
(2012) 11 P&H CK 0165
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 14597 of 2007

Burning Brain Society

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Constitution of India, 1950 — Article 21, 226
Criminal Procedure Code, 1973 (CrPC) — Section 144
Insecticides Act, 1968 — Section 3(e)
Punjab Municipal Corporation Act, 1976 — Section 343
Punjab Municipal Corporation Law (Extension To Chandigarh) Act, 1994 — Section 2

Citation : (2013) 1 RCR(Criminal) 736

Hon'ble Judges : A.K. Sikri, C.J.; Rakesh Kumar Jain, J

Bench : Division Bench

Advocate : Hemant Goswani, in-Person, for the Appellant; O.S. Batalvi, Standing Counsel, with Ms. Kamla Malik, Advocate, for the Union of India and Mr. J.S. Puri, Addl. A.G. Punjab, Mr. B.S. Rana, Addl. A.G. Haryana, Ms. Lisa Gill, Advocate, for respondent No. 6, Mr. Kanwaljit Singh, with Mr. Ajaib Singh, for the Respondent

Judgement

Rakesh Kumar Jain, J.—In this Public Interest Litigation, the main anxiety and concern of the petitioner is regarding unregulated sale and supply of drug like "Nicotine" with ancillary prayers for issuance of directions to respondents No. 2 and 3 to register First Information Report and initiate criminal proceedings against all establishments providing drug like "Nicotine" for inhalation and/or oral consumption, directions to respondents No. 1, 2 and 4 to seize all the stock available anywhere in Chandigarh or elsewhere and get the sample of material tested at the Central Drug Laboratory, Food Testing Laboratory and at such other places where the complete constitution, flavouring agents and adulterants with regard to the consumption of the product as a drug or food can be ascertained. It is alleged in the petition that Nicotine is a poisonous drug, also known by chemical name of C₁₀H₁₄ NO₂. In its extracted form, it is clearly oily liquid turning yellowish-brown after coming into contact with air and is distinguished by

pungent odour and extracted from dried leaves of Nicotine tabacum, and Nicotine rustica. It is also alleged that the sale, supply, import, manufacturing and trade of Nicotine can be done through a proper licence obtained under the Drug and Cosmetic Act, 1940 and other laws in force and the only exemption for sale of Nicotine without license is provided in "Schedule K" of "Drugs and Cosmetic Rules, 1945" as item No. 33 wherein the extent of exemption is to the limits of 2 mg of Nicotine and the exemption is only applicable to Nicotine Chewing Gums meant for de-addiction of tobacco addicts. The exemption is subject to the provisions of Chapter IV of the Drug and Cosmetic Act, 1940 and is applicable only if the Nicotine offered for sale is actually manufactured under a licence.

2. It is also alleged that "the Insecticides Act, 1968" lists "Nicotine" as "Nicotine Sulphate" as an insecticide in the Schedule made u/s 3(e) under the heading "List of Insecticides"

3. The Manufacturer, Storage and Import of Hazardous Chemical Rules, 1986 made under the "Environment (Protection) Act, 1986 also lists "Nicotine" under the "List of Hazardous and Toxic Chemicals" in Part-II of Schedule-I as item number 421.

4. It is also alleged that the Cigarettes and other tobacco products "Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution Act, 2003" allows raw "Hookah Tobacco" occurring in its natural form as per the Schedule of the Act but does not permit the water-pipe/hookah-pipe/sheesha apparatus to be used for consuming or inhaling any other admixture of chemicals or any substance other than naturally occurring tobacco, as found in leaf on tobacco plants.

5. The patent grievance of the petitioner is that drug "Nicotine" is provided for inhalation in restaurant and other outlets by burning of the Nicotine laced viscous material by the means of specially constructed water-pipe also called sheesha and erroneously referred to as Hookah for which various establishments calling themselves or commonly known and referred to as "Hookah Bars" and constituted in the form and style of restaurants, bars, have come up in the city of Chandigarh. Some of which have been identified by the petitioner as Wild n West in Sector 35, Mocha in Sector 26 and Mr. Beans in Sector 9, Chandigarh.

