
(2014) 07 AHC CK 0120
In the Allahabad High Court
Case No : Writ Petition No. 1078 (M/B) of 2013

Love Care Foundation

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-07-2014

Acts Referred:

Constitution of India, 1950 — Article 47

Citation : (2014) 07 AHC CK 0120

Hon'ble Judges : Surendra Vikram Singh Rathore, J; Narayan Shukla, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Surendra Vikram Singh Rathore, J.—This petition has been filed on behalf of the Love Care Foundation, registered society, who has approached this Court with a pious object of reducing the growing tendency of smoking among the Indian youths and thereby to create a healthy society free from several diseases.

2. Initially, the prayer of the petitioner in the instant writ petition was as under:-

(i) A writ, order or direction in the nature of mandamus commanding the opposite parties to ban the distribution and sale of cigarette and other tobacco products in public and open market and to implement plain packaging rule in cigarette and other tobacco products by prohibiting the use of logos, colours, brand names or prominent information on packaging.

3. But during course of arguments, learned counsels for the petitioner have fairly conceded that they have restricted their prayer only to the extent of implementing plain packaging rule in cigarettes and other tobacco products by prohibiting use of logos, colours, brand names or prominent information on packaging.

4. The case of the petitioner is that an attractive packaging is a pseudo mode of advertisement. The cigarettes are being packed in such an attractive packaging

that it attracts the youths for smoking. The ill effects of smoking are well known. The statement of Objects and Reasons of the cigarettes (Regulation of Production, Supply and Distribution) Act, 1975, inter alia, provides:

Smoking of cigarettes is a harmful habit and, in course of time, can lead to grave health hazards. Researches carried out in various parts of the world have confirmed that there is a relationship between smoking of cigarettes and lung cancer, chronic bronchitis; certain diseases of the heart and arteries; cancer of bladder, prostate, mouth, pharynx and oesophagus; peptic ulcer etc., are also reported to be among the ill-effects of cigarette smoking."

(4) Similarly, the statement of Objects and Reasons of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Bill, 2001 provides:

"Tobacco is universally regarded as one of the major public health hazards and is responsible directly or indirectly for an estimated eight lakh deaths annually in the country. It has also been found that treatment of tobacco related diseases and the loss of productivity caused therein cost the country almost Rs. 13,500 crores annually, which more than offsets all the benefits accruing in the form of revenue and employment generated by tobacco industry."

In the case of *Murli S. Deora Vs. Union of India and ors*, of that case, the question of passive smoking was before the court and Hon'ble Apex Court, keeping in view the hazardous of smoking had issued several directions to protect, the citizens from the ill effects of passive smoking. These directions reads as under:-

(9) Realising the gravity of the situation and considering the adverse effect of smoking on smokers and passive smokers, we direct and prohibit smoking in public places and issue directions to the Union of India, State Governments as well as the Union Territories to take effective steps to ensure prohibiting smoking in public places, namely:

- (a) Auditoriums.
- (b) Hospital buildings
- (c) Health institutions
- (d) Educational institutions
- (e) Libraries
- (f) Court buildings
- (g) Public offices
- (h) Public conveyance, including railways.

(10) Learned Attorney-General for India assured the Court that the Union of

India shall take necessary effective steps to give wide publicity to this order by electronic as well as print media to make the general public aware of this order of prohibition of smoking.

5. After the aforementioned judgment of Hon"ble Apex Court the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce Production, Supply and Distribution) Act, 2003 was enacted and thereafter the cigarettes and other tobacco products rules 2008 were also framed and it provided for the health warning regarding the ill effects of tobacco use. By Act 2003 the advertisement of cigarettes was also restricted and stringent steps were taken regarding advertisement of cigarettes and smoking.

6. Submission of the learned counsel for the petitioner was that the very object of the aforesaid legislation was to prohibit the advertisement of cigarettes and smoking that at present cigarettes are being packed in a very attractive packaging. Such attractive packets are being displayed in open shops which attracts the youths to smoke and if plain packaging is adopted, then it will definitely reduce the allurements among the youths towards smoking.

7. On behalf of the Union of India, counter affidavit has been filed before this Court and we consider it necessary to quote para 5(i) of the counter affidavit filed on behalf of Union of India.

