

Kerala High Court

K. Ramakrishnan And Anr. vs State Of Kerala And Ors. on 12 July, 1999

Equivalent citations: AIR 1999 Ker 385

Author: N Kurup

Bench: A Lakshmanan, K N Kurup

JUDGMENT

Narayana Kurup, J.

1. This is an original petition highlighting the public health issue of the dangers of passive smoking and in which prayers are made to declare that smoking of tobacco in any form, whether in the form of cigarette, cigar, beedies or otherwise in public places is illegal, unconstitutional and violative of Article 21 of the Constitution of India; issue a writ in the nature of mandamus or such other writ commanding the respondents to take appropriate and immediate measures to prosecute and punish all persons guilty of smoking in public places treating the said act as satisfying the definition of 'public nuisance' as defined under Section 268 of the Indian Penal Code. We heard Mr. P. Deepak, counsel for the petitioners, the Advocate General for the State and counsel for other respondents.

2. In the writ petition originally there were only respondents 1 to 9 viz. State of Kerala, Director of Panchayat, Director General of Police, Commissioners of Police, Thiruvananthapuram, Kochi and Kozhikode and Commissioners of Thiruvananthapuram, Kochi and Kozhikode Municipal Corporations. During the pendency of the Original Petition this court suo motu impleaded additional respondents 10 to 52 on whom service is complete.

3. Before proceeding to discuss the legal issues arising in this original petition, we feel that it is useful to refer to certain facts and figures of startling revelations which has a direct bearing on the dangers of smoking, active and passive, and its horrifying impact on public health.

#### ON SMOKING GENERALLY

4. One million Indians die every year from tobacco-related diseases. This is more than the number of deaths due to motor accidents, AIDS, alcohol and drug abuse put together, say the Indian Medical Association (IMA) and the Indian Academy of Paediatrics (IAP), quoting studies.

5. Cigarette smoking is the major preventable cause of death in America, contributing to an estimated 350000 deaths annually. Epidemiologic and experimental evidence has identified cigarette smoking as the primary cause of lung cancer and chronic obstructive pulmonary diseases (COPD) and as a major risk factor for coronary heart disease. Smoking has been associated with other cancers, cerebrovascular and peripheral vascular diseases, and peptic ulcer disease. Smokers also suffer more acute respiratory illness. Cigarette smoke, consisting of particles dispersed in a gas phase, is a complex mixture of thousands of compounds produced by the incomplete combustion of the tobacco leaf. Smoke constituents strongly implicated in causing disease are nicotine and tar in the particulate phase and carbon monoxide in the gas phase. Smokers have a 70 per cent higher mortality rate than non smokers. The risk of dying increases with the amount and duration of smoking and is higher in smokers who inhale. Coronary heart disease is the chief contributor to the excess mortality among cigarette smokers, followed by lung cancer and chronic obstructive pulmonary disease (COPD). Life expectancy is significantly shortened by smoking cigarettes. Tobacco smoke also gets dissolved in the saliva and is swallowed, exposing the upper gastrointestinal tract to carcinogens. A strong association between smoking and lung cancer has been demonstrated in multiple prospective and retrospective epidemiologic studies, and corroborated by autopsy evidence. Lung cancer has been the leading cause of cancer death in men since the 1950s, and it surpassed breast cancer as a leading cause of cancer death in women in 1985. Male smokers have a tenfold higher risk of developing lung cancer, and the risk increases with the number of cigarettes smoked. There is also strong evidence that smoking is a major cause of cancers

of the larynx, oral cavity anoesophagus. The risk of these cancers increases with the intensity of exposure to cigarette smoke either active or passive. Epidemiologic studies show an association between smoking and cancers of the bladder, pancreas stomach, and u terine cervix.

6. Cigarette smoking is a major independent risk factor for coronary artery disease. Retrospective and prospective epidemiologic studies have demonstrated a strong relationship between smoking and coronary morbidity and mortality in both men and women. The coronary disease death rate in smokers is 70% higher than in nonsmokers, and the risk increases with the amount of cigarette exposure. The risk of sudden death is two to four times higher in smokers. Smoking is also a risk factor for cardiac arrest and severe malignant arrhythmias. In addition to increased coronary mortality, smokers have a higher risk of non fatal myocardial infraction or unstable angina. Patients with angina lower their exercise tolerance if they smoke. Women who smoke and use oral contraceptives or pot-menopausal estrogen replacement greatly increase their risk of myocardial infarction.

