

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No.61/2010**

% **Date of Decision: 19.10.2010**

M/s Raj Products Appellant

Through Mr.Deepak Gandhi and Mr.Abhas
Kumar, Advocates

Versus

State (Govt. of NCT of Delhi) and Anr. Respondents

Through Mr.A.S.Chandhiok, ASG with
Mr.S.C.Aggarwala and Ms.Vibha
Diwan, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

MOOL CHAND GARG, J. (ORAL)

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CM No. 3418/2010 (Exemption)

Allowed subject to just exceptions.

Application stands disposed of.

FAO No. 61/2010

1. M/s Raj Products has filed this appeal under Order 43 of the Code of Civil Procedure (for short 'CPC') r/w Section 151 CPC and Section 19 of the Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Product Supply and Distribution) Act, 2003 (hereinafter referred to as "the COTP Act") aggrieved of the order dated 18.1.2010 passed by the learned Additional District Judge, Dwarka Courts, New Delhi in Suit No.34/2009, whereby the learned Additional District Judge has allowed the suit filed by the respondent and has given the following directions:-

“36. Resultantly it is ordered that the petitioner is entitled to confiscate the seized gutkha pouches as the respondent has admitted that the same were not in conformity with Rule 3(1) (b) of the COTP (Packaging and labeling) Rules 2008. However, in view of Section 15 of the Act, respondent is given an option to pay in lieu of confiscation, costs equal to the value of goods confiscated. In case the respondent exercises such an option within 15 days and pays the costs to the petitioner equal to the value of the goods, the Superdginama given by respondent will be cancelled and respondent would be entitled to make distribution, sale or supply of such packages after getting the specified health warning incorporated on each package.

37. The petition is therefore allowed. Let the file be consigned to record room.”

2. Before the Additional District Judge it was the claim of the respondent that the officers of Central Excise Department headed by the Superintendent, Shri Narender Pal, visited the factory premises of the appellant and examined the finished goods and packing material used for making gutkha pouches lying stored in the factory premises.

3. It was claimed that the specified health warning did not occupy 40% of the principal display area of the front panel of the pouches, which were taken into possession by the respondent during the raid conducted at the premises of the appellant, which is required under clause (b) of sub rule (1) of Rule 3 of the COTP Act as per the amended notification dated 30.05.2009 [G.S.R. 305(E)] issued by the Ministry of Health and Family Welfare vide F.No.16011/07/2005-PH.

4. It was the case of the respondent that since the finished goods in the form of gutkha pouches as well as plastic material used for gutkha pouches lying with the appellant were not displaying specified health warning occupying 40% of the principal display area of the front panel of the pouches in violation of Rule 3 (a) of the said Rules, the goods were seized under Section 13 of COTP Act. The respondent consequently prayed for confiscation of the goods under Section 14 of the COTP Act.

5. The appellant who contested the proceedings before the Additional District Judge took a plea that it was not a case where

statutory warning did not exist on the pouches/packages seized by the respondent, but the warning existed on the packages as per Rules prevalent at that time. The new amendment of Rules came into force two-three months before the seizure. The appellant was always following the Rules. Therefore, the appellant has not committed any Act of violation of the aforesaid Act and Rule.

6. However, the submissions made by the appellant were not found favour with the Additional District Judge who held that the COPT (Packaging and labeling) Rules 2008 came into force with effect from 31.05.2009 after their publication in the official gazette. The Trade Notice is internal communication and has no statutory force. Trade notice is not mandatory. The department is under no obligation to send the Trade Notices and no excuse can be taken by a manufacturer that violation of law between the date of coming into force of Rules and intimation of Trade Notice is to be condoned. The appellant is in the trade of manufacturing tobacco products and cannot take a defence that the Rules which were published in the gazette on 03.05.2009 and came into force on 31.05.2009 were unknown to him till 22.09.2009 when the officials of the respondent searched his factory and seized the offending goods. Therefore, the objection of the appellant that the goods be not confiscated as these were seized by the department prior to intimation of Trade Notice to the appellant is rejected.

7. Another objection raised by the appellant is that since it was not a case of sale as per Section 14 of the Act, the prohibition was not applicable to the product in question as the product was not being sold and was in the process of being prepared for making it saleable in the market. It was argued that the seized material was not for sale but was in the process of replacing/refilling in new packages. The appellant submits that after the enforcement of amended Rules 2009 which came into force on 31.05.2009 vide notification dated 03.05.2009, the appellant withheld its earlier stock packed in all packages, thereafter, its products were packed in new packages

which were got prepared as per the amended Rules 2009 containing the statutory and specified health warning on more than 40% of the principal display area.

