

(2011) 12 GUJ CK 0007

In the Gujarat High Court

Case No : Special Civil Application No's. 8973, 8977, 8978, 8981, 8982, 8985, 8986, 8987, 8988 and 8991 of 2011

Titanic Restaurant

APPELLANT

Vs

Dy. Police Commissioner and 2

RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Bombay Police Act, 1951 — Section 2(10), 2(5A), 3, 32, 33
Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 — Section 12, 13, 23, 23(1A), 24
Constitution of India, 1950 — Article 14, 162, 19, 19(1), 19(6)
Criminal Procedure Code, 1973 (CrPC) — Section 144, 144(3), 144(4), 144(6)
Food Safety and Standards Act, 2006 — Section 97
Maharashtra Prevention of Food Adulteration Rules, 1962 — Rule 3
Prevention of Food Adulteration Act, 1954 — Section 7, 7(4)
Prohibition of Smoking in Public Places Rules, 2008 — Rule 2, 3, 3(1), 4, 4(2)
Smoke Free Rules, 2008 — Rule 2, 3(1), 4(3)

Citation : (2011) 12 GUJ CK 0007

Hon'ble Judges : J.B. Pardiwala, J;A.L. Dave, J

Bench : Division Bench

Advocate : Y N Oza, with Ms Roma I Fidelis for Petitioners, for the Appellant; P K Jani, Government Pleader with Mrs. Krina Calla, AGP for Respondent(s) :1 - 3, for the Respondent

Final Decision : Allowed

Judgement

Honorable Mr. Justice J.B. Pardiwala

1. As common questions of fact and law are involved in this batch of petitions, they were heard together and are being disposed of by this common judgment and order.

2. In all the writ petitions the prayers are common. The petitioners who have been issued license u/s 33 of the Bombay Police Act, 1951 to run eating house/ restaurant in the city of Ahmedabad have preferred these petitions with the

following prayers :-

(A) Your Lordships may be pleased to hold and declare that the respondent no.1, his officers, servants, etc. have no power, authority and/or jurisdiction to make any further endorsement on the license of the petitioner - License Holder and thereby to restrain the petitioner establishment to run Hukka Bar.

(AA) Your Lordships may be pleased to quash and set aside the circular/notification dated 14.07.2011 issued by the Commissioner of Police, City Ahmedabad.

(B) Your Lordships may be pleased to hold and declare that any further endorsement made on the License of the petitioner by the respondent no.1, his officers, agents, etc., if any, is illegal and the same is not binding to the petitioner - License Holder and in conformity with the provisions of Cigarettes and Other Tobacco Products Act, 2003 and the Cigarettes and Other Tobacco Products Rules, 2008 framed there under and further be pleased to hold and declare that preventing the petitioner from carrying on their lawful and legal business by the respondents is in violation of the rights conferred upon the petitioner under Article 19(1)(g) of the Constitution of India.

(C) Your Lordships may be pleased to direct the respondents, their agents, servants, etc. not to create any hindrance or obstructions in the smooth running of Hukka Bar as per the conditions of the original license and not to restrain the petitioner from giving service of Hukka Bar on the basis of further endorsement made on the license, if any, and permit the petitioner to run the Hukka Bar in accordance with law.

(D) Pending admission, hearing and final disposal of this petition, Your Lordships may be pleased to permit the petitioner to run the service of the petitioner of Hukka Bar, as mentioned in the title clause of this petition and further be pleased to direct the respondents, their agents, servants, etc. not to disturb and/or create any hindrance.

(DD) Pending admission, hearing and final disposal of this petition, Your Lordships may be pleased to stay the operation, execution and implementation of the circular/notification dated 14.07.2011 issued by the Commissioner of Police, City Ahmedabad.

3. Brief facts relevant for the purpose of deciding these petitions can be summarized as under :-

1. The petitions have been preferred mainly challenging the jurisdiction of the Police Commissioner of the city of Ahmedabad in issuing the notification u/s 144 of the Criminal Procedure Code and u/s 33(1) of the Bombay Police Act, 1951 (for short, "the Act of 1951") imposing a complete ban and prohibiting providing hookah at eating house/ restaurant.

2. Petitioners are running restaurants on the strength of license/permission

granted by the Police Commissioner of the city of Ahmedabad on their giving an undertaking to abide by all the conditions which may be imposed upon by the Police Commissioner under the Act of 1951. The licenses are issued to open "eating house" as defined u/s 2(5A) of the Act of 1951.

3. It appears from the record that a notification dated 2nd December 2005 was issued by the Police Commissioner of the city of Ahmedabad imposing two conditions for regulating hookah bar: (1) a separate cabin would be provided over and above the other general area for providing food in the restaurant and that hookah would not be provided in the common area of the restaurant; and (2) that hookah would not be provided to the persons below the age of 18 years.

4. Record reveals that thereafter on 14th May 2009 further eight conditions were added to the earlier notification dated 2nd December 2005 by the Police Commissioner of the city of Ahmedabad.

5. It appears that at a later stage in the license issued to the owners of various eating houses a condition has been added to the effect that no eating house/ restaurant shall provide hookah. In short, a complete ban has now been imposed on the petitioners who are running eating houses/ restaurants so far as providing hookah is concerned. It is this addition of the condition in the respective licenses which has led the respective petitioners in filing the writ petitions.

6. It appears that after addition of the condition in the respective licenses of the petitioners imposing a complete ban or restraint on providing of hookah at a eating house/ restaurant, the Police Commissioner of the city of Ahmedabad thought fit to issue a notification dated 14th July 2011 in purported exercise of powers u/s 144 of the Code of Criminal Procedure. On being satisfied that it is essential to prevent danger to life, health, safety or peace and tranquility of the members of the public.

It appears that this notification was issued to give true effect to the addition of the condition in the respective licenses imposing a complete ban and restraint on providing of hookah with a view to meet with the emergent situation which was prevailing in the city of Ahmedabad so far as the hookah bars are concerned. This notification is also a subject matter of challenge substantially on the ground that it is only temporary order which cannot last beyond two months from the making thereof as is clear from Section 144(6) of the Code of Criminal Procedure and proviso to sub-section (4) of Section 144 empowers only the State Government the jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Police Commissioner.

7. Record also reveals that this Court had taken up the issue of hookah bars being run by various eating houses/restaurants in a suo motu public interest litigation being Special Civil Application No.4857/2009. In the said petition, a report was called for from the authorities and after inspection of about 20 such places providing hookah, 17 were closed down as they were contravening the

provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short, "the COTPA"). The petition was disposed of by the Division Bench vide order dated 12th July 2010 observing as under :-

An additional affidavit has been filed on behalf of respondent no. 3. From the earlier report and the present affidavit, we find that earlier number of Hukka Bars were inspected which were found to be running in accordance with the Cigarettes and Other Tobacco Products Act, 2006 and the Rules framed there under. In the present affidavit, it is stated that pursuant to the order passed on 17th June, 2010, inspection of 20 Hukka Bars has been done, out of which three Hukka Bars were found to be functioning and the remaining 17 were closed. No Hukka Bar is running in contravention of the Act and the Rules framed there under.

Having heard learned counsel appearing on behalf of the State and 6th respondent and the Association of Hukka Bars Owners, we are of the view that no further order is required to be passed in this case. However, the State authorities will continue with the periodical inspection of the Hukka Bars to ensure that the Act and the Rules framed there under or guidelines issued by the State vide notification dated 10th October, 2010 are not contravened by one or other Hukka Bar owners. This petition is disposed of with the aforesaid observations and directions. No costs.

4. In the backdrop of the above referred factual background, the question which falls for our consideration in this batch of petitions is as to whether the imposition of complete ban on providing hookah at eating house/restaurant can be said to be legally justified. The second question which we need to address is as to whether the restriction imposed can be said to be, in any manner, violative of Article 19 of the Constitution of India, and lastly and most importantly, as to whether the restriction which has been imposed is in consonance with the provisions of COTPA and the rules framed there under, more particularly, keeping in mind Article 47 of the Constitution of India. These are the broad issues which we need to keep in mind over and above the other issues which we shall deal with in our judgment.

(A) CONTENTIONS ON BEHALF OF THE PETITIONERS :-

1. The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 is an Act of Parliament and as per the decision of the Hon'ble Supreme Court in the case of Godawat Pan Masala Products I.P. Ltd. and Another Vs. Union of India (UOI) and Others, the entire field of smoking and tobacco is covered by the said Act and the Central Government alone is competent to deal with the subject covered under the Act. The State Government or the authorities working under the State can act under the said Act only to the extent it is empowered to and not beyond. Any action beyond what is empowered under the Act by the

State or its officer would be ultra vires. The only power under the Act or the Rules framed under the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 or Rules framed there under more particularly, the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 as well as the Prohibition of Smoking in Public Places Rules, 2008, is search, seizure and imposition of penalty, namely, fine, and nothing else. The prohibition on the ground of public health or closure on the ground that youth would be misdirected would be clearly beyond the jurisdiction of the Police Commissioner. Such an action would be an exhibition of executive being wiser than Parliament. When Parliament has not put an embargo on use of tobacco or its products but, rather, has canalized and regulated its use by setting different parameters, then it has to be presumed that the Parliament was aware about its effects and ill-effects and has not left any discretion in the hands of either of the officers to examine the same.

2. As per the aforesaid judgment of the Hon''ble Supreme Court, reported in Godawat Pan Masala Products I.P. Ltd. and Another Vs. Union of India (UOI) and Others, more particularly para 60, power for prohibition or closure vests only with the Central Government and that too based on policy decision and not otherwise. The Parliament has consciously taken away discretion of the above nature from the officers i.e. Executive or bureaucrats howsoever highly placed they may be. Malabar Fisheries Co. Vs. Commissioner of Income Tax, Kerala,

3. Having considered the statement of objects and reasons of the Act and also having considered the applicability of Article 47 of the Constitution of India, Hon''ble Supreme Court has held that the powers of prohibition or closure do not vest with the State Government or its authority.

