

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

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Date of decision: 9th November, 2012

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W.P.(C) No.7292/2011

**NAYA BANS SARV VYAPAR
ASSOCIATION (REGD.)**

..... Petitioner

Through: Ms. Anusuya Salwan with Mr. Vikas Sood,
Mr. Kunal Kohli & Ms. Renuka Arora,
Advs.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through: Mr. Sunil Kumar & Mr. Ranjit Singh, Advs.
for R-1.
Mr. N. Waziri with Ms. Neha Kapoor
Khanna, Advs. for R-2 GNCTD.
Mr. Madhurendra Sharma along with Mr.
Rajiv Mishra and Mr. Rajiv Katian, Advs.
for the applicant / Impleader/ World Lung
Foundation

AND

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W.P.(C) No.4392/2012

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CORAM :-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The petitioner, an Association of wholesalers of tobacco and tobacco products, having their shops / establishments at Naya Bans area at Fatehpuri, Chandni Chowk, Delhi, has instituted these two petitions challenging the provisions of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement & Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 (COTPA) and of the Delhi Prohibition of Smoking and Non-smokers Health Protection Act, 1996 (Prohibition Act) respectively, to the extent they prohibit even wholesale of cigarette(s) or any other tobacco products within a radius of 100 yards of any educational institution, on the following grounds:

- (i) that the said market at Naya Bans is the only wholesale market of tobacco and tobacco products in Delhi and in existence since the year 1925;
- (ii) that the members of the petitioner Association have been carrying on the wholesale business in tobacco for generations;

- (iii) that the customers of the members of the petitioner Association are the large and small retailers, distributors etc. from all over India, who make bulk purchases and who in turn either sell the products to the end-users themselves or through other retailers – the end-users of the product never approach the said market as small quantity or open / loose packets are not sold therein;
- (iv) that the members of the petitioner Association are registered with the Department of Sales Tax and have huge turnovers due to large volumes and have also obtained the licences for carrying on the said business;
- (v) that though the purport of the legislations, as enumerated in the Statement of Objects and Reasons is to ban sale / reduce / control sale of cigarettes, tobacco and tobacco products to children admitted in schools but the legislations have also included within their ambit wholesalers when such wholesale outlets are not intended to and do not retail or sell the said products to consumers thereof – that prohibition of wholesale business also within the vicinity of educational institutions is contrary to the basic structure of the said legislations;

- (vi) that the business activity of the members of the petitioner can thus cause no harm to the children studying in the educational institutions;
- (vii) that the Acts aforesaid, in not differentiating between retail sellers and the wholesalers of tobacco and tobacco products, are arbitrary and in denial of right of livelihood of the members of the petitioner Association;
- (viii) that the intent behind the legislations aforesaid is to reduce consumption of cigarette and tobacco products but even if the establishments / shops of the members of the petitioner are shifted to another location beyond the radius of 100 yards from an educational institution, it would in no manner affect the consumption of tobacco and tobacco products;
- (ix) that there is no rationale in clubbing wholesalers and retailers together for the purpose of prohibiting sale of tobacco and tobacco products within a radius of 100 yards from an educational institution;

- (x) that the same unreasonably restricts the fundamental right to trade, of the members of the petitioner Association, under Article 19(1)(g) of the Constitution of India; and
- (xi) that the legislations suffer from the vice of unintelligible classification bearing no nexus with the objectives sought to be achieved therefrom.

2. The cause of action for the petitions accrued to the petitioners when in enforcement of the aforesaid Acts, notices were issued to the members of the petitioner Association to stop carrying on their business aforesaid from their establishments within the prohibited radius of educational institutions.

3. Notices of the petitions were issued and vide interim order dated 05.10.2011 in W.P.(C) No.7292/2011 (challenging the provisions of COTPA), action threatened against the members of the petitioner Association was restrained and the said order has continued in operation till date.

