
(2008) 02 DEL CK 0189

In the Delhi High Court

Case No : Writ Petition (C) No"s. 18761 and 23716 of 2005

Maresh Bhatt

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 07-02-2008

Acts Referred:

Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 — Section 10, 22, 3, 30, 31

Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 — Rule 4(6), 4(7), 4(8)

Cinematograph Act, 1952 — Section 5B, 5B(2)

Constitution of India, 1950 — Article 14, 19, 19(1), 19(2)

Citation : (2008) 02 DEL CK 0189

Hon'ble Judges : Sanjiv Khanna, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Sandeep Sethi, Pradyuman Dubey, C.M. Lal, in WP C Nos. 18761 and 23716/2005, Arvind Datar, Nikhil Nayyar and Ankit Singhal, in WP C No. 7410-11/2006, for the Appellant; P.P. Malhotra, Add. Solicitor General, Suresh Kait and Mukul Gupta for Union of India, for the Respondent

Final Decision : Allowed

Judgement

Mukul Mudgal, J.—I have read a copy of the judgment of my learned brother Sanjiv Khanna, J. I agree with the statement of the facts of the case and the discussion by my learned colleague from paragraphs 1 to 14 and from paragraphs 20 to 42 of his judgment and these paragraphs are not being repeated herein for the sake of brevity. However, the only difference is my inability to agree with my learned brother with the views expressed in paragraphs 15 to 19 and paragraphs 43 to 56 of his judgment and the eventual conclusion.

2. The principal question which this Court is required to address in this writ petition pursuant to the challenge by the petitioner as formulated by Shri

Sandeep Sethi, Senior counsel, relates to the constitutional validity of Sub-rule 6 Rule 4 of The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 as amended in 2005 (hereinafter referred to as "the Rules") framed under The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (hereinafter referred to as "the Act"). The said amended Rule reads as follows:

(6) No individual or a person or a character in films and television programmes shall display tobacco products or their use:

Provided that this sub-rule shall not apply to-

(a) old Indian films and old television programmes, produced prior to coming into effect of this notification, being screened in a cinema hall or theatre or aired on television;

(b) old foreign films and old television programmes, including dubbed and sub-titled "foreign films" and television programmes, being screened in cinema halls or theatres or aired on television;

(c) Indian or foreign documentaries and health spots displaying use of tobacco products made to clearly and unambiguously reflect the dangers and dire consequences of tobacco use being screened in cinema hall or theatre or aired on television;

(d) live coverage of news, current affairs, interviews, public meetings, sports events, cultural events and the like, being telecast on television whereby there is a purely incidental and completely unintentional coverage of use of tobacco products:

Provided further that the exemptions under Clauses (a), (b), (c) and (d) above shall not extend to display of brands of tobacco products or tobacco product placement in any form:

Provided also that close ups of cigarette packages or tobacco products shall not be permissible and such scenes shall be edited by the producer or distributor or broadcaster prior to screening in cinemas or theatres or airing on television.

Explanation (1).- For the purpose of this sub-rule, all films that receive Central Board of Film certification prior to the effective date of this notification shall be categorized as "old films".

Explanation (2).- For the purpose of this sub-rule, "foreign film" implies "imported" as defined in the Cinematography (Certification) Rules, 1983.

(6A) In case of old Indian and foreign films, the owner or manager of the cinema hall or theatre where the film is being screened shall ensure that anti tobacco health spots of minimum thirty seconds duration each are screened at the

beginning, middle and end of the said film. The provisions of this sub-rule shall not apply to Clause (c) of Sub-rule 6.

(6B)(a) In case of old television programmes, it shall be mandatory for the broadcaster to ensure either placement of an anti tobacco health warning as a prominent scroll at the bottom of the television screen during the period of such display or airing of anti tobacco health spots for a period of minimum thirty seconds during the telecast of each television programme of thirty minute duration or less.

(b) In case the television programme is more than thirty minutes further airtime of thirty seconds shall be allocated for each incremental thirty minutes, for telecasting anti tobacco spots.

(c) the minimum duration of each anti tobacco spot shall be not less than fifteen seconds.

(d) The provisions of this sub-rule shall not apply to Clauses (c) and (d) of Sub-rule 6:

Provided that, the anti tobacco health warning scroll shall be legible and readable with font in black colour on white background with the warnings "Smoking causes cancer" or "Smoking kills" for smoking form of tobacco use and "Tobacco causes cancer" or "Tobacco kills" for chewing and other form of tobacco or such other warnings as may be specified by the Central Government, from time to time.

