
(2008) 07 MP CK 0056
In the Madhya Pradesh High Court

Avinash

APPELLANT

Vs

The Union of India (UOI) and Others

RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (2008) ILR (MP) 1725 : (2008) 4 MPHT 482 : (2008) 4 MPLJ 49

Hon'ble Judges : A.K. Patnaik, C.J.; Sanjay Yadav, J

Bench : Division Bench

Judgement

A.K. Patnaik, C.J.

Petitioner is an NGO registered under the Societies Registration Act, 1860 and Dr. Harish Bhalla, a leading de-addiction expert in India is its Honorary Secretary. The petitioner has filed this writ petition as a Public Interest Litigation making a grievance that although tobacco directly and indirectly kills 2,800 people everyday and to prevent such death, Parliament has enacted the Cigarettes and Other Tobacco Product (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (for short "the Act") the respondents are not enforcing its provisions and as a consequence, the number of deaths on account of smoking of cigarettes has increased substantially. The petitioner has stated that the Central Government has not yet issued a gazette notification prescribing the permissible level of nicotine and tar contents in tobacco products and has also not taken steps for recognizing laboratories for testing the nicotine, tar and other contents in cigarettes and other tobacco products despite clear provisions in this regard in Sections 7 and 11 of the Act. The petitioner has therefore prayed that the Central Government be directed to enforce a Product Regulation Policy so as to regulate the toxicity and carcinogenicity of all tobacco products, which includes a fixed level of tar, nicotine and carbon monoxide and to constitute and grant recognition to the testing laboratories for nicotine and tar contents in cigarettes and other tobacco products as per Section 11 of the Act. The petitioner has also prayed that the

Government be directed to enforce a taxation policy so as to control the toxicity levels in tobacco products and levy higher taxes on products having higher toxicity level.

When the hearing of the writ petition was taken up on merits, Mr. Vivek Tankha, learned Senior Counsel for the petitioner, brought to the notice of the Court the provisions of Section 7 of the Act which puts restrictions on the trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products. He submitted that Sub-section (5) of Section 7 of the Act states that no person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco product unless every package of cigarettes or any other tobacco product produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be, on any other tobacco product along with the maximum permissible limits thereof, and the Proviso to Sub-section (5) of Section 7 states that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under the Act. He submitted that the language of Sub-section (5) of Section 7 of the Act is thus clear that even where the maximum permissible quantity of nicotine and tar contents is not prescribed by the mles, the package of cigarettes or any other tobacco product must disclose on its label the nicotine and tar contents so that the consumer buying the package of cigarettes or any other tobacco product knows exactly the nicotine and tar contents of the cigarettes or any other tobacco product that he is going to buy for consumption. He further submitted that the Act received the assent of the President on 18-5-2003 and although more than five years have passed thereafter, Sub-section (5) of Section 7 of the Act has not been enforced and as a consequence the entire object of the Act has been frustrated and the number of deaths on account of consumption of cigarettes and other tobacco products are increasing in the country every year. He submitted that the Court should issue appropriate directions so that the nicotine and tar contents are displayed on the label of the package of cigarettes or any other tobacco product. He submitted that the Court should also direct the Central Government to frame the Rules prescribing the maximum permissible quantity of nicotine and tar contents under Sub-section (5) of Section 7 of the Act and to establish and recognise laboratories for testing of such products. He cited the decision in *Hindustan Coca-Cola Beverages (P) Ltd. v. Santosh Mittal and Ors.* (2005) 5 SCC 771 in which the order passed by the Division Bench of the High Court of Rajasthan issuing directions to Pepsi Company and Coca-Cola and other manufacturers of beverages and soft drinks to disclose the composition and contents of the product including the presence of pesticides and chemicals on the bottle, package or container, as the case may be, was not interfered with by the Supreme Court.

