

MUNICIPAL CORPORATION OF GREATER MUMBAI
PUBLIC HEALTH DEPARTMENT

NO: HO/14432/C Dtd: 4-7-2011

CIRCULAR

Sub: Incorporation of condition nos 35 to 37 in General Conditions of Licence issued u/s 394 of MMC Act.

In Public Interest Litigation (LOD) no. 111 of 2010 filed by the NGO "Crusade Against Tobacco", Hon'ble High Court, Mumbai by order dtd 5/5/2011 has observed that the Hukkah Parlors are being run at places which are granted licences as Eating Houses, however the terms & conditions of License for do not provide, as a part of the, for stringent compliance with the provisions of "Cigarette and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production Supply and Distribution) Act, 2003" and the rules made therein.

Hence, Hon'ble High Court, Mumbai has directed Municipal Commissioner to incorporate stringent terms and conditions in the Eating House licenses issued u/s 394 of MMC Act. In view of the same, AMC (WS) has accorded the approval under No. AMC/WS/H/5047 dt. 1.7.2011 to incorporate new conditions no 35 to 37 in General Conditions of Licenses. These conditions shall be deemed to be incorporated in all the Eating House Licenses, including the existing Licenses issued u/s 394 of MMC Act.

The conditions under no. 35 to 37 in General conditions of licence u/s 394 of MMC Act reads as under:-

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

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

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

- i. is physically separated and surrounded by full height walls on all four sides;
 - ii. has an entrance with an automatically closing doors normally kept in close position;
 - iii. has an air flow system that
 - a. is exhausted directly to the outside and not mixed back into the supply air for the other parts of the building;
 - b. is fitted with a non-recirculation exhaust ventilation system or an air cleaning system, or by a combination of the two, to ensure that the air discharges only in a manner that does not re-circulate or transfer it from a smoking area or space to non-smoking areas.
 - iv. has negative air pressure in comparison with the remainder of the building.
- B) The Smoking area shall not be established at the Entrance or Exit of the eating house and shall be distinctively marked as "Smoking Area" in English & in Marathi as per the COTPA.
- C) The Smoking area shall be used only for the purpose of smoking and no other service(s) or any apparatus designed to facilitate smoking shall be provided.
- D) The smoking area shall not be less than 100 sq.ft. with each side of the room shall not be less than 8 ft. and height of the room shall not be less than 9 ft. The smoking area shall be included in the licensed area of the eating house.
- E) The total area of the smoking room shall not be more than 30% of the total licensed service area of the eating house.

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

Condition No. 37 - The owner, proprietor, manager, supervisor in charge of the eating house shall notify and caused to be displayed prominently the name of the person(s) to

whom a complaint may be made by a person(s) who observes any person violating the provisions of COTPA.

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

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

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

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

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

The above instructions should be followed scrupulously. Zonal AHOs, DEHOs, and Jt. E.H.O. shall exercise close supervision over this special drive.


Executive Health Officer (I/c)

NO: HO/14432/C of 4-7-2011

Copy submitted to AMC (WS) for information please.

Copy submitted to DMC (Z-I to Z-VII) for information please.

Copy to Asst. Commissioner – A to T wards for information please.

Copy to Supdt. of Licences for information & necessary instructions to his subordinate officer please.

Copy to MOsH – A to T wards for information & necessary action.

Copy to Jt. EHO, DEHOs, AHOs for information & necessary action.

Copy to DEHOs (SAP) for information & necessary action for SAP system.


Executive Health Officer i/c

Important Court order

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 rule '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 21 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 license 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

Costs paid on; } 281-3/11
 by on; - } oil 10/11
 varied 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.

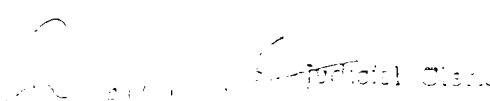

 (A.P. BHAVTHANKAR)

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

Mumbai.

Dt: 15.09.2011.

TRUE COPY


 Official Clerk.