Provided further that, the anti tobacco health warning scrolls or health spots shall be in the same language(s) as used in the film or television programme. In case of dubbed or sub-titled films or television programmes, the scrolls or spots shall be carried in the language of dubbing or sub-titlement.

(7) Sub-rule (6) shall not apply to new Indian or foreign films and television programmes displaying use of tobacco products necessary to represent the smoking of tobacco usage of a real historical figure or for representation of a historical era or classified well known character:

Provided that in very rare cases where there is display or use of tobacco products due to compulsions of the script, they shall be supported by a strong editorial justification:

Provided further that the display of usage of tobacco products in such movies and television programmes under this sub-rule shall be subject to the following safeguards:

(a) Film and television programs depicting tobacco related scenes shall mandatorily be given "A" Certification. Such films and television programmes may be permitted to be telecast at such timings as are likely to have least viewership from persons below the age of eighteen years.

(b) The films or television programs, which depict such scenes, would have a disclaimer by the concerned actor regarding the ill effects of use of such products. The disclaimer would be shown in the beginning, middle and end of the film.

(c) Whenever such scenes are shown in a film or television programme, an anti tobacco health warning scroll will be continuously displayed on the screen starting a minute before the scene and would be continuously displayed until one minute after the scene.

Provided also that there shall not be any display of brands of tobacco products or tobacco product placement in any form:

Provided also that close-ups of cigarette packages or tobacco products shall not be permissible and such scenes shall be edited by the producer or distributor or broadcaster prior to screening in cinemas or theatres or airing on television.

Explanation (1).- For the purpose of this sub-rule, all films and television programmes that receive Central Board of Film certification after the effective date of this notification shall be categorized as "new".

Explanation (2).- For the purpose of this sub-rule, representatives from Ministry of Health and Family Welfare shall also be represented in the Central Board of Film Certification.

3. I have gone through the reasoning contained in paragraph 17, 18 and 19 of the judgment of my learned brother Khanna, J. The relevant operative portions of the said paragraphs reads as under:

Para 17...The Act seeks to prohibit, direct and indirect, advertisement by the person engaged in production, supply or distribution of cigarettes and also any person having control over the media shall be prohibited from advertising, directly or indirectly, cigarettes or tobacco products. Any other interpretation would prohibit a person from participating directly or indirectly in an offending advertisement but would permit and tacitly permit indirect advertisements by dealers, manufacturers, media etc.

Para 18. Sub-section (3) of Section 5 prohibits a person from entering into contract or promote or agreeing to promote tobacco products or even brand name of cigarettes and tobacco products. Section 22 provides for prosecution of persons who infringe or contravene the provisions of Section 5 of the act.

Para 19. ... The impugned Rules, which seek to define the term "indirect advertisement", therefore cannot be regarded as ultra vires or seeking to go beyond the parent statute. The relevant Rules, their scope, import, purpose and reasonableness has been discussed in the later portion of this judgment and is not being separately examined under this heading.

I am respectfully unable to agree with the view taken by my learned brother holding that the impugned rules cannot be regarded as ultra vires or seeking to

go beyond the parent statute. The scope of the rule-making power conferred by Section 31 of the Act by virtue of which the impugned Rules were framed is fundamental to assessment of the legality of such rules. In my view, none of the provisions of Section 31 contemplates directly or indirectly the power to make rules in respect of television serials and films and, therefore, in my view, the plea of the petitioner that a blanket ban on production of films and television serial which show a smoking scene is ultra vires the rule making power u/s 31 of the Act appears to have substance.

4. 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) Act, 2003 reads as follows:

2. The proposed Bill seeks to put total ban on advertising of cigarettes and other tobacco products and to prohibit sponsorship of sports and cultural events either directly or indirectly as well as sale of tobacco products to minors.

The objective of the proposed enactment is to reduce the exposure of people to tobacco smoke (passive smoking) and to prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements.

