

2023 C L C 744

[Islamabad]

Before Mohsin Akhtar Kayani, J

YASSA KHAN----Petitioner

Versus

FEDERATION OF PAKISTAN through Secretary Ministry of National Health Services Regulation and Coordination and another----Respondents

Writ Petition No.4242 of 2021, decided on 21st October, 2022.

(a) Prohibition of Smoking and Protection of Non-Smokers Health Ordinance (LXXIV of 2002)---

---Ss.2(c), 5 & 17---Prohibition of smoking and others tobacco use---"Place of public work or use"---Power to make rules---Scope---Smoking gadgets, sheesha or any other instruments are completely banned in places of public work or use as explained in S. 2(c) of the Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002---Smoking tobacco in any form whether in the form of cigarette, cigar or otherwise is also not permitted at public places--Any person who contravenes is liable for penalties in terms of S. 11 of the Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002---Any authorized officer or a police officer not below the rank of Sub-Inspector may eject any person from any place of public work or use who contravenes the provisions of the Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002---Answer to the question whether any such business of Sheesha or smoking gadgets pipes wrapper is permissible where an individual can use the specific space/place for the purposes of smoking can only be settled in terms of the powers contained in S. 17 of the Prohibition of Smoking and Protection of Non-Smokers Health Ordinance, 2002---High Court directed the Federal Government to notify the rules within six months---Chief Commissioner was directed to visit all those Sheesha bars and public places and stop the smoking activities in accordance with law till the rules were notified.

Olive Grill Restaurant v. Province of Punjab through Secretary Home Department PLD 2013 Lah. 689 rel.

(b) International law---

---International law unless in direct conflict with municipal law ought to be applied and respected by municipal courts in deciding matters arising therefrom.

Shehla Zia v. WAPDA PLD 1994 (SC) 693 ref.

Haji Lal Muhammad v. Federation of Pakistan through Secretary Ministry of Interior Division, Islamabad PLD 2014 Pesh. 199 rel.

Waheed-ur-Rehman Qureshi for Petitioner

Mian Muhammad Faisal Irfan, D.A.G., Usman Rasool Ghuman, A.A.G., Ms. Khadija Ali, State Counsel, Imran Feroz Malik and Muhammad Mohsin Ahmad, Counsel for Respondent No.3.

Majid Khan, A.D. (Legal), Ministry of NHSRC.

Date of hearing: 6th September, 2022.

JUDGMENT

MOHSIN AKHTAR KAYANI, J.---Through this writ petition, the petitioner has prayed for the following:

- i. To initiate immediate crackdown against the restaurants and cafes that serves flavored/non- flavored Sheesha (tobacco and tobacco free) and related substances, operating in Islamabad Capital Territory (particularly in Sector E-11) being in violation of national and International Law i.e. (Prohibition of smoking and protection of non-smokers health ordinance (2002), World Health Organization (WHO) treaty of

Framework Convention of Tobacco Control (FCTC) and orders passed by the Honorable Supreme Court of Pakistan.

- ii. To eject the violators from the premises and thereafter register criminal cases/lodge FIR against the manager and owner of Shop/restaurant/sheesha cafes in accordance with provisions of Prohibition of Smoking and Protection of Non-smokers Health Ordinance (2002).
- iii. To setup vigilance mechanism wherein a toll free helpline is designated who shall note the complaint and is authorized to take action upon such complaint.
- iv. Any other relief this Honorable Court deems fit and proper may also be granted.

2. The petitioner has filed the instant Writ Petition as pro bono publico being citizen of Pakistan and resident of Services Co-operative Society, E-11/2, Islamabad, pointing out illegal practices of sheesha centers in sector E-11 in particular in order to protect the rights of other citizens with reference to Prohibition of Smoking and Protection of Non-smokers Health Ordinance (2002).

3. The primary concern of the petitioner is with reference to different sheesha centers and restaurants which fall within the definition of places of public work or public use under the law, where smoking is prohibited in all senses, but despite the Prohibition of Smoking and Protection of Non-smokers Health Ordinance (2002), majority of the sheesha centers and restaurants owners permitted the use of sheesha Within the public place. The respondent No.2 / Chief Commissioner, Islamabad, is bound to initiate actions for compliance of law including the ejection of violators from the premises, register criminal cases and take all appropriate actions in accordance with the Ordinance (ibid).

4. This court has issued notices to the District Administration, whereupon, a report has been submitted containing actions against sheesha/tobacco related matters which reflects that 62 raids were conducted in I.C.T at different areas; 31 sheesha cafes were sealed, 58 individuals were arrested, 37 were convicted and Rs.1,09,000/- has been imposed as fine. Besides the above referred actions a private respondent Iftikhar Saeed also became party in this case as respondent No.3, representing the sheesha bars business owners, who came up with the argument that no specific legislation is available in Pakistan regarding prohibition, consumption, purchase and sale of sheesha at any place. In absence of such law prohibition cannot be placed but with in accordance with law. Respondent No.3 has also argued his case on the ground of Article 18 of the Constitution of Islamic Republic of Pakistan, 1973, where, every citizen has a right to enter upon any lawful profession or occupation and to conduct any lawful trade of business. He even pointed out that District Administration issued NOCs' to Cafes' to designate. separate places as smoking areas to allow any customer to smoke within the prescribed area under the law.