7. Autopsy studies demonstrate more atheromatous changes in smokers than nonsmokers. Carbon monoxide in cigarette smoke decreases oxygen delivery to endothelial tissues. In addition, smoking may trigger acute ischemia. Carbon monoxide decreases myocardial oxygen supply, while nicotine increases myocardial demand by releasing catecholamines that raise blood pressure, heart rate, and contractility. Carbon monoxide and nicotine also induce platelet aggregation that may cause occulision of narrowed vessels. Cigarette smoking is the most important risk factor for peripheral vascular disease. In patients with intermittent claudication, smoking lowers exercise tolerance and may shorten graft survival after vascular surgery. Smokers have more aortic atherosclerosis and an increased risk of dying from a ruptured aortic aneurysm. Smokers under the age of 65 have a higher risk of dying from cerebrovascular disease and women who smoke have a greater risk of subarachnoid haemorrhage, especially if they also use oral contraceptives.

#### Smoking and Pulmonary Disease :

8. Cigarette smoking is the primary cause of chronic bronchitis and emphysema. Smokers have a higher prevalence of respiratory symptoms than non smokers. Studies of pulmonary function indicate that impairment exists in asymptomatic as well as symptomatic smokers. Smokers have a higher risk of acute as well as chronic pulmonary disease. Inhaling cigarette smoke impairs pulmonary clearance mechanisms by paralyzing ciliary transport. This may explain the susceptibility to viral respiratory infections, including influenza. Smokers who develop acute respiratory infections have longer and more severe courses, with a more prolonged cough.

#### Other Health Consequences:

9. Smokers have a higher prevalence of peptic ulcer disease and a higher case fatality rate. Smoking has been associated with increased osteoporosis in men and post-menopausal women. Female smokers weigh less than non smokers and have an earlier age of menopause; both of these factors are associated with osteoporosis and may contribute to the relationship between smoking and osteoporosis. Moreover, smoking depresses serum estrogen levels in post-menopausal women taking estrogen replacement therapy.

#### ON PASSIVE SMOKING

#### Passive Smoking (Environmental Smoke Exposure) :

10. Nonsmokers involuntarily inhale the smoke of nearby smokers, a phenomenon known as passive smoking. Wives, children and friends of smokers are a highly risk-prone group. Inhalation of sidestream smoke by a non-smoker is definitely more harmful to him than to the actual smoker as he inhales more toxins. This is because sidestream smoke contains three times more nicotine, three times more tar and about 50 times more ammonia. Passive smoking (because of smoking by their fathers) could lead to severe complications in babies

aged below two. It is pointed out that in India hospital admission rates are 28 per cent higher among the children of smokers. These children have acute lower respiratory infection, decreased lung function, increased eczema and asthma and increased cot deaths. Also children of heavy smokers tend to be shorter.

11. Passive smoking is associated with an overall 23 per cent increase in risk of coronary heart disease (CHD) among men and women who had never smoked. The following data shows just how heavy is cigarette smoking's toll on non-smokers. A new "meta-analysis" of data from 14 studies involving 6,166 individuals with coronary heart disease (CHD) finds that passive smoking was associated with an overall 23 per cent increase in the risk of CHD among men and women who had never smoked. It is estimated that 35,000 to 40,000 non-smokers' deaths each year in the United States can be attributed to passive smoking. This underscores the need to eliminate passive smoking as an important strategy to reduce the societal burden of CHD. The United Nations health agency insisted that passive smoking caused lung cancer and that an environmental tobacco smoke poses a positive health hazard. Research on the subject has found an estimated 16 per cent increase in the risk of developing lung cancer among nonsmoking spouses of smokers and an estimated 17 per cent rise in risk for work place exposure. The public is left high and dry over the risks of "second-hand smoke." For non-smokers, the major source of carbon monoxide is from passively inhaled cigarette smoke. Environmental tobacco smoke (ETS) has been shown to reduce lung function in children. Its irritant effect could not be ignored as this is the reason why most people object to being the victims of passive smoking. Patients with asthma find this irritant effect will worsen symptoms. The most remarkable effect of environmental tobacco smoke (ETS) is the development of lung cancer in passively exposed non-smokers as shown by reports from Japan and Greece. Large number of controlled studies have confirmed a relative risk of developing lung cancer in passively exposed subjects. Estimates from the United States have suggested that 3000 to 5000 deaths per year from lung cancer can be attributed to passive smoking.

12. Maternal smoking during pregnancy increases risks to foetus and non-smokers chronically exposed to tobacco smoke will suffer health hazards. Maternal smoking during pregnancy contributes to fetal growth retardation. Infants born to mothers who smoke weigh an average of 200 gm less but have no shorter gestations than infants of non-smoking mothers. Carbon monoxide in smoke may decrease oxygen availability to the fetus and account for the growth retardation. Smoking during pregnancy has also been linked with higher rates of spontaneous abortion, fetal death, and neonatal death.

When smoking occurs in enclosed areas with poor ventilation, such as in buses, bars, and conference rooms, high levels of smoke exposure can occur. Acute exposure to smoke-contaminated air decreases exercise capacity in healthy non-smokers and can worsen symptoms in individuals with angina, chronic obstructive pulmonary disease (COPD) or asthma. Chronic exposure to smoky air occurs in the workplace and in the homes of smokers. Non-smokers in smoky workplaces develop small-airways dysfunction similar to that observed in tight smokers. Compared to the children of non-smokers, children whose parents smoke have more respiratory infections throughout childhood, a higher risk of asthma, and alternations in pulmonary function tests. In recent studies of non-smoking women, those married to smokers had higher lung cancer rates than those married to non-smokers. Chronic smoke exposure may be associated with increased incidence of cardiopulmonary disease in nonsmokers.