"Advertisement" has been defined u/s 3 (a) as:

Advertisement" includes any visible representation by way of notice, circular, label, wrapper or other document and also includes any announcement made orally or by any means of producing or transmitting light, sound, smoke or gas;

5. Section 31 of the Act provides that Rules may be made on the following subjects:

Section 31. "Power of the Central Government to make rules: (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely-

(a) specify the form and manner in which warning shall be given in respect of cigarettes or other tobacco products under Clause (o) of Section 3;

(b) specify the maximum permissible nicotine and tar contents in cigarettes or other tobacco products under the proviso to Sub-section (5) of Section 7;

(c) specify the manner in which the specified warning shall be inscribed on each package of cigarettes or other tobacco products or its label under Sub-section (2) of Section 8;

(d) specify the height of the letter or figure or both to be used in specified warning or to indicate the nicotine and tar contents in cigarettes or other tobacco products u/s 10;

(e) provide for the manner in which entry into and search of any premises is to be conducted and the manner in which the seizure of any package of cigarettes or other tobacco products shall be made and the manner in which seizure list shall be prepared and delivered to the person from whose custody any package of cigarettes or other tobacco products has been seized;

(f) provide for any other matter which is required to be, or may be prescribed.

1. Every rule made under this Act and every notification made u/s 30 shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive session aforesaid, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

6. The preamble of the Act avowedly deals with a total ban on cigarette advertising and other tobacco products and the sponsoring of sports and cultural events and sale of tobacco products to minors and does not deal with media at all except advertising and sponsorship. Neither the preamble nor any of the provisions of Section 31, in my view contemplates directly or indirectly the power to make rules in respect to television serials and films. Section 31 (1) of the Act confers the power upon the Government to make Rules to carry out the provisions of the Act. There is no provision in the Act, which seeks to regulate or prohibit any matters relating to cinema or television, including the contents of cinema or television programmes. If the Act is read as a whole, it becomes obvious that the intention is to regulate the manner in which tobacco products are packaged, sold and advertised and/or sponsored. There is no reference to cinema or any other media in the Act. If the intention of the legislature was to apply the Act to cinema, it would have found a mention expressly or by necessary implication. The omission of any reference to cinema and the matters incidental to it in the Act is not a result of oversight, but the expression of a conscious legislative intention not to extend the application of the Act to other subjects including the fields of cinema and television, which are covered under the Cinematographic Act and the Cable Television Act. A mere depiction of a smoking scene in a movie or serial cannot be termed as an indirect advertisement. The impugned Rules, therefore, cannot be framed under the powers conferred u/s 31 (1) and thus are ultra vires the statute.

Since the impugned Rules are neither authorized under Sub-section (1) nor under Sub-section (2) of Section 31 of the Act, the same are held to be ultra vires the Rules making power u/s 31 of the Act and are accordingly struck down.

7. Even proceeding on an assumption that the rules were intra vires Section 31 of the Act, the scope of freedom of speech and expression as envisaged in Article 19 of the Constitution is required to be defined in order to appreciate the issues arising in the writ petition de hors the plea about the vires of the Rules qua Section 31 of the Act.

Article 19 of the Constitution reads as under:

19. Protection of certain rights regarding freedom of speech etc. -

(1) All citizens shall have the right-

(a) to freedom of speech and expression;

(b) x x x x x

(c) x x x x x

(d) x x x x x

(e) x x x x x

(g) x x x x x

[(2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.]

(emphasis supplied)

8. The Constitution of India has not adopted the doctrine of preferred freedoms nor has any such theory been evolved by our Supreme Court. The Hon''ble Supreme Court has preserved this cherished right and has refused to give a clean chit to legislative or executive measures abridging this vital freedom unless such measures strictly and squarely conformed to the permissible limits contained in Article 19 (2).

(i) In Secretary, Ministry of Information and Broadcasting, Govt. of India and others Vs. Cricket Association of Bengal and others, , it was clearly held that the freedom to air one''s view is the lifeline of any democratic constitution. It was also held in the said judgment that no restriction should be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2) of the Constitution. The relevant portion of the said judgment reads as under:

The freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of

legislatures and governments and must be preserved.

The Court must be careful to see that it does not even unwittingly aid the effort to defeat the parties' right. Every free citizen has an undoubted right to lay what sentiments he pleases before the public. Freedom to air one's views is the lifeline of any democratic institution and any attempt to stifle, suffocate or gag this right would sound a death-knell to democracy and would help usher in autocracy or dictatorship. This Court has always placed a broad interpretation on the value and content of Article 19 (1)(a), making it subject only to the restrictions permissible under Article 19 (2)

Unlike in American limitations on fundamental rights are specifically spelt out under Article 19 (2) of our Constitution. Hence no restriction can be placed on the right to freedom of speech and expression on grounds other than those specified under Article 19(2).

