IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIM. PUBLIC INTEREST LITIGATION St. NO. 3 OF 2019

Sandeep Patil. ..Petitioner.
Versus
Union of India & Another. ..Respondents.

Mr. Anup Patil for the Petitioner.
Mr. Vikram Nankani, Senior Advocate with Abhay Jadeja, Mr. Varun Satiya I/b Crawford Bayley & Co., for Respondent No. 2.
Mrs. P. H. Kantharia for Respondent No. 1-Union of India.
Mrs. P. P. Shinde, APP for the Respondent – State.

Coram : RANJIT MORE &
SMT. BHARATI H. DANGRE, JJ.
Date : **February 6, 2019**.

P. C. :

1. Rule. Rule made returnable forthwith. By consent, petition is forthwith taken up for final hearing.

2. This petition is filed in public interest seeking to strike down / read down sections 1(2), 7(3) and 32 of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003 *[for short "the COTPA"]* insofar as the applicability thereof to the duty free shops operated by Respondent No.2 at Chhatapati Shivaji Maharaj International Airport, Mumbai is concerned, so that the impugned provisions of COTPA are in consonance with Articles 14, 21

and 47 of the Constitution of India and not *ultra vires* of the Constitution of India. The Petitioner is also seeking directions for initiating appropriate criminal / penal action under section 20 the COTPA against Respondent No.2. The Petitioner is seeking further direction to forthwith prohibit sale and distribution of cigarettes and other tobacco product manufactured by Indian manufacturers and suppliers at the duty free shops operated by Respondent No.2 until such time the health warnings as specified under the COTP Labelling Amendments Rules, 2014 are implemented.

3. Learned counsel for the Petitioner submitted that supply and retail sale of tobacco products at duty free shops operated by Respondent No.2 do not comply with the mandatory labelling requirements as specified in COTPA, COTP Labelling Rules, 2008 and COPT Labelling Amendment Rules, 2014. The Petitioner further submitted that duty free shops operated by Respondent No.2 procure tobacco products both from domestic and international suppliers and the same are sold at arrival and departure terminals of the Airport. The grievance of the Petitioner is that the said tobacco products are being permitted to be sold without insisting upon the compliance under the COTPA, COTP Labelling Rules, 2014 and COTP Labelling Amendment Rules, 2014. It is also case of the Petitioner that actions

of the Respondents are in violation of Article 21 of the Constitution of India as such actions directly enure for the benefit of an industry which has been found to manufacture products directly and substantially prejudicing the right to life of the entire citizenry, both present and future. Relying upon Article 47 of the Constitution of India, the Petitioner contends that it is obligatory for the State to take steps including prohibition, to curb use of intoxicants in order to improve health. The Petitioner emphasizes that as a matter of fact safeguarding the public health has been defined as a primary duty of the State. To substantiate his contention, the learned counsel for the Petitioner relied upon the decision of Madhya Pradesh High Court in *Vasu Clothing Private Limited v. Union of India*[1]. The Petitioner submitted that decision of this Court in *A-1 Cuisines Pvt Limited v. Union of India*[2] and decision of the Apex Court in *M/s. Ashoka Hotel (Indian Tourism Development Corporation Limited v. Assistant Commissioner of Commercial Taxes*[3] are *per incuriam* and erroneous for not considering the territorial extent of India as per the Constitution of India. The Petitioner alleged that section 1(2) of COTPA is ambiguous. He submitted that sales by duty free shops, whether at arrival or departure terminals, are erroneously construed as "exports",

1 Judgment dated 17.12.2018 in Writ Petition No. 17999 of 2018.
2 Judgment dated 28th November 2018 in Writ Petition [Nagpur bench] No. 8034 of 2018.
3 (2012) 3 SCC 204

thereby erroneously extending the benefit of impugned section 32 of the COTPA.

4. Mr. Nankani, the learned senior counsel for Respondent No.2 opposed the petition by filing reply. He heavily relied upon the decision of the Apex Court in *Ashoka (supra)* and decision of this Court in *A-1 Cuisines (supra)* and submitted that it is settled position of law that duty free shops at international airports are considered as situated outside India for being beyond customs frontiers of India. Mr. Nankani contended that the issue raised in the PIL is covered by the decision of the Apex Court. He lastly submitted that the petition is devoid of substance and deserves to be dismissed.

5. The goods sold or supplied from duty free shops at international airports are export undertaken by the duty free shop operators. The word "export" under the COTPA is identical to the definition of word "export" under the Customs Act, 1962 and the IGST Act 2017, which read thus :

COTPA :-

> section 2(d) - "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India"

Customs Act, 1962 :-

> Section 2(18) - "export" with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

IGST Act, 2017 :-

Section 2(5) - "export of goods" with its grammatical variations and cognate expressions, means taking out of India to a place outside India.