13. Environmental tobacco smoke (ETS) also contributes to respiratory morbidity of children. Increased platelet aggregation also occurs when a nonsmoker smokes or is passively exposed to smoke. Although environmental tobacco smoke (ETS) differs from "mainstream smoke" in several ways, it contains many of the same toxic substances. Infants and toddlers may be especially at risk when exposed to environmental tobacco smoke (ETS). Considering the substantial morbidity, and even modality of acute respiratory illness in childhood, a doubling in risk attributable to passive smoking clearly represents a serious paediatric health problem. Exposure to environmental tobacco smoke (ETS) has been associated with increased asthma-related trips to the emergency room of hospitals. There is now sufficient evidence to conclude that passive smoking is associated with additional episodes and increased severity of asthma in children who already have the disease. Exposure to passive smoking may alter children's intelligence and behaviour and passive smoke exposure in

childhood may be a risk factor for developing lung cancer as an adult. Environmental tobacco smoke (ETS) contains more than 4000 chemicals and at least 40 known carcinogens. Nicotine, the addictive drug contained in tobacco leads to acute increase in heart rate and blood pressure. ETS also increases platelet aggregation, or blood clotting. It also damages the endothelium, the layer of cells that line all blood vessels, including the coronary arteries. In addition, nonsmokers who have high blood pressure or high blood cholesterol are at even greater risk of developing heart diseases from ETS exposure". An investigation in Bristol has found that the children of smokers have high levels of cotinine, a metabolite of nicotine, in their saliva. The results indicated that children who had two smoking parents were breathing in as much nicotine as if they themselves were smoking 80 cigarettes a year. A study published in the "New England Journal of Medicine" found that the children of smoking mothers were less efficient at breathing. A study conducted by the Harvard Medical School in Boston, concluded that passive exposure to maternal cigarette smoke may have important effects on the development of pulmonary function in children. An important discovery is that the cocktail of chemicals in a smoky room may be more lethal than the smoke inhaled by the smoker. The "sidestream" smoke contains three times as much benzo(a)pyrene (a virulent cause of cancer) six times as much toluene another carcinogen, and more than 50 times as much dimethyl nitrosamine. It has been commended by Dale Sandler of the National Institute of Environmental Health Studies in the United States that the potential for damage from passive smoking may be greater than has been previously recognised.

14. Thus, it can be safely concluded that the dangers of passive smoking are real, broader than once believed and parallel those of direct smoke. It has long been established that smoking harms the health of those who smoke. Now, new epidemiological studies and reviews are strengthening the evidence that it also harms the health of other people nearby who inhale the toxic fumes generated by the smoker, particularly from the burning end of the cigarette. Such indirect, or second-hand, smoking causes death not only by lung cancer but even more by heart attack, the studies show. The studies on passive smoking, as it is often called, also strengthen the link between parental smoking and respiratory damage in children. According to experts, there was little question that passive smoking is a major health hazard. What has swayed many scientists is a remarkable consistency in findings from different types of studies in several countries with improved methods over those used in the first such studies a few years ago. The new findings confirm and advance the earlier reports from the U. S. Surgeon General, who concluded that passive smoking caused lung cancer, According to Dr. Cedric F. Garland, an expert in the epidemiology of smoking at the University of California at San Diego "the links between passive smoking and health problems are now as solid as any finding in epidemiology." The never understanding of the health hazards of passive smoking were underscored in a report at a world conference on lung health in Boston recently. Dr. Stanton A. Glantz of the University of California at San Francisco estimated that passive smoke killed 50000 Americans a year, two-thirds of whom died of heart disease. Passive smoking ranks behind direct smoking and alcohol as the third leading preventable cause of death. Dr. Donald Shopland of the U. S. National Cancer Institute, who has helped to prepare the Surgeon General's reports on smoking has said : "there's no question" now that passive smoking is also a cause of heart disease. The new findings on passive smoking parallel recent changes in U. S. laws and rules that limit smoking in public places. In recent years, all but four States (Missouri, North Carolina, Tennessee and Wyoming) have passed comprehensive laws limiting smoking in public place. Only a decade ago many scientists were sceptical about the initial links between passive smoking and lung cancer.