4. Parliament in its wisdom has not thought it fit to ban the consumption of tobacco or tobacco products in toto. It has only set parameters, as stated above and the only requirement of law is that a restaurant must provide a separate space for smoking so as not to disturb other guests or customers, who have come for food. Once this requirement is answered, howsoever strong State or its officers may have ideas they cannot stop or prohibit the petitioners from serving Hukka.

5. Providing facility of Hukka in a separate smoking zone is not banned by any law. Once a separate smoking zone is provided which answers the parameters laid down by law and further more that tobacco product which is offered for smoking is not banned by any law howsoever strong the Commissioner of Police may feel, he cannot prohibit the same.

6. Hukka is covered under the definition of the Act under a larger head of smoking and also covered under the larger head of cigarette. Thus, it would be seen that there is nothing like smoking of cigarette on one hand and smoking of

Hukka on other hand. Cigarette or Hukka forms a part of the very same definition. Therefore, smoking can be always consumed through Cigarette or Hukka and there cannot be two separate parameters for the same. Once it is held that Cigarette or Bidi can be smoked in a smoking area, there is no differentiation because within the definition of smoking also, Hukka is covered. Thus, the action of the Police Commissioner is nothing else but exhibiting wisdom which negatives the intention of the Parliament.

7. Time and again the Hon"ble Supreme has observed and held that morality effects on the society etc. are left to the Legislature because neither executive nor the Court has mandate of the people and when law requires an act to be done in a particular way, it has to be done in that way only and in no other manner Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, That powers u/s 144 of the Code of Criminal Procedure by the Police Commissioner are absolutely unwarranted and not available to him. Powers u/s 144 of the Code of Criminal Procedure are transitory and of fixed duration of two months only. Assuming without admitting and conceding to the fact that the Police Commissioner has powers u/s 144 of the Code of Criminal Procedure then such powers comes to an end on and from 14/9/2011 because Notification is dtd. 14/7/2011, as Parliament in its wisdom has restricted the said powers only for a period of two months and thereafter for a further period of four months such powers can be exercised by the State and not by the Police Commissioner, which is not a case here. Moreover, powers u/s 144 of the Code of Criminal Procedure are of emergent nature and with a view to prevent immediate damage or ill effect on the society. Bare reading of the Notification dtd. 14/7/2011 (page No.44 of the compilation) gives a clear idea that it is not with a view to prevent some imminent danger or damage but it is in form of a Policy. It is almost in nature of Policy giving reasons and objects as to why Hukka should not be permitted in the restaurant having a separate smoking area and within the smoking zone. Such a policy decision is not within the competence of the Police Commissioner inasmuch as in the above-referred judgment reported in Godawat Pan Masala Products I.P. Ltd. and Another Vs. Union of India (UOI) and Others, Honorable Supreme Court has given the reasons as to why it cannot be executed by the Executive officers because different Executive officers working in the different areas may have different ideas.

8. Sections 32 and 33 of the Bombay Police Act which have been referred to in the Notification, if closely read would lead to a conclusion that those powers are bestowed on the State Government to maintain the public order and not for laying down any Policy or the Resolution, because that is left to the Legislature or the State Government, which can exercise powers only under Article 162 of the Constitution of India.

9. Assuming without admitting and without prejudice to the rights and contentions of the petitioners that such a power vests in Commissioner of Police, it cannot be exercised without affording an opportunity of being heard to the

petitioners inasmuch as it has a civil consequences and affects the rights of the petitioners and, therefore, violative of Article 14 of the Constitution of India.

10. Barring Gujarat, all other States throughout the country, have not adhered to Policy of prohibition. In cities like Mumbai and Bangalore, every third premises is Bar and restaurant, which serves food as well as alcohol. There the people visit with their family for food and find next table where people consume alcohol, but Parliament or State Legislature has not prohibited the same. The Commissioner of Police cannot be wiser than the State Legislature by saying that young youth below the age of 18 years would be inspired to consume the same. If that was so, the Parliament would have totally banned and prohibited and would not have laid down parameters of providing a separate smoking zone.

11. Judicial orders have a sanctity and they are read as precedent and have binding effect. If on 12/7/2010 Division Bench of this Honorable High Court, having taken into consideration all the aspects which have been canvassed on behalf of the State Government in this petition, found that running of Hukka Bar does not constitute an illegal activity then without any change in circumstance it cannot be gainsaid that the issue can be reopened. Once the Division Bench of this Honorable High Court has found in no uncertain terms that the issue does not violate the provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, then under no circumstances, no powers to prohibit can be exercised, may be under different statute, because smoking of tobacco is solely and wholly governed by the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003. If that be so, no other authority can pass order for closure of Hukka Bar or to prevent a person from serving it when the entire issue is covered by the Central Act. Its effect and impact cannot be assessed and no action can be taken thereon by putting into service the provisions of other statute.

12. Moreover, if it is found that provisions of law are not being adhered to as laid down in the Act, independent action can be taken and that too by specified officer, but, as a result of which wholesome ban cannot be imposed. (Decision of the Andhra Pradesh High Court reported in 2003 Criminal Law Journal 1360).

13. The Honorable Supreme Court in the decision reported in Krishna Kumar Narula etc. Vs. The State of Jammu and Kashmir and Others, has held that question of gambling may be bad and has adverse impact on the society, but the Parliament has not banned it. The Parliament has provided safeguards to regulate its activity, but it cannot be banned by an executive officer or by the Court. Executive officer can only see to it that parameters or guidelines laid down in the Act are strictly followed and adhered to.

14. Compared to Tea, Coffee, Chocolate and Cigarette, consumption of Hukka is less injurious in comparison to contents of Nicotine and Tar. Hukka contains 0%

Tar and 0.5% Nicotine, whereas herbal Hukka contains 0% Tar and 0% Nicotine. The Hon''ble Supreme Court in the decision reported in Godawat Pan Masala Products I.P. Ltd. and Another Vs. Union of India (UOI) and Others, has categorically dealt with the arguments that other products which contains more Tobacco have not been prohibited whereas the lesser contents product of tobacco has been prohibited and that argument has found favour with the Honorable Supreme Court.

(B) PER CONTRA, CONTENTIONS ON BEHALF OF THE RESPONDENT -STATE :-

1. So far as the contention of the petitioner that the police/state authorities have no right to issue any notification or guidelines for implementation of the central piece of legislation i.e. COTPA 2003 and rules there under, as the Act and Rules are Central piece of legislation, the same is ill founded inasmuch as that reading of Sections 12 and 13 of the Act, 2003 makes it clear that any police officer not below the rank of Sub Inspector or any officer of the State Food and Drug Control Administration or any other officers if find that the Act is not properly implemented, can enter and search such premises and also has the power to seize the products. The Section gives powers to the State as well as its officers to see to it that there are no violation of Act and Rules.

2. According to Section 2(5A) of Bombay Police Act 1951, "eating house" is defined as under :

2(5A) "eating house" means any place to which the public are admitted and where any kind of food or drink is supplied for consumption on the premises by any person owning or having an interest in or managing such place and includes a refreshment room, coffee house or a shop where any kind of food or drink is supplied to the public for consumption in or near such shop; but does not include a place of public entertainment.

Therefore, it is clear that permission is given only to start a place where one can serve food or drink and nothing more than that.

3. Section 33(1)(w) gives powers to the Police Commissioner to issue any such notification for licensing or controlling the place of public amusement or entertainment and also prohibition in such activities which may affect the safety of public and for preventing any disturbances to the public.

4. Article 47 of the Constitution of India, inter alia, states that it is duty of the state to raise level of nutrition and standard of living and to improve public health; For the same, the State Authorities can prevent any such activities which may be undergoing on or in the State, which is harmful to the public health and safety.

5. The Police Commissioner also has powers u/s 144 of the CrPC to take immediate preventive action against any act which is harmful to the public at large. Looking to the health issue of the public which was adversely affected by the Hukka Bars, and looking at the breach of the conditions done by the Hukka

Bar owners and looking at the provisions of COTPA, 2003 and Rules there under immediate action was required to be taken by the Police Commissioner and therefore by the powers vested by the CrPC u/s 144 and by section 33(1) of Bombay Police Act, 1951, the Police Commissioner issued prohibitory orders for stopping the operation of Hukka Bars vide notification dated 14.07.2011.

6. So far as the jurisdiction of Police Commissioner to issue notification u/s 144 of CrPC and 33(1) of BP Act is concerned, the Police Commissioner has all the powers to issue such notification.

7. It is clear that Hukkas have nicotine in it and highly injurious to health. When the Hukkas were seized in the year 2009, many of the samples of Hukkas were sent for Forensic Science Laboratory, wherein the FSL report clearly shows the presence of nicotine in them. Hukka smoking is squarely covered under COTPA, 2003 and therefore it has to follow the Act and Rules there under, i.e. as smoking is not permitted in any public place, therefore, also smoking a Hukka is not permitted in public place.

8. To make it more clear, it may be explained that while opening a restaurant or hoteletc. permission is given u/s 2(5A) of the Bombay Police Act, whereas if a person wants to give facilities to its customers who are addicted to smoking, as they are not permitted to smoke in public place like restaurant etc., the owner of such a place has to provide a separate section or area wherein their customers can go and smoke, but it does not give any right to the owners of the restaurant etc. to serve or supply such tobacco products as u/s 5 of the Act, 2003, there is a prohibition of advertising of Cigarettes and other products.

9. So far as the Hukka bars are concerned, they are actually running a business/commercial activity of not only advertising the Hukkas but also serving them, which is an illegal activity in itself and is a clear contravention of Section 7 of the COTPA, 2003 which specifically states that there are restrictions of trade and commercial advertising of any production, supply and distribution of Cigarettes and other Tobacco Products. Therefore, Hukka Bars are in clear violation of the COTPA, 2003.