(ii) The Hon'ble Supreme Court in the case of S. Rangarajan Vs. P. Jagjevan Ram and Others, held as follows:

Fundamental Rights guaranteed under Article 19 (1) (a) can be curbed or restrained only on the grounds specifically mentioned under Article 19 (2).

(iii) In Life Insurance Corporation of India and Union of India and another Vs. Prof. Manubhai D. Shah and Cinemart Foundation, the Hon'ble Supreme Court held as follows:

The freedom of speech and expression must be broadly construed to include the freedom to circulate one's views by word of mouth or in writing or through audio visual media. This includes the right to propagate one's views through the print or other media. The Court observed:

Freedom to air one's view is the lifeline of any democratic institution and any attempt to stifle or suffocate or gag this right would sound a death knell to democracy and would help usher in autocracy or dictatorship.

(iv) In Sakal Papers (P) Ltd. and Others Vs. The Union of India (UOI), the Hon'ble Supreme Court held as follows:

There is nothing in Clause (2) of Article 19 which permits the State to abridge this right on the ground of conferring benefits upon the public in general or upon a section of the public. It is not open to the State to curtail, or infringe the freedom of speech of one for promoting the general welfare of a section or a group of people unless its action could be justified under Clause (2) of Article 19.

(v) The Hon'ble Supreme Court in the case of Bobby Art International, etc. Vs. Om Pal Singh Hoon and others, held as under: -

Section 5B of the Cinematograph Act, which echoes Article 19(2), states that a film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the

interests of, inter alia, decency. Under the provisions of Sub-section (2) of Section 5B the Central Government is empowered to issue directions setting out the principles which shall guide the authority competent to grant certificates in sanctioning films for public exhibition.

The guidelines earlier issued were revised in 1991. Clause (1) thereof reads thus: "1. The objectives of film certification will be to ensure that-

- (a) the medium of film remains responsible and sensitive to the values and standards of society;
- (b) artistic expression and creative freedom are not unduly curbed;
- (c) certification is responsive to social change;
- (d) the medium of film provides clean and healthy entertainment and
- (e) as far as possible, the film is of aesthetic value and cinematically of a good standard."

The guidelines aforementioned have been carefully drawn. They require the authorities concerned with film certification to be responsive to the values and standards of society and take note of social change. They are required to ensure that "artistic expression and creative freedom are not unduly curbed". The film must be "judged in its entirety from the point of view of its overall impact". It must also be judged in the light of the period depicted and the contemporary standards of the people to whom it relates, but it must not deprave the morality of the audience.

9. Freedom of press is a basic prerequisite of a democratic framework as per our Constitution. This freedom depends heavily on the widest possible dissemination and when the process of dissemination is hindered or obstructed by means of legislation or otherwise, it defeats the right guaranteed by Article 19 (1) (a) and it also takes away the rights of the people to find out what is correct by means of a free discussion and criticism. Any legislation subordinate or otherwise affecting the freedom of the press therefore must first undergo the test of directness i.e. whether the effect of the impugned action shall take away or abridge the fundamental right of freedom of speech and expression.

The Apex Court in *Bennett Coleman and Co. and Others Vs. Union of India (UOI) and Others*, observed as follows:

If it is to be assumed that the direct object of law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be related to the directness of effect and not to the directness of the subject matter of impeached law or action. The action may have a direct effect on a fundamental right although its direct subject matter may be different. Therefore, the word "direct" would go to the quality or character of the effect and not the subject matter.

Thus it is the direct operation of the Act or the Rules upon the rights that forms the real test. In *Sakal Papers*" case (supra), the Hon"ble Supreme Court referred to the ruling in *Dwarkadas Shrinivas Sholapur Shining & Weaving Co. Ltd.* and held that the correct approach is to enquire what in actual form was the loss or injury caused to the citizens and not just the method adopted by the State in placing restrictions.

In *Bennett Coleman* (supra), the Court had further held that:

No law or action would state in words that rights of freedom of speech and expression are abridged or taken away. That is why courts have to protect and guard fundamental rights by considering the scope and provisions of the Act and its effect upon the fundamental rights. The ruling of this Court in *Rustom Cavasjee Cooper Vs. Union of India (UOI)*, is the test of direct operation upon the rights. By direct operation is meant the direct consequence or effect of the Act upon the rights.

