Reserved on : 11.03.2024
Pronounced on :22.04.2024

R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF APRIL, 2024

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

WRIT PETITION No.4461 OF 2024 (GM - RES)
C/W
WRIT PETITION No.282 OF 2024 (GM – POLICE)
WRIT PETITION No.4658 OF 2024 (GM – RES)
WRIT PETITION No.4672 OF 2024 (GM – RES)
WRIT PETITION No.4689 OF 2024 (GM - RES)
WRIT PETITION No.4837 OF 2024 (GM - RES)
WRIT PETITION No.5066 OF 2024 (GM - RES)
WRIT PETITION No.5332 OF 2024 (GM - RES)
WRIT PETITION No.5431 OF 2024 (GM - POLICE)
WRIT PETITION No.5756 OF 2024 (GM - POLICE)
WRIT PETITION No.5832 OF 2024 (GM - RES)
WRIT PETITION No.6102 OF 2024 (GM - RES)
WRIT PETITION No.7427 OF 2024 (GM - RES)

IN WRIT PETITION No.4461 OF 2024

BETWEEN:

SRI. R.BHARATH
S/O M.RAMESH
AGED ABOUT 27 YEARS
RESIDING AT: NO.377, 2B CROSS
4TH MAIN, 14TH BLOCK, 2ND STAGE
NAGARBHAVI, BENGALURU – 560 072
SOLE PROPRIETOR OF TERRACE CAFE.

... PETITIONER

(BY SRI KIRAN S.JAVALI, SENIOR ADVOCATE A/W.,

SRI KIRAN GOWDA M., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
DEPARTMENT OF HEALTH AND
FAMILY WELFARE
VIKAS SOUDHA
BENGALURU – 560 001
REPRESENTED BY ITS PRINCIPAL SECRETARY

2 . DEPARTMENT OF HEALTH AND
FAMILY WELFARE, VIKAS SOUDHA
BENGALURU – 560 001.
REPRESENTED BY UNDER SECRETARY

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

APPLICANT ON IA 2/2024:

VERVE FOUNDATION TRUST
NO.44/2, 5TH CROSS, 5TH MAIN
MALLESHWARAM, BENGALURU
KARNATAKA – 560 003
REPRESENTED BY: MR.PRABHU K.,
ORGANIZING SECRETARY.

APPLICANTS ON IA 3/2024:

1 . JUSTICE P.KRISHNA BHAT (RETD.)
R/A VASISHTA, NO.41
NEAR GANESHA EMERALD JUDICIAL LAYOUT
3RD PHASE, HEJJALA, BIDADI, BENGALURU
KARNATAKA – 562 109.

2 . DR. (PROF) U S VISHAL RAO

(MEMBER - CONSULTATIVE GROUP
TO PRINCIPAL SCIENTIFIC ADVISOR
TO PRIME MINISTER – GOVT. OF INDIA
MEMBER OF HIGH POWER COMMITTEE ON
TOBACCO CONTROL – GOVT. OF KARNATAKA)
OFFICE: INSTITUTE FOR POLICY RESEARCH
NO.408/22, 19TH G-MAIN ROAD
1ST BLOCK, RAJAJINAGAR

BENGALURU, KARNATAKA – 560 010.

(BY SRI. RAVISHANKAR S. S., ADVOCATE FOR APPLICANTS)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECTION AGAINST THE R2 TO QUASH THE IMPUGNED NOTIFICATION DATED 07/02/2024 BEARING NO.AA.KU.KA 170 CGE 2023 VIDE ANNEXURE-A IN SO FAR AS PETITIONER IS CONCERNED.

IN WRIT PETITION No.282 OF 2024

BETWEEN:

RAUCH
UNIT OF LORDS KITCHEN II
NO.1, SIR M.N.KRISHNARAO ROAD
BASAVANAGUDI, BBMP SOUTH
BENGALURU - 560 004.
HOTEL AND RESTAURANT,
A REGISTERED PARTNERSHIP FIRM,
REP BY ITS PARTNERS,

1. SMT. KEERTHI
D/O MANJUNATH
AGED ABOUT 30 YEARS
NO.235, HARLEKODIGE VILLAGE
SAKALESHPURA TALUK

GANADAHOLE, HEBBASALE
HASSAN – 573 134

2 . SMT. PALLAVI B. C.,
D/O CHANDRASHEKAR
AGED ABOUT 28 YEARS
NO.137, LALBHAGH FORT ROAD
PARVATHIPURAM
BENGALURU – 560 004.

3 . SMT. KEERTHI B. R.,
D/O B.V.RAMESH
AGED ABOUT 32 YEARS
NO.10/1, 9TH CROSS
CUBBON PET
BENGALURU – 560 002.

4 . SMT. PAVITHRA K.,
D/O KUMAR
AGED ABOUT 35 YEARS
NO.227, BELVATTA VILLAGE
R.B.I.POST, MYSORE – 570 003.

... PETITIONERS

(BY SRI. SUNIL KUMAR B.N., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
REP. BY ITS SECRETARY
HOME DEPARTMENT
VIDHANA SOUDHA
BENGALURU - 560 001.

2 . COMMISSIONER OF POLICE
INFANTRY ROAD
BENGALURU - 560 001.

3 . DEPUTY COMMISSIONER OF POLICE
BENGALURU SOUTH
BENGALURU - 560 003.

4 . ASSISTANT COMMISSIONER OF POLICE
CHAMARAJAPETE
BENGALURU - 560 003.

5 . STATION HOUSE OFFICER/INSPECTOR
CHANNAMANAKER ACHUKATTU
POLICE STATION
BENGALURU - 560 010.

6 . CENTRAL CRIME BRANCH
NARCOTIC DEPARTMENT
MYSORE ROAD, CHAMARAJAPETE
BENGALURU - 560 018
REPRESENTED BY ITS INSPECTOR.

7 . THE COMMISSIONER
BRUHATH BENGALURU
MAHANAGARA PALIKE, N.R.SQUARE
BENGALURU - 560 002.

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO A) DIRECTING THE R1 TO 6 NOT TO INTERFERE IN THE LAWFUL ACTIVITIES CARRIED ON BY THE PETITIONER IN THE PREMISES OF THE PETITIONER; B) DIRECT THE RESPONDENTS NOT TO INSIST FOR OBTAINING LICENSE UNDER THE KARNATAKA POLICE ACT OR ANY OTHER ACT TO SERVE HOOKAH AND ETC.,

IN WRIT PETITION No.4658 OF 2024

BETWEEN:

1 . SMT. NISARGA GOWDA
AGED ABOUT 32 YEARS
W/O HEMANTH KUMAR
PROPRIETRIX
M/S. FILTER CAFE
THE NEW BANGALORE CLUB
NO.134, JANATHA COLONY
NEAR KENCHANAKUPPE GATE
BIDADI, RAMANAGARA TALUK
RAMANAGARA DISTRICT – 562 109.

2 . SRI. HEMANTH KUMAR R.,
AGED ABOUT 34 YEARS
S/O SRI. RANGANATH R.,
PROPRIETOR
FILTER CAFE AND KITCHEN
NO.353/47/3, NO.354/47/4
355/47/2 AND 356/47/5
MAYAGONDANAHALLI KASABA
MADAPURAM, RAMANAGAR – 562 128.

... PETITIONERS

(BY SRI. K.SUMAN, SENIOR ADVOCATE A/W.,
SRI. SIDDHARTH SUMAN, ADVOCATE)

AND:

THE STATE OF KARNATAKA
BY ITS PRINCIPAL SECRETARY
HEALTH AND FAMILY
WELFARE DEPARTMENT (HEALTH 1 AND 2)
VIKAS SOUDHA, VIDHANA VEEDHI
BENGALURU – 560 001.

... RESPONDENT

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECT, QUASHING THE NOTIFICATION BEARING NO. AAKUKA 170 CGE 2023 DTD 07.02.2024 ISSUED BY THE RESPONDENT (I.E ANNEXURE-A) AS ARBITRARY, ILLEGAL, UNJUST AND WITHOUT JURISDICTION IN SO FAR AS IT RELATES TO THE PETITIONERS.

IN WRIT PETITION No.4672 OF 2024

BETWEEN:

DAWN AND BEACH
(AN PARTNERSHIP FIRM)
BRAND NAME - THREE DOTS AND A DASH
NO.840/1, 100 FT ROAD
METRO PILLAR 56 AND 57
INDIRANAGAR, BENGALURU – 560 038
REPRESENTED BY ITS PARTNER
RAGHAVENDRA RAMESH.

... PETITIONER

(BY SRI. MAHESH S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT
REPRESENTED BY
PRINCIPAL SECRETARY
VIDHANA SOUDHA
BENGALURU – 560 001.

2 . STATE OF KARNATAKA
HEALTH AND FAMILY
WELFARE DEPARTMENT
REPRESENTED BY ITS UNDER SECRETARY
VIDHANA SOUDHA

BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY, INFANTRY ROAD
BENGALURU – 560 001.

4 . THE COMMISSIONER
BRUHAT BANGALORE
MAHANAGARA PALIKE
N.R.SQUARE, BENGALURU – 560 001.

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED NOTIFICATION DTD 07.02.2024 BEARING NO. HA KU KA/170/CGE/2023 ISSUED BY R-2 VIDE ANNEXURE-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER; DIRECT THE R-3 AND 4 AUTHORITIES NOT TO INTERFERE INTO THE BUSINESS OF THE PETITIONER WHILE CARRYING ON THEIR BUSINESS IN HOOKAH.

IN WRIT PETITION No.4689 OF 2024

BETWEEN:

1 . M/S. ZREDHI HOSPITALITY
A PARTNERSHIP FIRM
RUNNING A HOTEL UNDER THE
NAME "LEPHOOK", SITUATED AT NO.42/5
5TH AND 6TH FLOOR, 22ND CROSS
3RD 'B' BLOCK, JAYANAGAR
BENGALURU – 560 011
REPRESENTED BY ITS PARTNER
MR. PALANI N.,

2 . M/S. ICAFE HOSPITALITY
A PARTNERSHIP FIRM
RUNNING A HOTEL UNDER THE
NAME "ICAFE – TITLI"
SITUATED AT NO.706
3RD FLOOR, WCR 2ND STAGE
9TH CROSS, DR. MC MODI HOSPITAL ROAD
RAJAJINAGAR, BENGALURU – 560 086
REPRESENTED BY ITS PARTNER
MR. SRINIVAS MOHAN

3 . M.P.HOSPITALITY
RUNNING A HOTEL UNDER THE
NAME "BAROOD", SITUATED AT 37/1
3RD / 4TH FLOOR, CUNNINGHAM ROAD
BENGALURU – 560 052
REP. BY ITS PROPRIETOR
MR. PIYUS SAMPATHRAJ

4 . M/S. EAT REPEAT INDIA PVT. LTD.,
COMPANY INCORPORATED UNDER
COMPANIES ACT, RUNNING A HOTEL
UNDER THE NAME "DR. SHEESHA"
SITUATED AT NO.74, 2ND AND 3RD FLOOR
JYOTHINIVAS COLLEGE ROAD
5TH BLOCK, KORAMANGALA
BTM LAYOUT, BENGALURU – 560 095
REPRESENTED BY ITS DIRECTOR
MR. BHARATH SATHISH

5 . M/S. EAT REPEAT INDIA PVT. LTD.,
COMPANY INCORPORATED
UNDER COMPANIES ACT
RUNNING A HOTEL UNDER THE
NAME "MACAW BY STORIES"
SITUATED AT WARD NO.191
TERRACE FLOOR, NO.2224, 2225
AECS LAYOUT, SINGASANDRA

HOSUR MAIN ROAD
BENGALURU – 560 068
REPRESENTED BY ITS MANAGING DIRECTOR
MR. BHARATH SATHISH

6 . M/S. EAT REPEAT INDIA PVT. LTD.,
COMPANY INCORPORATED
UNDER COMPANIES ACT
RUNNING THE HOTEL UNDER THE
NAME "DR. SHEESHA"
NO.17/17, DEEPA PLAZA, 3RD FLOOR
24TH MAIN, 1ST PHASE
OPP. TO SHANTHI SAGAR HOTEL
J.P.NAGAR, BENGALURU – 560 078
REPRESENTED BY ITS DIRECTOR
MR. BHARATH SATHISH

7 . M/S. FOOD BUFFS LLP
REGISTERED LLP
RUNNING A HOTEL UNDER THE
NAME "STORIES BREWERY AND KITCHEN"
SITUATED AT NO.62, MUNIVENKATAPPA LAYOUT
BILEKAHALLI, B.G.MAIN ROAD
BEGURU HOBLI, BENGALURU SOUTH TALUK
BENGALURU – 560 076
REPRESENTED BY ITS
MANAGING DIRECTOR/PARTNER
MR. BHARATH SATHISH

8 . M/S. BREW CASCADE LLP
REGISTERED LLP UNDER LLP ACT
RUNNING A HOTEL UNDER THE
NAME "DR. SHEESHA"
SITUATED AT NO.77, NEW MUNICIPAL NO.7
WEST OF CHORD ROAD, 20TH MAIN ROAD
1ST 'R' BLOCK, RAJAJINAGAR
BENGALURU – 560 010
REPRESENTED BY ITS PARTNER/DIRECTOR

MR. MANISH NAIDU

9 . M/S. TWIN SPOON LLP
REGISTERED LLP UNDER LLP ACT
RUNNING A HOTEL UNDER THE
NAME "DR. SHEESHA"
SITUTAED AT NO. 93/1
SUBBAIAH REDDY COLONY
MARATHAHALLI, MUNNEKOLALA
BENGALURU – 560 037
REPRESENTED BY ITS PARTNER/DIRECTOR
MR. MANISH NAIDU

10 . M/S. SIDDIVINAYAKA VENTURES
A PARTNERSHIP FIRM
RUNNING A HOTEL UNDER
THE NAME "MOCKAHOLIC"
NO.1107, 24TH MAIN ROAD
J.P.NAGAR, 1ST PHASE
KARNATAKA – 560 078
REPRESENTED BY ITS PARTNER
PAVAN KUMAR V.,

11 . ZEPHYR
RUNNING THE HOTEL UNDER
THE NAME PROPRIETOR
MR. PRADEEP B. R.,
S/O R.RANGE GOWDA
AGED ABOUT 34 YEARS
NO.79/1, AISHWARYA SAMPOORNA
VANIVILAS ROAD, BENGALURU – 560 004

12 . MR. SYED RAEES
S/O SYED AZAM
AGED ABOUT 31 YEARS
PROPRIETOR OF RESTAURANT
M/S. MARBELLA
NO. 17/17/18/20/2/1

4TH AND TERRACE FLOOR
24TH MAIN ROAD, J.P.NAGAR
5TH PHASE, SARAKKIKERE
PUTTENAHALLI, J.P.NAGAR
BENGALURU – 560 068

... PETITIONERS

(BY SRI. GOVINDARAJU K., ADVOCATE)

AND:

1 . THE STATE OF KARNATAKA
REPRESENTED BY ITS CHIEF SECRETARY
HEALTH AND FAMILY WELFARE DEPARTMENT
VIKASA SOUDHA, BENGALURU – 560 001.

2 . STATE OF KARNATAKA
REPRESENTED BY ITS CHIEF SECRETARY
VIKASA SOUDHA, BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY, INFANTRY ROAD
BENGALURU – 560 001.

4 . THE CENTRAL CRIME BRANCH
NARCOTIC DEPARTMENT
MYSORE ROAD, CHAMARAJPET
BENGALURU – 560 018
REPRESENTED BY ITS INSPECTOR.

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO i) QUASH THE OFFICIAL NOTIFICATION DATED 07/02/24 BEARING NO. AKUKA/170/CGE/2023 ISSUED BY THE R1 AS PER ANNEXURE-A

PROHIBITING SERVING HOOKAH TO ITS CUSTOMERS; ii) DIRECTING THE RESPONDENTS NOT TO INTERFERE IN THE BUSINESS OF THE PETITIONERS INCLUDING SERVING HOOKAH TO ITS CUSTOMERS IN SMOKING AREA.

IN WRIT PETITION No.4837 OF 2024

BETWEEN:

LORD'S KITCHEN
REPRESENTED BY ITS PARTNER
B.R.KEERTHI, S/O B.V.RAMESH
AGED ABOUT 30 YEARS
BUSINESS AT NO.1
SIR. M.N.KRISHNA ROAD
BASAVANAGUDI, BBMP SOUTH
BENGALURU - 560 004.

... PETITIONER

(BY SRI. MAHESH S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT
REPRESENTED BY PRINCIPAL SECRETARY
VIDHANA SOUDHA, BENGALURU - 560 001.

2 . STATE OF KARNATAKA
HEALTH AND FAMILY WELFARE DEPARTMENT
REPRESENTED BY ITS UNDER SECRETARY
VIDHANA SOUDHA, BENGALURU - 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY, INFANTRY ROAD
BENGALURU - 560 001.

4 . THE COMMISSIONER

BRUHAT BANGALORE
MAHANAGARA PALIKE
N.R.SQUARE, BENGALURU - 560 001.

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED NOTIFICATION DTD 07.02.2024 BEARING NO. HA KU KA/170/CGE/2023 ISSUED BY THE R-2 VIDE ANNEXURE-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER AND ETC.,

IN WRIT PETITION No.5066 OF 2024

BETWEEN:

SYED TASHRIFULLA
S/O FAIZI KHUNDMIRI S. F.,
AGED ABOUT 27 YEARS
PARTNER OF THE ORIGIONAL'S CAFE
NO.62, 3RD FLOOR, 1ST MAIN CORNER
BUILDING, KORAMANGALA, JAYANAGAR
BBMP SOUTH, BENGALURU – 560 095.

... PETITIONER

(BY SRI. MAHESH S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT
REPRESENTED BY PRINCIPAL SECRETARY
VIDHANA SOUDHA, BENGALURU – 560 001.

2 . STATE OF KARNATAKA

HEALTH AND FAMILY
WELFARE DEPARTMENT
REPRESENTED BY ITS UNDER SECRETARY
VIDHANA SOUDHA, BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY, INFANTRY ROAD
BENGALURU - 560 001.

4 . THE COMMISSIONER
BRUHAT BANGALORE MAHANAGARA PALIKE
N.R.SQUARE, BENGALURU – 560 001.