6. Respondent No.2 while selling the goods from its duty free shops at departure terminal hold themselves as exporters of the goods and therefore it falls under the ambit of "exporter" as defined in section 2(20) of the Customs Act, 1962. Applying the definition provided in the Customs Act, in this context, the goods supplied to the duty free shops by the Indian and international manufacturers / suppliers are 'exported goods', and on reading this definition in conjunction with the definitions of exporter, it is clear that the duty free shop operator is the "exporter" and the supply of goods to the international passengers is an export.

7. At this stage, it is also worth to make reference to Chapter 6, Para 6.00(a) and 6.21 of the Foreign Trade Policy of India 2015-2020 (FTP) which reads thus :

"6.00 Introduction and objective

Units undertaking to export their entire production of goods and services (except permissible sales in DTA), may be set up under the Export Oriented Unit (EOU) Scheme....

Objectives of these schemes are to promote exports, enhance foreign exchange earnings, attract investment for export production and employment generation.

> *6.21 Export through Exhibitions / Export Promotion Tours / Showrooms Abroad / Duty Free Shops*
>
> *EOU/ EHTP / STP/ BTP are permitted to*
>
> *(i) export goods for holding / participating in exhibitions abroad with permission of DC.*
>
> *(ii) personal carriage of gold / silver / platinum jewellery, precious, semi – precious stones, beads and articles.*
>
> *(iii) Export goods for display / sale in permitted shps set up abroad.*
>
> *(iv) Display / sell in permitted shops set up abroad, or in showrooms of their distributors/agents.*
>
> *(v) Set up showrooms/ retail outlets at International airports.*

8. The above policy shows that the export oriented units which undertake to export their entire quantity of goods and services, are permitted to do so by setting up retail outlets, i.e., duty free shops, at international airports. Even as per the FTP of India, sales undertaken from the said duty free shops are export and the duty free shop operator is the exporter. It is also worth to mention that COTPA itself provides for reasonable restriction wherever the legislature intended to impose such restriction.

9. The Supreme Court in *M/s. Ashoka (supra)* has held thus :

> 17. …..........It is an admitted fact that the goods which had been brought from foreign countries by the appellant had been kept in bonded warehouses and they were transferred to duty free shops situated at International Airport of Bengaluru as and when the stock of goods lying at the duty free shops was

exhausted. It is also an admitted fact that the appellant had executed bonds and the goods, which had been brought from foreign countries, had been kept in bonded warehouses by the appellant. When the goods are kept in the bonded warehouses, it cannot be said that the said goods had crossed the customs frontiers. The goods are not cleared from the customs till they are brought in India by crossing the customs frontiers. When the goods are lying in the bonded warehouses, they are deemed to have been kept outside the customs frontiers of the country and as stated by the learned senior counsel appearing for the appellant, the appellant was selling the goods from the duty free shops owned by it at Bengaluru International Airport before the said goods had crossed the customs frontiers. Thus, before the goods were imported in the country, they had been sold at the duty free shops of the appellant.

18. In view of the aforestated factual position and in the light of the legal position stated hereinabove, it is very clear that no tax on the sale or purchase of goods can be imposed by any State when the transaction of sale or purchase takes place in the course of import of goods into or export of the goods out of the territory of India. Thus, if any transaction of sale or purchase takes place when the goods are being imported in India or they are being exported from India, no State can impose any tax thereon.

20. Upon perusal of the aforestated provision of Section 5 of the Central Act, it is clear that a sale or purchase of goods shall be deemed to take place in the course of import of the goods into the territory of India only if sale or purchase takes place before the goods have crossed the customs frontiers of India. Looking to the aforestated legal position, it cannot be disputed that the goods sold at the duty free shops, owned by the appellant, would be said to have been sold before the goods crossed the customs frontiers of India, as it is not in dispute that the duty free shops of the appellant situated at the International Airport of Bengaluru are beyond the customs frontiers of India i.e. they are not within the customs frontiers of India.

> 26. When any transaction takes place outside the customs frontiers of India, the transaction would be said to have taken place outside India. Though the transaction might take place within India but technically, looking to the provisions of Section 2(11) of the Customs Act and Article 286 of the Constitution, the said transaction would be said to have taken place outside India. In other words, it cannot be said that the goods are imported into the territory of India till the goods or the documents of title to the goods are brought into India. Admittedly, in the instant case, the goods had not been brought into the customs frontiers of India before the transaction of sales had taken place and, therefore, in our opinion, the transactions had taken place beyond or outside the custom frontiers of India."

