REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.10836 OF 2014
[Arising out of SLP (Civil) No.30832 OF 2011]

Narinder S. Chadha & Ors. … Appellants

VERSUS

Municipal Corporation of Greater Mumbai & Ors. … Respondents

WITH

CIVIL APPEAL NOS.10837-10839 OF 2014
[Arising out of SLP (Civil) Nos. 31048-31050 OF 2011]

WITH

CIVIL APPEAL NO.10840 OF 2014
[Arising out of SLP (Civil) No.33140 OF 2011]

WITH

CIVIL APPEAL NOS.10841-10843 OF 2014
[Arising out of SLP (Civil) Nos.33141-33143 OF 2011]

WITH

CIVIL APPEAL NOS.10844-10845 OF 2014
[Arising out of SLP (Civil) Nos.19247-19248 OF 2012]

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AND

CIVIL APPEAL NO.10846 OF 2014
[Arising out of SLP (Civil) No.8143 OF 2014]

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. In this batch of matters, we are concerned with the Municipal Corporations of various cities implementing the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003. In the first case before us, namely, civil appeal arising out of SLP(C) No.30832 of 2011 – Narinder S. Chadha and others v. Municipal Corporation of Greater Mumbai and others, a judgment of the Bombay High Court dated 11th August, 2011 disposed of a writ petition in which several wide ranging contentions were urged, and ultimately decided that the impugned circular dated 4th July, 2011 only implemented the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply & Distribution) Act, 2003 (hereinafter referred to

as the "Cigarettes Act") and the Prohibition of Smoking in Public Places Rules, 2008 (hereinafter referred to as the "Rules") and dismissed the challenge to the said circular. Similarly, in cases arising from Chennai and Ahmedabad, similar circulars/notices were under challenge and in both the impugned judgments in SLP(C) Nos.19247-19248 of 2012 (Temperature etc. v. Deputy Police Commissioner, Zone-1 Ahmedabad and Others) and SLP(C) No.8143 of 2014 (Robustaa (Hyglow Café) v. The Commissioner Corporation of Chennai and others), the Gujarat and Madras High Courts followed the Bombay High Court judgment dated 11th August, 2011 and, consequently, dismissed the writ petitions filed before them. It is from these three judgments that appeals have been preferred.

3. Mr. C.U. Singh, learned senior advocate appearing on behalf of the appellants in the civil appeal arising out of SLP(C) No.30832 of 2011 made wide ranging arguments on the genesis of the Cigarettes Act and the fact that it was legislation made under Entry 52 List I read with Entry 33 List III of the 7th Schedule to the Constitution of India. He cited **Godawat Pan Masala Products I.P. Ltd. & Anr.** v. **Union of India & Ors.,** (2004) 7 SCC 68, particularly the concluding paragraph 77 (6) stating that the Cigarettes Act is a special Act

dealing only with tobacco and tobacco products, while the Prevention of Food Adulteration Act, 1954 is general and must therefore yield to the Cigarettes Act. He also cited **Bajinath Kedia** v. **State of Bihar & Ors.,** (1969) 3 SCC 838 for the proposition that once the requisite declaration under Section 2 of the Cigarettes Act is made, the State Government is denuded of any power to legislate in the field occupied by the Cigarettes Act. He also cited **Paluru Ramakrishnaiah & Ors.** v. **Union of India & Anr.,** (1989) 2 SCC 541 for the proposition that executive instructions and conditions cannot be contrary to statute or statutory rules. Ultimately, however, he contended that there were three features of the impugned circular which required to be struck down being *ultra vires* the Cigarettes Act and the Rules made therein.

4. The first condition did not allow a licensee of a restaurant to keep or sell or provide any tobacco or tobacco related products in any form in the licenced premises. This, according to him, was contrary to Section 6 of the Cigarettes Act and the Rules made thereunder. Further, smoking areas which are to be used only for the purpose of smoking cannot have any apparatus designed to facilitate smoking. This in his respectful submission puts a bar on Hookah smoking and is also outside the scope of the Cigarettes Act read with the Rules.

Further, smoking area dimensions laid down in paragraphs (D) and (E) of Condition No.35 were also conditions which one did not find either in the Cigarettes Act or in the Rules made thereunder and, hence, were *ultra vires*. Other learned counsel appearing for other appellants and interveners adopted the arguments of Shri Singh.