10. So far as the Rules framed under the COTPA, 2003 are concerned and Rules which reads as "Prohibition of Smoking in Public Places Rules, 2008" which defines "restaurant" at Rule 2(b); "smoke area or place" at Rule 2(e); and "prohibition of smoking in public place" at Rule 3. So far as the "prohibition of smoking in hotel, restaurant/airport" are concerned it is stated in Rule 4. Therefore, there are clear statutory Acts and Rules for prohibiting smoking in public place and in the present case the Hukka bars are in clear violation of the Rules.

11. The contention of the petitioners that there is a infringement of their fundamental right under Article 19(1)(g) of the Constitution of India is concerned, the same is ill-founded inasmuch as it is not a fundamental right of any citizen to contravene any Act or Rules and do an illegal activity in any State

of India and therefore it cannot be said that there is any infringement of any fundamental right of the petitioners.

12. The main object of the COTPA, 2003 and Rules there under, is to see that no person smoke in public and to see that the persons who are addicted to smoking go to a particular place where they can smoke, and also to see that as smoking is injurious to health, the smoke is not exposed to others and also to see to that that by looking at the smokers, others are not encouraged to do the same. It may be noted that the Act does not provide for a total ban on smoking but the Act certainly does not encourage the activity of smoking. Therefore, there is a ban of advertising and commercializing the activity of smoking.

13. The contention of the petitioner that there are pan shops outside the restaurant; people buy cigarettes from such pan shops and come inside the restaurant and smoke in the smoking chamber is not banned, is correct; but those pan shops selling cigarettes are not given licenses to run a rest and the cigarettes etc. is not sold inside the restaurant as a part of its providing service to its customers. In the present case, the Hukkas are served in, within the premises of the restaurant which itself is an illegal activity inasmuch as that it is not only advertising but also serving tobacco products.

14. Passive smoking is considered to be as harmful as actual smoking but so far as the smoking of Hukka is concerned, here passive smoking is much more injurious and harmful not only to those who smoke, but also to those who are around and in the Hukka bars. Such Hukkas are smoked in close cabins or rooms where person who smoke are given company by others who sit around and chat for hours together where room is filled with smoke and the person sitting there for hours together inhale or re-inhale the smoke which would be more injurious to the lungs and the same would create number of diseases like Caner, Lung Cancer, Asthma, Pneumonia, Bronchitis, Tuberculosis, Hypertension and if a person is continuously exposed to passive smoking for a long time, he has increased risk of suffering from diseases like heart disease, disease of circulatory system, Dementia, Renal Cell, Carcinoma and Brain tumor etc. It is submitted that passive smoke is highly injurious to children and pregnant women etc.

15. One of the contentions of the petitioner is that, that it contains either no amount of tobacco or nicotine or if it does contain, the same is in a very small percentage of tobacco or nicotine, to this context, it may be seen that, Hukkas are smoked in closed cabins or rooms and persons sit for hours together and inhale much more smoke than those who smoke cigarette for 3 minutes to 4 minutes, even though the contents of the percentage of tobacco is much higher in cigarettes, but if the smoke is taken in small quantity for hours, it may prove to be more fatal. Therefore, contention that it has very little amount of tobacco or nicotine would not make it less harmful.

5. Considering the importance of the issue and before we proceed to consider the contentions of the respective parties on merits, we would like to comment on

smoking in general and the ill-effects of the same. We would also like to say something as regards hookah compared with cigarette and other health effects of hookah smoke.

ON SMOKING GENERALLY

6. One million Indians die every year from tobacco-related diseases. This is more than the number of deaths due to motor accidents, AIDS, alcohol and drug abuse put together, say the Indian Medical Association (IMA) and the Indian Academy of Pediatrics (IAP), quoting studies. (see "The Hindu" Trivandrum Edition dt. 31-10-1998 under the caption "Smoking kill 10 lakhs Indians a Year")

7. Cigarette smoking is the major preventable cause of death in America, contributing to an estimated 350000 deaths annually. Epidemiologic and experimental evidence has identified cigarette smoking as the primary cause of lung cancer and chronic obstructive pulmonary diseases (COPD) and as a major risk factor for coronary heart disease. Smoking has been associated with other cancers, cerebrovascular and peripheral vascular diseases, and peptic ulcer disease. Smokers also suffer more acute respiratory illness. Cigarette smoke, consisting of particles dispersed in a gas phase, is a complex mixture of thousands of compounds produced by the incomplete combustion of the tobacco leaf. Smoke constituents strongly implicated in causing disease are nicotine and tar in the particulate phase and carbon monoxide in the gas phase. Smokers have a 70 per cent higher mortality rate than non smokers. The risk of dying increases with the amount and duration of smoking and is higher in smokers who inhale. Coronary heart disease is the chief contributor to the excess mortality among cigarette smokers, followed by lung cancer and chronic obstructive pulmonary disease (COPD). Life expectancy is significantly shortened by smoking cigarettes. Tobacco smoke also gets dissolved in the saliva and is swallowed, exposing the upper gastrointestinal tract to carcinogens. A strong association between smoking and lung cancer has been demonstrated in multiple prospective and retrospective epidemiologic studies, and corroborated by autopsy evidence. Lung cancer has been the leading cause of cancer death in men since the 1950s, and it surpassed breast cancer as a leading cause of cancer death in women in 1985. Male smokers have a tenfold higher risk of developing lung cancer, and the risk increases with the number of cigarettes smoked. There is also strong evidence that smoking is a major cause of cancers of the larynx, oral cavity and esophagus. The risk of these cancers increases with the intensity of exposure to cigarette smoke either active or passive. Epidemiologic studies show an association between smoking and cancers of the bladder, pancreas, stomach, and uterine cervix. Cigarette smoking is a major independent risk factor for coronary artery disease. Retrospective and prospective epidemiologic studies have demonstrated a strong relationship between smoking and coronary morbidity and mortality in both men and women. The coronary disease death rate in smokers is 70% higher than in nonsmokers, and the risk increases with the amount of cigarette exposure. The risk of sudden death is two to four times higher in

smokers. Smoking is also a risk factor for cardiac arrest and severe malignant arrhythmias. In addition to increased coronary mortality, smokers have a higher risk of non fatal myocardial infarction or unstable angina. Patients with angina lower their exercise tolerance if they smoke. Women who smoke and use oral contraceptives or post-menopausal estrogen replacement greatly increase their risk of myocardial infarction.

8. Autopsy studies demonstrate more atheromatous changes in smokers than nonsmokers. Carbon monoxide in cigarette smoke decreases oxygen delivery to endothelial tissues. In addition, smoking may trigger acute ischemia. Carbon monoxide decreases myocardial oxygen supply, while nicotine increases myocardial demand by releasing catecholamines that raise blood pressure, heart rate, and contractility. Carbon monoxide and nicotine also induce platelet aggregation that may cause occlusion of narrowed vessels. Cigarette smoking is the most important risk factor for peripheral vascular disease. In patients with intermittent claudication, smoking lowers exercise tolerance and may shorten graft survival after vascular surgery. Smokers have more aortic atherosclerosis and an increased risk of dying from a ruptured aortic aneurysm. Smokers under the age of 65 have a higher risk of dying from cerebrovascular disease and women who smoke have a greater risk of subarachnoid hemorrhage, especially if they also use oral contraceptives.

Smoking and Pulmonary Disease :

9. Cigarette smoking is the primary cause of chronic bronchitis and emphysema. Smokers have a higher prevalence of respiratory symptoms than non smokers. Studies of pulmonary function indicate that impairment exists in asymptomatic as well as symptomatic smokers. Smokers have a higher risk of acute as well as chronic pulmonary disease. Inhaling cigarette smoke impairs pulmonary clearance mechanisms by paralyzing ciliary transport. This may explain the susceptibility to viral respiratory infections, including influenza. Smokers who develop acute respiratory infections have longer and more severe courses, with a more prolonged cough.

Other Health Consequences :

10. Smokers have a higher prevalence of peptic ulcer disease and a higher case fatality rate. Smoking has been associated with increased osteoporosis in men and postmenopausal women. Female smokers weigh less than non smokers and have an earlier age of menopause; both of these factors are associated with osteoporosis and may contribute to the relationship between smoking and osteoporosis. Moreover, smoking depresses serum estrogen levels in postmenopausal women taking estrogen replacement therapy.

ON PASSIVE SMOKING

Passive Smoking (Environmental Smoke Exposure) :

11. Nonsmokers involuntarily inhale the smoke of nearby smokers, a

phenomenon known as passive smoking. Wives, children and friends of smokers are a highly risk-prone group. Inhalation of side stream smoke (side stream smoke is the smoke issued from the burning end of a cigarette between puffs) by a non-smoker is definitely more harmful to him than to the actual smoker as he inhales more toxins. This is because side stream smoke contains three times more nicotine, three times more tar and about 50 times more ammonia. Passive smoking (Ibid, the Hindu, Exposure of nonsmokers to environmental tobacco smoke (ETS) is known as passive smoking)(because of smoking by their fathers) could lead to severe complications in babies aged below two. It is pointed out that in India hospital admission rates are 28 per cent higher among the children of smokers. These children have acute lower respiratory infection, decreased lung function, increased eczema and asthma and increased cot deaths (Ibid). Also children of heavy smokers tend to be shorter.