. The above observations of the Apex Court make it abundantly clear that duty free shops at International airports are deemed to be outside India or beyond the geographical area-territory of India and therefore for all purposes they are treated to be outside India.

10. The Division Bench of this Court at Nagpur in *A-1 Cuisines (supra)* has taken similar position with respect to the duty free shops, which reads thus :

> 11. The Central Government has thus applied the ratio laid down by the Hon'ble Supreme Court in Hotel Ashoka (supra) and correctly held that the transactions effected at the duty free shops at the arrival or departure of the International Airports in India located after the passenger clears immigration might have taken place within the geographical territory of India, but for the purpose of levy of Customs Duties or nay

> other taxes, the area of duty free shops shall be deemed to be the area beyond the customs frontiers of India and the transaction would be said to have taken place outside India.
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> 12. The aforesaid judgments are clearly applicable only in respect of supplies to or from duty free shops situated after the passenger crosses the immigration counter beyond the Customs Frontiers, at arrival or departure hall of International Airport Terminals, where the transaction would be said to have taken place outside India. The international travel of incoming or outgoing passenger after immigration clearance would be beyond any doubt. In such event, whether it is the sale / purchase / supplies of goods or services, to or from such duty free shop, the same is said to be taken place outside India . Hence, the same would be a non-taxable supply under section 2(78) of CGST/SGST and such duty free shops located at the international airports would be in "non-taxable territory" as defined in section 2(79) of CGST/SGST. As per section 2(24) of IGST, the same meaning as given in CGST/SGST applies for IGST as well."

11. In the matter of *DFS India Private Limited vs. Commissioner of Customs*[4] the Apex Court took cognizance of the fact that business undertaken at the departure duty free shop is in the nature of export. In fact pursuant to this order, the stocks of tobacco products held by Respondent No. 2 at duty free shops came to be released by the Department of Customs after being satisfied that the business undertaken from the duty free shops at departure is export. In pursuance of this order of the Apex Court, this High Court in the matter of *DFS India Pvt. Ltd and another v. the Commissioner of*

4 Order dated 12th March 2010 in SLP (C) No. 2436 of 2010

Customs[5] also granted final relief in favour of Respondent No. 2. If the legislative intent which is also supported by various precedents noted above, is not to extent the restriction under the COTPA to shops situated beyond India and not to apply the restrictions on passengers importing tobacco products, that is not trade or commerce. Even in GST regime, duty free shops at international airports are considered non taxable area and their sales whether at arrival or departure lounge are considered as export.

12. So far as the Petitioner's reliance on the decision of Vasu Clothing Private Limited (supra) and further contention that the judgment of the Apex Court in M/s. Ashoka (supra) and decision of this Court in A-1 Cuisines (supra) are *per incuriam* is concerned, we find no merit. It is settled position of law that it is not open for the High Court to declare a judgment passed by the Hon'ble Supreme Court of India as *per incuriam*. The Apex Court in *South Central Railway Employees Co-op. Credit Society Employees Union v. B. Yashodabai*[6] has observed thus :

> *"16. We are of the view that it was not open to the High Court to hold that the judgment delivered by this Court in C.A.No.4343 of 1988 was per incuriam.*
>
> *17. If the view taken by the High Court is accepted, in our opinion, there would be total chaos in this country because in that case there would be no finality to any*

5 Writ Petition No. 2578 of 2009.
6 (2015) 2 SCC 727.

> *order passed by this Court. When a higher Court has rendered a particular decision the said decision must be followed by a subordinate or lower Court unless it is distinguished or overruled or set aside. The High Court had considered several provisions which, in its opinion, had not been considered or argued before this Court when C.A.No.4343 of 1988 was decided. If the litigants or lawyers are permitted to argue that something what was correct, but was not argued earlier before the higher Court and on that ground if the courts below are permitted to take a different view in a matter, possibly the entire law in relation to the precedents and ratio decidendi will have to be re-written and, in our opinion, that cannot be done. Moreover, by not following the law laid down by this Court, the High Court or the subordinate Courts would also be violating the provisions of Article 141 of the Constitution of India."*

13. In the light of above discussion, we find that exemption provided under section 32 of the COPTA for export of tobacco product is rightly conferred on the duty free shops and challenges to the provisions of the COPTA cannot be entertained. The petition is devoid of any merit and the same deserves to be dismissed. Accordingly, we dismiss the Public Interest Litigation. Rule is discharged. No order as to cost.

[SMT. BHARATI H. DANGRE, J.] **[RANJIT MORE, J.]**