4. Counter affidavit has been filed by the Ministry of Health & Family Welfare, Government of India as well as by the Delhi Police in W.P.(C) No.7292/2011 and to which rejoinder has been filed. Applications for impleadment / intervention in both the writ petitions have been filed by

World Lung Foundation (South Asia) opposing the petitions and pleadings in which applications have also been completed. Though no formal order allowing impleadment / intervention was made but the counsel for the applicant has also been heard in opposition to the petitions.

5. The counsel for the petitioner has during the hearing made the same arguments as already noted above and has further offered an undertaking on behalf of members of the petitioner Association to limit their business hours to beyond school hours. It is further contended that the Prohibition Act takes within its ambit even storage of tobacco and tobacco products within the said radius. Reference is made to Paras No.57 and 63 of ***Godawat Pan Masala Products I.P. Ltd. Vs. Union of India*** (2004) 7 SCC 68 to urge the need to read down the prohibition provided for in the said Acts as not including prohibition on wholesale and reliance is placed on ***Anuj Garg Vs. Hotel Association of India*** (2008) 3 SCC 1 to contend that the operation of the law has to be limited to subserve the purpose which it intends to achieve and not beyond that.

6. The counsel for the Delhi Government has contended that challenge to a legislation can be either on the ground of lack of legislative competence or on the ground of violation of fundamental rights and neither of which

grounds is pleaded or urged. Reliance in this regard is placed on ***Public Services Tribunal Bar Association Vs. State of U.P.*** AIR 2003 SC 1115.

Attention is also invited to the Preamble of the legislations in question.

7. The counsel for the applicant World Lung Foundation (South Asia) has argued that there is no distinction between a wholeseller and a retailer and that there is no right to deal in noxious substances and the same is always subject to conditions which may be imposed while granting the privilege to deal therein. Reliance is placed on ***State of Punjab Vs. Devans Modern Breweries Ltd.*** (2004) 11 SCC 26. A copy of the extracts of the report on Tobacco Control in India published by the Ministry of Health and Family Welfare, Government of India is also handed over to show that the most susceptible time for initiation of tobacco use in India is during adolescence and early adulthood i.e. in the age group of 15–24 years and majority of users start using tobacco before the age of 18 years, some even start as young as 10 years; that such early age of initiation points to an urgent need to plan effective interventions for this vulnerable age group and that one of the major goals of any tobacco control effort is to prevent people from starting or experimenting with tobacco and the target group should be

the youth who are primarily non-users and are vulnerable as the industry especially targets them.

8. Though the counsel for the applicant has also controverted that the wholesalers are not retailing tobacco and tobacco products but we are called upon to adjudicate the legal question and if it were to be held that the prohibition does not apply to wholesalers, the dispute whether a particular establishment is wholeselling or retailing is a question of fact to be decided on case to case basis.

9. Though there is some controversy, with the counsel for the petitioner stating that there is only one school within the prohibited radius of the said market and the counsel for the applicant stating that there are three schools but in our view the same is irrelevant for the present purposes. Similarly the contention of the counsel for the applicant that there were only five wholesale establishments earlier in the market and which under the garb of interim order have increased to nineteen, also need not be dealt upon.

10. The counsel for the UOI in his written submissions has urged that the presence of a wholesale shop near educational institution will not only increase the propensity and susceptibility of minors to tobacco products but also in large quantities; that if a distinction were to be made out between

wholesellers and retailers, it would lead to a spate of litigation on whether a particular shop is carrying on wholesale or retail sale of tobacco or tobacco products; that the laws aforesaid have been enacted pursuant to the resolution passed in the 39th and 43rd World Health Assembly to *inter alia* ensure effective protection to non-smokers from involuntary exposure to tobacco smoke and to protect children and young people from being addicted to the use of tobacco which is injurious to health; and lastly that, these are beneficial legislations enacted in the interest of public at large.

Reference is made to:

- (a) Judgment/order dated 3rd June, 2011 of the High Court of Jammu & Kashmir in OWP (PIL) No.406/2010 titled ***J&K Voluntary Health & Dev. Association Vs. State.***
- (b) ***World Lung Foundation South Asia Vs. Ministry of Health & Family Welfare*** MANU/DE/2692/2012.
- (c) Judgment dated 29th March, 2011 of the Karnataka High Court in W.P.(C) No.17958/2009 titled ***Cancer Patients Aid Association Vs. State of Karnataka.***

(d) Judgment dated 26th March, 2012 of the Kerala High Court in W.P.(C) No.38513/2010 titled ***Kerala Voluntary Health Services Vs. Union of India.***

and it is contended that the directions sought in the instant petitions are contrary thereto.

