

**AN ANALYSIS ON REGISTRATION OF NON-COGNIZABLE
OFFENCES UNDER COTPA, 2003 AND PROCESS OF
INVESTIGATION THEREOF**

-Ba. Dhaarani, B.S.L. LL.B., D.T.L.,
Judicial Magistrate No.I, Chidambaram.

Article 47 of Constitution of India directs the State to raise the level of nutrition and the standard of living and to improve public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of intoxicating drinks and drugs which are injurious to health. A citizen's right to live in a clean and pollution-free environment has been recognized as a fundamental right enshrined in Article 21 of the Constitution of India in various decisions of the Hon'ble Supreme Court.¹ More specifically, smoking is injurious to the health of not only smokers but also the passive smokers, which clearly deprives them of right to live in a clean environment encompassed in Article 21 of the Constitution of India. Smoking and tobacco consumption, selling and its impact on non-consumers pose a severe threat to their lives, which is a violation of their fundamental right.²

The World Health Organisation in the Resolution passed in the 39th World Health Assembly, 1986³ urged the Member States to consider adopting effective measures for protecting their citizens with special attention to risk

1. Deepak Nitrite Ltd. v. State of Gujarat, (2004) 6 SCC 402

2. Murli S. Deora v. Union of India, (2001) 8 SCC 765.

3. https://apps.who.int/iris/bitstream/handle/10665/162252/WHA39_1986-REC-1_eng.pdf?sequence=1&isAllowed=y

groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and imposing restrictions and eventually eliminating all advertisement and promotion of tobacco. Further, the Legislature considered it expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health keeping in view of the directions given by the Hon'ble Supreme Court in the case of *Murli S. Deora v. Union of India*. Thus, the Parliament enacted the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (Act No. 34 of 2003) (in short 'COTPA').

The acts which are declared as offences under COTPA, 2003 and punishments provided thereunder are tabled as follows;

LIST OF OFFENCES AND PUNISHMENT UNDER COTPA,2003.

Sl. No	Offences	Punishment	Compoundable/ Non-Compoundable	Bailable & Non-Cognizable
1	Smoking in public place [Sec. 4]	Fine upto Rs.200 [Sec.21]	Compoundable [Sec.28]	Bailable [Sec.27]
2	Advertisement of cigarettes and tobacco products [Sec. 5]	Upto 2 years imprisonment or fine upto Rs. 1,000/- or both. [Sec. 22]	Non-compoundable	
3	Sale of Cigarettes or other tobacco products to a person below 18 years & within radius of 100 yards of any educational	Fine upto Rs.200 [Sec.24]	Compoundable [Sec.28]	

	institution [Sec. 6]			
4	Production/manufacture of cigarettes, tobacco products without specified warning and nicotine and tar contents on the label/package [Sec. 7]	<p>First conviction - upto 2 years imprisonment or fine upto Rs.5,000/- or both.</p> <p>Subsequent conviction— upto 5 years imprisonment and fine upto Rs. 10,000/- [Sec.20(1)]</p>	Non-Compoundable	<p>Non-cognizable</p> <p>[Part- II of Schedule I of Cr.P.C]</p>
5	Sale/distribution of cigarettes, tobacco products without specified warning and nicotine and tar contents on the label/package [Sec. 7]	<p>First conviction - upto 1 year imprisonment or fine upto Rs. 1,000/- or both.</p> <p>Subsequent conviction— upto 2 years imprisonment and fine upto Rs. 3,000/- [Sec.20(2)]</p>	Non-Compoundable	

OFFENCES UNDER COTPA- COGNIZABLE OR NON-COGNIZABLE?

Section 27 of COTPA declares that the offences punishable under the Act are bailable. COTPA is silent about the cognizable/non-cognizable nature of the offences covered under the said Act. Then, reference has to be made to Part II

of Schedule I of Code of Criminal Procedure, which classifies offences under other laws which are punishable below 3 years as non-cognizable offences.