12. Passive smoking is associated with an overall 23 per cent increase in risk of coronary heart disease (CHD) among men and women who had never smoked. The following data shows just how heavy is cigarette smoking's toll on non-smokers. A new "meta-analysis" of data from 14 studies involving 6,166 individuals with coronary heart disease (CHD) finds that passive smoking was associated with an overall 23 per cent increase in the risk of CHD among men and women who had never smoked. It is estimated that 35,000 to 40,000 non-smokers' deaths each year in the United States can be attributed to passive smoking (American Heart Association SMOKING-2. HRT 19th March, 1998 page 1). This underscores the need to eliminate passive smoking as an important strategy to reduce the societal burden of CHD. The United Nations health agency insisted that passive smoking caused lung cancer and that an environmental tobacco smoke poses a positive health hazard. Research on the subject has found an estimated 16 per cent increase in the risk of developing lung cancer among nonsmoking spouses of smokers and an estimated 17 per cent rise in risk for work place exposure. The public is left high and dry over the risks of "secondhand smoke" (Reuter - World 10th March, 1998). For nonsmokers, the major source of carbon monoxide is from passively inhaled cigarette smoke. Environmental tobacco smoke (ETS) has been shown to reduce lung function in children. Its irritant effect could not be ignored as this is the reason why most people object to being the victims of passive smoking. Patients with asthma find this irritant effect will worsen symptoms. The most remarkable effect of environmental tobacco smoke (ETS) is the development of lung cancer in passively exposed non-smokers as shown by reports from Japan and Greece. Large number of controlled studies have confirmed a relative risk of developing lung cancer in passively exposed subjects. Estimates from the United States have suggested that 3000 to 5000 deaths per year from lung cancer can be attributed to passive smoking.

13. Maternal smoking during pregnancy increases risks to fetus and non-smokers chronically exposed to tobacco smoke will suffer health hazards. Maternal smoking during pregnancy contributes to fetal growth retardation. Infants born

to mothers who smoke weigh an average of 200 gm less but have no shorter gestations than infants of non-smoking mothers. Carbon monoxide in smoke may decrease oxygen availability to the fetus and account for the growth retardation. Smoking during pregnancy has also been linked with higher rates of spontaneous abortion, fetal death, and neonatal death. (Primary Care Medicine - Respiratory Problems; Health Consequences of Smoking Nancy A. Rigotti, page 167)

14. When smoking occurs in enclosed areas with poor ventilation, such as in buses, bars, and conference rooms, high levels of smoke exposure can occur. Acute exposure to smoke-contaminated air decreases exercise capacity in healthy non-smokers and can worsen symptoms in individuals with angina, chronic obstructive pulmonary disease (COPD) or asthma. Chronic exposure to smoky air occurs in the workplace and in the homes of smokers. Non-smokers in smoky workplaces develop small-airways dysfunction similar to that observed in light smokers. Compared to the children of non-smokers, children whose parents smoke have more respiratory infections throughout childhood, a higher risk of asthma, and alternations in pulmonary function tests. In recent studies of non-smoking women, those married to smokers had higher lung cancer rates than those married to non-smokers. Chronic smoke exposure may be associated with increased incidence of cardiopulmonary disease in nonsmokers. (Ibid, page 167 - 168)

15. Environmental tobacco smoke (ETS) also contributes to respiratory morbidity of children. Increased platelet aggregation also occurs when a nonsmoker smokes or is passively exposed to smoke. Although environmental tobacco smoke (ETS) differs from "mainstream smoke" ("Main-stream smoke" is the one that is exhaled by the smoker after inhalation) in several ways, it contains many of the same toxic substances. Infants and toddlers may be especially at risk when exposed to environmental tobacco smoke (ETS). Considering the substantial morbidity, and even mortality of acute respiratory illness in childhood, a doubling in risk attributable to passive smoking clearly represents a serious pediatric health problem. Exposure to environmental tobacco smoke (ETS) has been associated with increased asthma-related trips to the emergency room of hospitals. There is now sufficient evidence to conclude that passive smoking is associated with additional episodes and increased severity of asthma in children who already have the disease. Exposure to passive smoking may alter children's intelligence and behavior and passive smoke exposure in childhood may be a risk factor for developing lung cancer as an adult (Active and Passive Tobacco Exposure : A Serious Pediatric Health Problem, page 1). Environmental tobacco smoke (ETS) contains more than 4000 chemicals and at least 40 known carcinogens. Nicotine, the addictive drug contained in tobacco leads to acute increase in heart rate and blood pressure. ETS also increases platelet aggregation, or blood clotting. It also damages the endothelium, the layer of cells that line all blood vessels, including the coronary arteries. In addition, nonsmokers who have high blood pressure or high blood cholesterol are at even greater risk of developing heart diseases from ETS exposure (Ibid, page 8). An

investigation in Bristol has found that the children of smokers have high levels of cotinine, a metabolite of nicotine, in their saliva. The results indicated that children who had two smoking parents were breathing in as much nicotine as if they themselves were smoking 80 cigarettes a year. A study published in the "New England Journal of Medicine" found that the children of smoking mothers were less efficient at breathing. A study conducted by the Harvard Medical School in Boston, concluded that passive exposure to maternal cigarette smoke may have important effects on the development of pulmonary function in children. An important discovery is that the cocktail of chemicals in a smoky room may be more lethal than the smoke inhaled by the smoker. The "sidestream" smoke contains three times as much benzo(a)pyrene (a virulent cause of cancer) six times as much toluene, another carcinogen, and more than 50 times as much dimethylnitrosamine. It has been commented by Dale Sandler of the National Institute of Environmental Health Studies in the United States that the potential for damage from passive smoking may be greater than has been previously recognized.

16. Thus, it can be safely concluded that the dangers of passive smoking are real, broader than once believed and parallel those of direct smoke. It has long been established that smoking harms the health of those who smoke. Now, new epidemiological studies (Health - Evidence mounts on passive smoking ("The Hindu" Sunday, August 5, 1990) and reviews are strengthening the evidence that it also harms the health of other people nearby who inhale the toxic fumes generated by the smoker, particularly from the burning end of the cigarette. Such indirect, or secondhand, smoking causes death not only by lung cancer but even more by heart attack, the studies show. The studies on passive smoking, as it is often called, also strengthen the link between parental smoking and respiratory damage in children. According to experts, there was little question that passive smoking is a major health hazard. What has swayed many scientists is a remarkable consistency in findings from different types of studies in several countries with improved methods over those used in the first such studies a few years ago. The new findings confirm and advance the earlier reports from the U.S. Surgeon General, who concluded that passive smoking caused lung cancer. According to Dr. Cedric F. Garland, an expert in the epidemiology of smoking at the University of California at San Diego "the links between passive smoking and health problems are now as solid as any finding in epidemiology." The never understanding of the health hazards of passive smoking were underscored in a report at a world conference on lung health in Boston recently. Dr. Stanton A. Glantz of the University of California at San Francisco estimated that passive smoke killed 50000 Americans a year, two thirds of whom died of heart disease. Passive smoking ranks behind direct smoking and alcohol as the third leading preventable cause of death. Dr. Donald Shopland of the U.S. National Cancer Institute, who has helped to prepare the Surgeon General's reports on smoking has said : "there's no question" now that passive smoking is also a cause of heart disease. The new findings on passive smoking parallel recent changes in U.

S. laws and rules that limit smoking in public places. In recent years, all but four States (Missouri, North Carolina, Tennessee and Wymoiing) have passed comprehensive laws limiting smoking in public place. Only a decade ago many scientists were sceptical about the initial links between passive smoking and lung cancer.

17. "Mainstream smoke" is inhaled and consists of large particles deposited in the larger airways of the lung. "Side stream smoke" is generated from the burning end of cigarettes, cigars and pipes during the smouldering between puffs. It may come from someone else's tobacco or from one's own and in the major source of environmental tobacco smoke (ETS). It is a mixture of irritating gases and carcinogenic tar particles that reach deeper into the lungs because they are small. According to scientists, because of incomplete combustion from the lower temperatures of a smouldering cigarette, side stream smoke is dirtier and chemically different from mainstream smoke. Scientists have found a 30 per cent increase in risk of death from heart attacks among nonsmokers living with smokers due to passive smoking. Researchers have found that passive smoking makes platelets the tiny fragments in the blood that help it clot, stickier. Platelets can form clots on plaques in fat clogged arteries to cause heart attacks and they may also play a role in promoting arteriosclerosis, the underlying cause of most heart attacks. Researchers have also shown that passive smoking affects heart function, decreasing the ability of people with and without heart disease to exercise. It has been pointed out that passive smoking increases the demand on the heart during exercise and reduces the heart's capacity to speed up. For people with heart disease, the decreased function can precipitate chest pains from angina. The children exposed to passive smoke since birth, had increased amounts of cholesterol and lower levels of HDL, a protein in blood that is believed to provide protection against heart attacks. The researchers found that the greater the exposure to passive smoke, the greater was the biochemical changes. (Ibid, 12)

18. A pioneering report linking passive smoking and lung cancer came in 1981 from a 14-year Japanese study by Dr. Takeshi Hirayama. His research methods were criticized at first. Mr. Lawrence Garfinkel, an epidemiologist who is Vice-president of the American Cancer Society, said that he was at present sceptical of Dr. Hirayama's report but was convinced from later studies, including his own, that there was about a 30 per cent increased risk of developing lung cancer from passive smoking. Mr. Garfinkel said a study of 1.2 million Americans now being completed should help clarify the degree of risk from all types of cancer and other diseases. Dr. Glantz estimated that one-third of the 50,000 deaths from passive smoking were from cancer. In addition to lung cancer, researchers have linked cancer of the cervix to both mainstream and side stream smoke. The American Academy of Pediatrics estimates that 9 million to 12 million American children under the age of 5 may be exposed to passive smoke. The newer studies strengthened earlier conclusions that passive smoke increases the risk of serious early childhood respiratory illness, particularly bronchitis and pneumonia

in infancy. Increased coughing was reported from birth to the mid-teenage years among 13 never studies of passive smoking and respiratory symptoms. It has also been found that passive smoke can lead to middle ear infections and other conditions in children. Asthmatic children are particularly at risk and the lung problems in childhood can extend to adulthood. (Ibid, 12)