Para-5(i) The use of tobacco is a prominent risk factor for 6 to 8 leading causes of death and almost 40% of the Non Communicable Diseases (NCD) including cancers, cardiovascular diseases and lung disorders are directly attributable to tobacco use. The number of deaths every year in India which is attributable to tobacco use is almost 8-9 lakhs (Tobacco Control in India Report, 2004 of Ministry of Health & Family Welfare and WHO). If the current trends continue and if effective that by the year 2020, tobacco use will account for 13% of all deaths in India every year. Studies national and international reveal that tobacco is the only substance which if taken as intended by its seller over a period of time kills or incapacitates its consumer, therefore the tobacco industry looks for tapping new consumers, with special attention on youth and young children since they are of impressionable mind. Studies also report high prevalence of tobacco use amongst children and youth of the country. As per the Global Adult Tobacco Survey India Report 2010 (carried out by the Government of India), more than one-third (35%) of adults (15 years and above) in India (almost 29 crore in number) use tobacco in some form or the other. 14.6% of the youth in the age group of 13-15 years consume tobacco in some form or other (Global Youth Tobacco Survey, 2009). More than 5500 children/Adolescents start tobacco consumption daily. (Indian J Pediatr 1999; 66: 817-824). (Emphasis added)

8. Respondent No. 2, the State of U.P. has also filed its counter affidavit in which it has been stated that the Provisions of Act, 2003 and the rules are being implemented strictly in this State by the State Government. It has further been submitted in para 16 of the counter affidavit that the matter of amendment in

the provisions of Act, 2003 is under consideration before the Government of India. Virtually neither the Union of India nor the State of U.P. has raised any objection against the prayer of the petitioner.

9. The object of Cigarettes and other Tobacco Products Act, 2003 reads as under:-

"An Act to prohibit the advertisement of and to provide for the regulation of trade and commerce in, and production, supply and distribution of cigarettes and other tobacco products and for matters connected therewith or incidental thereto Whereas, the Resolution passed by the 39th World Health Assembly (WHO), in its Fourteenth Plenary meeting held on the 15th May, 1986 urged the member States of WHO which have not yet done so to implement the measures to ensure that effective protection is provided to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco. And whereas, the 43rd World Health Assembly in its Fourteenth Plenary meeting held on the 17th May, 1990, reiterated the concerns expressed in the Resolution passed in the 39th World Health Assembly and urged Member-States to consider in their tobacco control strategies, plans for legislation and other effective measures for protecting their citizens with special attention to risk groups such as pregnant women and children from involuntary exposure to tobacco smoke, discourage the use of tobacco and impose progressive restrictions and take concerted action to eventually eliminate all direct and indirect advertising, promotion and sponsorship concerning tobacco;

And whereas, it is considered expedient to enact a comprehensive law on tobacco in the public interest and to protect the public health;

And whereas, it is expedient to prohibit the consumption of cigarettes and other tobacco products which are injurious to health with a view to achieving improvement of public health in general as enjoined by Article 47 of the Constitution;

And whereas, it is expedient to prohibit the advertisement of, and to provide for regulation of trade and commerce, production, supply and distribution of, cigarettes and other tobacco products and for matters connected therewith or incidental thereto;

So, the object to implement the aforementioned Act shows the concern of the Government which was to implement measures to ensure effective protection to non-smokers and also to protect children and young people from being addicted to the use of tobacco. The instant petition has also been filed with the aforesaid objects. Government of Australia has implemented Tobacco Plain Packaging Regulation, 2011 instruments 2011 no. 263 and in England a similar regulation is likely to be implemented in the near future.

10. The Plain Packaging Act, 2001", was challenged before the High Court of Australia and the petition was dismissed on 15.08.2012 and plain packaging was

held to be constitutional. Copy of the order of Hon"ble High Court of Australia has been annexed as Annexure No. 7 to the instant writ petition.