5. Mr. R.P. Bhatt, learned senior counsel appearing for the Municipal Corporation of Greater Mumbai argued before us that on a true reading of the Cigarettes Act and the Rules made thereunder, all that the added conditions did was to implement the Cigarettes Act and the Rules and on a true construction of the Act and Rules nothing was really added to what is already there. Miss Pinky Anand, learned Additional Solicitor General appearing on behalf of the Union, broadly supported Mr. Bhatt's stand.

6. In view of the rival contentions, the point that needs to be decided in this case is in a narrow compass. We have basically to see whether the impugned circular dated 4th July, 2011 travels outside the Cigarettes Act and the Rules or merely seeks to implement the said Act and the Rules as they stand.

7. For a determination of this case, it will be necessary to set out the relevant statutory provisions. First, the Cigarettes Act-

> "**Section 3- Definitions.** - In this Act, unless the context otherwise requires,-
>
> (k) "production", with its grammatical variations and cognate expressions, includes the making of cigarettes, cigars, cheroots, beedis, cigarette tobacco, pipe tobacco, hookah tobacco, chewing tobacco, pan masala or any chewing material having tobacco as one of its ingredients (by whatever name called) or snuff and shall include-
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> (i) Packing, labeling or re-labelling, of containers;
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> (ii) Re-packing from bulk packages to retail packages; and
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> (iii) The adoption of any other method to render the tobacco product marketable;
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> (l) "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 centres, 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;
>
> (m) "sale", with its grammatical variations and cognate expressions, means any transfer of property in goods by one person to another, whether for cash or on credit, or by way of exchange, and whether wholesale or retail, and includes an agreement for sale, and offer for sale and exposure for sale;

(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;

(p) “tobacco products” means the products specified in the Schedule.”

“THE SCHEDULE

[See Section 3(p)]

1. Cigarettes

2. Cigars

3. Cheroots

4. Beedis

5. Cigarette tobacco, pipe tobacco and hookah tobacco

6. Chewing Tobacco

7. Snuff

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

9. Gutka

10. Tooth powder containing tobacco.”

“**Section 4. Prohibition of smoking in a public place.-** 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 may be made.

Section 6. Prohibition on sale of cigarettes or other tobacco products to a person below the age of eighteen years and in particular areas.- No person shall sell, offer for sale, or permit sale of, cigarette or any other tobacco product-

(a) to any person who is under eighteen years of age, and

(b) in an area within a radius of one hundred yards of any educational institution.

Section 21. Punishment for smoking in certain places.- (1) Whoever contravenes the provisions of section 4 shall be punishable with fine which may extend to two hundred rupees.

(2) An offence under this section shall be compoundable and shall be tried summarily in accordance with the procedure provided for summary trials in the Code of Criminal Procedure, 1973 (2 of 1974).

Section 24. Punishment for sale of cigarette or any other tobacco products in certain places or to persons below the age of eighteen years.- (1) Any person who contravenes the provisions of section 6 shall be guilty of an offence under this Act and shall be punishable with fine which may extend to two hundred rupees.

(2) All offences under this section shall be compoundable and shall be tried summarily in accordance with the procedure provided for summary trials in the Code of Criminal Procedure, 1973 (2 of 1974).

Section 31. Power of the Central Government to make rules.- (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely: -

(a) specify the form and manner in which warning shall be given in respect of cigarettes or other tobacco products under clause (o) of section 3;

(b) specify the maximum permissible nicotine and tar contents in cigarettes or other tobacco products under the proviso to sub-section (5) of section 7;

(c) specify the manner in which the specified warning shall be inscribed on each package of cigarettes or other tobacco products or its label under sub-section (2) of section 8;

(d) specify the height of the letter or figure or both to be used in specified warning or to indicate the nicotine and tar contents in cigarettes or other tobacco products under section 10;

(e) provide for the manner in which entry into and search of any premises is to be conducted and the manner in which the seizure of any package of cigarettes or other tobacco products shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody any package of cigarettes or other tobacco products has been seized;

(f) provide for any other matter which is required to be, or may be, prescribed.

(3) Every rule made under this Act and every notification made under section 30 shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive

sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification."