19. In 1962 and 1964 the Royal College of Physicians in London and the Surgeon General of the United States released landmark reports documenting the casual relation between smoking and lung cancer (Selections from British Medical Journal (South Asia Edition) Vol.13, No.11, January 1998, page 1110-1111). Thereafter, extensive research has confirmed that smoking affects virtually every organ system. By 1990, the Surgeon General of the United States concluded that "smoking represents the most extensively documented cause of disease over investigated in the history of biomedical research". Studies have shown increased risk of lung cancer in non-smoking women whose husbands smoked. Spousal studies on passive smoking showed a positive association between smoking and lung cancer. It has now been shown that involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers. Studies in various countries have established a positive association between passive smoking and lung cancer. The Environmental Protection Agency of U.S. classified environmental tobacco smoke (ETS) as a known human carcinogen, to which it attributed 3000 lung cancer deaths annually in American non-smokers. The agency also documented casual associations between exposure to environmental tobacco smoke (ETS) and lower respiratory tract infections such as pneumonia and bronchitis, middle ear disease, and exacerbations of asthma in children. A report on environmental tobacco smoke (ETS) published in December, 1998 by the California Environmental Protection Agency affirmed the findings of the US Environmental Protection Agency on the link between environmental tobacco smoke (ETS) and lung cancer and respiratory illness. It also concluded that passive smoking is a cause of heart disease mortality, acute and chronic heart disease morbidity, retardation of fetal growth, sudden infant death syndrome (SIDS) nasal sinus cancer, and induction of asthma in children. Two important studies from the Wolfson Institute of Preventive Medicine in London, published in 1998 show that marriage to a smoker increased the risk of lung cancer by 26%. Studies have also established strong relation between passive smoking and ischemic heart disease (IED). The systematic reviews from the Wolfson Institute, the California Environmental Protection Agency and the US Environmental Protection Agency, and the various reports released make it clear that exposure to environmental tobacco smoke (ETS) is a cause of lung cancer, heart disease and other serious illness. In the United States alone, it is responsible each year for 3000 deaths from lung cancer, 35,000 to 62,000 deaths from ischemic heart disease (IHD), 150,000 to 3000 000 cases of bronchitis or pneumonia in infants and children aged 18 months and younger causing 136 to 212 deaths, 8000 to 26,000 new cases of asthma, exacerbation of asthma in 400 000 to 1 million children, 700 000 to 1.6 million visits of physician offices for middle ear infection,

9700 to 18600 cases of low birth weight, and 1900 to 2700 sudden infant deaths. Those figures make passive smoking one of the leading preventable causes of premature death in the United States. (Ibid, 15)

20. Public health action by policy makers to eliminate exposure to environmental tobacco smoke (ETS) is long overdue. A total ban on smoking is preferred on various grounds. Policy makers should pursue all strategies that would help accomplish that goal, including education, legislation, regulation, litigation and enforcement of existing laws.

21. Government of India is a party to 16 or so resolutions adopted by the World Health Organization since the 1970s, particularly the one adopted in 1986 which urged member countries to formulate a comprehensive national tobacco control strategy. It was envisaged that the strategy would contain measures (i) to ensure effective protection to nonsmokers from involuntary exposure to tobacco smoke; (ii) to promote abstention from the use of tobacco to protect children and young people from becoming addicted; (iii) to ensure that a good example is set on all health-related premises by all health personnel; (iv) to progressively eliminate all incentives which maintain and promote the use of tobacco; (v) to prescribe statutory health warnings on cigarette packets and the containers of all types of tobacco products; (vi) to establish programmes of education and public information on tobacco and health issues with the active involvement of health professionals and media; (vii) to monitor trends in smoking and other forms of tobacco use, tobacco-related diseases and effectiveness of national smoking control action; (viii) to promote viable economic alternatives to tobacco production, trade and taxation; and (ix) to establish a national focal point to stimulate, support and coordinate all these activities.

22. Every year, 1 million tobacco-related deaths take place in India (Ibid, 1). An estimated 65 per cent of men use tobacco and in some parts a large proportion of women chew tobacco and biddies. About 33 per cent of all cancers are caused by tobacco. About 50 per cent of all cancers among men and 25 per cent among women are tobacco-related. The number of cases of avoidable tobacco-related cancers of the upper alimentary and respiratory tracts, coronary heart disease and chronic obstructive pulmonary disease (COPD) has been estimated as 2,00,000 every year. Many stillbirths, low birth infants, and pre-natal mortality have been reported among female chewers.

23. Tobacco kills 50 per cent of its regular users within 40 years. Apart from these direct health implications of tobacco use, the hazards faced by those engaged in the plucking and curing of tobacco leaves have been highlighted by researchers of the Ahmedabad-based National Institute of Occupational Health. The hands of the workers get affected by the chemicals in tobacco and sickness is caused when nicotine gets absorbed into the body through the skin. The symptoms are head-ache, nausea and vomiting. All these well-documented findings are available with the State but if it has not taken any effective action it can only be attributed to the clout which the lethal leaf enjoys in the corridors of

power. One of the pet contentions of the protagonists of tobacco is that it makes a significant contribution to the exchequer by way of taxes and hence should not be disturbed. Also a large number of tobacco farmers will be hit if consumption is curbed. Both these have been countered by WHO forcefully. Several studies have brought out that the cost of healthcare of those affected by tobacco-related ailments, which is met from the Government exchequer, is much more than what the Government garners by way of taxes. Thus, there is a net drain on the Government resources. Illness or the premature death of the tobacco-users would cast a heavy economic burden on their families, perpetuating the cycle of poverty. As regards the possible impact of any curb on tobacco use on tobacco farmers, studies by the Rajahmundry-based Tobacco Research Institute of the ICAR have brought out equally remunerative alternative to tobacco cultivation, besides use of tobacco for purposes other than smoking and chewing.

24. Hookahs-sometimes called water pipes-are used to smoke specially made tobacco that is available in a variety of flavors (e.g., apple, mint, cherry, chocolate, coconut, licorice, cappuccino, and watermelon).

? Hookah smoking is typically practiced in groups, with the same mouthpiece passed from person to person.

? Hookahs originated in ancient Persia and India and have been used extensively for centuries. Today, hookah caf?s are gaining popularity around the globe, including Britain, France, Russia, the Middle East, and the United States. An estimated 300 hookah caf?s operated in the United States in 2006, and the numbers continue to grow. In recent years, there has been a increase in hookah use around the world, most notably among youth.

Compared with Cigarettes

25. While many hookah smokers may consider this practice less harmful than smoking cigarettes, hookah smoking carries many of the same health risks as cigarettes.

? Water pipe smoking delivers the addictive drug nicotine and is at least as toxic as cigarette smoke.

? Due to the mode of smoking-including frequency of puffing, depth of inhalation, and length of the smoking session-hookah smokers may absorb higher concentrations of the toxins found in cigarette smoke.

? A typical 1-hour-long hookah smoking session involves inhaling 100-200 times the volume of smoke inhaled from a single cigarette.

? Hookah smokers are at risk for the same kinds of diseases as are caused by cigarette smoking, including oral cancer, lung cancer, stomach cancer, cancer of the esophagus, reduced lung function, and decreased fertility.

Hookah smoking is NOT a safe alternative to smoking cigarettes

Health Effects

Hookah Smoke and Cancer

? The charcoal used to heat tobacco in the hookah increases the health risks by producing high levels of carbon monoxide, metals, and cancer-causing chemicals.

? Even after it has passed through water, the smoke produced by a hookah contains high levels of toxic compounds, including carbon monoxide, heavy metals, and cancer-causing chemicals.

? Hookah tobacco and smoke contain numerous toxic substances known to cause lung, bladder, and oral cancers.

? Irritation from exposure to tobacco juices increases the risk of developing oral cancers. The irritation by tobacco juice products is likely to be greater among hookah smokers than among pipe or cigar smokers because hookah smoking is typically practiced (with or without inhalation) more often and for longer periods of time.

Other Health Effects of Hookah Smoke

? Hookah tobacco and smoke contain numerous toxic substances known to cause clogged arteries and heart disease.

? Infectious diseases may be transmitted by sharing a hookah.

? Babies born to women who smoked one or more water pipes a day during pregnancy have lower birth weights (were at least 31/2 ounces less) than babies born to nonsmokers and are at an increased risk for respiratory diseases.

Hookahs and Secondhand Smoke

? Secondhand smoke from hookahs poses a serious risk for nonsmokers, particularly because it contains smoke not only from the tobacco but also from the heat source (e.g., charcoal) used in the hookah.

26. Using a hookah to smoke tobacco poses a serious potential health hazard to smokers and others exposed to the smoke emitted.

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Health effects

27. Contrary to ancient lore and popular belief, the smoke that emerges from a water pipe contains numerous toxicants known to cause lung cancer, heart disease, and other diseases. Waterpipe tobacco smoking delivers the addictive drug nicotine, and, as is the case with other tobacco products, more frequent use is associated with the smokers being more likely to report that they are addicted.

28. A water pipe smoking session may expose the smoker to more smoke over a longer period of time than occurs when smoking a cigarette. Cigarette smokers typically take 8-12, 40-75 ml puffs over about 5-7 minutes and inhale 0.5 to 0.6 liters of smoke. In contrast, water pipe smoking sessions typically last 20-80 minutes, during which the smoker may take 50-200 puffs which range from about 0.15 to 1 liter each. The water pipe smoker may therefore inhale as much smoke during one session as a cigarette smoker would inhale consuming 100 or more cigarettes.

29. While the water does absorb some of the nicotine, water pipe smokers can be exposed to a sufficient dose of this drug to cause addiction. Nicotine intake is an important regulator of tobacco intake in general, as evidenced by the fact that cigarette smokers tend to smoke until they get enough nicotine to satisfy their need and addiction, but not so much as to cause nausea. It is likely that the reduced concentration of nicotine in the water pipe smoke may result in smokers inhaling higher amounts of smoke and thus exposing themselves to higher levels of cancer-causing chemicals and hazardous gases such as carbon monoxide than if none of the nicotine was absorbed by the water; however, this issue needs further study. This puts water pipe smokers and second-hand smokers at risk for the same kinds of diseases as are caused by cigarette smoking, including cancer, heart disease, respiratory disease, and adverse effects during pregnancy.