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED NOTIFICATION DTD 07.02.2024 BEARING NO. HA KU KA/170/CGE/23 ISSUED BY R-2 VIDE ANNEXURE-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER; DIRECT THE R-3 AND 4 AUTHORITIES NOT TO INTERFERE INTO THE BUSINESS OF THE PETITIONER WHILE CARRYING ON THEIR BUSINESS IN HOOKAH.

IN WRIT PETITION No.5332 OF 2024

BETWEEN:

BAMBOO HUT
NO.5, CPR COMFORTS
NAGARBHAVI MAIN ROAD
VIJAYANAGAR, BENGALURU
KARNATAKA – 560 072
REPRESENTED BY ITS PROPRIETOR
SUDHIR PARTHA SARATHI

AGED ABOUT 33 YEARS

... PETITIONER

(BY SRI. A.MAHESH CHOUDHARY, ADVOCATE AND
MS. KRISHIKA VAISHNAV, ADVOCATE)

AND:

1 . STATE OF KARNATAKA
DEPARTMENT OF HEALTH AND FAMILY WELFARE
REPRESENTED BY ITS PRINCIPAL SECRETARY
NO.105, 1ST FLOOR, VIKAS SOUDHA
BENGALURU – 560 001.

2 . DEPARTMENT OF HEALTH AND FAMILY WELFARE
REPRESENTED BY ITS UNDER SECRETARY
1ST FLOOR, VIKAS SOUDHA
BENGALURU – 560 001.

3 . BRUHAT BENGALURU MAHANAGARA PALIKE
REPRESENTED BY HEALTH OFFICER
BTM LAYOUT RANGE, 16TH MAIN ROAD
OPP. TO CHAMUNDESHWARI TEMPLE
BTM II STAGE, BENGALURU – 560 076.

... RESPONDENTS

(BY SRI. K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT. NAVYA SHEKHAR, AGA FOR R1 AND R2;
SRI. PAVAN KUMAR, ADVOCATE FOR R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH AND STRIKE DOWN THE IMPUGNED NOTIFICATION BEARING NO. AA.KU.KA 170 CJE 2023 DATED 7.2.24 PASSED BY THE R2 AUTHORITY VIDE ANNEXURE-A AS BEING WITHOUT JURISDICTION, VOID, ILLEGAL, AND HENCE UNCONSTITUTIONAL.

IN WRIT PETITION No.5431 OF 2024

BETWEEN:

ARJUN SHETTY
S/O BHARATH KUMAR SHETTY
AGED ABOUT 42 YEARS
MANAGING PARTNER OF
FIRST ORDER HOSPITALITY
HUNGRY HIPPIE, NO.104, 4th FLOOR
1ST MAIN, 5th BLOCK
KORAMANGALA,
BENGALURU – 560 095.

... PETITIONER

(BY SRI MAHESH S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT
REPRESENTED BY
PRINCIPAL SECRETARY,
VIDHANA SOUDHA,
BENGALURU – 560 001.

2 . STATE OF KARNATAKA
HEALTH AND FAMILY
WELFARE DEPARTMENT
REPRESENTED BY IT'S
UNDER SECRETARY,
VIDHANA SOUDHA,
BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY
INFANTRY ROAD,
BENGALURU – 560 001.

4 . THE COMMISSIONER
BRUHAT BANGALORE MAHANAGARA PALIKE,
N.R.SQUARE,
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI K.SHASHIKIRAN SHETTY, ADVOCATE GENERAL A/W
SMT.NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO A) QUASH THE IMPUGNED NOTIFICATION DATED 07/02/2024 BEARING NO. HA KU KA/170CGE/2023 ISSUED BY R2 VIDE ANNEXUER-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER; B) DIRECTING THE R3 AND 4TH RESPONDENT AUTHORITIES NOT TO INTERFERE INTO THE BUSINESS OF THE PETITIONER WHILE CARRYING ON THEIR BUSINESS IN HOOKAH.

IN WRIT PETITION No.5756 OF 2024

BETWEEN:

MOHAMMED ANAS MERCHANT
S/O MOHAMMED ASHRAF
AGED 30 YEARS
DIRECTOR OF
ROCCIA FOODS PVT. LTD.,
CAFE AZZURE
NO.52, M.G.ROAD
BENGALURU – 560 001.

... PETITIONER

(BY SRI MAHESH S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT,

REPRSETNED BY
PRINCIPAL SECRETARY,
VIDHANA SOUDHA
BENGALURU – 560 001.

2 . STATE OF KARNATAKA
HEALTH AND FAMILY
WELFARE DEPARTMENT
REPRSENTED BY IT'S
UNDER SECRETARY
VIDHANA SOUDHA
BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY
INFANTRY ROAD,
BENGALURU – 560 001.

4 . THE COMMISSIONER
BRUHAT BANGALORE MAHANAGARA PALIKE
N.R.SQUARE
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI K.SHASHIKIRAN SHETTY, ADVOCATE GENERAL A/W
SMT.NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED NOTIFICATION DTD 07.02.2024 BEARING NO. HA KU KA/170/CGE/2023 ISSUED BY THE R-2 VIDE ANNEXURE-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER; DIRECTING THE R-3 AND 4 AUTHORITIES NOT TO INTERFERE INTO THE BUSINESS OF THE PETITIONER WHILE CARRYING ON THEIR BUSINESS IN HOOKHA.

IN WRIT PETITION No.5832 OF 2024

BETWEEN:

HARSHA N.,
S/O NAGENDRA PRASAD
AGED ABOUT 34 YEARS
MANAGING PARTNER OF
BAMBOO HEIGHTS CAFE
TERRACE FLOOR, NO.12,
KRISHNA NAGAR,
INDUSTRIAL LAYOUT,
NEAR CHRIST COLLEGE,
KORAMANGALA
BENGALURU – 560 029.

... PETITIONER

(BY SRI MAHESH S., ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT,
REPRESENTED BY
PRINCIPAL SECRETARY,
VIDHANA SOUDHA,
BENGALURU – 560 001.

2 . STATE OF KARNATAKA
HEALTH AND FAMILY
WELFARE DEPARTMENT,
REPRESENTED BY IT'S
UNDER SECRETARY
VIDHANA SOUDHA
BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE,
BENGALURU CITY,
INFANTRY ROAD,
BENGALURU – 560 001.

4 . THE COMMISSIONER,
BRUHAT BANGALORE MAHANAGARA PALIKE
N.R.SQUARE,
BENGALURU – 560 001.

... RESPONDENTS

(BY SRI K.SHASHIKIRAN SHETTY, ADVOCATE GENERAL A/W
SMT.NAVYA SHEKHAR, AGA)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASHING THE IMPUGNED NOTIFICATION DATED 7-2-2024 BEARING NO.HA KU KA/170/CGE/2023 ISSUED BY 2ND RESPONDENT VIDE ANNEXURE-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER; DIRECTING THE R-3 AND 4TH RESPONDENT AUTHORITIES NOT TO INTERFERE INTO THE BUSINESS OF THE PETITIONER WHILE CARRYING ON THEIR BUSINESS IN HOOKHA.

IN WRIT PETITION No.6102 OF 2024

BETWEEN:

01. M/S. HAVANA
HAVING ITS PLACE OF BUSINESS AT
NO.1/3, K.B. ARCADE,
HUNSUR ROAD,
NEXT TO BHUDEVI FARM,
PADUVARAHALLI,
MYSURU – 570 002.

02. M/S. CAFE THE NON SENS
HAVING ITS PLACE OF BUSINESS AT
NO.3122, D-17, KALIDASA ROAD,
JAYALAKSHMIPURAM,
MYSURU – 570 012.

03. M/S. BASE CAMP
HAVING ITS PLACE OF BUSINESS AT
NO.2911, NEW NO.10,
LIVE IN CORNER, 3RD FLOOR,
TEMPLE ROAD, V.V.PURAM,
ONTIKOPPAL,
MYSURU – 570 004.

PETITIONER NO.1 TO 3 ARE RESTAURANTS
BEING RUN BY M/S.SUTRA LIVE AND LET,
LIVE LLP BEING A LIMITED
PROPRITERSHIP CONCERN,
REPRESENTED BY ITS PARTNER:
SRI RAVI P. JAIN,
S/O SRI PRAKASH RAICHAND,
AGED ABOUT 32 YEARS.

04. M/S. THE LOFT CAFE
HAVING ITS PLACE OF BUSINESS AT
NO.9/A, 9/14, 3RD BLOCK,
GOKULAM MAIN ROAD,
JAYALAKSHIPURAM,
MYSURU – 570 012.

05. M/S. CAFE MIST
HAVING ITS PLACE OF BUSINESS AT
NO.55/1, D 3/1, F.F. AND S.S.,
GOKULAM PARK ROAD,
JAYALAKSHMIPURAM,
MYSURU – 570 002

PETITIONER NO.4 AND 5 ARE
REPRESENTED BY THEIR PROPRIETOR,
SRI M. RAVIKIRAN,
S/O LATE L.S. MAHADEVA,
AGED ABOUT 34 YEARS.

06. M/S. TIMBERYARD

HAVING ITS PLACE OF BUSINESS AT
NO.2928, D8,
GOKULAM MAIN ROAD,
V.V.MOHALLA,
MYSURU – 570 002.

REPRESENTED BY ITS PROPRIETOR,
SRI. IBRAHIM BATISH,
S/O IBRAHIM SHAFFI,
AGED ABOUT 29 YEARS.

... PETITIONERS

(BY SRI JAYASIMHA K.S., ADVOCATE FOR
SRI K.L.SHREENIVASA, ADVOCATES)

AND:

1 . THE STATE OF KARNATAKA
HEALTH AND FAMILY
WELFARE DEPARTMENT,
REPRESENTED BY ITS
UNDER SECRETARY,
VIDHANA SOUDHA,
BENGALURU – 560 001.

2 . THE STATE OF KARNATAKA
HOME DEPARTMENT,
REPRESENTED BY
PRINCIPAL SECRETARY,
VIDHANA SOUDHA,
BENGALURU – 560 001.

3 . THE COMMISSIONER OF POLICE
MIRZA ROAD,
NAZARBAD MOHALLA,
MYSURU – 570 004.

4 . THE COMMISSIONER
MYSURU CITY CORPORATION,

NEW SAYYAGI ROAD,
MYSURU – 570 024.

... RESPONDENTS

(BY SRI K.SHASHI KIRAN SHETTY, ADVOCATE GENERAL A/W.,
SMT.NAVYA SHEKHAR, AGA FOR R1 AND R2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED NOTIFICATION BEARING NO. HA.KU.KA/170/CGE/2023, DTD. 07.02.2024 PASSED BY R-1 AT ANNX-N1; DIRECT THE R-3 AND 4 NOT TO INTERFERE IN OPENING AND FUNCTIONING OF THE BUSINESS ESTABLISHMENT OF THE PETITIONERS BEING RUN UNDER THE NAME AND STYLE.

IN WRIT PETITION No.7427 OF 2024

BETWEEN:

SHISHA CAFES AND RESTAURANT'S ASSOCIATION
AN ASSOCIATION REGISTERED UNDER
THE SOCIETIES REGISTRATION ACT, 1960
REPRESENTED BY ITS
PRESIDENT MOHAMMED DANISH
HAVING OFFICE AT: NO. 27,
KAMMANAHALLI MAIN ROAD,
OPP. NANDANA PALACE,
BENGALURU – 560 084.

... PETITIONER

(BY SRI MUIZ AHMED KHAN USMANI, ADVOCATE)

AND:

1 . STATE OF KARNATAKA
HOME DEPARTMENT,
REPRESENTED BY,
PRINCIPAL SECRETARY,

VIDHANA SOUDHA,
BENGALURU - 560 001.

2 . STATE OF KARNATAKA
HEALTH AND FAMILY,
WELFARE DEPARTMENT,
REPRESENTED BY IT'S
UNDER SECRETARY,
VIDHANA SOUDHA,
BENGALURU - 560 001.

3 . THE COMMISSIONER OF POLICE
BENGALURU CITY,
INFANTRY ROAD,
BENGALURU - 560 001.

4 . THE COMMISSIONER
BRUHAT BENGALURU MAHANAGARA PALIKE,
N.R.SQUARE,
BENGALURU - 560 001.

... RESPONDENTS

(BY SMT.NAVYA SHEKHAR, AGA FOR C/R1 AND 2)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE IMPUGNED NOTIFICATION DTD 07.02.2024 BEARING NO. HA KU KA/170/CGE/2023 ISSUED BY R-2 VIDE ANNEXURE-A, BANNING THE MANUFACTURE, SALE, USAGE, CONSUMPTION OF HOOKAH IN ANY MANNER WHATSOEVER.

THESE WRIT PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 11.03.2024 AND 12.03.2024, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

Conglomeration of these cases raise a challenge to the notification dated 07-02-2024, issued by the respondent/Health and Family Welfare Department, by which a complete ban on sale of Hookah, in any public place in the State, is imposed. Since all the petitions raise a common challenge and project common grounds on such challenge, these petitions are taken up together and considered by this common order. The matters are heard with consent of parties. For the sake of convenience the pleadings and grounds urged in Writ Petition No.4461 of 2024, which are common in all the other writ petitions, would be taken note of.

2. *Succinctly* stated, facts germane are as follows:-

The petitioners in all these cases are having their respective trade iicences to run restaurants. The petitioner in W.P.No.4461 of 2024, like others, is involved in the running of hookah bar at Mysore in the name and style of 'Terrace Café'. The names and restaurants differ in all the cases but are all involved in the sale/service of hookah to its patrons. The businesses have gone on

since trade licences were granted to the petitioners by the respective authorities. The petitions aver that Police interference was rampant in all these cases and, therefore, the owners of restaurants like the petitioners were approaching this Court and seeking a mandamus directing the Police not to interfere in the business of respective petitioners. This Court, from time to time, has disposed of such petitions directing non-interference by the Police, subject to the condition that hookah was being sold at designated smoking area and not in the common area of the restaurants where food was served. These are common orders that are passed by the Courts from time to time.

3. When things stood thus, Government of Karnataka comes up with the impugned notification dated 07-02-2024, by which the Government imposes a blanket ban on sale of hookah and in all its forms. The ban is imposed taking recourse to two enactments viz., The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter referred to as 'COTPA' for short) and the Karnataka Poisons (Possession and Sale)

Rules, 2015. The moment ban is clamped upon the restaurants for sale of any form of hookah in public places, these petitions have emerged before this Court.

4. Heard Sri Kiran S. Javali, learned senior counsel along with Sri Kiran Gowda.M, learned counsel for the petitioner in W.P.No.4461/2024, Sri Sunil Kumar B.N., learned counsel for the petitioner in W.P.No.282/2024, Sri K. Suman, learned senior counsel along with Sri Siddharth Suman, learned counsel for petitioner in W.P.No.4658/2024, Sri Mahesh S., learned counsel for petitioner in W.P.Nos.4672/2024, 4837/2024, 5066/2024, 5431/2024, 5756/2024 and, 5832/2024 and Sri Govindaraju K., learned counsel for petitioners in W.P.No.4689/2024, Sri A. Mahesh Choudhary and Ms.Krishika Vaishnav, learned counsel for the petitioner in W.P.No.5332/2024 and Sri Jayasimha K.S., learned counsel for Sri K.L.Shreenivasa, learned counsel for petitioners in W.P.No.6102/2024, Sri K. Shashi Kiran Shetty, learned Advocate General along with Smt. Navya Shekhar, learned Additional Government Advocate for the respondents – State in all the petitions, Sri Pavan Kumar, learned counsel for

respondent No.3 in W.P.No.5332/2024 and Sri Ravishankar S.S., learned counsel for the impleading applicant in I.A.Nos.2/2024 and 3/2024, filed in W.P.No.4461/2024.

IMPUGNED NOTIFICATION:

"ಸಂಖ್ಯೆ: ಆಕುಕ :170 ಸಿಜಿಇ 2023 *ಕರ್ನಾಟಕ ಸರ್ಕಾರದ ಸಚಿವಾಲಯ*
ವಿಕಾಸಸೌಧ,
ಬೆಂಗಳೂರು, ದಿನಾಂಕ: 07.02.2024.

ಅಧಿಸೂಚನೆ

ವಿಶ್ವ ಆರೋಗ್ಯ ಸಂಸ್ಥೆ (WHO) ನಡೆಸಿರುವ ಗ್ಲೋಬಲ್ ಅಡಲ್ಟ್ ಟೊಬ್ಯಾಕೊ ಸರ್ವೇ 2016-17 ಅಧಯನ ಪ್ರಕಾರ, ಕರ್ನಾಟಕದಲ್ಲಿ 22.8% ವಯಸ್ಕರು (15 ಮತ್ತು ಅದಕ್ಕಿಂತ ಹೆಚ್ಚಿನ ವಯಸ್ಸಿನವರು) ಒಂದಲ್ಲ ಒಂದು ರೀತಿಯ ತಂಬಾಕು ಉತ್ಪನ್ನಗಳನ್ನು ಸೇವಿಸುತ್ತಿದ್ದಾರೆ. ಈ ವೈಕಿ ಶೇ.8.8 ರಷ್ಟು ಮಂದಿ ಧೂಮಪಾನಿಗಳಾಗಿದ್ದಾರೆ. ಕರ್ನಾಟಕದಲ್ಲಿ 23.9% ವಯಸ್ಕರು ಸಾರ್ವಜನಿಕ ಸ್ಥಳಗಳಲ್ಲಿ ಪರೋಕ್ಷ ಧೂಮಪಾನಕ್ಕೆ ಒಳಗಾಗುತ್ತಿದ್ದಾರೆ.

ಭಾರತದಲ್ಲಿ ತಂಬಾಕು ಉತ್ಪನ್ನಗಳ ಸೇವನೆ ಮಾರಾಟ, ಜಾಹೀರಾತು, ಸಂಗ್ರಹಣೆ, ವಾಣಿಜ್ಯ ಮಹಾರ, ಉತ್ಪಾದನೆ, ಹಂಚಿಕೆ ಇವುಗಳನ್ನು ಸಿಗರೇಟ್ ಅಂಡ್ ಟೊಬ್ಯಾಕೊ ಪ್ರಾಡಕ್ಟ್ ಆಕ್ಟ್ (COTPA) 2003 ರಲ್ಲಿ ನಿಯಂತ್ರಿಸಲಾಗಿದೆ.

