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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 3rd December, 2012**

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+ **W.P.(C) 4579/2012 & CM No.9509/2012**

**WORLD LUNG FOUNDATION-SOUTH ASIA
THROUGH ITS PRESIDENT**

..... Petitioner

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Through: Mr. Santosh Kumar, Mr. Rajiv
Ranjan Mishra and Mr. Saurabh,
Advocates.

Versus

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**NEW DELHI MUNICIPAL COUNCIL
THROUGH ITS CHAIRPERSON & ORS.**

..... Respondents

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Through: Mr. Anil Amrit and Mr. Rohit
Dhingra, Advocates for R-1 NDMC.
Mr. Jagdish Sagar, Advocate for R-2
to 4.
Mr. Rajeeve Mehra, ASG with Mr.
Himanshu Bajaj, Mr. Ashish Virmani
and Mr. Kunal Kahol, Advocates for
R-6 UOI.
Mr. Nazmi Waziri, Advocate for R-7
& 8.
Mr. Lalit Bhasin with Mr. Sanjay
Gupta, Ms. Shikha Sachdeva and Mr.
Ranjan Jha, Advocates for R-9/NRAI.

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CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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JUSTICE RAJIV SAHAI ENDLAW, J.

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1. This petition filed in public interest flags the aspect of non-
implementation of the provisions of Cigarettes and Other Tobacco Products

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(Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) and the Rules framed thereunder including the Prohibition of Smoking in Public Places Rules, 2008 (Smoke Free Rules). The particular grievance is that Eating Houses which have been granted licenses, also run Hookah Bars in violation of the COTPA and the Smoke Free Rules. The petition seeks a mandamus to the respondents No.1 to 5 Municipal Council/Corporation of Delhi to incorporate in the licenses granted to the said Eating Houses, a condition to comply with the COTPA and the Smoke Free Rules and a further direction for cancellation of the said licenses for violation of COTPA and Smoke Free Rules. Similar directions are also sought against respondent No.6 Ministry of Health and Family Welfare (Department of Health), Government of India, respondent No.7 Government of National Capital Territory of Delhi (GNCTD) and respondent No.8 Delhi Police. Action with respect to the Hookah Parlours and Hookah Bars in particular is sought.

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2. Notice of the petition was issued. The National Restaurant Association of India (NRAI) applied for impleadment, which was allowed. Counter affidavits have been filed by the respondent No.1 New Delhi Municipal Council (NDMC), respondent No.2 North Delhi Municipal

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Corporation and respondent No.3 South Delhi Municipal Corporation,
respondent No.7 GNCTD, respondent No.8 Delhi Police and by respondent
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No.9 NRAI to which rejoinders have been filed by the petitioner.

3. The respondent No.1 NDMC in its counter affidavit has pleaded that
vide Circular dated 20th July, 2012 of the office of the Medical Officer of
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Health, all officials have been directed to implement the COTPA and to
impose and collect fines for violation thereof; that though NDMC is not
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incorporating the statutory provisions of the COTPA and Smoke Free Rules
in the terms and conditions of the licenses issued to Food Joints but NDMC
takes legal action for violation of the said Rules. It is also pleaded that there
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are no Hookah Bars operating in NDMC's jurisdiction and no license to run
any such Hookah Bar has been given in the said area.

4. The North Delhi Municipal Corporation and the South Delhi
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Municipal Corporation in their joint counter affidavit have pleaded that by
virtue of Item 3 in Schedule 3 of Rule 5 of the Smoke Free Rules, all
gazetted officers of the said municipalities are empowered to enforce
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Section 4 of the COTPA; that the Medical Health Officers of the said
Municipalities are also empowered to enforce the said provisions under Item
10 of the said Schedule; that the said Municipalities have also not, while
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granting licenses to Eating Houses, specifically permitted operation of
Hookah Bars therein and the same if being operated are outside the scope of
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the license and appropriate action against such establishments shall be
taken.

