

(2012) 09 DEL CK 0359

In the Delhi High Court

Case No : Writ Petition (C) No. 5280 of 2012 and CM 10784 of 2012

Utv Software Communications Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 10-09-2012

Acts Referred:

Constitution of India, 1950 — Article 19(1)(a)

Citation : (2012) 132 DRJ 143

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Parag Tripathi, Mr. Atul Nanda, s with Mr. Ravi Prakash, Mr. Anuj Bhandari, Mr. Priyadarshi and Ms. Avni Singh, for the Appellant; Rajeeve Mehra, ASG with Mr. Jatan Singh, Ashish Virmani and Mr. Tushar Singh, for the Respondent

Judgement

Rajiv Shakdher, J

CM 10784/2012 (stay)

1. The captioned writ petition is directed against the letter dated 02.08.2012 issued by respondent no.1. In the interlocutory application, prayers have been made for: grant of ex parte stay of the impugned letter dated 02.08.2012; issuance of a direction to respondent no.3 to consider grant of certification to the film "Heroine" in terms of the provisions of the law which obtained prior to the coming into force of the notification dated 27.10.2011 read alongwith minutes of meeting (in short MOM) dated 29.11.2011.

2. Notice in the writ petition and the application was issued by me on 27.08.2012 when, on behalf of respondent nos.1 to 3 notice was accepted by Mr. Jatan Singh, Advocate. Due to the urgency in the matter, respondents were granted five days to file a reply, while the petitioner was directed to file a rejoinder, if any, before the next date of hearing. In the meanwhile, the learned Additional Solicitor General (ASG) was asked to take instructions as to whether or not the

respondents continue to abide by the MOM dated 29.11.2011. Direction was also issued to respondent no.3 to proceed with the certification of the film in issue by taking into account the following two scenarios :

(a). where provisions of clause (ii) of the impugned letter dated 02.08.2012 is enforced; and

(b). where the aforementioned provision, i.e., clause (ii) of the letter dated 02.08.2012 is disregarded.

2.1 The matter was made returnable today.

3. Briefly, the broad background facts, based on which, the writ petitioner has approached this Court, are as follows :-

3.1 On 18.05.2003, the Parliament enacted the Cigarettes and other Tobacco Products (Prohibition of Advertising and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (in short, COPTA Act). The respondent nos.1 and 2 vide notification bearing no. G.S.R. 137 dated 25.02.2004 brought into force certain provisions of COPTA, including section 5, pertaining to ban on advertisements related to cigarettes and other tobacco products. The notification was to come in force w.e.f. 01.05.2004. The rules framed under the COPTA Act known as Cigarettes and other Tobacco Products (Prohibition of Advertising and Regulation of Trade and Commerce, Production, Supply and Distribution) Rules, 2004 (2004 Rules), were also brought in force w.e.f. 01.05.2004 vide notification of even date 25.02.2004.

3.2 It appears that the 2004 Rules were challenged in April, 2005 in the High Court of Madras, by one, M/s Kasturi and Sons in WP(C) 12344/2005. The said writ petition was transferred to this Court by the Supreme Court and consequently, re-registered as WP (C)7411/2006.

3.3 On 31.05.2005, 2004 Rules were amended. The amended Rules of 2005, inter alia amended Rule 4 of 2004, inasmuch as, it provided for a complete ban on the display of tobacco products and their use in cinema and television programmes.

3.4 The aforesaid resulted in, M/s Kasturi and Sons, once again, approaching the Madras High Court, in July, 2005, to lay challenge to the 2005 amendment of the Rules. As on the previous occasion, this writ petition was also transferred to this Court, by the Supreme Court, and was re-registered as WP(C) 7410/2006.

3.5 One, Sh. Mahesh Bhatt, challenged the notification dated 31.05.2005 which, brought about the 2005 amendment to the Rules by filing a writ petition in this Court. The said writ petition was filed on 27.09.2005 and is numbered as WP(C) 18761/2005. The challenge made was directed at insertion of Rule 4 (6) which completely banned the depiction of use of tobacco in cinema and television programmes.