8. However, this argument was not found favour with the Additional District Judge, who has taken note of the panchnama dated 22.09.2009 (Annexure A to the seizure memo) which is also filed before this Court as Annexure 10 along with the present petition. It shows that 10980 packets of 'Kareena' Gutkha pouch (each packet contains 75 pouches of MRP ₹ 0.50), 117096 packets of 'Rangeela' Gutkha pouches (each packet contains 60 pouches of ₹1.00 MRP) and 10980 packets of 'Rangeela' gutkha pouch of MRP ₹1.00 were seized by the respondent. There can be no doubt that the same were meant for sale and nothing else.

9. It will also be appropriate to take note of paragraph 31 of the impugned order passed by the Additional District Judge:-

"31. Moreover, the argument of respondent that the seized material was not for the purposes of sale is clearly an after-thought in view of the main defence of the respondent that the respondent was not even aware of change in Rules brought in force on 31.05.2009 as the trade notice was received by him on 05.11.2009. If the respondent was not even aware of new Rules that came into force on 31.05.2009 till 5.11.2009, it is not possible that on the date of search on 22.09.2009 the respondent was in the process of refilling the old pouches in new pouches which were conforming with the Rules brought in force with effect from 31.05.2009. Therefore, the objection of the respondent that the goods were not for sale is also rejected."

10. I have heard the arguments made on behalf of learned counsel for the appellant. Before me, the appellant has confined his arguments to the effect that the product seized by the respondent was not meant for sale. However, in this regard, it would be appropriate to take note of some of the provisions of COPT Act, which reads as under:-

"12. Power of entry and search.-(1) Any police officer, not below the rank of a sub-inspector or any officer of State Food or Drug Administration or any other officer, holding the equivalent rank being not below the rank of Sub-Inspector of Police, authorised by the Central Government or by the State

Government may, if he has any reason to suspect that any provision of this Act has been, or is being, contravened, enter and search in the manner prescribed, at any reasonable time, any factory, building, business premises or any other place,-

(a) where any trade or commerce in cigarettes or any other tobacco products is carried on or cigarettes or any other tobacco products are produced, supplied or distributed; or

(b) where any advertisement of the cigarettes or any other tobacco products has been or is being made.

(2) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall apply to every search and seizure made under this Act.

13. Power to seize.-(1) If any police officer, not below the rank of a sub-inspector or any officer of State Food or Drug Administration or any other officer, holding the equivalent rank being not below the rank of Sub-Inspector of Police, authorised by the Central Government or by the State Government, has any reason to believe that,-

(a) in respect of any package of cigarettes or any other tobacco products, or

(b) in respect of any advertisement of cigarettes or any other tobacco products, the provisions of this Act have been, or are being, contravened, he may seize such package or advertisement material in the manner prescribed.

(2) No package of cigarettes or any other tobacco products or advertisement material seized under clause (a) of sub-section (1) shall be retained by the officer who seized the package or advertisement material for a period exceeding ninety days from the date of the seizure unless the approval of the District Judge, within the local limits of whose jurisdiction such seizure was made, has been obtained for such retention.

14. Confiscation of Package:-Any package of cigarettes or any other tobacco products or any advertisement material of cigarettes or any other tobacco products, in respect of which any provision of this Act has been or is being contravened, shall be liable to be confiscated.

Provided that, where it is established to the satisfaction of the court adjudging the confiscation that the person in whose possession, power or control any such package of cigarettes or any other tobacco products is found is not responsible for the contravention of the provisions of this Act, the Court may, instead of making an order for the confiscation of such package, make such other order authorized by this Act against the person guilty of the breach of the provisions of this Act as it may think fit."

11. In fact to prove this aspect, no evidence has been led by the appellant despite opportunity granted to them.

12. The learned counsel for the appellant also submitted that in the impugned order the Additional District Judge has also included the finished Gutkha product in the definition of the products, which is completely wrong. However, this argument is of no consequence because Section 17 deals with the power of confiscation, which as stated above, empowers confiscation of any package of cigarette or any other tobacco product or any other product in respect of which any provision of this Act is being contravened.

13. In the present case, there was a necessity to display the statutory warning in an area equivalent to 40% of the pre-display area of the front panel of the pouches in terms of the amended notification dated 30.05.009, which admittedly has not been done. As per the panchnama, it is very clear that the pouches which have been seized were containing tobacco with label as that of 'Rangeela' Gutkha, 'Panmasala' Gutkha and thus, in the absence of necessary statutory warning, were liable for confiscation. It is a matter of record that no evidence has been led on the file by the appellants that the goods seized were in the process of replacing/refilling in new packages and thus were not ready for sale.

14. As the learned counsel for the appellant has not argued with regard to the applicability of the notification, which admittedly is dated 30.05.2009 and there is no other issue which requires adjudication by this Court, the appeal filed by the appellant is dismissed with no orders as to costs. Trial court record, if any, be sent back forthwith.

CM No. 3417/2010 (stay)

Dismissed as infructuous.

MOOL CHAND GARG, J.

OCTOBER 19, 2010

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