The Prohibition of Smoking in Public Places Rules, 2008 are also relevant.

"**2. Definitions.**-In these rules, unless the context otherwise requires,-

(d) "public place" defined in Section 3(1) of the Act shall also include work places, shopping malls, and cinema halls.

(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 close 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.

(f) Words and expressions used herein and not defined in these rules but defined in the Act shall have the meanings, respectively, assigned to them in the Act.

3. Prohibition of smoking in a public place.- (1) The owner, proprietor, manager, supervisor or in charge of the affairs of a public place shall ensure that:

(a) No person smokes in the public place (under his jurisdiction/implied).

(b) The board as specified in schedule II is displayed prominently at the entrance of the public place, in case there are more than one entrance at each such entrance and conspicuous place(s) inside. In case if there are more than one floor, at each floor including the staircase and entrance to the lift/s at each floor.

(c) No ashtrays, matches, lighters or other things designed to facilitate smoking are provided in the public place.

(2) The owner, proprietor, manager, supervisor or incharge of the affairs of a public place shall notify and cause to be displayed prominently the name of the person(s) to whom a complaint may be made by a person(s) who observes any person violating the provision of these Rules.

(3) lf the owner, proprietor, manager, supervisor or the authorized officer of a public place fails to act on report of such violation, the owner, proprietor, manager, supervisor or the authorized officer shall be liable to pay fine equivalent to the number of individual offences.

4. Hotels, Restaurants and Airports. – (1) The owner, proprietor, manager, supervisor or in-charge of the affairs of a hotel having thirty or more rooms or restaurant

having seating capacity of thirty persons or more and the manager of the airport may provide for a smoking area or space as defined in rule 2(e).

(2) Smoking area or space shall not be established at the entrance or exit of the hotel, restaurant and the airport and shall be distinctively marked as "Smoking Area" in English and one Indian language, as applicable.

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

(4) The owner, proprietor, manager, supervisor or in-charge of the affairs of a hotel having thirty or more rooms may designate separate smoking rooms in the manner prescribed as under:

(a) all the rooms so designated shall form a separate section in the same floor or wing, as the case may be. In case of more than one floors/ wings the room shall be in one floor/wing as the case may be.

(b) all such rooms shall be distinctively marked as "Smoking rooms" in English and one Indian language, as applicable.

(c) the smoke from such room shall be ventilated outside and does not infiltrate/permeate into the non-smoking areas of the hotel including lobbies and the corridors."

8. The Cigarettes Act was really in implementation of World Health Assembly Resolutions and was enacted to put a total ban on

advertising of tobacco products and to prevent the sale of tobacco products to minors. It is also legislation which seeks to implement Article 47 of the Constitution which reads as under:-

> "**47. Duty of the State to raise the level of nutrition and the standard of living and to improve public health**.—The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health."

9. It all began *vide* an order dated 5th May, 2011 in a Public Interest Litigation which is No.111 of 2011 in which the Bombay High Court asked the Municipal Corporation to incorporate terms and conditions while issuing licences under Section 479 of the Mumbai Municipal Corporation Act so as to comply with the provisions of the Cigarettes Act and the Rules made thereunder. This was directed to be done within a period of six weeks. It is as a result of this direction that the impugned circular dated 4th July, 2011 was issued in which Conditions 35 to 37 in general conditions of licence issued under Section 394 of the Mumbai Municipal Corporation Act were to be added. These conditions read as under:

"Condition No. 35: <u>The licensee shall not keep or allow to keep or sell or provide any tobacco or tobacco related products in any form whether in the form of cigarette, cigar, bidis or otherwise with the aid of a pipe, wrapper or any other instrument in the licensed premises.</u>

The Commissioner may permit smoking area as per Section 4 of Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production Supply and Distribution) Act, 2003 (COTPA) in an eating house having seating capacity of thirty persons or more.

A) The smoking area shall mean separately ventilated smoking room that:

i. is physically separated and surrounded by full height walls on all four sides.

ii. has an entrance with an automatically closing doors normally kept in close position.

iii. has an air flow system that

a. is exhausted directly to the outside and not mixed back into the supply air for the other parts of the building.

b. is fitted with a non-recirculation exhaust ventilation system or an air cleaning system, or by a combination of the two, to ensure that the air discharges only in a manner that does not re-circulate or transfer it from a smoking area or space to non-smoking areas.

iv. has negative air pressure in comparison with the remainder of the building.

