products particularly, while the latter enactment is a general enactment. Thus, the Act 34 of 2003 being a special Act, and of later origin, overrides the provisions of Section 7(iv) of the Prevention of Food Adulteration Act, 1954 with regard to the power to prohibit*

the sale or manufacture of tobacco products which are listed in the Schedule to the Act 34 of 2003.

7. The impugned notifications are ultra vires the Act and, hence, bad in law.

8. The impugned notifications are unconstitutional and void as abridging the fundamental rights of the appellants guaranteed under Articles 14 and 19 of the Constitution."

26. It is thus clear that the controversy involved in the case of Godawat Pan Masala (supra) was entirely different. We are dealing with the situation where after the enactment of the COTPA, 2003; in exercise of powers conferred by Section 31 thereof, the Central Government has itself framed the 2008 Rules for implementation of the said Act and all that has been done by the Municipal Commissioner by the impugned circular is to incorporate conditions in the licences issued under M.M.C. Act, 1888 so as to implement the provisions of the COTPA, 2003 and Smoke Free Rules, 2008. The question regarding any conflict between a Central Statute and a State enactment or the question regarding any enactment being a special Statute and other being General Statute does not arise even remotely. For the same reason, the argument regarding "occupied field" also deserves to be and is rejected.

27. Principal activity for which the licence has been applied for and issued is the activity of running an eating house and in that context, word "licenced premises" will have to be construed and interpreted and it is in this context that the argument advanced in the contention Nos. (c) and (g) will have to be rejected. In the case of Godawat Pan Masala(supra), the Supreme Court was dealing with the product "Pan Masala" and since that was one of the

products described in paragraph-A.30 in appendix B of Part-9 of the Prevention of Food Adulteration Rules, 1955 framed under the Prevention of Food Adulteration Act, 1954 it was held by the Supreme Court that Pan Masala or gutka were "food" within the meaning of said enactment and the rules. Such is not the case in respect of a cigarette or a hookah. By section 97 of the Food Safety and Standards Act, 2006, the earlier Prevention of Food Adulteration Act, 1954 has been repealed with effect from 29/7/2010 vide SO 1885(E) dated 29/7/2010.

Re-Contention Nos. (d), (e) and (f) of Dr. Sathey :

28. Even the aforesaid contentions do not impress us. Condition in sub-clause (i) and similar condition (D) that 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. merely fill in the gaps and cannot be said to be inconsistent with the Smoke Free Rules. There is no dispute about the fact that a person cannot construct any building or part thereof, not even a room, without the permission of the Municipal Commissioner. Grant of such permission for constructing building or part thereof is governed by the Development Control Regulations for Greater Mumbai, 1991. Regulation 38 provides tables for minimum size and width relevant for a habitable room. As per the table provided in Regulation 38 minimum height for a room is to the extent of 2.75 meters and maximum height is 4.2 meters. It is therefore clear that the Municipal Commissioner is having powers under the M.M.C. Act, 1888 to grant building permission which power is also governed by the Development Control Regulations for Greater Mumbai, 1991 and certainly empowers to impose such

conditions while issuing licence for running eating houses under M.M.C. Act.

29. The object of the said enactment is not merely to reduce the exposure of people to tobacco smoke and to completely prevent the sale of tobacco products to minors. The statement of objects and reasons of COTPA makes it clear that COTPA is made by Parliament pursuant to the resolution passed by the 39th World Health Assembly on 15 May 1986 to implement the measures, interalia, to protect children and young prople from being addicted to the use of tobacco. The statement of objects and reasons of COTPA further 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. The COTPA is, therefore, enacted to achieve healthier lifestyle and to improve public health.

It was the contention of the petitioners in the PIL that large number of children and young people were being attracted to the hookah bars and getting addicted to the tobacco through hookah smoking and that this fact was brought to the notice of the Municipal Corporation and impugned circular dated 4/7/2011 came to be issued. It cannot therefore be stated that the impugned conditions in the circular dated 4/7/2011 are contrary to law or without any authority of law.

30. The argument of Dr. Sathey that owner of an eating house/restaurant cannot be prohibited from providing hookah in a smoking area can also not be accepted. As indicated in our earlier Judgment, the entire premises of eating houses are defined as a “public place” under section 3(l) of the COTPA 2003, the

prohibition against smoking applies under section 4 and only an exception is carved out in the proviso to section 4. "Smoking area" in a restaurant/eating house is obviously not excluded from the definition of the word "public place" but only an exception is carved out for individuals who want to smoke with their own cigarettes and the legislative intent is clear from sub clause (c) of Rule 3(1) of the 2008 rules.

Re-contention No. (h) of Dr. Sathey .