15. "Mainstream smoke" is inhaled and consists of large particles deposited in the larger airways of the lung. "Sidestream smoke" is generated from the burning end of cigarettes, cigars and pipes during the smouldering between puffs. It may come from someone else's tobacco or from one's own and is the major source of environmental tobacco smoke (ETS). It is a mixture of irritating gasses and carcinogenic tar particles that reach deeper into the lungs because they, are small. According to scientists, because of incomplete combustion from the lower temperatures of a smouldering cigarette, sidestream smoke is dirtier and chemically different from, mainstream smoke. Scientists have found a 30 per cent increase in risk of death from heart attacks among nonsmokers living with smokers due to passive smoking. Researchers have found that passive smoking makes platelets the tiny fragments in the blood that help it clot, stickier. Platelets can form clots on plaques in fat-clogged arteries to cause heart attacks and they may also play a role in promoting

arteriosclerosis, the underlying cause of most heart attacks. Researchers have also shown that passive smoking affects heart function, decreasing the ability of people with and without heart disease to exercise. It has been pointed out that passive smoking increases the demand on the heart during exercise and reduces the heart's capacity to speed up. For people with heart disease, the decreased function can precipitate chest pains from angina. The children exposed to passive smoke since birth, had increased amounts of cholesterol and lower levels of HDL, a protein in blood that is believed to provide protection against heart attacks'. The researchers found that the greater the exposure to passive smoke, the greater were the biochemical changes.

16. A pioneering report linking passive smoking and lung cancer came in 1981 from a 14-year Japanese study by Dr. Takeshi Hirayama. His research methods were criticised at first. Mr. Lawrence Garfinkel, an epidemiologist who is Vice-president of the American Cancer Society, said that he was at present sceptical of Dr. Hirayama's report but was convinced from later studies, including his own, that there was about a 30 per cent increased risk of developing lung cancer from passive smoking. Mr. Garfinkel said a study of 1.2 million Americans now being completed should help clarify the degree of risk from all types of cancer and other diseases. Dr. Glantz estimated that one-third of the 50,000 deaths from passive smoking were from cancer. In addition to lung cancer, researchers have linked cancer of the cervix to both mainstream and sidestream smoke. The American Academy of Paediatrics estimates that 9 million to 12 million American children under the age of 5 may be exposed to passive smoke. The newer studies strengthened earlier conclusions that passive smoke increases the risk of serious early childhood respiratory illness, particularly bronchitis and pneumonia in infancy. Increased coughing was reported from birth to the mid-teenage years among 13 never studies of passive smoking and respiratory symptoms. It has also been found that passive smoke can lead to middle ear infections and other conditions in children. Asthmatic children are particularly at risk and the lung problems in childhood can extend to adulthood.

17. In 1962 and 1964 the Royal College of Physicians in London and the Surgeon General of the United States released landmark reports documenting the casual relation between smoking and lung cancer. Thereafter, extensive research has confirmed that smoking affects virtually every organ system. By 1990, the Surgeon General of the United States concluded that "smoking represents the most extensively documented cause of disease over investigated in the history of biomedical research." Studies have shown increased risk of lung cancer in nonsmoking women whose husbands smoked. Spousal studies on passive smoking showed a positive association between smoking and lung cancer. It has now been shown that involuntary smoking is a cause of disease, including lung cancer, in healthy non-smokers. Studies in various countries have established a positive association between passive smoking and lung cancer. The Environmental Protection Agency of U.S. classified environmental tobacco smoke (ETS) as a known human carcinogen, to which it attributed 3000 lung cancer deaths annually in American non-smokers. The agency also documented casual associations between exposure to environmental tobacco smoke (ETS) and lower respiratory tract infections such as pneumonia and bronchitis, middle ear disease, and exacerbations of asthma in children. A report on environmental tobacco smoke (ETS) published in December, 1998 by the California Environmental Protection Agency affirmed the findings of the US Environmental Protection Agency on the link between environmental tobacco smoke (ETS) and lung cancer and respiratory illness. It also concluded that passive smoking is a cause of heart disease mortality acute and chronic heart disease morbidity. retardation of fetal growth, sudden infant death syndrome (SIPS) nasal sinus cancer, and induction of asthma in children. Two important studies from the Wolfson Institute of Preventive Medicine in London, published in 1998 show that marriage to a smoker increased the risk of lung cancer by 26%. Studies have also established strong relation between passive smoking and ischaemic heart disease (IED). The systematic reviews from the Wolfson Institute, the California Enviromental Protection Agency and the US Environmental Projection Agency, and the various reports released make it clear that exposure to environmental tobacco smoke (ETS) is a cause of lung cancer, heart disease and other serious illness. In the United States alone, it is responsible each year for 3000 deaths from lung cancer, 35,000 to 62,000 deaths from ischaemic heart disease (IHD), 150,000 to 3000 000 cases of bronchitis or pneumonia in infants and children aged 18 months and younger causing 136 to 212 deaths, 8000 to 26,000 new cases of asthma, exacerbation of asthma in 400 000 to 1 million children, 700 000 to 1.6 million visits of physician offices for middle ear infection, 9700 to 18600 cases of low birth weight, and

1900 to 2700 sudden infant deaths. Those figures make passive smoking one of the leading preventable causes of premature death in the United States.