ಅಧಯನಗಳ ಪ್ರಕಾರ, 45 ನಿಮಿಷಗಳ ಹುಕ್ಕಾ ಸೇವನೆ, 100 ಸಿಗರೇಟ್ ಸೇದುವುದಕ್ಕೆ ಸಮನಾಗಿರುತ್ತದೆ ಹಾಗೂ ಆರೋಗ್ಯಕ್ಕೆ ಮಾರಕ ಎಂದು ಉಲ್ಲೇಖಿಸಿದೆ. ವಿಶ್ವ ಆರೋಗ್ಯ ಸಂಸ್ಥೆಯ ವರದಿ ಪ್ರಕಾರ, ಹುಕ್ಕಾ ಒಂದು ವ್ಯಸನಕಾರಿ ವಸ್ತುವಾಗಿದ್ದು, ಅದರಲ್ಲಿರುವ ನಿಕೋಟಿನ್ ಅಥವಾ ತಂಬಾಕು ಹಾಗೂ ಮೊಲಾಸನ್ ಅಥವಾ ಸುವಾಸನೆಭರಿತ ಪದಾರ್ಥಗಳಲ್ಲಿ ಹೆಚ್ಚಿನ ಪ್ರಮಾಣದಲ್ಲಿ ಕಾರ್ಬನ್ ಮಾನಾಕ್ರೈಡ್ ರಾಸಾಯನಿಕ ವಸ್ತುವನ್ನು ಒಳಗೊಂಡಿದ್ದು ಆರೋಗ್ಯಕ್ಕೆ ಅತ್ಯಂತ ಮಾರಿಕ ಎಂದು ಎಚ್ಚರಿಸಿದೆ.
COTPA 2003ರ ಕಾಯ್ದೆಯ ಕಲಂ 3(ಪಿ) ಶೆಡ್ಯೂಲ್‌ನಲ್ಲಿ ಹುಕ್ಕಾವನ್ನು ತಂಬಾಕು ಉತ್ಪನ್ನವೆಂದು ವರ್ಗೀಕರಿಸಲಾಗಿದೆ. ಇತ್ತೀಚಿನ ದಿನಗಳಲ್ಲಿ ಯುವಕ ಯುವತಿಯರು ಅದರಲ್ಲೂ ಪ್ರಮುಖವಾಗಿ ವಿದ್ಯಾರ್ಥಿ ಸಮುದಾಯದವರು ತಂಬಾಕು ಸಹಿತ ಅಥವಾ ಹುಕ್ಕಾ ಮೊಲಾಸನ್ ಇತರ ಹೆಸರಿನಿಂದ ಕರೆಯಲ್ಪಡುವ

ಹುಕ್ಕಾ ಉತ್ಪನ್ನಗಳನ್ನು ಸಾರ್ವಜನಿಕ ಸ್ಥಳಗಳಲ್ಲಿ ಸೇವನೆಮಾಡಿ ಮಾದಕ ವ್ಯಸನದಂತಹ ದುಶ್ಚಟಗಳಿಗೆ ಬಲಿಯಾಗುತ್ತಿರುವುದು ಸರ್ಕಾರದ ಗಮನಕ್ಕೆ ಬಂದಿರುತ್ತದೆ.

COTPA 2003 ಸೆಕ್ಷನ್ 4ರಡಿ, ಸಾರ್ವಜನಿಕ ಸ್ಥಳಗಳಲ್ಲಿ ಧೂಮಪಾನ ಮಾಡುವುದು ನಿಷೇಧಿಸಲಾಗಿದೆ ಮುಂದುವರಿದು, 30 ಹಾಗೂ ಮೂವತ್ತಕ್ಕಿಂತ ಹೆಚ್ಚು ಆಸನ ವ್ಯವಸ್ಥೆ ಇರುವ ರೆಸ್ಟೋರೆಂಟ್, ಪಬ್‌ಗಳಲ್ಲಿ ನಿಗದಿಪಡಿಸಿದ ಪ್ರತ್ಯೇಕ ಧೂಮಪಾನ ವಲಯದಲ್ಲಿ ಮಾತ್ರ ಮಾಡಬಹುದಾಗಿರುತ್ತದೆ ಧೂಮಪಾನ ವಲಯ ಅಥವಾ ಕೊಠಡಿಯಲ್ಲಿ ವುಚೋದಿಸುವ ವಸ್ತುಗಳನ್ನು ಹಾಗೂ ಇತರೆ ಸೇವೆಗಳನ್ನು ನೀಡುವುದು COTPA 2003 ಕಾಯ್ದೆಯ ಸೆಕ್ಷನ್ 4ರ ಉಲ್ಲಂಘನೆಯಾಗಿರುತ್ತದೆ.

COTPA ಕಲಂ 6(a) ಮತ್ತು 6(b) ಪ್ರಕಾರ, ಮಕ್ಕಳು ಮತ್ತು ವಿದ್ಯಾರ್ಥಿಗಳಿಗೆ ತಂಬಾಕು ಸೇವನೆ ಮಾಡುವಂತೆ ಪ್ರಚೋದಿಸುವುದು ಹಾಗೂ ಶೈಕ್ಷಣಿಕ ಸಂಸ್ಥೆಯ ನೂರು ಗಜದ ವ್ಯಾಪ್ತಿಯಲ್ಲಿ ಹುಕ್ಕಾ ಒಳಗೊಂಡಂತೆ ಇತರೆ ತಂಬಾಕು ವಸ್ತುಗಳ ಮಾರಾಟ/ಉಪಯೋಗ ನಿಷೇಧಿಸಲಾಗಿದೆ.

ಮಕ್ಕಳ ಆರೈಕೆ ಮತ್ತು ರಕ್ಷಣೆ ಕಾಯಿದೆ 2015 ಸೆಕ್ಷನ್ 77ರ ಪ್ರಕಾರ, ಅಪ್ರಾಪ್ತರಿಗೆ ತಂಬಾಕು ಅಥವಾ ಇತರೆ ಮಾದಕ ವಸ್ತುಗಳ ಸೇವನೆ ಬಗ್ಗೆ ಪ್ರಚೋದಿಸುವುದು ಹಾಗೂ ಮಾರಾಟ ಮಾಡುವುದು ಶಿಕ್ಷಾರ್ಹ ಅಪರಾಧವಾಗಿರುತ್ತದೆ.

ವಿಷ (ಸ್ವಾಧೀನ ಮತ್ತು ಮಾರಾಟ) ನಿಯಮ 2015 ರಡಿ ನಿಕೋಟಿನ್ ಅನ್ನು ವಿಷ ಅಥವಾ ಅವಾಯಕಾರಿ ರಾಸಾಯನಿಕ ವಸ್ತುವಾಗಿ ವರ್ಗೀಕರಿಸಲಾಗಿದೆ.

ಹುಕ್ಕಾವು ಮುಚ್ಚಿರುವ ಕೊಠಡಿಯಲ್ಲಿ ನಳಿಕೆ ಅಥವಾ ಪೈಪ್ ಸಲಕರಣೆ ಮೂಲಕ ಬಾಯಿಯಿಂದ ಸೇವನೆ ಮಾಡುವ ಉತ್ಪನ್ನವಾಗಿರುತ್ತದೆ. ಇದರಿಂದ ಬಾಯಿ ಮೂಲಕ ಸಾಂಕ್ರಾಮಿಕ ಕಾಯಿಲೆಗಳಾದ ಹರ್ಪಿಸ್, ಕ್ಷಯರೋಗ, ಹಪಟೈಟಿಸ್, ಕೋವಿಡ್ 19 ಹಾಗೂ ಇತರ ಕಾಯಿಲೆಗಳು ಹರಡುವ ಆತಂಕವಿದೆ.
ಹುಕ್ಕಾ ಬಾರ್ ವ್ಯವಸ್ಥೆಯು ರಾಜ್ಯ ಅಗ್ನಿ ಅನಾಹುತಗಳಿಗೆ ಕಾರಣವು ಮತ್ತು ರಾಜ್ಯ ಅಗ್ನಿ ನಿಯಂತ್ರಣ ಹಾಗೂ ಅಗ್ನಿಸುರಕ್ಷತೆ ಕಾಯ್ದೆ ಉಲ್ಲಂಘನೆ ಆಗುತ್ತದೆ.

ಹುಕ್ಕಾ ಬಾರ್ ಗಳು ಆಹಾರ ಸುರಕ್ಷತೆ ಹಾಗೂ ಗುಣಮಟ್ಟ ಕಾಯಿದೆ 2006 ಹಾಗೂ 2.1.1 ಶೆಡ್ಯೂಲ್ 5ರ ನಿಬಂಧನಗಳ ಮೇರೆಗೆ ವರವಾನಗಿ ಪಡೆದಿರುತ್ತವೆ. ಹೋಟಲ್, ಬಾರ್, ರೆಸ್ಟೋರೆಂಟ್ ಗಳಲ್ಲಿ ಯಕ್ಕಾ ಸೇವನೆ ಮಾಡುವುದರಿಂದ ಆಹಾರ ವದಾರ್ಥಗಳು ಸಾರ್ವಜನಿಕರ ಸೇವನೆಗೆ ಅನುರಕ್ಷಿತವಾಗಿರುತ್ತದೆ ಹಾಗೂ ಸಾರ್ವಜನಿಕರ ಆರೋಗ್ಯದ ಮೇಲೆ ದುಷ್ಪರಿಣಾಮ ಬೀರಬಹುದು.

ಸಂವಿಧಾನದ 47ನೇ ಪರಿಚ್ಛೇದದಲ್ಲಿ ಸ್ಪಷ್ಟವಾಗಿ ಉಲ್ಲೇಖಿಸಿದಂತೆ, ಸಾರ್ವಜನಿಕರ ಆರೋಗ್ಯ ಕಾವಾಡುವುದು ರಾಜ್ಯ ಸರ್ಕಾರದ ಕರ್ತವ್ಯವಾಗಿರುತ್ತದೆ. ಒಟ್ಟಾರೆಯಾಗಿ, ಹುಕ್ಕಾ ತಂಬಾಕು ಅಥವಾ ನಿಕೋಟಿನ್ ಒಳಗೊಂಡ ನಿಕೋಟಿನ್ ರಹಿತ ತಂಬಾಕು ರಹಿತ, ಸ್ವಾಧಭರಿತ, ಸ್ವಾಧರಹಿತ ಹುಕ್ಕಾ

ಮೊಲಾಸಸ್, ಶಿಶಾ ಹಾಗೂ ಇದೇ ಮಾದರಿಯ ಇನ್ನಿತರೆ ಹೆಸರುಗಳಿಂದ ಕರೆಯಲ್ಪಡುವ ಹುಕ್ಕಾ ಉತನಗಳ ಮಾರಾಟ ಸೇವನೆ, ಜಾಹೀರಾತು. ಪ್ರಚೋದನೆ, ಸಂಗ್ರಹಣೆ, ವ್ಯಾಪಾರವನ್ನು ರಾಜ್ಯದಲ್ಲಿ ಸಾರ್ವಜನಿಕರ ಆರೋಗ್ಯದ ಹಿತದೃಷ್ಟಿಯಿಂದ ತಕ್ಷಣದಿಂದ ಜಾರಿಗೆ ಬರುವಂತೆ ನಿಷೇಧಿಸಲಾಗಿದೆ.

ಇದನ್ನು ಉಲ್ಲಂಘನೆ ಮಾಡಿದವರ ವಿರುದ್ಧ COTPA 2003, ಕಾಯ್ಕ ಮಕ್ಕಳ ಆರೈಕೆ ಮತ್ತು ರಕ್ಷಣೆ ಕಾಯಿದೆ 2015, ಆಹಾರ ಸುರಕ್ಷತೆ ಮತ್ತು ಗುಣಮಟ್ಟ ಕಾಯ್ದೆ 2006, ಕರ್ನಾಟಕ ವಿಷ (ಸ್ವಾಧೀನ ಮತ್ತು ಮಾರಾಟ) ನಿಯಮ 2015 ಮತ್ತು ಭಾರತೀಯ ದಂಡಸಂಹಿತ ಮತ್ತು ಅಗ್ನಿ ನಿಯಂತ್ರಣ ಹಾಗೂ ಅಗ್ನಿಸುರಕ್ಷತೆ ಕಾಯಿದೆ ಪ್ರಕಾರ ಕ್ರಮಗಳನ್ನು ಕೈಗೊಳ್ಳುವಂತೆ ತಿಳಿಸಿದೆ.

ಕರ್ನಾಟಕ ರಾಜ್ಯ. ಪಾಲರ ಆಜ್ಞಾನುಸಾರ ಮತ್ತು ಅವರ ಹೆಸರಿನಲ್ಲಿ Bur

7/2/2024 ಸರ್ಕಾರದ ಅಧೀನ ಕಾರ್ಯದರ್ಶಿ, ಆರೋಗ್ಯ ಮತ್ತು ಕುಟುಂಬ ಕಲ್ಯಾಣ ಇಲಾಖೆ (ಟಿಟಿಎ 1 & 2)"

SUBMISSIONS:

The learned senior counsel Sri Kiran S. Javali and the learned senior counsel Sri K. Suman have sphere headed the arguments for all the petitioners along with other counsel who represent petitioners in the respective petitions. The learned Advocate General has led his submissions for the respondents. The impleading applicants, though not permitted to get themselves impleaded, their counsel was permitted to submit only as assistance to the Court.

PETITIONERS:

5. The learned senior counsel appearing for petitioners would vehemently contend that the COTPA is a piece of Central legislation. The COTPA is promulgated in the year 2003 which holds the field in regard to sale and regulation of such sale of cigarettes and other allied products i.e., tobacco products in its entirety. Since the field is occupied by a Central legislation, the State by a notification could not impose a ban on sale of hookah. By taking this Court through the COTPA, the learned senior counsel would submit that the COTPA nowhere delegates rule making power to respective States. In the absence of such power and in the light of the field being occupied by the legislation of Government of India, the very issuance of notification of the kind by the State Government, imposing a ban exercising its power under the COTPA is, on the face of it, illegal. The learned senior counsel would further submit that invocation of Poisons Act or the Juvenile Justice (Care and Protection of Children) Act, is contrary to law, as there is no foundation laid for invocation of those enactments. They would in unison submit that, the schedule appended to the COTPA take care of all forms of tobacco including hookah tobacco. If hookah tobacco

can be regulated only by the Central Government, it was not open to the State to regulate it. Elaborating their submissions the illegality that is projected is, the notification bring in Section 4A to the Act banning use and consumption of hookah and Section 21A again to the Act depicting punishment for sale of hookah at hookah bars. The learned senior counsel would submit that the issue stands answered by the judgment rendered by the Apex Court in the case of ***NARINDER S.CHADHA v. MUNICIPAL CORPORATION OF GREATER MUMBAI***[1] to buttress the submission that sale of hookah cannot be prohibited by way of circulars which are in the teeth of adding restrictions and prohibitions without those existing in the Act and have placed reliance upon several other judgments which would all bear consideration *qua* their relevance in the course of the order.

THE STATE – ADVOCATE GENERAL:

6. Per-contra, the learned Advocate General would vehemently refute the submissions contending that sale of hookah and health disaster that it generated became a cause of concern to

[1] *(2014) 15 SCC 689*

the State Government. Therefore, obligation of the State Government to regulate health care of citizens is invoked not under any statute but under Article 47 of the Constitution, which depicts that it is the duty of the State to raise the level of nutrition and the standard of living and to improve public health. He would submit that, taking recourse to Article 47, it becomes necessary for the Government to bring in the notification pending formal amendment to the Act. He would further submit that the State Government has also introduced a Bill seeking banning of hookah and the Bill has passed muster in both the Houses of Legislature and is pending assent at the hands of the Governor. Article 162 of the Constitution empowers the State to issue such notification or make a law which would be subject to the power expressly conferred in the Constitution. He would further take this Court to the 7th Schedule to the Constitution, with particular reference to List-II – State list, entry-6 which deals with public health and sanitation; hospitals and dispensaries. The learned Advocate General taking cue to the words 'public health' in entry-6 of List-II defends the action on the score that what is invoked is the obligation under the Constitution though it refers to enactments in the impugned notification.

7. The learned counsel representing other petitioners would add that banning of hookah will not achieve what is sought to be projected before this Court i.e., public health. Cigarettes are not banned; all other forms of tobacco are not banned and banning of hookah would only increase the danger to public health, as they would continue to smoke cigarettes. Therefore, the submission is there is no rationale behind the blanket ban imposed or its pseudo projection of the obligation under Article 47 of the Constitution of India. The learned senior counsel Sri K. Suman would add that entry-6 of List-II deals with public health and sanitation. Therefore, it is restricted to sanitation and not anything else.

INTERVENERS:

8. The learned counsel for the impleading applicants who was permitted to assist the Court has placed on record elaborate documents to demonstrate other side of the coin, apart from health hazard that it causes. According to the learned counsel, every puff of hookah that is dragged into the body is equivalent to smoking of 100 cigarettes and if that is not hazardous to public health, it is his submission that there is nothing else to be considered so. The

learned counsel would submit that sale of hookah is permitted in restaurants. No separate tax is laid on sale of hookah. Under the garb of keeping separate place of smoking, hookah is being sold at floors together and there are exclusive hookah bars in the entire State which sell only hookah along with food. He has placed certain documents with regard to the restaurants, sale of hookah and many of the types of hookah. Tax evasion is another submission that is tried to be projected by the impleading applicants. As sale of cigarettes and sale of alcohol generate revenue to the State or the Centre as the case would be, the sale of hookah does nothing. Several crores of rupees of business is generated by the sale of hookah, which would not attract a penny to the State, as compared to the sale of cigarette or alcohol would generate. He would submit that the ban should not be interfered with.

9. The learned senior counsel for the petitioners joining the issue would seek to contend that the petitioner in Writ Petition No.4461 of 2024 and other petitioners in few other cases sell herbal hookah. They do not use tobacco at all. Therefore, there is no question of health hazard as is projected. They are fruit flavoured

hookah which are imported and served to the asking customers. In the entire café what the petitioner in W.P.No.4461 of 2024 sells is only herbal hookah or fruit hookah, as the case would be. This would be another factor to be considered whether the Act would become applicable to the petitioners, as there is no element of tobacco involved, but only fruit sweeteners and flavouring. The other counsel, that apart from restaurants which sell herbal hookah, admit that hookah they sell contains tobacco, sweeteners and flavouring. But, their defence is they are covered by the Central legislation. Several judgments are relied on in reply which would bear consideration at the hands of this Court *qua* their relevance.

10. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. In furtherance whereof, the issue that falls for consideration is:

"Whether the impugned notification dated 07-02-2024 would stand the test of law?"

CONSIDERATION:

11. Before embarking upon the consideration of the case of the petitioners on their merit, I deem it appropriate to notice Article 47 of the Constitution of India, as obtaining in chapter IV of the Directive Principles of State Policy on which heavy reliance is placed by the State. It reads as follows:

> *"**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**."*
>
> *(Emphasis supplied)*

Article 47 directs that it is the duty of the State to raise the level of nutrition and improve public health. It directs the State that standard of living of its people and improvement of public health is the primary duty of the State. In furtherance of the said duty, it should be the endeavour to bring about prohibition of consumption except for medical purposes, of intoxicating drinks and drugs, which are injurious to health. It becomes germane now to notice the

delineation of the words of Article of 47 by the Apex Court through its judgments. The Apex Court in the case of ***VINCENT PANIKURLANGARA v. UNION OF INDIA***[2] while considering Article 47 and Article 21 of the Constitution of India, and harmonizing the Roles and duties of the State, has held as follows:

> ***"16. A healthy body is the very foundation for all human activities. That is why the adage "Sariramadyam Khaludharma Sadhanam". In a welfare State, therefore, it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health****. This Court in Bandhua Mukti Morcha v. Union of India [(1984) 3 SCC 161: 1984 SCC (L&S) 389] aptly observed: (SCC p. 183. para 10)*
>
> > *"It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin case [Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 : 1981 SCC (Cri) 212] to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of the workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State — neither the Central Government nor any State Government — has the right to take any action which will deprive a person of the enjoyment of these basic essentials."*

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[2] *(1987) 2 SCC 165*

While endorsing what has been said above, we would refer to Article 47 in Part IV of the Constitution. That article provides:

> *"**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."***

***This article has laid stress on improvement of public health and prohibition of drugs injurious to health as one of the primary duties of the State**. In Akhil Bharatiya Soshit Karamchari Sangh v. Union of India [(1981) 1 SCC 246 : 1981 SCC (L&S) 50] this Court has pointed out that: (SCC pp. 308-09, para 123)*

> *"The fundamental rights are intended to foster the ideal of a political democracy and to prevent the establishment of authoritarian rule but they are of no value unless they can be enforced by resort to courts. So they are made justiciable. **But, it is also evident that notwithstanding their great importance, the Directive Principles cannot in the very nature of things be enforced in a court of law.... It does not mean that directive principles are less important than fundamental rights or that they are not binding on the various organs of the State**."*

In a series of pronouncements during the recent years this Court has culled out from the provisions of Part IV of the Constitution these several obligations of the State and called upon it to effectuate them in order that the resultant pictured by the Constitution Fathers may become a reality. As pointed out by us, maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health, in our opinion, therefore, is of high priority — perhaps the one at the top

> ***17.*** *None of the parties before us claimed, and perhaps rightly, that the prevailing state of affairs in this regard is a commendable one. The technical aspects which arise for consideration in a matter of this type cannot be effectively handled by a court. Similarly the question of policy which is involved in the matter is also one for the Union Government — keeping the best of interests of citizens in view to decide. No final say in regard to such aspects come under the purview of the court. Yet there are certain contentions raised by the petitioner which deserve serious consideration and we would now proceed to deal with them.*
>
> ***18. The branch with which we are now dealing, namely, health care of citizens, is a problem with various facets. It involves an ever-changing challenge. There appears to be, as it were, a constant competition between Nature*** *(which can be said to be responsible for new ailments) on one side and human ingenuity engaged in research and finding out curative processes. This being the situation, the problem has an ever-shifting base. It is commonplace that what is considered to be the best medicine today for treatment of a particular disease becomes out of date and soon goes out of the market with the discovery or invention of new drugs. Again what is considered to be incurable at any given point of time becomes subjected to treatment and cure with new finds. There is yet another situation which must be taken note of as human knowledge expands and marches ahead. With the onward march of science and complexities of the living process hitherto unknown diseases are noticed. To meet new challenges, new drugs have to be found. In this field, therefore, change appears to be the rule."*
>
> *(Emphasis supplied)*

The Apex Court holds that a healthy body is the very foundation of all human activities. In a welfare State, therefore, it is the obligation of the State to ensure the creation and sustaining of conditions congenial to good health. It elaborates that Article 21 of

the Constitution is to live with human dignity free from exploitation which is derived only from the Directive Principles of State Policy. It further elaborates Article 47 and the obligations of the State to effectuate the tenets of every Article in Part-IV – Directive Principles of State Policy. It holds that none of the parties can have a right to get into such business which would be contrary to public interest.

12. The other issue that forms the fulcrum of the *lis* is, the right to trade under Article 19(1)(g) of the Constitution of India. The contention is that right to trade of any kind cannot be restricted, as it would amount to violation of fundamental right of such traders under Article 19(1)(g), which would in effect be violative of Article 21. Therefore, it becomes necessary to notice the line of law, as laid down by the Apex court harmonizing fundamental rights, as obtaining under Articles 19(1)(g) and 21 of the Constitution of India with the Directive Principles of State

Policy. The Apex Court in the case of ***NARENDRA KUMAR v. UNION OF INDIA***[3] has held as follows:

> ***"The three persons who have filed this petition under Article 32 of the Constitution for enforcement of their fundamental rights conferred by Article 14, Article 19(1)(f) and Article 19(1)(g) thereof are dealers in imported copper and carry on their business at Jagadhri in the State of Punjab.*** *On different dates prior to April 3, 1958, they entered into contracts of purchase of copper with importers at Bombay and Calcutta.* ***Before, however, they could take delivery from the importers the Government of India issued on April 2, 1958, an order called the "Non-ferrous Metal Control Order, 1958" hereafter referred to as "the order" in exercise of its powers under Section 3 of the Essential Commodities Act (Act 10 of 1955) — referred to hereafter as "the Act". In this order "non-ferrous metal" was defined to mean "imported copper, lead, tin and zinc in any of the forms specified in the Schedule of the order". The order was from the very beginning made applicable to imported copper. The price was controlled by clause 3 of the Order which provides in its first sub-clause that "no person shall sell or offer to sell any non-ferrous metal at a price which exceeds the amount represented by an addition of 3½% to its landed cost," and in its second sub-clause that "no person shall purchase or offer to purchase from any person non-ferrous metal at a price higher than at which it is permissible for that other person to sell to him under sub-clause (i)." Clause 4 is designed to regulate the acquisition of non-ferrous metal by permit only and provides that "no person shall acquire or agree to acquire any non-ferrous metal except under and in accordance with a permit issued in this behalf by the Controller in accordance with such principles as the Central Government may from time to time specify". Clauses 5 and 6 of the Order made it obligatory on the importers to notify quantities of non-ferrous metal imported and to maintain certain books of account, while the last clause***

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[3] *1959 SCC OnLine SC 36*

i.e. clause 7 confers powers on the Controller to enter and search any premises in order to inspect any book or document and to seize any non-ferrous metal in certain circumstances. This Order was published in the Gazette of India on April 2, 1958. No principles specified by the Central Government in accordance with clause 4 of the Order were however published either on this date or any other date. Certain principles were however specified by the Central Government in a communication addressed by the Deputy Secretary to the Government of India dated April 18, 1958, to the Chief Industrial Adviser to the Government of India, New Delhi. The relevant portion of this communication is in these words:

"The following principles shall govern the issue of permits by the Controller:

(1) In respect of the scheduled industries under the control of the Development Wing, the Controller will determine the 6 monthly requirements of actual users based on their production in the year 1956;

(2) In the case of small scale industries the Chief Controller of Imports and Exports on the certificate of the State Directors of Industries will inform the Controller of the quantities that the units would be entitled to and thereupon the Controller will make such quantities available to these units from time to time;

(3) The Controller shall normally release one month's requirements at a time to the consuming units and the permit shall be valid for a period of two months; but if heavy imports are reported the Controller shall have the discretion to issue stocks in larger quantities."

… … …

***5.** The application was opposed by the respondents, their main contention being that clauses 3 and 4 of the Order and the "principles" specified are laws which impose reasonable restrictions on the exercise of rights conferred by Articles 19(1)(f) and 19(1)(g) in the interest of the general public.*

… … …

8. In deciding whether this total elimination of dealer from trade in imported copper is within the saving provisions of Article 19(5) and Article 19(6) we have first to consider the question whether such total elimination is a mere restriction on the rights under Articles 19(1)(f) and 19(1)(g) or goes beyond "restriction."

… … …

14. *In Saghir Ahamad case [(1955) 1 SCR 707] and in Chamarbaugwala case [(1957) SCR 874] the question whether prohibition of the exercise of a right was within the meaning of restrictions on the exercise of a right used in clause 6 was raised but the court decided to express no final opinion in the matter and left the question open. In Cooverjee case [(1954) SCR 873, 879] the court extended the provisions of clause 6 of Article 19 to a law which had the effect of prohibiting the exercise of a right to carry on trade to many citizens. Mahajan, J., delivering the judgment of the Court observed:*

> *"In order to determine the reasonableness of the restriction regard must be had to the nature of the business and the conditions prevailing in that trade. It is obvious that these factors must differ from trade to trade and no hard and fast rules concerning all trades can be laid down. It can also not be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business, is, therefore, an important factor in deciding the reasonableness of the restrictions."*

In Madhya Bharat Cotton Association Ltd. [AIR 1954 SC 634] the Court had to consider the constitutionality of an order which in effect prohibited a large section of traders, from carrying on their normal trade in forward contracts. In holding the order to be valid, Bose, J., delivering the judgment of the court said "Cotton being a commodity essential to the life of the community, it is reasonable to have restrictions which may, in certain circumstances, extend to total prohibition for a time, of all normal trading in the commodity."

15. *It is clear that in these three cases viz. Chintaman Rao case [1950 SCC 695: (1950) SCR 759], Cooverjee case [(1954) SCR 873, 879] and Madhya Bharat Cotton Association Ltd. case [AIR 1954 SC 634] the court considered the real question to be whether the interference with the fundamental right, was "reasonable" or not in the interests of the general public and that if the answer to the question was in the affirmative, the law would be valid and it would be invalid if the test of reasonableness was not passed. Prohibition was in all these cases treated as only a kind of "restriction". Any other view would, in our opinion, defeat the intention of the Constitution.*

16. *After Article 19(1) has conferred on the citizen the several rights set out in its seven sub-clauses, action is at once taken by the Constitution in clauses 2 to 6 to keep the way of social control free from unreasonable impediment. The raison d'etre of a State being the welfare of the members of the State by suitable legislation and appropriate administration, the whole purpose of the creation of the State would be frustrated if the conferment of these seven rights would result in cessation of legislation in the extensive fields where these seven rights operate. But without the saving provisions that would be the exact result of Article 13 of the Constitution. It was to guard against this position that the Constitution provided in its clauses 2 to 6 that even in the fields of these rights new laws might be made and old laws would operate where this was necessary for general welfare. Laws imposing reasonable restriction on the exercise of the rights are saved by clause 2 in respect of rights under sub-clause (a) where the restrictions are "in the interests of the security of the State;" and of other matters mentioned therein; by clause 3 in respect of the rights conferred by sub-clause (b) where the restrictions are "in the interests of the public order; by clauses 4, 5 and 6 in respect of the rights conferred by sub-clauses (c), (d), (e), (f) & (g) the restrictions are "in the interest of the general public" — in clause 5 which is in respect of rights conferred by sub-clauses (d), (e) & (f) also where the restrictions are "for the protection of the interests of any scheduled tribe". But for these saving provisions such laws would have been void because of Article 13, which is in these words:"All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the*

extent, of such inconsistency be void; (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void…."

17. As it was to remedy the harm that would otherwise be caused by the provisions of Article 13, that these saving provisions were made, it is proper to remember the words of Article 13 in interpreting the words "reasonable restrictions" on the exercise of the right as used in clause (2). It is reasonable to think that the makers of the Constitution considered the word "restriction" to be sufficiently wide to save laws "inconsistent" with Article 19(1), or "taking away the rights" conferred by the Article, provided this inconsistency or taking away was reasonable in the interests of the different matters mentioned in the clause. There can be no doubt therefore that they intended the word "restriction" to include cases of "prohibition" also. The contention that a law prohibiting the exercise of a fundamental right is in no case saved, cannot therefore be accepted. It is undoubtedly correct, however, that when, as in the present case, the restriction reaches the stage of prohibition special care has to be taken by the Court to see that the test of reasonableness is satisfied. The greater the restriction, the more the need for strict scrutiny by the Court.

18. *In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is more than was necessary in the interests of the general public.*

19. *The position of the copper trade at the end of March 1958, within two days of which the impugned order was made is fairly clear. Copper is so largely required by the industries in India for producing various consumer's goods and also sheets*

> *and other articles which are needed as raw material in other industries that the position that it is an essential commodity cannot be and has not been disputed. The quantity of copper produced in India is so small as compared with the normal needs of the Industry that for many years the Industry had to depend on imports from abroad. It was apparently because of the importance of this metal for the industries in India that copper was kept for a long time in the Open General List and free import was permitted. When however the foreign exchange position of the country deteriorated and it was felt necessary in the larger interests of the country to conserve foreign exchange as much as possible copper was excluded from the Open General List from July 1, 1957, and it became necessary to obtain a licence before copper could be imported. During the period July to September 1957 licences were granted to both established importers of coppers as also to actual users not being established importers. During the period October 1957 to March 1958, licences were granted to established importers only. Whatever the motive of such exclusion of actual users might have been, the result was disastrous. Having a practical monopoly of this imported commodity a handful of importers was in a position to dictate terms to consumers and by March 1958 the price of copper in India per ton was Rs 3477 as against the international price of Rs 2221. It is not disputed that result of the abuse by the importers of the practical monopoly given to them of the copper market seriously affected the interests of the general public in India. Nor is it disputed that it was in an honest effort to protect these interests of the public that the impugned legislation in the form of Non-ferrous Metal Control Order and the subsequent specification of principles was made."*
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> *(Emphasis supplied)*

The Apex Court was dealing with a case relating to price regulation of non-ferrous metals under the Essential Commodities Act where total elimination or a mere restriction would run foul of Article 19(1)(g) of the Constitution is also considered. It further notices

that the laws made under Article 13 are always subject to reasonable restrictions. The Apex Court holds that **'restriction would include prohibition'**. In a later judgment the Apex Court in the case of ***P.N. KAUSHAL v. UNION OF INDIA***[4] has held as follows:

"…. …. ….

> ***37.*** *The panorama of views, insights and analyses we have tediously projected serves the socio-legal essay on adjudicating the reasonableness and arbitrariness of the impugned shut down order on Tuesdays and Fridays. Whatever our personal views and reservations on the philosophy, the politics, the economics and the pragmatics of prohibition,* ***we are called upon to pass on the vires of the amended order. "We, the people of India", have enacted Article 47 and "we, the Justices of India" cannot "lure it back to cancel half a life" or "wash out a word of it", especially when progressive implementation of the policy of prohibition is, by Articles 38 and 47 made fundamental to the country's governance. The Constitution is the property of the people and the court's know-how is to apply the Constitution, not to assess, it.*** *In the process of interpretation, Part IV of the Constitution must enter the soul of Part III and the laws, as held by the Court in State of Kerala v. N.M. Thomas [(1976) 2 SCC 310 : (1976) 1 SCR 906] and earlier. The dynamics of statutory construction, in a country like ours, where the pre-Independence Legislative package has to be adapted to the vital spirit of the Constitution, may demand that new wine be poured into old bottles, language permitting. We propound no novel proposition and recall the opinion of Chief Justice Winslow of Wisconsin upholding as constitutional a Workmen's Compensation Act of which he said:*
>
> > *"When an eighteenth century constitution forms the character of liberty of a twentieth century government,*

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[4] *(1978) 3 SCC 558*

> *must its general provisions be construed and interpreted by an eighteenth century mind surrounded by eighteenth century conditions and ideals? Clearly not. This were a command of half the race in its progress, to stretch the State upon a veritable bed of Procrustes. Where there is no express command or prohibition, but only general language of policy to be considered, the conditions prevailing at the time of its adoption must have their due weight but the changed social, economic and governmental conditions of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential factors in the settlement of problems of construction and interpretation." [Borgnis v. Folk Co., 147 Wisconsin Reports, p. 327 at 348 et seq. (1911). That this doctrine is to be deemed to apply only to "due process" and "police power" determinations, see especially concurring opinions of Marshall, J. and Barness, J.]*

38. In short, while the imperial masters were concerned about the revenues they could make from the liquor trade they were not indifferent to the social control of this business which, if left unbridled, was fraught with danger to health, morals, public order and the flow of life without stress or distress. Indeed, even collection of revenue was intertwined with orderly milieu; and these twin objects are reflected in the scheme and provisions of the Act*. Indeed the history of excise legislation in this country has received judicial attention earlier and the whole position has been neatly summarised by Chandrachud, J., (as he then was) if we may say so with great respect, and a scissors-and-paste operation is enough for our purpose: [Har Shankar v. Dy. Excise and Taxation Commr., (1975) 1 SCC 737, 749-50, 752: (1975) 1 SCR 254 at 266-67] (SCC pp. 749-50, 752)*

… … …

42. *We must here record an undertaking by the Punjab Government and eliminate a possible confusion. The amended rule partially prohibits liquor sales in the sense that on Tuesdays and Fridays no hotel, restaurant or other institution covered by it shall trade in liquor. But this prohibition is made non-applicable to like institutions run by the Government or its agencies. We, prima facie, felt that this was discriminatory on its face. Further, Article 47 charges the State with promotion of prohibition as a fundamental policy and it is indefensible for Government to enforce prohibitionist restraints on others and*

itself practise the opposite and betray the constitutional mandate. It suggests dubious dealing by State Power. Such hollow homage to Article 47 and the Father of the nation gives diminishing credibility mileage in a democratic polity. The learned Additional Solicitor General, without going into the correctness of propriety of our initial view — probably he wanted to controvert or clarify — readily agreed that the Tuesday-Friday ban would be equally observed by the State organs also. The undertaking recorded, as part of the proceedings of the Court, runs thus:

> *"The Additional Solicitor General appearing for the State of Punjab states that the Punjab State undertakes to proceed on the footing that the 'Note' is not in force and that they do not propose to rely on the 'Note' and will, in regard to tourist bungalows and resorts run by the Tourism Department of the State Government, observe the same regulatory provision as is contained in the substantive part of Rule 37, sub-Rule 9. We accept this statement and treat it as an undertaking by the State. Formal steps for deleting the 'Note' will be taken in due course."*
>
> … … …