B) The smoking area shall not be established at the Entrance or Exit of the eating house and shall be distinctively marked as "Smoking Area" in English & in Marathi as per the COTPA.

C) The Smoking area shall be used only for the purpose of smoking and no other service(s) or any apparatus designed to facilitate smoking shall be provided.

D) The smoking area shall not be less than 100 sq. ft. with each side of the room shall not be less than 8 ft. and height of the room shall not be less than 9 ft. The smoking area shall be included in the licensed area of the eating house.

E) The total area of the smoking room shall not be more than 30% of the total licensed service area of the eating house.

Condition No.36: No person below the age of 18 years shall be permitted in the smoking area.

Condition No.37: The owner, proprietor, manager, supervisor in charge of the eating house shall notify and caused to be displayed prominently the name of the person(s) to whom a complaint may be made by a person(s) who observes any person violating the provisions of COTPA.

The Licensee shall comply with the aforesaid conditions and breach of any of the condition shall entail cancellations/ suspensions/ revocations of License.

The proposal regarding inclusion of the smoking area in the licensed area of Eating House shall be approved by the concerned DEHO.

All concerned officers of Health Department & Licence Department are hereby instructed to stringently enforce the above mentioned condition nos. 35 to 37 of the general conditions of Licences under Section 394 of MMC Act. These conditions should be incorporated in all existing as well new Eating House Licenses.

A notice may be issued to all the existing Eating Houses Licensees that condition nos. 35 to 37 shall be deemed to be incorporated in the existing licenses and any breach of the same shall entail suspension/revocation of the said License.

All the concerned Officers of the Health Department are directed to take special drive against those eating houses against whom complaints of serving hukkah are received and take stringent action by following due procedure."

10. Mr. Bhatt appearing for the Municipal Corporation urged that this circular would be valid being issued under Section 394 (1)(d) of the Mumbai Municipal Corporation Act which reads as under:-

"394. Certain articles or animals not to be kept and certain trades, processes and operations not to be carried on without a licence; and things liable to be seized destroyed, etc., to prevent danger or nuisance.

(1) Except under and in accordance with the terms and conditions of the licence granted by the Commissioner, no person shall—

(d) keep or use, or suffer or allow to be kept or used, in or upon any premises, any article or animal which, in the opinion of the Commissioner, is dangerous to life, health or property, or likely to create a nuisance either from its nature or by reason of the manner in which, or the conditions under which, the same is, or is proposed to be, kept or used or suffered or allowed to be kept or used;"

11. According to Mr. C.U. Singh, the very first paragraph of Condition No.35 is bad inasmuch as it does not allow the licensee to

keep or sell or provide any tobacco or tobacco related products in the licenced premises. We find considerable force in this submission.

12. It will be noticed that Section 6 of the Cigarettes Act permits the sale of cigarettes and any other tobacco products, except to persons under 18 years of age and in an area within a radius of 100 yards of any educational institution. It is clear that any condition which prohibits the sale of cigarettes or any other tobacco products in premises licenced by the Municipal Corporation would amount to adding another exception which would be impermissible in law. Mr. Bhatt sought to uphold this condition with a reference to Rule 4(3) as, in his submission, in a smoking area "no other service shall be allowed". According to him, the sale of tobacco or tobacco related products would amount to a service that cannot be so allowed.

13. We cannot accept this contention for more than one reason. First and foremost, it is difficult conceptually to say that "sale" and "service" are interchangeable items. "Sale" is defined under the Act as meaning a transfer of property in goods for consideration. It is obvious that "sale" has to be understood in this sense, and properly so understood would not include "service" which would refer not to transfer of property in goods but to "service" as is understood in its

ordinary sense. In **Northern India Caterers (India) Ltd.** v. **Lt. Governor of Delhi** [1979] 1 S.C.R. 557, a distinction was made between sale of food and the provision of services in hotels and restaurants. The Court held:-

> "Like the hotelier, a restaurateur provides many services in addition to the supply of food. He provides furniture and furnishings, linen, crockery and cutlery, and in the eating places of today he may add music and a specially provided area for floor dancing and in some cases a floor show. The view taken by the English law found acceptance on American soil, and after some desultory dissent initially in certain states it very soon became firmly established as the general view of the law. The first addition of American Jurisprudence [Vol. 46, p. 207, para 13] sets forth the statement of the law in that regard, but we may go to the case itself, *Electa B. Merrill* v. *James W. Hodson* [1915 B LRA 481] from which the statement has been derived. Holding that the supply of food or drink to customers did not partake of the character of a sale of goods the Court commented:
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> > "The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires, or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set

> before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire,—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food applied as a factor in the service rendered."