11. Now before proceedings further in the matter the first point to be considered is as to what is plain packaging and how it will keep the young citizens of India away from the allurements of smoking. The effect of plain packaging would be that the cigarette packets cannot carry brand, logos and colourful designs, even brand name and packets will be of a standard size, font and colour. The plain packaging will further advance the very purpose of "Cigarettes and other tobacco products packaging Act. If plain packaging is implemented in India, the cigarettes and other tobacco products packets will cease to be a market tool for advertising the brand image and promoting smoking as a status symbol. Instead it will become effective means of spreading public health message and discouraging consumption at no cost to the Government.

12. The young people get attracted to cigarettes packets because of the way they present their lifestyle. Learned counsel for the petitioner has submitted that a sportier person would like to buy what he considers sportier brand and every time he takes packet of cigarettes out. He indirectly advertises that brand amongst the persons connected with the sports. A plain packaging brand products commodity, its ability to differentiate its product from better brands and thereby substantially diminishing the smokers in the country who look for a particular brand.

13. As per recent reports around 9 lacs people die in India from tobacco related diseases. World Health Organization, which supports the plain packaging, estimates that 5 million world wide died only from the diseases linked with tobacco and this figure is likely to become 9 million by 2030 provided necessary steps to reduce the growing tendency of smoking are not taken forthwith.

14. After implementation of the packaging in Australia a study was conducted regarding the effectiveness of the Australian plain packaging policy on adult smokers. The introduction paragraph of the said report reads as under:-

Introduction

"From 1st September 2012, all tobacco manufactured for sale in Australia was required to be contained in plain dark brown packs, with 75% front-of-pack graphic health warnings and the brand name and variant limited to a standardised font size and type. 1 This requirement supplanted Australian legislation that had required 30% front-of-pack graphic health warnings since 2006. The new plain packs with larger warnings began appearing for sale at retail outlets early in October and increasingly so during November, since from 1 December 2012, all tobacco sold at retail outlets was required to be contained in plain packs. The roll-out period of the new packs was accompanied by a nationally televised mass media campaign throughout November, promoting several serious harms of smoking that were also featured on the larger pack health warnings, including blindness, lung cancer and pregnancy-related harm.

Other health warnings featured in the larger pack health warnings were peripheral vascular disease (gangrene), mouth (tongue) cancer and improvements to Health from quitting.

Conclusions of the aforesaid study is as under:-

The early indication is that plain packaging is associated with lower smoking appeal, more support for the policy and more urgency to quit among adult smokers.

15. Some of the paragraphs of discussion regarding the aforesaid study are necessary to be reproduced which reads as under:-

Discussion

Compared with branded pack smokers, smokers who were smoking from plain packs rated their cigarettes as being lower in quality and as tending to be less satisfying than 1 year ago. These appeal outcomes were sensitive to the extent to which plain packaging had rolled out among the smoker population over the survey period, with responses from branded pack smokers approaching those of plain pack smokers, once 80% of survey respondents were smoking from plain packs 1-2 weeks before the December implementation date. Among brand loyal smokers, effects were in the same direction but not significant. In all analyses, plain pack smokers were more likely to think often or very often about quitting in the past week and to rate quitting as a higher priority in their lives, compared with branded pack smokers. There were no significant differences in the proportion of plain and branded pack smokers who thought frequently about the harms of smoking or thought smoking harms had been exaggerated. While a similar proportion of plain and branded pack smokers supported the larger graphic health warnings, a significantly greater proportion of plain pack smokers approved of plain packaging.

The observed pattern of findings in relation to brand appeal and the direction of findings relating to perceived harms is consistent with those of experimental studies of plain packaging conducted in Australia, UK, and other countries and also with the Australian government's pretesting of mocked-up plain packs. The finding that smokers smoking from a plain pack evidenced more frequent thoughts about and priority for quitting than branded pack smokers is important, since frequency of thoughts about quitting has strong predictive validity in prospective studies for actually making a quit attempt. Past research on graphic health warnings has found that the larger size of warnings is associated with more message recall, greater perceived effectiveness and risks of smoking and less appeal. Also, noticing pictorial health warnings on others' tobacco packs reduced the risk of relapse in recent quitters in a cohort study. Our study is not able to tease apart the independent contributions of plain packaging and the new larger health warnings, since they co-occurred. These responses are unlikely to be due to any media campaign effects since we adjusted for campaign recall and, in other analyses, determined that campaign recall was unrelated to the

frequency of thoughts of harm and quitting intentions and importance.