6. The petitioner has put on record various news reports covering the incident regarding life threatening situation of the general public consuming water-pipe/Hookah alleging that Nicotine's adverse effect on brain dopamine systems is similar to those of drugs such as heroin and cocaine. It is also alleged that after taking note of free sale and supply of Nicotine laced product in the city of Chandigarh, the petitioner made complaints to the Director of Health, Food Inspectors (under the prevention of Food Adulteration Act), Drug Inspectors (under the Drug and Cosmetic Act, 1940), Health-cum-Home Secretary of Chandigarh and Chandigarh Police about the supply of dangerous and lethal drugs like Nicotine in the restaurants, hotels and other outlets in Chandigarh with

a request to take action but to no avail as neither any case has been registered nor any inspection has been done. At last finding no way out, as a public spirited society, the petitioner has knocked the doors of this Court invoking its extraordinary jurisdiction under Article 226 of the Constitution of India to protect the life of the common public as guaranteed to be protected under Article 21 of the Constitution of India.

7. After the notice was issued, respondent No. 2-Health-cum-Home Secretary of the Chandigarh Administration filed its written statement in which it is admitted that certain restaurants are providing Hookah Bars. The Hookahs are charged with compounds which are imported. The product contains sticker specifying "Nicotine" to the tune of 0.05% but it was denied that the answering respondent had turned a blind eye as it is averred in the reply that the Food Inspector of Health Department, Chandigarh Administration challaned M/s. Jai Parwati Restaurant (Mr. Beans) SCO No. 42-43, Sector 9-D, Chandigarh on 24.7.2007 and Vijyant Chaudhary (owner) M/s. Saffron Tree Beverages (Mocha) SCO No. 12, Sector 26, Chandigarh on 24.7.2007 and 06.08.2007 u/s 4 of the COPT Act for non-segregating "smoking" and "non-smoking" area.

8. In reply filed by respondent No. 3 i.e. Senior Superintendent of Police, Chandigarh, it has been alleged that on 30.7.2007, secret information was received by Operation Cell, Chandigarh Police disclosing that Mr. Beans Coffee Lounge SCO No. 42-43, Sector 9, Chandigarh and Mocha Bar (Coffee House), SCO 12, Sector 26, Chandigarh are in the habit of supplying prohibited dugs like Nicotine for inhalation in excess quantity. On the basis of the said information, a special team was constituted consisting, which consulted Drugs Inspector on 31.7.2007 regarding raid but the Drug Inspector replied that the above matter is under consideration of his department. However, on 1.8.2007, raid was conducted at Mocha Hookah Bar, SCO 12, Sector 26, Chandigarh and three samples of smoking Hookah flavour i.e. melon apricot and two apples along with residue of used flavour from Hookah were taken into Police possession and converted into sealed parcel bearing seal impression of "K.K" in the presence of owner of the Hookah Bar. On 3.8.2007, the sealed parcels were sent to Central Forensic Science Laboratory, Sector 36, Chandigarh vide R/C No. 45 of Police Station, Sector 26, Chandigarh but the result of the said sample till then was awaited when the reply was filed.

9. During the course of hearing, an order was passed on 22.12.2008, which reads as under:-

Section 2 of the Punjab Municipal Corporation Law (Extension to Chandigarh) Act, 1994 extends the provision of Municipal Corporation Act, 1976 (in short the Act) to the Union Territory of Chandigarh. Section 343 of the Act, inter alia, provides that no person shall use or permit to be used any premises for any of the purposes enumerated therein without or otherwise than in conformity with the terms of a licence granted by the Commissioner in that behalf. Part I of the second Schedule enumerates the purposes for which the premises may be

licenced. At item No. 7 of the said schedule is eating house or catering establishment. The schedule enumerates a whole lot of activities, trades and professions which require licences before they can be carried on in any premises within municipal/UT area.