Regional and global patterns of water pipe smoking

30. Waterpipe smoking is often social, and two or more people may share the same water pipe. In South-West Asia and North Africa, it is not uncommon for children to smoke with their parents. If used in a commercial establishment such

as a cafe or restaurant, the water pipe is ordered (often from a menu of flavors) and an employee prepares it from an in-house stock.

31. Globally, the highest rates of smoking occur in the African Region (primarily North Africa), the Eastern Mediterranean Region and the South-East Asia Region. Since the 1990s water pipe smoking appears to be spreading among new populations such as college students and young persons in the United States, Brazil and European countries. Waterpipe smoking appears to be stimulated by unfounded assumptions of relative safety compared to cigarettes, as well as the social nature of the activity. Commercial marketing, often with implicit or explicit safety-related claims, may also be contributing to the spread of water pipe smoking across the globe. Waterpipe smokers may use water pipes exclusively; however, many smokers may also smoke cigarettes. In some countries in which cigarette smoking is concentrated among men, water pipe smoking appears more evenly distributed between both sexes. All these findings reinforce the need to conduct more research on water pipes and the issues surrounding their use, and then to disseminate the information on the health risks to all countries.

Science base and conclusions

32. Waterpipe smoking has not been studied as intensively as has cigarette smoking; however, preliminary research on patterns of smoking, the chemistry of the smoke that is inhaled, and health effects supports the idea that water pipe smoking is associated with many of the same risks as cigarette smoking, and may, in fact, involve some unique health risks. The science base supports the following conclusions:

1. Using a water pipe to smoke tobacco poses a serious potential health hazard to smokers and others exposed to the smoke emitted.
2. Using a water pipe to smoke tobacco is not a safe alternative to cigarette smoking.
3. A typical 1 -hour long water pipe smoking session involves inhaling 100-200 times the volume of smoke inhaled with a single cigarette.
4. Even after it has been passed through water, the smoke produced by a water pipe contains high levels of toxic compounds, including carbon monoxide, heavy metals and cancer-causing chemicals.
5. Commonly used heat sources that are applied to burn the tobacco, such as wood cinders or charcoal, are likely to increase the health risks because when such fuels are combusted they produce their own toxicants, including high levels of carbon monoxide, metals and cancer-causing chemicals.
6. Pregnant women and the fetus are particularly vulnerable when exposed either actively or involuntarily to the water pipe smoke toxicants.
7. Second-hand smoke from water pipes is a mixture of tobacco smoke in addition to smoke from the fuel and therefore poses a serious risk for non-

smokers.

8. There is no proof that any device or accessory can make water pipe smoking safer.

9. Sharing a water pipe mouthpiece poses a serious risk of transmission of communicable diseases, including tuberculosis and hepatitis.

10. Waterpipe tobacco is often sweetened and flavored, making it very appealing; the sweet smell and taste of the smoke may explain why some people, particularly young people who otherwise would not use tobacco, begin to use water pipes.

33. It is in the aforesaid background that the Legislature thought fit to enact "the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003" to achieve healthier life style and the protection of life enshrined in the Constitution and to improve public health. The preamble to this particular Act of 2003 i.e. COTPA is as under :-

An Act to prohibit the advertisement of, and to provide for the regulation of trade and commerce in, and production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto.

WHEREAS, the Resolution passed by the 39th World Health Assembly (WHO), in its Fourteenth Plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so 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;

AND WHEREAS, the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, reiterated the concerns expressed in the Resolution passed in the 39th World Health Assembly 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 risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco;

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

AND WHEREAS, 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 enjoined by article 47 of the Constitution;

AND WHEREAS, it is expedient to prohibit the advertisement of, and to provide

for regulation of trade and commerce, production, supply and distribution of cigarettes and other tobacco products and for matters connected therewith or incidental thereto.

34. We have noticed that the license/permission to run eating house/restaurant is being issued under the provisions of the Bombay Police Act, 1951. Since the petitioners have been granted licenses in exercise of the powers conferred by Section 33 of the Act of 1951, the relevant provisions are stated herein below:

Section 33. Power to make rules or regulation of traffic and for preservation of order in public place, etc. - (1) The Commissioner, with respect to all or any of the following matters specified in this sub-section and the District Magistrate, with respect to all or any of the said matters except the matters referred to in sub-section (1AA), may make, alter or rescind rules or orders not inconsistent with this Act, in areas under their respective charges or any part thereof, namely :-

(a) xxx

(aa) xxx

(b) xxx

(c) xxx

(d) xxx

(da) xxx

(db) xxx

(e) xxx

(f) xxx

(g) xxx

(h) xxx

(i) xxx

(j) xxx

(k) xxx

(l) xxx

(m) xxx

(n) xxx

(o) xxx

(p) xxx

(q) xxx

(r) xxx

(s) xxx

(t) xxx

(u) xxx

(v) xxx

(w)(i) licensing or controlling places of public amusement or entertainment;

(ii) xxx

(iii) xxx

(wa)(i) xxx

(ii) xxx

(iii) xxx

(iv) xxx

(x) xxx

(xa) registration of eating houses, including granting a certificate of registration in each case, which shall be deemed to be a written permission required and obtained under this Act for keeping the eating house for ten years and decennial renewal of such registration, within a prescribed period;

(y) prescribing the procedure in accordance with which any license, permission or certificate of registration sought to be obtained or required under this Act should be applied for and fixing the fees to be charged for any such license, permission or certificate of registration.

Section 2(5A) defines "eating house" which means any place to which the public are admitted and where any kind of food or drink is supplied for consumption on the premises by any person owning or having an interest in or managing such place and includes a refreshment room, coffee-house or a shop where any kind of food or drink is supplied to the public for consumption in or near such shop; but does not include a place of public entertainment.

Section 2(10) defines "place of public entertainment" which means a boarding house, lodging house or residential hotel, and includes any eating house in which any kind of liquor or intoxicating drug is supplied (such as a tavern, a wine shop, a beer shop or a spirit, arrack, toddy, ganja, bhang or opium shop) to the public for consumption in or near such place.

35. Definition of "eating house" as defined u/s 2(5A) makes it abundantly clear that it is a place whether any kind of food or drink can be supplied for

consumption and includes a refreshment room, coffee house or a shop and nothing beyond food or drink.

36. Perusal of the provisions of Section 33 of the Act of 1951 makes it clear that there is no prohibition imposing any valid restrictions or conditions which were not incorporated at the time of issuance of licenses. Apart from that, firstly, the Prohibition of Smoking in Public Places Rules, 2008 (for short, "the Smoke Free Rules, 2008") framed under the COPTA are statutory provisions which are binding on all the persons and authorities within the country and, therefore, the action of the Police Commissioner of the city of Ahmedabad incorporating such restrictions or conditions even in the existing licenses cannot be said to be without any authority of law. Secondly, the licenses are in any case issued on annual basis. The office of the Police Commissioner would, therefore, in any case, have the powers to incorporate such restrictions and conditions at the time of renewal of the licenses.

37. At this stage, it is necessary to refer to the relevant statutory provisions of COTPA.

38. Section 4 provides that no person shall smoke in any public place, provided that in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in the airports, a separate provision for smoking area or space will be made. "Public place" is defined by section 3(l) as under :

"public place" means any place to which the public have access, whether as of right or not, and includes auditorium, hospital buildings, railway waiting room, amusement centers, restaurants, public offices, court buildings, educational institutions, libraries, public conveyances and the like which are visited by general public but does not include any open space;

39. Section 3(n) defines "smoking" as under :

"smoking", means smoking of tobacco in any form whether in the form of cigarette, cigar, beedis or otherwise with the aid of a pipe, wrapper or any other instruments;

40. "Tobacco products" is defined u/s 3(p) as the products specified in the Schedule to the Act which includes various tobacco products including cigar tobacco, pipe tobacco and hukka tobacco. It is thus clear that smoking in public place including restaurant is prohibited by the Legislature and only exception is made as far as restaurant is concerned that smoking is permissible in separate smoking area or space in restaurant having seating capacity of 30 persons or more. The Smoke Free Rules, 2008 define "restaurant" in Rule 2(b) as under :

(b) "restaurant" shall mean any place to which the public has access and where any kind of food or drink is supplied for consumption on the premises by any person by way of business for consideration monetary or otherwise and shall include the open space surrounding such premises and includes-

(i) refreshment rooms, banquet halls, discotheques, canteen, coffee house, pubs, bars, airport lounge, and the like.

41. Definition of "public place" defined in section 3(1) is further expanded by Rule 2(d) by including the places such as work places, shopping malls and cinema halls. Smoking area or space mentioned in the proviso to section 4 of the Act is defined in Rule 2(e) as under :

(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;

42. Rule 3 imposes a duty upon the owner and manager of a public place including restaurant to ensure that no person smokes in the public place which would include a restaurant. Rule 3(1)(c) also contains the following prohibition- "No ashtrays, matches, lighters or other things designed to facilitate smoking are provided in the public place." Rule 4 further provides that the owner/manager of the restaurant having seating capacity of thirty persons or more may provide for a smoking area or space as defined in rule 2(e); while sub rule (2) of rule (4) provides that space shall not be established at the entrance or exit of the restaurant, hotel and airport and shall be distinctively marked as "Smoking Area" in English and one Indian language, as applicable. Sub rule (3) rule (4) reads as under :

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

43. The COPTA is a central enactment made 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 nonsmokers from involuntary exposure to tobacco smoke and to protect 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. The Statement of Objects and Reasons of COPTA recognizes 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 COPTA is enacted to achieve healthier lifestyle and the protection of life enshrined in the Constitution and

seeks to improve public health.

44. Section 2 reads thus :

(2) Declaration as to expediency of control by the Union:- It is hereby declared that it is expedient in the public interest that the Union should take under its control the tobacco industry.