18. Public health action by policy makers to eliminate exposure to environmental tobacco smoke (ETS) is long overdue. A total ban on smoking is preferred on various grounds. Policy makers should pursue all strategies that would help accomplish that goal, including education, legislation, regulation, litigation and enforcement of existing laws.

19. Government of India is a party to 16 or so resolutions adopted by the World Health Organisation since the 1970s, particularly the one adopted in 1986 which urged member-countries to formulate a comprehensive national tobacco control strategy. It was envisaged that the strategy would contain measures (i) to ensure effective protection to non-smokers from involuntary exposure to tobacco smoke; (ii) to promote abstinence from the use of tobacco to protect children and young people from becoming addicted; (iii) to ensure that a good example is set on all health-related premises by all health personnel; (iv) to progressively eliminate all incentives which maintain and promote the use of tobacco; (v) to prescribe statutory health warnings on cigarette packets and the containers of all types of tobacco products; (vi) to establish programmes of education and public information on tobacco and health issues with the active involvement of health professionals and media; (vii) to monitor trends in smoking and other forms of tobacco use, tobacco-related diseases and effectiveness of national smoking control action; (viii) to promote viable economic alternatives to tobacco production, trade and taxation; and (ix) to establish a national focal point to stimulate, support and coordinate all these activities. Despite the fact that India is a signatory to these resolutions it is saddening to note that no significant follow-up action has been taken, except banning smoking in public places and public transport and printing a statutory warning on cigarette packets. Even here, the action has been half-hearted with the ban on smoking in public places confined to Delhi and a few other cities and the statutory warning being followed more as a ritual and printed in such small letters that the consumer hardly notices it. Advertisement in the Government-controlled mass media has been prohibited, but it continues unabated in the print media and private television channels. The Government's lip-service is reflected in the absence of any mention about the hazards of tobacco in the Health Ministry's Annual Report. Except on the occasion of the "World No Tobacco day", once a year, there has been no sustained campaign to counter the promotional campaign of tobacco and highlight the toll tobacco use takes.

20. Every year, 1 million tobacco-related deaths take place in India. An estimated 65 per cent of men use tobacco and in some parts a large proportion of women chew tobacco and bidies. About 33 per cent of all cancers are caused by tobacco. About 50 per cent of all cancers among men and 25 per cent among women are tobacco-related. The number of cases of avoidable tobacco-related cancers of the upper alimentary and respiratory tracts, coronary heart disease and chronic obstructive pulmonary disease (COPD) has been estimated as 2,00,000 every year. Many still-births, low birth infants, and pre-natal mortality have been reported among female chewers.

21. Tobacco kills 50 per cent of its regular users within 40 years. Apart from these direct health implications of tobacco use, the hazards faced by those engaged in the plucking and curing of tobacco leaves have been highlighted by researchers of the Ahmedabad-based National Institute of Occupational Health. The hands of the workers get affected by the chemicals in tobacco and sickness is caused when nicotine gets absorbed into the body through the skin. The symptoms are head-ache, nausea and vomiting. All these well-documented findings are available with the State but if it has not taken any effective action it can only be attributed to the clout which the lethal leaf enjoys in the corridors of power. One of the pet contentions of the protagonists of tobacco is that it makes a significant contribution to the exchequer by way of taxes and hence should not be disturbed. Also a large number of tobacco farmers will be hit if consumption is curbed. Both these have been countered by WHO forcefully. Several studies have brought out that the cost of healthcare of those affected by tobacco-related ailments, which is met from the Government exchequer, is much more than what the Government garners by way of taxes. Thus, there is a net drain on the Government resources. Illness or the premature death of the tobacco-users would cast a heavy economic burden on their families, perpetuating the

cycle of poverty. As regards the possible impact of any curb on tobacco use on tobacco farmers, studies by the Rajahmundry-based Tobacco Research Institute of the ICAR have brought out equally remunerative alternative to tobacco cultivation, besides use of tobacco for purposes other than smoking and chewing.