11. Though the High Court of Allahabad in ***Varshney General Sales v. State of U.P.*** MANU/UP/0148/1994 has held that tobacco could not be placed at par with liquor, as hazardous to health, and to trade wherein there could be said to be no fundamental right and which aspect remained undealt in the appeal therefrom reported as ***Godfrey Phillips India Ltd. v. State of U.P.*** (2005) 2 SCC 515 but over the time the hazards of tobacco seem to have overtaken the hazards of liquor, leading to the legislation such as COTPA. The Supreme Court in ***Khoday Distilleries Ltd. v. State of Karnataka*** (1995) 1 SCC 574 observed that what may not be considered harmful today, may be considered so tomorrow and what articles and goods should be allowed to be produced, possessed, sold and consumed, is to be left to the judgment of the legislative and executive wisdom. Similarly, in ***Madras City Wine Merchants' Assn. v. State of T.N.*** (1994) 5 SCC 509 and in ***Ramesh Chandra Kachardas Porwal v.***

State of Maharashtra (1981) 2 SCC 722 it was held that nothing can be expected to remain static in this changing world of ours and a market which is suitable and conveniently located today may be found to be unsuitable and inconvenient tomorrow on account of the development, congestion or for a variety of other reasons. The Parliament, in the year 2003, while enacting COTPA, in the Statement of Objects and Reasons thereof noted that tobacco is responsible for an estimated eight lakh deaths annually in the country, that the treatment of tobacco related diseases and loss of productivity caused therefrom was costing the country almost ₹13,500 crores annually, offsetting completely the revenue and employment generated by tobacco industry and described the objective of COTPA as to prevent the sale of tobacco products to minors and to protect them from becoming victims of misleading advertisements, all to achieve a healthier lifestyle and protection of right to life enshrined in the Constitution. Undoubtedly, the Supreme Court in *Godawat Pan Masala Products I.P. Ltd.* (supra) maintained that the legislature/government having chosen not to ban the sale of tobacco products except to minors, trade in tobacco could not be classified as *res extra commercium* i.e. a business in crime, but the principles laid down in

Cooverjee B. Bharucha v. Excise Commr., Ajmer AIR 1954 SC 220 and *P.N. Krishna Lal v. Govt. of Kerala* 1995 Supp (2) SCC 187, that there is no fundamental right to trade in dangerous and noxious substances, would nevertheless apply to tobacco which has now been universally accepted as a major public health hazard.

12. It is in the said light that we proceed to adjudge the challenge. The only challenge, as aforesaid, by the petitioner is on the ground of the wholesalers and the retailers of tobacco and tobacco products not falling in the same class and clubbing thereof in the ban on sale of tobacco and tobacco products to students of educational institutions being arbitrary and irrational.

13. However, the provisions under challenge cannot be read in isolation and have to necessarily take their colour from the legislations of which they are a part. The said legislations are not intended merely against sale of tobacco and tobacco products to students in the vicinity of their educational institutions but also take within their ambit restrictions on places where one can smoke and advertisement or other ways of promoting smoking or sale of cigarettes to minors etc. We are thus unable to accept the narrow and constricted aim and intent which the petitioner would impute to the provisions under challenge. The prohibition on sale

of cigarette or tobacco products in close vicinity of educational institutions is found to have the larger objective of reducing the exposure of the students of the said educational institutions to cigarette or tobacco products. The question which thus arises is whether in the said light wholesalers and retailers can be said to be differently placed or the provisions under challenge being unreasonable and arbitrary.