3.6 On 30.11.2005, the Central Government brought out yet another notification

being GSR 698(E). By this notification, which was a second amendment of the rules originally framed, sought to replace Rule 4(6) while seeking to introduce sub rule (6A) and (6B). The notification of 30.11.2005, was also challenged by the said Sh. Mahesh Bhatt, by filing yet another writ petition, in this Court, being: WP(C) 23716/2005. This writ petition was filed on 16.12.2005.

3.7 On 20.10.2006, vide notification bearing no. GSR 656(E), a third amendment was carried out which sought to incorporate changes in Rule 4. this Court vide order dated 22.02.2006 passed in WP(C) 18761/2005 stayed the implementation of the said notification.

3.8 On 07.02.2008, a Division Bench of this Court pronounced its judgment in WP(C) Nos. 18761/2005, 23765/2005, 7410/2006 and 7411/2006. On account of the fact, that the two learned Judges of this Court presiding on the Bench had deferred on the issue as to whether or not the Rule imposing a ban on use and depiction of tobacco products in Cinema and television programmes was valid or not, the said writ petition was referred to a third Judge. The third Judge vide his judgment dated 23.01.2009, concurred with the view of one of the Judges, by coming to the conclusion that Rule 4 sub rule (6), (6A), (6B) and 8 as finally amended by GSR 656 (E) dated 20.10.2006 were ultra vires Article 19(1)(a) of the Constitution Of India. The said provisions were accordingly struck down. Respondent nos.1 and 2 preferred a SLP being : SLP 8439/2009. The Supreme Court vide order dated 02.04.2009 stayed the operation of the judgment passed by this Court.

3.9 To complete the narrative on 27.04.2012, the Supreme Court made an order making the interim order absolute.

4. This is in so far as the challenge to the provisions of Rule 4 is concerned.

5. In so far as the writ petitioner is concerned, it is averred that it commenced work on the film "Heroine" on 07.06.2011, which got concluded on 13.08.2012.

5.1 In the interregnum, the Central Government issued a notification bearing no. GRS 786(E) on 27.10.2011 to amend the 2004 Rules. By this notification, Rules 7, 8 and 9 are sought to be inserted. Aggrieved by the aforementioned notification, representatives of the film industry held a meeting with the representatives of, the Ministry of Information and Broadcasting (i.e. R-1), the Ministry of Law and Justice and the Central Board of Film Certification (i.e., R-3). The meeting was convened specifically to discuss the difficulties and challenges which the film industry was facing pursuant to the notification dated 27.10.2011. The meeting was minuted. Since the minutes of the meeting are crucial to the issuance of interim directions, the operative part of the decisions taken in the said meeting is extracted hereinbelow for the sake of convenience :-

(i). The Ministry of I&B will make a formal reference to Ministry of Health requesting them to keep the Notification in abeyance and also refer the matter to Ministry of Law and Justice for their considered opinion / advice.

ii). Till the issue gets resolved amicably, the Ministry of Information and Broadcasting may direct the Central Board of film Certification to adhere to the certification process as was being done before the issue of notification dated 27.10.2011 with the proviso that a disclaimer of 15 seconds be issued in the beginning of the film and another similar disclaimer immediately after the interval of the film. Occasional scrolls may also be inserted by the film maker.

iii). Ministry of I&B will also separately make a reference to M/o. Law and Justice along with:

a. Copies of the judgments of Hon"ble Delhi High Court and Hon"ble Supreme Court, and

b. Writ petition filed by the representatives of Film Industry in Hon"ble Supreme court for rectification of the clerical error in the judgment.

for tendering considered opinion / advice (copies of these documents will be provided by Sh. Mahesh Bhatt).

iv). The representatives of the Film Industry agreed to do the following :

a. A disclaimer/ statutory warning to be put on screen for 15 seconds in the beginning of the film and after the interval.

b. The TV promos / trailers of films shall not contain any shots of smoking.

v). They also voiced their commitment towards any campaigns / advertisements on anti-smoking in consultation with the Ministry of Information and Broadcasting / Ministry of Health and Family Welfare

5.2 It may also be relevant to note that even though the Minister for Health and Family Welfare was not physically present at this meeting, the Minister for Information and Broadcasting held telephonic discussion with the said Minister and brought to his notice the difficulties faced by Central Board of Film Certification (R-3) and the film industry on account of notification dated 27.10.2011.