45. An eating house, which is called a restaurant, is declared to be a public place. Section 3(n) reads thus :

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

46. Section 4 imposes a prohibition on smoking in any public place and the proviso thereto has carved out an exception whereby a separate provision for smoking area or space can be made in certain specified Hotels/Restaurants. The entire premises of a hotel or a restaurant referred to in the proviso continue to be a "public place" and "smoking area or space" defined under Rule 2 (e) is essentially a part of such public place. This is also clear from Rule 4. Rule 3 casts a statutory obligation on person in charge of the affairs of public place and sub-rule 3 of Rule 4 prohibits any other services being allowed in a smoking area or space. Sub-Rule 4 of Rule 4 again carves out an exception in respect of a hotel having 30 rooms or more. Considering the scheme of the Act and the Rules, it is not possible to accept the submission that the "smoking area or space" cannot be considered to be a "public place".

(C) ANALYSIS OF THE CONTENTIONS OF THE RESPECTIVE PARTIES :-

47. Learned counsel for the petitioners has heavily relied upon the judgment of the Supreme Court in the case of Godawat Pan Masala Products I.P. Ltd. and another (supra). He would submit that considering the facts that the COTPA was a Central enactment and the Smoke Free Rules, 2008 has 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 Police Commissioner. Relying on Section 31 of the COTPA, 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 the COTPA or the rules there under, the Police Commissioner can never exercise any such power u/s 33 of the Bombay Police Act, as, according to the learned counsel, imposition of condition no.12 in the licenses of various petitioners running eating house/restaurants amounts to a legislation, which is impermissible. In support of this proposition, counsel relied on the observations of the Supreme Court made in paragraphs 24 to 28 of the said judgment. Reliance has also been placed on the observations made in paragraphs 36 to 42

of the said judgment to contend that the Supreme Court having conclusively laid down that the provisions of the COTPA being a special statute dealing with tobacco and tobacco products must override the provisions of any other enactment and since the COTPA is a special law as against the Bombay Police Act which, according to the counsel, is a State Local Act, and since the COTPA is enacted by Central Legislature as against the Bombay Police Act which has been enacted by the State Legislature, the special law prevail over 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.

48. Learned counsel would also submit that when the Parliament has not considered hookah to be a product inherently or viciously dangerous to health, it is not open for the Police Commissioner to treat the activity of smoking of hookah with very little content of tobacco, as dangerous or injurious to public health.

49. We do not find any merit in the contentions of the learned counsel so far as the interpretation sought to be placed of the ratio laid down by the Supreme Court in *Godawat Pan Masala Products I.P. Ltd. (supra)* is concerned. As a matter of fact, identical issue fell for consideration before the Division Bench of the Bombay High Court and the Division Bench of the Bombay High Court exhaustively dealt with this issue and we also propose to follow the same reasoning's. In the case of *Berrys Hotel Pvt. Ltd. (MOCHA)*, a private limited company v/s. The Municipal Corporation of Greater Mumbai and others, Writ Petition (L) No.1531 of 2011 decided on 11th August 2011, the Bombay High Court ruled as under :-

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, u/s 7(iv) of the Act.

In that context, the provisions of Section 7 of Prevention of Food Adulteration Act, 1954 and the Rules framed there under 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 u/s 24 of the Act by the State Government, to the extent permitted there under.

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 u/s 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 u/s 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 licenses 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 license has been applied for and issued is the activity of running an eating house and in that context, word "licensed 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.

50. In this view of the matter, the contention of the learned counsel that the entire field of smoking and tobacco is covered by the COTPA and the Central Government alone is competent to deal with the subjects covered under the Act is outright rejected.

51. As a matter of fact, practically all contentions as canvassed by learned counsel for the petitioners are taken care of by the reasoning's assigned by the Division Bench of the Bombay High Court which we have also followed and

adopted.

52. Learned counsel for the petitioner vehemently submitted that in each of the eating houses/ restaurants run by the respective petitioners, a separate smoking area has been provided. Counsel would submit that earlier a condition was imposed that there shall be a separate area for smoking which shall be transparent so that one can notice the activities being going on in the enclosed area specifically for smoking. Counsel would submit that the prohibition contained in Rules 3(1)(b) and (c) against providing ashtrays, matches, lighters or other things designed to facilitate smoking is applicable to a public place which is not a smoking area. It is submitted that smoking area or smoking space is governed by Rule 4(3) of the Rules. It is submitted that it is open to the owner/ manager of the eating places having hookah bar to provide ashtrays, matches, lighters or other things (including hookah) designed to facilitate smoking and it is also open to the owner/manager of the eating houses to provide hookah tobacco.

53. We do not find any merits in this contention also and we are in complete agreement with the contention on behalf of the respondent that if the contentions advanced on behalf of the private respondents is accepted, this Court would be permitting the private respondents to commit violation of the COTPA and Smoke Free Rules, which have been specifically enacted by the legislature to ensure that no person in charge of the public place facilitates smoking. It is also submitted that young students below the age of 18 years visiting different places such as restaurants having hookah bars are thrown into smoking hookah and the owner and manager of the restaurants provide hookah as well as tobacco. Proviso to section 4 is in the nature of exception and there is nothing in the said section or Rule 2 (e) which would warrant the interpretation advanced on behalf of the private respondents. If such interpretation is accepted, it would amount to defeating the very purpose of enactment and would also not be in consonance with the settled norms of interpretation of Statute. An exception cannot be interpreted in the manner which will defeat the substantive statutory provisions. It is also not possible to accept the submission that prohibition contained in Rule 3(1)(c) is not applicable in a "smoking area or space" within a restaurant/hotel and the contention that there is no prohibition against supplying ashtray, matches, lighters or other things designed to facilitate smoking in such smoking area or space. This argument cannot be accepted since it would defeat the legislative intent. The definition of the word "smoking" includes "any other instruments" and tobacco products defined in Section 2(p) read with the Schedule includes hookah tobacco. The "smoking area or space" within a public place, which is an exception carved out, is thus in the nature of a concession which has been given to an individual and cannot be construed to be conferring any right on the owner, proprietor, manager, supervisor or person in charge of any restaurant or hotel. It was also sought to be contended that in view of Rule 4(4), since "services" are allowed to be provided in specified separate smoking rooms in a hotel, there is no justification for prohibiting such "services" in a "smoking area or space" in a restaurant or a hotel. This argument

clearly overlooks that Rule 4(4) deals with only "separate smoking rooms" which cannot be equated with a "smoking area or space". The articles mentioned in Rule 3(1)(c) are those "designed to facilitate smoking" and cannot be termed as "services" as contemplated by Rule 4(3). Rule 4(3) imposes blanket restriction against providing any services in "smoking area or space" and such a restriction will obviously apply to such smoking area or space in a restaurant or in hotel.

54. This issue as regards Rule 3 of the Rules read with Section 4 of the Act was a subject matter of adjudication before the Division Bench of the Bombay High Court in the case of *Crusade Against Tobacco (A branch of The Nell Charitable Trust) and others v/s. Union of India and others Public Interest Litigation* (L) No.111 of 2010. The Division Bench of the Bombay High Court, vide its judgment and order dated 13th July 2011 speaking through Hon'ble the Chief Justice, held as under :-

13. The submission made on behalf of the private respondents on the basis of instruction (i) is also misconceived. All that this instruction means is that the prohibition against providing any services in a smoking area or space does not apply to smoking rooms in a hotel. That is to say, in a smoking room in a hotel, food and beverages may be provided by way of room services, but such services cannot be provided in the smoking area/space in a restaurant.

14. The rationale underlying instruction (i) is obvious. A smoking room in a Hotel may be occupied by the guest for one day or several days. Such a guest can not be denied food and beverages by way of room service or other services like laundry service or entertainment through television watching in the smoking room in a hotel.

15. On the other hand, the customer in a restaurant, who is otherwise not allowed to smoke in any public place including a restaurant [Sec. 3 (I)] 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, does not want to encourage the customer in the restaurant to spend 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.

16. 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 (I) from providing devices like lighter which facilitate smoking and which prohibits a restaurant owner 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 gadgets like hookas in the smoking area of the restaurant. Hooka is more than a device that facilitates smoking. Hooka is the

gadget through which the person smokes. Providing a gadget like hooka to young boys and girls 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.

55. We follow the same reasoning's as assigned by the Division Bench of the Bombay High Court and are in complete agreement with the same.

56. We may also quote some paragraphs of the Division Bench judgment of the Bombay High Court in the case of Berrys Hotel Pvt. Ltd. (MOCHA) (supra), where the Division Bench, considering the Preamble of Statement of Objects and Reasons for COTPA, held as under :-

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 nonsmokers 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 enjoined 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 recognizes 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.

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, inter alia, to protect children and young people from being addicted to the use of tobacco. The statement of objects and reasons of COTPA further recognizes 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" u/s 3(I) of the COTPA 2003, the prohibition against smoking applies u/s 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.

36. The customer in a restaurant, who is otherwise not allowed to smoke in any public place including a restaurant [Sec. 3(I)] 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 Health Assembly on 15 May 1986 to implement the measures interlaid 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 there under, 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 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.

(D) FREEDOM OF TRADE UNDER ARTICLE 19(1)(g) AND LIMITATIONS SPECIFIED IN ARTICLE 19(6) - REASONABLE RESTRICTIONS :-

57. Article 19(1)(g) read with Article 19(6) of the Constitution of India spells out fundamental rights given to the citizens to practice any profession or carrying on any occupation, trade or business so long as it is not prevented or is within the frame work of the regulation, if any. There cannot be any dispute that certain professions, occupations, trade or business which are not in the interest of general public may be completely prohibited while others may be permitted with reasonable restrictions. Further, Article 47 of the Constitution enjoins on the State and contains a Directive Principle of the State Policy and provides that the State shall regard the improvement of public health as amongst its primary duties. Restrictions permitted to be imposed by sub-clauses (2) to (6) of Article 19 must be read as a whole, each throwing light on the scope of the other and that the common thread running through these several provisions was the ground of public policy understood in a comprehensive sense. The public policy thus enforced might be founded on the principles of the common law; vide for instance *Egerton v. Earl Brownlow*, (1853) 4 HLC 1 at p.256(G), where the House of Lords said :

No subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.