14. Article 14 is not a voodoo which visits with invalidation every executive or legislative fusion of things or categories where there are no pronounced inequalities. Mathematical equality is not the touchstone of Constitutionality (Krishna Iyer, J. in *State of Kerala v. Kumari T.P. Roshana* (1979) 1 SCC 572). In *Jalan Trading Co. Pvt. Ltd. v. Mill Mazdoor Sabha* AIR 1967 SC 691 it was held that invalidity of legislation is not established by merely finding faults with the scheme adopted by the Legislature to achieve the purpose it has in view and such scheme is not liable to be struck down as discriminatory unless there is simultaneously absence of a rational relation to the object intended to be achieved by the law.

15. The presence of wholesalers of tobacco and tobacco products within the prohibited radius would definitely expose the students of educational

institutions to the sight and also probably the aroma of tobacco. It has been famously said that attraction to tobacco is largely because of its aroma and addiction follows. The lure of the aroma of tobacco is such that even the female gender, traditionally not known as consumers of tobacco, in our country, have not been spared. It is such lure which leads to the adolescents, in their bravado, to tobacco and tobacco products. Sensory cues accompanying cigarette smoking contribute significantly to enticement associated therewith.

16. The presence, even of a wholesale shop of tobacco / tobacco products next door to an educational institution will certainly have the propensity of reminding the students thereof, day in and day out, of the availability of tobacco and will also bring, literally to their door, traders in tobacco. The bringing in and bringing out of tobacco and tobacco products from said shops / establishments in the sight of the students, will also expose them to the easy accessibility thereto and may also plant a seed in their adolescent minds as to the consumption thereof. Even if it were to be held that the said shops / establishments will not display on their façade any advertisements of the products they are dealing in, but would certainly display their names and description of their trade and a child learning to read would learn to read the

spelling of cigarette, tobacco etc. We for this reason also do not find any merit in the plea raised.

17. We have enquired from the counsel for the petitioner whether there is any definition of wholesale and whether there is any condition in the licences issued to the members of the petitioner Association as to the minimum quantity of each transaction. We are told that there is none. Wholesale, in the context of cigarettes can thus also be interpreted as sale of a carton containing 20 packets of cigarettes instead of only a packet of cigarette or loose cigarettes. Experience of life shows that the consumers of tobacco as of any other product of daily use, often in their zeal to acquire at a lesser cost, visit the wholesale markets. The consumer of a packet or more of cigarettes in a day is unlikely to acquire / purchase cigarettes in individual packets and more likely to acquire carton if not cartons of cigarettes in one go. Once it is found that there is nothing which demarcates a wholeseller, the argument of the petitioner dissipates in thin air, if not smoke!

18. Patanjali Sastri, C.J. in *State of Madras v. V.G. Row* AIR 1952 SC 196 had observed that in applying the test of reasonableness, the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be

remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. The reasonableness of a restriction depends upon the values of life in a society and the magnitude of the evil and the urgency of the reform may require drastic remedies. Similarly in *Jyoti Pershad v. Union Territory of Delhi* AIR 1961 SC 1602 it was held that in adjudging the validity of the restriction the Court has necessarily to approach the question from the point of view of the social interest which the State action intends to promote and the State should not be hampered by the Court in dealing with evils.

19. Article 47 of the Constitution of India in Part IV titled “Directive Principles of State Policy” makes it the primary duty of the State to raise the level of nutrition and the standard of living of its people and the improvement of public health and in particular to endeavor to bring about prohibition of the consumption of intoxicating drinks and drugs which are injurious to health. Article 37 requires the State to, in governance of the country and in making laws abide by the principles contained in the same Part. The Supreme Court in *U.P. SEB v. Hari Shankar Jain* (1978) 4 SCC 16 held that the said command of the Constitution must be ever present in the minds of Judges when interpreting statutes.