51. *A final bid to stigmatize the provision [Section 59(f)(v)] was made by raising a consternation. The power to fix the days and hours is so broad that the authority may fix six out of seven days or 23 out of 24 hours as "dry" days or closed hours and thus cripple the purpose of the licence. This is an ersatz apprehension, a caricature of the provision and an assumption of power run amok. An Abkari law, as here unfolded by the scheme (Chapters and Sections further amplified by the rules framed thereunder during the last 64 years) is not a Prohibition Act with a mission of total prohibition. The obvious object is to balance temperance with tax, to condition and curtail consumption without liquidating the liquor business, to experiment with phased and progressive projects of prohibition without total ban on the alcohol trade or individual intake. The temperance movement leaves the door half-closed, not wide ajar; the prohibition crusade banishes wholly the drinking of intoxicants. So it follows that the limited temperance guideline writ large in the Act will monitor the use of the power. Operation Temperance, leading later to the former, may be a strategy within the scope of the Abkari Act.*

… … …

> ***67. As between temperance and prohibition it is a policy decision for the Administration. Much may be said for and against total prohibition as an American wit has cryptically yet sarcastically summed up: [Reconsiderations H.L. Mencken—Anti All Kinds of Blah by Lila Ray, appeared in "Span" August, 1978, p. 41]***
>
> > ***"The chief argument against prohibition is that it does not prohibit. This is also the chief argument in favour of it.""***
>
> *(Emphasis supplied)*

The case related to a challenge to an order calling for dry days for liquor vending and restricting it to other days other than Tuesdays and Fridays. The restriction was upheld. In the case of ***STATE OF TAMIL NADU v. HIND STONE***[5] the Apex Court has held as follows:

> "….. ….. …..
>
> ***10.*** *One of the arguments pressed before us was that Section 15 of the Mines and Minerals (Regulation and Development) Act authorised the making of rules for regulating the grant of mining leases and not for prohibiting them as Rule 8-C sought to do, and, therefore, Rule 8-C was ultra vires Section 15. Well-known cases on the subject right from Municipal Corporation of the City of Toronto v. Virgo [1896 AC 88] and Attorney-General for Ontario v. Attorney-General for the Dominions [1896 AC 348] up to State of U.P. v. Hindustan Aluminium Corporation Ltd. [(1979) 3 SCC 229 : AIR 1979 SC 1459 : (1979) 3 SCR 709]* ***were brought to our attention. We do not think that "regulation" has that rigidity of meaning as never to take in "prohibition". Much depends on the context in which the expression is used in the***

[5] *(1981) 2 SCC 205*

> ***statute and the object sought to be achieved by the contemplated regulation****. It was observed by Mathew, J. in G.K. Krishnan v. State of Tamil Nadu [(1975) 1 SCC 375: AIR 1975 SC 583: (1975) 2 SCR 715, 721]: "The word 'regulation' has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied." In modern statutes concerned as they are with economic and social activities, "regulation" must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in Commonwealth of Australia v. Bank of New South Wales [1950 AC 235 : (1949) 2 All ER 755 (PC)] — and we agree with what was stated therein — that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The statute with which we are concerned, the Mines and Minerals (Development and Regulation) Act, is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."*
>
> *(Emphasis supplied)*

The Apex Court considers the intertwined object of regulating and prohibiting and holds that it depends on the fact situation and the

context in which it is sought. In certain judgments, the Apex Court considers the state of harmonizing Fundamental Rights with the Directive Principles of State Policy. In the case of ***STATE OF GUJARAT v. MIRZAPUR MOTI KURESHI KASSAB JAMAT***[6] the Apex Court has held as follows:

"…. …. ….

> ***Question 1. Fundamental rights and directive principles***
>
> ***36.*** *"It was the Sapru Committee (1945) which initially suggested two categories of rights: one justiciable and the other in the form of directives to the State which should be regarded as fundamental in the governance of the country … Those directives are not merely pious declarations.* ***It was the intention of the framers of the Constitution that in future both the legislature and the executive should not merely pay lip-service to these principles but they should be made the basis of all legislative and executive actions that the future Government may be taking in the matter of governance of the country. (Constituent Assembly Debates, Vol. 7, at p. 41.)"***
>
> ***(See The Constitution of India, D.J. De, 2nd Edn. 2005, p. 1367.) If we were to trace the history of conflict and irreconciliability between fundamental rights and directive principles, we will find that the development of law has passed through three distinct stages.***
>
> ***37.*** *To begin with, Article 37 was given a literal meaning holding the provisions contained in Part IV of the Constitution to be unenforceable by any court. In State of Madras v. Champakam Dorairajan [1951 SCC 351: 1951 SCR 525: AIR 1951 SC 226]* ***it was held that the directive principles of State policy have to conform to and run as subsidiary to the chapter of fundamental rights.*** *The view*

[6] *(2005) 8 SCC 534*

was reiterated in Deep Chand v. State of U.P. [1959 Supp (2) SCR 8: AIR 1959 SC 648] ***The Court went on to hold that disobedience to directive principles cannot affect the legislative power of the State.*** *So was the view taken in Kerala Education Bill, 1957, In re [1959 SCR 995 : AIR 1958 SC 956] .*

38. *With Golak Nath v. State of Punjab [(1967) 2 SCR 762: AIR 1967 SC 1643] the Supreme Court departed from the rigid rule of subordinating directive principles and entered the era of harmonious construction. The need for avoiding a conflict between fundamental rights and directive principles was emphasised, appealing to the legislature and the courts to strike a balance between the two as far as possible. Having noticed Champakam [1951 SCC 351 : 1951 SCR 525 : AIR 1951 SC 226] even the Constitution Bench in Quareshi-I [1959 SCR 629 : AIR 1958 SC 731] chose to make a headway and held that the directive principles nevertheless are fundamental in the governance of the country and it is the duty of the State to give effect to them:*

> *"A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that the State should certainly implement the directive principles but it must do so in such a way that its laws do not take away or abridge the fundamental rights, for otherwise the protecting provisions of Part III will be a 'mere rope of sand'." (Quareshi-I [1959 SCR 629 : AIR 1958 SC 731] , SCR p. 648)*

Thus, Quareshi-I [1959 SCR 629 : AIR 1958 SC 731] did take note of the status of directive principles having been elevated from "subordinate" or "subservient" to "partner" of fundamental rights in guiding the nation.

39. Kesavananda Bharati v. State of Kerala [(1973) 4 SCC 225] a thirteen-Judge Bench decision of this Court is a turning point in the history of directive principles' jurisprudence. This decision clearly mandated the need for bearing in mind the directive principles of State policy while judging the reasonableness of the restriction imposed on fundamental rights*. Several opinions were recorded in Kesavananda Bharati [(1973) 4 SCC 225] and*

quoting from them would significantly increase the length of this judgment. For our purpose, it would suffice to refer to the seven-Judge Bench decision in Pathumma v. State of Kerala [(1978) 2 SCC 1] wherein the learned Judges neatly summed up the ratio of Kesavananda Bharati [(1973) 4 SCC 225] and other decisions which are relevant for our purpose. Pathumma [(1978) 2 SCC 1] holds: (SCC pp. 2-3)

> *"(1) The courts interpret the constitutional provisions against the social setting of the country so as to show a complete consciousness and deep awareness of the growing requirements of society, the increasing needs of the nation, the burning problems of the day and the complex issues facing the people, which the legislature, in its wisdom, through beneficial legislation, seeks to solve. The judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid. This Court while acting as a sentinel on the qui vive to protect fundamental rights guaranteed to the citizens of the country must try to strike a just balance between the fundamental rights and the larger and broader interests of society so that when such a right clashes with a larger interest of the country it must yield to the latter.*
>
> *(para 5)*
>
> *(2) The legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in this process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. The courts have recognised that there is always a presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies on the party which assails it.*
>
> *(para 6)*
>
> ***(3) The right conferred by Article 19(1)(f) is conditioned by the various factors mentioned in clause (5)**.*
>
> *(para 8)*
>
> ***(4) The following tests have been laid down as guidelines to indicate in what particular circumstances a restriction can be regarded as reasonable:***

(a) ***In judging the reasonableness of the restriction the court has to bear in mind the directive principles of State policy. …***

(para 8)

(b) ***The restrictions must not be arbitrary or of an excessive nature so as to go beyond the requirements of the interests of the general public. The legislature must take intelligent care and deliberation in choosing the course which is dictated by reason and good conscience so as to strike a just balance between the freedom in the article and the social control permitted by the restrictions under the article.***

(para 14)

(c) ***No abstract or general pattern or fixed principle can be laid down so as to be of universal application. It will have to vary from case to case and having regard to the changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances all of which must enter into the judicial verdict****.*

(para 15)

(d) ***The Court is to examine the nature and extent, the purport and content of the right, the nature of the evil sought to be remedied by the statute, the ratio of harm caused to the citizen and the benefit conferred on the person or the community for whose benefit the legislation is passed.***

(para 18)

(e) ***There must be a direct and proximate nexus or a reasonable connection between the restriction imposed and the object which is sought to be achieved****.*

(para 20)

(f) The needs of the prevailing social values must be satisfied by the restrictions meant to protect social welfare.

(para 22)

(g) The restriction has to be viewed not only from the point of view of the citizen but the problem before the legislature and the object which is sought to be achieved by the statute. In other words, the Court must see whether the social control envisaged by Article 19(1) is being effectuated by the restrictions imposed on the fundamental right. However important the right of a citizen or an individual may be it has to yield to the larger interests of the country or the community.

(para 24)

> *(h) The Court is entitled to take into consideration matters of common report, history of the times and matters of common knowledge and the circumstances existing at the time of the legislation for this purpose.*
>
> *(underlining [**Ed.**: Herein italicised.] by us) (para 25)"*

40. In State of Kerala v. N.M. Thomas [(1976) 2 SCC 310: 1976 SCC (L&S) 227] also a seven-Judge Bench of this Court culled out and summarised the ratio of this Court in Kesavananda Bharati [(1973) 4 SCC 225] . Fazal Ali, J. extracted and set out the relevant extract from the opinion of several Judges in Kesavananda Bharati [(1973) 4 SCC 225] and then opined: (SCC p. 379, para 164)

> ***"164. In view of the principles adumbrated by this Court it is clear that the directive principles form the fundamental feature and the social conscience of the Constitution and the Constitution enjoins upon the State to implement these directive principles. The directives thus provide the policy, the guidelines and the end of socio-economic freedom and Articles 14 and 16 are the means to implement the policy to achieve the ends sought to be promoted by the directive principles. So far as the courts are concerned where there is no apparent inconsistency between the directive principles contained in Part IV and the fundamental rights mentioned in Part III, which in fact supplement each other, there is no difficulty in putting a harmonious construction which advances the object of the Constitution. Once this basic fact is kept in mind, the interpretation of Articles 14 and 16 and their scope and ambit become as clear as day."***
>
> *… … …*

43. In Workmen v. Meenakshi Mills Ltd. [(1992) 3 SCC 336: 1992 SCC (L&S) 679] the Constitution Bench clearly ruled (vide SCC p. 362, para 27): "Ordinarily any restriction so imposed which has the effect of promoting or effectuating a directive principle can be presumed to be a reasonable restriction in public interest." Similar view is taken in Papnasam Labour Union v. Madura Coats Ltd. [(1995) 1 SCC 501: 1995 SCC (L&S) 339]

Directive principles

44. *Long* ***back in State of Bombay v. F.N. Balsara [1951 SCC 860: 1951 SCR 682: AIR 1951 SC 318: 1951 Cri LJ 1361] a Constitution Bench had ruled that in judging the reasonableness of the restrictions imposed on the fundamental rights, one has to bear in mind the directive principles of State policy set forth in Part IV of the Constitution, while examining the challenge to the constitutional validity of law by reference to Article 19(1)(g) of the Constitution.***

45. In a comparatively recent decision of this Court in M.R.F. Ltd. v. Inspector, Kerala Govt. [(1998) 8 SCC 227: 1999 SCC (L&S) 1] this Court, on a conspectus of its various prior decisions summed up the principles as "clearly discernible", out of which three that are relevant for our purpose, are extracted and reproduced hereunder: (SCC p. 233, para 13)

> ***"13. On a conspectus of various decisions of this Court, the following principles are clearly discernible:***
>
> ***(1) While considering the reasonableness of the restrictions, the court has to keep in mind the directive principles of State policy.***
>
> ***
>
> ***(3) In order to judge the reasonableness of the restrictions, no abstract or general pattern or a fixed principle can be laid down so as to be of universal application and the same will vary from case to case as also with regard to changing conditions, values of human life, social philosophy of the Constitution, prevailing conditions and the surrounding circumstances.***
>
> ***
>
> ***(6) There must be a direct and proximate nexus or a reasonable connection between the restrictions imposed and the object sought to be achieved. If there is a direct nexus between the restrictions and the object of the Act, then a strong presumption in favour of the constitutionality of the Act will naturally arise. (See K.K. Kochuni v. State of***

Madras and Kerala [(1960) 3 SCR 887 : AIR 1960 SC 1080]; O.K. Ghosh v. E.X. Joseph [1963 Supp (1) SCR 789 : AIR 1963 SC 812] .)"

46. Very recently in Indian Handicrafts Emporium v. Union of India [(2003) 7 SCC 589] this Court while dealing with the case of a total prohibition reiterated that "regulation" includes "prohibition" and in order to determine whether total prohibition would be reasonable, the Court has to balance the direct impact on the fundamental right of the citizens as against the greater public or social interest sought to be ensured. Implementation of the directive principles contained in Part IV is within the expression of "restriction in the interests of the general public".

47. *Post Kesavananda Bharati [(1973) 4 SCC 225] so far as the determination of the position of directive principles, vis-à-vis fundamental rights are concerned, it has been an era of positivism and creativity. Article 37 of the Constitution while declaring the directive principles to be unenforceable by any court goes on to say, "that they are nevertheless fundamental in the governance of the country". The several clauses of Article 37 themselves need to be harmoniously construed assigning equal weightage to all of them. The end part of Article 37 — "it shall be the duty of the State to apply these principles in making laws" is not a pariah but a constitutional mandate.* ***The series of decisions which we have referred to hereinabove and the series of decisions which formulate the three stages of development of the relationship between directive principles and fundamental rights undoubtedly hold that, while interpreting the interplay of rights and restrictions, Part III (Fundamental rights) and Part IV (Directive principles) have to be read together. The restriction which can be placed on the rights listed in Article 19(1) are not subject only to Articles 19(2) to 19(6); the provisions contained in the chapter on directive principles of State policy can also be pressed into service and relied on for the purpose of adjudging the reasonability of restrictions placed on the fundamental rights."***

(Emphasis supplied)

The Apex Court harmonizes fundamental rights of Directive Principles of State Policy and holds that Directive Principles of State Policy cannot be completely ignored merely because it is in Part-IV. Part-III and Part-IV will have to be read together. The restriction which can be placed on the rights listed in Article 19(1) can sometimes take the colour of Directive Principles of State Policy by pressing that into service for the purpose of reasonability of restriction placed upon a fundamental right. Therefore, the Directive Principles of State Policy, merely because it is in Part-IV, could not mean that the State has no power to regulate, taking the foundation of any legislation to the Directive Principles of State Policy, be it legislation or a Government order. The seven Judge Bench in the very judgment formulates a question whether Article 19(1)(g) would be regulation, restriction or total prohibition. The Apex Court holds as follows:

> ***"Question-5. Article 19(1)(g) "Regulation" or "Restriction" includes total prohibition; partial restraint is not total prohibition***
>
> ***73. The respondents rely on Article 19(1)(g) which deals with the fundamental right to "practise any profession, or to carry on any occupation, trade or business". This right is subject to Article 19(6) which***

permits reasonable restrictions to be imposed on it in the interests of the general public.

74. This raises the question of what is the meaning of the word "restriction".

75. Three propositions are well settled: (i) "restriction" includes cases of "prohibition"; (ii) the standard for judging reasonability of restriction or restriction amounting to prohibition remains the same, excepting that a total prohibition must also satisfy the test that a lesser alternative would be inadequate; and (iii) whether a restriction in effect amounts to a total prohibition is a question of fact which shall have to be determined with regard to the facts and circumstances of each case, the ambit of the right and the effect of the restriction upon the exercise of that right*. Reference may be made to M.B. Cotton Assn. Ltd. v. Union of India [AIR 1954 SC 634] , Krishna Kumar v. Municipal Committee of Bhatapara [Petn. No. 660 of 1954 decided on 21-2-1957 by the Constitution Bench subsequently reported at (2005) 8 SCC 612.] (see Compilation of Supreme Court Judgments, 1957 Jan-May, p. 33, available in Supreme Court Judges' Library), Narendra Kumar v. Union of India [(1960) 2 SCR 375 : AIR 1960 SC 430] , State of Maharashtra v. Himmatbhai Narbheram Rao [AIR 1970 SC 1157 : (1969) 2 SCR 392] , Sushila Saw Mill v. State of Orissa [(1995) 5 SCC 615], Pratap Pharma (P) Ltd. v. Union of India [(1997) 5 SCC 87] and Dharam Dutt v. Union of India [(2004) 1 SCC 712] .*

… … …

79. We hold that though it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of the general public, yet, in the present case banning slaughter of cow progeny is not a prohibition but only a restriction*."*

(Emphasis supplied)

The Apex Court was dealing with slaughter of cows. The Apex Court holds that it is permissible to place a total ban amounting to prohibition on any profession, occupation, trade or business subject to satisfying the test of being reasonable in the interest of general public. The Apex Court in the case of ***MINERVA TALKIES v. STATE OF KARNATAKA***[7] has held as follows:

"…. …. ….