In case of second or subsequent conviction of offence involving failure to give specified warning and nicotine contents in the label or package, Section 20(1) COTPA provides for enhanced imprisonment upto 5 years and fine upto Rs.10,000/-. The said enhanced punishment comes into operation only after conclusion of trial in the subsequent case and during the sentencing of the said case in trial. During reporting of subsequent offence of the already convicted accused under 20(1) COTPA, the police should not look into the enhanced punishment clause in deciding the cognizable or non-cognizable nature of the offence. As all other offences under COTPA are punishable with imprisonment below 3 years, the penal provisions of COTPA becomes non-cognizable by virtue of Schedule I of Part II of CrPC.

WHEN AUTHORIZED PERSONS MAY DETAIN ACCUSED UNDER COTPA?

Section 25 of COTPA deals with prevention, detention and place of trial of offences under Section 4 or Section 6 of COTPA. Proviso to Section 25(1) of COTPA states that the person so authorized ⁴ may, if he has reasonable ground for believing that any person has committed an offence under Sections 4 or 6, may detain such person unless the accused person furnishes his name and

4.No separate definition for authorized persons provided under the Act. List of Authorised persons are given under Annexure II to COTPA Rules, 2004 and Schedule III to Prohibition of Smoking in Public Places Rules, 2008.

address, and otherwise satisfies the officer detaining that he will duly answer any summons or other proceedings which may be taken against him. As per Section 25(2) of COTPA, any person detained under Section 25(1) of COTPA shall forthwith be taken to Judicial Magistrate to be dealt with according to law. On reading the bare text of Section 25 of COTPA, it is clear that only in cases when the accused is not ready to furnish his name and address, then the authorized officer may detain the accused and such detained person shall forthwith be taken before the Judicial Magistrate.

Interestingly, COTPA has used the term ‘*Detain*’ and not ‘*arrest.*’ In this regard, reference may be made to the decision of the Hon’ble Supreme Court in the case of ***Sundeep Kumar Bafna v. State of Maharashtra and another (2014)***⁵ wherein the following observations had been made by referring to dictionaries and case laws: “16. *It appears to us from the above analysis that custody, detention and arrest are sequentially cognate concepts. On the occurrence of a crime, the police is likely to carry out the investigative interrogation of a person, in the course of which the liberty of that individual is not impaired, suspects are then preferred by the police to undergo custodial interrogation during which their liberty is impeded and encroached upon. If grave suspicion against a suspect emerges, he may be detained in which event his liberty is seriously impaired. Where the investigative agency is of the*

5.Sundeep Kumar Bafna v. State of Maharashtra and another (2014) SCC ONLINE SC 257

opinion that the detainee or person in custody is guilty of the commission of a crime, he is charged of it and thereupon arrested.”

From the above analysis of the Hon’ble Supreme Court, it is clear that arrest is the act of apprehending an individual for the alleged commission of an offence; Detention may involve arrest and not necessarily all detention to have arrest of an individual. But there is detention in every arrest of an individual. At this juncture, it is relevant to refer to Section 42 Code of Criminal Procedure which deals with arrest of accused on refusal to give name and residence in case of non-cognizable offences. Section 42 Cr.P.C provides for arrest by police officer on refusal of accused to furnish name and other particulars. After ascertaining name and residence of the accused, the accused shall be released on executing bond with or without sureties. Whereas Section 25(2) of COTPA states that in case of any detention by authorized persons (including police officer), such authorized person shall forthwith produce the accused before the Judicial Magistrate except in cases of compoundable offences when the offence is compounded as per law. Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of such offences.⁶

In non-cognizable offences, the police officer before arresting the accused, must obtain warrant under Section 155 CrPC from the Judicial

⁶.Section 28(2) of COTPA, 2003.

Magistrate, in the absence of which the arrest of the accused would be illegal.⁷ Keeping in mind the offence and the scope of punishment under COTPA being non-registrable crime without the permission of the Judicial Magistrate, the Police officers are not vested with powers to arrest any person except with warrant. COTPA offences being non-cognizable in nature, the police cannot in a routine fashion register First Information Report. The police officers are permitted to register crime number for offences under COTPA only after they have obtained the requisite permission from Judicial Magistrate concerned.

PRIOR ORDER OF JUDICIAL MAGISTRATE FOR REGISTRATION OF CASES UNDER COTPA IS MANDATORY.