Thus when we examine the impugned Rule in the context of the above discussion, it is clear that the blanket ban on production of films and television serials which show a smoking scene is a direct encroachment on the creativity and free artistic expression of the maker of such film or television serial guaranteed under Article 19 (1) (a). Such restriction does not fall within the parameters of reasonableness under Article 19(2) and hence cannot be upheld.

10. Thus the Hon"ble Supreme Court proscribed the undue curbing of artistic expression and creative freedom. At this stage, the scope and ambit of the phrase "decency and morality" in Article 19(2) relied upon by Shri P.P. Malhotra, the learned Additional Solicitor General is required to be construed in the context of the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution and under the scope of Article 19(2) which specifies heads under which that right could be restricted. While the petitioner is right in contending that the freedom of speech and expression cannot be curtailed merely on the ground of public health but nevertheless I find that the term "decency and morality" under Article 19 (2) of the Constitution must receive a wider meaning and to exclude public health from the scope and ambit of decency and morality would be putting too narrow an interpretation on the said phrase. The interpretation of the constitution must receive the dynamic interpretation which is conditioned and indicated by the societal development and reflects current societal norms.

11. The incidence of research on ill effects of tobacco and the knowledge and the connection between cancer and tobacco may bring public health into the ambit of "decency and morality" in the present context even though it may not have been traditionally perceived to be so. The entries in Schedule VII of the Constitution are required to be construed widely and liberally and must receive an interpretation in accordance with the present state of affairs in the Indian society.

12. Therefore, I am of the view that in so far as the power to frame the Rules is

concerned, the impugned rules could have been framed under the scope of the phrase "decency and morality" used in Article 19(2) provided Section 31 contemplated such a jurisdiction to frame rules.

However, merely because of the existence of the power to frame rules, it does not necessarily imply that the rules formulated pursuant to the use of such power are legal. In testing the sweep of the right of freedom of speech and expression under Article 19 (1) (a), the reasonableness of the restriction permissible under Article 19 (2), even if put for safeguarding public health, which I have already construed to be part of decency and morality, nevertheless, has to be judged. Article 19 (2) clearly stipulates that the restrictions must be reasonable. In my view, the blanket restriction put on the scenes of smoking in all the films and television serials even with the editorial justification cannot be sustained as it is, in my view, unreasonable and violates Article 19(1)(a) for that reason.

13. I also cannot lose sight of the fact that the Cinematograph Act, 1952 and the Rules framed thereunder provide adequate safeguards if a scene of smoking is used as a surrogate/indirect advertisement or the use of a smoking scene is so prominent so as to masquerade as an purported incident of artistic freedom and leads to promotion of the use of tobacco. The undoubted evils of tobacco and the need to curb smoking particularly among youngsters who emulate their matinee-idols cannot be over emphasized. I do not have the slightest doubt that the impugned rule is well intentioned and indeed if constitutionally valid, would promote good health in the country. However, I am required to judge the legality and not the noble intention or the public interest subserved which led to the framing of the impugned rules. I cannot lose sight of the fact that smoking per se has not been banned in our country, and in such a situation, a blanket ban on the use of scenes of smoking in films and television serials would clearly be unreasonable as it would proscribe the depiction of what actually transpires in life in this country and curb unreasonably, artistic expression and creative freedom contrary to the law laid down in Bobby Art International (supra) by the Hon"ble Supreme Court.

14. The Guidelines for Certification of Films for Public Exhibition (hereinafter referred to as the "CBFS guidelines") read as follows:

MINISTRY OF INFORMATION AND BROADCASTING

New Delhi, the 6th December, 1991.

NOTIFICATION

S.O 836(E). In exercise of the power conferred by Sub-section(2) of Section 5B of the Cinematograph Act, 1952 (37 of 1952) and in supersession of the notification of the Government of India in the Ministry of Information and Broadcasting No. S.O. 9(E), dated 7th January 1978, except as respects things done or omitted to be done before such supersession, the Central Government

hereby directs that in sanctioning films for public exhibition, the Board of Film Certification shall be guided by the following principles:

1. The objectives of film certification will be ensure that-

(a) the medium of film remains responsible and sensitive to the values and standards of society;

(b) artistic expression and creative freedom are not unduly curbed;

(c) certification is responsive to social change;

(d) The medium of film provides clean and healthy entertainment; and

(e) as far as possible, the film is of aesthetic value and cinematically of a good standard.