> ***9.*** *The question arises whether Rule 41-A places unreasonable restrictions on the appellants' right to carry on business of exhibiting cinematograph films in violation of Article 19(1)(g) of the Constitution. The appellants/petitioners have not challenged the validity of the Act. Therefore they have no unrestricted right to exhibit cinematograph films. They are carrying on the business under a licence containing the terms and conditions prescribed by the Act and the Rules framed thereunder. The licence issued under Form F contains a number of terms and conditions which a licensee is required to comply with, including Condition 11 which provides that no exhibition of cinematograph film shall continue after 1 a.m. Rule 41-A adds one more condition to it, requiring the licensee not to exhibit more than four shows in a day. Article 19(1)(g) guarantees freedom to practise any profession, or to carry on any occupation, trade or business. ..*
>
> … … …
>
> ***12. The appellants'/petitioners' contention that restriction under Rule 41-A is unreasonable is founded on the premise that Rule 41-A is not regulatory in nature instead it totally prohibits exhibition of cinematograph films for one show and its impact is excessive as it reduces appellants'/petitioners' income to the extent of one-fifth. The appellants/petitioners have no unrestricted fundamental right to carry on business of exhibiting***

[7] *1988 Supp SCC 176*

> ***cinematograph films. Their right to carry on business is regulated by the provisions of the Act and the Rules framed thereunder. These provisions are necessary to ensure public safety, public health and other allied matters. As already discussed Rule 41-A has placed limit on the number of shows which a licensee can hold in a day. The rule does not prohibit exhibition of cinematograph films instead it regulates it by providing that instead of five shows only four shows should be exhibited in a day. In Narendra Kumar v. Union of India [AIR 1960 SC 430 : (1960) 2 SCR 375] this Court held that a law made in the public interest prohibiting a business would be valid as the "prohibition" is only a kind of "restriction". The expression "restriction" includes "prohibition" also. Rule 41-A, however, does not take away the licensees' right to carry on business of exhibiting cinematograph films. It merely regulates it. No rule or law can be declared to be unreasonable merely because there is reduction in the income of a citizen on account of the regulation of the business. In our opinion, Rule 41-A does not place any unreasonable restriction on the appellants'/ petitioners' fundamental right guaranteed to them under Article 19(1)(g) of the Constitution.***"
>
> *(Emphasis supplied)*

The Apex Court holds that Article 19(1)(g) guarantees freedom to practice any profession or to carry on any occupation, trade or business. The freedom so guaranteed is not absolute. It does have imposition of reasonable restrictions if it is necessary in the interest of general public. Any law imposing reasonable restriction on the exercise of right guaranteed under Article 19(1)(g) would be valid, if it is in the interest of general public. The Apex Court, in a later

judgment in the case of ***CENTRE FOR PUBLIC INTEREST LITIGATION v. UNION OF INDIA***[8] has held as follows:

"…. …. ….

23. Article 21 of the Constitution of India guarantees the right to live with dignity. The right to live with human dignity denies the life breach from the directive principles of State policy, particularly clauses (e) and (f) of Article 39 read with Article 47 of the Constitution of India. Article 47 reads as follows:

> ***"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."***

24. Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966 reads as follows:

> ***"12. (1) The States parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.***
>
> ***(2) The steps to be taken by the States parties to the present Covenant to achieve the full realisation of this right shall include those necessary for—***
>
> ***(a) the provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;***

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[8] *(2013) 16 SCC 279*

(b) the improvement of all aspects of environmental and industrial hygiene;
(c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) the creation of conditions which would assure to a medical service and medical attention in the event of sickness."

25. We may emphasise that any food article which is hazardous or injurious to public health is a potential danger to the fundamental right to life guaranteed under Article 21 of the Constitution of India. A paramount duty is cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Article 21 read with Article 47 of the Constitution of India.

… … …

27. Enjoyment of life and its attainment, including right to life and human dignity encompasses, within its ambit availability of articles of food, without insecticide or pesticide residues, veterinary drugs residues, antibiotic residues, solvent residues, etc. But the fact remains, many of the food articles like rice, vegetables, meat, fish, milk, fruits available in the market contain insecticide or pesticide residues, beyond the tolerable limits, causing serious health hazards. We notice, fruit based soft drinks available in various fruit stalls contain such pesticide residues in alarming proportion, but no attention is made to examine its contents. Children and infants are uniquely susceptible to the effects of pesticides because of their physiological immaturity and greater exposure to soft drinks, fruit based or otherwise."

(Emphasis supplied)

The Apex Court was dealing with regulation of soft drinks. The Apex Court considers harmonizing the fundamental rights under

Article 19, right to life of a citizen under Article 21 and the obligations of a State under Article 47 of the Constitution of India. The Apex Court holds that Article 21 of the Constitution guarantees right to life with dignity. The Apex Court further emphasizes that any food article which is hazardous or injurious to public health is a potential danger to fundamental right to life guaranteed under Article 21 of the Constitution of India. The paramount duty is cast upon the States and its authorities to achieve appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under Article 21 r/w Article 47 of the Constitution of India. In the case of ***ARJUN GOPAL v. UNION OF INDIA***[9] the Apex Court has held as follows:

"…. …. ….

> ***37. The aforesaid findings are sufficient to negate the arguments of the opposite side that there is absence of scientific study about the adverse effect of firecrackers during Diwali. In environmental law, "precautionary principle" is one of the well-recognised principles which is followed to save the environment. It is rightly argued by the petitioners that this principle does not need exact studies/material. The very word "precautionary" indicates that such a measure is taken by way of precaution which can be resorted to even in the absence of definite studies.***
>
> … … …

[9] *(2019) 13 SCC 523*

40. This brings us to the next argument which is predicated on Article 19(1)(g) of the Constitution. Mr Shankarnarayanan had submitted that principle of res extra commercium shall apply inasmuch as firecrackers are a health hazard, the manufacturers and traders thereof cannot claim any fundamental right to carry on business in this field. Such a plea may not be tenable. Therefore, it calls for a measure that would amount to a reasonable restriction.

41. It may be stressed that in Vellore Citizens' Welfare Forum case [Vellore Citizens' Welfare Forum v. Union of India, (1996) 5 SCC 647] , this Court had banned the tanneries when it was found that they were causing immense damage to the environment. Thus, environment protection, which is a facet of Article 21, was given supremacy over the right to carry on business enshrined in Article 19(1)(g). We state at the cost of repetition that right to health, which is recognised as a facet of Article 21 of the Constitution and, therefore, is a fundamental right, assumes greater importance. It is not only the petitioners and other applicants who have intervened in support of the petitioners but the issue involves millions of persons living in Delhi and NCR, whose right to health is at stake. However, for the time being, without going into this debate in greater details, our endeavour is to strive at balancing of two rights, namely, right of the petitioners under Article 21 and right of the manufacturers and traders under Article 19(1)(g) of the Constitution.

… … …

43. We now deal with the argument that banning the sale of firecrackers may lead to extreme economic hardship, namely, on the one hand loss of substantial revenue and on the other hand unemployment to lakhs of persons. This brings up the issue of connect or relationship between the law and economics*. … …*

44. Applying the aforesaid principle, in the first blush it may appear that the aforesaid argument has substantial force in it. However, that would be only one

side of the picture as there are two contra-arguments which are sufficient to take the sheen out of the aforesaid plea. First aspect is that the argument of economic hardship is pitched against right to health and life. When the Court is called upon to protect the right to life, economic effect of a particular measure for the protection of such right to health will have to give way to this fundamental right. Second factor, which is equally important, is that the economic loss to the State is pitched against the economic loss in the form of cost of treatment for treating the ailments with which people suffer as a result of burning of these crackers. Health hazards in the form of various diseases that are the direct result of burning of crackers have already been noted above. It leads to asthma, coughing, bronchitis, retarded nervous system breakdown and even cognitive impairment. Some of the diseases continue on a prolonged basis. Some of these which are caused because of high level of $PM_{2.5}$ are even irreversible. In such cases, patients may have to continue to get the medical treatment for much longer period and even for life. Though there are no statistics as to what would be the cost for treating such diseases which are as a direct consequence of fireworks on these occasions like Diwali, it can safely be said that this may also be substantial. It may be more than the revenue which is generated from the manufacturers of the crackers. However, we say no more for want of precise statistical data in this behalf.

… … …

49. One clarification needs to be given at this stage. Our discussion pertaining to the arguments based on Article 19(1)(g), Article 25 as well as the argument of loss of substantial revenue and unemployment, in cases the manufacture and sale of the firecrackers is totally banned, is prima facie and we have not given our conclusive determination. It is because of want of detailed studies on various aspects which have been mentioned and taken note of during discussion in this order. However, we also make it clear that, prima facie, we do not find much merit in these arguments for which we have given our reasons in brief."

The Court was called upon to consider the arguments on economic hardship pitched against right to health and right to life. The Apex Court holds that economic effect of a particular measure for the protection of right to health will have to give way, as the right to health and living is a fundamental right. While dealing with sale of liquor the Apex Court in ***KHODAY DISTILLERIES LIMITED v. STATE OF KARNATAKA***[10] has held as follows:

> "…. …. ….
>
> ***55.*** *The contention that if a citizen has no fundamental right to carry on trade or business in potable liquor, the State is also injuncted from carrying on such trade, particularly in view of the provisions of Article 47, though apparently attractive, is fallacious. The State's power to regulate and to restrict the business in potable liquor impliedly includes the power to carry on such trade to the exclusion of others. Prohibition is not the only way to restrict and regulate the consumption of intoxicating liquor. The abuse of drinking intoxicants can be prevented also by limiting and controlling its production, supply and consumption. The State can do so also by creating in itself the monopoly of the production and supply of the liquor. When the State does so, it does not carry on business in illegal products. It carries on business in products which are not declared illegal by completely prohibiting their production but in products the manufacture, possession and supply of which is regulated in the interests of the health, morals and welfare of the people. It does so also in the interests of the general public under Article 19(6) of the Constitution.*
>
> ***56. The contention further that till prohibition is introduced, a citizen has a fundamental right to carry on trade or business in potable liquor has also no merit. All that the citizen can claim in such a situation is an equal***

[10] *(1995) 1 SCC 574*

right to carry on trade or business in potable liquor as against the other citizens. He cannot claim equal right to carry on the business against the State when the State reserves to itself the exclusive right to carry on such trade or business. When the State neither prohibits nor monopolises the said business, the citizens cannot be discriminated against while granting licences to carry on such business. But the said equal right cannot be elevated to the status of a fundamental right.

57. *It is no answer against complete or partial prohibition of the production, possession, sale and consumption etc. of potable liquor to contend that the prohibition where it was introduced earlier and where it is in operation at present, has failed. The failure of measures permitted by law does not detract from the power of the State to introduce such measures and implement them as best as they can.*

58. We also do not see any merit in the argument that there are more harmful substances like tobacco, the consumption of which is not prohibited and hence there is no justification for prohibiting the business in potable alcohol. What articles and goods should be allowed to be produced, possessed, sold and consumed is to be left to the judgment of the legislative and the executive wisdom. Things which are not considered harmful today, may be considered so tomorrow in the light of the fresh medical evidence. It requires research and education to convince the society of the harmful effects of the products before a consensus is reached to ban its consumption. Alcohol has since long been known all over the world to have had harmful effects on the health of the individual and the welfare of the society. Even long before the Constitution was framed, it was one of the major items on the agenda of the society to ban or at least to regulate, its consumption. That is why it found place in Article 47 of the Constitution. It is only in recent years that medical research has brought to the fore the fatal link between smoking and consumption of tobacco and cancer, cardiac diseases and deterioration and tuberculosis. There is a sizeable movement all over the world including in this country to educate people about the dangerous effect of tobacco on individual's health. The society may, in course

> ***of time, think of prohibiting its production and consumption as in the case of alcohol. There may be more such dangerous products, the harmful effects of which are today unknown. But merely because their production and consumption is not today banned, does not mean that products like alcohol which are proved harmful, should not be banned.***"
>
> *(Emphasis supplied)*

The Apex Court holds that what articles and goods should be allowed to be produced, processed, sold and consumed is to be left to the best judgment of the Legislature and the executive wisdom, as Article 47 directs the State to ensure public health does not suffer. Anything hazardous to public health is held to be a potential danger to fundamental right under Article 21 of the Constitution. It becomes apposite to refer to the judgment of the Allahabad High Court reported in ***SHAIBYA SHUKLA v. STATE OF U.P***[11] again which harmonizes rights under Article 21 and obligations of the State under Article 47. The Court has held as follows:

"…. …. ….

> ***7.*** *The Constitution of India as per preamble thereof indicates a resolve by the people of India to secure to all its citizens justice, liberty and equity and to promote among them all fraternity assuring the dignity of the individual and unity and integrity of nation and makes provision pertaining to life and*

[11] *1992 SCC OnLine All 196*

liberty. It is to be taken that dignity of individual and right to life and personal liberty conferred by Art. 21 of the Constitution of India have got much importance. If life is put in danger or in hazardous condition by permitting the sale or auction of such material or goods which are not fit for human consumption to those who deal in goods for human consumption simply for the sake of getting higher bids that will be an action against the letter and spirit of the Constitution of India. Dignity of individual is the first thing to be preserved, and, as such, the framers of the constitution guaranteed the right to life under Art. 21 of the Constitution itself as a fundamental right. Art. 21 provides that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law.

8. Life does not mean bare animal life or life without health. Anything that adversely affects life of human being materially, physically or from the point of the health or anything that creates abstruction in the physical, moral or other development of the individual and his dignity, anything that deprives or adversely affects the human life and any act of offering such goods for sale for human consumption, — whether there is very meagre possibility of same being used for human consumption after sale that will be an act interfering with the fundamental right of life. As in the present case the opposite-parties were never prepared to give affidavit that the soyabean seeds in question will not be used for processing commodity of human consumption and annexure-6 indicates that in fact the chamically treated soyabean is not fit for human consumption there does not appear any reason or justification for the opposite-parties 1 to 3 to offer the same for sale by auction in general and to any one, i.e. individual or factory simply on the basis that the intended purchasers offers higher bid. This action of the opposite-parties, in particular, of opposite-party No. 3 of offering the chemically treated soyabean in question for auction in general i.e. to any one, irrespective of its admittedly being unfit for human consumption as well as its being unfit for consumption by cattle runs counter to the mandate and directions contained in Arts. 47 and 48 of the Constitution of India. Art. 47 and 48 of the Constitution of India as contained in Part IV reads as under:—

> ***"Article 47. Duty of the State to raise the level of nutrition and standard of living and improve public health. — The State shall regard the raising of level of nutrition and standard of living of its people and 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 injuries to health.***

9. Article 48. Organisation of agriculture and animal husbandry. — The State shall endeavour to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

10. A bare reading of these two articles per se shows that it is the primary duty of the State to raise the level of nutrition and standard of living of people and to improve the health of its people and public health as well as to prohibit consumption of intoxicating drinks and drugs which are injurious to people's health and that it is another and further obligation of the State to preserve and improve the breeds of, cows and calves and other milch and draught cattle.

11. The principle enshrined in the Articles contained in Part IV of the Constitution under the head "Directive of Principles of State Policy" are not mere pious declaration but are the directions and principles for the guidance and governance of State Policy and action and are to be treated as fundamentals and fundamental basis of all legislative and executive action as Art. 37 provides, and that it is the duty of the State to apply these principles in matter of legislative and executive action being done. Encourage-ment to sell such as chemically treated soyabean seeds which are treated with poisonous chemicals, and, as such, are unfit for consumption is negation of principle of law under Arts. 21, 47, 48 of constitution as its offer for sale by auction in general

market to any one definitely apart from creating hazards to human life or is likely to create danger to the life and health of human being as well as of cows, calves and other milch animals*. In this view of the matter and the facts and circumstances narrated above keeping in view the letter and spirit of the Constitution of India, its preamble as well as the provisions contained in Art. 21, 37, 47 and 48 of the Constitution, in our opinion, the offer for sale by auction of chemically treated soyabean seeds in question is an illegal act having tendency of depriving the citizens as well as cattle of their lives and health and, as such, appears to be against the provisions of the Constitution as well. A perusal of annexure-6, dated 28-8-86 clearly shows that thereunder it was directed by the Directorate of seeds, Uttar Pradesh and chemically treated soyabean seeds being unfit for human consumption should not and cannot be made subject matter of public auction. Such seeds can only be sold to the companies and organisations which produces or manufactures or process starch therefrom, and, as such, Joint Directors and the Deputy Directors of various divisions should try to find out the starch manufacturing companies or institutions which are prepared to purchase chemically treated soyabean for the purposes of producing starch and rates be obtained. It does not appear as to why the opposite-party No. 3 the Deputy/Joint Director, Agriculture Jhansi Mandal has taken a stand quite different and contrary to the directions contained in annexure-6, i.e. the directions issued by the Directorate of Agriculture, Beej Prakshetra Anubhag, U.P., Lucknow. In our opinion, as such, as the soyabean in question is dangerous for human life, health as well as cattle life and is not fit for consumption by any of them the opposite parties are not justified in offering the same for sale by public auction and are desirous to sell in favour of appellate-party No. 4 who is not prepared to give certificate that it will not be sold or used for human consumption instead tried to assert that it is fit for human consumption quite contrary to the stand that it is not fit for human consumption."*

(Emphasis supplied)

13. On a coalesce of the judgments of the Apex Court and that of other constitutional Courts as quoted hereinabove, what would unmistakably emerge is, that in certain circumstances State has a duty and an obligation under Article 47 of the Constitution of India to ensure nutrition and improvement of standard of living and public health and also to bring in prohibition of consumption of intoxicating drinks and of drugs which are injurious to health. The obligation under Article 47 is not restricted to intoxicating drugs or drugs only. Under the label of improvement of public health, State definitely does have a play in the joints to bring in such law or order to ensure that public health does not suffer. Public health has different hues and forms, emanating from manifold circumstances and myriad activities of the citizens of the country. Therefore, in the light of Article 47 of the Constitution and its interpretation, it is the duty of the State to ensure public health and prohibition of intoxication and drugs that would be injurious to public health. It is not that intoxication or drugs are to be regulated by statutes, it has to be regulated sometimes under the **fountainhead of the statutes** – **The Constitution of India**. How it is now applicable to the fact situation is necessary to be considered.