A non-cognizable offence is defined in Section 2(l) Cr.P.C as an offence for which the police officer has no authority to arrest without warrant. Moving on to provision regarding non-cognizable offences, Section 155(1) Cr.P.C states that on receipt of information as to commission of non-cognizable offence, the police shall enter the information in CSR and further thereon, in private cases, the police shall refer the informant to the Court and in police cases, the police shall file report to the Judicial Magistrate concerned. No police officers shall investigate a non-cognizable case without the order of a Judicial Magistrate having power to try such case or commit the case for trial.

7.J.Vanaraj v. State (2003) SCC ONLINE MAD 186.

In this regard, the Hon'ble Supreme Court in the case of *Keshav Lal Thakur v. State of Bihar (1996)*⁸, had observed that “*On the own showing of the police, the offence under Section 31 of the Representation of People Act is non-cognizable and therefore, the police could not have registered a case for such an offence under Section 154 CrPC. Of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155(2) CrPC. But, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate.*”

The Hon'ble High Court of Kerala in the case of *Mehboob v. State*⁹, while answering the questions as to the procedure to be followed in cases of non-cognizable offences, following the *ratio* laid down in *Keshav Lal Thakur's* case, has held as;

“*The police officer, as indicated in paragraph 10 above may subject to the relevant laws, seek permission of the learned Magistrate to conduct investigation under Sec. 155(2) of the Code and on receiving such permission register a case, conduct investigation as provided under Sub sec. (3) of Sec. 155 and submit a final report as provided under Sec. 173(2) of the Code or if he is so advised, file a complaint on his own as provided under Sec. 190(1)(a) and*

8.Keshav Lal Thakur v. State of Bihar (1996) SCC 11 557.

9.Mehboob v. State 2011 (2) KHC 261.

200 of the Code in which case it is within the power of the Magistrate to order an investigation and call for a report under Sec. 202 of the Code.”

It, thus, has been consistently reiterated in judicial pronouncements that in the cases of non-cognizable offences, registering FIR, conducting investigation, filing of final report without obtaining an order from Jurisdictional Judicial Magistrate are all illegal. Therefore, the authorised persons may file complaint before the Judicial Magistrate of offences under COTPA Act, which are not compounded, and the said complaint to be treated as one filed by public servant acting or purporting to act in the discharge of his official duty.

Further, the Hon'ble Supreme Court in the case of *State of Haryana and Others v. Bhajan Lal and Others*¹⁰ held that one of the grounds for quashing of criminal complaint is that if FIR does not disclose cognizable offence and police has conducted investigation without permission of the Judicial Magistrate. The investigation of a non-cognizable offence by the police without the permission of the Judicial Magistrate concerned is illegal, subsequent permission granted cannot cure the illegality, the defect is not curable under Section 460 CrPC. If a mandatory provision of law is not complied with, then the act complained of has to be struck down irrespective of any question of prejudice.¹¹

10. *State of Haryana and Others v. Bhajan Lal and Others* 1992 AIR SC 604.

11. Ratanlal & Dhirajlal, 'Code of Criminal Procedure' (20th Ed. 2017) Pg.no. 556-557.

When the offences under COTPA being that of non-cognizable in nature, the police cannot do investigation without order of Judicial Magistrate concerned. But as a matter of usual course in COTPA cases, there is routine registration of FIR, arrest of accused and release of accused on station bail and investigation done by police officer without order of Judicial Magistrate and even filing of final report before the Judicial Magistrate without requisite permission. This issue comes up only when the alleged offence of COTPA is involved and not when the offence under COTPA is clubbed with other cognizable offences. It is needless to say that in a case involving multiple offences even if there is a single offence which is cognizable in nature, Police can investigate non-cognizable offences covered in that case without an order of Judicial Magistrate.

COMPOSITION OF OFFENCES BY AUTHORIZED PERSONS.