2. In pursuance of the above objectives, the Board of Film Certification shall ensure that-

(vi-a) Scenes tending to encourage, justify or glamorise consumption of tobacco or smoking are not shown;

(emphasis supplied)

Any film or television serial which abuses the right of artistic freedom of speech and expression and tends to encourage, justify or glamorize the concept of tobacco can and certainly is bound to be dealt with, by the Censor Board by denying it certification or ordering suitable alterations/deletion. Thus, the public intent sought to be sub served by the impugned rules can be and indeed is required to be preserved by the above noticed guidelines for film certification.

15. No one can doubt the evils of tobacco and they are well manifested in the judgment of the Hon"ble Supreme Court in Murli S. Deora Vs. Union of India and ors, . Nevertheless, I cannot lose sight of the fact that the tobacco consumption, in whatever form, has not been per se banned in our country. Consequently, the question of ban on scenes of tobacco consumption by smoking, the issue we are concerned with in the present petition, has to be examined in that light. Today, in the restricted form, smoking is permissible in this Country. Movies and television serials are meant to depict and reflect life in all its facets. In the guise of promoting good health, which is undoubtedly a desired goal, the freedom of speech and expression cannot be unreasonably interfered with particularly when such restriction is in addition to the restrictions which may be imposed upon by the Censor Board. Quite apart from the fact that I have already held that the Rules are ultra vires the Section 31 of the Act for the reasons given in the foregoing paragraphs, nevertheless I am of the view that even if assumed to be intra vires, the rules insofar as they put a ban on the depiction of smoking scenes even with the amended rider of strong editorial justification, will violate Article 19(1)(a) and the right of artistic expression and creative freedom for film

makers and other media and the restrictions sought to be put cannot be held to be reasonable.

The freedom of speech and expression is one of the pillars of the Constitution of India and indeed sustains its democratic structure. What I find in addition to the rule being ultra vires the Act is the safeguard, that all the evils sought to be curbed by the rules impugned are remediable under the Cinematographic Act and CBFS guidelines, as referred to above.

The evils sought to be remedied and public interest sought to be advanced by the impugned rules can be and ought to be redressed by the Board of Censors. I have already held that the Act and the Rule making power conferred u/s 31 of the Act, does not empower the Government to make the impugned Rules. Consequently, with great respect I am unable to agree with the conclusions in the erudite judgment of my learned brother Sanjiv Khanna, J., and strike down the provisions of Rule 4 (6) as being ultra vires Section 31 of the Act.

16. The Hon"ble Supreme Court in K.A. Abbas Vs. The Union of India (UOI) and Another, , held as follows:

...Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst is determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favor of freedom thus leaving a cast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal for and the line is to be drawn where the average moral man beings to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the deprived begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman"s legs in everything, it cannot be helped. In our scheme of things, ideas having redeeming social or artistic value must also have importance and protection for their growth....

17. Creativity and the formation of artistic expression cannot be curtailed to the extent of banning it as the films and television serials could and would reflect reality. Even otherwise, if a film depicts a smoking scene which is hit by the restriction, it may reflect life with all its manifestations. Therefore, to put a total restriction on scenes of smoking in films and serials punishable when smoking is not banned in the court, in my view, is an exercise impermissible under the Constitution. As such, a blanket ban imposes an wholly unreasonable restriction on the freedom of speech and expression manifested by artistic freedom. Such a blanket ban, therefore, does not take into account the cinematic necessity and the intent of the narration of the Director and would even forbid the actual reality

of life to be portrayed by the scene. It would also curb artistic freedom. If a fetter imposed by the Rules is upheld, a corollary of the above rule could be another rule proscribing scenes which show promiscuity and villainy on the screen. Even such scenes could legitimately be termed as setting a deleterious example before the youth and the impressionable sections of the country. Such possible inroads into the freedom of speech and expression could be illustrated by other depictions necessitated by the script which show what is not necessarily good or moral. However, cinema must both reflect good and bad aspects of life. Imagine a movie where all is well and every character is moral and obeys the laws and is happy and contented. Such a script apart from being very boring also necessarily has to be very short. Even epics such as "Mahabharata" and "Ramayana" have gambling, kidnapping and deceit and such depictions cannot be legitimately prohibited to promote a morally idealistic society. For example, it would be difficult to portray the youthful gathering say in a college or a club without the use of incidental smoking being a part of the script. It is precisely such inroads into the right of freedom of speech and expression that have to be curbed and safeguarded as per Article 19(1)(a) of our Constitution and accordingly must be struck down.