5. While going through the pro and contra arguments of the parties this Court is of the view that promulgation of the Prohibition of Smoking and Protection of Non-smokers Health Ordinance (2002), notified on 15th of October 2002, with reference to tobacco use in place of public work or used in public service vehicles, is with reference to protect the rights of non-smokers. The very basis of this law is to redress the concerns relating to tobacco use which is a serious threat to health of people and environment. The enforcement date of the said law has been notified by the Federal Government in the official gazette as 20th June 2003, whereafter, the Federal Government is under obligation to notify in official gazette and to declare any place, public work or used to be no smoking and no-tobacco use place under this Ordinance. On the other hand Section 5 of the ordinance places, an embargo upon any person to smoke or use tobacco in any other form in any place of public work or use. The Federal Government may, however, issue guidelines for permitting designated smoking areas in premises or places where no adequate arrangements are made to protect the health of non-smokers, though at this stage the state has not yet notified any designated smoking areas to permit smokers to use tobacco in a public place, even the Federal Government has not yet notified any rules under this law in terms of section 17 of the Ordinance. This Court has also been guided with the WHO Framework Convention on Tobacco Control, hereinafter, referred as WHO (FCTC),

which is the first evidence based treaty that reaffirms the right of all people to the highest standard of health. WHO Framework provided in this convention is focused in developing regulating strategies to address the addictive substances; in contrast with previous drug control treaties.

6. The primary feature under the said convention is to give priority to the right to protect public health and to recognize the spread of tobacco epidemic with a global problem with serious consequences for public health. In terms of Article 4 of the convention every person should be informed of health consequences, addictive nature and mortal threat posed by tobacco consumption and exposure to tobacco smoke and effective legislative, executive, administrative or other measures should be contemplated at the appropriate government level to protect all individuals from exposure to tobacco smoke. Each party of this convention is under obligation to develop, implement periodically update and review comprehensive multi-sectoral national tobacco control strategies, plans and programs in accordance with convention and protocols. Article 8 of the convention confers a responsibility upon each party /state to adopt and implement in areas of existing national jurisdiction as determined by national law and actively promote at other jurisdictional levels the adoption and implementation of effective legislative, executive, administrative and / or other measures, providing for protection from exposure to tobacco smoke indoor workplaces, public transport, indoor public places and, as appropriate, other public places.

7. With reference to the convention initially, specifically designated places have been notified known as permissible smoking areas in different public places, bars, restaurants, hotels, airports with certain parameters, but later on such areas were also eliminated under best international practices in Finland. WHO framework under tobacco control provides guidelines for implementation in terms of Article 8 of the convention in order to achieve 100% smoke free environment. The primary principles are as under:

Principle 1:

Effective measures to provide protection from exposure to tobacco smoke, as envisioned by Article 8 of the WHO Framework Convention, require the total elimination of smoking and tobacco smoke in a particular space or environment in order to create a 100% smoke free environment. There is no safe level of exposure to tobacco smoke, and notions such as a threshold value for toxicity from second-hand smoke should be rejected, as they are contradicted by scientific evidence. Approaches other than 100% smoke free environments, including ventilation, air filtration and the use of designated smoking areas (whether with separate ventilation systems or not), have repeatedly been shown to be ineffective and there is conclusive evidence, scientific and otherwise, that engineering approaches do not protect against exposure to tobacco smokes.

Principle 2:

All people should be protected from exposure to tobacco smoke. All indoor workplaces and indoor public places should be smoke free.

Principle 3:

Legislation is necessary to protect people from exposure to tobacco smoke. Voluntary smoke free policies have repeatedly been shown to be ineffective and do not provide adequate protection. In order to be effective, legislation should be simple, clear and enforceable.

Principle 4:

Good planning and adequate resources are essential for successful implementation and enforcement of smoke free legislation.

Principle 5:

Civil society has a central role in building support for and ensuring compliance with smoke free measures, and should be included as an active partner in the process of developing, implementing and enforcing legislation.

Principle 6:

The implementation of smoke free legislation, its enforcement and its impact should all be monitored and evaluated. This should include monitoring and responding to tobacco industry activities that undermine the implementation and enforcement of the legislation, as specified in Article 20.4 of the WHO FCTC.

Principle 7:

The protection of people from exposure to tobacco smoke should be strengthened and expanded, if necessary; such action may include new or amended legislation, improved enforcement and other measures to reflect new scientific evidence and case-study experiences.