6. It is averred by the petitioner that pursuant to the meeting dated 29.11.2011, between December 2011 and May, 2012, thirteen (13) new cinematographic films were granted certification in accordance with the norms which were in place prior to the notification dated 27.10.2011 and those which were put in place pursuant to MOM dated 29.11.2011. The names of the films and the months in which the referred films have been released are set out in paragraph 21 of the writ petition. It is averred that in the thirteen (13) films referred to in paragraph 21: there are disclaimers of a duration of 10 to 15 minutes in each of the films; in most of the films no disclaimer was shown in the middle of the film either before or after the interval; in some cases there was not even a voice over of the concerned actor regarding the ill effects of the use of cigarette and other tobacco products; in all cases the disclaimer adverts to the fact that "cigarette smoking is injurious to health"; there are no messages or depiction of anti tobacco health

spots either in the beginning or in the middle of the film; and lastly, there are no disclaimer's scroll running at the bottom end of the screen in respect of scenes which depict smoking by actors/actresses.

6.1 It is further averred that the cost of producing a film alone, at the end of July, 2012 has reached a figure of Rs.20 Crores. In addition to the above, it is averred that a sum of Rs.10 Crores have been spent on publicity. The film is set to be released in theatres on 21.09.2012; a date which was published on 05.06.2012. It is further averred that music videos of the songs in the said film have been aired on television since 26.07.2012. There is also an averment to the effect that distribution contracts for release of the said film on 21.09.2012 have been executed by the petitioner and any delay beyond that date may result in the petitioner being mulcted with additional cost in the form of damages.

7. In so far as notification dated 27.11.2011 is concerned, the same has also been challenged by Sh. Mahesh Bhatt, who had filed writ petitions earlier in this Court, vide WP(C) 1475/2012. A Division Bench of this Court vide order dated 16.03.2012 directed parties to complete pleadings in the said matter. The said writ petition is pending adjudication before the Division Bench.

8. It appears that respondent no.1 rocked the boat, so to say, by issuing the impugned communication dated 02.08.2012 to respondent no.3. Respondent no.1 by this communication, after referring to an earlier communication of respondent no.3 dated 15.05.2012, informed respondent no.3 to advise the film makers to adhere to the following :-

(i). A 20 second anti-smoking message as approved by Ministry of Health with voiceover of one of the actors who is seen smoking in the film to be displayed at the beginning and in middle (after interval) of the film.

(ii). A static anti-smoking message to be displayed for the duration of the smoking scene in the film

8.1 The aforesaid measures apparently as per the impugned communication have been put in place as the official respondents are evidently in the process of modifying the notification dated 27.11.2011. The impugned communication also records that the measures now put in place were a result of discussions held at various levels, amongst the representatives of the Ministry of Information and Broadcasting and the Ministry of Health and Family Welfare, including those, which were held under the chairmanship of the Minister of Health and Family Welfare, when Secretaries to the said Ministries were also present.

9. In the background of the aforesaid, it was argued by the Learned Counsel for the petitioners that they are not concerned presently with the challenge qua the 2004 Rules. It was also contended that they were not impugning in this writ petition the notification dated 27.10.2011. What concerned them presently, was the impugned communication dated 02.08.2012 and that part of the impugned communication which requires the petitioner to carry a "static anti smoking

message" during the duration of a smoking scene in the film. It is contended that this, particularly, was contrary to the decision arrived at with the representatives of respondent nos.1 and 2 at the meeting of 29.11.2011. It was submitted that it was because of the difficulties faced by the film makers qua the provisions of the notifications dated 27.11.2011, that a decision had been arrived to put in place a protem measure pending the modification of the said notification dated 27.11.2011.