14. The 7th Schedule to the Constitution has three lists – the Union list, the State list and the concurrent List. Certain acts are promulgated by the Union Government under the Union list. They are among others, the COTPA and Food Safety and Standards Act, 2006. The State Government is empowered to enact certain laws under the State list. The State Government under List-II is to make laws relating to public health, industries governed by the State Government and prohibition of certain consumptions as a public policy. In the concurrent list, both the Union and the State are empowered to make laws subject to repugnancy. List-II, entries 6 and 8 read as follows:

> ***"6. Public health and sanitation; hospitals and dispensaries.***
>
> ***8. Intoxicating liquors, that is to say, the production manufacture, possession, transport, purchase and sale of intoxicating liquors."***
>
> *(Emphasis supplied)*

Entry-6 deals with public health and sanitation, hospitals and dispensaries. Entry-8 deals with intoxicating liquor, production, manufacture, possession, transport and purchase, both of which are to be regulated by the State. The State Government taking cue

from Entry-6 of List-II, contends to have brought in, the impugned notification. Under Entry-8 the State Government claims to have brought in Karnataka Prohibition Act, 1961. The State Government, in exercise of power conferred under the Poisons Act, 1919 has framed Karnataka Poisons Rules and has scheduled those classes of poison as is found in the Act. Therefore, the Union Government and the State Government under the respective entries in the Union list, State List or the concurrent List have promulgated the said laws. Article 47 of the Constitution, the laws afore-noted and their applicability to the fact situation, are necessary to be considered.

HOOKAH:

15. The **nub** of this conundrum is the ban of sale of hookah. Therefore, **Hookah**, **Hookah** and **Hookah** is echoed all over, in all these petitions. Therefore, what is this hookah? Hookah is essentially an instrument used to smoke tobacco or flavoured herbal products using a water pipe.

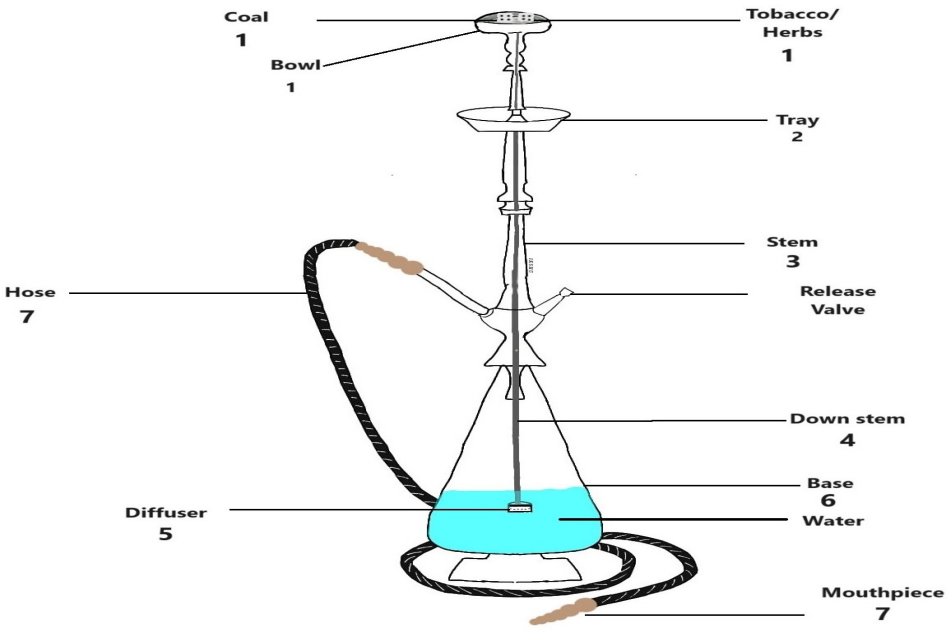
GENESIS AND ETIMOLOGY:

16. The genesis of hookah in this nation, did not take place yesterday. The evolution dates back to 500 years. Hookah or the water pipe was invented in the reign of Mughal Emperor – Akbar, by his Persian Physician in Fatehpur Sikri. Since smoking directly was considered to be hazardous, the Persian Physician invented this apparatus and it was named hookah. The nomenclature may vary from nation to nation, but the concept remains the same. The modern water pipe that exists today is with an extended neck and a mouthpiece. The country, the origin and the nomenclature are as follows:

Sl. No.	***Country***	***Water Pipe Name and Origin***
1.	*Indian Sub continent*	*Huqqa — Devanagari: हुक्का, Nastaleeq: بَحق ;Jajeer(in Kashmir)*
2.	*Lebanon, Syria, Palestine, Jordan, Azerbaijan, Uzbekistan, Kuwait and Iraq*	*Arjīlah — Arabic: أرجيلـــــــة,*
3.	*Israel*	*Nargilah— Hebrew: נַרְגִּילָה; Arabic: نارجيلـــــــة Derived from Sanskrit word nārikela (नारिकेल), meaning coconut, suggesting that early hookahs were from coconut shells*

4.	*Persia*	*qalyān—ش ; šiše— قليـــــان (means glass)*
5.	*Spain; Turkey*	*Narguile*
6.	*Uzbekistan and Afghanistan*	*chillim*
7.	*United Kingdom*	*marra pipe*
8.	Vietnam	*shisha tobacco* — thuốc shisha

The etymology of hookah and its nomenclature are as afore-quoted. The mechanism of such smoking is by way of an instrument. The sketch of the instrument - hookah is drawn for the purpose of ready reference:



The smoking through this instrument involves several processes. Those processes that go through several parts of the instrument are as follows:

"Process No. 1:	*Tobacco/ Herbs is placed on top of hot coals in the bowl and is burned.*
Process No. 2:	*The ash and burning coal are collected in the Tray.*
Process No. 3 and 4:	*The smoke from burning coal on Tobacco and/or Herbs passes through stem, reaches the down- stem and passes through water, cooking the smoke on its path.*
Process No. 5 and 6:	*The smoke passes through the diffuser in the base/vase.*
Process No. 7:	*The user inhales the smoke using mouthpiece, passing through the hose."*

What is in public domain is the sketch afore-drawn. Tobacco is said to be placed on the hot coals in the receptacle and burned. The user inhales from a metal or plastic mouthpiece attached to the end of the pipe which creates an oxygen vacuum in the instrument and forces smoke to pass through water. There are three common types of tobacco which are also in public domain. Therefore, '**hookah tobacco is also a form of tobacco'**. The contention of

herbal hookah which is projected will bear consideration at a later point in time.

LEGISLATIONS REGULATING TOBACCO:

17. Tobacco, right from its advertisement till its distribution, is regulated by the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 and the Rules, 2004 framed thereunder. Certain provisions of the COTPA are germane to be noticed. Section 3 reads as follows:

> *"**3. Definitions**.—In this Act, unless the context otherwise requires,—*
>
> *(a) "advertisement" includes any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas;*
>
> *(b) **"cigarette" includes,—***
>
> ***(i) any roll of tobacco wrapped in paper or in any other substance not containing tobacco;***
>
> ***(ii) any roll of tobacco wrapped in any substance tobacco, which, by reason of its appearance, the type of tobacco used in the filter, or its packaging and labelling is likely to be offered to, or purchased by, consumers as cigarette, but does not include beedi, cheroot and cigar**;*

(c) "distribution" includes distribution by way of samples, whether free or otherwise;

(d) "export", with its grammatical variations and cognate expressions, means taking out of India to a place outside India;

(e) "foreign language" means a language which is neither an Indian language nor the English language;

(f) "import", with its grammatical variations and cognate expressions, means bringing into India from a place outside India;

(g) "Indian language" means a language specified in the Eighth Schedule to the Constitution, and includes any dialect of such language;

(h) "label" means any written, marked, stamped, printed or graphic matter, affixed to, or appearing upon, any package;

(i) "package" includes a wrapper, box, carton, tin or other container;

(j) "prescribed" means prescribed by rules made under this Act;

(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—

(i) packing, labelling or re-labelling, of containers;

(ii) re-packing from bulk packages to retail packages; and

(iii) the adoption of any other method to render the tobacco product marketable;

(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;

(o) "specified warning" means such warnings against the use of cigarettes or other tobacco products to be printed, painted or inscribed on packages of cigarettes or other tobacco products in such form and manner as may be prescribed by rules made under this Act;

(p) "tobacco products" means the products specified in the Schedule."

(Emphasis supplied)

Section 3(b) defines what is cigarette. **Section 3(n)** defines what is smoking. Smoking would mean smoking of tobacco in any form, whether in the form of cigarette, cigar, beedi or otherwise with the aid of a pipe, wrapper or any other instruments. Therefore, smoking

involves tobacco. **Section 4** deals with prohibition of smoking in public place. It mandates that no person shall smoke in public place provided in a hotel having 30 rooms or a restaurant having seating capacity of more than 30 persons and in the Airports, a separate provision is made for smoking area or space. **Section 3(o)** mandates specific warning to be used on cigarettes or other tobacco products. **Section 3(p)** defines what are tobacco products; they are what is specified in the schedule. The schedule appended to Section 3(p) reads as follows:

> ***"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"***

Amongst various things, it contains cigarette, tobacco, pipe tobacco and '**hookah tobacco'**. Therefore, the rigour under Section 4 which deals with prohibition of smoking in a public place would become applicable to all the items in the schedule *supra*.

18. Rules have been framed under Section 31 of the COTPA. They are again by Government of India. Sub-rule (2) of COTP Rules, 2004 reads as follows:

> ***"4. Prohibition of advertisement of cigarettes and other tobacco products****.—(1) … …*
>
> *"(2)* ***Each such board shall contain in an Indian language as applicable, one of the following warnings occupying the top edge of the board in a prominent manner measuring twenty centimeters by fifteen centimeters, namely:—***
>
> ***(i) Tobacco causes cancer, or***
> ***(ii) Tobacco kills,"***

The Rule *supra* mandates that statutory warning occupying the top edge of the board in a prominent manner should be found. The board should depict words 'tobacco causes cancer' or 'tobacco kills'. The Rule deals with prohibition of cigarettes and other tobacco products like in the COTPA. Certain Rules were also brought into force in the 2008 in exercise of power under Section 31 of the COTPA. They are Prohibition of Smoking in Public Places Rules, 2008. Rules 3 and 4 read as follows:

*"**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 in-charge 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) If 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.

(Explanation.—For the purpose of these rules the word offence means a person found violating any provision of the rules).

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.

(3A) The ***owner, proprietor, manager, supervisor or in charge of the affairs of the hotel, restaurant or airport, shall display a board at the entrance of the smoking area or space of minimum size of 60×30 cm with a white background and having the message in English and one Indian language as applicable in black colour that—***

(i) tobacco smoking is harmful to your health and the health of non-smokers; and

(ii) entry of person below the age of eighteen years is prohibited.

(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 infilterate/permeate into the non-smoking areas of the hotel including lobbies and the corridors."

(Emphasis supplied)

Sub-rule 3A to Rule 4 mandates that the owner, proprietor or in-charge of the affairs of the hotel, restaurant or airport shall display a Board at the entrance of the smoking area or space of minimum size of 60x30 cm. that tobacco smoking is harmful to your health and the health of non-smokers and entry of persons below the age of eighteen years is prohibited. The COTP Rules undergoes certain amendment, by a Notification issued by Government of India on 23-05-2017. The amendment is called, the Prohibition of Smoking in Public Places (Amendment) Rules, 2017 (hereinafter referred to as 'the 2017 Rules'). It reads as follows:

> *"(3)* ***No service shall be allowed in any smoking area or space provided for smoking"***

The amendment is to **sub-rule (3) of Rule 4**. What is added is **sub-rule (3)** which mandates that no service shall be allowed in any smoking area or space provided for smoking. It is this that is in existence today. The Rule *supra* stands amended, in terms of the Amendment Act of 2017. What becomes necessary to be noticed in the light of the said amendment to the Rules by the Government of India is whether smoking through hookah is plain smoking which can be permitted in a designated area or it is a product of service

that needs to be rendered. It, therefore, becomes necessary to compare/test the activity of smoking to the activity of hookah.

HOOKAH vis-à-vis SMOKING:

19. The difference is plain and simple in the manner of consumption itself. For consuming cigarette, an individual need not have a separate apparatus apart from carrying a fire stick to light the cigarette and ash tray at the best; the smoking zones created in designated places do not give any other service except creation of a smoking zone. In the case of smoking through hookah, it cannot be consumed unless there is apparatus, a pipe, hot coal, hot water along with nicotine or herbal hookah as the case may be, which would be sprinkled on hot coal along with flavouring, all of which is provided by the owners of the restaurants. The manner of service to smoke a cigarette is zero. The manner of service to smoke hookah with or without tobacco, needs rendering of services in the designated area, as it requires external human hand to place all the apparatus on the tables like food or alcohol would be served on those tables. It is, therefore, on the face of it, a service.

20. If hookah requires service that needs to be rendered, it cannot be in the corner of a designated place and apparatus to smoke through hookah cannot be carried in the pocket by the smoker who wants to go into a designated area, smoke and come out. It requires all the **overtones** of a service, as akin to food and alcohol. If the aforesaid activity is pitted on the amendment to the 2017 Rules, what would unmistakably emerge is the prohibition in furtherance of the amendment brought into the Rule, as no service should be allowed in any smoking area or space provided for smoking. If a designated place is provided for smoking which may include, smoking hookah - hookah tobacco, the very act of preparation to smoke hookah tobacco, cannot but be held to be a service, and if it is, **it flies on the face of sub-rule (3) of 2017 Rules.**

21. Much reliance is placed by all the learned counsel representing the petitioners on the judgment in ***NARINDER S.CHADHA*** *supra*. The said judgment is distinguishable without much *ado*, as it is a judgment that is rendered prior to the

amendment to the Rules in terms of 2017 Rules, when it was a case where there was no occasion to prohibit a service also in a designated smoking area. The Apex Court in the said judgment has held as follows:

"…. …. ….

> ***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 [Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1978) 4 SCC 36 : 1978 SCC (Tax) 198 : (1979) 1 SCR 557] , a distinction was made between sale of food and the provision of services in hotels and restaurants. The Court held: (SCR pp. 560-61 : SCC pp. 39-40, para 5)*
>
> > *"5. … 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 [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:

> *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 (forty-sixth Amendment) Act by which Article 366(29-A) was inserted. Article 366(29-A) reads as follows:

> *"**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 v. P.S.G. College of Technology [P. Kasilingam v. P.S.G. College of Technology, 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 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 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 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 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****."*
>
> *(Emphasis supplied)*

The Apex Court was interpreting the then existing Rule 4(3). The Apex Court also interprets the expression, no other service shall be

allowed to mean that, providing services other than hookah, which obviously meant, food, alcohol or any other service. Whether hookah itself was a service was not the question before the Apex Court. Then comes the amendment to the Rules *supra*. The amendment makes the rigour stronger. The Government of India was well aware of the existing Rule 4(3) and the aforesaid judgment of the Apex Court. Even then, brings in an amendment. The amendment is unequivocal, that no service shall be allowed in any smoking area or space provided for smoking. The difference is, that in the Rule that existed at the time when the Apex Court rendered the judgment is, it read as, the space shall not be used for any other purpose except smoking and no other service shall be allowed. A slight difference in the amendment is, it is more rigorous, that no service shall be allowed in any smoking area or space provided for smoking. Therefore, the said judgment, in the considered view of this Court, would become inapplicable to the case at hand, which has emerged, post the amendment. Without any service being permitted hookah cannot be inhaled. It requires whole lot of apparatus, as observed *supra* a human hand in the form of a waiter at a restaurant and therefore, it is not as simple as

it is sought to be projected by the petitioners, that hookah tobacco is already covered under the COTPA and as such no prohibition can be imposed. The State has not transgressed its jurisdiction in notifying a complete ban as hookah is undoubtedly requires a service and if service is prohibited by a Central legislation, the State is only implementing the same.

POISONS ACT:

22. The other provision that is invoked by the State is, the Karnataka Poisons (Possession and Sale) Rules 2015, (hereinafter referred to as the '2015 Rules' for short). The State Government has notified the 2015 Rules in exercise of powers conferred on it under Sections 2 and 8 of the Poisons Act, 1919. The relevant 2015 Rules read as follows:

> *"2. **Definitions**: In these Rules, unless the context otherwise requires,-*
>
> *(a) "**Act**" means the Poisons Act, 1919 (Central Act No.12 of 1919);*
>
> *(b) "**Dealer**" means a 'person holding license under these Rules';*

*(c) '**Distribution**' means 'supply of acid or corrosive substance supplied to any person, only on the demand either in writing or orally' without any fee;*

*(d) "**Form**" means a form appended to these Rules;*

*(e) "**Licensing Authority**" means the District Magistrate or any other officer authorized by the State Government under sub-section (1) of Section 7 to grant a license;*

*(f) "**Licensee**" means a holder of a license;*

*(g) "**Notification**" means a notification published in the Official Gazette;*

*(h) "**Poison**" means keeping a stock of the said substance for various purposes;*

*(i) "**Schedule**" means the Schedule appended to these Rules;*

*(j) "**Sale**" means any sale by one licensed dealer to another or by a licensed dealer to any educational institution or to any research or medical institution or hospital or dispensary or to any factory or machine/automobile maintenance, example recharge of batteries, invertors etc. under a qualified medical practitioner (Registered Medical Practitioner) or any recognized public institution or industrial firm requiring poisons for its own use) or to Government Departments or Public Sector Undertakings or to an individual for personal use."*

… … …

*5. **Licence to whom granted. -** (1) A licence shall be granted only to a person who in the opinion of the Licensing Authority is competent to conduct business in poisons or process of poison or store poison for various purposes, whether educational, industrial, mechanical, small enterprises or otherwise etc.*

> *(2) The license issued to a firm or company shall always be in the name of the proprietor or proprietors of the company or a responsible person to be nominated by such proprietor or proprietors for the purpose, or in the case of a public company, in the name of its manager or in the case of an educational institution, the head of the said institution or in the case of a group of educational institutions, the individual Heads of Department where the poison is stored or in the case of small enterprises, the head or the owner of the said establishment.*
>
> *(3) The name or names so given may be altered or amended by the licensing authority on a written application from the firm or company and such application shall bear a court fee stamp of hundred rupees."*

Rule 2 deals with definitions. Rule 5 deals with licence to whom can be granted. A licence under Rule 5 would be granted only to a person who is competent to conduct business in poisons or process of poison or store poison for various purposes, be it educational, industrial and other purposes. Poisons Act is invoked as what is used in hookah tobacco is **nicotine** and **nicotine comes within Poisons Act, 1919**. Nicotine being an intoxicating substance, undoubtedly finds place as a substance and a poison which would come within the provisions of the Poisons Act and the Rules framed by the State. Therefore, no fault can be found with the State Government invoking Poisons Act or the 2015 Rules framed thereunder insofar as tobacco/nicotine found in hookah.