Miss Anjali Banerjee, learned Counsel for the respondent No. 1, on the other hand, submitted that Sub-section (3) of Section 1 of the Act provides for appointment of different dates for bringing into force the different provisions of

the Act. She submitted relying on the return filed by the respondent No. 1 that the provisions of the Act are being enforced in a phased manner as and when the infrastructure for their enforcement is available and thereafter, the rules are being framed. Regarding enforcement of Sub-section (5) of Section 7 of the Act, she submitted that there is little institutional capacity to test the nicotine and tar contents and hence, the Central Government is actively engaged in the process of building capacity in the country by setting up Regional/Referral laboratory facilities for testing tar and nicotine contents in all forms of tobacco products. She also submitted that the Central Government is also in the process of taking technical assistance from the Centre for Disease Control, Atlanta USA, which is a World Class institution having necessary technical expertise. Relying on Paragraph 4 of the return filed on behalf of the respondent No. 1 she submitted that the rules for implementation of Section 7 of the Act will be framed only after the laboratory facilities are in place, otherwise enforcement of the rules will not be possible. She submitted that the intention of the Central Government is to discourage the use and consumption of tobacco products in any form and quantity by creating a general awareness of the ill effects of tobacco products amongst smokers and non-smokers and by enacting stringent laws to this effect, which will reduce the demand for tobacco products and thereby its supply and will eventually eradicate the menace caused by the consumption of tobacco products.

Mr. Dharmadhikari, learned Counsel appearing for the respondent No. 2, relying on a separate return filed by the respondent No. 2 submitted that duty structures for various goods/products is determined after taking into account all relevant factors, including revenue requirement, need to encourage/discourage consumption of such products, administrative feasibility of tax collection etc. He also submitted relying on the return of the respondent No. 2 that as per the present duty structure on cigarettes of tobacco and cigarettes of tobacco substitutes, excise duty on cigarettes increase with the increase of the length of cigarettes and cigarettes of tobacco substitutes attract lesser rate of duty as compared to cigarette of tobacco (except small length cigarette). He submitted that fiscal policy fall within the domain of the Legislature or the executive and regulation of toxicity of tobacco falls within the domain of the Ministry of Health and Family Welfare.

Fiscal policy with regard to taxation of tobacco and tobacco products is not within the domain of the Court and it is well settled that a wide latitude has to be given to the Government in matters of taxation and the Court normally does not interfere in such matters unless there is a clear violation of the Constitution or the law. Hence, in this writ petition, we are not inclined to issue any directions to the respondent No. 2 to adopt a fiscal policy of controlling toxicity levels in tobacco products and impose a higher tax on products having higher toxicity level. We leave it to the wisdom of the Government and the Legislature to decide a policy that they deem fit and proper considering all relevant factors including the need to control and reduce the consumption of tobacco and tobacco products.

Regarding enforcement of the provisions of the Act, Sub-section (3) of Section 1 of the Act provides that the Act shall come into on such date as the Central Government may by notification in the Official Gazette appoint and different dates may be appointed for different provisions of the Act. We find that notification dated 25-2-2004 has been issued under Sub-section (3) of Section 1 of the Act enforcing the provisions of Sections 1, 2, 3, 4, 5, 6(a), 12(1)(b), 12(2), 13(1)(b), 13(2), 14, 16, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Act with effect from 1-5-2004. We also find that a notification dated 16-11-2007 has also been issued under Sub-section (3) of Section 1 enforcing the provisions of Sections 7(1)(2)(3)(4), 8, 9, 10 and 20, but no notification appears to have been issued as yet by the Central Government bringing into force the provisions of Sub-section (5) of Section 7 and Section 11 of the Act.

Sections 7 and 11 of the Act are quoted herein below:

7. Restrictions on trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products.-

(1) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him bears thereon, or on its label (such specified warning including a pictorial warning as may be prescribed).

(2) No person shall carry on trade or commerce in cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products sold, supplied or distributed by him bears thereon, or on its label, the specified warning.

(3) No person shall import cigarettes or any other tobacco products for distribution or supply for a valuable consideration or for sale in India unless every package of cigarettes or any other tobacco products so imported by him bears thereon, or on its label, the specified warning.

(4) The specified warning shall appears on not less than one of the largest panels of the package in which cigarettes or any other tobacco products have been packed for distribution, sale or supply for a valuable consideration.

(5) No person shall, directly or indirectly, produce, supply or distribute cigarettes or any other tobacco products unless every package of cigarettes or any other tobacco products produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be on other tobacco products along with the maximum permissible limits thereof:

Provided that the nicotine and tar contents shall not exceed the maximum permissible quantity thereof as may be prescribed by rules made under this Act.

Testing laboratory for nicotine and tar contents.- For purposes of testing the nicotine and tar contents in cigarettes and any other tobacco products the

Central Government shall by notification in the Official Gazette grant recognition to such testing laboratory as that Government may deem necessary.