We noted that the proportion who thought the harms had been exaggerated was not higher for plain pack smokers with the larger graphic warnings, than for branded pack smokers. We also found similar proportions of branded and plain pack smokers who supported the larger graphic health warnings, with a majority supporting it. Interestingly, those smoking from plain packs were more likely to approve of plain packaging than those smoking from branded packs. Given that 73% of Australian smokers intend to quit and over 90% regret having started, smokers may acknowledge such packaging changes as a source of motivation or reminder for quitting, and/or as being important to reduce the appeal of smoking for young people. This pattern of differences in approval is similar to the pattern of increase in public support that is observed when smoke-free laws and display bans have been implemented."

16. The impact of plain packaging of cigarettes products among the Brazilian young women and experimental study was conducted in the year 2012. The background of the said study was as under:-

(1-A) Tobacco use is responsible for 5.4 million deaths every year worldwide and is a leading cause of preventable death. The burden of these deaths is rapidly shifting to low and middle-income countries, such as Brazil. Brazil has prohibited most forms of tobacco advertising; however, the cigarette pack remains a primary source of marketing. The current study examined how tobacco packaging influences brand appeal and perceptions of health risk among young women in Brazil.

Methods

A between subjects experiment was conducted in which 640 Brazilian women aged 16-26 participated in an online survey. Participants were randomized to view 10 cigarette packages according to one of three experimental conditions: standard branded packages, the same packs without brand imagery ("plain packaging"), or the same packs without brand imagery or descriptors (e.g., flavors). Participants rated packages on perceived appeal, taste, health risk, smoothness, and smoker attributes. Finally, participants were shown a range of branded and plain packs from which they could select one as a free gift, which constituted a behavioral measure of appeal."

17. The result and conclusions of the said study was as under:-

Results

Branded packs were rated as significantly more appealing, better tasting, and smoother on the throat than plain packs. Branded packs were also associated with a greater number of positive smoker attributes including style and sophistication, and were perceived as more likely to be smoked by females than the plain packs. Removing descriptors from the plain packs further decreased the ratings of appeal, taste and smoothness, and also reduced associations with

positive attributes. In the pack offer, participants were three times more likely to select branded packs than plain packs."

Conclusion:

Plain packaging and removal of descriptors may reduce the appeal of smoking for youth and young adults, and consequently reduce smoking susceptibility. Overall, the findings provide support for plain packaging regulations, such as those in Australia.

Cigarettes taste and flavor also influence cigarette appeal and make initial experience of smoking less aversive to youth. Brands targeted at youth are typically marketed as smoother and less harsh, and include flavors that may be more palatable such as mint, or strawberry. The names of these flavors are often featured in the package descriptors and may increase smoking appeal.

Brand descriptors and imagery on cigarette packaging can falsely reassure consumers about the potential risks of their products. Studies have shown that many smokers mistakenly believe that cigarettes labeled as "light" or "mind" actually deliver less tar and are less harmful to smokers, and consequently are "healthier" than regular cigarettes. Although Brazil banned the use of these misleading descriptors in 2001, a number of brands use alternative terms such as "fresh" or references to lighter colors such as "gold" or "silver". Elements such as the pack color and shape can also reinforce false beliefs among smokers.

Plain packaging has been recommended by the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) as a component of marketing restrictions. Plain packaging regulations would prohibit logos, colors, and images from appearing on packages. Manufacturers would only be permitted to print the brand name and descriptors in a standard font and size against a standard background color. In December 2012, Australia will become the first country in the world to introduce plain packaging.

Research in "Western" countries has indicated that plain packaging has the potential to impact youth smoking perceptions and behaviors. Youth perceive plain packages as less appealing and have more negative expectations of cigarette taste. They are also less likely to associate brands in plain packages with favorable personality traits such as being trendy and sociable. Additionally, individuals shown plain packages are less likely to falsely believe that certain brands are less harmful, deliver less tar, or are easier to quit. However, the effect of packaging has yet to be systematically tested in other markets, including Latin American countries such as Brazil.

18. The result of the aforesaid study of plain packaging on the Brazilian women was as under:-

Overall, the findings support the recommendations for plain packaging in the WHO Framework Convention on Tobacco Control and Australia's recent plain packaging regulation.