By our order dated 18.11.2008, we had directed Mr. Mutneja appearing for the UT Administration to secure the relevant record regarding issue of licences to Hookah Bars/Coffee house including the Beans Coffee House and Mocha Bar at Chandigarh. He was also directed to take instructions whether any action for breach of the conditions of the licences had been taken against licencees at any stage and in case no action had been taken the reasons for failure by the Administration to do so. When the matter came up before us on 27.11.2008, Mr. Gupta appeared for the UT Administration and placed on record a copy of an order dated 25.11.2008, purporting to have been issued u/s 144 of the Cr.P.C., for bidding owners and proprietors of any eatery, restaurant and/or hotel in the Union Territory of Chandigarh from permitting use of any Hookah or anything in the nature of it. Mr. Gupta was unable to secure the relevant record regarding the licences issued by the "competent authority nor did he have any instruction as to what action has been taken against the licencees for violation of the terms of the licences, if any, issued in their favour.

When the matter came up before us today, Mr. Gupta submitted on instructions that the Chandigarh Municipal Corporation was set up somewhere in the year 1996 and that the licencing powers vested in it were exercised by the medical officers of the Corporation till the year 2003 under the Prevention of Food Adulteration Act, 1954. From the year 2003 onwards, the said power is now being exercised by the Director, Health Services, Chandigarh. He, however, has no instructions even today whether or not any licences are being issued or insisted upon for carrying on trades and professions as required under Section 343 of the Schedule mentioned in the Act and whether or not any licences have ever been issued or enforced against any trade or profession being carried on within UT/Corporation limits. All that he submitted was that the office of Director, Health Services, which is dealing with the licences of the establishments is under staffed and that although licences are being issued, it takes several months before inspections are carried out and completed.

We are not in the present proceedings examining whether a licence under the Prevention of Food Adulteration Act also is required and if so, the consequences that would follow for breach of any such licences. What we are examining is whether any licences under the Municipal Corporation Act, which is admittedly, extended to the UT of Chandigarh, are being insisted upon and issued. Prima facie, we see no cogent reason coming forth from the administration for its failure to enforce the said provision. Before we pass any effective orders on the subject, we allow Mr. Gupta to take fuller instructions from his client and to file an affidavit stating the following:-

i) Whether the Chandigarh Municipal Corporation has at any stage enforced

Section 343 of the Act by insisting upon proper licences for carrying on various trades, professions and activities enumerated in part I of the second schedule and if so whether there is any record of such licences having been sought and issued in favour of the concerned.

ii) If the Corporation has not enforced Section 343 of the Act, whether administration has at any stage taken steps to enforce the said provision. In case it has not, the reasons for its failure to do so;

iii) Whether the administration has any statistics as to the number of establishments that would require licences u/s 343 read with part I of second Schedule and whether it is willing to enforce the said provision. If so, the time frame within which that can be done.

Mr. Gupta shall do the needful expeditiously but not later than four weeks from today.

Post this writ petition again on 3.3.2009. Mr. Chopra, counsel for the impleading applicants shall also file an affidavit whether he has secured any licence within the meaning of Section 343 of the Act. If so, a copy of the said licence shall also be placed on record. The relevant record in relation to the grant and cancellation of the licences shall also be secured by Mr. Gupta on the next date.

10. Pursuant to the aforesaid order, Municipal Corporation, Chandigarh, was impleaded as respondent No. 3, filed its response dated 14.9.2009. During the course of hearing, the State of Punjab and Haryana were also joined as parties. The order in this regard was passed on 19.01.2010, which reads as under:

Learned counsel for the petitioner seeks time to file an affidavit about shifting of the hazardous activities to the adjoining areas of Chandigarh. He also prays that the State of Punjab and Haryana be joined as parties. At his request, State of Punjab and Haryana are ordered to be arrayed as respondent Nos. 5 and 6. Registry to carry out the necessary correction in array of parties.