A regarding of Section 7 of the Act quoted above would show that Sub-section (1) of Section 7 of the Act provides for specified warning including a pictorial warning to be prescribed on the label of the package containing the cigarettes or any other tobacco product and prohibits the production, supply or distribution of cigarettes or other tobacco products unless the package of cigarettes or other tobacco products contain the specified warning. Sub-section (2) of Section 7 of the Act provides for specified warning on the label of the cigarettes or any other tobacco product and prohibits the sale, supply or distribution of any cigarette or any other tobacco product unless its label contains the specified warning. Sub-section (5) of Section 7 of the Act prohibits a person from directly or indirectly producing, supplying or distributing cigarettes or any other tobacco product unless every package of cigarettes or any other tobacco product produced, supplied or distributed by him indicates thereon, or on its label, the nicotine and tar contents on each cigarette or as the case may be, on any other tobacco product alongwith the maximum permissible limits thereof. The proviso to Sub-section (5) of Section 7 further states that the nicotine and tar contents shall not exceed the maximum prescribed quantity as may be prescribed by the rules made under the Act. These provisions have been made by the Legislature to ensure that the consumer knows of the consequences of consuming a cigarette or any other tobacco product which he is buying for consumption, but unless the provisions of Sub-section (5) of Section 7 of the Act are enforced the consumer will not know the tar and nicotine contents of the cigarette or any other tobacco product and whether such tar and nicotine contents in the product which he proposes to consume exceeds the maximum permissible limits. Hence, the laudable objects of the Act, as mentioned in the return filed by the respondent No. 1, namely, reducing the demand for tobacco products by creating a general awareness of the ill effects of the tobacco products amongst smokers and non-smokers and thereby reducing its supply and eventually eradicating the menace caused by the consumption of tobacco cigarettes and other tobacco products, will be frustrated unless the provisions of Sub-section (5) of Section 7 of the Act are enforced by the respondent No. 1 as early as possible.

The difficulties pleaded in the return filed by the respondent No. 1 for not enforcing the provisions of Sub-section (5) of Section 7 of the Act are that there is little institutional capacity to test the nicotine and tar contents of the cigarettes and other tobacco products and that the Central Government is also in the process of obtaining technical assistance from the Centres for Disease Control, Atlanta USA which is having necessary technical expertise in the matter and that the rules for implementation of the provisions can only be framed after laboratory facilities are in place or otherwise enforcement of the rules will not be possible. When the matter was listed on the previous occasion before the Court on 8-5-2008, it was brought to the notice of the Court by Miss Banerjee that before the Supreme Court, a counter affidavit has been filed by the Central

Government stating that a budget of approximately rupees 51 crores has been proposed for the capacity building of 5-6 laboratories so that the laboratories as contemplated by Section 11 of the Act are established and recognised and the nicotine and tar contents of cigarettes and other tobacco products can be tested to find out whether they exceed maximum permissible limit.

The use of the word "may" in Sub-section (3) of Section 1 of the Act by the Legislature shows that a discretion is vested in the Central Government under Sub-section (3) of Section 1 of the Act to appoint the date when the provisions in Sub-section (5) of Section 7 and Section 11 shall come into force. The Supreme Court has held in *Aeltemesh Rein, Advocate, Supreme Court of India Vs. Union of India (UOI) and Others*, that a writ of mandamus cannot be issued to the Central Government to bring a statutory provision into force when according to the statute the date on which it is brought into force is left to the discretion of the Central Government, but the Court can always issue a mandamus to the Central Government to consider whether the time for bringing a provision of an Act into force has arrived or not. In *Murli S. Deora Vs. Union of India and ors*, , after considering the right to life guaranteed under Article 21 of the Constitution as well as harmful effects of the contents of tobacco including nicotine and tar on the life of human beings the Supreme Court has also issued directions prohibiting smoking in public places.

For the aforesaid reasons, we direct the respondent No. 1 to seriously consider whether the provisions of Sub-section (5) of Section 7 of the Act could be enforced by issuing necessary notification under Sub-section (3) of Section 1 of the Act and to consider whether the rules prescribing the maximum permissible limits of nicotine and tar in cigarettes and other tobacco products could be made and testing laboratories contemplated by Section 11 of the Act could be established and recognised as early as possible. We further direct the respondent No. 1 to file an affidavit showing such consideration within a period of six months from the date of receipt of the copy of this order.

With the aforesaid directions, the writ petition is disposed of.