This led to the Constitution 46th Amendment Act by which Article 366 (29A) was inserted. Article 366 (29A) reads as follows:-

> "**Article 366 (29-A)** "tax on the sale or purchase of goods" includes—
>
> (*a*) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(*b*) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(*c*) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(*d*) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(*e*) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(*f*) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;".

It will be seen that the definition of tax on the sale or purchase of goods has been artificially expanded more particularly by sub-clause (f), with which we are concerned, where the distinction between "sale" and "service" has been done away with. In the present case, the well established distinction between "sale" and "service" would continue to apply in view of the definition of "sale" contained in Section 3(m). It will be noticed that the definition is a "means" and

"includes" one. It is well settled that such definition is an exhaustive definition (see: **P. Kasilingam and others** v. **P.S.G. College of Technology and others** 1995 Supp (2) SCC 348 at para 19). There is thus, no scope to include "service' in such a definition. Further, even if we were to accept Mr. Bhatt's contention, Rule 4(3) would become *ultra vires* Section 6 of the Act inasmuch as it would prohibit the sale of cigarettes and other tobacco products in a smoking area in hotels, restaurants and airports, thus, adding one more exception to the two exceptions already contained in Section 6. It is, thus, clear that this condition would be *ultra vires* the Cigarettes Act and the Rules properly so read.

14. It will be seen that Condition No. 35(C) of the impugned circular essentially reproduces Rule 4(3) of the said Rules and then adds the words "or any apparatus designed to facilitate smoking". The effect of the added words is that a Hookah cannot be provided by the hotel, restaurant or airport being an apparatus designed to facilitate smoking.

15. Mr. Bhatt sought to derive power for the added words from Rule 3(1)(c) and argued that the Hookah would be "other things"

designed to facilitate smoking which would be prohibited under Rule 3(1)(c).

16. We find it difficult to accept this contention because, if carefully read, Rule 3 deals with the prohibition of smoking in public places, which is referable to Section 4 (main part) whereas Rule 4 is referable to the proviso to Section 4. Rule 3 would only apply where there is a total prohibition of smoking in all public places as is clear from Rule 3(1)(a) which makes it is incumbent on the owner, proprietor, etc. of a public place to ensure that no person smokes in that place. It is in that context that ashtrays, matches, lighters and other things designed to facilitate smoking are not to be provided in public places where smoking is prohibited altogether.

17. On the other hand, where smoking is allowed in a smoking area or space, sub-rule (3) of Rule 4 makes it clear that such place can be used for the purpose of "smoking". Under Rule 2(f) words and expressions not defined in these Rules but defined in the Act shall have the meanings, respectively, assigned to them in the Act.

18. This takes us to the definition of "smoking" contained in Section 3(n) of the Act which has been set out hereinabove. A perusal

of this definition shows that it includes smoking of tobacco in any form with the aid of a pipe, wrapper, or any other instrument, which would obviously include a Hookah. That being the case, "smoking" with a Hookah would be permissible under Rule 4(3) and the expression "no other service shall be allowed" obviously refers to services other than the providing of a Hookah. It is, thus, evident that the added words in clause (C) of Condition No.35 are clearly *ultra vires* the Act and the Rules.

19. Looked at from another angle, Rule 3(1)(c) and Rule 4(3) have to be harmoniously construed. If the respondents' contention has to be accepted, Rule 4(3) would be rendered nugatory. What is expressly allowed by Rule 4(3) cannot be said to be taken away by Rule 3(1)(c). For this reason also, Mr. Bhatt's contention will have to be turned down.