31. The said contention is also not well founded and does not appeal to us. In the case of S.N. Rao (supra), the Supreme Court was dealing with the provisions of M.R.T.P. Act, 1966 in respect of the grant of a development permission which is not the case in hand. Power to incorporate a condition in the licence under M.M.C. Act, 1888 is being exercised for effective implementation of a Central enactment and the rules framed thereunder and there is no lack of authority in doing so.

Re-contention Nos. (a) and (b) of Smt. Thadani :

32. These submissions are based on the observations in paragraph-53 of the Judgment in the case of Godawat Pan Masala (supra). In fact, in the present case, the legislative policy is to ban smoking of cigarettes and hookah and other tobacco products in all public places and limited exception is carved out. By the impugned circular, the Commissioner has only sought to implement the same legislative intent and the circular does not impose any ban on smoking of cigarettes inside a "smoking area" within the public place, viz. premises of restaurant or hotels. Consequently, the said submissions also have no force.

Re-contention No. (c) of Mrs. Thadani :

33. In this regard the learned counsel for the Municipal Corporation has also invited our attention to Rule 5 of Schedule B and pointed out that Director of Public Health is also authorised to impose fine on those who have violated the Smoke Free Rules in public place which would include restaurant. It is also submitted that Municipal Corporation has a public health branch to exercise such powers. The submission of the learned counsel for the Municipal Corporation deserves acceptance.

34. It was also vehemently contended by the learned counsel for the petitioners that Rule 4 is an exception to Rule 3 of the Smoke Free Rules and that while Rule 4(3) provides that a smoking area or space is to be used only for smoking and no other services shall be allowed, it would only mean that the restaurant owner/manager is prohibited from providing any services which are not related to smoking and, therefore, no food or beverages or entertainment to be provided in the smoking area, but the owner/manager of the restaurant can certainly provide ashtrays, matches, lighters and other things like hookah designed to facilitate smoking.

35. We have already held in our order dated 13 July 2011 that Rule 4(3) only gives concession to a smoker, who is otherwise prohibited from smoking in a public place including a restaurant, to use smoking area/space in the restaurant only for the purpose of smoking. The words, "and no other services shall be allowed" comprehends prohibition against any service being provided by the restaurant owner/manager. Providing hookah for the purpose of smoking is providing any other service. Providing hookah in a

smoking area is not the same thing as providing ashtrays, matches or lighters in a smoking area.

36. The customer in a restaurant, who is otherwise not allowed to smoke in any public place including a restaurant [Sec. 3 (l)] 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, wants to discourage the customer in the restaurant from spending 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. 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 even 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 apparatus or gadget like hookah in the smoking area of the restaurant. Hookah is more than a device that facilitates smoking. Hookah is the apparatus through which the person smokes. Providing an apparatus like hookah to young people 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.

37. As already indicated hereinabove, the statement of objects and reasons of COTPA specifically refers to the resolution passed by the 39th World 39th World Health Assembly on 15 May 1986 to implement the measures interalia to provide the effective protection to 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 and in *U.P. State Electricity Board and anr. v. Hari Shanker Jain and ors.*[4], the 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 COTPA 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.

38. As the statement of Objects and Reasons to COTPA states, it is enacted to protect not only children but also "young

4. AIR 1979 SC 65

people" from being addicted to use of tobacco. Hence we find no substance in the petitioners' contention that hookah can be provided to young people above the age of 18 years.

39. The impugned circular of the Municipal Corporation was issued to prohibit a restaurant having licence of an eating house under the MMC Act, 1888 from providing any services in the smoking area of a restaurant and to prohibit any apparatus like hookah being provided in the smoking area of a restaurant. As already held by us in our order dated 13 July, 2011, Hookah is more than a device which facilitates smoking because it is a gadget or apparatus though which a person smokes. Providing an apparatus like hookah to young boys and girls with impressionable mind, even if they are above 18 years of age, is not merely giving them a facility to smoke, but luring them to smoke tobacco lying in the hookah to get addicted to smoking tobacco.

40. In PIL 118 of 2010, our attention was invited by the PIL petitioner and by the police authorities that a large number of young college students and even children below 18 years of age are getting addicted to smoking tobacco through hookah. The circular of the Municipal Corporation, thus, merely seeks to implement the provisions of COTPA, 2003. The provisions of section 394(1)(b) and (1)(e) of the MMC Act, 1888 empower the Commissioner to impose conditions subject to which the restaurant owner can carry on the trade or keep any article which, in the opinion of the Commissioner, is dangerous to life, health or property.

41. In our view, therefore, there is no merit in the contention that the Municipal Corporation cannot impose any conditions in the licence issued to the eating house, which will have the effect of enforcing the provisions of COTPA.

42. In view of the above discussion, we find no merit in these petitions. The petitions are therefore dismissed. Rule in all the Petitions is discharged.

CHIEF JUSTICE

GIRISH GODBOLE, J