22. Taking note of the alarming scenario as discussed above, the question then is, what is the relief which this Court can grant to the petitioners? Can this Court direct the legislature to enact a law banning tobacco smoking? In our considered opinion the answer can only be an emphatic 'no'. It is entirely for the executive branch of the Government to decide whether or not to introduce any particular legislation..... The Court certainly cannot mandate the executive or any member of the legislature to initiate legislation, howsoever necessary or desirable the Court may consider it to be..... If the executive is not carrying out any duty laid upon it by the Constitution or the law, the Court, can certainly require the executive to carry out such duty and this is precisely what the Court does when it entertains Public interest Litigation..... But at the same time the Court cannot usurp the functions assigned to the executive and the legislature under the Constitution and it cannot even indirectly require the executive to introduce a particular legislation or the legislature to pass it to assume to itself a supervisory role over the law making activities of the executive and the legislature. Thus, from the above observation of the Supreme Court, it is clear even the Supreme Court found that Himachal Pradesh High Court had exceeded the limits of judicial power in ordering relief in Public Interest Litigation State of Himachal Pradesh v. A. Parent of a Student of Medical College, Shimla, AIR 1985 SC 910. But then, it has to be borne in mind that this Court acting as the sentinel on the qui vive can certainly interfere and grant relief by way of mandamus to the Government and its officials including police to enforce the existing laws which is quite sufficient to safeguard the interests of the public against the wisp of environmental tobacco smoke (ETS). When laws are there to deal with nuisance the law has to be enforced by the law enforcing agency of the State. The question of discretion of the police in the matter of prosecution of offenders was considered by Lord Denning, saying : "For instance, it is for the Commissioner of Police of the metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than 100 pounds in value I should have thought that the court could countermand it. He would be failing in his duty to enforce the law R. v. Metropolitan Police Commissioner ex p. Blackburn (1968) 2 QB 118 at 135. See also R v. Devon and Cornwall Chief Constable ex p. C.E.G.B. (1981) 3 WLR 967." The discretion possessed by the police in enforcing the law was considered by the Court of Appeal in a case in which the applicant complained, merely as a citizen, that the police had adopted a policy of not prosecuting London gaming clubs for illegal forms of gaming R. v. Metropolitan Police Commissioner ex p. Blackburn (1968) 2 QB 118. See also Adams v. Metropolitan Police Commissioner, 1980 RTR 289. The Commissioner's confidential instructions, when revealed to the court, substantially bore out the complaint, being based on the uncertainty of the law and the expense and manpower required to keep the clubs under observation. But while the case was pending the law was clarified, fresh instructions were issued, and the Commissioner undertook to withdraw the former instructions. The court therefore found no occasion to intervene. But they made it clear that the Commissioner was not an entirely free agent as his counsel contended. He had a legal duty to the public to enforce the law and, the court could intervene by mandamus if, for example, he made it a rule not to, prosecute house breakers. On the other hand the court would not question his discretion when reasonably exercised, e.g. in not prosecuting offenders who for some special reason were not blameworthy in the way contemplated by the Act creating the offence. The court criticised the police policy of suspending observation of gaming clubs, as being clearly contrary to Parliament's intentions; and had it not been changed, they would have been disposed to intervene. In 1972 the same public-spirited citizen brought similar proceedings, asking the Court to order the police to take more effective action to enforce the law against the publication and sale of pornography. The Metropolitan Police were given instructions not to institute prosecutions or apply for destruction orders without the approval of the Director of Public Prosecutions; and it was shown that

much pornographic literature was flagrantly offered for sale without interference by the police. The Court of Appeal found that the efforts of the police had been largely ineffective, but that the real cause of the trouble was the febleness of the Obscene Publications Act 1959. Accordingly it could not be said that the police were failing in their duty, and an order of mandamus was refused R. v. Metropolitan Police Commissioner ex p. Blackburn No. 3, (1973) 1 QB

241. It was again made clear that if the police were carrying out their duty to enforce the law, the court would not interfere with their discretion; but that the court would do so in the extreme case where it was shown that they were neglecting their duty. Exactly that is the factual situation here.

23. The existing law on the subject is embodied in Sections 268 and 278, IPC, Rule 227(1)(d) and 227(5) 22(a) of the Kerala Motor Vehicles Rules 1989 besides the relevant provisions of Cr.P.C. Section 268, IPC define public nuisance. Section 268 :-

"Public nuisance -- A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage."

There can be no doubt that smoking in a public place will vitiate the atmosphere so as to make it noxious to the health of persons who happened to be there. Therefore, smoking in a public place is an offence punishable under Section 278, IPC. The punishment for the offence is fine which may extend to Rs. 500/- as prescribed under Section 278, IPC.

Section 278 :

"Making atmosphere noxious to health.--Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred rupees."

In Schedule I of Cr.P.C. offence under Section 278, IPC is a non-cognizable offence. Since the offence alleged is non-cognizable the police has no authority to arrest the offender without an order from a Magistrate or without a warrant. But, since the complaint includes the report of a police officer in a non-cognizable case, the police can file a complaint before the Magistrate against the offender for the said offence. Since the offence is punishable with fine up to Rs. 500/ - only, the case comes within the definition of a 'petty case' as per Section 206(2), Cr.P.C. However, it is not necessary that the offence complained of is cognizable to enable the police to file a complaint. A reading of Section 153(2) Cr.P.C. shows that the police can file a complaint to the Magistrate in anon-cognizable case. When the complaint is made by a public servant in discharge of his official duty the Magistrate need not follow the procedure under Sections 200 and 202, Cr.P.C. in which case the Magistrate can straightway issue process to the accused. That apart, if any person who commits the offence refuses to give his name and addresses, a police officer can arrest him for the purpose of ascertaining his address. Since smoking is a public nuisance, it can be more effectively abated by invoking Section 133, Cr.P.C.