At our asking, Mr. Rupinder Khosla, Additional Advocate General, Punjab and Mr. B.S. Rana, Additional Advocate General, Haryana accept notice on behalf of respondent Nos. 5 and 6 respectively. Responses be filed within three weeks from today. Rejoinders, if any, be filed with three weeks thereafter.

Full set of papers shall be furnished to counsel for the States of Punjab and Haryana who have accepted notice, within two days.

An additional affidavit about the locus of the fresh outlets shall be filed within a period of four weeks. Response to the same shall be filed within four weeks thereafter.

List again on 23.4.2010.

11. Similarly, another order was passed on 4.2.2011, which reads as under:-

In view of the affidavit filed by the Union Territory, Chandigarh dated 14.9.2009,

the Chandigarh Administration, for the time being is left out of the purview of this order. However, it will be open for the petitioner to lay before the Court details of such bars and restaurants where nicotine is freely available for inhalation through the hookas or any other such apparatus.

In so far as the State of Punjab is concerned 07 days" time is granted for filing of reply to CM No. 10523 of 2010. The said reply of the State of Punjab will contain specific details of the action taken in respect of the places" mentioned in the civil miscellaneous application.

The State of Haryana is directed to file a better affidavit explaining the action taken by it in respect of the places mentioned in CM No. 10523 of 2010. Such affidavit will be filed within the next 07 days.

From the interaction that the Court have had with the petitioner in person as well as the learned counsels for the parties, it appears that there is larger issue emanating in the present case which needs to be resolved in public interest. Evidently, the nicotine which is made available through the various bars and restaurants for inhalation through the hooka and such other apparatus is an admixture of nicotine and certain other commodities. Such admixture is freely available in the market both in the solid and the liquid form. The nicotine in the admixture is in the chemical form which is a poisonous substance and is intended to be used as an insecticide. In such circumstances, available of the admixture in the open market poses a serious threat to the health of the citizens particularly the younger citizens. Orders of the court in respect of hooka bars and restaurants alone will be inadequate in solving the problem. The Court has been told that nicotine in the chemical form to be used as an insecticide is neither a drug nor a psychotropic substance and the said item is also not covered under the Drugs and Cosmetic Act, 1940 so as to require a license to deal with such products. In such circumstances, according to the petitioner appearing in person the only way that the matter can be proceeded with, till appropriate legislations are put into place, will be to understand any dealing in the said item as a trade in poisonous articles which is prohibited/regulated by the Poison Act, 1919 and the Insecticides Act, 1968.

Before passing any order to the above effect the Court would like to have the response of the Union Territory, Chandigarh and the States of Punjab and Haryana as well as the Union of India. The aforesaid/stand be made known to the Court within 06 weeks from today when the matter will be separately considered on the further date to be fixed.

For the time being case be listed on 11.2.2011 for consideration of the affidavits to be filed by the States of Punjab and Haryana as directed above.

Pursuant to the aforesaid order, the State of Haryana and Punjab filed their response giving details of the cases having been registered against Hookah Bars in various cities. The respondents have also placed on record the report of the Chemical Analyst obtained from the Central Forensic Science Laboratory, Ministry

of Home Affairs, Government of India, in which it has been concluded that all the samples were positive insofar as "Nicotine" is concerned.

From the facts and circumstances narrated hereinabove, there is no dispute that many Hookah bars are serving tobacco molasses containing "Nicotine", which is clearly illegal and entails penal consequences.

In our considered opinion, the menace of the use of drug laced with "Nicotine" by the restaurants/lounges offering inhalation by means of hookah/sheesha cannot be resolved only by closing down such offending hookah/sheesha bars out the States of Punjab & Haryana and UT, Chandigarh are required to constitute task force to monitor the use of "Nicotine" in chemical form.

Thus, the writ petition is hereby disposed of with the direction to the States of Punjab, Haryana and Union Territory, Chandigarh to constitute a Permanent Task Force for monitoring the abuse of Nicotine in chemical form which is being used by Hookah Bars etc.; register criminal cases against the violators and take all appropriate steps as required in accordance with the law. The quarterly Action Taken Report shall be placed on record of this case.