8. This court has confronted the parties to highlight these implementation strategies within Islamabad Capital Territory in terms of WHO framework referred above being the principle guidelines to achieve 100% smoke free environment, however, surprisingly, only the Prohibition of Smoking and Protection of Non-smokers Health Ordinance (2002) is referred in this regard, though, the said law provided penalties in a specific manner, ejection of violators from any place of public work or use have also been provided therein and specific powers have been extended to the magistrates to take action under this law. It is also observed that rule making authority has been vested to Federal Government in terms of section 17 of the Ordinance, but no rules have been framed so far as to how the smoke free environment could be achieved.

9. Respondent No.3, who has been impleaded as party representing the Cafe association of sector E-11, highlights that in terms of section 5 of the ordinance (ibid), Federal Government has the authority to issue guidelines for permitting designated smoking areas in premises or places where adequate arrangements are made to protect the health of non-smokers, however, till now no guidelines have been issued in this regard.

10. Now the question arises as to whether a smoking or any other form of smoking like sheesha is permitted in any public place? The answer to the proposition has been considered with reference to case law reported as PLD 2013 [Lahore] 689 (Olive Grill Restaurant v. Province of Punjab through Secretary Home Department), where similar question has already been taken up before the Lahore high court, where, the term open place with reference to section 2-C, has been explained as, any place that is open to sky but is cordoned in a manner to accommodate persons engaging in smoking within the close restricted area cannot be described as an "open place", therefore, in open place the present context must necessarily be a place where an individual exercises his preference of smoking individually and not collectively, consequently, to the extent that District Government is taking prohibitory action against enclosed places open to the sky situated within the sheesha cafes is concerned, such action is lawful within the meaning of section 3 read with section 2(C) of the Ordinance. Counsel for respondent No.3 contends that beside the above referred interpretation by the Lahore High Court, the District Administration allowed the sheesha cafes to run their business in terms of Article 18 read with Article 4 of the Constitution of Islamic Republic of Pakistan, 1973, where equal protection including treatment in accordance with law is the inalienable right of every citizen and everyone is allowed to enjoy the freedom of trade and business of any profession subject to regulations if framed. No doubt, the international guidelines are the key features to be referred in such type of scenario, where there is no denial that Pakistan is signatory to WHO convention on tobacco control, pursuant thereto, the ordinance has been promulgated. We have also been guided with the principles set out in PLD 1994 [SC] 693 (Shehla Zia v. WAPDA) case, where right to life has been explained with reference to word "lift" in terms of Article 9 of the Constitution and has been given wide meaning and observed that it should not be restricted to ordinary sense rather it includes the quality of life nor the concept of life could be considered restricted to vegetative or animal life or mere existence from conception to death, rather life includes all such amenities and facilities, which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally.

11. While considering the extended meaning of life in Shehla Zia case supra, question

arises, whether we can apply it in the context of international law, including the guidelines referred above? The answer to the proposition in this respect has to be seen in the light of PLD 2014 [Peshawar] 199 (Haji Lal Muhammad v. Federation of Pakistan through Secretary Ministry of Interior Division, Islamabad), where it was settled that international law unless in direct conflict with municipal law ought to be applied and respected by municipal courts in deciding matters arising therefrom.

12. In view of above standard set out in WHO framework as well as under Prohibition of Smoking and Protection of Non-smokers Health Ordinance (2002) read with S.R.O No.652(I)/2003 dated 30.06.2003, S.R.O No.655(I)/2003, S.R.O No.277(I)/2011 dated 29.03.2011, there is no denial to the understanding that smoking gadgets or Sheesha as the case may be or any other instruments are completely banned on places of public work or use as explained in Section 2 of the ordinance (ibid) that all kinds of smoking tobacco in any form whether in the form of cigarette, cigar or otherwise and smoking is also not permitted to be used in public places and Federal Government may by notification in the official Gazette, make rules for carrying out the purpose of this Ordinance. Any person, who contravene is liable for penalties in terms of Section 11 of the Ordinance. Any authorized officer or a police officer not below the rank of Sub-Inspector may eject any person from any place of public work or use who contravenes the provisions of this Ordinance. However, the only question left is as to whether any such business of Sheesha or smoking gadgets pipes wrapper is permissible where an individual can use the specific space/place for the purposes of smoking; the answer could only be settled in terms of the powers contained in Section 17 of the Ordinance, where scope of Section 5 could be elaborated by the Federal Government in terms of the guidelines for permitting designated smoking areas in premises or places where adequate arrangements are made to protect the health of non-smokers, hence, Federal Government through Secretary, National Health Services Regulations and Coordination shall notify those rules within period of six (06) months and the Chief Commissioner, Islamabad Capital Territory shall also visit all those Sheesha bars and public places and stop the smoking activities/Sheesha bars in accordance with law till the time Federal Government notifies the designated areas in terms of Section 5 of their rules.

13. In such eventuality the persons, who are running such businesses relating to Tobacco may obtain NOC if any, settled by the Federal Government in their rules to run and manage the affairs of businesses accordingly.

14. The instant writ petition stands DISPOSED OF in the above terms.

SA/229/Isl.

Order accordingly.