19. Ireland has also step forward for implementing the plain packaging. In the news, "Minister for Health Ireland" has pressed the need of plain packaging. The abstract of the said news reads as under:-

(4-A) Cabinet approval for draft laws to compel tobacco companies to use plain packaging on all the products they sell in the Republic represents a significant public health initiative and reaffirms this country's reputation as a global leader in tobacco control. When enacted, the new law would ban the use of any logos on cigarette packs. Graphic warnings would be mandatory on all packaging, and terms such as "low tar" would be forbidden.

As the first EU member state to introduce plain packaging legislation, stern opposition to the law from the global tobacco industry can be expected. Indeed the lobbying has already commenced; the Taoiseach has been approached by American business and political interests who argue the plain packaging initiative would convey an adverse message to foreign investors.

According to the Minister for Health, the objective of the Public Health (Standardised Packaging of Tobacco) Bill 2014 is to make tobacco packs look less attractive to consumers; to make health warnings more prominent; and to reduce the ability of the packs to mislead people, especially children about the harmful effects of smoking.

By targeting children under the age of 18, the tobacco industry knows that, due to the challenge of giving up cigarettes in later life, it can exploit an opportunity to ensure a customer base for many years to come. Out of more than 4,000 chemicals in tobacco smoke, at least 250 are known to be harmful and more than 50 are known to cause cancer.

20. Even the developed countries have taken steps to implement plain packaging the reasons given therefor are in our considered opinion are compelling, we know that the dangers of smoking are not acceptable to allow the tobacco industry to use deceptive market to allure the children keeping this deadly attractive and to deceive the current smokers about the impact of their reduction. We are of the view that the introduction of standards packaging will remove the final way from tobacco company to permit their deadly product in an implied manner and the cigarettes packets, after implementation of the plain packaging will no longer be a mobile advertisement for the tobacco industry. Tobacco plain packaging measure would be a long term investment to safeguard the health of the Indian youth. The plain packaging aims to reduce the attractiveness of tobacco products. The noticeability and effectiveness of mandatory health warning and plain packaging reduce the ability of attractive packaging to mislead consumer about the harms of smoking.

21. These measures are based on safe research and are also supported by leading public health experts world wide. World Health Organization (WHO) has strongly welcomed the landmark decision of Australian High Court to dismiss the legal challenge from tobacco industry and calls on the rest of the world to follow

Australia's tough stand on tobacco marketing.

22. Under Article 47 of the Constitution of India a duty is vested in the State to raise the level of nutrition and standard of living to improve public health as amongst its primary duties. There cannot be any doubt to the fact situation that smoking or consumption of tobacco products is extremely injurious to health and is cause of several diseases, so it adversely effects the general health of the country. At present, the cigarettes are being packed in India in very attractive colours, and the same are being displayed openly in open shops. Such colourful packaging draws the attention of the youths and it becomes an incentive in the mind of the immature youth to start smoking but if plain packaging scheme is implemented then all the cigarettes brand shall be packaged in a common form, in a common colour. Only on a restricted part of the packet the name shall be displayed. On the rest part of the packets the health warning as required under the Rules of 2008 have to be printed. This can be done only by strict regulation. We have been informed that after implementation of the plain packaging rules in Australia, the sale of cigarettes has considerably reduced. Australia has adopted plain packaging in the year 2013. If only in one year the sale of cigarettes starts decreasing then it is very positive sign to accept said plain packaging formula in India also. We found no harm in implementing this scheme. The State of U.P. has stated that certain amendments are still under consideration in the Act 2003 so while considering the State amendments the question of implementing the plain packaging may also be considered by Government of India and also by all the concerned authorities.

23. Keeping in view the discussion made hereinabove, we are of the considered view that this writ petition deserves to be allowed and is hereby allowed. The scheme of plain packaging must be welcomed by all concerned and the Government of India must consider to implement the said scheme at the earliest. We therefore, strongly recommend to the Government of India to consider the feasibility of implementing the plain packaging of cigarettes and other tobacco products. We hope and trust that necessary steps shall be taken by the Union of India, at the earliest.