

No smoking

IN THE COURT OF THE ADDL. CHIEF METROPOLITAN MAGISTRATE.

17TH MORNING COURT, BORIVALI, MUMBAI.

C.C.NO.15036 H 11.

The State (at the instance  
of Dindoshi Police Station)

...Complainant.

V/s.

Umeshkumar Banarasi Paswan

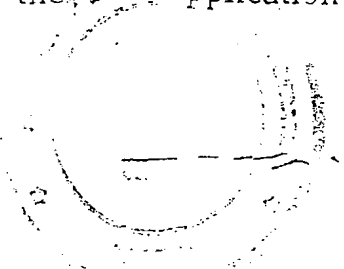
...Accused.

ORDER BELOW APPLICATION FOR DISCHARGE OF ACCUSED

DTD.10.08.2011

PSO of Dindoshi Police Station had filed this report (Ishtagasha) under Local Act Case No.1595 of 2011 alleging about the incident dated 09.08.2011 at Laxmi Bar and Refreshment, Malad (E.), Mumbai. The accused person being Manager of the said hotel allowed smoking in public place in contravention of Hotel license Rule 22-51 r.w. 33(1)(wa) and which amounts to indecent behaviour in public, therefore, this N.C. complaint is filed against the accused. After the arrest of the accused, he was released on bail of Rs.5000/- Thereafter, accused was produced before the Court. He pleaded not guilty for the offence. He was released on cash bail of Rs.5000/- Thereafter, the application is filed on record by accused for claiming discharge, as no offence is made out against the accused u/s. 221, Rule 1 r.w. Sec.33(1)(w)(a) of the Bombay Police Act.

2. After filing of this application, say of the Ld. A.P.P. is obtained. The Ld. A.P.P. objected the said application and replied that the application is not tenable.



3. I have perused the allegations made by Dindoshi Police against the accused. It is invariably found that during the raid or inspection of the hotel during the night patrolling hours, the similar nature of the cases are appearing in which the police charges the owner of the hotel or manager for the contravention of Hotel License Rules of 129 alleging that they have allowed the customer to smoke in public place and committed breach of license rules.

4. The person who actually smokes is also similarly need to be made an accused. He never turns up to the Court. Here, in similar type of the case, when N.C. complaint is placed before the Court for cognizance, it is duty of the Court to go through the allegation and verify whether it amounts to an offence and contravention of existing law which is in force in the territory of jurisdiction. Upon verification of the provisions of section 129, the allegations made that the owner/Manager allows customer to smoke in public place in his hotel, to my view, the said action of hotel manager or owner are disobedience of control over the activities of customers when they demand for smoking and found in public place actually smoking at one breach. The license is issued to run the hotel and required license is to be recovered. The customer service is a satisfaction of business. In existing law, the prohibition of smoking in public place Rules 2008 came in existence in consequences of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 if the provision of this act and circular issued by Government of Maharashtra is minutely seen, the relevant rules '5' is in respect of the authorized person for recovery of fine. Schedule III under Rule 5, the list of 1 to 21

establishments are given which are declared as public places. Section 29 of the said act prohibits a person from smoking in public place. The said offence is bailable and compoundable. Punishment is provided to the person who makes the contravention with fine which may be extended to two hundred rupees. Proviso (2) of the section allows to compound the said offence. It means that if the person is ready to pay a fine of Rs.200/- accepting the guilt, he need not to be placed for the prosecution by the authority who entitled to compound the said offence under the said act. Considering the provisions of section 29 r.w. rule 5 together the new legislation came in existence under General Clauses Act, the person who make the contravention of the offence cannot be punished twice for the same act. Every citizen has to obey the intention of the legislation which is for welfare and health of the society and the report of the World Health Organization is that even the passive smoker may suffer hazardous health problem due to smoking by an active smoker and as such general health of public is to be protected and this enactment came in existence with a view regarding the liability of the hotel owners to make the provision for smoking chambers in the hotel. If the establishment is more than 30 tables in the premises is available, they have to seek permission from the police for running the hotel business license and for the construction of BMC for smoking chambers in the hotel premises. This aspect is under consideration of Hon'ble High Court by challenging the said notification of 2008. It appears that there is no straight order or enforcement is still in existence.

5. To my view, the attempt made by investigation officer in the vicinity to charge the hotel owner or Manager allowing customer to smoke

In the hotel premises is seriously questioned whether the criminal liability can be imposed against them. In order to make the contravention of licen. rules, the matter should be placed before licensing authority for making necessary punishment or directions. Coming to the issue, to my view, the allegation made by the police against the hotel owner or manager for contravention of hotel license rule 129 punishable with 116 r/w. 117 is improper. Person who actually smokes can be brought under prosecution in view of section 21 Rule 4 of the said Act and as such there is no prima-facie case is made out to continue with the trial against the accused. It appears from the provision for the order of discharge as there is no charge can be framed in hawkers cases, the said responsibility is on recording plea in the format provided under provision of section 257 of Criminal Procedure Code But if the unwarranted prosecution at any stage u/s. 258 of Cr.P.C., the Court is empowered to stop the proceeding. Hence, I am inclined to stop the proceeding u/s. 258 of Cr.P.C. as no purpose can be served by launching prosecution under the contravention of section 22-51 r/w. 116 r/w. 117 of Bombay Police Act when special legislation is enacted for the said act. Hence, I proceed to pass the following order-

ORDER

Gas paid on: } 28/9/11  
 by on: } 28/9/11  
 rered on: }

Accused is hereby discharged and released u/s. 258 of Cr.P.C.

The cash bail deposited by the accused be refunded.

Prosecution is entitled to launch fresh proceeding under the said new enactment within the limitation.

Proceeding is closed.

  
 (A.P.BHAVTHANKAR)

Addl. Chief Metropolitan Magistrate,  
 17th Morning Court, Borivali, Mumbai.

Mumbai.  
 Dt: 15.09.2011.

**TRUE COPY**