HERBAL HOOKAH:

23. Learned senior counsel Sri Kiran S. Javali has vehemently contended and also brought to the notice of the Court live samples of Hookah that is used in his café – terrace café. According to the senior counsel, *herbal hookah* does not contain tobacco and, therefore does not contain nicotine. If nicotine and tobacco are absent in herbal hookah, it is his submission, that ban imposed upon his restaurant which is selling hookah is absolutely uncalled for. This submission is *sans* acceptance as *herbal hookah*, like any other tobacco, does need an instrument. Therefore, it is also a service. Apart from the fact that it is service, as narrated hereinabove, the usage of herbal hookah though is without tobacco, it cannot be without molasses. It is an admitted fact that contents of herbal hookah have flavours of molasses. Molasses is also a prohibited substance. Legislation is in place against usage of molasses. The Government of Karnataka has promulgated the **Karnataka Prohibition Act, 1961**. Section 43 of the said Act reads as follows:

> *"43.* ***Control and export, etc., of molasses****.—(1) Except as otherwise provided in sub-section (2), no person shall*

export, import, transport, sell or ***have in his possession any quantity of molasses****:*

Provided that no manufacturer of jaggery from sugarcane shall be liable for possession of molasses which is the by product of the process and is not in excess of such quantity as may be prescribed.

(2) The State Government or, subject to its control, the Deputy Commissioner may grant,-

(a) licences for the export, import, sale or possession of molasses, or

(b) permits for the transport of molasses."

(Emphasis supplied)

Section 43 deals with control and export of molasses. Except as otherwise provided, no person is permitted to export, import, transport, sell or have in his possession any quantity of molasses without the express permission from the hands of the competent authority, under the said Act who is the Deputy Commissioner. who can grant such permission. The section uses the words "**any quantity of molasses**". If molasses is the ingredient for preparation of herbal hookah, any quantity of molasses being present in herbal hookah cannot be made use of, unless there is expression permission from the hands of the State.

24. Every herbal product requires licence from the Ayush Ministry. Herbal tobacco or herbal hookah does not bear the seal of permission being granted by Ayush Ministry. Every herbal product that is sold in the nation is required to print on it, the ingredients in the said product so as to depict nutrition or other factors. Every herbal hookah does not contain any such indication on its cover as live sample is also placed for perusal of the Court. The submission that it is herbal hookah and the Act does not impose a ban and, therefore, the State cannot impose a ban, on the face of it is unacceptable, as the Act may not have the power to ban herbal hookah but the State under the 2015 Rules and the Prohibition Act, for the purpose of protection of health of the citizens, is empowered to ban the same, invoking the powers conferred under the Constitution itself. Therefore, merely because herbal hookah does not contain tobacco, it does not mean that it is to be unregulated, as the key component is molasses and molasses is regulated.

25. A Division Bench of the High Court of Bombay in ***SAYLI B. PARKHI v. STATE OF MAHARASHTRA***[12] was dealing with a case of sale of herbal hookah. The High Court of Bombay was answering a challenge to an order of the Municipal Corporation of Bombay cancelling the licence of the restaurant. In answer to the challenge, the High Court of Bombay observes as follows:

> *"26.* ***Before parting, we may observe that in the present case, Municipal Commissioner taking into consideration the facts and circumstances of the case and the overall situation has appropriately used his discretion in taking the impugned decision, also bearing in mind the requirements of the license conditions. It cannot be overlooked that the Municipal Commissioner is not expected to keep a continuous vigil in the hookah trade/ activities of the petitioner including on the petitioner's claim of its herbal ingredients and to a further claim that they are not affecting the "health" and/or creating a nuisance, as specified in the license conditions, to run an eating house. Once it is clear that hookah activities are not part of the eating house license conditions such activity cannot be permitted. If it is permitted every eating house in the city can provide "hookah", the nature of which the Municipal Commissioner in the normal course of his duties cannot ascertain. This would result in a situation beyond one's imagination and totally uncontrolled.***
>
> *27. It may also be observed that when licensing provisions are incorporated in municipal legislations, the same are required to be interpreted keeping in mind the object of the legislation, which would include achieving societal welfare and public good not only from the point of public health but avoidance of public nuisance."*

[12] *2023 SCC OnLine Bom 1044*

The Division Bench observes that the Municipal Commissioner is not expected to keep a continuous vigil of the hookah activities of the petitioner therein, including the petitioner's claim of its herbal ingredients. Once it is clear that hookah activities are not a part of the eating house license conditions, such activities cannot be permitted. This judgment of the Division Bench of the Bombay High Court is challenged by the petitioner before the Apex Court in S.L.P.No.9755 of 2023. The Apex Court by its order dated 15-05-2023 observes as follows and permits the restaurant to function:

> *"**Learned senior counsel for the Corporation would submit that the entire controversy is with regard to the premises being used as herbal hookah Bar. Since affidavit has now been filed by the petitioners to the effect that pending consideration of the special leave petition, it will not be used for any smoking activity as also for serving herbal hookah, the affidavit may be considered and appropriate orders may be made.***
>
> *The affidavit is taken on record.*
>
> *In the above circumstances, we have considered the contents of the affidavit filed by the petitioner. The petitioner shall be bound by the said affidavit.*
>
> ***Having regard to the affidavit of undertaking filed by the petitioner, the premises is permitted to be used as a restaurant only or as an eating place. There shall be no service of herbal hookah or any other type of hookah and no smoking activity shall be permitted in the scheduled premises till the next date of hearing.***

> *The respondent to file its counter to the special leave petition within six weeks.*
>
> ***It is needless to observe that the conditions appended to the grant of licence shall be strictly complied with by the petitioner.***
>
> *The aforesaid order is without prejudice to the contentions that may be advanced by the respondent-Corporation".*
>
> *(Emphasis supplied)*

The Apex Court directs the petitioner to file an affidavit that there shall be no service of herbal hookah, any other type of hookah and no smoking activity in the schedule premises and, therefore, the restaurant was permitted to function on reopening.

26. It is now germane in the journey to consider the judgments relied on by the respective learned senior counsel and the counsel for the petitioners. All the learned senior counsel and the respective learned counsel, have in unison, places reliance upon the judgment of the Apex Court in the case ***NARINDER S. CHADHA V. MUNICIPAL CORPORATION OF GREATER MUMBAI***. The paragraphs so relied on are quoted *supra*. The very fact that the said judgment is rendered prior to the amendment to the Act makes it inapplicable to the fact situation. As observed

hereinabove, the amendment comes into effect in the year 2017. The judgment is rendered in the year 2014. Therefore, it is not a case where the State has transgressed its jurisdiction in imposing a ban. The State has, in fact, implemented the Act. Narration of other enactments in the impugned notification would not mean that the impugned notification itself is bad in law. The petitioners in all these cases are admittedly selling hookah, be it herbal or tobacco made. The learned counsel for the petitioners and the State have relied on several judgments in support of the solitary contention that the State has no power to issue the impugned notification, in the teeth of the Act and the Rules made under the Central legislation/s. The sheet anchor of all the petitioners, as observed hereinabove, is the judgment rendered by the Apex Court in ***NARINDER S.CHADHA*** *supra*. That is considered and held to be inapplicable to the present fact situation. Consideration of all the other judgments, on the same issue, would only lead to the bulk of the present order, as all of them are on the same principle, as considered in ***NARINDER S.CHADHA***.

27. After issuance of the impugned notification, the State has notified a Bill. The objects and reasons of the Bill are as follows:

"STATEMENT OF OBJECTS AND REASONS

It is considered necessary to amend the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (Central Act 34 of 2003) in its application to the State of Karnataka to,-

(a) prohibit the use of tobacco products in public place;

(b) prohibit to open or run hookah bar in eating house or restaurant;

(c) prohibit sale of cigarettes and other tobacco products to a person below the age of twenty one years and in a particular area; and

certain other consequential amendments are also made.

Hence, the Bill."

The contents of the Bill are as follows:

"KARNATAKA LEGISLATIVE ASSEMBLY
SIXTEENTH LEGISLATIVE ASSEMBLY
THIRD SESSION

THE CIGARETTES AND OTHER TOBACCO PRODUCTS (PROHIBITION OF ADVERTISEMENT AND REGULA-TION OF TRADE AND COMMERCE, PRODUCTION, SUPPLY AND DISTRIBUTION) (KARNATAKA AMEND-MENT) BILL, 2004.
(L.A.Bill Nol.16 of 2024)

A Bill to amend the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003

(Central Act 34 of 2003) in its application to the State of Karnataka.

Whereas, it is expedient to amend the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (Central Act 34 of 2003) in its application to the State of Karnataka for the purposes hereinafter appearing.

Be it enacted by the Karnataka State legislature in the seventh fifty year of the Republic of India as follows:

*1**. Short title and commencement.**- (1) This Act may be called the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) (Karnataka Amendment) Act, 2004.*

(2) It shall come into force on such date as the State Government may, by notification in the official Gazette, appoint.

***2. Substitution of Section 4**.- For section 4 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (Central Act 34 of 2003)(hereinafter referred to as the Principal Act), the following shall be substituted, namely:-*

*"**4. Prohibition of use of tobacco products in public place.**- No person shall use tobacco products in any public place.*

***Explanation:** For the purpose of this section, "use" means and includes smoking and spitting of tobacco.*

Provided that, in a hotel having thirty rooms or a restaurant having seating capacity of thirty persons or more and in airports, a separate provision for smoking area or space shall be made.

***4A. Prohibition to open or run hookah bar**, - No person shall either on his own or on behalf of any other person shall open or un any hookah bar, in any place including the*

eating house or pub or bar or restaurant by whatever name called.

Explanation: *For the purpose of this section, "hookah" bar means establishment or place where people gather to smoke tobacco from a communal hookah or narghile, which is provided individually."*

3. Substitution of section 6*,- For section 6 of the Principal Act, the following shall be substituted, namely:-*

*"**6. Prohibition on sale of cigarettes or other tobacco products to a person below the age of twenty one year and in a particular area**.- No person shall sell, offer for sale or permit the sale of cigarettes or any other tobacco products, -*

(a) to any person who is under the age of twenty one years;
(b) in any area within a radius of one hundred meters of any educational institution; or
(c) loose or in single sticks."

4. Amendment to section 21.*- In section 21 of the Principal Act, in sub-section (1), for the words, "two hundred rupees", the words "one thousand rupees shall be substituted.*

5. Insertion of new section 21A.*- After section 21 of the Principal Act, the following shall be inserted, namely:-*

"21A. Punishment for running hookah bar*.- Whoever contravenes the provisions of Section 4A, shall be punishable with imprisonment for a term which shall not be less than one year but may extend to three years and with five which shall not be less than fifty thousand rupees but may extend up to one lakh rupees"*

6. Amendment of section 24*.- In section24 of the Principal Act, in sub-section (1), for the words, "two hundred rupees", the words "one thousand rupees" shall be substituted.*

7. Amendment of Section 28*. – In Section 28 of the Principal Act, in sub-section (1), for the words, "two hundred rupees", the words "one thousand rupees" shall be substituted."*

It is submitted across the bar that the Bill has been cleared by both the Houses and is on the table of the Governor for its assent. If the ban imposed in terms of the notification dated 07-02-2024 is read with the Bill that is tabled which is pending assent, would in no way be contrary to the Act and the Rules. The Rules are clearly in favour of the State to ban any service in a smoking area and what is now sought to be done is exactly the same. Therefore, I do not find any merit in any of the contentions so advanced by the learned senior counsel and the respective learned counsel for the petitioners, as the contentions of the learned Advocate General in defence of the notification are overwhelming and clearly outweigh the submissions so made by the petitioners.

A VIEW FROM THE OUTSIDE:

HAZARDS OF HOOKAH – IN PUBLIC DOMAIN:

28. It may not be inapt to make certain observations before parting with the cases. It is projected by the learned counsel for the petitioners in defence of restaurants that hookah is harmless.

Smoking of hookah is not like smoking cigarettes etcetera. This is contrary to various studies. Hookah is today a global phenomenon; all countries have now begun the task of analyzing the damage caused by hookah in comparison to that of cigarettes. Cigarettes are completely regulated all over the world. Hookah is let loose. The New York Poison Control Center, of the United State of America undertakes a study as to what happens in one hour of smoking hookah and the result is in public domain. The observations become germane to be noticed and they are as follows:

> "***Carbon Monoxide Poisoning Form Smoking Hookah***
>
> *The NYC Poison Control Center has been receiving reports of carbon monoxide poisoning from smoking hookah.*
>
> - ***Hookah pipes typically use burning charcoal, which releases carbon monoxide.***
> - ***Carbon monoxide, by itself, is a colorless and odorless gas.***
> - ***The risk of carbon monoxide poisoning can vary, based on the size and ventilation of the space where hookah is smoked, the amount of charcoal burning in that space and the amount of time spent in that space.***
>
> ***Common symptoms of mild carbon monoxide poisoning include headaches, sleepiness, fatigue, confusion and irritability. Dangerous symptoms of carbon monoxide poisoning include nausea, vomiting, irregular heartbeat and impaired vision or coordination.***
>
> - *If you have these symptoms after being around indoor hookah smoke, seek medical attention immediately.*

- ***At very high blood levels, carbon monoxide poisoning can result in seizures, brain damage or death.***

Health care providers should report possible cases of carbon monoxide poisoning associated with hookah use to the NYC Poison Control Center at 212-POISONS (212-764-7667).

Dangers of Hookah Smoke

A hookah, or water pipe, uses burning charcoal to heat shisha, a flavored blend of herbal substances. Tobacco is a popular and common ingredient in shisha, but some shisha is tobacco-free. No type of shisha – with or without tobacco – is a healthy alternative to cigarettes.

People smoking hookah and those around them are exposed to toxic chemicals in hookah smoke. These toxic chemicals come from two different sources; the charcoal that is burned to heat the shisha and the shisha itself. Many of these chemicals (PDF), such as carbon monoxide, tar and formaldehyde, are also found in cigarette smoke. When shisha contains tobacco, the smoke also contains nicotine, which is addictive. Water does not effectively filter out unhealthy chemicals from hookah smoke.

The chemicals in hookah smoke can increase your risk of –

- ***Heart attack***
- ***Decreased lung function***
- ***Respirator symptoms***
- ***Cancer***
- ***Premature death (for people with heart and lung disease)***

Unlike smoking cigarettes, smoking hookah can also cause carbon monoxide poisoning."

The dangers are noticed hereinabove. This is a study by the Department of Poison Control of the United States of America.

29. The World Health Organization has also conducted extensive study on the harmful effects of water-pipe smoking. Water-pipe smoking is hookah. The health effects of water-pipe smoking as found in the reports of World Health Organization are as follows:

> ***"Water-pipe tobacco smoking (shisha) is increasing globally, and is especially prevalent in the Eastern Mediterranean Region. Young people are particularly at risk. Smoking rates can reach 42% among boys and 31% among girls in this Region. This includes smoking shisha, which is more popular among young people than cigarettes.***
>
> ***Over the past 10 years, WHO has accumulated evidence on the increasing prevalence of shisha and its effects on health. This evidence is presented in the second edition of the WHO Study Group on Tobacco Products Regulation scientific advisory note on water-pipe tobacco smoking. The note provides a more thorough understanding of the health effects of water-pipe smoking for WHO, countries and research entities.***
>
> ***Health effects of water-pipe smoking***
>
> *Every* ***study to date has found that water-pipe tobacco smoke contains ample quantities of the toxicants known to cause diseases in cigarette smokers, including cancer, and that at least some of those toxicants are effectively absorbed by water-pipe user and are therefore present in their breath, blood and urine.*** *The evidence shows that water-pipe tobacco smoking is probably associated with oral, oesophageal and lung cancers and possibly with gastric and bladder cancers. There is also evidence of associations with*

respiratory disease, cardiovascular disease, periodontal disease, low birth weight, perennial rhinitis, male infertility, gastro-oesophageal reflux disease and impairment of mental health."

30. The learned counsel for the impleading applicants have produced enormous materials along with pictures to demonstrate that hookah which is permitted by this Court in plethora of orders is to be in a corner, designated corner/area, but are now being done in complete floors. Designated corner has become the entire floor. Pictures are produced of the restaurants, which are not disputed by the learned counsel for the petitioners. What is defended is that they are selling herbal hookah or no other service is rendered. To quote an illustration a brand called '**Aafreen**' is being sold as herbal hookah. It is titled **flavoured hookah molasses**. Different kinds of flavours are sold which are all **hookah molasses**. As observed hereinabove, molasses is a prohibited product and it is being freely sold. Hookah smoking has projected a health hazard which is equivalent to smoking 100 cigarettes. A complete puff of hookah taken in using a water-pipe is equivalent to 100 cigarettes. Herbal hookah, as observed hereinabove, is a storehouse of carbon monoxide which is poisonous. With all these being in public

domain, it is ununderstandable as to why the State had kept quiet all these days to leave these places to mushroom into hundreds. It is averred that there are about 800 hookah places/hookah bars in the State of Karnataka. Therefore, they have been completely unregulated till today.

31. The defence all over is that Hookah is less harmful than Cigarettes. The studies again are otherwise, that Hookah exposes users to nicotine, an addictive chemical. The study is still on, whether Hookah may also contain higher levels of arsenic, lead, nickel and 15 times more carbon monoxide than cigarettes. Hookah, at public places, is typically used in groups, with the same mouth piece being passed around. The risk of contacting contracting diseases like hepatitis, herpes is more. It is again a myth that smoking of hookah carries less risk of tobacco related diseases than smoking cigarettes. Hookah contains many of the common toxins as cigarettes. If cigarettes can cause lung cancer or respiratory illness, hookah is catching up to it, as hookah sessions allow smokers for prolonged amount of usage, therefore, they are exposed to high concentrations of toxins. It is a fact that a session

of hookah is more harmful than a pack of cigarettes. Hookah sessions are said to be typically around an hour in length, which is an estimated 200 puffs per session. If it is 200 puffs per session, it is equivalent to 100 cigarettes, in any of these sessions. Hookah, is, as addictive as a cigarette; as harmful as a cigarette; has the same chemicals as a cigarette. Every packet of cigarette must contain a warning that it is injurious to health; every bottle of alcohol would contain a warning that it is injurious to health, but Hookah does not. Therefore, the action of the State is in strict consonance with Article 47 of the Constitution of India, apart from it being completely tenable in law.

32. Finding no merit in the petitions, the petitions stand rejected.

Consequently, pending applications, if any, also stand disposed.

This Court places its appreciation for the able assistance rendered by Ms. Sonia Singh R, Law Clerk cum Research Assistant and Ms. Sai Suvedhya R., Law Intern attached to this Court.

Sd/-
JUDGE

bkp
CT:MJ