18. Accordingly, the writ petitions are allowed and Rule 4(6) is quashed and set aside as being ultra vires Section 31 of the Act and in any event violative of Article 19(1)(a) of the Constitution of India.

WP(C) No. 7410-11/2006

KASTURI & SONS:

1. De hors the finding on the Rule 4(8) being ultra vires Section 31 and on the assumption that the Rules could be framed I proceed to consider the validity of Rule 4(8) on the ground of violation of Articles 14 and 19 (1) (a). The challenge by the petitioner Newspaper Hindu through senior counsel Shri Arvind Datar is to publishing a photograph of a live event containing a cigarette brand which has already been telecast. My reasoning in so far as the Rules being ultra vires Section 31 of the Act has been formulated in the judgment in WP(C) No. 18761/05 and I adopt the same reasoning and hold the Rule 4(8) to be ultra vires Section 31 of the Act. I also however proceed to discuss the validity of Rule 4(8) on the assumption that it is intra vires Section 31 of the Act. In my view if such an event has been telecast live, then to forbid the photograph of the event which has already been telecast live under the provisions of Sub-rule 7 of Rule 4 as amended in the year 2005 and renumbered as Sub-rule 8 of Rule 4 would certainly be unreasonable, arbitrary and violative of Article 14 of the Constitution.

2. The challenge here is to amended Sub-rule (8) of Rule 4 which reads as follows:

(8) Wherever brand names or logos of tobacco products form a part of the pictures to be printed in any form or print or outdoor media or footage to be aired through any form of electronic media, it shall be mandatory for the media

to crop or mask the same to ensure that the brand names and logos of the tobacco products are not visible, except in case of live or deferred live telecast of sports, cultural and other events or activities held in other countries being aired on television in India.

3. It has been contended that while the unhindered live telecast of Formula-I Race took place, the petitioner has been proceeded against on the ground that they published a photograph of the same event which had already been telecast live. The challenge is required to be adjudicated in the aforesaid factual background. I have also noted the fact that the television channels are permitted to telecast the said Formula-I Race without any editing as amended Sub-rule 8 of Rule 4 has clearly excluded from its ambit the live television coverage of events. To the extent the print media is singled out while not touching the live coverage on the television channels, the said ban is violative of Article 14. In so far as the pictorial representation of a live event in a newspaper is concerned I am of the view that firstly it is not possible to differentiate between the visual depiction of a live telecast and still photography of the same event in the print media, and secondly I see no reason why a visual depiction (though live) or even deferred live, both of which have a far greater impact, can be permitted whereas a photograph of the said event cannot be. This would amount to invidious discrimination clearly violating the basic mandate of Article 14 of the Constitution of India. In my view the Formula I Race attracts a lot of public attention and to forbid to print the pictures of prize distribution ceremony as done in the present case, would certainly amount to violation of Article 19(1)(a) as it impedes the right to disseminate and circulate news guaranteed as part of freedom of speech and expression.

4. The freedom of speech and expression is a prominent constituent of democracy. A healthy and fetter free press promotes dissemination of news and views. A healthy democracy is sustained by informing and making aware the citizens of conflicting and differing points of view and any inroads into the freedom of speech and expression, and any rules made in the form of imposing curbs thereon would violate Article 19(1)(a) of the Constitution. Such curbs are not saved by Article 19(2) of the Constitution. Accordingly, the impugned Rule 4(8) in so far as it proscribes in toto the photographs of already telecast events clearly violate not only Article 14 but also hinders unreasonably the rights guaranteed under Article 19(1)(a) and is not protected by Sub-clause (2) of Article 19 of the Constitution. Thus, while I concur with the quashing of the show cause notice issued to Kasturi and Sons by my learned brother Sanjiv Khanna, J., I am further unable to sustain the constitutional validity of the Rule 4 Sub Rule 8.

5. Accordingly, the writ petitions are allowed and Rule 4(8) is quashed and set aside as being ultra vires Section 31 of the Act and in any event violative of Articles 14 and 19(1)(a) of the Constitution of India.