9.1 Learned Counsel for the petitioner submitted that the condition contained in paragraph 3(ii) of the impugned communication which seeks insertion of a static anti smoking message is stringent as it results in obliterating the creative freedom granted to the petitioner by the 2004 Rules as amended by notification dated 20.10.2006. It was submitted that vide decision taken at the meeting of 29.11.2011 respondent nos. 1 and 2 had kept the provisions of notification dated 27.10.2011, in abeyance. The decision taken to now issue the impugned communication was, according to the Learned Counsel for the petitioner, a complete U-turn in the matter. This was specially so as the Government of India itself was of the view that notification dated 27.10.2011 required modulation.

10. On the other hand, the learned ASG submitted that the impugned communication was a dilution of the provisions of notification dated 27.10.2011. The petitioners cannot quibble with what is required of them as per the impugned notification. The learned ASG also submitted that, in view of the fact that the Government of India had made a statement before the Supreme Court, in SLP No.8429-31/2009 titled Union of India Vs. Mahesh Bhatt and Another that, it would issue a fresh notification superseding all previous notifications therefore, in the meanwhile the impugned notification should operate. The learned ASG submitted that, after a discussion with the Ministry of Law and Justice, it was decided to issue the impugned communication.

11. I have heard the Learned Counsels for the parties. As indicated on the previous date i.e., 27.08.2012, respondents no.1 and 2 were required to convey to this Court, as to whether, as a pro tem measure, they would insist on a static display of anti smoking message during the duration of a smoking scene in respect of the film in issue. Respondent nos.1 and 2, who were represented by the learned ASG are evidently opposed to applying the measures which had been put in place at the meeting held amongst various stake holders on 29.11.2011 and the measures referred to in the impugned communications sans the condition contained in paragraph 3(ii).

12. There is no gainsaying that, smoking needs to be discouraged to protect the health of the polity at large. The fact that a smoking is a habit which is prevalent amongst various sections of our society is, a reality, which cannot be ignored. Film makers and TV producers through the medium of films and TV programmes attempt to bring to fore this reality by depicting on reel what they perceive is present in real life. Therefore, while the larger public weal undoubtedly deserves to be protected, there is also a competing right of artistic freedom which cannot

be overlooked.

13. Given the fact that respondents nos.1 and 2 had taken a decision at the meeting of 29.11.2011 to put certain interim measures in place pending a final decision qua notification dated 27.10.2011, it is prima facie not appropriate for respondent nos.1 and 2 to disturb the state of affairs in the interregnum. This is specially so, as the measures put in place on 29.11.2011 appear to have worked well between December, 2011 and March, 2012. In the instant case, the balance of convenience also appears to be in favour of the writ petitioner in view of the fact that it has invested a huge sum of money based on what was perhaps according to it, was the state of the legal regime, in which, it was required to operate.

13.1 A substantial part of the film in issue, was completed during the period when the regime put in place vide meeting dated 29.11.2011 held the field. Its withdrawal at the nth hour when, the film is about to be released would in my view be both unfair and detrimental to the interest of the petitioner. Therefore, having regard to the aforesaid circumstances, the following directions are issued :-

(i). respondent no.3 shall certify the film by marrying the decisions taken in the meeting of 29.11.2011 as contained in paragraphs (ii), (iv)(a) & (b), (v) and the directions contained in para 3(i) of the impugned notification dated 02.08.2012;

(ii). the aforesaid regime shall operate only till such time Respondent nos.1 and 2 places on record a fresh notification superseding all earlier notifications (which I was told includes notification dated 27.10.2011) as conveyed to the Supreme Court at the hearing held on 04.09.2012 in SLP No.8429-8431/2009, titled tiled Union of India Vs. Mahesh Bhatt and Another.

With the aforesaid directions, the interlocutory application is disposed of.