5. The GNCTD and the Delhi Police in their counter affidavit have
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pleaded that the Licensing Unit of the Delhi Police issues / renews
Certificates of Registration under the provisions of the Delhi Eating Houses
Registration Regulations, 1980 and on the strength of Health Trade Licenses
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issued by the Municipalities; that no permission has been granted to any
Eating House to operate Hookah Bars / Lounges; that however noticing the
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alarming trend of increasing popularity of Hookah Bars / Lounges, a
clarification was sought from the State Tobacco Control Cell and which has
clarified that Hookah / Shisha Bars and Restaurants are public places within
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the ambit of Section 4 of the COTPA and Section 5 of the Delhi Prohibition
of Smoking and Non-Smokers Health Protection Act, 1996, and that
smoking is completely banned in public premises and therefore Hookah
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Bars are violating the said laws. It was further clarified that Hookah is
covered under Schedule Tobacco Products mentioned under Section 3(p) of
the COTPA. The GNCTD and Delhi Police in their counter affidavit have
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re-assured that all Deputy Commissioners of Police of various districts in
Delhi have been instructed to implement the said laws in all strictness.

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6. NRAI in its counter affidavit has pleaded that its members are
primarily serving herbal/flavoured hookahs which contain no
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nicotine/tobacco and since these hookahs contain no nicotine/tobacco, the
same are not governed by the provisions of the COTPA and can be served in
any part of the Eating House. It is further pleaded that the herbal/flavoured
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hookahs come in different fruit flavours and mint flavour. It is asserted that
a restaurant/hotel owner can legally and legitimately provide service of
hookah smoking (tobacco free, nicotine free and tar free) to its customers in
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the main restaurant and such customers cannot be made to go to the
segregated area for the reason that they are not indulging in smoking of any
tobacco product. It is yet further pleaded that tobacco free hookah uses
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herbal ingredients which are harmless. It is yet further pleaded that storage,
sale, distribution and consumption of tobacco and tobacco products, is not a
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licensable trade under any provision of the Municipal Laws and hence the
Municipalities have no power to issue any condition with respect to the
same. It is also their plea that the COTPA and the Rules framed thereunder,
being central legislation, the Municipalities do not have any jurisdiction to
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issue any condition with respect to the same, as is sought in the present petition. Certain other pleas are also taken in the said counter affidavit but which are not relevant for the present purposes.

7. NRAI has also filed an additional affidavit *inter alia* pleading that the Licensing Department of the Delhi Police, have vide Notification dated 28th September, 2012, included conditions of compliance of provisions of the COTPA therein, and have vide yet further Notification dated 25th October, 2012, prohibited serving of hookahs / shishas to the customers of the Restaurants. NRAI of course in the said affidavit has pleaded the said action of the Delhi Police to be bad and beyond their powers. We may however notice that no challenge to the said Notifications is made by any party in this petition. We are thus not concerned with the validity thereof.

8. We have heard the counsels for the parties.

9. The counsel for the petitioner has during the hearing handed over a compilation of the judgments / orders of various High Courts, stated to be relevant for the present purposes. Particular, reliance is placed on the judgment dated 13th July, 2011 of the Division Bench of the Bombay High Court in Public Interest Litigation (L) No.111 of 2010 titled ***Crusade Against Tobacco (A Branch of the Nell Charitable Trust) Vs. Union of***

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India, wherein the Mumbai Municipal Corporation was directed to incorporate necessary terms and conditions in the license of Eating House including in existing licenses, requiring the licensees to comply with the COTPA and the Rules framed thereunder and providing for cancellation / suspension of the license for breach of the said condition. The challenge by some of the licensees, to the conditions so incorporated by the Mumbai Municipal Corporation, was negated *inter alia* observing that while interpreting the provisions of the COTPA and the Rules framed thereunder, regard must be given to Article 47 of the Constitution of India and to the fact that the same were enacted with the expressly stated objective of improving public health and in accordance with the resolutions passed by the World Health Organization (WHO) and further expressed a view that Municipalities of other regions of the State should also incorporate similar conditions.

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10. The counsel for the petitioner, to meet the plea of the NRAI of the hookahs served being tobacco / nicotine free, has contended that the said hookahs also burn charcoal which, under the Municipal Laws, cannot be stored. He has further contended that even burning of such charcoal is harmful. It is yet further contended that under the garb of non-tobacco /

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nicotine hookahs and by disguising it with flavours, the COTPA and the
Rules framed thereunder, are being violated. It is yet further contended that
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common use of hookah by more than one person as in vogue in the Hookah
Bars / Lounges, is itself detrimental to health, enabling spread of contagious
diseases through saliva.