58. Another instance which can be afforded is through a leading case of *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, 1894 AC 535 (H), where the House of Lords had to deal with the scope of the common law prohibition against improper restraint of trade. This principle of public policy was not confined to that which the common law recognized or enforced, and it extended equally to the public policy involved in the enforcement of statutes.

59. Every public statute was enacted in the public interest and, therefore, both public policy and public interest demanded its enforcement. The public interest justifying the restrictions might, therefore, arise from the very provisions of the enactment and might be grounded on the necessity to prevent its evasion.

60. Having considered the matter carefully, we have reached the conclusion, that the view pressed upon us by learned counsel for the petitioners, that the public interest to justify restrictions of the rights conferred by Article 19(1)(g) must arise from the inherent nature of the particular trade, involves an unduly narrow interpretation of the words employed in Article 19(6) and ought to be rejected. We see considerable force in the argument of the learned counsel for the State that the restrictions permitted by sub-clauses (2) to (6) follow a pattern i.e. they are imposed by the Legislature for reasons of public policy. The precise aspect of public policy involved in the case of each of the several fundamental rights conferred by the several sub-clauses of Article 19(1) might differ, but one underlying principle - the requirement of public policy - runs through the various classes of restrictions and pervades the scheme.

61. While considering the effect of the Directive Principles contained in part IV of the Constitution of India, particularly in the context of principles of interpretation of a statute, in case of U. P. State Electricity Board and Anr. v/s. Hari Shanker Jain and ors., AIR 1979 SC 65, the Hon"ble 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.

62. While interpreting the provisions of COPTA and the Rules framed there under, 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. Section 2 of COPTA contains declaration of expediency to enact the Act in public interest. Hence the challenge based on Article 19 is also without substance.

MEANING OF THE WORD "REGULATION"

63. We would also like to deal with one another contention which assumes importance in the peculiar facts of the present case. It was contended during the course of argument on behalf of the petitioners that the license which is being issued by the Police Commissioner of the city of Ahmedabad or as the case may be, is in exercise of powers u/s 33 of the Bombay Police Act. We have quoted in the earlier part of our judgment Section 33 of the Bombay Police Act, more particularly, the relevant provisions, so we need not repeat the same. However, the contention is that Chapter IV of the Bombay Police Act, 1951 provides for police regulations. In fact, Chapter IV of the Act is with regard to police regulations. Section 33 empowers the authority concerned to make rules or regulations of traffic and for preservation of order in public place, etc. The contention of the counsel for the petitioners is that the powers u/s 33 are merely regulatory and there is no specific power to impose a complete ban or prohibition of a particular activity, like in the instant case, a hookah or providing with a hookah at a eating house/restaurant registered under Sections 33(xa). To understand the true meaning and import of the word "regulate" we may refer to a Division Bench judgment of Andhra Pradesh High Court in the case of D.K.V. Prasada Rao and Others Vs. Government of Andhra Pradesh, where the Division Bench of the Andhra Pradesh High Court interpreted the word "regulation" while considering the matter under A.P. Cinemas (Regulation) Act and the rules framed there under. This is how the word "regulation" has been understood and explained.

64. The heart of the title is the word "Regulation". The prominence thus ascribed is to the word was "Regulation". But it lacks legislative definition of its own. Therefore, it is profitable to find what meaning has been ascribed to it either under the dictionaries or analogous statutes or Judge made law to understand its scope and reach and whether it would comprehend within its ambit the power to make rules to regulate maximum rates of admission. The term "Regulate" is defined in Oxford Dictionary, as follows :

to control, to govern, to protect by rules or regulations, to subject to guidance or restrictions, to adopt to circumstances or surroundings.

65. In *Corpus Juris Secundum*, Volume 76, p. 610, the meaning of the word "regulate" is stated thus :

The word "regulates" is derived from the latin word "rego and regula". It is a word of broad import having a broad meaning and is very comprehensive in scope.

(Emphasis supplied.)

66. In *Municipal Corporation of the City of Toronto v. Virgo*, (1896) AC 88 at 93 (House of Lords (Privy Council- Ed.)), Lord Davey. while considering the word "Regulation" has held that:

There is a marked distinction to be drawn between the prohibition or prevention of trade and the regulation or governance of it and indeed.... a power to regulate and to govern seems to imply the continued existence of that which is to be regulated or governed.

(Empasis supplied.)

67. Sri C. Herman Prechette in "The American Constitution" III Edition, at page 186, gives the meaning of the word "Regulation" as the breadth of regulatory power which the Congress may exercise within its recognized scope of authority has seldom successfully questioned. Efforts to read restrictive interpretations into the word "regulate" have almost uniformly failed. Regulations, the Court has said, means not only "protection and promotion" but also "restriction and even prohibition".

68. In *Cook v. Marshall Country*, (1904) 196 US 261 at 272 Mr. Justice Brown of the Supreme Court of America while considering the power of Congress to regulate inter State Commerce, observed that:

... but so long as they are adopted in good faith, with an eye single to the public welfare, they are as much entitled to the recognition of the general Government as if they were uniformly adopted by all the States.

(Emphasis supplied.)

69. In this context, it is appropriate to refer to a decision of their Lordships of the Supreme Court in *Indu Bhushan Bose Vs. Rama Sundari Debi and Another*, where

the scope of the word "regulation" was considered, it was held:

The Dictionary meaning of the word "regulation" in Shorter Oxford Dictionary is "the act of regulating" and the word "regulate" is given the meaning "to control, govern, or direct by rule or regulation". This entry thus, gives the power to Parliament to pass legislation for the purpose of directing or controlling all house accommodation in cantonment areas. Clearly, this power to direct or control will include within it all aspects as to who is to make the constructions under that conditions the constructions can be altered, who is to occupy the accommodation and for how long, on what terms is to be occupied, when and under what circumstances the occupant is to cease to occupy it, and the manner in which the accommodation is to be utilized. All these are ingredients of regulation of house accommodation and we see no reason to hold that this word "regulation" has not been used in this wide sense in this entirety.

70. It would, therefore, be reasonable to deduce that the word "regulation" is a word of broad import having wide meaning comprehending all facets not only specifically enumerated in the Act but also embrace within its fold the powers incidental to the regulation envisaged in good faith with an eye single to the public welfare. Court has to recognize this power of the Government in public interest.

71. In *Corpus Juris Secundum*, Vol. 76, at page 612, it is stated : "The power to regulate carries with it full power over the thing subject to regulation, and in the absence of restrictive words the power must be regarded as "plenary over the entire subject."..... It has been held to contemplate or imply the continued existence of the subject matter to be regulated. The power to regulate includes the power to restrain, and indicate restriction in some respects and the term "regulate" embraces the idea of fixing limitations and restrictions, and contemplates the power of restriction or restraint." "The word necessarily denotes some degrees of restraint of acts usually done in connection with the thing to be regulated."... "The power to regulate may include the power to license or to refuse a license, or to require a bond from an applicant therefore, or to require the taking out of a license and it may include the power to tax or to exempt from taxation but not the right to impose a tax for revenue."

72. Thus, it could be seen that the power to regulate would also include the power to restrain and embrace the idea of fixing limitations and restrictions on the acts usually done in connection with the right to trade or business under a license.

SECTION 144 OF THE CODE OF CRIMINAL PROCEDURE

73. Now we may proceed to deal with the contention of the learned counsel for the petitioners as regards the legality and validity of the notification dated 14th July 2011 issued by the Police Commissioner of the city of Ahmedabad in exercise of powers u/s 144 of the Code of Criminal Procedure (for short, "the Code"). The contention is that the kind of orders mentioned in Section 144(3) of

the Code are intended only to prevent danger to life, health, safety, peace and tranquility of members of the public. They are only temporary orders which cannot last beyond two months from the making thereof as is clear from Section 144(6) of the Code. It is contended that even by virtue of proviso sub-section (4) to Section 144, it is only the State Government which is empowered to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Police Commissioner is clearly indicative of the position that Parliament never intended the life of an order u/s 144 to remain in force beyond two months when made by a Magistrate. It is also contended that the scheme of that section does not contemplate repetitive orders and in case the situation so warrants, steps have to be taken under other provisions of the law. It is further contended that if repetitive orders are made it would clearly amount to abuse of power conferred by Section 144 as the nature of the order u/s 144 is intended to meet emergent situation and the order u/s 144 is not intended to be either permanent or semi-permanent in character.

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

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

76. In the case of Shiv Shankar Dal Mills and Others Vs. State of Haryana and Others, while disposing of the petition and laying down guidelines, the Hon''ble

Supreme Court of India held as under :-

Article 226 grants an extraordinary remedy, which is essentially discretionary, although founded on legal injury. It is perfectly open for the Court, exercising this flexible power, to pass such order as public interest dictates and equity projects. Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependent upon considerations as of public interest.

77. It has been rightly observed that legal formulations cannot be enforced divorce from the realities of the fact situation of the case. While administering law it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable considerations and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal Court of Appeal.

78. In this view of the matter, the State in enforcement of its duties to improve the health is absolutely justified in prohibiting and banning supply of hookahs at eating houses/restaurants. Such a decision can never be struck down as violative of Article 19(1)(g) of the Constitution of India. A citizen would have no fundamental right to trade in hookahs. Petitioners' contention that by imposition of such an absolute ban and prohibition they will be deprived of practicing such trade and thus they will lose their livelihood cannot be countenanced. Interest of the public outweighs the inconvenience caused to persons like the petitioners.

79. In the aforesaid view of the matter and for the reasons recorded in the judgment, we hold that there is no merit in the petitions and none of the contentions canvassed on behalf of the petitioners can be accepted.

80. In the result, all the petitions fail and are hereby rejected. No order as to cost.