Section 28 of COTPA deals with composition of offences wherein cases of offences under Section 4 and Section 6 of COTPA before or after institution of prosecution be compounded by such authorized person for an amount not exceeding Rs. 200/-. Rule 6 of COTPA Rules, 2004 provides for authorized officers to compound the offences under Section 6 (a) and (b) of COTPA [i.e. Sale of Cigarettes and tobacco to persons below 18 years & within radius of 100 yards of any educational institution - offence punishable under Section 24 of COTPA]. Annexure II to COTPA Rules, 2004 provides for list of authorized

persons for compounding of offence of sale of cigarettes and tobacco to persons below 18 years and near 100 yards of educational institution. Following are the few amongst the persons authorized to compound offences under Section 24 COTPA.¹²

Sl. No	Persons authorized to take actions.
1.	Principal or Headmaster or incharge of an Educational Institution
2.	All police officers of the rank of Sub- Inspector and above.
3.	Block Development Officer
4.	Municipal Health officers
4.	All officers of the rank of Sub- Inspector in State Food and Drug Administration from Department of Food and Drugs.

Every authorised person under Section 25(1) COTPA shall be deemed to be public servant.¹³ As every COTPA officer is deemed to be a public servant in the Act, the non-enforceability of the Sections in COTPA and failure to perform their duty and checks under the COTPA Act attracts penal consequences under Chapter IX of IPC – Offences by or relating to Public Servants. This in a way fixes responsibility on the authorised persons to perform their duty diligently and not in a casual manner.

The Prohibition of Smoking in Public Places Rules, 2008 states that prohibition of smoking in public places is prohibited and mandates the owner, proprietor, manager or officer in charge of the public place to ensure non-smoking in public places and display of specified size and visuals of no

12. G.S.R. 619 (E), dated 11.08.2011(w.e.f. 11.08.2011)- 12 categories of persons are authorized to compound offence of Section 24 of COTPA as per Annexure II of COTPA Rules, 2004.

13. Section 25(5) COTPA

smoking board and conditions to be complied for setting up smoking area in hotels, restaurants, etc. Schedule III to Prohibition of Smoking in Public Places Rules, 2008 specifically provides for list of authorized officers and their jurisdiction to act upon under Section 4 of COTPA dealing with prohibition of smoking in public place. Following are the few amongst the persons authorized to impose and collect the fine for violation of Section 4 COTPA.¹⁴

Sl. No	Persons authorized to take action	Description of public places
1.	Station Master/Station Head/ Station in charge	Railway and all its premises.
2.	Post master and above	Respective post office in their jurisdiction.
3.	Police officers not below the rank of Sub-Inspector	All public places within their jurisdiction.

When authorization is given to Sub-Inspector to compound offences under Section 28 of COTPA, the police officers of the rank Sub- Inspector and above may compound the offences as provided under the Act. The prototype of challan for compounding of offences on the spot, prototype of seizure memo, etc, are available in the guidelines for law enforcers for effective implementation of COTPA in the website of Ministry of Health and Family Welfare – National Tobacco Control Programme¹⁵. If at all, there is no

14.G.S.R. 680 (E) dated 15.09.2009 (w.e.f. 15.09.2009)- 21 categories of persons are authorized to compound offence of Section 21 of COTPA as per Schedule III to Prohibition of Smoking in Public Places Rules, 2008.

15.<https://ntcp.mohfw.gov.in/-https://ntcp.mohfw.gov.in/assets/document/Guideline-manuals/Guidelines-for-Law-Enforcers-for-effective-implementation-of-Tobacco-Control-Laws-2013.pdf>

compounding of offences by police, then the police shall mandatorily seek for Jurisdictional Judicial Magistrate's order for investigation of COTPA cases.

CONCLUDING NOTE.

It is apt to note here that The Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) (Amendment) Bill, 2020¹⁶ mooted by the legislature has provided for enhanced punishment and also made certain offences as cognizable. Until the Bill evolves into an Act after mooting and comes into effect, the police shall follow the existing procedure as mandated for non-cognizable offences while dealing with cases under COTPA.

16.https://ntcp.mohfw.gov.in/assets/document/Cigarettes_and_Other_Tobacco_Products_Prohibition_of_Advertisement_and_Regulation_of_Trade_and_Commerce_Production_Supply_and_Distribution_Amendment_Bill_2020.pdf