Section 133, Cr.P.C.:

"Conditional order for removal of nuisance.--(1) Whenever a District Magistrate or a Sub-divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, on receiving the report of a police officer or other information and on taking such evidence (if any) as he thinks fit, considers--



(a) that any unlawful obstruction or nuisance should be removed from any public place or from any way, river or channel which is or may be lawfully used by the public; or

(b) that the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated; or

(c) that the construction of any building, or, the disposal of any substance, as is likely to occasion conflagration or explosion, should be prevented or stopped; or

(d) that any building, tent or structure, or any tree is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence the removal, repair or support of such building, tent or structure, or the removal or support of such tree, is necessary; or

(e) that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public; or

(f) that any dangerous animal should be destroyed, confined or otherwise disposed of, such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning possessing or controlling such building, tent, structure, substance, tank, well or excavation, or owning or possessing such animal or tree, within a time to be fixed in the order--

(i) to remove such obstruction or nuisance; or

(ii) to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation, or to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed; or

(iii) to prevent or stop the construction of such building, or to alter the disposal of such Substance; or

(iv) to remove, repair, or support such building, tent or structure, or to remove or support such trees; or

(v) to fence such tank, well or excavation; or

(vi) to destroy, confine or dispose of such dangerous animal in the manner provided in the said order;

or, if he objects so to do, to appear before himself or some other Executive Magistrate subordinate to him at a time and place to be fixed by the order, and show cause, in the manner hereinafter provided, why the order should not be made absolute.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.--A "public place" includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes."

If such an order is passed by the Executive Magistrate any person who disobeys the order is guilty of the offence punishable under Section 188, IPC.

Section 188:

"Disobedience to order duly promulgated by public servant.-- Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both :

and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

Explanation.-- It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce, harm."

Offence under Section 188, IPC is cognizable as per first schedule of Cr.P.C. Therefore, after the promulgation of an order under Section 133(a). Cr.P.C., if any person is found smoking in a public place, the police can arrest him without a warrant. The only condition is that the order is duly promulgated by the Executive Magistrates, The Executive Magistrates have a duty to promulgate such an order.

24. In Ratlam Municipality v. Vardhichand, AIR 1980 SC 1622 Krishna Iyer, J. speaking for the Bench rules that the imperative tone of Section 133, Cr.P.C. read with the punitive temper of Section 188, IPC make the prohibitory act a mandatory duty. If a complaint is filed under Section 188, IPC, there is an embargo for the Magistrate to take cognizance under Section 195(1), Cr.P.C. as cognizance can be taken for the offence on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. This embargo will disappear if there is a complaint in writing by the public servant concerned. Where there existed a public nuisance this. Court could require the executive under Section 133. Cr.P.C. to abate the nuisance by taking affirmative action on a time bound basis. Otherwise, it will pave the way for a profligate statutory body or pachydermic governmental agency to defy the law by wilful in action. Section 133, Cr.P.C. is categorical although reads discretionary. Judicial discretion when facts for its exercise are present, has a mandatory import. Therefore, when the Magistrate has, before him all the information and evidence, which disclose the existence of a public nuisance and, on the materials placed, he considers that such nuisance should be removed from any public place which may be lawfully used by the public, he shall act. Thus, his judicial power shall, passing through the procedural barrel, fire upon the obstruction or nuisance, triggered by the jurisdictional facts. The responsibility of the Magistrate under Section 133. Cr.P.C. is to order removal of such nuisance within a time to be fixed in the order. This is a public duty implicit in the public power to be exercised on behalf of the public and pursuant to a public proceedings. Failure to comply with the direction will be visited with a punishment contemplated by Section 188, IPC. The new social justice orientation imparted by the Constitution of India makes Section 133. Cr.P.C. a remedial weapon of verstaile use. Social justice is due to the people and, therefore, the people must be able to trigger off the jurisdiction vested for their benefit in any public functionary like a Magistrate under Section 133. Cr.P.C., AIR 1980 SC 1622 at p. 1628 (supra). In the exercise of such power, the judiciary must be informed by the broader principle of access to justice necessitated by the conditions of developing countries and obligated by the mandate contained in Article 21. Article 38 and Article 51 (a) of the Constitution of India. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The word 'life' in this article is very significant as it covers every facet of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life does not merely connote a continued drudgery through life. The expression 'life' has a much wider meaning bringing within its sweep some of the finer graces of human civilisation which makes life worth living Board of Trustees of the Port of Bombay v. D. R. Nadkarni, AIR 1983 SC 109. Life includes all such

amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. The amplitude of the word 'life' is so wide that the danger and encroachment complained of would impinge upon the fundamental rights of citizens as in the present case. The apex Court has interpreted Article 21 giving wide meaning to 'life' which includes the quality of life, adequate nutrition, clothing and shelter and cannot be restricted merely to physical existence. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to the expression 'life' to enable a man not only to sustain life but to enjoy it in a full measure. The sweep of right to life conferred by Article 21 of the Constitution is wide and far-reaching so as to bring within its scope the right to pollution free air and the "right to decent environment Shantistar Builders v. Narayan Khimalal Totame AIR 1990 SC 630." Under our Constitutional set up the dignity of man and subject to law the privacy of home shall be inviolable. The Constitution through various Articles in Part III and Part IV guarantees the dignity of the individual and also right to life which if permitted to trample upon will result in negation of these rights and, dignity of human personality.