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11. Counsel for the North Delhi Municipal Corporation and the South
Delhi Municipal Corporation, has contended that such hookahs are not
within the scope of license issued by the said Municipalities, which pertain
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only to food and drinks. It is rather contended that providing/serving
hookahs for smoking is not even covered in the definition of a 'Restaurant'.
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He has further contended that the smoking areas in public places are meant
for the patrons / customers smoking their own tobacco products and the
license does not permit the restaurant / hotel to supply equipment for
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smoking i.e. hookahs to their customers / patrons.

12. Counsel for NRAI has contended that the hookahs provided by its
members to their patrons / customers, are non-nicotine / tobacco hookahs
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and which are not barred under COTPA or the Rules framed thereunder and
its members are being harassed for no reason. It is yet further contended that
in accordance with Rules, exclusive area for smoking is provided, wherever
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required.

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13. We are of the opinion that the relief now pressed by the petitioner, of
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banning of non-nicotine / tobacco hookahs also, for the reason that under the
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garb thereof COTPA and the Rules framed thereunder are being violated, is
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not only beyond the pleadings in this petition but also not capable of
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adjudication in these proceedings. It is for the appropriate authorities, upon
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detecting individual violations, to adjudicate whether the COTPA and the
Rules framed thereunder, are being violated or not. Similarly, the reasons
given of harmful effect of burning of charcoal or of other dangers from the
use of hookahs i.e. of spreading contagious diseases, are also beyond the
scope of this petition which is concerned only as aforesaid with enforcement
of the COTPA and the Rules framed thereunder. The counsel for the
petitioner in spite of our asking, has been unable to show any provision of
the COTPA or the Rules framed thereunder, banning charcoal or charcoal
products or use of non-tobacco / nicotine hookahs for the reason of the same
being capable of spreading contagious diseases. Suffice it is to observe that
if the petitioner has any independent right in this regard, it shall be entitled
to pursue the same, as this petition is not concerned with the said aspect.

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14. After some hearing, the counsel for the Municipalities as well as the

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counsel for the NRAI state that the petition for the reliefs claimed be
allowed. It is the case of NRAI that its members are not violating the
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provisions of the COTPA or the Rules framed thereunder and if any
violation is found, the same be proceeded against in accordance with law. It
is further his contention that for the same reason, the NRAI has no objection
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if the conditions for complying with the COTPA and the Rules framed
thereunder are incorporated in the license issued to its members including
the existing licenses and if it is also made a condition of the license that
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violation shall entail cancellation of the license.

15. The Delhi Police as aforesaid have already incorporated the said
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conditions in the licenses issued by it. The counsels for the Municipalities
also state that they have no objection to incorporating such conditions in the
licenses issued by them to such Eating Houses, Food Joints, Restaurants,
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and Hotels etc.

16. We accordingly allow this writ petition and:

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(i) direct the New Delhi Municipal Council, the North Delhi
Municipal Corporation, the South Delhi Municipal Corporation, the
East Delhi Municipal Corporation and any other Municipality having
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jurisdiction in Delhi to incorporate in the licenses issued by it to

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Hotels, Restaurants, Eating Houses and Food Joints etc., a condition
b requiring such licensees to comply with the provisions of the COTPA
and the Rules framed thereunder and with a further condition that
c breach thereof shall entail cancellation of the license. The Delhi
Police which though had incorporated such conditions as aforesaid, to
continue to incorporate the same;

(ii) the aforesaid shall apply to the future licenses issued as well as
d to the existing licenses and also to the renewal of the licenses;

(iii) we further direct the Municipalities as well as the Delhi Police
e to, upon finding any violation by any of the Hotels, Restaurants,
Eating Houses and Food Joints of the provisions of the COTPA or the
Rules framed thereunder, immediately in accordance with law, cancel
f the license and take such other steps as may be necessary / required in
law.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

DECEMBER 03, 2012

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a *This print replica of the raw text of the judgment is as appearing on court website (authoritative source)*

Publisher has only added the Page para for convenience in referencing.

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