20. Furtherance of public good is written over the face of both the statutes (provisions whereof are under challenge) from beginning to end as their animating motive. Cardozo, J. in *Williams v. Mayor and City Council Of Baltimore* 289 U.S. 36 (1933) held that it is not the function of a Court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived and within the field where men of reason may reasonably differ, the legislature must have its way. Time with its tides brings new conditions, which must be cared for by new laws even if they affect the members of a class and only in cases of plain abuse will the Courts interfere. For whatsoever reason, the world till today is not ready for a complete ban on tobacco and tobacco products. However it cannot be forgotten that the small steps forward which have been taken, have proved to be a huge success. No more can the loiterers in public places smoke and have to go to a safe haven to their inconvenience for a smoke and which is perceived as a stigma and brings a smoker to the limelight and much to his chagrin. The same undoubtedly has the potential of reducing the intake. We are proud to say that the society today has identified and accepted the evils of tobacco consumption and this Court would refuse to become a clog in the

remedies being taken at all levels to attempt to save hitherto unaffected from the clutches of the evil.

21. The Supreme Court in ***R.K. Garg v. Union of India*** (1981) 4 SCC 675 observed that while considering the Constitutional validity of a statute said to be violative of Article 14, laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. The observation of Holmes J., that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula was quoted with approval. We may respectfully add that what was held qua economic matters equally applies to socially beneficial legislations as the laws under challenge in these petitions are. The primacy of public over private interests vis-à-vis wholesalers and retailers, though in a different context was upheld in ***Mohd. Murtaza v. State of Assam*** (2011) 12 SCC 413. It was further held that though the right to do business is a fundamental right guaranteed under Article 19(1)(g) of the Constitution but the right is subject to reasonable restrictions under Article 19(6).

22. The Court of appeal of U.K. in ***Regina (Sinclair Collis Ltd.) Vs. Secretary of State for Health*** (2012) Q.B. 394 was concerned with the ban imposed by the Protection from Tobacco (Sales from Vending Machines) (England) Regulations, 2010 framed under the Health Act, 2009 on sale of tobacco from automatic vending machines. The Court observed that children are particularly vulnerable to addiction of smoking and are often unable to comprehend the dangers they are creating for themselves and that the society owes them some obligation to ensure that so far as possible they are protected. It was also noticed that inspite of ban on, tobacco advertising, inclusion of pictorial warnings on tobacco packs to raise awareness of risks of smoking and increasing tax to make tobacco products unaffordable, young people are continuing to take up smoking for a number of reasons including the way tobacco products are promoted. The Court further held that in testing the validity of a community law, the principle of proportionality i.e. of pitting the lawfulness of the prohibition of economic activity against the appropriateness and necessity of such measures to achieve the objective pursued by the legislation in question and whether there is any less effective means of achieving the objective required by the community law, is to be applied. The Court concluded that the prohibition

on sale of tobacco from automatic vending machines had the potential of making cigarettes less and less available to under age purchasers. It was further concluded that if cigarettes are less visible and less available, underage purchases will fall. It was yet further observed that children are attracted to cigarette by the fact that they can see them in machines and elsewhere and they will be less attracted if they can no longer see them sitting there. It was held that fewer children and indeed adults will have access to tobacco if one source of supply i.e. automatic vending machines is removed.

23. We are entirely in agreement with the reasoning aforesaid and find the same to be applicable on all fours to the prohibition in the present case also. Sale of cigarettes and other tobacco products, whether in wholesale or in retail, near the educational institution has the potential of attracting the students thereof and will definitely reduce the access to tobacco. The benefits from the said prohibition far outweigh the harm or loss to the handful of wholesalers.

24. In the facts aforesaid, we find equal treatment of retailers and wholesalers to be having a rational relation to the object of the two legislations and for that matter, other legislations on the subject i.e. to as

far as possible prevent exposure of the vulnerable group to tobacco and tobacco products. Moreover, even if there were to be any merit in the contentions of the petitioner with the possibility of students of educational institutions being unaffected by the presence of wholesalers of tobacco and tobacco products within the prohibited radius, we, applying the precautionary principle would rather err on the side of the society at large than on the side of a handful of members of the petitioner. When a general evil is sought to be suppressed, some martyrs may have to suffer, for the legislature cannot easily make meticulous exceptions and has to proceed on broad categorizations.

25. We therefore dismiss these petitions with costs of ₹20,000/- each payable to the Union of India and Government of NCT of Delhi respectively and to be utilized in appropriate anti-tobacco initiatives.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

NOVEMBER 09, 2012
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