25. For the purpose of the present controversy, suffice it to say, that a person is entitled to protection of law from being exposed to hazards of passive smoking. Under the common law a person whose right of easement, property or health is adversely affected by any act or omission of a third person in the neighbourhood or at a far off place is entitled to seek an injunction and also claim damages, but the constitutional rights stand at a higher pedestal than the legal rights conferred by law be it the municipal law or the common law. Such a danger as depicted in the earlier paragraphs of this judgment is bound to affect lakhs of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who are exposed to the lethal smoke do not know that they are in fact facing any risk or are likely to suffer by such risk. Because of lapses on the part of the authorities concerned in creating awareness of the dangers of passive smoking innocent people are unwittingly made to inhale noxious environmental tobacco smoke (ETS) and consequently became victims of various deadly diseases. It is therefore time that the authorities should wake up before the matter slips out of their hands since health of large number of people is at stake. Maintenance of health and environment falls within the purview of Article 21 of the Constitution as it adversely affects the life of the citizens by slow and insidious poisoning thereby reducing the very life span itself. Exposing unsuspecting individuals to environmental tobacco smoke (ETS) with ominous consequences amounts to taking away their life, not by execution of death sentence but by a slow and gradual process by robbing him of all his qualities and graces, a process which is much more cruel than sending a man to gallows. To convert human existence into animal existence no doubt amounts to taking away human life, because a man lives not by his physical existence or by bread alone but by his human existence Sankar Banerjee v. Durgapur Projects Ltd. (AIR 1988 Calcutta 136). Smokers dig not only their own graves prematurely but also pose a serious threat to the lives of lakhs of innocent nonsmokers who get themselves exposed to ETS thereby violating their right to life guaranteed under Article 21 of the Constitution of India. A healthy body is the very foundation for all human activities. In a welfare State it is the obligation of the State to ensure the creation and the sustaining of conditions congenial to good health.

26. In the result, we declare and hold as follows :

i) Public smoking of tobacco in any form whether in the form of cigarettes, cigars, beedies or otherwise is illegal, unconstitutional and violative of Article 21 of the Constitution of India. We direct the District Collectors of all the Districts of the State of Kerala who are suo motu impleaded as Additional respondents 39 to 52 to promulgate an order under Section 133 (a) Cr.P.C. prohibiting public smoking within one month from today and direct the 3rd respondent Director General of Police, Thiruvananthapuram, to issue instructions to his subordinates to take appropriate and immediate measures to prosecute all persons found smoking in public places treating the said act as satisfying the definition of "public nuisance" as defined under Section 268 IPC, in the manner indicated in this judgment by filing a complaint before the competent Magistrate and direct all other respondents to take appropriate action by way of display of 'Smoking Prohibited' boards etc. in their respective offices or campuses.

ii) There will be a further direction to Addl. respondents 39 to 52 to issue appropriate directions to the respective R.T.Os. to strictly enforce the provisions contained in Rule 227 (1) (d) and 227 (5) of the Kerala Motor Vehicles Rules, 1989.

iii) Tobacco smoking in public places falls within the mischief of the penal provisions relating to "public nuisance" as contained in the Indian Penal Code and also the definition of "air pollution" as contained in the statutes dealing with the protection and preservation of the environment, in particular the Air (Prevention and Control of Pollution) Act, 1981.

iv) The respondents, repositories of wide statutory powers and enjoined by the statute and Rules to enforce the penal provisions therein are duty bound to require that the invidious practice of smoking in public places, a positive nuisance, is discouraged and offenders visited with prosecution and penalty as mandated by law. Accordingly, the respondents are liable to be compelled by positive directions from this Court to act and take measures to abate the nuisance of public smoking in accordance with law. Directions in the above lines are hereby issued.

v) The continued omission and inaction on the part of the respondents to comply with the constitutional mandate to protect life and to recognise the inviolability of dignity of man and their refusal to countenance the baneful consequences of smoking on the public at large has resulted in extreme hardship and injury to the citizens and amounts to a negation of their constitutional guarantee of decent living as provided under Article 21 of the Constitution of India.

26-A. Media, print and electronic will take note of this judgment and caution the public about penal consequences of violation of the ban on public smoking.

27. The petitioners are free to move this Court for further directions as and when deemed necessary. The Original Petition is allowed as above.