20. Sub-clauses (D) and (E) of Condition No. 35 were stated by Mr. Bhatt to be regulations relatable to buildings which is a purely municipal function within the Municipal Corporation's ken. There is no challenge to the dimensions of the smoking area set out in these sub-clauses. So far as these conditions are concerned, we agree with

Mr. Bhatt and the dimensions set out in (D) and (E) will have to be followed in all cases.

21. Since we are deciding this case only on the narrow ground that the High Court is incorrect when it holds that all that the Municipal Corporation did in the present case was to follow the Cigarettes Act and the Rules made thereunder, we need not delve on other aspects that were urged before us.

22. We, therefore, set aside the Bombay High Court judgment and delete the first paragraph of Condition No.35 and the added words in (C) of Condition No.35. The appeal succeeds to that extent.

23. In the Madras High Court judgment a notice dated 5th July, 2011 was upheld by the High Court. The notice is obviously *ultra vires* the Cigarettes Act and the Rules made thereunder as it prevents the owner of the hotel/restaurant from providing tobacco to persons who are not minors and asking such persons affirmatively to stop people from sucking and swallowing tobacco. Further, sale of tobacco can only be prohibited within a radius of 100 yards of an educational establishment and not 300 feet as is stated in the impugned notice. This judgment also deserves to be set aside.

24. In the Gujarat High Court case, an order dated 14th July, 2011, purportedly made under Section 33 of the Bombay Police Act read with Section 144 of the Code of Criminal Procedure prohibited hotels and restaurants from providing the facility of hookah and prohibited hookah bars. In the course of a lengthy judgment, the Division Bench referred to the evil effects of smoking and generally of tobacco products and ultimately came to the conclusion that Section 33 of the Bombay Police Act would include the power to prohibit, stating that the word "regulate" would include "restriction" and even "prohibition". Several authorities were stated for this proposition, but the one authority binding on the High Court was missed. In **Himat Lal K. Shah** v. **Commissioner of Police, Ahmedabad,** (1973) 1 SCC 227, the Supreme Court had to construe the word "regulate" under the very Act i.e. Section 33 of the Bombay Police Act. The Court held:

> *"**15.** Coming to the first point raised by the learned counsel, it seems to us that the word "regulating" in Section 33(o) would include the power to prescribe that permission in writing should be taken a few days before the holding of a meeting on a public street. Under Section 33(o) no rule could be prescribed prohibiting all meetings or processions. The section proceeds on the basis that the public has a right to hold assemblies and processions on and along streets though it is necessary to regulate the conduct and behaviour or action of persons constituting such assemblies or processions in*

order to safeguard the rights of citizens and in order to preserve public order. The word "regulate", according to Shorter Oxford Dictionary, means, "to control, govern, or direct by rule or regulation; to subject to guidance or restrictions". The impugned Rules do not prohibit the holding of meetings but only prescribe that permission should be taken although it is not stated on what grounds permission could be refused. We shall deal with this aspect a little later."

25. From a reading of **Himat Lal's** case, it is clear that the word "regulate" would not include the power to prohibit. Further, Section 144 of the Code of Criminal Procedure provides a power to grant only temporary orders which cannot last beyond 2 months from the making thereof (see Section 144(6) of the Code of Criminal Procedure). Despite this being pointed out to the High Court, the High Court held:

"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 under Section 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 licences 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 licence, the Police Commissioner thought fit to invoke Section 144 of the Code.

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 under Section 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 thereunder 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 thereunder can refuse to upset it."

26. We are at a loss to understand the aforesaid reasoning. If Section 144 is to be invoked, the order dated 14th July, 2011 would have expired 2 months thereafter. The High Court went on to state that while administering the law it is to be tempered with equity and if an equitable situation demands, the High Court would fail in its duty if it does not mould relief accordingly. It must never be forgotten that one of the maxims of equity is that `equity follows the law'. If the law is clear, no notions of equity can substitute the same. We are

clearly of the view that the Gujarat High Court judgment dated 2nd December, 2011 deserves to be set aside not only for following the Bombay High Court judgment impugned in the appeals before us but for the reasons stated hereinabove.

27. All the appeals are allowed in the aforesaid terms. There will be no order as to costs.

……..…..……J.
(Ranjan Gogoi)

……..……J.
(Rohinton Fali Nariman)

New Delhi;
December 08, 2014.